

JUST A JOKE: DEFAMATORY HUMOR AND INCONGRUITY’S PROMISE

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*Can't take a joke, eh? A little levity is good for body, mind, and soul,
y'know. Suing over THAT little schoolyard jab? I say you're either "thin-
skinned or a self-important prig"*¹

I. INTRODUCTION

At what point does a joke become a legal wrong, justifying resort to defamation law? And at what point must a lawyer tell his or her client to steer clear of humor—or at least keep jokes focused exclusively on public figures, officials, and matters of clear public interest? The challenge of drawing the line between protecting and restricting humor has dogged United States courts for years. And what a difficult line it is to chart! First, the line must navigate a stark value clash: the right of individuals and groups to be free from attack on their property, dignity, and honor versus the right of individuals to free expression. To make matters more complicated—in fact, much more complicated—the line must not only account for, but also respect, the artistry of comedy and its beneficial contributions to society.

In regulating defamation, American courts deploy a familiar concept for navigating the line between respecting humor and protecting individual

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1. In a classic admonition about libel actions based on ridicule, Judge Learned Hand declared that “a man must not be too thin-skinned or a self-important prig.” *Burton v. Crowell Publ'g Co.*, 82 F.2d 154, 155 (2d Cir. 1936) (Hand, J.).

reputations: the fact/opinion distinction. On one hand, if a joke can be sorted down the “opinion chute,” then the humorist faces no civil liability. If, on the other hand, the joke suggests false facts unfavorable to the plaintiff, defamation liability can attach. Given the complexity and gravity of the value clash that the fact/opinion distinction seeks to govern, we should not be surprised that this distinction is not completely up to the task. While it is an appropriate starting point, the fact/opinion concept needs to be augmented to accomplish the required balance.

So, what are we to do? There is no quick fix for this problem, and we need to keep working on it. In the meantime, however, insight comes from a remote—and arguably unlikely—place: Australia. The remoteness is only geographic, which provides little problem in today’s high-technology world. The unlikelihood derives instead from Australia’s ties to the law of Great Britain, and Australia’s decision so far not to protect or formalize free speech values to the same extent as the United States. Several factors, however, make meaningful guidance from Australia possible, not the least of which is the confluence of two cherished Australian cultural traditions: plain speaking and a great sense of humor. But I should not overstate the case here. The Australian cases sometimes yield results that the United States does not promote. Nonetheless, Australian cases provide a vehicle for understanding what is at stake in defamatory humor cases and a foil for identifying a valuable analytical approach.² In addition, most of the Australian cases reach a result quite similar to that reached in cases in the United States—minus the sometimes distracting and oversimplifying language of First Amendment exceptionalism. In other words, qualities of the Australian cases, particularly their straightforward candor and approach to humor, provide a useful message for U.S. courts.

2. The citations to Australian cases throughout this article are formatted pursuant to Table 2.2 in *The Bluebook*. See *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 280–81 tbl.T.2.2 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010). However, where *The Bluebook* fails to provide guidance—particularly with unreported Australian cases—the citations are formatted according to the Third Edition of the Australian Guide to Legal Citation, published by the Melbourne University Law Review Association. *AUSTRALIAN GUIDE TO LEGAL CITATION* 52–55 (Melbourne University Law Review Ass’n ed., 3d ed. 2010), available at <http://mulr.law.unimelb.edu.au/go/AGLC3>. Pursuant to the Australian Guide to Legal Citation, pinpoint citations for unreported Australian opinions refer to the paragraph in the opinion, not a page number implemented by an unofficial reporter such as WestLaw or LexisNexis; thus if the cited material appears in the first paragraph of the opinion, the proper pinpoint citation is: “[1].” See *id.* at 53. Accordingly, an *id.* citation referring to an unreported Australian case is formatted as: “*Id.* [1].” In addition, when quotations employ the Australian or British spellings, we have simply left the spelling as in the original source rather than Americanizing it or noting the difference with “[sic].”

Happily, there is another, entirely separate source of guidance for charting the line between reputation and humor protection: interdisciplinary research on the humor process. Humor scholars have for centuries identified important characteristics that tend to make a communication funny.³ This scholarship sheds light on when courts tend to use defamation law to regulate humor, and provides normative guidance on when they should regulate humor.

Before I get started with the task of mining Australian case law and interdisciplinary scholarship for insights into how defamation law should regulate comedy, I should lay on the table certain presumptions and values that informed my research for this project. The first is my premise that humor is presumptively beneficial to human society and should be celebrated. The second premise—a related point—is that humor is intimately tied to the creative process, which also should be celebrated and fostered.

While these two premises are uncontroversial as a starting point, they yield three more contestable, subsidiary presumptions. First is the idea that the imagination necessary to create humor has a special moral force. I embrace philosopher John Dewey's statement that "[i]magination is the chief instrument of the good. . . [and] is more moral than moralities."⁴ Imagination allows individuals to reach beyond themselves. When combined with the genuine honesty often imbedded in humor, imagination can allow humans to achieve a degree of selfless commentary that benefits both the individual and the collective. My second presumption concerns the creative source for humor, which I accept as derived from recognition and appreciation of incongruity.⁵ Humor theorists debate this proposition in

3. See Laura E. Little, *Regulating Funny: Humor and the Law*, 94 CORNELL L. REV. 1235 (2009) for my study using this interdisciplinary work to analyze contract, trademark, and employment law. Expanding on the study, this Article extends the interdisciplinary thinking about humor into several new contexts: defamation law, First Amendment protections, and transnational/comparative law analysis.

4. JOHN DEWEY, *ART AS EXPERIENCE* 348 (1934).

5. See, e.g., PAUL R. MCGHEE, *HUMOR: ITS ORIGIN AND DEVELOPMENT* 166–67 (1979) (stating “the production of humorous incongruities in fantasy probably fosters development of creative thinking”); AVNER ZIV, *PERSONALITY AND SENSE OF HUMOR* 132 (1984) (“Correlations between humor and creativity are positive and statistically significant.”) (internal citations omitted); Michael K. Cundall, Jr., *Humor and the Limits of Incongruity*, 19 CREATIVITY RES. J. 203, 204 (2007) (“[A]s is the case for creativity, originality is a prerequisite for good humor.”); Tony Veale, *Figure-Ground Duality in Humour: A Multi-Modal Perspective*, 4 LODZ PAPERS PRAGMATICS 63, 64 (2008) [hereinafter *Figure-Ground Duality in Humour*] (noting that the “cathartic effect” of separating “layers of meaning” in the creative process “is . . . most keenly experienced and appreciated in the realm of humorous creativity”).

their work, which I survey in Part II.⁶ Finally, it is my belief that judicial decisionmaking by necessity requires a court to make choices among value preferences and that an important mechanism for regulating that process is maintaining rules and mechanisms that foster judicial candor. When a court is asked to regulate something as subjective as humor, justice can come about only through the full disclosure of competing concerns.

American and Australian cases have long recognized the defamatory potential of jokes. These cases have weaved into their analyses the classic admonition from an 1831 Irish case: “If a man in jest conveys a serious imputation, he jests at his peril.”⁷ Apparently taking their cue from this admonition, plaintiffs have energetically pursued defamation remedies for injuries resulting from diverse types of humor, ranging from cartoons, songs, and news stories to offhand quips.⁸ After a spate of U.S. decisions in the 1980s dealing with defamatory humor, legal scholars produced several articles trying to untangle the doctrines courts invoked.⁹ Although a steady flow of the defamatory humor cases continue to make their way into U.S.

6. See *infra* notes 41–79 and accompanying text for a discussion of the debates about the role of incongruity in producing humor.

7. *Donoghue v. Hayes*, (1831) *Hayes Ir. Exch. Rep.* 265, 266. See also *Triggs v. Sun Printing & Publ’g Ass’n*, 71 N.E. 739, 742 (N.Y. 1904) (citing *Donoghue’s* proposition on jesting at one’s peril); *Salomone v. Macmillan Publ’g Co.*, 411 N.Y.S.2d 105, 109 (Sup. Ct. 1978) (same), *rev’d on other grounds*, 429 N.Y.S.2d 441 (App. Div. 1980); *Entienne Pty Ltd. v Festival City Broads. Pty Ltd.* (2001) 79 SASR 19, 29 (Austl.) (same).

8. See *infra* notes 119–128 and accompanying text for a survey of United States cases and notes 231–250 and accompanying text for a survey of Australian cases.

9. See, e.g., Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923 (1985) (focusing on particular problems of regulating satire); Donna Stricof Kramer, *Drawing Fire: The Proliferation of Libel Suits Against Cartoonists*, 5 CARDOZO ARTS & ENT. L.J. 573 (1986) (surveying suits and suggesting protections for cartoonists); Robert C. Lind, *The Visual Artist and the Law of Defamation*, 2 UCLA ENT. L. REV. 63 (1995) (reviewing legal doctrines governing the visual artist as a defendant and a plaintiff); Catherine L. Amspacher & Randel Steven Springer, Note, *Humor, Defamation, and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701, 703–04 (1990) (reviewing tort suits based on humor and suggesting “an analytical method by which courts can hold liable media defendants who, in the name of humor, egregiously harass, humiliate, or falsely portray private figure plaintiffs”); Kenneth M. Fitzgerald, Comment, *Humor and the Law of Libel: Serious Protections for Attacks Made in Jest*, 40 FED. COMM. L.J. 377, 378 (1988) (outlining ways in which the author believes that humor has achieved “near immunity from the law of libel”); Cary Dee Glasberg, Case Note, *Who Has the Last Laugh? A Look at Defamation in Humor*, 9 LOY. L.A. ENT. L. REV. 381 (1989) (evaluating the decision in *Mendelson v. Carson* and proposing standard for evaluating defamation in humor cases); Leslie Kim Treiger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment’s Opinion Privilege*, 98 YALE L.J. 1215 (1989) (exploring how current First Amendment protections for humor are inadequate to protect satire).

courts, new legal scholarship on the issue—doctrinal or otherwise—has dwindled during the new millennium.¹⁰

This Article tries to fill the scholarship gap, using lessons from interdisciplinary learning on humor and comparative analysis of Australian cases. To lay the groundwork for the thesis that the fact/opinion distinction is insufficient for the task of regulating defamatory humor in the United States, the Article begins with a review of the interdisciplinary scholarship. It then turns to American legal doctrine, which is grounded in both common law defamation and First Amendment principles. Next, it reviews the work of Australian courts, which have navigated the challenges of defamatory humor largely without resort to any sort of fact/opinion distinction. Rather, Australian courts have focused on the plaintiff's harm, essentially asking whether a jest sufficiently disparages the plaintiff as to call for civil liability. While certainly not free from problems, this approach, I conclude, is forthrightly consistent with the central goal of tort law: repairing a wrong done.¹¹ As for the important First Amendment values that need to be balanced against this goal, guidance comes from a core concept found in interdisciplinary humor scholarship—incongruity. The end of this Article explores how the incongruity concept helps to calibrate an optimal balance of First Amendment concerns and the values of human dignity, property, and honor reflected in defamation law. I ultimately conclude that courts deciding whether to restrict defamation liability for a particular communication are well served to evaluate the communication's presentation of incongruities.

10. Notable exceptions include: Lauren Gilbert, *Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843 (2004) (examining attempts to regulate satire under legal provisions designed to protect national security); Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to be Understood as Fact*, 2008 UTAH L. REV. 875 (proposing a four-part test for determining whether a parody is protected opinion); Eric Scott Fulcher, Note, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L. REV. 717 (2004) (reviewing case law and proposing a strategy for courts to determine whether a statement qualifies as "rhetorical hyperbole").

11. See, e.g., John Gardner, *What is Tort Law for? Part 1: The Place of Corrective Justice*, U. OF OXFORD LEGAL RES. PAPER SERIES 6–7 (Jan. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1538342 (arguing that corrective justice is a necessary but not sufficient justification for tort law); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918–19 (2010) (arguing that the goal of tort suits is to provide plaintiffs with an avenue for getting redress from those who have inflicted a wrong on them).

II. INTERDISCIPLINARY HUMOR SCHOLARSHIP

Humor scholarship spans a myriad of disciplines, with philosophy, literary theory, sociology, and psychology perhaps best represented. For analyzing defamatory humor, three components of interdisciplinary humor scholarship are particularly relevant: (1) inventories of humor types, (2) theories of how humor operates, and (3) studies of humor's instrumental consequences (both beneficial and detrimental). I consider these components in turn.

A. A HUMOR INVENTORY

Scholars have invested considerable effort in categorizing varieties of humor,¹² with major categories including formal jokes, wit, satire, sarcasm, parody, puns, and practical joking.¹³ Formal jokes, practical jokes, satire, and parody most often serve as the vehicles for alleged defamation. Formal jokes are “prepackaged humorous anecdotes that people memorize and pass on to one another . . .”¹⁴ Practical jokes are normally defined as unkind “tricks” played on a person.¹⁵

Most commonly occurring in the defamation context are satire and parody, two forms of humor that scholars often consider together. Both tend to be aimed at derision,¹⁶ to include ridicule, to operate without subtlety,¹⁷ and to have a “symbiotic relationship.”¹⁸ As a matter of formal definition, however, the two are quite separate: parody is “a manipulation of pre-existing works, usually for comic effect[,]” while satire is “[an] attack on some irritating aspect of the world.”¹⁹ As these two definitions suggest, joviality more often accompanies parody than satire, which is often perceived as having a sharper edge than parody. Another important

12. Scholars have identified as many as twenty-one varieties of humor. Little, *supra* note 3, at 1235–81 (surveying interdisciplinary humor scholarship and analyzing regulation of humor through contract, trademark infringement, and employment discrimination principles).

13. JON E. ROECKELEIN, *THE PSYCHOLOGY OF HUMOR* 13 (2002).

14. ROD A. MARTIN, *THE PSYCHOLOGY OF HUMOR* 11 (2007) [hereinafter *THE PSYCHOLOGY OF HUMOR*].

15. *Id.* at 126.

16. ROECKELEIN, *supra* note 13, at 59–61.

17. See Nicholas Garland, *Political Cartooning*, in *LAUGHING MATTERS: A SERIOUS LOOK AT HUMOUR* 76 (John Durant & Jonathan Miller eds., 1988).

18. Conal Condren et al., *Defining Parody and Satire: Australian Copyright Law and its New Exception*, 13 *MEDIA & ARTS L. REV.* 273, 279 (2008) [hereinafter Condren 1].

19. *Id.*

distinction between parody and satire is “intertextuality.”²⁰ Unlike satire, parody overlaps with the text serving as the parody’s object. This overlap, which allows the audience to recognize the original text within the parody,²¹ can occur in characteristics such as the qualities of a particular genre (for example, poetry or popular song lyrics), or in specific words, characters, or plot lines (for example, a character that resembles the *Star Wars* character Jar Jar Binks, the plot of *Goldilocks and the Three Bears*, or words that track Little Bear’s exclamation upon seeing Goldilocks in his bed).²² Yet despite parody’s distinctive intertextual quality, many works exhibit both “parodic form and satiric purpose.”²³ For example, “Jonathan Swift’s *Gulliver’s Travels* parodies travel books while also satirising British politics and European civilisation[,]” and *The Simpsons* “parodies TV situation comedy in general while also satirising middle America.”²⁴

B. MAJOR THEORIES OF HUMOR

For years the gold standard for explaining what constitutes humor has had a tripartite structure: superiority, release, and incongruity theories.²⁵ Scholars have recently expended considerable effort developing new approaches to explaining why a communication is funny, but the three classic theories retain considerable dominance. Each possesses a unique heritage, yet the three are not mutually exclusive, and one can easily

20. SALVATORE ATTARDO, HUMOROUS TEXTS: A SEMANTIC AND PRAGMATIC ANALYSIS 71, 87 (Victor Raskin & Willibald Ruch eds., 2001) (describing parody’s connection to intertextualism and defining the term: “A text [T1] will be said to have an intertextual relation to another text [T2] when the processing of T1 would be incomplete without a reference to T2.”); Peggy Zeglin Brand, *Parody*, in 3 ENCYCLOPEDIA OF AESTHETICS 441, 442 (Michael Kelly ed., 1998) (describing intertextualism); Jerry Palmer, *Parody and Decorum: Permission to Mock*, in BEYOND A JOKE 79, 81 (Sharon Lockyer & Michael Pickering eds., 2005) [hereinafter *Parody and Decorum*] (referring to parody’s quality of intertextuality).

21. See *Parody and Decorum*, *supra* note 20, at 82.

22. ARTHUR ASA BERGER, BLIND MEN AND ELEPHANTS 74 (1995) (discussing style of “authorship,” “genre,” and “specific text”).

23. Condren 1, *supra* note 18, at 279.

24. *Id.* at 280.

25. See, e.g., Tad Friend, *What’s So Funny?*, THE NEW YORKER, Nov. 11, 2002, at 78, 93 (describing three different theories, and identifying them as “history’s three favorite comedy theories”). The following is a recent summary of the three theories:

The Renaissance brought Hobbes’s superiority theory (laughter marks the sudden attainment of power over someone else), which gave way first to Kant’s incongruity theory (laughter occurs when perceptions don’t conform to logical expectations), and, finally, to Freud’s release theory (laughter releases pent-up nervous energy.) Emily Eakin, *If It’s Funny, You Laugh, But Why?*, N.Y. TIMES, Dec. 9, 2000, at B7.

combine them in explaining why a communication is funny. Indeed, as the defamation case law reveals, a particular quip or joke often does not parse naturally into distinct humor categories. Nonetheless, the three categories of humor remain useful heuristics for analysis. For the purpose of clarity I describe them separately immediately below.

As shown below, incongruity is a quality that is consistent throughout humorous communications.²⁶ If, as I maintain below, the humorous quality of a communication is relevant to whether the law should expose the communication to defamation liability, then identifying incongruity in a communication can play a key role for evaluating whether the communication is funny and, thus, should be insulated from (or exposed to) defamation liability. Superiority and release theories also have unique contributions to understanding humor that focuses on different parts of human experiences. Contemporary humor theorist Marta Dynel helpfully explains: whereas incongruity theory focuses on cognitive processing of jokes, superiority theory highlights social qualities of humor, and release theory focuses on psychoanalytical phenomena.²⁷ Accordingly, superiority and release theory both can shed light on whether humans would perceive a communication as funny and—ultimately—worthy of insulation from (or exposure to) legal regulation. Yet because funny communications do not necessarily always exhibit qualities of superiority or release humor, the theories take secondary importance to incongruity theory. I explore all three theories in this section.

1. Superiority Theory

Superiority theory derives from ancient thinkers (Aristotle, Plato, Socrates, and Cicero) who associated humor with the process of aggressively disparaging others in order to enhance oneself.²⁸ Not

26. See *infra* notes 42–47 for further discussion of this proposition.

27. MARTA DYNEL, HUMOROUS GARDEN-PATHS: A PRAGMATIC-COGNITIVE STUDY 42 (2009) [hereinafter HUMOROUS GARDEN-PATHS].

28. See, e.g., Antony J. Chapman & Hugh C. Foot, *Introduction* to HUMOUR AND LAUGHTER: THEORY, RESEARCH AND APPLICATIONS 1, 1 (Antony J. Chapman & Hugh C. Foot eds., 1976) (observing that Cicero and Aristotle believed that laughter derives from “shabbiness or deformity,” is “degrading” and has no place in the lives of civilized men); Rod A. Martin, *Humor and Laughter*, in 4 ENCYCLOPEDIA OF PSYCHOL. 202, 202–03 (Alan E. Kazdin ed., 2000) [hereinafter *Humor and Laughter*]. Socrates advocated for society to control laughter that “mocks authority” and “notions of truth and beauty.” MICHAEL BILLIG, LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR 41–42 (2005). As for Plato, he took the view that humor was a weapon deployed by weak individuals when they perceived themselves unlikely to face counterattack. Dolf Zillman & Joanne R. Cantor, *A Disposition Theory of Humour and Mirth*, in HUMOUR AND LAUGHTER: THEORY, RESEARCH AND APPLICATIONS 94 (Antony J. Chapman & Hugh C. Foot eds., 1976) [hereinafter *A*

surprisingly, English philosopher Thomas Hobbes propounded an equally negative view of humor; he is often named as the progenitor of superiority theory itself.²⁹ Hobbes focused on humor's association with egocentricity and power, suggesting that a person finds amusement only if the communication makes them feel personally successful or superior to another.³⁰ Hobbes states in an oft-quoted passage: "*Sudden Glory*, is the passion which maketh those *Grimaces* called LAUGHTER; and is caused either by some sudden act of their own, that pleaseth them; or by the apprehension of some deformed thing in another, by comparison whereof they suddenly applaud themselves."³¹

2. Release Theory

Release theory identifies repressed pleasure³² or anxiety³³ as humor's sources. Scholars credit Sigmund Freud and two English philosophers, Alexander Bain and Herbert Spencer, with developing the theory.³⁴ Bain and Spencer focused on humor's ability to release nervous energy.³⁵ As Bain explained, release results from humor's embrace of "degradation" or the "personal pleasure in naughtiness."³⁶ Freud imported to this observation his theory that jokes express taboo desires.³⁷ Particularly salient to understanding defamatory humor is the connection Freud draws between jokes and dreams. Freud hypothesized that both joking and dreaming work by analogy or allusion, thereby sidestepping logic and literal meaning in

Disposition Theory of Humour and Mirth] (describing Plato's observation about the usefulness of the "the weak and helpless" as a "target of ridicule and a risk-free source of social gaiety").

29. 2 THOMAS HOBBS, *LEVIATHAN* 48 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651).

30. *Id.*

31. *Id.* According to Hobbes, one commonly finds this tendency in humans who discern few "abilities in themselves" and "who are forced to keep themselves in their own favour, by observing the imperfections of other men." *Id.*

32. SIGMUND FREUD, *THE JOKE AND ITS RELATION TO THE UNCONSCIOUS* (Joyce Crick trans., Penguin Classics 2003) (1905).

33. JOHN LIMON, *STAND-UP COMEDY IN THEORY, OR, ABJECTION IN AMERICA* 39 (2000) (observing that a joke can release anxiety and fear about such matters as miscegenation and homoeroticism). *See also* BILLIG, *supra* note 28, at 86 (referring to humor's role in releasing pressure).

34. Michael Billig traces the theory to a dispute between Bain and Spencer. BILLIG, *supra* note 28, at 86 (referring to humor's role in releasing pressure). *See also* MURRAY S. DAVIS, *WHAT'S SO FUNNY?* 7 (1993) (identifying Freud and Spencer with the theory).

35. BILLIG, *supra* note 28, at 91.

36. *Id.* at 93–97.

37. *See* FREUD, *supra* note 32.

order to elude our conscious minds' censors.³⁸ Freud noted jokes' tendency to focus on "bawdry" or "sexual facts and relations."³⁹ Scholars building on his work expanded the taboo, or sensitive topics, targeted by release humor to include excretion, death, disability, and other negative aspects of the human condition.⁴⁰

3. Incongruity Theory

A particular funny communication may or may not exhibit the humorist's need to relieve anxiety or express superiority. Yet nearly all humor theorists agree that incongruity is a necessary condition for a communication to be humorous.⁴¹ For this reason, incongruity theory is by far the most important of the three theories for identifying whether a communication is funny and for evaluating whether its humor justifies insulating it from legal liability.

