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Of Bee Stings, Mud Pies, and Outhouses: Exploring the Value of Satire Through the Theory of Useful Untruths

Leonard M. Niehoff
University of Michigan Law School, lniehoff@umich.edu

OF BEE STINGS, MUD PIES, AND OUTHOUSES: EXPLORING THE VALUE OF SATIRE THROUGH THE THEORY OF USEFUL UNTRUTHS

Len Niehoff

Professor from Practice, University of Michigan Law School

"Why should we fear; and what? The laws?
They all are armed in virtue's cause;
And, aiming at the self-same end,
Satire is always virtue's friend."[1]

INTRODUCTION

In the *Hustler* case,[2] the Supreme Court described the satire in question as suggesting that the Reverend Jerry Falwell's first sexual experience was "a drunken incestuous rendezvous with his mother in an outhouse."[3] This description is technically inaccurate, because the satire implies that Falwell began by having intercourse with a goat, who he then had to eject from the premises to make room for his mother.[4] I raise this quibble to emphasize the extraordinarily over-the-top heights to which Larry Flynt's satiric missile soared.

Despite the satire's graphic sexual content and abusive treatment of Falwell, the Court held that the First Amendment protected it and reversed the jury verdict against Hustler for intentional infliction of emotional distress ("IIED"). For those who value freedom of expression, particularly in the form of satire, this outcome set an important and welcome precedent. Furthermore, the opinion makes for fun reading, citing numerous historical examples of

[1] Charles Churchill, *The Ghost* (1763), book III, lines 943-946.
[2] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[3] *Id.* at 48.
[4] *See* RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL Appendix I (1988).

important editorial cartoons and celebrating the unique contribution of satire to public discourse. Indeed, the opinion verges on satire itself, with the discussion of all this randy material coming to us through the decorous voice of Chief Justice William Rehnquist.

Nevertheless, at some deeper level the opinion disappoints. The legal analysis seems a bit of a hodgepodge. The Court rejects the "outrageousness" standard that applies in IIED cases as too vague and subjective a test; then it borrows the actual malice requirement from defamation law and *New York Times Co. v. Sullivan*;[5] and then it imports the jury's finding (as to Falwell's libel claim) that this satire did not state any actual facts about him. The Court reaches the right result, but, following hard on its cheerleading about the importance of satire, the reasoning seems technical and tepid.

More importantly, although the Court waxes enthusiastically about the special place of satire in our public discourse, it says almost nothing about how satire works or why we value its contribution to the marketplace of ideas. Indeed, some of the rote observations that the Court includes in its analysis appear to undercut an argument that satire should receive strong First Amendment protection or any protection at all. For example, the Court reiterates its longstanding position that false statements contribute nothing to public discourse, disregarding the fact that satire depends upon exaggerations, caricatures, and other intentional literal falsehoods. We do not ordinarily view intentional literal falsehood as a credential for constitutional immunity from suit. Why do we do so here? What makes satire special? The Court does not say.

In this article, I attempt to fill this conceptual gap within *Hustler* by offering a theory of how satire functions and why it has a distinctively important place in our public discourse. That theory draws on the work of philosophers like Kwame Anthony Appiah, Hans Vaihinger, Kendall Walton, and Lon Fuller, who have discussed the concept of "useful untruths"—lines of thought where we proceed as if something we know to be false is in fact true, because doing so serves a useful and valuable purpose. In my view, the philosophy of useful untruths can help us understand the complexity of satire, its paradoxical relationship with truth and falsity, why it has an indispensable role in a democratic society, and the reasons it resists tidy analysis under general First Amendment doctrine.

[5] 376 U.S. 254 (1964).

I. BEE STINGS: WHAT *HUSTLER V. FALWELL* DID NOT SAY

An old legal adage holds that hard cases make bad law. A related maxim could declare that crazy cases make contorted law. When judges face a combination of whacky facts, weird legal questions, and worrisome potential outcomes, they often seek comfort in established but ill-fitting legal principles. Those principles may solve the immediate problem before the court, but the attendant reasoning can strike us as overwrought and puzzling.