Philosophers and other thinkers have long connected humor and incongruity,⁴² tracing the connection to Aristotle's view of the comic as derived from surprise and deception,⁴³ and finding the theory's intellectual

38. FREUD, *supra* note 32, at 154 (observing that the technique of jokes includes similar processes as "dream-work": "the processes of condensation . . . displacement, representation by absurdity or by the opposite, indirect representation").

39. *Id.* at 92.

40. See, e.g., JAMES M. COX, MARK TWAIN: THE FATE OF HUMOR vii, xv (Univ. of Mo. Press 2002) (1966) (arguing that humorists make possible the release of "repressed tension" by exposing "the absence of meaning in existence"); Vassilis Saroglou & Lydwine Anciaux, *Liking Sick Humor: Coping Styles and Religion as Predictors*, 17 HUMOR: INT'L J. HUMOR RES 257, 257-66 (2004) (demonstrating a correlation between coping styles and appreciation of jokes about disability, deformity, disease, and death).

41. See *infra* notes 42-47 and accompanying text for further discussion of this proposition.

42. As of 1955, at least forty-six authors used the concept of incongruity in describing and explaining humor. Giovannantonio Forabosco, *Is the Concept of Incongruity Still a Useful Construct for the Advancement of Humor Research?*, 4 LODZ PAPERS PRAGMATICS 45, 46 (2008) [hereinafter *Concept of Incongruity*] (citing Wilma H. Grimes, *A Theory of Humor for Public Address: The Mirth Experience*, 22 SPEECH MONOGRAPHS 217, 218 (1955)).

43. Marta Dynel, *Introduction to the Special Issue on Humour: A Modest Attempt at Presenting Contemporary Linguistic Approaches to Humour Studies*, 4 LODZ PAPERS PRAGMATICS 1, 1 (2008) (observing that psychological, philosophical, and linguistic literature observes that humor "invariably arises from incongruity"); *Concept of Incongruity, supra* note 42, at 46 (citing Aristotle's definition of comic and explaining the connection with the concept of incongruity). Incongruity theory is also attributed to the rhetorical question posed by Roman poet Horace: If a painter chose to join a human head to the neck of a horse, and to spread feathers of many a hue over limbs picked up now here now there, so that what at the top is a lovely woman ends below in a black and ugly fish, could you, my friends, if favoured with a private view, refrain from laughing? ROBERT L. LATTA, THE BASIC HUMOR PROCESS: A COGNITIVE SHIFT THEORY AND THE CASE AGAINST

pedigree in the work of philosophers Immanuel Kant and Arthur Schopenhauer.⁴⁴ Although theorists propose a number of incongruity definitions, they all share a common theme: the notion of joining two or more otherwise diverse or contrary phenomenon. One theorist, for example, describes incongruity as “something unexpected, out of context, inappropriate, unreasonable, illogical, exaggerated,”⁴⁵ while others emphasize joinder of opposites, concluding that incongruity suggests “a conflict between what we perceive and our expectations.”⁴⁶ Despite some variety in the approach and discussion of subcategories of incongruity, humor theorists generally embrace the “terminological uniformity” provided by the words “incongruity theories.”⁴⁷

Humorous incongruity manifests in a variety of ways. First, incongruity can emerge simply because the familiar is placed in a foreign, unfamiliar context.⁴⁸ More commonly, incongruity results from a sudden altering of a point of view, such as where a humorous setting reflects both the profound and the mundane⁴⁹ or where characters engage in role reversal.⁵⁰ In a related manner, incongruity may result from confusion about the context in which a term is used. This confusion, coupled with the process of resolving it, often results in a fun or satisfying mental exercise. Theorists suggest that the comedy in these techniques derives from surprise (unforeseen insight), fulfilled expectations, or both.⁵¹

INCONGRUITY 101 (1999) (quoting HORACE: SATIRES, EPISTLES AND ARS POETICA (G.P. Goold, ed., H. Rushton Fairclough trans., Harvard Univ. Press 1991) (1926)).

44. Little, *supra* note 3, at 1245 (describing connection of the incongruity theory with Kant and Schopenhauer).

45. MCGHEE, *supra* note 5, at 10. See also Henry W. Cetola, *Toward a Cognitive-Appraisal Model of Humor Appreciation*, 1 HUMOR: INT'L J. HUMOR RES. 245, 245–46 (1988) (opining that “things that we find funny have to be somewhat unexpected, ambiguous, illogical, or inappropriate”).

46. John Morreall, *Funny Ha-Ha, Funny Strange, and Other Reactions to Incongruity*, in THE PHILOSOPHY OF LAUGHTER AND HUMOR 188, 188–89 (John Morreall ed., 1987). See also JOHN ALLEN PAULOS, MATHEMATICS AND HUMOR 9 (1980) (infusing the idea of opposites into defining the element of incongruity in humor).

47. HUMOROUS GARDEN-PATHS, *supra* note 27, at 45.

48. HENRI BERGSON, LAUGHTER: AN ESSAY ON THE MEANING OF THE COMIC 112 (Cloudesley Breerton & Fred Rothwell trans., Macmillan 1911) (1900).

49. Issac Asimov suggests that humor readily results where the alteration creates an “anticlimax.” ISAAC ASIMOV, TREASURY OF HUMOR 1 (1971).

50. BERGSON, *supra* note 48, at 94.

51. Mathematician John Allen Paulos created a taxonomy of “opposites” that are contained in various humorous incongruities: expectation/surprise; mechanical/spiritual; superiority/incompetence; balance/exaggeration; propriety/vulgarity. PAULOS, *supra* note 46, at 9. See also Patricia Ewick & Susan S. Silbey, *No Laughing Matter: Humor and Contradictions*, in *Stories of Law*, 50 DEPAUL L. REV. 559, 561 (2000) (reasoning that

Building on the notion that incongruity works together with both surprise and fulfilled expectations, several scholars have sought to identify a general theory of verbal humor based on priming.⁵² The priming theory suggests that humor occurs when a listener is primed with a “script” and tricked into applying the script in an incongruous situation. This creates an interpretative difficulty that the listener may resolve only by replacing the original script with a less obvious or salient one. Take, for example, the following light bulb joke: “How many X’s does it take to change a light bulb? 100—one to hold the bulb and ninety-nine to spin the room around.”⁵³ In this joke, life experience informs the “primed” script (the process of twisting a light bulb) and the joke inspires a reformulated script (the process of twisting the room).⁵⁴ Twisting the room appears incongruous because twisting is generally paired with the light bulb function.

Thus emerges an important—albeit arguably ironic—insight: incongruity operates as humor by reference to congruity. Professor Giovannantonio Forabosco explains that the humor process requires an “attention-shift . . . in which the project passes from the perception of congruence to the perception of incongruity and, sometimes, vice versa, with several shifts.”⁵⁵

Professor Tony Veale further explains how incongruity must work within a field of congruity in order to yield humor using the following example: “Consider . . . the four most primitive and fundamental drives guiding the instinctive [behavior] of mammals . . . commonly known as the

humor’s “quality of suspense” results from placing “disparate elements . . . in competition”); Victor Raskin & Salvatore Attardo, *Non-Literalness and Non-Bona Fide in Language: An Approach to Formal and Computational Treatments of Humor*, 2 PRAGMATICS AND COGNITION 31, 35–37 (1994) [hereinafter *Non-Literalness and Non-Bona-Fide in Language*] (discussing a recoil effect and how listeners participate in joke telling by anticipating and searching for joke ingredients in the speaker’s words).

52. See, e.g., Salvatore Attardo & Victor Raskin, *Script Theory Revis(it)ed: Joke Similarity and Joke Representational Model*, 4 HUMOR: INT’L J. HUMOR RES. 293, 331 (1991); *Figure-Ground Duality in Humour*, *supra* note 5, at 74. Theorist Marta Dynel describes at least two different uses of incongruity humor that could be tied to the priming theory. One approach, she maintains, ends with a “surprising red light.” HUMOROUS GARDEN-PATHS, *supra* note 27, at 25. This is reflected in the following quip: “War does not determine who is right but who is left.” *Id.* at 27. In another example, the priming takes place in an “ambiguous lead up,” such as in the following example: “She has her looks from her father. He’s a plastic surgeon.” *Id.* at 51.

53. *Figure-Ground Duality in Humour*, *supra* note 5, at 75.

54. *Id.*

55. Giovannantonio Forabosco, *Cognitive Aspects of the Humor Process: The Concept of Incongruity*, 5 HUMOR: INT’L J. HUMOR RES. 45, 60 (1992).

four F's, namely *Fight, Flight, Feeding* and *Mating*.⁵⁶ The incongruity here is that “mating” is not an “F-word.” Yet the word choice “mating” is relevant, since it is, after all, a polite term for another F-word that would fit quite aptly in the list. According to Veale, “We thus see past the foregrounded *Mating* to grasp the backgrounded F-word that lies underneath, and in doing so, preserve the validity of the phrase *four F's*.”⁵⁷ Furthermore, Veale explains that the joke “relies on the complicity of the audience, both in their understanding of the speaker’s desire to avoid any mention of a vulgar word and in their desire to enjoy the frisson generated by this four-letter Anglo-Saxon expletive.”⁵⁸ Consequently, Veale continues, “the phrasing seems clever and cheeky, making the speaker (and the audience) simultaneously innocent *and* guilty of violating a commonplace taboo.”⁵⁹

The process described by Veale and Forabosco was also identified by earlier thinkers, who characterized humor as making “sense in nonsense” (Freud’s phrase)⁶⁰ or as containing a sort of “limited logic”⁶¹ or “local logic.”⁶² Some thinkers further argue that in order for humor to succeed, the listener needs to at least partially resolve the incongruities set up in a humorous statement. The argument posits that without resolution—a return to congruity after experiencing the joke’s incongruity—the listener’s discomfort interferes with her perception of the communication as funny.⁶³ Several empirical studies suggest, however, that incongruity resolution is not always essential for listeners to find a joke funny and satisfying,⁶⁴ particularly listeners with a high tolerance for ambiguity.⁶⁵

56. *Figure-Ground Duality in Humour*, *supra* note 5, at 73.

57. *Id.*

58. *Id.* at 73–74.

59. *Id.* at 74.

60. FREUD, *supra* note 32, at 3–4.

61. Norman R.F. Maier, *A Gestalt Theory of Humor*, 23 BRIT. J. PSYCHOL. 69, 72 (1932).

62. ZIV, *supra* note 5, at 90. For a description of the mental discomfort inspired by incongruity, see Benedict Carey, *How Nonsense Sharpens the Intellect*, N.Y. TIMES, Oct. 5, 2009, at D1.

63. Forabosco, *Cognitive Aspects*, *supra* note 55, at 57 (arguing that without resolution, “incongruity cannot be . . . used in the humor context” and the listener “would remain perplexed, confused, disoriented, and perhaps in extreme cases even frightened”).

64. THE PSYCHOLOGY OF HUMOR, *supra* note 14, at 68–73 (describing various studies regarding the effect of incongruity resolution).

65. See, e.g., Willibald Ruch & Franz-Josef Hehl, *A Two-Mode Model of Humor Appreciation: Its Relation to Aesthetic Appreciation and Simplicity-Complexity of Personality*, in THE SENSE OF HUMOR: EXPLORATIONS OF A PERSONALITY CHARACTERISTIC 109, 127 (Willibald Ruch ed., 1998) (finding that tolerance for ambiguity correlates

A handful of thinkers who are skeptical of incongruity's essential relationship to humor provide further discord in contemporary scholarship.⁶⁶ Despite the stridency of their work, the overwhelmingly dominant view continues to hold that in order for a communication to have humor potential it needs incongruity.⁶⁷ Moreover, a consensus also exists about a specific, curious aspect of incongruity: some incongruity is simply not funny. In other words, incongruity may be a necessary condition for humor, but it is not a sufficient condition. Thus, some incongruities, such as randomly connected concepts, "poetic metaphors, [and] magic tricks,"⁶⁸

positively with appreciation for humor with unresolved incongruity, bizarreness, and absurdity, while conservative and authoritarian personality traits correlate positively only with appreciating jokes that resolve incongruity); Willibald Ruch, *Assessment of Appreciation of Humor: Studies with the 3 WD Humor Test*, in 9 ADVANCES PERSONALITY ASSESSMENT 27, 67 (Charles D. Spielberger & James N. Butcher eds., 1992) (finding that tolerance for ambiguity correlates positively with appreciation for humor with unresolved incongruity, bizarreness, and absurdity, while conservative and authoritarian personality traits correlate positively only with appreciating jokes that resolve incongruity).

66. The most prominent challenge to incongruity's essential role in the humor process comes from Professor Gabriella Eichinger Ferro-Luzzi. Although asserting that incongruity occurs frequently in humor, she maintains that it is not essential to producing humor. Gabriella Eichinger Ferro-Luzzi, *On Necessary Incongruities*, 10 HUMOR: INT'L J. HUMOR RES. 117 (1997) [hereinafter *On Necessary Incongruities*]; Gabriella Eichinger Ferro-Luzzi, *Tamil Jokes and the Polythetic-Prototype Approach to Humor*, 3 HUMOR: INT'L J. HUMOR RES. 147, 152 (1990). Other humor scholars take her work very seriously, but believe it to be insufficiently theorized and insufficiently supported by examples. See, e.g., ELLIOTT ORING, *ENGAGING HUMOR* 8–10 (2003) (arguing that Eichinger Ferro-Luzzi's analyses of jokes seem "incomplete or off the mark" and that her examples are "questionable"); *Concept of Incongruity*, *supra* note 42, at 55 (criticizing Eichinger Ferro-Luzzi's use of a standard "dictionary-based . . . definition" of incongruity rather than a theory-dependent use of the term). Robert Latta also launched a broad-ranging attack on incongruity theory. Latta, *supra* note 43, at 99–234. But other humor theorists have vigorously criticized his work as well. *Concept of Incongruity*, *supra* note 42, at 55 (stating that Latta's "case against incongruity" has "been radically criticized in a close and tough analysis"); Elliott Oring, *Book Review*, 12 HUMOR: INT'L J. HUMOR RES. 457, 457–59 (1999) (reviewing ROBERT L. Latta, *THE BASIC HUMOR PROCESS: A COGNITIVE SHIFT THEORY AND THE CASE AGAINST INCONGRUITY*) (arguing that Latta's alternative theory is not firmly grounded in psychological literature and that Latta's attempt to impose "a strict logical standard" on incongruity is at odds with the nature of humor). For an intermediate position on the incongruity debate, see Cundall, *supra* note 5, at 211 (acknowledging that humor perception does require "recognition of an incongruity," but also arguing that incongruity theory "leaves too much of the act of perceiving humor unexplained").

67. See, e.g., *THE PSYCHOLOGY OF HUMOR*, *supra* note 14, at 72 (summarizing current research and concluding that "some sort of incongruity (however defined) seems to be necessary for all types of humor").

68. Tony Veale, *Incongruity in Humor: Root Cause or Epiphenomenon?*, 17 HUMOR: INT'L J. HUMOR RES. 419, 424 (2004).

may be insightful, quirky, illogical, or “irredeemably absurd,”⁶⁹ but not funny. Take for example the concept of “being hit by a car while walking on the sidewalk”⁷⁰ or arbitrary word pairings such as “tomato/carburetor.” Incongruous? Yes. Funny? Hardly.

Even so, precisely what makes some incongruities funny and what makes others not is elusive. Given that identifying incongruity is a key step in segregating humor from non-humor, the process of trying to pinpoint what makes certain incongruities funny is important both in a legal context as well as nonlegal contexts where one might benefit from understanding the operation of humor. As a starting point, one might say that—to be funny—incongruities must be “motivated by, and understandable within, the context of their use.”⁷¹ Scholars have also long identified two other conditions enabling humor to emerge from incongruity: the incongruity “take[s] place in a playful and non-threatening context” or “occur[s] suddenly.”⁷² Yet another quality known to enhance comedic effect derives from the social quality of humor. A listener often knows from a joke teller’s cue that the joke teller seeks to make them laugh. Through symbiotic mental cooperation with the joke teller, the listener anticipates that a punch line is coming, doesn’t know what it will be, and experiences both fulfillment and surprise when it arrives.⁷³ Where such conditions are established, even the most mundane incongruity may give rise to pleasurable comedic appreciation.

A recently articulated theory argues that humor results from incongruity where a joke’s “engagement of the incongruity and search for

69. *Figure-Ground Duality in Humour*, *supra* note 5, at 73 (explaining how “incongruity alone does not automatically produce either creativity or humour”). Cf. BILLIG, *supra* note 28, at 76 (observing that one might conclude that incongruity often accompanies comedy, but this alone does not “explain why the perception of incongruity should be followed by a sense of pleasure and laughter”).

70. THE PSYCHOLOGY OF HUMOR, *supra* note 14, at 64.

71. *Figure-Ground Duality in Humour*, *supra* note 5, at 73 (citing ORING, *supra* note 66).

72. THE PSYCHOLOGY OF HUMOR, *supra* note 14, at 64–65 (summarizing literature on what “something extra” enables incongruity to be humor).

73. *Non-Literalness and Non-Bona-Fide in Language*, *supra* note 51, at 35–37 (analyzing how listeners participate in joke telling by anticipating and searching for joke ingredients in the joke teller’s words). See also TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 28 (1999) (explaining that shared knowledge or experience between joke teller and listener can provide a “foundation of the intimacy” that develops if a joke “succeeds”).

its appropriateness is *spurious* rather than *genuine*.”⁷⁴ Professor Elliot Oring, the proponent of this view, uses the following riddle to explain:

Q: Why should you always wear a watch in the desert?

A: Because a watch has springs (water sources) in it.⁷⁵

According to Oring, “springs” and “the desert” have an appropriate relation because both are characterized by water (or lack of it). In the riddle, however, the relation is linguistic only—and not legitimate—since the type of springs that watches have do not give water.⁷⁶ If, on the other hand, the juxtaposition of watch springs and the desert sought to demonstrate some kind of genuine connection—as in a metaphor—it would be wholly lacking in humor. That is not to say that this riddle is knee-slappingly hilarious. The humor is in the nature of a pun, a type of humor in which “the spuriousness of an . . . incongruity is . . . obvious and transparent.”⁷⁷ This obviousness is why, Oring explains, “puns often elicit groans rather than laughter.”⁷⁸ According to Oring, “Groans register the recognition of the humor while devaluing it socially and intellectually.”⁷⁹

C. INSTRUMENTAL CONSEQUENCES OF HUMOR: HIGH PRAISE

Times are good for the joke. And no wonder—jokes have special communicative potency and therapeutic effect, and foster human organization. A good joke can build a human relationship and provide a great deal of fun, pleasure, and happiness. Indeed, in this atomistic, sometimes alienating era, humor (and its beneficial consequences) has a particularly significant role to play for both individuals and collective entities.⁸⁰ This potential is not lost on the world’s thinkers. They do, however, measure their praise carefully. With some exceptions, social and natural scientists as well as humanities theorists find the greatest value in humor that is high in incongruity, mixed value for jokes associated with

74. ORING, *supra* note 66, at 5.

75. *Id.* at 3 (quoting MCGHEE, *supra* note 5, at 131–33).

76. *Id.* at 6.

77. *Id.* at 7.

78. *Id.*

79. *Id.* Oring further suggests that humor is labeled corny where it “flagrantly displays its spurious devices.” *Id.* at 7.

80. See generally ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 5:5.2[G][1] (3d ed. 1999) (“Humor is an important medium of legitimate expression and central to the well-being of individuals, society, and their government”).

release humor, and frequent problems with superiority humor.⁸¹ Scholars scrutinize humor's double-edged quality, but expend most of their effort cataloguing its positive consequences.⁸²

Why does all this matter to defamation cases? To begin, the primary enterprise of law is of course to regulate human interaction. Within the specific context of defamation, this regulation must account for sometimes conflicting individual liberties (freedom of expression versus reputation and human dignity) as well as collective social benefits of criticism that might clash with individual reputational rights. I explore these matters in detail in the Part IV below. As I will illustrate, the task of balancing the various interests is particularly challenging in the context of humorous communications that are alleged defamatory. As preparation for understanding the interests relevant to this balance, we must heed the work of nonlegal scholars in identifying humor's individual and social consequences.

1. Humor's Consequences for Individuals

For individual well-being, scholars cast humor as an effective coping device, which can afford altered and empowering perspectives to persons confronting fearful, sad, or angry situations.⁸³ Studies document that humor reduces stress by moderating stress-related emotions and physiological changes.⁸⁴

81. See, e.g., MICHAEL BILLIG, LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR 57–85, 158–68 (2005) (describing connections among incongruity humor, high social rank, education, and “gentlemanly laughter” and explaining both benefits and dangers that Freud identified in “tendentious” humor concerning taboo topics); Nicholas H. Kuiper et al., *Humor s Not Always the Best Medicine: Specific Components of Sense of Humor and Psychological Well-Being*, HUMOR:INT’L J. HUMOR RES. 135, 139–41 (2004) (describing psychological analysis of humor based on superiority, which tends to be “boorish,” based on a “mean-spirited and sarcastic style of poking fun at others,” and “maladaptive”).

82. See Little, *supra* note 3, at 1252–54 (reviewing interdisciplinary scholarship analyzing beneficial aspects of humor).

83. Kimberlianne Podlas, *Respect My Authority! South Park's Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 512 (2009) (“Comic relief” can reduce anxiety associated with disconcerting topics and provide a safe harbor in which to reaction to them.”); COHEN, *supra* note 73, at 40–41 (arguing that laughing allows us to accept our limitations and to process “devastating and incomprehensible matters”); *Humor and Laughter*, *supra* note 28, at 203 (noting how humor alters perspective and increases coping abilities).

84. *Humor and Laughter*, *supra* note 28, at 204 (describing physiological and emotional changes resulting from humor); ROECKELEIN, *supra* note 13, at 58 (describing how comedians transform tragedy into something pleasant and funny).

One particularly positive consequence is humor's role in forging social bonds among people. As described above, the joke-telling process links the joke teller with the listener as they experience the joke unfold.⁸⁵ Moreover, shared humor often inspires a feeling that one is part of an "intellectual in-crowd," making listeners feel less defensive and more positive about themselves.⁸⁶ This is particularly true for humor based on previously shared experiences, or inside jokes.⁸⁷ Analysis of parody suggests that a similar process occurs for collective audiences before whom parody is performed or published; true parody works only with that part of the audience that possesses preexisting knowledge of the parody's object.⁸⁸

The verdict is more mixed for humor's health effects, with studies revealing an uncertain link between robust health and humor. Scholars for many years proposed that laughter promoted beneficial emotional states and decreased stress,⁸⁹ yet actual empirical support for a positive link between humor and good physical health could be stronger.⁹⁰ One problem in establishing the connection is the difficulty of distinguishing between the

85. See *supra* footnotes 73 and accompanying text for discussion of the dynamic between joke teller and listener.

86. Katrina Triezenberg, *Humor Enhancers in the Study of Humorous Literature*, 17 HUMOR: INT'L J. HUMOR RES. 411, 413 (2004). See also Cundall, *supra* note 5, at 210 (explaining a joke-transaction theory under which jokes require "shared knowledge of the subject matter and the notion of community").

87. COHEN, *supra* note 73, at 40–41 (explaining that where a joke teller and listener share a joke's background, a "foundation of intimacy" can develop between them).

88. See, e.g., ATTARDO, *supra* note 20, at 87 (describing parody's connection to a preexisting text); Brand, *supra* note 20, at 442 (describing the interrelationship between parody and preexisting text); *Parody and Decorum*, *supra* note 20, at 81.

89. Rod A. Martin, *Sense of Humor and Physical Health: Theoretical Issues, Recent Findings, and Future Directions*, 17 HUMOR: INT'L J. HUMOR RES. 1, 4–5 (2004). For a more detailed review of this literature and its nuances, see THE PSYCHOLOGY OF HUMOR, *supra* note 14, at 309–33.

90. See Nicholas Kuiper & Sorrel Nicholl, *Thoughts on Feeling Better? Sense of Humor and Physical Health*, 17 HUMOR: INT'L J. HUMOR RES. 37, 38 (2004) (reporting that empirical evidence is "surprisingly weak" for the hypothesis that a greater sense of humor is linked to better health). Significant support does exist, however, for the proposition that humor increases pain tolerance. See, e.g., Karen Zweyer, Barbara Velker & Willibald Ruch, *Do Cheerfulness, Exhilaration, and Humor Production Moderate Pain Tolerance? A FACS Study*, 17 HUMOR: INT'L J. HUMOR RES. 85, 86–92 (2004) (describing past literature on the correlation and reporting the results of a study in which pain tolerance increased after watching a "funny film"); THE PSYCHOLOGY OF HUMOR, *supra* note 14, at 331 ("[O]f all the health benefits claimed for humor and laughter, the most consistent research support has been found for the hypothesized analgesic effects.").

effects of humor and the effects of other positive emotions or effects, such as mirth, playfulness, and optimism, which often accompany humor.⁹¹

A common approach to the literature on the humor/health connection distinguishes among humor styles, often using a binary matrix separating “adaptive” humor styles from “maladaptive” humor styles.⁹² Not surprisingly, scholars often denominate superiority humor as maladaptive, associating it with depression, anxiety, and aggressiveness.⁹³ By contrast, they correlate socially adaptive humor with reduced anxiety and depression, as well as increased self-esteem.⁹⁴ Empirical findings are nuanced, however, suggesting that the effects of different humor vary according to context. Thus, lighthearted humor (such as incongruity humor and witticisms) might best enable the staff of a mental health facility to deal with the challenges of the mentally ill.⁹⁵ By contrast, aggressive superiority humor may be a more effective survival mechanism for concentration camp prisoners.⁹⁶ As such, the adaptive/maladaptive formula may be oversimplistic, since negative or superiority humor can result in positive consequences, such as relieving one’s own stress⁹⁷ and bolstering one’s own self-esteem,⁹⁸ while at the same time destroying personal relationships and eliminating social support structure.⁹⁹

91. See, e.g., Jaak Panksepp & Jeff Burgdorf, “Laughing” Rats and the Evolutionary Antecedents of Human Joy?, 79 *PHYSIOLOGY & BEHAV.* 533 (2003) (noting that positive emotions such as joy and love may share the same brain circuits as humor).

92. See, e.g., *Sense of Humor and Physical Health*, *supra* note 89, at 14 (describing a “multidimensional approach” that differentiates aspects of humor that “are potentially beneficial to well-being” from “those that are potentially detrimental”).

93. See, e.g., Nicholas A. Kuiper et al., *Humor is Not Always the Best Medicine: Specific Components of Sense of Humor and Psychological Well-Being*, 17 *HUMOR: INT’L J. HUMOR RES.* 135, 135, 139–141 (2004).

94. *Id.* at 135–36, 160–62.

95. See, e.g., Joan Sayre, *The Use of Aberrant Medical Humor by Psychiatric Unit Staff*, 22 *ISSUES MENTAL HEALTH NURSING* 669, 672 (2001) (suggesting that aggressive humor toward patients may “create a nontherapeutic distancing from patient” and promote cynicism and morale problems among psychiatric staff).

96. *THE PSYCHOLOGY OF HUMOR*, *supra* note 14, at 288–306 (2007) (summarizing studies of context dependency on mental health effects of different humor types, including report on humor evidenced in World War II concentration camps). The prevalence of aggressive humor in the context of severe hardship, such as a concentration camp, may be explained by the need to develop a form of hard-heartedness or a “suspension of sensibility” necessary to cope with “the hostile and cruel content of many funny stories.” *Concept of Incongruity*, *supra* note 42, at 56.

97. This is, after all, the underpinning of Freud’s theory of tendentious wit. FREUD, *supra* note 32, at 91–106 (cataloguing the function of “tendentious” jokes to release tension about sex and excrement, hostilities toward others, and cynicism about social forces).

98. Lawrence La Fave, Jay Haddad & William A. Maesen, *Superiority, Enhanced Self-Esteem, and Perceived Incongruity Humour Theory*, in *HUMOUR AND LAUGHTER*:

2. Humor's Consequences for Groups

Thinkers from many disciplines herald humor's potential to contribute to civilization on an aggregate level, enhancing both society and culture. Throughout society, we celebrate humor as an art form and important expressive mode.¹⁰⁰ Sociologists, anthropologists, folklorists, and others find the raw material of humor crucial for studying and understanding cross-cultural differences.¹⁰¹ And, of course, humor has a key role in regulating social norms, enabling powerful expressions of disapproval and approval through gradations of wit ranging from sugar-coated quips to acid barbs. In this way, humor provides a mechanism for social commentary—allowing a commentator to “tell[] the truth with a laugh.”¹⁰²

As it does with individuals, negative humor can have subtle and apparently contradictory effects on groups. Sharing or observing a humorous repartee over words can assist a group in establishing or exchanging their identity.¹⁰³ A group can reinforce its own identity by sharing negative humor about its superiority to others, often at the expense of others.¹⁰⁴ Likewise, humor can perform the apparently inconsistent role of enabling “collaborative”¹⁰⁵ resolution of social tensions, while also

THEORY, RESEARCH, AND APPLICATIONS 63, 86 (Anthony J. Chapman & Hugh C. Foot eds., 1976).

99. *Sense of Humor and Physical Health*, *supra* note 89, at 16 (discussing the double-edged relationship between humor and health).

100. Folklorist Elliott Oring, for example, describes his view on humor as follows: I consider jokes and other forms of humorous expression to be meaningful and sometimes significant communications. I also believe humorous expressions to be art. Some jokes are truly beautiful, and those who create them, reshape them, and orally purvey them are often genuine artists . . . Humor and laughter are cultural universals. They are a condition of humanity. Humor could be considered trivial only from a perspective that holds humanity itself to be trivial. ORING, *supra* note 66, at ix–x.

101. Examples are legion. Recent works spanning many different cultures include CHRISTIE DAVIES, *JOKES AND THEIR RELATION TO SOCIETY* (1998) (exploring jokes in a number of cultures, including Polish, Chinese, Japanese, Irish, British, Australian, and Palestinian); GISELINDE KUIPERS, *GOOD HUMOR, BAD TASTE: A SOCIOLOGY OF THE JOKE* (2006) (exploring jokes in the context of primarily Dutch and United States culture).

102. HORACE, *SATIRES* § I.1.25–26 (P. Michael Brown trans., Aris & Phillips 1993).

103. Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 *LAW & SOC. INQUIRY* 1151, 1165 (2000) (observing how the insider humor resulting from a “common history of word play” can help establish group solidarity).

104. *See id.* at 1165 (noting how a group can define itself by “degrading those who are *outside*”) (emphasis added).

105. MICHAEL MULKAY, *ON HUMOUR: ITS NATURE AND PLACE IN MODERN SOCIETY* 152–53 (1988) (analyzing humor and social structure).

damaging community structure by providing a platform for communal “inconsistencies and irrationalities.”¹⁰⁶

This contradictory potential provides an especially challenging puzzle in understanding the group dynamics of stereotype and discrimination. One can easily imagine how humorous taunting based on racial, ethnic, or gender characteristics can libel an entire group. Yet the taunting can backfire by either overplaying or undermining the stereotypes that it trades on.¹⁰⁷ Additionally—as in the circumstance where a group appropriates for itself a derogatory term used by others to name the group—humor can suck the power out of stereotypes. Humor can release inhibition or tension related to group differences. As such, even negative humor is a positive instrument for members of a disempowered group to assert themselves.¹⁰⁸ How does humor accomplish this? At least a partial explanation lies in humor's invitation for people to let down their guards and to reduce their cognitive and emotional resistance to what others are saying.¹⁰⁹ As a result of its defense-lowering potential, humor can provide a “safe harbor” for individuals and groups to process sensitive subject matter.¹¹⁰

Examples of two group contexts where scholars recognize humor's significant positive potential are education and the workplace. Recent trends in education promote humor to raise student interest and reduce anxiety about learning. Although empirical studies on the actual effect of humor on learning are relatively sparse, research does suggest that moderated humor in the classroom increases student interest, enjoyment level, and perception of how much they learn.¹¹¹ As for joking in the workplace, scholars recognize that superiority humor can damage

106. *Id.*

107. JOSEPH BOSKIN, *REBELLIOUS LAUGHTER: PEOPLE'S HUMOR IN AMERICAN CULTURE* 38 (1997) (describing humor's apparently contradictory potential of reinforcing “pejorative images” and inverting stereotypes).

108. *See, e.g.*, Charles Winick, *The Social Contexts of Humor*, 26 J. COMM. 124, 126–28 (1976) (describing how groups use humor to manage power conflicts); COHEN, *supra* note 73, at 44 (describing how the disempowered often joke about their oppressors).

109. Podlas, *supra* note 83, at 512 (arguing that humor lowers “emotional (and intellectual) defenses, thereby avoiding resistance” of listeners).

110. *Id.* (suggesting that humor creates this “safe harbor” by reducing anxiety).

111. Melissa Bekelja Wanzer & Ann Bainbridge Frymier, *The Relationship Between Student Perceptions of Instructor Humor and Students' Reports of Learning*, 48 COMM. EDUC. 48, 55 (1999) (reporting on positive correlation between humor on one hand and student enjoyment and learning perception on the other hand); Stephen B. Fortson & William E. Brown, *Best and Worst University Instructors: The Opinions of Graduate Students*, 32 C. STUDENT J. 572, 573 (1998) (identifying correlation between teacher humor and student opinions of their effectiveness).

cohesiveness and—when egregious—significantly damage employment conditions for minority group members and women.¹¹² Nonetheless, scholars identify humor’s substantial contributions to forging bonds between coworkers, developing organizational identity, and enabling employees to negotiate hierarchical relationships.¹¹³

Lawsuits based on defamatory humor appear to occur more often in the workplace¹¹⁴ than in the educational context.¹¹⁵ Even so, the results of all defamatory humor suits that make their way into the court system send an important message about the limits of appropriate humor deployed in all group settings, including education and employment. I, thus, turn to a general review of defamation suits that have the effect of regulating humor.

III. DEFAMATION LAW, THE FIRST AMENDMENT, AND HUMOR REGULATION

Courts regulate humor all the time. The most obvious examples are the criminal cases where courts decide whether to punish for joking about

112. For example, sexual harassment employment discrimination claims under 42 U.S.C. § 2000e-2(a) (2006) (Title VII) are often premised on a pattern of harassing humor. In fact, the United States Department of Labor released a pamphlet admonishing that actionable discrimination can result where a coworker’s sexual jokes make it hard for a plaintiff to work. *Sexual Harassment: Know Your Rights*, U.S. DEP’T OF LABOR (1994), available at <http://www.empowermentzone.com/harass.txt>. For a critique of the social ramifications of this pamphlet, see DAVID E. BERNSTEIN, YOU CAN’T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 26 (2003) (describing the aforementioned pamphlet and taking the position that the hostile environment sexual harassment law violates free speech principles); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627, 633–37 (1997) (citing the pamphlet and arguing that sexual harassment law suppresses “core protected speech”).

113. See, e.g., JERRY PALMER, TAKING HUMOUR SERIOUSLY 59 (1994) [hereinafter TAKING HUMOUR SERIOUSLY] (observing that humor “functions to ease tensions caused by the contradiction between hierarchy and collegiality”); Joseph Alan Ullian, *Joking at Work*, 26 J. COMM. 129, 129 (1976) (analyzing how banter and joking help organizations remain stable in the face of change); *Humor and Laughter*, supra note 28, at 203 (noting humor’s ability to strengthen human relationships and provide enhanced feelings of closeness within working environments).

114. For a review of cases, see John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards*, 52 DEPAUL L. REV. 19, 56–73 (2002).

115. Possible liability arising out of social networking sites may provide fertile ground for such defamatory humor cases related to the school environment. In the meantime, there are plenty of non-humor defamation cases arising in the context of education—with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), being a prominent example. *Milkovich* was a defamation suit based on alleged perjury by a high school wrestling coach.

such matters as shooting the president¹¹⁶ or bombing an airplane.¹¹⁷ Courts also regulate humor directly when asked to enjoin communication, such as a song parody.¹¹⁸ More indirectly, courts regulate humor when evaluating civil liability claims, which can derive from humor-inflicted injury in a broad range of contexts, such as contract, trademark infringement, and employment discrimination, to name a few. Where a court endorses civil liability, the resulting damage verdict sends a deterrent message to others who consider making a similar joke. Tort actions to remedy dignitary harms is one context in which plaintiffs frequently request that courts impose damages and thereby send this deterrence message for hurtful jokes.¹¹⁹ Of all the dignitary harms, defamation is probably the most common theory plaintiffs invoke to remedy hurt flowing from a joke.

When asked to regulate humor in the civil justice context, United States courts occasionally acknowledge humor's individual and social benefits, which a damage judgment could discourage or undermine.¹²⁰ In

116. See 18 U.S.C. § 871 (2006) (criminalizing threats against the President); *Watts v. United States*, 394 U.S. 705, 706–08 (1969) (finding that the defendant's remarks did not violate 18 U.S.C. § 871, and stressing the context of the remarks and that listeners reacted with laughter).

117. See 49 U.S.C. § 46507 (2006) (criminalizing false information and threats in the context of aviation); *United States v. Cothran*, 286 F.3d 173, 176 (3d Cir. 2002) (finding that “[a] bad joke” could violate 49 U.S.C. § 46507). See generally Gilbert, *supra* note 10, at 864–66 (describing jokes ridiculing the Bush Administration that were subject to Secret Service investigation).

118. See, e.g., *Austl. Broad. Corp. v Hanson* [1998] QCA 306 (28 September 1998) (Austl.) (enjoining as defamatory a song parody of a Member of the Queensland House of Representatives).

119. Dignitary harms in which humor is frequently at issue include defamation, false light, and invasion of privacy. Sometimes, right of publicity (which concerns a person's right to protect the commercial value of her or his own name) is also included in the list of dignity harms. This right also arises in the humor context, particularly in the context of parody and satire.

120. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (asserting that “[p]arody, humor, irreverence are all vital components of the marketplace of ideas”); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 (1st Cir. 1987) (stating that parody is “deserving of substantial freedom—both as entertainment and as a form of social and literary criticism” (quoting *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541 (2d Cir. 1964))); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (*per curiam*) (rejecting a copyright infringement claim, and proclaiming the belief “that, in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody”); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 669 N.Y.S.2d 122, 124 (App. Div. 1997) (noting in the context of an employment discrimination case that “good-natured [humor] . . . may relieve the tensions imposed by the pressures of daily life”); *Salomone v. Macmillan Publ'g Co.*, 411 N.Y.S.2d 105, 109 (Sup. Ct. 1978), *rev'd on other grounds*, 429 N.Y.S.2d 441 (App. Div. 1980) (declaring that “[w]ithout humor[—]the ability to recognize the ridiculous in any situation[—]there can be no perspective”).

connection with discussing humor's advantages, courts sometimes (but not always) frame their concerns in terms of free speech values. One area where freedom of expression consistently features prominently in United States cases, however, is defamation. This is unsurprising, given the long established linkage between the First Amendment and defamation law, and the repeated efforts of the United States Supreme Court to calibrate a careful balance between reputational and free speech values.¹²¹

In this section, I review efforts in the United States to use First Amendment doctrine to limit the reach of state defamation actions regulating humor, starting first with the basics of defamation liability and then moving on to First Amendment case law. I critique the primary doctrinal technique that United States courts use to accomplish this task, specifically the fact/opinion distinction, and show its limitations. I then survey Australian defamatory humor cases and glean lessons for United States courts.

A. UNITED STATES DEFAMATION LAW

Defamation is a tort theory designed to protect an individual's interest in preserving personal reputation.¹²² As it is formally defined under state common law in the United States, a defamatory statement "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹²³ The standard elements of the defamation cause of action, however, require not only that the plaintiff show that a statement is defamatory, but

121. While not the first case concerning defamation and the First Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), stands as the beginning of the Court's contemporary efforts to strike this balance. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICES 1045 (3d ed. 2006) (citing *New York Times Co. v. Sullivan* as the beginning of the Court's effort to "balance the need to protect reputation . . . with the desire to safeguard expression").

122. In an influential law review article, Robert Post observed that reputation is a complex concept and that defamation law has sought to protect a least three aspects: "reputation as property, as honor, and as dignity." Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693 (1986).

123. RESTATEMENT (SECOND) OF TORTS § 559 (1977). The state law landscape of defamation law is relatively uniform. To the extent that variation exists in this area, the law of New York and California is most pertinent to this paper, since these two entertainment capitals generate the most defamatory humor opinions. Sometimes, states provide a fuller picture of what constitutes defamation than the bare-boned Restatement defamation. See, e.g., *Frank v. Nat'l Broad. Co.*, 506 N.Y.S.2d 869, 871 (App. Div. 1986) (stating that defamatory speech tends to expose the plaintiff "to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their intercourse in society" (quoting *Sydney v. MacFadden Newspaper Publ'g Corp.*, 151 N.E. 209, 210 (N.Y. 1926))).

also that the statement is false.¹²⁴ Here lies the problem with regulating defamatory humor: it does not fit easily into the paradigm of truth and falsity. Humor is by definition not “serious,” thus suggesting that it operates outside the realm of anything one could verify. Yet—as a society—we also know that “many a truth is said in jest.”

United States courts and commentators have taken a variety of approaches to the problem of fitting the round peg of humor into the square hole of defamation. Some have said that at least one type of humor—parody—is not capable of being defamatory, reasoning that defamation is “mutually exclusive of parody.”¹²⁵ Some have alluded to the notion that all humor deserves immunity from liability.¹²⁶

124. The Second Restatement sets forth the actual elements of defamation as follows:

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1977).

125. 50 AM. JUR. 2D *Libel and Slander* § 156 (2011). Here is the full statement of this position:

By definition, defamation requires a false statement of fact; parody, to the degree it is perceived as parody by its intended audience, conveys the message that it is not the original and, therefore, cannot constitute a false statement of fact . . . If a parody could be actionable because, while recognizable as a joke, it conveyed an unfavorable impression, very few journalistic parodies could survive. It is not for the court to evaluate a parody as to whether it went too far, for the purposes of a libel claim; as long as it is recognizable to the average reader as a joke, it must be protected or parody must cease to exist.

Id. (footnotes omitted). The Indiana Court of Appeals specifically adopted this approach in *Hamilton v. Prewett*, 860 N.E.2d 1234, 1244 (Ind. Ct. App. 2007). The court first acknowledged that a humorous statement could be defamatory. *Id.* at 1245 (“A defendant who couches a defamatory imputation of fact in humor *cannot* simply avoid liability by dressing his wolfish words in humorous sheep’s clothing.”). The court nonetheless identified parody as “another beast that goes beyond mere humor”). *See also* *Garvelink v. Detroit News*, 522 N.W.2d 883, 887 (Mich. Ct. App. 1994) (stating that “even if the writer is motivated by hatred or ill” a parody is still not to be actionable because it is “in the area of public debate concerning public officials”).

126. For example, Robert Sack argues:

Although perhaps annoying or embarrassing, humorous statements will typically have no substantial and permanent impact on reputation and therefore ought not to be held to be defamatory. Incidental jibes and barbs may be humorous forms of epithets or “mere name-calling” and are not actionable under settled law governing such communications. And it is on these bases that most humor cases are decided. Humor is usually understood to be humor and to convey no serious, objective factual allegations about its target. Although perhaps annoying or embarrassing, humorous

The more common approach, however, has been for courts to differentiate humor that merits defamation liability from humor that does not. The common law privilege of fair comment long performed this sorting process, insulating criticism relating to “matters of public concern” from liability.¹²⁷ As lower courts applied this privilege, they also made a distinction between humorous assertions that were based on fact (which were actionable) and assertions based on opinion (which were not actionable). The distinction developed into an important common law concept. Courts further refined the concept, and the Restatement (Second) of Torts now provides that “[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.”¹²⁸

The United States Supreme Court also found use for the distinction in First Amendment doctrine; indeed, it is likely neither possible nor fruitful to segregate constitutional and common law sources of the fact/opinion distinction.¹²⁹ For common law purposes, however, it is important to note that the comments to Restatement (Second) section 566 specifically apply the fact/opinion distinction to humor, stating that “[h]umorous writings, verses, cartoons or caricatures that carry a sting and cause adverse rather

statements will have no substantial impact on reputation and therefore ought not to be held to be defamatory. Incidental jibes and barbs may be humorous forms of epithets or “mere name-calling” and are not actionable under settled law governing such communications. And it is on these bases that most humor cases are decided.

SACK, *supra* note 80, § 5:5.2[G][1] (footnotes omitted). See also *Salomone v. Macmillan Publ'g Co.*, 411 N.Y.S.2d 105, 108 (Sup. Ct. 1978), *rev'd on other grounds*, 429 N.Y.S.2d 441 (App. Div. 1980) (“Is there a recognized exception from the laws of libel when words otherwise defamatory are uttered in a humorous context? Of course, common sense tells us there must be.”); *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 228 & n.13 (E.D. Va. 1990) (concluding that song parody amounted to “comedic expression” and “a protected form of free speech” whether or not the song constituted “protected opinion”).

127. RESTATEMENT (FIRST) OF TORTS § 606 (1938). Although the First Restatement provides a uniform standard, lower courts varied in how they applied the fair comment privilege. King, *supra* note 10, at 883–84. In his comprehensive study of parody cases, Professor King reports that the Second Restatement’s section 566 provides an approach to defamation that “subsume[s] the prior rule for fair comment, essentially obviating the need for it.” *Id.* at 891–92.

128. King, *supra* note 10, at 891–92 (quoting RESTATEMENT (SECOND) OF TORTS § 566 (1977)).

129. *Id.* at 882 (noting that the common law and constitutional sources for the distinction are “intertwined”). See also SACK, *supra* note 80, at § 5:5.2[G][1] (“Much humor is a form of opinion or criticism protected under the common-law defense of ‘fair comment’ or the doctrines suggested by the Supreme Court cases: that there are ‘constitutional limits on the type of speech which may be the subject of state defamation actions’”).

than sympathetic or neutral merriment may be defamatory.”¹³⁰ Expanding on this point, the comments to section 566 also state that no defamation occurs where a communication evinces “a harsh judgment upon known or assumed facts,” since—in that event—the communication “is no more than an expression of opinion of the pure type”¹³¹

B. FIRST AMENDMENT DOCTRINE

The central challenge of regulating defamation actions is calibrating the appropriate balance of reputational and free expression values. In developing the First Amendment's role in this balance, the Supreme Court first targeted the identity of the defamation plaintiff, reasoning that the United States' commitment to robust debate on public issues justified restricting defamation laws' protection for public officials¹³² and public figures.¹³³ The Court then turned its focus to the subject matter of defamation actions, holding that the First Amendment restricted defamation actions by private figures based on “matters of public concern.”¹³⁴ For similar reasons, the Court also excised expressions of “opinion” from defamation liability.¹³⁵

Articulating a marketplace of ideas rationale in *Gertz v. Robert Welch, Inc.*, the Supreme Court counterposed to “opinion” the concept of false factual statements.¹³⁶ The *Gertz* Court famously declared: “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.”¹³⁷ After lower courts struggled with the scope of constitutional protection of opinions for fifteen years, the Court took up the concept again in *Milkovich v. Lorain Journal Co.*¹³⁸ While refusing to articulate a one-size-fits-all definition of opinion or to create “an artificial dichotomy between ‘opinion’ and fact,” the Court found First Amendment “protection for statements that cannot ‘reasonably [be] interpreted as stating actual

130. King, *supra* note 10, at 893 (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977)).

131. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 566 cmt. d (1977)).