Let us stipulate that the *Hustler* case arose from a singular set of facts. Just consider the players. Evangelist Jerry Falwell began his broadcasting career in 1956, and by 1985 some 500 radio stations, 392 television stations, and over 10,000 cable television stations carried his daily program.[6] Along the way, he helped found the Moral Majority organization, which in the late 1970s and 1980s became a formidable force in American politics and spoke out strongly against abortion, homosexuality, the "fractured family," and pornography.[7] Polls routinely identified Falwell as one of the most influential figures in America.[8]

Larry Flynt, the publisher of Hustler Magazine, had experienced his own meteoric rise to prominence, although, shall we say, in a different field. Son of a Kentucky sharecropper, Flynt lied about his age to join the military at fourteen, and, after working briefly at General Motors, opened a string of strip clubs in Ohio.[9] Hustler began as an internal newsletter of sorts for patrons of the bars, but Flynt transformed it into a professionally produced magazine and its circulation quickly rose to over two million readers.[10] Through the 1970s and into the 1980s, Flynt's mercurial personality went on full display: he was, in turn, publisher of the raunchiest mainstream adult magazine available, a short-lived religious convert, defendant in an obscenity prosecution, victim of a shooting that left him a paraplegic, a recluse, and a candidate for the Republican nomination for President.[11] One profile of him

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[6] Smolla, *supra* note 4, at 96.
[7] *Id.* at 106-107.
[8] *Id.* at 102-103.
[9] *Id.* at 37.
[10] *Id.*
[11] *Id.* at 38-44.

includes comparisons to Thomas Paine, Barnum & Bailey, Johnathan Edwards, and a character in a Faulkner novel, all apt.[12]

While Falwell and Flynt were skyrocketing in their respective realms, the maker of the Italian liqueur Campari was trying to do the same in its own. Toward that end, Campari ran a popular advertising campaign that playfully addressed its reputation as a bitter, herbal concoction that many drinkers viewed as an acquired taste.[13] The magazine-based campaign featured mock interviews with celebrities who talked about their "first time." [14] Although the celebrities initially appeared to be describing their first sexual encounter, it ultimately became clear that they were talking about their fledgling experience drinking Campari.[15]

Over the years, Hustler had lampooned numerous public figures and it now turned its attention to Falwell. The inside front cover of the November 1983 issue of Hustler featured a parody of the Campari advertisement entitled "Jerry Falwell talks about his first time."[16] Copying the form and layout of the Campari ads, the piece presented a mock interview in which Falwell stated that his first time was—as the Supreme Court not quite accurately summarized it—"a drunken incestuous rendezvous with his mother in an outhouse."[17] At the bottom of the page the words "ad parody—not to be taken seriously" appeared and the magazine's table of contents described the piece as "Fiction; Ad and Personality Parody."[18]

Falwell brought a diversity action against Flynt and his magazine in federal court in Virginia.[19] The complaint raised claims of libel, invasion of privacy, and IIED based on the publication.[20] The District Court granted a directed verdict for the defendants on the invasion of privacy claim.[21] The jury

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[12] *Id.* at 37-44.
[13] For a history of Campari's inventive advertising campaigns, *see* MARK SPIVAK, ICONIC SPIRITS: AN INTOXICATING HISTORY 39-51 (2012).
[14] *Hustler*, 485 U.S. at 48.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 48-49.
[21] *Id.* at 49.

held against Falwell on the libel claim, expressly finding that a reasonable person could not understand the piece as describing actual events or stating facts about him.[22] The jury did however find for Falwell on the IIED claim, awarding him $100,000 in compensatory damages and $50,000 in punitive damages. [23] The trial court denied Flynt's motion for judgment notwithstanding the verdict, the Fourth Circuit affirmed, and the Supreme Court granted certiorari.

Good reasons existed to believe that Flynt would prevail on appeal. Falwell clearly qualified as a leading public figure with immense influence over the discussion of the major social and political issues of the day. In earlier decisions, the Supreme Court had stressed the importance of legal standards that allow for the robust criticism of such individuals.[24]

Furthermore, Falwell's IIED verdict posed an obvious and significant threat to the protections afforded by the Court in *New York Times Co. v. Sullivan* and its progeny. Those cases imposed a very demanding standard on public official and public figure plaintiffs in defamation cases, requiring them to prove, by clear and convincing evidence, that the defendant published the statement in question with actual malice—that is, knowing it was false or entertaining serious subjective doubts about its truth.[25] Such plaintiffs could render these requirements meaningless if they could avoid them through the simple expedient of relabeling their defamation claim as one for IIED.

There were, however, two reasons for concern that the *Hustler* case might muddle, limit, or even hobble the protections previously afforded by the Supreme Court. Nor were they insignificant reasons. They were the facts and the law.