132. See e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 279–80 (1964) (defamation action by public official).

133. See e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (defamation action by public figure).

134. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

135. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

136. *Id.* at 340.

137. *Id.* at 339–40.

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

facts.”¹³⁹ One scholar has explained that, although the Court professed to reject the fact/opinion dichotomy, the Court merely substituted that “dichotomy . . . with a new dichotomy between ‘fact and non-fact.’”¹⁴⁰

A review of the core values animating the First Amendment sheds light on what the Supreme Court was trying to achieve with these dichotomies. Received wisdom suggests that in protecting free expression, the First Amendment promotes truth seeking, democratic self-governance, social tolerance, and individual autonomy.¹⁴¹ On a simplistic level, one can appreciate how courts can serve these values by protecting opinions (or non-facts), whereas in some cases one can undermine the values by allowing false facts to flourish in public debate. While opinions can be countered with debate, the dissemination of known false facts does not facilitate society’s search for truth. Likewise, expression of opinions can assist voters in making informed electoral choices and governmental officials in making well-considered policy decisions.¹⁴²

False facts, however, can hinder wise governmental choices. Allowing the free flow of all opinions models open-mindedness; similarly, expression of personal opinion also advances individual autonomy and a robust sense of personhood. While allowing communication of false facts may also foster personal autonomy and tolerance of the speaker, the false facts impose a countervailing toll on both autonomy and tolerance of the individual about whom the facts concern. The damage to reputation expresses intolerance toward the individual and detracts from the individual’s sense of personhood.¹⁴³

139. *Id.* at 20 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). The focus on factual accuracy in defamation is somewhat unique for First Amendment analysis. Indeed, Frederick Schauer has forcefully and persuasively argued that First Amendment doctrine is too tolerant of factual inaccuracy. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 918–19 (2010) (bemoaning tolerance of First Amendment theory and doctrine for “widespread public factual falsit[ies]”). Outside of the defamation context, the First Amendment protects factual falsity—particularly in the area of public debate. *See id.* at 915 (concluding that, given the extension of the *New York Times Co. v. Sullivan* actual malice standard to public figures, the current state of constitutional doctrine does not allow governmental regulation of statements of “public non-commercial factual falsity”); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (holding that the only remedies available against false or misleading campaign speech would be those that satisfied the *New York Times Co. v. Sullivan* actual malice standard).

140. 1 RODNEY SMOLLA, LAW OF DEFAMATION § 6:21 (2d ed. 2011).

141. CHEMERINSKY, *supra* note 121, at 925–30 (reviewing various interests animating First Amendment doctrine).

142. *Id.* at 926 (discussing free speech’s role in ensuring a functioning democracy).

143. *See id.* at 929–30 (discussing the complexities of free speech’s role in advancing “personhood and autonomy” as well as “promoting tolerance”). Alluding to the conflicting

Concomitantly with its efforts to demarcate the scope of opinion protection, the Supreme Court also tracked concern with First Amendment values in reckoning with the appropriate level of protection for colorful language. The first cases in this area dealt with name-calling rather than jokes.¹⁴⁴ Nonetheless, the cases directly wrestled with the type of vivid language jokesters often use. First, in *Greenbelt Cooperative Publishing Association v. Bresler*, the Court held that that a newspaper story alleging “blackmail” could not be the basis for defamation liability because “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet”¹⁴⁵ Likewise, the Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* found First Amendment protection for the description “scab” as applied to nonunion members, explaining that the term is “merely rhetorical hyperbole, a lusty and imaginative expression of the contempt”¹⁴⁶

Finally, in a case that explicitly grappled with humor, *Hustler Magazine v. Falwell*, the Court found that Reverend Jerry Falwell could not recover in tort for a parody, unless he showed that the defendant acted with knowledge of the falsity of facts asserted in the communication or with reckless disregard for the truth or falsity of any facts asserted.¹⁴⁷ In the course of its reasoning, the Court celebrated the role of parodies in our cultural tradition, noting that our national “political discourse would have been considerably poorer without them.”¹⁴⁸ Drawing from earlier First Amendment precedent focusing on the relationship between defamation and falsehoods, the Court held that the parody in the case could not have reasonably been interpreted as asserting “actual facts about [Falwell] or

interest of the speaker and the subject of the speech, Rodney Smolla argues that an “intelligent argument concerning the fact/opinion distinction cannot be marshalled without resort to discussion” of the distinction’s attempt to protect reputation, while preserving an opportunity for robust criticism. SMOLLA, *supra* note 140, at § 6:21.

144. *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 13–14 (1970).

145. *Id.* at 13–14.

146. *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974).

147. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). *Hustler* concerned the tort of intentional infliction of emotional distress, but the Court treated the First Amendment issues as one would have expected it to in a defamation case. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (confirming First Amendment obstacles to recovery for intentional infliction of emotional distress involving a matter of public concern rather than a public figure).

148. *Hustler*, 485 U.S. at 55.

actual events in which he participated.”¹⁴⁹ The Court thus reinforced the principle that the First Amendment shields from liability communications that are not reasonably interpreted as factual in nature.

C. THE FACT/OPINION DISTINCTION

1. Lower Court Experience

Following the lead of the Supreme Court, as well as common sense notions of good judging, lower courts generally go out of their way to avoid making an explicit value judgment about the humor at issue in defamation suits. Courts protest that they are not deciding whether a putative joke works as comedy,¹⁵⁰ and that the First Amendment does not cast them in the role of “polic[ing] bad taste.”¹⁵¹ Explaining this hands-off approach, one court cited humor’s “intensely subjective” nature and observed that “[b]lank looks or even active loathing may be engendered by a statement or cartoon that evokes howls of laughter from another. What is amusing or funny in the eyes of one person may be cruel and tasteless to someone else.”¹⁵²

Given these limitations, lower courts in the United States evaluate allegedly defamatory humor with the eyeglasses of the reasonable reader or fact finder, a hypothetical entity whose virtues are routinely celebrated by courts.¹⁵³ In deciding whether a reasonable reader or fact finder would

149. *Id.* at 52, 57.

150. *See, e.g.*, *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 259 (Ct. App. 1985) (explaining that the “proper focus of judicial inquiry . . . is not whether the allegedly defamatory statement succeeds as comedy, nor whether its audience thought it to be humorous . . .”); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 158 (Tex. 2004) (explaining that the proper legal question is not whether “all readers actually . . . ‘got the joke’”); *Salomone v. MacMillan Publ’g Co.*, 411 N.Y.S.2d 105, 109 (Sup. Ct. 1978) (adopting the proposition in a defamation action that judges should not act as “literary . . . critic[s]”), *rev’d on other grounds*, 429 N.Y.S.2d 441 (App. Div. 1980). *Cf.* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (observing in the context of a copyright claim that the “*First Amendment* protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed”); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 307 (App. Div.) (observing in the context of an unfair competition action that judges should “not import the role of literary or dramatic critic into our functioning as Judges in this case Whether [the humor] is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide”), *aff’d by order*, 207 N.E.2d 508 (N.Y. 1965).

151. *New Times, Inc.*, 146 S.W.3d at 166. *See S.F. Bay Guardian, Inc. v. Superior Court*, 21 Cal. Rptr. 2d 464, 468 (Ct. App. 1993) (stating that the court’s role is not to decide whether a joke “went ‘too far’”).

152. *Salomone*, 411 N.Y.S.2d at 109.

153. As the court explained in *Patrick v. Superior Court*, a reasonable reader “[i]s no dullard. He or she does not represent the lowest common denominator, but reasonable

interpret the communication as suggesting actual facts, lower courts often rely on the line of Supreme Court cases dealing with exaggeration, deciding whether to assign the label “rhetorical hyperbole” or “vigorous epithet” to the putative joke.¹⁵⁴ Sometimes, however, lower courts focus on the fact/opinion distinction, without reliance on either the hyperbole or epithet characterization.¹⁵⁵ In at least one instance, a court concluded that a song parody contained sufficient rhetorical hyperbole and indication of comedic expression that it merited protection from liability, whether or not it constituted protected opinion.¹⁵⁶

When drawing from the fact/opinion distinction, courts ask whether the humor contains material that a reasonable reader or fact finder could interpret as suggesting actual facts.¹⁵⁷ The notion is that humor suggests

intelligence and learning. He or she can tell the difference between satire and sincerity.” *Patrick v. Superior Court*, 27 Cal. Rptr. 2d 883, 887 (Ct. App. 1994). See also *New Times, Inc.*, 146 S.W.3d at 158 (describing a reasonable reader as one who exercises care and prudence, and explaining that “[i]ntelligent, well-read people act unreasonably from time to time, whereas the hypothetical reasonable reader . . . does not”).

154. See, e.g., *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 716 (11th Cir. 1985) (evaluating an editorial cartoon referring to a nursing home as a haunted house by reference to the fact/opinion dichotomy as well as by reference to “hyperbole, exaggeration, and caricature”); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 441 (10th Cir. 1982) (evaluating a beauty contest spoof by reference to rhetorical hyperbole case law and deciding that the spoof could not be interpreted as providing actual facts since the spoof presented “impossibility and fantasy within a fanciful story”); *Hamilton v. Prewett*, 860 N.E.2d 1234, 1245–47 (Ind. Ct. App. 2007) (deciding whether parody is protected as hyperbole and asserting that parody “is speech that one cannot reasonably believe to be fact because of its exaggerated nature”); *Newman v. Delahunty*, 681 A.2d 671, 683–84 (N.J. Super. Ct. Law Div. 1994) (evaluating campaign literature for defamation liability by reference to whether it expressed facts or was “rhetorical hyperbole” or a “vigorous epithet”); *Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 721–22 (Ohio Ct. App. 2001) (explaining that a cartoon may be defamatory only if a “reasonable person” would conclude that it contained a factual assertion rather than “exaggeration and hyperbole”).

155. See, e.g., *Couch v. San Juan Unified Sch. Dist.*, 39 Cal. Rptr. 2d 848 (Ct. App. 1995) (deciding that mock examination in a student newspaper could not be interpreted as suggesting actual fact or anything other than parody); *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364, 371–72 (Ohio 2000) (evaluating whether election literature cartoons could be interpreted by reasonable reader as asserting facts); *New Times*, 146 S.W.3d at 158 (evaluating whether a newspaper spoof was subject to defamation liability by analyzing whether the publication could reasonably be understood as describing real facts).

156. *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 228 n.13 (E.D. Va. 1990) (“Having found that the song is a comedic expression based on fact, the Court deems it unnecessary to pursue defendant’s argument that the song constitutes protected opinion.”).

157. See, e.g., *Kniesel v. ESPN*, 393 F.3d 1068, 1071, 1077–78 (9th Cir. filed Jan. 4, 2005) (finding that a photograph with the caption “Evel Kniesel proves that you’re never too old to be a pimp” could not reasonably be interpreted as actual fact); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1193–94 (9th Cir. 1989) (dismissing a defamation claim by an anti-pornography advocate depicted in a Hustler cartoon because a reasonable reader

real facts and is thus capable of defamatory meaning and threatening reputational values. A contrary conclusion, that humor does not suggest real facts, brings the communication into the opinion realm, which is more clearly protected by free expression values.

2. The Limitations of the Fact/Opinion Distinction

So we see that the fact/opinion dichotomy is not only well-intended, but also reflects an intelligent effort to accommodate First Amendment values. Nonetheless, courts are having a devil of a time trying to chart a predictable line between fact and opinion. Indeed, one scholar proclaims that there are “as many tests for identifying opinion as there are home remedies for hiccups.”¹⁵⁸ Although the Supreme Court’s instruction that courts evaluate whether an assertion includes provably false facts seems relatively straightforward,¹⁵⁹ lower courts have indulged an impulse to develop complicated multifactor tests.¹⁶⁰

Understandably, courts are drawn to determinate doctrines that appear definitional and well designed for consistent application. No doubt the tests that have emerged in this area reflect that impulse. Yet—as in all matters related to defining truth—analysis becomes highly abstract and contested as soon as one puts sincere intellectual effort into the inquiry. To provide just one example of the crystalline distinctions that have emerged, much ink has been poured over whether the First Amendment protects only

could not interpret the cartoon as conveying a statement of fact); *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1075–76 (C.D. Cal 1994) (explaining in a defamation action based on changing computer code name from “Carl Sagan” to “Butt-Head Astronomer” that using “the figurative term ‘Butt-Head’” undermines the possibility that “a reasonable fact finder could conclude that the published statements imply a provably false factual assertion”); *Filippo v. Lee Publ’ns, Inc.*, 485 F. Supp. 2d 969, 980 (N.D. Ind. 2007) (stating that under Indiana law a cartoon can be defamatory only if a reasonable factfinder could conclude that it implies “objectively verifiable or testable facts”); *Ferreri v. Plain Dealer Publ’g Co.*, 756 N.E.2d 712, 721–22 (Ohio Ct. App. 2001) (explaining that a cartoon may be defamatory only if a reasonable person would conclude that it contained a factual assertion rather than “exaggeration and hyperbole”). *Cf.* *Collins v. Creative Loafing Savannah, Inc.*, 592 S.E.2d 170, 174–75 (Ga. Ct. App. 2003) (stating in the context of a defamatory cartoon that a court should inquire as to how “the average reader” would construe the communication).

158. SMOLLA, *supra* note 140, at § 6:1.

159. *Id.* § 6:21 (describing the Supreme Court’s “rather single-minded emphasis on whether the assertions that give rise to the suit are ‘provable as false’” as “a relatively narrow and mechanistic formula”).

160. For reviews of various tests, see Gregory G. Sarno, Annotation, *Libel or Slander: Defamation by Statement Made in Jest*, 57 A.L.R.4TH 520 §§ 5, 7 (1987 & Supp. 2011) (humor cases); Fulcher, *supra* note 10, at 737–44 (primarily humor cases); King, *supra* note 10, at 913–29 (general defamation cases and parody cases); Treiger, *supra* note 9, at 1221–26 (general defamation cases and satire cases).

“pure, *evaluative* opinion” and not “pure, *deductive* opinion, which is provable as true or false on the basis of objective evidence”¹⁶¹

The problem gets even worse in humor cases. Following the same methodology as in non-humor contexts, lower courts examine a putative joke to determine whether it meets the *Milkovich* standard: whether the joke could “reasonably be interpreted as stating actual facts.”¹⁶² Yet complications arise because humor is better than other modes of communication at concealing the possible truthfulness of its message. Why? To begin with, humor’s technique does not operate in the realm of fact; it operates in the realm of laughter. More specifically, humor works through incongruity, and by definition, incongruity does not reflect the constellation of facts and circumstances we readily experience but instead presents a reality we do not anticipate.¹⁶³ As philosopher Immanuel Kant said, “Jest must contain something that is capable of deceiving for a moment.”¹⁶⁴

Parody presents a particularly difficult challenge when it comes to the problem of segregating fact from non-fact. Although definitions of parody differ, theorists generally agree that a parody must resemble the object of

161. See, e.g., Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 474 (1994).

162. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990). See King, *supra* note 10, at 915 (reasoning that the various lower court tests in parody cases “ultimately” focus on this *Milkovich* test). For a similar argument about the difficulties of applying *Milkovich* in the context of sexual innuendo and teasing of women, see Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 MD. L. REV. 401, 523–28 (2004).

163. One humor theorist explained the matters as follows: humor needs an element of the ridiculous, and the “ridiculous is logical only within the bounds of certain facts. It appears logical in a certain setting, but as soon as we get out of the setting and take other facts into consideration, the logic is lost. Humour, therefore, may be inconsistent with reality as a whole.” Maier, *supra* note 61, at 72. Of course, for the incongruity to work as humor, it must build on a shared understanding of the world. See *supra* notes 48–60 and accompanying text.

164. IMMANUEL KANT, *THE CRITIQUE OF JUDGMENT* 225 (J.H. Bernard trans., Prometheus Books 2000) (1892). See also Gregory R. Naron, Note, *With Malice Toward All: The Political Cartoon and the Law of Libel*, 15 COLUM.-VLA J.L. & ARTS 93, 100 (1991) (observing that given that a cartoonist works in the realm of “truthful misrepresentation,” the notion of evaluating the truth of a cartoon is inherently questionable (quoting BOHUN LYNCH, *A HISTORY OF CARICATURE* 2 (1927))). In his treatise, Judge Robert Sack paints a picture of humor as largely lacking serious, factual content:

Although perhaps annoying or embarrassing, humorous statements will have no substantial impact on reputation and therefore ought not to be held to be defamatory. Incidental jibes and barbs may be humorous forms of epithets or ‘mere name-calling’ and are not actionable under settled law governing such communications. And it is on these bases that most humor cases are decided.

SACK, *supra* note 80, at § 5.5.2.7.1:5.2 (internal citation omitted).

the parody (the “original”), yet deviate sufficiently from the original, to cue the reader that a spoof is at play. Thus, parody skirts the line between the “fact” of the original, and the “opinion” represented by the ultimate message of the spoof. Artful parodies do this in a sneaky way: “The very nature of parody . . . 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.”¹⁶⁵

One prominent theory is particularly helpful in delineating the parameters of this problem of identifying facts underlying or suggested in humor. This theory is known as the semantic script theory identified by humor scholar Victor Raskin.¹⁶⁶ According to Raskin, a text is humorous if it is compatible with “two different scripts,” which are “opposite.”¹⁶⁷ A term of art in semantics, the concept of a “script” is illustrated in the following joke: “‘Is the doctor at home?’ the patient asked in his bronchial whisper. ‘No,’ the doctor’s young and pretty wife whispered in reply. ‘Come right in.’”¹⁶⁸

Raskin identifies two scripts that are compatible with the joke (the script of “doctor” and the script of “lover”), explaining that the scripts are opposite in the sense that one presents a sexual inference and the other does not.¹⁶⁹ Although the joke clearly implicates release theory, Raskin’s interpretation of the joke also evokes incongruity theory, because the interpretation suggests that “opposite” scripts are necessary conditions for the humor. For example, one could explain the joke using incongruity theory by pointing out that the patient would not need to enter the doctor’s home if the doctor were not present to provide for treatment.¹⁷⁰

165. *S.F. Bay Guardian, Inc. v. Superior Court*, 21 Cal. Rptr. 2d 464, 466 (Ct. App. 1993). *See, e.g., Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (“A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody.” (internal quotation marks omitted)); Andrew Watt, *Parody and Post-Modernism: The Story of Negativland*, 25 COLUM. J.L. & ARTS 171, 187 (2002) (noting that a judge evaluating parody must decide “what the original work represented and what the parody was saying about the original work”).

166. ATTARDO, *supra* note 20, at 1 (citing VICTOR RASKIN, *SEMANTIC MECHANISMS OF HUMOR* 99 (D. Reidel Publ’g Co. 1985) (1944)).

167. *Id.* (quoting RASKIN, *supra* note 166, at 99).

168. *Id.* at 21 (citing RASKIN, *supra* note 166, at 117–27).

169. *Id.* at 1 (citing RASKIN, *supra* note 166, at 21–22).

170. As support for the proposition that the script theory of opposites is aligned with incongruity theory, consider the following explanation of incongruity in humor offered by Professor John Allen Paulos:

Why do the opposite scripts present a problem for mining “facts” in a joke? The humor works only to the extent that there are two sufficiently plausible, dueling realities at play in the joke. As we hear the joke, we ponder whether the jokester really means to suggest that the doctor’s wife wishes to have sex with the patient.

Having pointed out the significant amount of untruth present in humor, I acknowledge that humor often serves as a medium for providing a highly factual message. Indeed, humor sometimes pitches a potent message that speaks truth to power or could not otherwise be easily delivered in a serious way.¹⁷¹ The tricky part is that this factual message is often covert: the nugget of truth may be hidden as a kind of time-release barb or embedded in an ambiguous joke that is subject to a considerable range of interpretations.¹⁷² In the doctor joke above, for example, one suspects that the true message is the doctor’s wife’s attempt at infidelity. But is this just a joke?

[A] necessary ingredient of humor is that two . . . incongruous ways of viewing something (a person, a sentence, a situation) be juxtaposed. In other words, for something to be funny, some unusual, inappropriate, or odds aspects of it must be perceived together and compared. We have seen that different writers have emphasized different oppositions: expectation versus surprise, the mechanical versus the spiritual, superiority versus incompetence, balance versus exaggeration, and propriety versus vulgarity.

PAULOS, *supra* note 46, at 9.

171. *Salomone v. MacMillan Publ’g Co.*, 411 N.Y.S.2d 105, 108 (Sup. Ct. 1978), *rev’d on other grounds*, 429 N.Y.S.2d 441 (App. Div. 1980) (“Laughter can soften the blows dealt by a cruel world, or can sharpen the cutting edge of truth.”). Moreover, the actual humor in a communication may derive from its naughtiness in pointing out something hurtfully hurtful and true about an individual. In one study, scholars argued that the hurtfulness is capable of humor because of circumstances that allow it to operate as a benign violation of some sort of norm. See A. Peter McGraw & Caleb Warren, *Benign Violations: Making Immoral Behavior Funny*, 20 PSYCHOL. SCI. 1 (2010) (suggesting three conditions that can make a norm violation capable of humor: “(a) the presence of an alternative norm suggesting that the situation is acceptable, (b) weak commitment to the violated norm, and (c) psychological distance from the violation.”).

172. See Maier, *supra* note 61, at 72 (explaining that humor operates in the realm of the ridiculous and “[b]ecause the ridiculous has only a limited logic, it is easy for us to take it lightly”). As Professor Kimberlianne Podlas thoughtfully explains, humor can act as a “Trojan Horse,” which possesses “communicative abilities that serious commentary lacks.” Podlas, *supra* note 83, at 511–12. She further explains:

[B]ecause a joke is subject to interpretation, it can disguise a comedian’s true meaning. Depending on the context, the same comment can be funny or mean, insightful or inappropriate. As a result, it can be difficult to see where humor ends and ridicule begins. This provides a joke with a degree of insulation. Consequently, and somewhat ironically, humor enables one to make serious points that could not be made in a serious tone.

Id. at 513 (internal citation omitted).

Matters do not get any better if we cast aside this notion of humor's dueling scripts. Indeed, whether humor is in the picture or not, determining whether something is "a fact" invariably presents a metaphysical challenge. In some theoretical circles, even suggesting that hard "facts" exist in counterpoise to something like "values" is cause for a snicker.¹⁷³ Leaving that debate aside, one can see that some phenomena can comfortably be asserted as fact—"there are more people in China than in New Jersey . . . Elvis Presley is dead . . . the square root of eighty-one is nine"¹⁷⁴—while other phenomena depend on questions of social construction that quickly muddy the characterization.¹⁷⁵ Although some humor does play off the first category of fact, humor often involves the latter category—which is difficult to characterize.