The facts of the case made it a less than ideal vehicle for defending free expression. The Court's highly sanitized description of the parody put a fig leaf, as it were, over the piece's stunning offensiveness by omitting a number

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[22] *Id.*
[23] *Id.*
[24] *See*, *e.g.*, *Gertz v. Robert Welch*, *Inc.*, 418 U.S. 323, 342-46 (1974) (discussing reasons for holding public figures to the *New York Times Co. v. Sullivan* actual malice standard).
[25] *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (clarifying the meaning of actual malice and recklessness in this context).

of details. For example, in addition to the reference to the goat, the parody also said that Falwell had decided to have sex with his mother after learning she had slept with "all the other guys in town." He and his mother were so drunk that she passed out before he achieved orgasm. He had done it again "lots of times." He drank heavily before preaching because that was the only way he could "lay down all that bullshit."[26] On and on it went.

In addition, Flynt's testimony at his deposition was spectacularly self-incriminating. He showed nothing short of contempt for the proceeding, for example stating his full name as "Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh," answering affirmatively when asked if he was determined to make a mockery of the deposition, and calling the interrogating lawyer "an asshole."[27]

More importantly, though, Flynt testified that he had a documents supporting the allegation that Falwell had engaged in sex with his mother, that he had not wanted to label the ad as a "parody," and that he had published the ad in order to "settle a score" with Falwell, to get even with him, and to "assassinate" his integrity.[28] The principal witness for the defense thus testified that he had intended to inflict emotional distress on his target by publishing facts about him that readers would take seriously. This was a dreadfully bad development in an IIED case where the defense centered on the argument that the statements in question were merely satirical.

The legal landscape brought some additional uncertainty to the outcome of the case. In *New York Times Co. v. Sullivan*, the Supreme Court had protected First Amendment interests by adjusting the fault element in certain types of defamation cases. What would a similar effort look like with respect to IIED? After all, an IIED claim does not even require that the defendant made a statement—let alone a false one. Imposing the actual malice standard here therefore would not involve the tweaking of an element of the tort; it would require a substantial reconstruction of it.

Anyone concerned about the potential impact of the *Hustler* case on existing First Amendment protections would likely have experienced even greater anxiety upon learning that the famously conservative Chief Justice

[26] Smolla, *supra* note 4, Appendix I.
[27] *Id.* at 31-33.
[28] *Id.* at 48-60.

William Rehnquist would write the majority opinion. A number of Rehnquist's earlier opinions reflected a crabbed and outlier view of free expression. For example, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[29] Rehnquist filed the lone dissent in a landmark case holding that commercial speech was not wholly unprotected by the First Amendment. Indeed, the pro-First Amendment opinion that Rehnquist wrote in the *Hustler* case proved over time to be a glaring exception. A posthumous retrospective concluded that in the course of his career Rehnquist had voted to support the First Amendment only twenty percent of the time.[30]

Despite all of these reasons for uncertainty and concern, the Court ruled in Hustler's favor. After a brief recitation of the background facts and prior proceedings, the Court described the issue before it: "This case presents us with a novel question involving First Amendment limitations upon a state's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most."[31] Falwell had asked the Court to endorse the principle that a public figure plaintiff had a viable IIED claim based on a published statement even if a reasonable person could not understand it as stating facts about him. "This," the Court flatly declared, "we decline to do."[32]

The Court then launched into a discussion about the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[33] The Court recognized that this robust exchange of ideas inevitably results in the harsh criticism of public officials and figures.[34] Nevertheless, citing and quoting *New York Times Co. v. Sullivan*, the Court

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[29] 425 U.S. 748 (1975).
[30] Geoffrey R. Stone, *Rehnquist's First Amendment*, HUFFPOST (Sept. 3, 2005, updated May 25, 2011), https://www.huffingtonpost.com/geoffrey-r-stone/rehnquists-first-amendmen_b_6771.html,
[31] *Hustler*, 485 U.S. at 50.
[32] *Id.*
[33] *Id.*
[34] *Id.*

reiterated that "vehement, caustic, and sometimes unpleasantly sharp attacks" were inherent in public discourse about them.[35]

The Court acknowledged that these principles do not render all criticism of such individuals immune from suit.[36] For example, a public official or public figure defamation plaintiff whose proofs meet the *Sullivan* actual malice standard can maintain a claim. In this connection, the Court emphasized that "[f]alse statements of fact are particularly valueless" in the constitutional scheme and do not contribute to the marketplace of ideas.[37] I will return to this "valueless falsehood" point shortly.