The philosophical challenges of defining "fact" are not unique to the humor context. Yet at least two reasons suggest that humor enhances the challenge. The first is humor's tendency to work by obfuscation, metaphor, and stealth.¹⁷⁶ This is a point that Freud emphasized in his analysis of humor's connection with dreaming.¹⁷⁷ Freud hypothesized that both joking and dreaming work by analogy or allusion, thereby sidestepping logic and literal meaning in order to elude the censors of our conscious minds.¹⁷⁸ When operating in this context, humor works outside the bipolar world of fact/non-fact. Other times, of course, humor actually works within the realm of fact, albeit concealing or disguising its factual message. While the fact/opinion paradigm is better suited to this use of humor, the challenge is, nonetheless, great where the disguise is particularly effective or the apparently truthful message is ambiguous.

173. Schauer, *supra* note 139, at 900 (observing that embracing a distinction between fact and value would "[i]n some circles . . . be an embarrassing thing to admit"). See generally HILARY PUTNAM, *The Collapse of the Fact/Value Dichotomy*, in *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 7, 28–30 (2004) (arguing that something could be both a fact and a value—and that both share overlapping realms); MARTIN HEIDEGGER, *BEING AND TIME* 125 (Joan Stambaugh trans., SUNY Press 1996) (1927) (rejecting a distinction between facts and values).

174. Schauer, *supra* note 139, 900–01 (listing examples of facts).

175. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 1–2 (Penguin Books 1996) (1995); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 949 n.19 (1995) (reviewing various approaches to social meaning construction).

176. Cf. FREUD, *supra* note 32, at 154.

177. *Id.*

178. *Id.* (observing that the technique of jokes includes similar processes as "dream-work": "the processes of condensation . . . displacement, representation by absurdity or by the opposite, indirect representation").

A related challenge is humor's tendency to operate in socially contested areas. As Professor Lawrence Lessig explains, not all "facts" are created equal.¹⁷⁹ Some facts work well within a First Amendment marketplace of ideas paradigm because of their ability to be verified in nature (such as the square root of eighty-one).¹⁸⁰ Others (such as the common characteristics of demographic groups or the personality strengths of an individual) are contingent on social definition.¹⁸¹ For this latter category, a "fact" (such as what tasks women are best suited for doing in the workplace) depends on what society has to say about the matter.¹⁸² Because of its unique ability to help individuals communicate about sensitive social topics, humor often crops up when those topics are discussed and—when it does so—can cause controversy that is not always susceptible to any precise factual litmus test.

Aside from general philosophical problems of defining "fact" in a humorous communication, one also encounters difficulties segregating fact from non-fact because of humor's dependence on the unique context in which it arises. What is funny in one social context may be tragic or sad in another. For example, we might be willing to laugh at slapstick depicting an unknown older woman who falls, but are aghast at such a depiction if we know the woman.¹⁸³ Classic interdisciplinary works on humor have explained that humorous subject matter must be "objective"—meaning that the recipient of a joke will not perceive it as funny if the recipient reacts to the subject matter subjectively by perceiving sympathy or other feeling.¹⁸⁴ This complex relationship between objective and subjective perceptions within humor makes the determination of "fact" even more problematic than it is outside the humor context. The complex relationship also highlights the limitations of the legal doctrine that focuses on a reasonable reader or fact finder. Because subjectivity plays a strong role in the perception and appreciation of humor, an objective reasonableness test is either inadequate for the matters it seeks to regulate or downright misguided.

179. See Lessig, *supra* note 175, at 1036–37.

180. *Id.* at 1037.

181. *Id.*

182. *Id.* at 1036–37 (discussing how different facts fare differently in the idea marketplace).

183. Maier, *supra* note 61, at 71.

184. BERGSON, *supra* note 48, at 139; Maier, *supra* note 61, at 71 (explaining the connection between humor appreciation and lack of subjective feelings).

One final reason why the fact/opinion distinction is problematic is that it sends arguably perverse incentives to humorists attempting to avoid defamation liability. The message of the fact/opinion distinction is that potential defendants wishing to avoid defamation damages judgments need to stay in the “opinion chute.” So what can they do to ensure that? According to existing state common law and First Amendment doctrine, it is certainly helpful if they include as many outrageously false, hyperbolic, or vigorous epithets as possible to describe the object of the communication.¹⁸⁵

Having pointed out these significant problems of deciding defamatory humor cases by reference to “facts,” I do not advocate dropping the fact/opinion dichotomy altogether. Until another approach suggests itself, the deeply entrenched dichotomy provides the best starting point that we have for accommodating the important social values implicated in this type of litigation. My intention here is to expose the complexities inherent in the dichotomy and to suggest refining the law’s approach to the dichotomy as much as possible. To that end, I turn now to the contributions of Australian courts. I follow that discussion with some upbeat thoughts about the promise of incongruity theory.

D. AUSTRALIA’S CONTRIBUTION: AUSTRALIAN DEFAMATION LAW AND ITS LESSON FOR THE UNITED STATES

Australian cases have a two-fold importance for United States jokesters: (1) the Australian cases directly regulate those foreign humorists who cast their jokes into Australia’s regulatory net, and (2) the Australian cases inform regulation in United States courts. While I use Australian experience in this article for the latter lesson, I advise those engaging in edgy humor—particularly on the Internet—to take note of Australia’s far-reaching regulation of defamation and to become familiar with its parameters.¹⁸⁶ But as I say, my primary enterprise here is to use the

185. See M. Kevin Smith, Note, *Constitutional Law—Satire, Defamation, and the Believability Rule as a Bar to Recovery—Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), 22 WAKE FOREST L. REV. 915, 915, 928–29 (1987) (reasoning that the focus on facts encourages speakers to increase intentional falsehoods to insulate themselves from defamation recovery). This problem of encouraging greater hyperbole or epithets likely operates most often in jokes laced heavily with superiority humor.

186. One could also say, of course, that Australian defamation law calls for significant attention because—as a general matter—Australia is an important global partner for the United States. Even leaving aside the cultural and ideological kinship between the United States and Australia, Australia is economically and strategically important to the United States. The economic importance of Australia may not be readily apparent, since, despite signing a free trade agreement with Australia in 2004, the United States has received only

Australian cases as a foil: to highlight qualities in the Australian case law from which United States courts might benefit or—alternatively—avoid.¹⁸⁷

marginal direct benefit. See Chris Nyland & Russell Smyth, *Australian Roadmaps to Globalism: Explaining the Shift from Multilateralism to Imperial Preference*, in GLOBALIZATION IN THE ASIAN REGION: IMPACTS AND CONSEQUENCES 117, 119–20 (Gloria Davies & Chris Nyland eds., 2004). Nonetheless, the United States has a strong, indirect economic interest in Australia, given Australia's ties with key Asian trade players, like China, India, and Japan. See BRUCE VAUGHN, CONG. RESEARCH SERV., RL 33010, AUSTRALIA: BACKGROUND AND U.S. RELATIONS 16–18 (2008). These countries, for their part, rely on Australia for access to raw materials. See *id.* at 12. From the point of view of politics and international security, the United States also considers Australia (along with Japan) to be an important partner, given its shared democratic traditions and strategically significant geographic position near China and the Korean Peninsula. See *id.* at 8–9, 11–13.

187. Comparative law is practically useful for expanding the horizons of law and treating similar legal problems that challenge multiple legal systems. See generally Laura E. Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. U. INT'L L. REV. 1, 6–18 (2006) (reviewing reasons why use of transnational materials promotes good judging methodology and is consistent with the constitutional role of United States courts, even if only to demonstrate what does not transfer well to United States jurisprudence). What I advocate here is to pursue what Professor Vicki Jackson might call “engagement” with Australian law rather than “convergence” with Australian law. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 11–12, 39, 71 (2010). In democratic countries where “the relative social, historical, and religious circumstances create a common ideological basis, it is possible to refer to a foreign legal system for a source of comparison and inspiration.” Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in Democracy*, 116 HARV. L. REV. 16, 110–11 (2002). Legal cross-fertilization, or the borrowing of legal experiences, is common in practice in Commonwealth and former Commonwealth countries with common law systems. *Id.* at 114. See, e.g., Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 554–62, 576–77 (2007) (favoring using comparative constitutional materials as persuasive authority and instruction on basic concepts such as liberty, equal protection, and privacy).

That is not to say that one should embark on the comparative enterprise lightly or with an inclination to make broad generalizations. See Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 252–53 (1999) (questioning whether comparative law can function as a source of legal inspiration since more of the foreign law's context is left out than is included in a comparative analysis). One must be mindful that the more detailed the scale of the inquiry, the more likely one will encounter increased complication and more variables to take into account. *Id.* Such information overload can make real comparison at different levels of generality well-nigh impossible. *Id.* See also Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 190 (2002) (doubting whether some modern comparativists do more than try to confirm the universality of their legal system or to indict other legal systems for what they lack).

Mindful of the risks of the comparative law enterprise, I try to confine my look at Australian law to a search for ideas and lessons. I do note that Australia's and America's shared legal heritage in the English common law combined with its sometimes path-breaking High Court rulings makes Australia an intelligent source to look for tested legal innovation. That Australia's federal structure of government and judiciary largely resembles that of the United States indicates that America can learn much from the Australian laboratory. See generally Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOB. STUD. L. REV. 281, 290–91 (2007) (describing the operation of Australian judicial review and the powers of the Australian High Court). Since gaining its autonomy from the British appeals system

To serve these goals, this section starts first with a description of Australia's regulatory tentacles within a global context. It next reviews general principles of Australia's speech protection and defamation law. Finally, it ends with an analysis of Australia's defamatory humor cases and their lessons for courts in the United States.

1. Br-r-r-r: Australian Defamation Laws' Global Chill

For those concerned with possible exposure to defamation liability, Sydney rivals London for the reputation of "a town named sue."¹⁸⁸ Indeed, as long as twenty-five years ago, Sydney was dubiously honored as the "defamation capital of the world."¹⁸⁹ While defamation practice in Sydney is particularly robust,¹⁹⁰ other parts of the Australian court system enjoy similarly lively and significant defamation dockets.¹⁹¹

The impact is not limited to domestic defendants. In 2002, the High Court of Australia struck fear in the hearts of publishers throughout the world with its decision in *Dow Jones & Co. v Gutnick*.¹⁹² Applying a choice of law rule based on *lex loci delicti* (law of the place of the tort governs), the High Court allowed a resident of the state of Victoria to proceed in a defamation action against Dow Jones for material uploaded onto the Internet in the United States. Uniform legislation enacted after the *Gutnick* decision left open liability exposure and uncertainties for foreign

in 1986, the Australian High Court has robustly reviewed cutting-edge legal issues, giving Australian law increasing relevance in a globalized world. *See id.* at 284, 305. Moreover, the two countries share deep-seated cultural values such as "almost strident egalitarianism, deep suspicion of authority, [and] laconic and even self-deprecating humour." *See* Michael Coper, *Three Good Things and Three Not-So-Good Things About the Australian Legal System*, INT'L ASS'N OF LAW SCHS. 2 (Oct. 17-19, 2007), <http://www.ialsnet.org/meetings/enriching/coper.pdf>.

188. Sarah Lyall, *England, Long a Libel Mecca, Reviews Laws*, N.Y. TIMES, Dec. 11, 2009, at A1 (associating that name with London).

189. Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1, 11 n.46, 64 (1991). *See also* Andrew Hemming, *Is Defamation the 'Galapagos Islands Division' of the Australian Law of Torts?*, 11 U. NOTRE DAME AUSTL. L. REV. 84, 110-11 (2009) (stating that "[w]hether Sydney continues to wear the crown as the defamation capital remains an open question").

190. Indeed, courts in Sydney have a special docket dedicated to defamation cases. *See* David Levine, *Defamation Practice: Change and Reform*, Lawlink New South Wales (Mar. 16, 2001), www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_levine_160301.

191. *See, e.g.*, ANDREW T. KENYON, DEFAMATION: COMPARATIVE LAW AND PRACTICE 2, 165-93 (2006) (describing detailed and well-developed defamation practice in Victoria).

192. *Dow Jones & Co. v Gutnick* (2002) 210 CLR 575 (Austl.).

defendants who publish material overseas¹⁹³—thus maintaining significant incentives for libel tourism and potentially excessive self-censorship on the part of publishers.¹⁹⁴

Australia continues to provide incentives for libel plaintiffs to file suit there because of its relatively plaintiff-friendly defamation laws, as well as personal jurisdiction and choice of law principles that allow extraterritorial application of Australian law on foreign defendants who make statements outside of Australia.¹⁹⁵ With Great Britain potentially responding to United States' libel tourism restrictions by making the country less hospitable to defamation plaintiffs,¹⁹⁶ Australia could take on even greater importance for those forum shopping for an attractive place to file a defamation suit. In its potential to chill the expression of humorists uploading materials from elsewhere in the world, Australian law requires attention.¹⁹⁷

2. Australian Defamation Law: A General Overview

Australian judges and legal scholars are deeply self-critical of Australia's current defamation laws.¹⁹⁸ Commenting on what he perceived

193. Belinda Robilliard, *Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the Gutnick Case and the Uniform Defamation Legislation*, 14 AUSTL. INT'L L.J. 185, 193, 197–198 (2007) (discussing uncertainty and exposure for defamation defendants under uniform defamation legislation). The potential exposure from *Gutnick*, however, can easily be overstated. For example, liability was restricted to damages accrued within the state of Victoria, and principles of abuse of process limit plaintiffs' ability to file repeated lawsuits in multiple jurisdictions based on the same matter. *See, e.g.*, David Rolph, *The Message, Not the Medium: Defamation, Publication and the Internet in Dow Jones & Co. Inc. v. Gutnick*, 24 SYDNEY L. REV. 263, 275 (2002) (discussing limitations on liability made possible under *Gutnick*).

194. Robilliard, *supra* note 193, at 193, 198 (explaining how a defendant with strict liability exposure—such as the case of defamation liability in Australia—will distort the level of precautions taken).

195. Michelle A. Wyant, *Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad*, 9 SAN DIEGO INT'L L.J. 367, 393–400 (2008) (explaining how the intersection of Australia's *lex loci delicti* choice of law rule and its recognition of a separate cause of action for each publication allows its defamation laws to have extraterritorial reach).

196. Lyall, *supra* note 188 (describing Great Britain's serious consideration of such a legislative change).

197. For a description of how a joke publication can result in a chilling foreign judgment on a U.S. newspaper, see Michael Socha, *Double Standard: A Comparison of British and American Defamation Law*, 23 PENN. ST. INT'L L. REV. 471 (2004) (describing the potential chilling effect of a defamation judgment against Dow Jones in British courts). For a discussion of the chilling effect of Australian defamation law for humorists within Australia, see Elizabeth Handsley & Robert Phiddian, *Political Cartoonists and the Law*, in COMIC COMMENTATORS 73–74 (Robert Phiddian & Haydon Manning, eds., 2008).

198. *See, e.g.*, Ruth McColl, *Forward to PATRICK GEORGE, DEFAMATION LAW IN AUSTRALIA* xv–xvi (2006) (stating that “Australian courts have resisted calls for the law of

as the unevolved status of Australian defamation law, one judge described it as the “Galapagos Island Division of the law of torts.”¹⁹⁹ He bemoaned defamation law’s “esoteric customs,” which perpetuate “distinctions between inferences upon inferences.”²⁰⁰ While this description suggests a dismal prognosis for the future of Australian defamation law, others are more sanguine,²⁰¹ finding hope in the Uniform Defamation Laws enacted throughout the country in 2006.²⁰²

Perhaps the most salient feature of Australian defamation laws (for this Article’s purposes) is their relative lack of constraint: they operate unfettered by any constitutional analogue to the First Amendment. Silence on free speech rights is not confined to that category of civil liberties, since the Australian Constitution reflects almost no mention of individual rights as a general matter.²⁰³ Australian law’s approach reflects a belief that social cohesion and public order should trump freedom of speech where speech might threaten a breach of the peace.²⁰⁴

defamation to adapt to the global . . . world”); Tony Fitzgerald, *Telling the Truth, Laughing*, 92 MEDIA INT’L AUSTL. 11, 16 (1999) (asserting that “[d]efamation law in Australia is in a mess”); Roger S. Magnusson, *Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges*, 9 TORTS L.J. 269, 272–74 (2001) (commenting on the “volatility” of defamation laws governing Australia’s media); David Rolph, *Critique of the Uniform Defamation Act*, 16 TORTS L.J. 207, 247 (2008) (opining that Australian defamation law bears the hallmarks of historical accident, comparative neglect, and piecemeal reform).

199. Justice David Ipp, *Themes in the Law of Torts*, 81 AUSTL. L.J. 609, 614 (2007).

200. *Id.*

201. *See, e.g.*, Hemming, *supra* note 189, at 84 (maintaining that “conjuring up images of giant turtle and arcane procedures in relation to defamation is to indulge hyperbole and gives insufficient credit to” Australia’s new uniform defamation laws).

202. Paul Svilans, *The Uniform Defamation Laws*, (New South Wales Young Lawyers CLE Seminar Papers 2006) (reporting that most states and territories enacted the uniform law on January 1, 2006, and at that time the Northern Territory was expected to follow shortly thereafter).

203. Magnusson, *supra* note 198, at 275 (maintaining that “constitutional protection in Australia confers no private rights, but operates as a limitation upon legislative and executive power” to ensure effective representational government).

204. *See, e.g.*, Melinda Jones, *Free Speech Revisited: The Implication of Lange and Levy*, 4 AUSTL. J. HUM. RTS. 188, 203 (1997). A powerful example of the willingness of Australian regulators to restrict humor appears in a legislative committee report relating exemptions to the Australian racial vilification laws. The committee report expressed concern about the exemption from liability under the federal racial vilification act for communications for artistic purposes. *See* Judith Bannister, *It’s Not What You Say but the Way That You Say It: Australian Hate Speech Laws and the Exemption of “Reasonable” Expression*, 36 FLA. ST. U. L. REV. 23, 33 (2008) (observing that in an artistic performance a “comedian can . . . tell blatantly racist jokes[,] . . . but those some [sic] jokes told by an ordinary citizen in a public place . . . could render him/her subject to civil proceedings”

Nonetheless, the Australian High Court has found an implied constitutional freedom of political communication.²⁰⁵ In language reminiscent of United States free speech rhetoric, the High Court cited the central role that political communication plays in the functioning of the representative government explicitly described in the written Australian Constitution.²⁰⁶ As originally articulated, the qualified freedom extends to protect public communications about politics.²⁰⁷ Judges have been reluctant to protect the freedom rigorously, choosing instead to defer to legislative judgments and to decline opportunities to expand the categories of protected communications.²⁰⁸ Thus, communications within the ambit of

(citing S. LEGAL AND CONSTITUTIONAL LEGIS. COMM., REPORT ON RACIAL HATRED BILL 1994, MINORITY REPORT, at 6 (1995)).

205. Under the Anglo-Australian approach adopted from the common law, this protection is accurately regarded as a freedom and not a right. See *Douglas v. Hello! Ltd.*, [2005] EWCA (Civ) 595, [64] (Eng.), in which Justice Brooke discussed the freedom/right distinction. The distinction generally means that a citizen may be free to say what he or she likes, but does not have a protected right to do so. Under this freedom-based approach, existing laws such as those proscribing defamation or contempt of court provide robust constraints on speech, with protections like the implied freedom of political communications providing only a negative limitation on the laws rather than a positive right of Australians to converse about political or governmental matters. For a discussion of the ramifications of this negative conceptualization of the freedom, see Adrienne Stone, *The Comparative Constitutional Law of Freedom of Expression*, in RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon & Tom Ginsburg eds., publication forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633231.

206. *Lange v. Austl. Broad. Corp.* (1997) 189 CLR 520 (Austl.).

207. *Id.* at 112. The High Court made clear that the freedom was unavailable if the plaintiff established that the publication was inspired by ill will or other improper motive. *Id.* at 117–18.

208. James Stellios, *Using Federalism to Protect Political Communication: Implications from Federal Representative Government*, 31 MELB. U. L. REV. 239, 240, 245 (2007). The High Justices have said that free speech protections in Australia differ from those in the United States in that Australian protections protect only political discourse as “an indispensable element in ensuring the efficacious working of representative democracy and government[,]” not “freedom of expression generally as a fundamental human right.” *Theophanous v. Herald & Weekly Times* (1994) 182 CLR 104, 125 (Austl.). Another example of Australia’s inclination to restrict this protection is federal and state racial vilification laws, at least some of which have been held to be an appropriate restriction on communications relating to political and governmental matters. See Bannister, *supra* note 204, at 26 (citing decisions of an Australian federal court as well as the Victoria Court of Appeal).

A possible exception to the High Court’s inclination to read the scope of political communication restrictively is *Coleman v. Power* (2004) 220 CLR 1 (Austl.), in which the High Court quashed the conviction of a political activist for using “threatening, abusive, or insulting words.” See Adrienne Stone & Simon Evans, *Australia: Freedom of Speech and Insult in the High Court of Australia*, 4 INT’L J. CONST. L. 677, 678 (2006) (noting that the *Coleman* majority did not accept that the state may “mandate civility in political communication”).

Australian constitutional protection continue to include only those “that are somehow related to government and political matters.”²⁰⁹ Although the Australian High Court has adopted a variation of the American actual malice standard in such cases, an Australian defamation plaintiff must establish that the publication was “actuated by . . . ill will or other improper motive”²¹⁰ only after the defendant has asserted the privilege and established that the publication was reasonable.

As for free speech protection in the context of defamation, defamation law itself is thought to calibrate the appropriate balance between expressive freedom and reputation protection.²¹¹ The law monitors this balance through the cause of action elements and a series of elaborate defenses. A look at the various definitions for “defamatory” appearing in Australian cases powerfully illustrates how this balance favors reputation more than United States law does.²¹² First, a defamatory publication is one that “is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.”²¹³ A publication can also be defamatory where “it tends to make the plaintiff be shunned and avoided . . . without any moral discredit” prompted by the plaintiff²¹⁴ or where it tends “to lower the plaintiff in the estimation of right-thinking [members of society generally.]”²¹⁵ Also indicative of the plaintiff-oriented balance is the strict liability nature of the tort: “[A] defendant may be liable even though no

209. William Buss, *Constitutional Words About Words: Protected Speech and “Fighting Words” Under the Australian and American Constitutions*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 489, 494 (2006).

210. *Lange v Austl. Broad. Corp.* (1997) 189 CLR 520, 574 (Austl.). See Wyant, *supra* note 195, at 388 (describing Australian rules and observing that a plaintiff under United States defamation laws would need to establish actual malice in every such case).

211. DAVID ROLPH, *REPUTATION, CELEBRITY AND DEFAMATION LAW 1* (2008) (stating that tort law “purports to strike a balance between freedom of speech and protection of reputation”). Some Australian judges have frankly questioned the value of freedom of expression and freedom of the press, particularly in media cases over the last fifteen years. See, e.g., *Austl. Broad. Corp. v. O’Neill* (2006) 227 CLR 57, 114–16 (Judge Heydon); *Austl. Broad. Corp. v. Lenah Game Meats* (2001) 208 CLR 199, 300–09 (Judge Callinan); *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680 (Austl. (Judge Mahoney)).

212. PATRICK GEORGE, *DEFAMATION LAW IN AUSTRALIA* 154–55 (2006) (summarizing the common law definitions of defamatory, which are deemed unaffected by the Uniform Act).

213. *Id.* (citing *Parmiter v. Coupland*, (1840) 151 Eng. Rep. 340 (Exch. of Pleas) 342).

214. *Id.* (citing *Youssouppoff v. MGM Pictures, Ltd.*, (1934) 1 T.L.R. 581 (EWCA) at 587 (Eng.)).

215. *Id.* (citing *Sim v. Stretch*, (1936) 2 All E.R. 1237 at 1240 (Eng.)).

injury to reputation was intended and the defendant acted with reasonable care”²¹⁶

The free speech side of the balance is represented by elaborate defenses, set forth in detail in the Uniform Defamation Act.²¹⁷ Most pertinent here is the defense of “honest opinion”—which may in some cases protect opinion-based humor. Although the “honest opinion” defense substantially mirrors a preexisting defense from Anglo-Australian common law known as the defense of fair comment, defendants encountered substantial difficulty in successfully asserting the common law fair comment defense.²¹⁸ The current provision under the Uniform Act tries to broaden protections against expressions of comment or opinion, although it limits the defense to a “matter of public interest”²¹⁹ and circumstances where the opinion is based on material that is “substantially true or published on an occasion of absolute, qualified, or fair report privilege.”²²⁰ One can see that the privilege operates quite differently than the fact/opinion dichotomy in United States law; the honest opinion privilege is available under Australian law only if the opinion actually has a factual underpinning or is otherwise protected by another privilege.

Prior to the Uniform Defamation Act, the notion of a defamatory “imputation” was a key concept for a defamation plaintiff in certain Australian jurisdictions.²²¹ Pleading rules imposed on the plaintiff a duty to identify the precise defamatory meaning that one might impute to the

216. Robilliard, *supra* note 193, at 193, 197–98 (discussing uncertainty and exposure for defamation defendants under uniform defamation legislation).

217. See *Defamation Act 2005* (NSW) ss 24–33 (Austl.), reprinted in GEORGE, *supra* note 212, at 450–58.

218. Andrew T. Kenyon, *Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice*, 29 SYDNEY L. REV. 651, 680 (2007) (describing prior practice under the defense). See also Handsley & Phiddian, *supra* note 197, at 68–73 (discussing fair comment and honest opinion as these defenses pertain to political cartoons).

219. Kenyon, *supra* note 218, at 680 (quoting Australia’s uniform defamation law).

220. *Id.* (describing uniform defamation law and reforms the law sought to implement).

221. The concept of an imputation was part of the cause of action for defamation in the largest source of defamation jurisprudence—New South Wales—and an important component of defamation codes in Queensland and Tasmania. See, e.g., *Defamation Act 1974* (NSW), s 9 (Austl.) (earlier provision, now repealed, detailing the imputation requirement). Pleading particular imputations were less important in other Australian jurisdictions, where the communication as a whole—not the imputations contained within it—provided the cause of action. See GEORGE, *supra* note 212, at 142–49 (discussing variation in the requirement of pleading imputations across Australian jurisdictions). The word “imputation” appears in older United States materials as well, although it is not clear that spawned complex procedural requirements as it did in Australia.

defendant's communication.²²² Although the concept of an imputation would seem to have the salutary effect of crystallizing the precise point of controversy between the parties, the requirement multiplied complexities in litigating defamation cases and the Uniform Defamation Act omitted it.²²³ The imputation requirement nonetheless remains an important part of precedent, providing the vocabulary for conceptualizing how a communication might be understood as defamatory.

Interpretation of the defendant's communication is for the jury, which should evaluate whether the plaintiff's asserted imputations are reasonable under community standards.²²⁴ Juries must follow the rule that the "defendant's *actual* intention (as opposed to what was *understood* to be his intention *from what he had published*) is irrelevant to the meaning in fact conveyed."²²⁵ Importantly though—for the purposes of humor cases—the jury must undertake its interpretative role in light of human discourse and expressive patterns. Reminiscent of the United States Supreme Court's "rhetorical hyperbole" exception to defamation liability,²²⁶ one Australian court explained:

[P]eople not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which, in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves.²²⁷

Similarly reminiscent of the United States Supreme Court's "vigorous epithet" exception to defamation liability,²²⁸ another line of Australian cases allows "vulgar abuse" to escape liability.²²⁹ One commentator

222. GEORGE, *supra* note 212, at 142.

223. *Id.* at 149. It is, however, still considered good pleading practice for a plaintiff to particularize imputations upon which the plaintiff relies. *Id.*

224. *O'Hara v Channel Seven Sydney Pty Ltd.*, [2007] NSWDC 81 (14 September 2007) [23–28] (Austl.) (discussing case law establishing that questions of interpretation as to allegedly defamatory material are questions for a jury). For a formula of this concept in the context of a classic humor case, see *Donoghue v. Hayes*, (1831) *Hayes Ir. Exch. Rep.* 265, 266 ("The whole question is, whether the jocularly was in the mind of the defendant alone, or was shared by the bystanders.").

225. *Anderson v Mirror Newspaper Ltd. (No. 1)* (1986) 6 NSWLR 99 (Austl.).

226. *See supra* notes 134–38 and accompanying text for further discussion of this exception.

227. *Austl. Newspaper Co. v. Bennett*, [1894] A.C. 284, 287 (Eng.).

228. *See supra* notes 134–38 and accompanying text for further discussion of this exception.

229. Magnusson, *supra* note 198.

explained that, “[v]ulgar abuse’ escapes liability not because it is nonsense or because it is vulgar, but frequently because it is so excessive, irrational and disproportionate that the imputations conveyed would not be taken seriously, and so cannot reasonably be said to arise.”²³⁰

3. Disparagement Versus Ridicule: Australian Defamatory Humor Cases

By evaluating whether a joke might suggest some unflattering fact about the plaintiff, Australian defamatory humor cases resemble their counterparts in the United States. Given Australia’s greater emphasis on reputational interests, one might expect this parallel analysis to yield liability for Australian defendants more often than in the United States.²³¹ Interestingly, however, the cases do not really bear this out. What is a striking difference from the United States is Australia’s continued commitment to defamation protection for plaintiffs who are simply exposed to ridicule, even where defendants’ communications contains little, if anything, suggesting an unflattering fact. The ridicule test is conceptually distinct from the tests for defamatory meaning based on disparagement, because ridicule does not necessarily suggest to others that the ridicule’s object (the plaintiff) possesses any characteristic, or has taken any action, that would lower others’ esteem for the plaintiff.²³² Although the “disparagement” versus “ridicule” labels are mine, Australian courts have occasionally explicitly described the distinction these labels represent.²³³ The following examples of Australian defamatory humor decisions illustrate these various observations.

a. Disparagement Cases

The broad sweep of Australia’s defamation definitions, and its comparatively constrained protection of free speech values, suggest that

230. *Id.* at 284.

231. Seeing analytical overlap in approaches, I only partly embrace the position of Richard Creech, who concluded his comparative study of United States and Australian libel cases as follows: “In the end, the American and Australian approaches to the analysis of defamatory language appear to be irreconcilable, as each is the product of a different societal judgment regarding the relative worth of free speech compared to a person’s reputational interest.” Richard L. Creech, *Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language in Cyberspace*, 22 J. MARSHALL J. COMPUTER & INFO. L. 553, 566 (2004).

232. Magnusson, *supra* note 198, at 280.

233. See, e.g., *Darbyshir v Daily Examiner Pty Ltd.* (Unreported, Supreme Court of New South Wales, Levine J, 29 August 1997) (Austl.) (discussing whether advertisement had an adverse reflection upon the reputation of the plaintiff or could hold her up to ridicule).

Australian cases evaluating whether a joke amounts to disparagement would be far more protective of the plaintiff, and more restrictive of humor, than United States cases are. But the results are not so clear. Of the relatively small universe of Australian decisions dealing with defamatory humor,²³⁴ many come out in favor of the jokester. For example, in *Seidler v. Fairfax*, an allegedly defamatory cartoon depicted a barren landscape containing austere, person-sized structures.²³⁵ Some of the structures were completely filled with a person being served sandwiches at the structure's front and excreting feces out the structure's back.²³⁶ The cartoon's caption said "Harry Seidler Retirement Park."²³⁷ The cartoon apparently sought to comment on "the dehumanizing . . . modernist architecture" of Australian architect Harry Seidler.²³⁸ Seidler lost at the defamation trial about the cartoon because the jury found the requisite elements of a fair comment defense, including finding that the cartoon was an expression of opinion and that the opinion was based on "proper material for comment."²³⁹ The appellate court affirmed, despite Seidler's argument that the fair comment defense should be unavailable because the cartoon inaccurately suggested that he had designed a retirement park.²⁴⁰ Explaining that the jury was free to find the retirement park reference to be fictitious, one appellate judge explained that a cartoon on a subject of public interest is "bound by its nature to traffic in exaggeration, caricature, allegory and fiction" and that the "ordinary reader would understand that cartoons are often not to be taken literally."²⁴¹

234. Since "humor" is not a legal category, I had to evaluate whether a particular defamation case presented an issue dealing with humor, rather than straightforward ridicule or some other expression with no comedic effect or intent. In one disparagement case filed by a federal election candidate, however, the defendant comedian formally asserted "humor" as a defense. Steve Larkin, *Court Jester: Mick Molloy to Use Humour as a Defence in Defamation Case*, SYDNEY MORNING HERALD, Apr. 27, 2010, <http://www.smh.com.au/entertainment/court-jester-mick-molloy-to-use-humour-as-a-defence-in-defamation-case-20100427-tp2i.html>.

235. *Seidler v Fairfax* [1986] Aust Torts Reports ¶¶ 80-002, 67,473-67,475 (Austl.).

236. *Id.* at 67, 475.

237. *Id.*

238. John McCallum, *Comedy and Constraint: Lenny Bruce, Bernard Manning, Pauline Pantsdown and Bill Hicks*, in *SERIOUS FROLIC: ESSAYS ON AUSTRALIAN HUMOUR* 202, 215 (Fran De Groen & Peter Kirkpatrick eds., 2009).

239. *Seidler v Fairfax* [1986] Aust Torts Reports ¶¶ 80-002, 67,475 (Austl.).

240. *Id.*

241. *Id.* at 67,476. One might argue that the reasoning here is contradictory: on one hand the court says that the cartoon is not to be taken literally, and on the other hand the court suggests that it is a serious comment (the fair comment defense acknowledges that the communication can make a literal, defamatory suggestion about the plaintiff). The bottom line, however, was a humor-protecting result. See generally *Austl. Broad. Corp. v Hanson*

The court reached a similarly humor-friendly result in *Coleman & Anor v. John Fairfax Publications Pty Ltd.*, an action brought by a coach in Australia's National Rugby League for an article that blamed the team's poor results on the coach's "being put in child care as a toddler."²⁴² The article quoted a "psychologist" as saying the coach's "somewhat fractured relationship with his mother as a child hasn't provided him with adequate communication and intimacy skills."²⁴³ Rejecting the defamation claim, the court reasoned that a reasonable reader would find nothing in the article's contents "to be taken seriously," adding that the article was "self-evidently absurd" and simply a "joke" that neither conveyed anything "disparaging," nor would inspire anyone to shun or avoid the plaintiff.²⁴⁴

The humor-protecting orientation guiding *Coleman* and *Seidler* appears in other disparagement cases as well.²⁴⁵ I note, however, that four

[1998] QCA 306 (28 September 1998) (Austl.); McCallum, *supra* note 238, at 215 (contrasting *Seidler* with a case in which the court was more hostile to the humor).

242. *Coleman v John Fairfax Publ'ns Pty Ltd.* [2003] NSWSC 564 (25 June 2003) [Appendix A] (Austl.).

243. *Id.*

244. *Id.* at [22]–[23].

245. *See, e.g., Falkenberg v Nationwide News Pty Ltd.* (Unreported, Supreme Court of New South Wales, Levine J, 16 December 1994) 3–4 (Austl.). The *Falkenberg* plaintiff sued over a Gary Larson "The Far Side" cartoon captioned "Graffiti in Hell," which depicted the devil in a rage because of the apparently sweet picture and statement "Satan is a warm and tender guy" written on the wall. *Id.* at [2]. The wall also had the following written: "For a pleasant conversation call Satan 5551232." *Id.* This, it turned out, was the phone number for plaintiffs, Daniel and Rosemary Falkenberg, who received many phone calls from readers who saw the cartoon in an Australian newspaper. *Id.* at [2]. These plaintiffs asserted four imputations based on the premise that they are akin to a devil who tries to attract telephone conversations. *Id.* at [2]. The court concluded that it was incapable of defaming Rosemary because the devil is depicted as a woman. *Id.* at [7]. As for Daniel, the court also determined that the cartoon was not capable of conveying the imputations. *Id.* at [8]. The court added that the appropriate test is "the ordinary reasonable reader, knowing the relevant facts and not what must have been a great deal of weird people who merely called the telephone number." *Id.*

The British case, *Berkoff v. Burchill* [1997] E.M.L.R. 139 (U.K.), a case which strongly influenced Australian defamation cases, is also aligned with the type of result one would likely see in the United States. In that case, a journalist described Steven Berkoff, an actor and director, as follows: "Film directors, from [Alfred] Hitchcock to [Steven] Berkoff, are notoriously hideous-looking people . . ." and in a review of *Frankenstein*, she described the new look for the monster, stating, "it's a lot like Stephen [sic] Berkoff, only marginally better looking." *Id.* at 141. In oft-quoted language, one judge stated: "Many a true word is spoken in jest. Many a false one too. But chaff and banter are not defamatory, and even serious imputations are not actionable if no one would take them to be meant seriously." *Id.* at 152 (Millett, L.J., dissenting). He added:

The line between mockery and defamation may sometimes be difficult to draw. When it is it should be left to the jury to draw it A decision that it is an actionable wrong to describe a man as "hideously ugly" would be an unwarranted

defamation cases arising from disparagement humor come out the other way—in support of the plaintiff. Nonetheless, the facts in two of the four cases so strongly support a plaintiff’s win that one would expect a similar result in the United States.²⁴⁶ Importantly, both cases reckon forthrightly

restriction on free speech. And if a bald statement to this effect would not be capable of being defamatory, I do not see how a humorously exaggerated observation to the like effect could be. People must be allowed to poke fun at one another without fear of litigation. It is one thing to ridicule a man; it is another to expose him to ridicule. Miss Burchill made a cheap joke at Mr. Berkoff’s expense; she may thereby have demeaned herself, but I do not believe that she defamed Mr. Berkoff.

Id. at 153. *See also* John v. Guardian News & Media Ltd., [2008] EWHC (QB) 3006, [47] (Eng.) (following *Berkoff*, a court in Great Britain concluded that a mock “diary entry” by Singer Sir Elton John was a form of teasing that could not be reasonably read to contain a serious allegation).

246. One case, *Entienne Pty Ltd. v Festival City Broad. Pty Ltd.* (2001) 79 SASR 19 (Austl.), was based on a parody weather report in which the radio host referred to a local street as a place to score drugs and referred to a “flash man” (a term used to refer to a drug peddler) on the street. Although considerable media reports had stated that the street was indeed a place to buy drugs, the tone of the parodied weather report was jocular. Allegedly unbeknownst to the radio host, the street did have a gelateria known as “Flash Gelateria.” The owner of the store sued. *Id.* at 24. The *Entienne* trial judge held that “a reasonable listener . . . would be fully aware that the whole program intended to be and was a comic program of complete nonsense. The only part of the program which makes sense is the initial giving of the temperature.” *Id.* at 25. The appellate court agreed that the general presentation was intended to be “a comic, nonsensical spoof.” *Id.* at 29. Nonetheless, the appellate court allowed the appeal, noting that the segment was “built on a substratum of fact.” *Id.* at 31. Although clearly a parody, the court concluded, the skit “incorporated factual material” and conveyed the imputation that the plaintiff was indeed a drug dealer. *Id.* The second case, *Darbyshir v Daily Examiner Pty Ltd.* (Unreported, Supreme Court of New South Wales, Levine J, 29 August 1997) [2] (Austl.), concerned a spoof advertisement about a plaintiff who practiced law. The plaintiff submitted imputations stating that the ad conveyed the impression that as a lawyer, she was an unprincipled, predatory vulture. *Id.* at [2]. The Supreme Court of New South Wales rejected the argument that advertisement was incapable of being defamatory because it was a “joke.” *Id.* at [10]. The court emphasized that even if it was clearly a joke, the advertisement was still capable of holding plaintiff up to ridicule and could thus adversely reflect on the plaintiff’s reputation. *Id.*

Two other cases present harder calls for predicting how a court in the United States would come out given the same facts. In one, *McGuinness v J. T. Publ’g Austl. Pty Ltd.* [1999] NSWSC 471 (21 May 1999) (Austl.), the defendant’s parody insinuated that the plaintiff would relish “emptying his service revolver into another” and the court concluded this had a disparaging ring. *Id.* [8]. In the second case, *Cornes v Ten Grp. Pty Ltd.* [2011] SASC 104 (5 July 2011) [1]–[2] (Austl.), the plaintiffs brought a defamation action on the basis of a comment by a talk show interviewer during an interview of a footballer. After discussion of the footballer’s sex life and relationship with an actress, the interviewer discussed the plaintiff’s praise of the footballer and stated: “And apparently you slept with her, too.” *Id.* at [4].

with the injuries to the plaintiffs' reputational interests, which swayed the courts' decisions.²⁴⁷

A third case favoring the plaintiff breaks from the pattern: the court in that case not only showed an unsympathetic approach to satire, but also limited the defense of fair comment on governmental and political matters in a way one would likely never expect to see reproduced in the United States.²⁴⁸ In the final case, the court not only failed to see the humor in what could quite reasonably be taken as a jaunty, spur-of-the-moment quip,²⁴⁹ but also channeled the plaintiff's theory of liability toward disparagement (and away from ridicule, which it described as the less serious theory of defamation).²⁵⁰

What accounts for the general similarity in results between Australian and United States disparagement cases? I hazard a possible explanation: Australian culture's commitment to humor and modesty. As a society,

247. *Entienne Pty Ltd. v Festival City Broad. Pty Ltd.* (2001) 79 SASR 19 (Austl.) evaluated the damage inflicted by the drug dealing insinuation and *Darbyshir v Daily Examiner Pty Ltd.* [1997] NSWSC1027 (29 August 1997) (Austl.), discussed how the plaintiff's reputation as a lawyer would suffer from the defendant's defamatory message.

248. The plaintiff in the case, chairman of a political party known as Australian National Action, sued about an article satirizing his racist views. *Brander v Ryan* [2000] SALR 234, 235 (Austl.). The article contained statements about the propensity of plaintiff, Michael Brander, for effeminate and juvenile behavior:

It's Little Mikey and the big bad racists

How did little Mikey Brander get to be the leader of the racist gang National Action?

Did he beat all the other, bigger NA chaps in a peeing contest or something?

It is hard to imagine how you can piddle higher than everyone else if you sit down to take a pee. . . .

Hey, loosen up, guys! Even political revolutionaries with a brittle potential for violence can still get in touch with the inner child. Follow your leader.

Id. In evaluating whether the defense applied, the court imposed a reasonableness standard in evaluating whether the defendant reasonably believed that the plaintiff possessed these qualities. Applying the reasonableness standard, the court ultimately concluded that the plaintiff had made out the imputations that plaintiff "did not hold his political views sincerely" and that he was motivated by "juvenile attention seeking." *Id.* at 246–47. As one commentator pointed out, this reasonableness requirement is ill-fitted for evaluating satire, which operates by exaggeration and distortion, not congruence with reality. Magnusson, *supra* note 198, at 289 (observing that satire "exaggerates and distorts perspectives in order to make its point. Rarely will a defendant hold an honest belief in the truth of the inflated, "literal" imputations the plaintiff is likely to find most offensive.").

249. *Cornes v Ten Grp. Pty Ltd.* (Unreported, Supreme Court of South Australia, Peek J, 5 July 2011) (Austl.). Although the statement, "[a]nd apparently you slept with her, too," was spontaneous and part of a jocular, lighthearted interchange, *id.* at [5], the court concluded that that the context suggested that it was "informative material," *id.* at [42].

250. *Id.* at [81].

Australia not only treasures laughter, but also uses deprecating humor as “an acculturating ritual.”²⁵¹ Australia’s affinity with laughter in general and deprecating humor in particular is often associated with the unique challenges of survival posed by the history and climate of the country.²⁵² Indeed, one scholar even noted Australian capacity for sardonic humor as an important factor enabling Australian prisoners of war to survive captivity more successfully than prisoners from other nations.²⁵³

In a totally different context—during debates over liberalization of Australia’s copyright laws to accommodate parody and satire—the Minister for Justice told the Senate that the new exception to the Copyright Act for both satire and parody would “ensure ‘that Australia’s fine tradition of poking fun at itself and others will not be unnecessarily restricted.’”²⁵⁴ Along the same vein, an Australian judge has explained that humor in Australia has exploited “the larrikinism in the national character to release us from rigidity and to push the boundaries of tolerance.”²⁵⁵ Larrikinism is the name associated with the Australian tradition of irreverent and self-deprecating humor.²⁵⁶ Onetime Attorney General Phillip Ruddock (who later became a Member of Parliament) has opined that, “Australians have always had an irreverent streak. . . . An integral part of their armoury is parody and satire—or, if you prefer, ‘taking the micky’ [sic] out of someone.”²⁵⁷ Taking the mickey includes “baiting others, particularly the obviously ‘other,’ with joking, teasing and insult.”²⁵⁸ To overcome this treatment effectively, the object of the joke is advised to acknowledge the

251. Jessica Milner Davis, ‘Aussie’ Humour and Laughter: Joking as an Acculturating Ritual, in *SERIOUS FROLIC: ESSAYS ON AUSTRALIAN HUMOUR* 31 (Fran De Groen & Peter Kirkpatrick eds., 2009).

252. See, e.g., Gerry Turcotte, *The Alternative Traditions: An Introduction to Australian Humour*, 10 *THALIA: STUDS. LITERARY HUMOUR* 3, 4–5 (1989), quoted in Davis, *supra* note 251, at 31 (observing that “Australia’s humorists are still laughing as part of a survival process” and noting that joke collectors often nominate as their favorites “a wry narrative, often with an outback setting”).

253. Fran De Groen, *Risus Sardonicus*, in *SERIOUS FROLIC: ESSAYS ON AUSTRALIAN HUMOUR* 69, 77 (Fran De Groen & Peter Kirkpatrick eds., 2009).

254. Conal Condren et al., *Defining Parody and Satire: Australian Copyright Law and Its New Exception: Part 2—Advancing Ordinary Definitions*, 13 *MEDIA & ARTS L. REV.* 401, 403 (2008) (quoting Parliamentary Debates, Senate, 29 Nov. 2006, 112 (Christopher Martin Ellison, Senator) (Austl.)).

255. Fitzgerald, *supra* note 198, at 14.

256. *Australian Humour—Larrikin*, CONVICTCREATIONS.COM, <http://www.convictcreations.com/culture/comedy.htm> (last visited Oct. 23, 2011).