The Court then embarked on a discussion of the history of political cartoons and satire in American politics. The Court noted that satirical speech tends to be personally injurious by design: it deliberately distorts and exaggerates its target's features and mannerisms; it exploits unfortunate physical traits or embarrassing events; it offers a distorted, "slashing," and one-sided portrayal of the person and his or her conduct.[38] The Court quoted one political cartoonist's observation that satire is a "weapon of attack, of scorn and ridicule … [and] is usually as welcome as a bee sting."[39]

In the course of several paragraphs, the Court then recited examples of caustic and caricatured portrayals of numerous historical figures, ranging from Washington and Lincoln to New York City's William M. "Boss" Tweed and his ring of corrupt associates.[40] The Court focused specifically on the cartoons of Thomas Nast, celebrating him as "probably the greatest American cartoonist to date" and explaining that his drawings achieved their power through their "emotional impact," continuously going "beyond the bounds of good taste and conventional manners."[41] The Court concluded: "From the

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[35] *Id.*
[36] *Id.* at 51.
[37] *Id.* In United States v. Alvarez, 567 U.S. 709 (2012), the Court observed that this statement, and others like it in other opinions, should not be read to stand for the proposition that the First Amendment affords no protection to false speech.
[38] *Hustler*, 485 U.S. at 53-54.
[39] *Id.*, quoting LONG, THE POLITICAL CARTOON: JOURNALISM'S STRONGEST WEAPON, THE QUILL 56, 57 (Nov. 1962).
[40] *Hustler*, 485 U .S. at 54.
[41] *Id.*, quoting C. PRESS, THE POLITICAL CARTOON 251 (1981).

viewpoint of history it is clear that our political discourse would have been considerably poorer without [these cartoons]."[42]

It is important to note what the Court said next—and what it did not say. The Court observed that the Hustler parody was "at best a distant cousin" of the famous political cartoons of history—and "a rather poor relation at that."[43] The Court concluded, however, that it was difficult, if not impossible, to articulate a principle by which to distinguish one from the other.[44]

The Court ruled that the IIED standard of "outrageousness" did not supply such a principle. After all, it contained an "inherent subjectiveness" that would "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[45] The Court cited a substantial body of First Amendment precedent holding that the state cannot suppress or punish speech simply because some people find it offensive.[46]

This holding sufficed to dispose of the case. Having concluded that an essential element of a state law tort did not pass muster under the First Amendment, the Court had reached the terminus of its analytic project. The Court plainly got this part of its decision right. Think of it this way: if a state adopted a statute that made it a tort or a crime to engage in "outrageous speech," there is no question that the Court would find the law unconstitutionally vague and overbroad.

Even that reasoning, however, misses the fundamental point. What the Court does not say is that, in the case of satire, outrageousness is not a negative characteristic. Not all satire seeks to invoke outrage, but much does, so when we describe one as having this quality we have not identified a fault—we have simply placed the speech into a sub-genre. To put it differently, we do not protect satire *despite* its outrageousness; we protect it *because of* its outrageousness. Satire does much of its work through its outrageousness.

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[42] *Hustler*, 485 U.S. at 54.
[43] *Id.* at 55.
[44] *Id.*
[45] *Id*.
[46] *Id*.

The Court nevertheless proceeded to borrow the protections afforded by *New York Times Co. v. Sullivan*, holding that "public figures and public officials may not recover for [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'"[47] With respect to Falwell's libel claim, the jury had found that a reasonable person could not understand the satire to describe actual events or facts about him.[48] The jury therefore could not have found that those statements were false, let alone knowingly so.

The importation of the actual malice standard may have helped the Court reach the right result, but, to borrow Bernard Williams's trenchant phrase, it was "one thought too many."[49] As noted above, the plain unconstitutionality of applying an outrageousness standard to speech in and of itself resolved the question before the Court. The Court did not need to rewrite state tort law—adding a falsity element that did not exist, and then enhancing it to knowing falsity—to reverse the jury verdict.

The Court's analysis here missed yet another fundamental point about the nature of satire. What the Court did not say is that, in a literal sense, satire is always factually false in some respect, and knowingly so. These qualities inhere it the art form. Larry Flynt's confused deposition testimony notwithstanding, he obviously knew that Jerry Falwell had not engaged in seriatim acts of bestiality and incest in an outhouse over a glass of Campari—but satire operates precisely through that sort of counterfactual expression. Applying the actual malice standard to satire in an effort to tease out the value of the speech, and the reasons to protect it, makes no more sense than doing so with respect to works like *King Lear* or *The Brothers Karamazov* or *The Waste Land.*

The disconnection between the actual malice doctrine and satire becomes particularly clear if we consider the Court's decision in *Masson v. New Yorker Magazine*, *Inc.*[50] The Supreme Court there recognized that a public figure may be able to prove actual malice by showing that the defendant

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[47] *Id.* at 56.
[48] *Id.* at 57.
[49] Bernard Williams, *Persons, Character, and Morality*, in JAMES RACHELS (ed.) MORAL LUCK (1981).
[50] 501 U.S. 496 (1991).

knowingly fabricated statements and falsely attributed them to the plaintiff. Satire does this all the time. Jerry Falwell did not say any of the things Hustler attributed to him and Larry Flynt knew it, as did everyone who read the piece.

The Court's failures to say anything about satire's common outrageousness or its inherent knowing factual falsity are symptoms of a larger failing: the Court does not at all address how satire works or why it makes a distinctive contribution to the marketplace of ideas. Certainly, the Court expresses its admiration of and appreciation for satire, and particularly satirical cartoons (an odd emphasis given that the *Hustler* case did not involve one). The Court says nothing, however, about how or why satire deserves and requires the highest level of protection the First Amendment affords. In the next two sections of this article, I will try to provide the explanation that the Court does not.

II. MUD PIES: USEFUL UNTRUTHS

In a recent book,[51] philosopher Kwame Anthony Appiah explores the role of idealization in different disciplines. Relying heavily on the thought of Hans Vaihinger,[52] Appiah contends that an idealization is a form of "useful untruth."[53] He summarizes the argument this way: "Very often we can reasonably proceed as if what we know to be false is true *because it is useful for some purpose to do so*."[54]

Appiah offers a number of examples and stories, including this one. In the mid-twentieth century, the neurophysiologist Warren S. McCulloch and the mathematician Walter Pitts set out to try to develop a computational theory of the human brain.[55] They developed a model of how neurons could carry out some of the logical functions that a brain had to be able to perform.[56] There was just one problem with the model: it was not true.

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[51] KWAME ANTHONY APPIAH, AS IF: IDEALIZATION AND IDEALS (2017).
[52] HANS VAIHINGER, THE PHILOSOPHY OF AS IF: A SYSTEM OF THE THEORETICAL PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND (1925).
[53] Appiah, *supra* note 51, at xii.
[54] *Id*. at 3 (emphasis in original).
[55] *Id*. at 28.
[56] *Id*. at 33.

McCulloch and Pitts recognized from the beginning that "actual neurons had properties very different from those of [their] neurons."[57] The model therefore did not necessarily achieve its effects the same way real neurons did.[58] The model was nevertheless useful: it provided techniques for mimicking the functions of the mind—even if it failed to express those functions through technically identical means.[59]

The model developed by McCulloch and Pitts certainly qualified as untrue. Whether it also qualified as useful, however, depended on the purposes for which they intended to use it. Given their purposes, the model proved to be a helpful idealization, a useful untruth.

There is a conceptual connection between what Appiah calls useful untruths and what lawyers call "legal fictions," which Lon Fuller defines as "false statement[s] recognized as having utility."[60] Consider, for example, the doctrine of "constructive notice," where the law assumes that someone received notice of something even though we understand that in fact he or she almost certainly did not.[61] The person actually received *no* notice, but pretending that he or she did serves some purpose within our justice system.

The most influential model governing our First Amendment jurisprudence—the marketplace of ideas metaphor used by Justice Holmes—is a legal fiction.[62] That model imagines a world where ideas have equal opportunity to compete, where we encounter them at a pace that allows for thoughtful consideration, where we put aside our preconceptions and prejudices and evaluate ideas rationally and on their merits, and where truth prevails over falsehood and good ideas triumph over bad ones. Of course, in

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[57] *Id*.
[58] *Id*.
[59] *Id*. at 34.
[60] LON L. FULLER, LEGAL FICTIONS 9 (1967). Vaihinger's work also deeply influenced Fuller. *Id.* at 94 ff.
[61] *Id*. at 24-25.
[62] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

reality the exchange of information and opinions works quite differently, when it manages to work at all.[63]

The marketplace of ideas model nevertheless has terrific utility. Among other things, indulging the fiction saves us from competing models in which the government picks and chooses the information and ideas we may express and entertain. The marketplace of ideas presents an idealized vision of how free expression operates, but it does not carry with it the perils of censorship and prescribed orthodoxy that inhere in other models.[64]

Useful untruths take different forms and serve different purposes. In the course of cataloging them, Appiah discusses the activity that philosopher Kendall Walton calls "make-believe." Appiah provides the example of a child in a garden who forms a cake out of mud and invites us to play. She asks us "to join her in treating something that she knows is not a cake *as if* it were."[65] Of course, she does so only in certain respects: she may pretend to put it in an oven and will blow on it as if it needed cooling, but she will not take a bite from it.[66]

Walton argues that such childhood make-believe prepares us for "the very grown-up activity of responding to the representational arts: fiction, storytelling, drama."[67] Walton writes, "In order to understand paintings, plays, films, and novels, we must look first at dolls, hobbyhorses, toy trucks,

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[63] See Leonard M. Niehoff and Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22 Mich. J. Race & Law 243 (2017).