257. Jessica Milner Davis, ‘Taking the Mickey’: A Brave Australian Tradition, 4 *THE FINE PRINT* 20, 22 (2007).

258. *Id.*

skill of the joke and . . . well . . . to return the favor.²⁵⁹ In the end, the result is generally a few bruises that heal themselves, a stronger bond (and sense of equality) among participants in the exchange, a feeling of membership in a shared culture, and the mental stimulation of lively repartee.

American culture, of course, also features a key role for humor,²⁶⁰ and certainly an important component of that humor includes American love of irreverence and dislike of arrogance.²⁶¹ Yet potent features of Australian society captured in the term 'larrikinism' seem more defining of the national character than in what has become an increasingly diverse and atomistic American culture.²⁶² Thus, one might see why results in Australian disparagement cases are similar to those in the United States. In striking the balance between reputation and free speech, Australia generally

259. *Id.* (explaining that "the only truly effective response is to accept that the mickey has indeed been taken, to appreciate its skill and to reply in kind").

260. *See, e.g.,* KUIPERS, *supra* note 101, at 222–23, 228, which reports on a study comparing Dutch and American reactions to jokes. The author concludes that Americans perceive a good sense of humor as key to a person's moral quality (Americans believe one needs to have a sense of humor, particularly about oneself) and that Americans are more "omnivorous" in appreciating and using humor.

261. As Professor Joseph Boskin explains: "It is explicitly declared that its historical dimension is boundless, its character egalitarian, its breadth all-encompassing, and its expression open and innovative. An oft-stated remark is that political irreverence is, and persistently [sic] remains, a distinctive American trait that subjects every form of power to humorous scrutiny and/or comedic skepticism." Joseph Boskin, *American Political Humor: Touchables and Taboos*, 11 INT'L POL. SCI. REV. 473 (1990). *See also* ORING, *supra* note 66, at 101 (describing how humorous invective toward another person was "an art form . . . conceived of as poetic speech" in the American Frontier).

262. Scholars sometimes trace Australia's defiant style of humor to the original convicts banished to Australia, who used humor to prove they were more likeable than those who shipped them to the Australian continent. While many might characterize contemporary Australians as restrained and "proper," the larrikin continues to be a stereotype with which Australians often self identify. *See, e.g., The Larrikin Legacy*, CONVICTCREATIONS.COM, <http://www.convictcreations.com/history/larrikin.htm> (last visited Oct. 23, 2011). Larrikins are self-deprecating and make jokes about things that should not be laughed at in good company. Making a joke at a mate's expense signals a sense of comfort in the strength of a relationship. *Australian Humour—Larrikan*, *supra* note 256.

One might make a case for the proposition that the attitudes of Australia and the United States are converging. The lineage for American humor, however, differs from the Australian tradition that gave rise to larrikinism: American attitudes toward humor arose in the context of different experiences in the country's original settlement (including slavery and rehabilitation), longer initial periods of immigration, vast regional biases among the states, and possibly wider disparity in attitudes between urban and rural dwellers. This early diversity in the United States gave rise to diverse humor styles. As Constance Rourke wrote in 1931: Although "[h]umor has been a fashioning instrument in America, cleaving its way through the national life . . . [no] single unmistakable type emerged; the American character is still split into many characters." CONSTANCE ROURKE, *AMERICAN HUMOR: A STUDY OF THE NATIONAL CHARACTER* 231–32 (The N.Y. Review of Books 2004) (1931).

weighs reputation more heavily than the United States does; however, Australia has a particularly strong factor that tips the scales for free speech: the nation's commitment to a "serious frolic."²⁶³ From a doctrinal viewpoint, Australia has reached these results without slavish reliance on the problem-ridden fact/opinion dichotomy. I explore this important observation later. First, however, is another line of Australian defamatory humor cases that requires attention.

b. Ridicule Cases

While Australian and United States disparagement cases both tend to protect humor, the outcome of contemporary ridicule cases differ. Australian cases from the last few decades reflect the notion that humor at "the expense" of the plaintiff—humor that "exposed" the plaintiff to ridicule—is actionable as defamation without apparent regard for whether the humor suggests anything factually unflattering about the plaintiff.²⁶⁴ In fact, the District Court of New South Wales suggested that the theory has greater currency now than in earlier points in the development of defamation law. Specifically, the court stated that "the concept of an imputation which holds a person up to ridicule did not receive much judicial attention" until a 1991 decision in which the defendant had published a photograph of "the plaintiff, a footballer, in which it is possible to see his penis."²⁶⁵ The court held that the photograph (which

263. The term comes from a recent scholarly study of Australian humor, *SERIOUS FROLIC: ESSAYS ON AUSTRALIAN HUMOUR* (Fran De Groen & Peter Kirkpatrick eds., 2009).

264. For example, in *Anderson v Gregory* [2008] QCA 419 (23 December 2008) (Austl.), the court explained that although the defendant may have intended a photograph as a joke, the joke occurred at the plaintiff's expense and thus exposed him to ridicule. Specifically the *Anderson* court found that it was the juxtaposition of plaintiff's visage on a T-shirt next to the words "I beat anorexia" that exposed the plaintiff to ridicule. The court explained that a "humorous context may in some circumstance serve to render otherwise defamatory words harmless." *Id.* at [6]. Similarly in *Wild v John Fairfax Publ'n Pty Ltd.* [1997] NSWSC *1 (Unreported, Levine, J, 8 Aug. 1997) (Austl.), the plaintiff's visage was juxtaposed next to a photograph of female buttocks with the captions, "They like to watch" and "In defence of female voyeurism and sexist ads." The court found this is capable of defamatory meaning because it gives rise to imputations that would render him liable to "hatred, ridicule, or contempt" and "to be shunned and avoided." *Id.* at *8. See also *Brander v Ryan* [2000] SASC 446, 245 (Austl.) (stating that "it may be inferred from the [satirical] article itself that the defendants were intending to hold the plaintiff up to ridicule.").

265. *O'Hara v Channel Seven Sydney Pty Ltd.*, [2007] NSWDC 81 (14 September 2007) [16] (Austl.) (citing *Ettingshausen v Austl. Consol. Press Ltd.* (1991) 23 NSWLR 443).

brought amusement to many who viewed it)²⁶⁶ was capable of defaming the plaintiff, because it could subject “the entirely blameless plaintiff to a more than trivial degree of ridicule.”²⁶⁷

Australian case law attributes the pedigree for this theory of defamation liability to a Judge Learned Hand opinion from the United States Court of Appeals for the Second Circuit in the 1930s.²⁶⁸ Ironically or not, that case concerned a photograph featuring an optical illusion representing the male plaintiff indulging in “indecent exposure.”²⁶⁹ It appears, however, that this theory of defamation liability is no longer robust in the United States. This is possibly because it clashes with subsequent First Amendment jurisprudence requiring the plaintiff to prove

266. Not surprisingly, the trial in this case also generated amusement when Hughes, counsel for the plaintiff cross-examined Martyn, the editor of the publication that ran the picture:

HUGHES: It is a penis isn't it?

MARTYN: I assume if it is in that part of the body, may be it could be or it might not be.

HUGHES: What else could it be . . . is it a duck?

REPUTATION, CELEBRITY AND DEFAMATION LAW, *supra* note 211, at 151 (describing the interchange as “one of the most famous pieces of cross-examination in Australian legal history.”). The interchange here is apparently an example of trans-Tasman ribbing, tied to the specifics of New Zealand pronunciation, which to the Australian ear interchanges the sounds duck and dick (Martyn is a New Zealander).

267. *O'Hara v Channel Seven Sydney Pty Ltd.*, [2007] NSWDC 81 (14 September 2007) [16] (Austl.). In a case similar to *Ettingshausen* (the footballer's penis case) the court used the ridicule rationale to impose defamation liability on a man who fraudulently submitted a naked picture of his ex-girlfriend, the plaintiff, a magazine in which it was subsequently published. *Shepherd v Walsh* [2001] QSC (Unreported, Jones J, 6 September 2001) (Austl.). See REPUTATION, CELEBRITY AND DEFAMATION LAW, *supra* note 211, at 151–67 for analysis of *Shepherd v Walsh* and another instance where defamation liability was threatened for publishing a photograph of exposed body parts.

268. See, e.g., *O'Hara v Channel Seven Sydney Pty Ltd.*, [2007] NSWDC 81 (14 September 2007) [16] (Austl.) (citing *Burton v. Crowell Publ'g Co.*, 82 F.2d 154 (2d Cir. 1936)).

269. *Burton v. Crowell Publ'g Co.*, 82 F.2d 154, 154 (2d Cir. 1936) (reporting that the plaintiff alleged that the photograph suggested he was “physically deformed and mentally perverted”). The case does not name the body part involved, but the description suggests that the photograph depicted that the plaintiff's penis as “grotesque, monstrous, and obscene.” *Id.* For another, older example of this concern with ridicule, see *Triggs v. Sun Printing & Publ'g Ass'n*, 71 N.E. 739, 742 (N.Y. 1904) (quoting *Donoghue v. Hayes*, (1831) *Hayes Ir. Exch. Rep.* 265, 266), which found statements that were “calculated . . . to injure the plaintiff's reputation, and to expose him to public contempt, ridicule, or shame” to be libelous per se. For a discussion of older United States cases, see generally Eric Scott Fulcher, Note, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L. REV. 717, 726 (2004).

falsity in defamation actions,²⁷⁰ or because plaintiffs have found that invasion of privacy doctrine is more amendable to such tort claims.²⁷¹

A central impulse behind these ridicule cases seems to reflect a desire to remedy damage to the plaintiff's dignity.²⁷² Indeed, ever since Professor Robert Post's classic work, *The Social Foundations of Defamation Law: Reputation and the Constitution*, identified the specific components of reputation implicated by defamation law, few would dispute that dignity—along with property and honor—are possible human interests that a defamatory communication can damage.²⁷³ Post describes dignity as a private concept that operates in a public sphere and encompasses “the respect (and self-respect) that arises from full membership in society.”²⁷⁴ He explains that “[p]ersons who are socially acceptable will be included within the forms of respect that constitute social dignity.”²⁷⁵ When that social dignity is damaged, a court might rehabilitate it with a defamation

270. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), the Supreme Court held that the First Amendment requires plaintiffs to prove falsity in a defamation action “against a media defendant for speech of public concern.” In a subsequent decision, justices writing in separate opinions concluded that this holding should not be confined to media defendants. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (White, J., concurring). Although one might argue that something like inadvertent nudity is not a matter of public concern, *Philadelphia Newspapers* and *Dun & Bradstreet* offer a disincentive for plaintiffs to choose defamation when trying to frame a tort cause of action.

271. See, e.g., *Daily Times Democrat v. Graham*, 162 So.2d 474 (Ala. 1964) (recognizing invasion of privacy cause of action where reporter took photograph of plaintiff's skirt being blown above her waist at a fun house); RESTATEMENT (SECOND) OF TORTS §652 (1977) (providing that “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”).

272. ROLPH, *supra* note 211, at 147. Indeed, one explanation for these cases is that they arise in the defamation context, because Australia lacks the privacy tort that might remedy similar violations under American law. See Peter Bartlett, *Privacy Down Under*, 3 J. INT'L MEDIA & ENT. L. 145, 163 (2010) (discussing lack of general protection of individual privacy under Australian law).

273. Post, *supra* note 122, at 693. Post describes the interests of property and honor as follows: property is “understood to be a form of ‘capital’ since it ‘creates funds’ and the potential for ‘patronage and support.’” *Id.* at 694 (quoting JOEL HAWES, LECTURES ADDRESSED TO THE YOUNG MEN OF HARTFORD AND NEW HAVEN 112 (Oliver D. Cooke & Co. 1828)). According to Post, honor “can be forfeited by improper behavior, but . . . cannot be individually created.” *Id.* at 70. Honor, he explains, “is a matter of either fulfilling or failing to fulfill the requirements of one's social position.” *Id.*

274. *Id.* at 711.

275. *Id.*

remedy by “authoritatively determin[ing] that the defendant’s departure from the rules of civility was unjustified.”²⁷⁶

Under Post’s analysis, one is hardly surprised that contemporary United States courts seem uninterested in using defamation liability to remedy injury to dignity. In Post’s view, that portion of reputation representing dignity clashes with “the essential premise of constitutional autonomy.”²⁷⁷ And what is that central premise? It is “the right to differ as to things that touch the heart of the existing order.”²⁷⁸ United States courts might be more comfortable curtailing the right to challenge “the existing order” when the plaintiff’s cause of action features an individual right possessing comparable constitutional pedigree—such as privacy. This would explain the inclination of United States courts to allow invasion of privacy actions to remedy damages to dignity.²⁷⁹

United States case law was the raw material for Post’s analysis. In a parallel study of Australian cases, Professor David Rolph points out that Post’s conceptualization fails to account for “a significant rights-based jurisprudence in common law countries, such as Canada, the United Kingdom and New Zealand, [which manifests] a concern for individual reputation as a dignitary right.”²⁸⁰

International instruments such as the International Covenant for Political and Civil Rights and the Universal Declaration of Human Rights also reflect this emphasis on individual dignity.²⁸¹ Yet this observation does not explain Australia’s approach to ridicule cases, since Australian courts and law makers have not formally developed such a rights-based jurisprudence.²⁸² Nonetheless, Australia’s embrace of international law and overlapping legal traditions with those countries that share its enthusiasm for international law may provide some explanation for its adherence to a conception of defamation that protects against invasion on individual

276. *Id.* at 712–31.

277. *Id.* at 737.

278. *Id.* at 737–38 (citing *W. V. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

279. For a review of such actions, see RESTATEMENT (SECOND) OF TORTS §652 (1977) (annotations). For a contrary suggestion, arguing that American courts are sometimes reluctant to use privacy torts in place defamation, see *supra* note 198.

280. ROLPH, *supra* note 211, at 30.

281. International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 (linking protection of reputation to sanctity of privacy); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

282. ROLPH, *supra* note 211, at 30. The ridicule cases may, however, be viewed as an attempt to remedy an invasion of privacy—which of course protects a form of human dignity with analytical kinship to the individual to reputation.

dignity. Moreover, what is even clearer is that (sadly for many of us) the United States has not embraced such enthusiasm for international definitions of human rights. One can, then, credibly explain at least some of the gulf between the United States and Australia by pointing to a different approach to the individual right of human dignity.

c. *Hanson v. Australian Broadcasting Corp.*: A Category of its Own

One prominent Australian defamatory humor case does not fit neatly into the disparagement/ridicule paradigm: *Hanson v. Australian Broadcasting Corp.*²⁸³ Although unusual, this case should not be dismissed as simply *sui generis*. *Hanson* deserves serious attention because of its prominence in the fabric of Australian defamation lore and its capacity to shed light on the difficulties of regulating defamatory humor.

The *Hanson* plaintiff, Pauline Hanson, was a member of the Australian House of Representatives who advocated such policies as governmental barriers for prospective immigrants to Australia, pride in Australian nationalism, and eliminating special government assistance for aboriginal people.²⁸⁴ She brought the defamation suit to enjoin a musical composition entitled “Back Door Man” from being broadcast on national radio, and—remarkably from the standpoint of an American jurist—she succeeded in getting her requested injunction.²⁸⁵ The challenged broadcast was created with sound tracks of Hanson’s own words, stringing together snippets of her speeches to provide the song’s lyrics. The lyrics are a nonsensical ramble, including such statements as: “I’m a back door man”; “I’m a homosexual”; “I’ve called for a homosexual government”; “I’m proud that I’m not straight”; “I’m not human”; “I like trees and I like shrubs and plants”; “I’m a backdoor man for the Klu [sic] Klux Klan with a very horrendous plan. I’m a very caring potato.”²⁸⁶ Invoking concern with political speech, the Australian Broadcasting Corporation fought the injunction request by arguing that the sexual and Ku Klux Klan references in the song alluded “in a satirical or ironic sense to

283. See *Austl. Broad. Corp. v Hanson* [1998] QCA 306 (28 September 1998) (Austl.).

284. L.M. BOGAD, ELECTORAL GUERRILLA THEATRE: RADICAL RIDICULE AND SOCIAL MOVEMENTS 167–68 (2005); Geoffrey Stokes, *One Nation and Australian Populism*, in *THE RISE AND FALL OF ONE NATION* 23, 27–29 (Michael Leach, Geoffrey Stokes & Ian Ward eds., 2000).

285. The case is also remarkable under Australian law itself, which shares the American aversion to prior restraint of speech. See David Rolph, *Showing Restraint: Interlocutory Injunctions in Defamation Cases*, 14 *MEDIA & ARTS L. REV.* 255 (2009).

286. *Austl. Broad. Corp. v Hanson* [1998] QCA 306 (28 September 1998) [2] (Austl.).

[Hanson's] . . . conservative political views"²⁸⁷ as a House of Representatives member. Rejecting this contention, the Queensland appellate court found nothing in the song relating to discussion of public matters "fundamental to our democratic society."²⁸⁸ The appellate court approvingly cited the lower court's conclusion that the song was defamatory because it asserted that she was a pedophile and a homosexual.²⁸⁹

By the measure of the courts' reasoning, *Hanson* is a disparagement case: the song defamed Pauline Hanson because it suggested that she possessed 'unsavory' characteristics such as homosexual and pedophilic tendencies. But is that really how the courts interpreted the song? Is that really the wrong the courts sought to remedy? Several reasons suggest otherwise. To begin with, the suggestion that Hanson possesses these tendencies is extravagantly far from any facts known about her. Hanson was well known to believe that homosexuality is unnatural.²⁹⁰ Second, the creator of the song—Simon Hunt—had explained that he used a satirical strategy in the lyrics similar to that used by Weimar satirists in Berlin cabarets, who found it necessary to find alternatives to usual exaggeration strategies in satirizing Adolf Hitler's views.²⁹¹ Hunt said that like these Hitler satirists, he sought to reveal the "ridiculousness of [Hanson's] style of argumentation by using it in retaliation to different matters."²⁹² As such, whatever one says about the decision, the courts clearly did not embrace the song on the terms it was intended—on a literal level it was nonsense, yet on a deeper, rhetorical level it was a serious comment on Hanson's communication style and politics.

287. *Id.* at 4.

288. *Id.* at 6.

289. *Id.* at 5.

290. See Magnusson, *supra* note 198, at 285. Commentators were somewhat dumbfounded by the courts' suggestion that the song should in any way be taken as suggesting anything factual. See MARGO KINGSTON, OFF THE RAILS: THE PAULINE HANSON TRIP 194 (1999) (observing that after the judgment in the *Hanson* case, "a posse of Sydney defamation lawyers and academics lampooned its reasoning"); Elizabeth Handsley & Gary Davis, Case Notes, *Defamation and Satire: Hanson v. Australian Broadcasting Corporation*, 2000 TLJ LEXIS 12 (2000) (reasoning that "many of the statements in the song were just so silly, either on their face or in the context [of being heard in Mrs. Hanson's voice], that the listener would have been on notice that the song was not to be taken literally"); Magnusson, *supra* note 198, at 286 (explaining that the song's satire derives in part from "the insertion in Hanson's own voice, of seemingly random and incoherent non sequiturs. They provide a biting critique of Hanson's speech patterns and interview style.").

291. Magnusson, *supra* note 198, at 284–85.

292. Handsley & Davis, *supra* note 290, at 4 (paraphrasing Simon Hunt).

The appellate court also treated the defendant to a “tails I win, heads you lose” approach to the defendant’s “fair comment” defense. On one hand, the court rejected the defendant’s averment that the song constituted a good faith comment on a subject of public interest, noting that sexual preferences were matters of private, not public, interest.²⁹³ The court also reasoned, however, that the defendant’s arguments were internally inconsistent since the defendant relied on a defense designed to protect serious matters of public debate, yet maintained that the song itself should be “dismissed as a piece of derisory fun or nonsense not to be taken in any degree seriously.”²⁹⁴ As commentators have argued, this reasoning handed the defendant the worst of all worlds: “[T]he material was taken literally and seriously for the purpose of determining whether it was irresistibly defamatory, and rejected as a piece of nonsense for the purpose of determining the potential availability of the [fair comment] defense.”²⁹⁵

What besides literal disparagement of Pauline Hanson might have concerned the courts? Could it be a perceived attack on her dignity? The *Hanson* court’s reference to the “private matters” of sexual preference adds credence to this interpretation—as does the court’s embrace of a strained reading of the alleged untruths in the song.²⁹⁶ *Hanson* may thus be taken on its own terms as a disparagement case or conceived of as a ridicule case. And, as suggested earlier, one could also simply dismiss the case as a

293. *Austl. Broad. Corp. v Hanson* [1998] QCA 306 (28 September 1998) [5] (Austl.).

294. *Id.*

295. Handsley & Davis, *supra* note 290, at 22. *See also* Magnusson, *supra* note 198, at 282 (reasoning that where “the imputation of ridicule arises from particular words that can be regarded as either expressing an opinion or asserting a fact, the quality of ‘ridicule’ will often arise from exaggerated or false meanings in ways that would defeat the defences of truth or fair comment”).

296. Reading the *Hanson* decision as concerned with avoiding ridicule and attacks on the dignity of an elected politician might shed light on another phenomenon in Australian defamation practice that was documented before the decision: at one time, Australian politicians represented proportionally greater percentage of defamation plaintiffs than elected politicians represent among United States defamation plaintiffs. *See* Newcity, *supra* note 189, at 25–26 (observing that “[w]hereas Australian elected officials initiate proportionally more defamation suits than do their American counterparts, Australian nonelected public officials bring a smaller portion of defamation suits than do American nonelected officials”). One surmises that Australian politicians pursue their lawsuits with the expectation of successfully vindicating their alleged injury. A ready explanation for the disparity is the formal obstacle in the United States (missing in Australia) of *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), and its actual malice standard. Yet the High Court adopted a similar approach to *New York Times, Co. v. Sullivan* in 1997. *See Lange v Austl. Broad. Corp.* (1997) 189 CLR 520, 548–49 (Austl.). One wonders whether the statistics would come out differently today.

sport—albeit a sport with interesting insights into defamatory humor regulation.

4. Australian Lessons for the United States

Australian defamation cases have a variety of lessons for United States defamatory humor cases. Some of the disputes would have come out quite differently in the United States and stand as an example of what not to do. Certainly a prior restraint like that issued in *Hanson* would be inimical to First Amendment doctrine, as would unfettered defamation liability asserted by a public official such as Pauline Hanson on a matter with such obvious political content. The courts' handling of the humor defense is also not worthy of imitation, since the reasoning suggests that humor cannot convey serious political messages.²⁹⁷ To treat humor in this way is not only to fail to understand the subtleties of political discourse, but also to denigrate the skill and artistry of humorists.²⁹⁸

The Australian ridicule cases are also not a particularly useful paradigm for United States courts seeking guidance with defamatory humor. The Australian cases' solicitude for dignitary interests likely clashes with the First Amendment doctrine's current orientation toward restricting defamation liability by giving wide berth to dissent from the settled order. Were United States courts to track the Australian ridicule cases in developing defamation doctrine, one can imagine the cries of criticism bemoaning the loss of the First Amendment's force in protecting unpopular ideas.

That is not to say that protecting dignity, which is often given short shrift as Americans struggle with such questions as whether and how to regulate racist or hate speech, is not a worthy concept. Yet the context of humorous ridicule does not present the best setting for venturing an experiment with regulating communication's potential for harming human dignity. For many cases, a cause of action already exists in the United States to remedy such harms: invasion of privacy.²⁹⁹ To add defamation as

297. McCallum, *supra* note 238, at 214 (arguing that as framed in *Hanson*, the humor defense suggests that "comedy itself is a ridiculous activity that has earned no right to be taken seriously . . . [and] implies that comedy is inevitably constrained by its own absurdity and can never operate in the real world of political and intellectual discourse").