[64] Vaihinger provides the analogous example of Adam Smith's assumption that "all human actions are dictated by egoism." As Vaihinger observes, Smith understood that this constituted a fiction. He also recognized, however, that given the vast complexity of causal factors in human behavior any model that attempted to account for them all would fail. *See* Vaihinger, *supra* note 52, at 15. Smith and Holmes thus adopted fictional and simplified models of human behavior in furtherance of different purposes, one explanatory and the other prescriptive.

[65] Appiah, *supra* note 51, at 105.

[66] *Id*.

[67] *Id.* at 106.

and teddy bears." [68] The imaginative games children play are "more transparent and easier to understand than their more sophisticated successors,"[69] which makes them helpful to understanding the subtler and less overt make-believe activities of adults.[70] These childhood and adult activities share a deep resemblance, Walton argues, because it turns out that dolls and stuffed animals serve as props to stimulate make-believe in a way that prepares us later to allow Michelangelo's *David*, *Gulliver's Travels*, and *Hamlet* to do so.[71]

Walton cautions that describing these activities as "games" and "make-believe" does not imply frivolity. To the contrary, they can place significant intellectual demands upon us. Those who find reading *One Hundred Years of Solitude*, or *Finnegans Wake*, or the short stories of Borges a daunting undertaking do so in part because of the elaborate and intricate make-believe they require.

Further, games and make-believe "have a profound role in our efforts to cope with our environment."[72] They can help us escape it, understand it, and imagine alternative realities to it. At the extreme end, Walton cites the grim example of children at the Auschwitz concentration camp playing a game called "going to the gas chamber" as a means of attempting to deal with their horrific circumstances.[73]

Make-believe can also assist us in critiquing our environment. Orwell's *1984*, Bradbury's *Fahrenheit 451*, and Atwood's *The Handmaid's Tale* invite us into fictional worlds that function according to their own rules and norms. We engage with that alternative reality at least in part in order to assess how it resembles or differs from our own—and perhaps toward the end of preventing it from materializing.

Of course, as with mud pies these grown-up acts of make-believe only go so far. When we feel moved by Horatio's loyalty to Hamlet, we react as if

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[68] KENDALL WALTON, MIMESIS AS MAKE-BELIEVE: ON THE FOUNDATIONS OF THE REPRESENTATIONAL ARTS 11 (1990).
[69] *Id.* at 12.
[70] *Id.*
[71] *Id.* at 51.
[72] *Id.* at 12.
[73] *Id.*

the two young men on the stage share a deep personal affinity, even though they may not.[74] When we weep upon learning of Ophelia's death, we react as if the girl we last saw wallowing in her madness has drowned, even though no such thing occurred.[75] At some level, however, we remain aware of the artificiality of the prompt.[76] This awareness allows us to transition to a different feeling relatively quickly if someone says to us (or we say to ourselves) "it's just a play and they're only actors."

One might argue that make-believe is valuable because, although literally false, it gets at some larger truth. Theologian Janet Martin Soskice makes a similar argument with respect to metaphors, which she describes as being "simultaneously true and false."[77] Phrases like "the joint is jumping" or "the lake is sapphire" are literally false but get at different truth that we would struggle to express without the literary device, if we could do so at all.[78] In the same vein, Vaihinger declares that "the nature of the fictive judgment is peculiarly complex: it is negative insofar as the equation of A and B is clearly stated to be invalid; it is positive insofar as the possibility of treating this non-valid judgment as nevertheless valid is affirmed."[79] We might say that make-believe is not about truth but Truth.