298. *Id.* at 215 (arguing that humor defense is "a denigration of the work of any artist . . . challenging such basic principles of comic practice as recognition-humour, identification and comic distance from painful realities").

299. I do not, however, want to overstate the availability of invasion of privacy as a theory of liability. As Professor Rodney Smolla has pointed out, United States courts actually seem to prefer defamation to other dignitary torts—at least where defamation liability is available. My point, however, is that defamation is not really a viable option in

a theory of liability would pick a fight with the First Amendment where the fight might not be necessary to correct a wrong done. Moreover, the United States has experienced dramatic social, political, and legal controversy over regulating speech where attacks on dignity are mixed with actual threats to safety.³⁰⁰ The magnitude of these controversies suggests that allowing defamation doctrine to regulate attacks on dignity alone would be unwise, whether or not those attacks manifest as humor or attempts at humor.

A more apt context for United States courts to consider a more nuanced understanding of dignity and other forms of reputation is that of disparagement cases, where humor inflicts harm on the plaintiff by suggesting something negative about the plaintiff's character or actions. It is here that the Australian disparagement cases might provide useful lessons. In the disparagement context, Australian courts often reached the same humor-protecting results as one would expect in United States courts. Yet the Australian courts arrived at the results without the obfuscation and difficulties of First Amendment doctrine governing fact and opinion.

this context, so we should simply leave in place invasion of privacy actions where existing law would support them in meritorious cases. See Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 292–96 (2002) (stating that “false light” right of privacy causes of action have been “devoured” by defamation actions). Smolla explains that the commonly asserted distinction that defamation compensates for reputational damage while false light is for emotional harm is largely academic and blurred in real world defamation practice. Courts are permissive in allowing plaintiffs to recover for essentially internal emotional injuries in defamation actions. *Id.* at 294.

300. See, e.g., C. Edwin Baker, *Autonomy and Hate Speech*, in EXTREME SPEECH AND DEMOCRACY 139, 147 (Ivan Hare & James Weinstein eds., 2009) (arguing that regulators should restrict hate speech only upon an empirical showing of such matters as virulent racism or genocidal practices such that the need to protect individuals from the harm of hate speech outweighs the societal benefits of autonomy and the protection of democracy that come with absolute free speech); Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336–38, 2351–53 (1989) (describing how the United States has protected such activities as Ku Klux Klan marches, but has heretofore been reluctant to protect against the effect of hate speech on victims, which can include physiological symptoms, emotional distress, and psychological effects that prompt victims to “quit jobs, forgo [sic] education . . . avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor”); Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 294–97 (1995) (pointing out that the United States has avoided regulating hate speech even though it can cause individuals the same humiliation, damage to reputation, and emotional torment that victims of dignitary torts suffer); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1636 (2010) (arguing that a free speech exception should be fashioned to protect against the brutal spirit murder resulting from hate speech and pointing out that the values of autonomy of personal expression and democracy do not merit protecting other damaging forms of expression, such as child pornography).

The fact/opinion dichotomy is a well-intentioned mechanism for seeking to identify when a communication suggests an untruth that inflicts harm on the plaintiff. Yet it is riddled with difficulties in application in the humor context and often displaces discussion of the individual reputational interests implicated in a case. Although I do not advocate abandoning the dichotomy altogether, I do suggest that analysis would benefit if courts explicitly considered the harm to the plaintiff's reputation that may go unremedied if the defamation case fails.³⁰¹ The fact/opinion dichotomy might continue to play a role in the decision so long as it does not obfuscate the reputational injury and courts are mindful of the dichotomy's significant limitations in understanding humor's impact.

The First Amendment is key to the political, governmental, and social systems in the United States, but it is not a shorthand or a replacement for justice. First Amendment doctrine should not hijack discussion of all factors relevant to whether a court should regulate communication. Candor and good judicial decision-making in the United States would be served by explicit discussion of all aspects of the plaintiff's reputation threatened by the defendant's attempt at a joke. This, it seems, is the most forthright approach to evaluating how and when to accommodate the corrective justice goals at play when our system of civil justice recognizes a cause of action for defamation.

IV. INCONGRUITY'S PROMISE

We have seen, thus far, several mechanisms for guiding United States courts in the difficult task of regulating defamatory humor. When used judiciously, the First Amendment and common law doctrines governing the fact/opinion distinction help take account of important interests associated with free expression, such as truth seeking, individual autonomy, social tolerance, and democratic self-governance.³⁰² Next, experience from other

301. This approach is arguably consistent with public opinion. A recent study by the First Amendment Center concludes that "a significant percentage of Americans are reluctant to give full First Amendment protection to comedic speech, art or performances that could potentially insult or offend others. There appears to be a willingness to give up a little liberty in exchange for fewer hurt feelings." Kenneth A. Paulson, *Comedy and Freedom of Speech*, FREEDOM FORUM (2002), available at <http://www.freedomforum.org/publications/first/sofa/2002/ComedyandFreedomofSpeech.pdf>. The two topics that the study found Americans most comfortable with regulating were humor that was offensive to racial groups (with 63 percent believing government should prevent such comments in public) and to religious groups (with 58 percent believing government should prevent such comments in public). *See id.*

302. *See supra* notes 141–149 and accompanying text for further discussion of these values, which are reviewed generally in CHEMERINSKY, *supra* note 121, at 925–32.

countries, such as Australia, provides the framework for more nuanced consideration of reputational interests. While the First Amendment remains a mainstay of American civil liberties and government, justice provides counsel that explicit consideration of a defamation plaintiff's various reputational injuries is necessary, and the Australian cases demonstrate an important angle on that process.

Fortunately, courts have yet another important mechanism for evaluating whether to regulate defamatory humor: interdisciplinary understanding of humor's various permutations. In particular, the three categories of humor—superiority humor, release humor, and incongruity humor—provide a useful rubric for courts deciding whether to use civil remedies in defamation actions to regulate humor. In using these categories, courts must tread carefully, since the categories are not mutually exclusive and the characterization of a particular joke requires a large measure of subjective interpretation. Nonetheless, the characterization process can help courts evaluate the social interests in protecting the joke from regulation. By focusing on what type of humor is involved in a challenged communication, the court can more knowledgeably evaluate the conflicting interests, considering both the nature and scope of the plaintiff's injury as well as the nature and scope of the defendant's misconduct.

Of the three categories, superiority humor is probably the most straightforward. If a court concludes that the primary purpose of a joke is to disparage others to the jokester's advantage, the court can comfortably conclude that the joke strikes at the heart of tort law's goal: providing an avenue of civil recourse to remedy a tortious injury inflicted to benefit the wrongdoer.³⁰³ The court may ultimately determine that First Amendment considerations mandate avoiding liability. For example, the Supreme Court often cites parody and satire as humor forms worthy of constitutional protection.³⁰⁴ If, however, a court decides to insulate the superiority humor

303. See, e.g., Goldberg & Zipursky, *supra* note 11, at 918 (arguing that the goal of tort suits is to provide plaintiffs with an avenue for getting redress from those who have inflicted a wrong on them). Goldberg and Zipursky focus their energy on analyzing the importance of a "wrongs-based" view of tort law rather than a "loss-based" view. See *id.* at 946. It is not necessary for me to enter a debate about this distinction, since the distinction is not crucial to identifying a useful role for characterizing the type of humor involved in a defamation action. The character of the joke is relevant to appreciating both the scope of the defendant's misconduct and the plaintiff's injury.

304. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 54–56 (1988) (celebrating the importance of parodists and satirists in public debate over politics); *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of petition for en banc rehearing) ("[s]atire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy"); Fitzgerald, *supra* note 198, at 14

from liability, the court does so with the understanding of possible personal injury that might go unremedied.

By contrast, release humor is probably the least helpful of the three humor categories. To be sure, plenty of sources suggest that release humor serves important individual and social functions of processing discomfort with taboo or negative subjects.³⁰⁵ Yet these functions do not translate neatly into any calculus about whether a court should regulate defamatory humor. Specifically, one wonders whose discomfort a court should consider and how: The jokester's discomfort? The discomfort of the plaintiff who was the joke's subject? Or should the court simply consider general social disapproval or collective discomfort over the subject matter? This latter possibility leads to a particular problem with regulating release humor: when a court decides to regulate a joke about one of the subjects associated with release humor—sex, incest, death, disability, excretion, and the like—one wonders whether the court is simply imposing its view of bad taste.³⁰⁶ Not only is the role of regulating taste inherently problematic for a court, but the concept of “taste” is relatively unhelpful in evaluating First Amendment values.³⁰⁷

What is an especially useful aid in deciding cases of defamatory humor is the concept of incongruity. Starting with the premise that humor is often artistic and beneficial to individuals and communities, a court should evaluate whether in fact a communication can be characterized as humorous. Incongruity theory provides a testing rod.

As discussed above, most humor theorists maintain that incongruity is a necessary, though not sufficient, condition for a communication to be

(explaining satire's important social role that “combines laughter with information and [sometimes lacerating] criticism.”).

305. See *supra* notes 35–40 and accompanying text for a discussion of the function of release humor.

306. See *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157, 166 (Tex. 2004) (explaining that courts should not be cast in the role of monitoring “bad taste”); Little, *supra* note 3, at 1285–88 (discussing the problems that arise when courts are cast in the role of regulating taste).

307. It is perhaps for this reason that United States courts initially abandoned trying to determine whether humor improperly undermined the dignity of a particular plaintiff. For an example of the Supreme Court steering clear of defining First Amendment restrictions on governmental judgments about taste, see, for example, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998), observing that in the arts funding context, the government is making decisions about “artistic worth” and cannot be guided by “absolute neutrality.”

funny.³⁰⁸ Thus, a court evaluating whether a communication merits protection from liability might, as a starting point, evaluate the degree of incongruity contained in the communication. Incongruity comes in many permutations, some slapstick-ed-ly obvious and some nuanced. Common heuristics of incongruity humor nonetheless exist, suggesting that a court might look fruitfully for such rhetorical techniques as juxtaposition of diverse phenomenon, illogical or irrational sequencing, joinder of opposites, dueling scripts, and a set-up that primes for a later surprise.³⁰⁹

Of course, a court's identifying one of these techniques in a communication does not definitively determine that the communication is funny or should be insulated from liability. The presence of incongruity, however, suggests that those who viewed or heard the communication were more likely to have perceived it as a joke, as something not to be interpreted literally and as something communicated for a reason other than simply conveying information about its subject. If that is the case, then the communication may be less likely to hurt the plaintiff.³¹⁰ In this way, incongruity serves a useful proxy for the reasonable reader's or listener's understanding: the greater the incongruity, the less likely that the reader or listener interpreted the communication as conveying solidly unflattering "truths" about the plaintiff. In addition, the incongruity's presence cues the court to the possibility that the communication is capable of amusing its audience and, thus, might satisfy one of the myriad positive functions, for individuals or groups, associated with humor.

Incongruity, therefore, provides tests for understanding how a communication is interpreted, as well as for evaluating the individual and social worth of the communication. Both of these are important, though not determinative, factors for a court to consider while evaluating whether a communication is the type that should flourish, unfettered by civil liability. In other words, incongruity's presence performs a screening function: a first step signaling the court to continue with the complex process of

308. See *supra* notes 41–44, 55–65, and accompanying text for a discussion of authority supporting the necessity of incongruity to humor.

309. See *supra* notes 3945–54 and accompanying text for an inventory of various earmarks of incongruity humor.

310. In addition to the possibility that a mere joke might not inflict harm, damages from humor may be particularly difficult to establish. Under First Amendment principles established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), liability for defamation "extends no further than compensation for actual injury," proven by competent evidence. Even if jokes are actionable, they may be unlikely to cause provable reputational injury. See Dorsen, *supra* note 9 (pointing out the difficulty of providing damages from satire).

evaluating whether First Amendment or defamation principles protect the communication.

A. ARE COURTS CAPABLE AND WILLING TO IDENTIFY INCONGRUITY?

Is testing for incongruity an intellectual operation that courts have the capacity and willingness to undertake? Yes. Courts interpret texts all the time, testing for such qualities as argumentation technique, linguistic patterns, logic, and internal consistency.³¹¹ Moreover, one can infer courts' capacity to discern incongruity from anecdotal evidence showing that they are already implicitly scanning challenged communications for incongruities. In an earlier study, I concluded that courts in three legal contexts evince a consistent tendency not to impose civil liability for incongruity humor.³¹² The contexts I studied are diverse—contract, trademark infringement, and employment discrimination—and arguably represent three pillars of law (contract, property, and tort).

Defamation cases show the same preference for incongruity humor. In the United States, this preference is clear from the fact/opinion dichotomy itself. When evaluating whether a communication suggests any factual matters about the plaintiff, courts are routinely asking whether the qualities of the communication—such as its logic and its congruence with known or external circumstances—could be reasonably understood as describing real facts.³¹³

Several classic as well as contemporary cases illustrate how this search for factual inferences is really no more than a search for incongruities in the challenged communication. For example, in *Polygram Records, Inc. v. Superior Court*,³¹⁴ the court evaluated a defamation claim

311. Michael L. Geis, *On Meaning: The Meaning of Meaning in the Law*, 73 WASH. U. L. Q. 1125, 1132 (1995) (presenting a case study of linguistic reasoning in the Supreme Court); Peter Meijes Tiersma, *The Judge as Linguist*, 27 LOY. L. REV. 269, 269-70 (1993) (exploring judicial analysis of language in a variety of contexts, including criminal law, torts, contracts, and wills); Stephanie A. Vaughan, *Persuasion Is An Art . . . but It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635 (2009) (discussing effective persuasive techniques). See generally LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993) (reviewing linguistics analyses in judicial opinions). See Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 320-21 (1993) (analyzing linguistic differences between men and women and proposing that legal doctrines accommodate these differences).

312. See Little, *supra* note 3, at 1239 (describing preference for incongruity humor in contract, trademark infringement, and employment cases).

313. See, e.g., *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 158 (Tex. 2004) (evaluating whether a newspaper spoof was subject to defamation liability by analyzing whether the publication could reasonably be understood as describing real facts).

314. *Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252 (Ct. App. 1985).

based on Comedian Robin Williams's parody of advertising practices and wine snobbery. According to the court, Williams developed his parody around "the fantasy of a black wine 'tough enough' to be advertised by 'Mean Joe Green.'"³¹⁵ In the crescendo of its decision insulating the parody from liability, the court concluded that Williams's "suggestions that the hypothetical wine is a 'motherfucker,' black in color, tastes like urine, goes with anything 'it' damn well pleases, or is 'tough' or endorsed by ruffians are obvious figments of a comic imagination impossible for any sensible person to take seriously."³¹⁶

Along the same lines, another court scanned a fictional editorial for signs of imaginative "exaggeration and distortion," concluding that the editorial contained too many incongruities to support defamation liability.³¹⁷ Referring to specific parts of the editorial, the court queried: "Would a six-year-old be able to comment intelligently on the works of [J.D.] Salinger and [Mark] Twain, while using expressions like '[e]xcuse my French'? Would a faith-based organization label itself 'GOOF'? Would a judge say that it is time to panic and overreact?"³¹⁸

Often United States courts look for reference to an act or state of being that is physically impossible. Thus, the court in *Pring v. Penthouse International, Ltd.*³¹⁹ concluded a spoof's description of a beauty contestant

315. *Id.* at 260.

316. *Id.* at 260–61.

317. *Isaacks*, 146 S.W.3d at 158.

318. The specific portions of the editorial supporting these rhetorical questions provided as follows:

*Reference to a freedom-opposing religious group that goes by the acronym, "GOOF," standing for "God Fearing Opponents of Freedom."

*Reference to a judge stating that "any implication of violence in a school setting . . . is reason enough for panic and overreaction."

*Reference to a six-year old's statement in reaction to her book report: "Like, I'm sure. It's bad enough people think like Salinger and Twain are dangerous, but [Maurice] Sendak? Give me a break, for Christ's sake. Excuse my French."

Id. at 149, 158.

An even more recent example is *Hamilton v. Prewett*, 860 N.E.2d 1234, 1247 (Ind. Ct. App. 2007). In *Hamilton*, the court decided that a website was not capable of defamation liability because it was a parody. In support of this decision, the court noted that the website asserted that a group of "Amish Aliens" from another solar system invaded the Earth and were taking over the world by placing minerals in our water. *Id.* at 1246. The parody continued that the only way to cope was to "submit to Amish Aliens" or to purchase the plaintiff's water conditioning products. *Id.*

319. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 441 (10th Cir. 1982) (evaluating a beauty contest spoof by reference to rhetorical hyperbole case law and deciding that the

having sex with her coach during a competition involved physically impossible acts. Another court reasoned that liability should not attach to a song parody containing illogical or impossible statements, such as directing the plaintiff to “‘move on in’ with his ‘live-in lover.’”³²⁰

Australian defamation cases also track incongruity reasoning. For example, Australian courts take the position that “vulgar abuse” escapes liability, reasoning that a communication can be “so excessive, irrational and disproportionate that the imputations conveyed would not be taken seriously, and so cannot reasonably be said to arise.”³²¹ Similarly, defamation liability does not attach if the challenged communication is “self-evidently absurd”³²² or the plaintiff could not reasonably be believed to possess certain unfavorable qualities.³²³

United States and Australian courts thus already seem to have made their way to a similar insight as humor theorists: a communication containing incongruities is more likely to be funny and less likely to be interpreted as a serious statement. This practice suggests that courts would take well to more explicit consideration of incongruity as part of textual analysis of allegedly defamatory humor.

spoof could not be interpreted as providing actual facts since the spoof presented “impossibility and fantasy within a fanciful story”).

320. *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 228 (E.D. Va. 1990).

321. *Magnusson*, *supra* note 198.

322. *Coleman v John Fairfax Publ'ns Pty Ltd.*, (2003) NSWSC 564 (25 June 2003) [22]–[23] (Austl.).

323. *Brander v Ryan* [2000] SASC 446 ¶¶ 77–89 (Austl.). Prior to the Uniform Defamation Act, Australian courts also made use of the concept of congruency in evaluating the fair comment defense. As a judge stated in one case: “I am of the opinion that . . . the comment established by the defendant should be congruent with the imputation to which it is pleaded. If a comment is established which falls short of such congruency the defence is not made out.” *David Syme & Co. v Lloyd* [1984] 3 NSWLR 346, 358 (Austl.) (Glass, JA), *discussed in* Andrew Kenyon, *Defamation, Artistic Criticism, and Fair Comment*, 18 SYDNEY L. REV. 193, 209–10 (1996). *Australian Broadcasting Corp. v Hanson* provides an important counterexample of the tendency of Australian courts to insulate incongruous humor from liability. [1998] QCA 306 (28 September 1998) (Austl.). The court in *Hanson* found the song parody defamatory even though it was chock full of incongruities. For example, the song included statements that no person would ever say about themselves. Handsley & Davis, *supra* note 290, at 6 (concluding that no person could be expected to say things like “You know I’m not human” and “I have very horrendous plans”). In addition, the song was filled with nonsensical juxtapositions and non-sequiturs. Magnusson, *supra* note 198, at 286 (explaining that the songs satire derives in part from “the insertion in Hanson’s own voice, of seemingly random and incoherent non sequiturs”).

B. IS INCONGRUITY A MEASURE OF WORTH?

Having concluded that courts can capably and meaningfully identify incongruous content, incongruity may seem a measure of whether a putatively funny communication is either worthy of First Amendment protection or should be otherwise disqualified from defamation liability. Since incongruity is suggestive of humor, incongruity establishes some of a communication's positive social worth. Considering incongruity as a definitive measure of social worth, however, would overstate incongruity's promise.

Implicit in the idea that a communication has positive social worth is the conclusion that the communication's contribution to social welfare is greater than its damage to an individual plaintiff or group. Unfortunately, one cannot accurately make such a broad claim for humor, given its double-edged quality on matters of hurt.

On the positive side, humor allows dialogue in uncomfortable matters to take place more easily. Through humor-studded communications, people can converse about matters they may not otherwise broach. Truths can sometimes be conveyed without the barbed quality accompanying straightforward, unadorned insults.³²⁴

Yet the opposite effect also frequently results. Incongruous humor is perfectly capable of conveying a negative message. Given the mental stimulation that incongruous humor inspires,³²⁵ one can imagine that such humor can be a potent vehicle for inflicting injury.³²⁶ Likewise, empirical studies suggest humor tinged with hostility can enhance aggressive

324. See, e.g., PALMER, *supra* note 113, at 61 (1994) (observing that humor can "release the pressure of inhibition" while leaving in place inhibition's function outside of the humor context); Podlas, *supra* note 83, at 512 (arguing that humor lowers "emotional (and intellectual) defenses, thereby avoiding resistance" of listeners).

325. See Carey, *supra* note 62 (reporting on studies supporting connection between mental stimulation and such things as a "pink unicorn," a "three dollar bill," and a "nun with a beard."). *But cf.* Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 766-67 (2005) (arguing that legal protection should vary according to "hierarchy" of cognitive "processing," and observing that the unconscious impact is greater for input for which there is less processing).

326. As Dr. Samuel Johnson observed, "[a]buse is not so dangerous when there is no vehicle of wit . . ." JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 1146 (Everyman's Library 1992) (1791). See also Fitzgerald, *supra* note 198, at 14 (quoting Johnson and explaining that "ridicule provokes amusement which emphasizes the underlying message").

tendencies,³²⁷ damage potential social networks,³²⁸ and camouflage feelings, such as Schadenfreude.³²⁹

These competing forces counsel against extravagant claims about incongruity's merit. Nonetheless, incongruity plays an important role in signaling courts that they have strong reason to believe they are considering humor and, thus, something worthy of protecting.

V. CONCLUSION

As part of the machinery of constitutional democracy, United States courts constantly handle clashes of important values. The constitutional doctrine they have developed for evaluating these clashes is far from perfect, but it is usually viable and well meaning. United States defamation law negotiates the clash between reputation and free expression with much the same success as other legal rules that confront a delicate balance, such as state criminal procedure rules, economic rules, and health care regulations. In the process of negotiating competing values, courts should avoid ritualistic incantations of constitutional doctrine without considering what they are trying to achieve. Courts must explicitly consider the values sacrificed and served by choosing a particular disposition.

United States courts risk ignoring important concerns when they become seduced by the apparent determinacy of the fact/opinion distinction. While the distinction does a proficient job of incorporating relevant concerns, it can obscure important values related to reputation and humorous expression. Given the particular importance of free expression in general and humor in particular, reputational concerns will often yield to other values in defamatory humor cases. But why cling so dogmatically to our sense of First Amendment exceptionalism? Americans should feel proud of our heritage in the free speech arena, but that should not stop us from learning from others—such as Australians—who strike a different balance for competing values.

327. Robert A. Baron, *Aggression-Inhibiting Influence of Sexual Humor*, 36 J. PERSONALITY & SOC. PSYCHOL. 189, 190 (1978) (discussing possible connection between aggression and humor).

328. Martin, *supra* note 89, at 16 (suggesting that negative humor can damage “potential social support”).

329. Dolf Zillman & Jennings Bryant, *Misattribution Theory of Tendentious Humor*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 146, 150 (1980) (suggesting that disparagement humor can cover up hostility or Schadenfreude).