While this may accurately describe some forms of make-believe it seems to me an unnecessary and potentially hazardous move. Make-believe draws us into an imaginative process that has value independent of truth seeking. This framing also may send us on Quixotic searches for larger truths that do not fairly inhere in the make-believe. Finally, treating truth finding as the ultimate source of validation may entice us into dismissing, punishing, or suppressing make-believe that we persuade ourselves does not further that end. Make-believe serves many purposes that make it useful even when it does

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[74] Appiah, *supra* note 51, at 107-108.
[75] *Id.*
[76] *Id.* at 108.
[77] JANET MARTIN SOSKICE, *Metaphor and 'Words Proper,'* in METAPHOR AND RELIGIOUS LANGUAGE (1985).
[78] *Id. See also* DAVID TRACY, BLESSED RAGE FOR ORDER 129 (1975) ("[W]hen a good metaphor 'hits' us we feel that we have discovered something really new about reality; something which we cannot without loss of meaning translate into strictly literal terms").
[79] Vaihinger, *supra* note 52, at 194.

not lead to epiphanies of grand truths or the revelation of "things hidden since the foundations of the world."[80]

With this general overview of the philosophy of useful untruths and make-believe before us, we return to the *Hustler* case to explore the theory's explanatory power. What does this philosophy tell us about what satire does and why it makes a unique contribution to public discourse? How does this philosophy help us understand where the Court went wrong? What guidance does it offer for future directions in the law?

III. OUTHOUSES: WHY WE PROTECT SATIRE

Satire works counterfactually, inviting us to think about false propositions *as if* they were true.[81] In Walton's language, satire serves as a "prop" to stimulate our make-believe: we imagine a world in which the represented falsehoods are true, and then try to figure out what to make of it. As noted above, this can serve a variety of purposes: to compel us to think in complex and multi-dimensional ways; to help us cope with our environment; to aid us in critiquing our present situation; and so on.

Satire has other distinctive virtues as well. It often does its work through multiple devices (words, images, humor) that render it particularly engaging

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[80] HOLY BIBLE (ENGLISH STANDARD VERSION), Matthew 13:35 ("This was to fulfill what was spoken by the prophet: 'I will open my mouth in parables; I will utter what has been hidden since the foundation of the world'").

[81] The online Oxford Living Dictionary defines satire as "the use of humor, irony, exaggeration, or ridicule to expose and criticize people's stupidity or vices, particularly in the context of contemporary politics and other topical issues." OXFORD LIVING DICTIONARY, https://en.oxforddictionaries.com/definition/satire. It defines parody as "an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect." *Id.* at https://en.oxforddictionaries.com/definition/parody. A given work could therefore be one or the other or both. The Hustler piece fell into this last category: it was a parody of the Campari advertisement, and a satire of Jerry Falwell (and perhaps other religious leaders). I focus here on satire, but much of the argument that follows applies with equal force to parody.

and compelling.[82] It frequently conveys a great deal with ruthless efficiency: a single satirical cartoon can communicate ideas that would require paragraphs of words to express, and to express less memorably and interestingly, if direct declarative propositions could express them at all. Much satire also appeals to an array of audiences of varying ages, races, ethnicities, socioeconomic conditions, and educational backgrounds. Its capacity for broad appeal helps account for the tremendous popularity of satirical publications like *The Onion* and television programs like *Saturday Night Live* and *The Colbert Report.*[83]

Furthermore, satire invites us into a deliberative process quite different from that prompted by direct propositions. If I seriously argue that the impoverished Irish should solve their economic problems by selling their children to the rich English for food, then you will respond by questioning my premises, challenging my conclusion, and perhaps doubting my sanity. If I satirically argue for such a practice, then you will respond by asking yourself whether your nation has taken an analogously heartless attitude toward the poor.[84] The latter process also commonly has a more open texture and invites different questions: What is the author saying? What does he mean? Do I think the comparison and proposed connection between the real and imagined worlds is valid? In what way? Is it fair? How does this satire want and expect me to respond?

As with mud pies and *Hamlet*, we engage in satire's activities of deliberation and make-believe without losing touch with reality. Appiah observes that because "our minds are not unified" we have the capacity to

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[82] Ironically, the Supreme Court noted in passing the distinctive "emotional impact" of Thomas Nast's cartoons without pausing to consider how he achieved it or why it mattered. *See* Hustler, 485 U.S. at 54.

[83] A 2014 report by the Pew Research Center found that 62% of online adults had heard of The Colbert Report, as opposed to 53% for NPR, 34% for the Economist, and 31% for Buzzfeed. *See* Jeffrey Gottfried and Monica Anderson, *For Some, the Satiric Colbert Report is a Trusted Source of Political News*, PEW RESEARCH CENTER (December 12, 2014, http://www.pewresearch.org/fact-tank/2014/12/12/for-some-the-satiric-colbert-report-is-a-trusted-source-of-political-news/.

[84] JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF THE POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL FOR THE PUBLICK (1729).

"work, not with a single picture of the world, but with many."[85] So it goes with satire: we simultaneously imagine the world it portrays and remain grounded in the one we have. We can at the same time think of Stephen Colbert as an ultraconservative nitwit while understanding that he is neither.

Indeed, satire creates an imagined world that maintains an explicit connection to the world in which we live. It targets something in our world, often making a person, or a political party, or a policy, or an idea look ridiculous. Or, more properly, satire shows that its target *is* ridiculous and leaves any dissenting voices to try to come up with counterargument.

The Hustler satire puts all of these dynamics on display. It used a rich array of devices to achieve its end. It gave readers a blaring headline, a layout that parodied a familiar advertisement, images of a smiling Falwell and a Campari bottle with a glass beside it, and a text that lampooned the sophisticated double entendre of the "first time" by gleefully scrubbing all of the subtlety right out of it. Its humor does not appeal to everyone, but we could say as much about a great deal of literature that we nevertheless deem valuable. Do we think the average person of our time rolls over in peals of laughter at the musings of Sir John Falstaff?

The Hustler satire may provoke not just a grin and a grimace, but questions. What is its point—if it has one? To make fun of a self-righteous preacher who condemns the magazine you are reading? To suggest he is a hypocrite? To imply that all pompous moralists are closet libertines? To lampoon the genteel sexuality of the Campari ads, or of ads generally? All of the above? Something else altogether?

I certainly do not mean to suggest that satire moves us to sit back, rub our chins, and ponder things at length—although some does. A great deal of satire inspires a quick, spontaneous reaction that we would struggle to explain, as we would a gag or a joke. That our earlier experiences with make-believe have conditioned us to allow satire to do its work rapidly, and maybe even unconsciously, does not diminish its value.

If the Hustler satire does inspire us to laugh or smile, it likely does so through its stunning outrageousness. We catch Justice Rehnquist in a bit of unconscious hypocrisy here. On one hand, he notes that the cartoons of

[85] Appiah, *supra* note 51, at 110.

Thomas Nast had such a powerful effect because they went "beyond the bounds of good taste and conventional manners." [86] On the other hand, he describes the Hustler satire as "at best a distant cousin of the political cartoons described above, and a poor relation at that."[87] One wonders. At a family gathering of those who shatter the boundaries of decorum, perhaps Larry Flynt sits at the head of the table.

The outrageousness of the Hustler piece also clearly signals that readers should receive it as satire. Indeed, taking the ad literally would require an Olympian level of unthinking gullibility. As additional insurance against misunderstanding, the magazine *twice* explicitly identified it as a parody, which, under the circumstances, seems almost like a satire on superfluous legal disclaimers. As a general proposition, satire greets us this way, as being precisely what it is, and we do not mistake it for anything else. To borrow a felicitous image used by Justice Scalia in a very different context, some art forms come to us as a wolf in sheep's clothing, but satire is a wolf that comes as a wolf.[88]

Close cases may arise. From time to time, readers have mistaken satirical pieces in the *New Yorker* or *The Onion* for news reports,[89] although this may say more about the current state of human attentiveness than it does about anything else. In any event, a straightforward analysis that takes into account context, the language used, and the common sense that God gave us should generally allow courts to know satire when they see it.

A determination that the piece in question qualifies as satire should end the inquiry. For the reasons described above, satire makes a unique and important contribution to the richness of public discourse. Just as importantly, the state has no significant interest in punishing it. Defamation law advances the state's interest in protecting the reputations of its citizens from the injury resulting from false statements about facts in the world. Satirical portrayals of alternative, imagined worlds do not pose the same threat. IIED advances the

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[86] *Hustler*, 485 U.S. at 54.
[87] *Id.* at 55.
[88] Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).
[89] *See*, *e.g.*, Kevin Fallon, "Fooled by The Onion: 9 Most Embarrassing Fails," The Daily Beast (last visited March 20, 2018) https://www.thedailybeast.com/fooled-by-the-onion-9-most-embarrassing-fails?ref=scroll.

state's interest in protecting its citizens from outrageous conduct that serves no legitimate purpose. Satire serves multiple purposes vital to an informed, engaged, and intellectually exploratory citizenry. That satire will hurt the feelings of some of its targets makes no constitutional difference; publishing defamatory but *true* statements about someone will have the same consequence, and the First Amendment inarguably protects those communications.

All of these considerations got lost in the Court's contorted reasoning. The Court instead got to the same destination through the labyrinthine process of (a) eliminating an element of the tort of IIED, (b) adding a new element, (c) elevating the standard under that new element, and (d) applying a jury finding, with respect to a different claim, to show that Falwell had not satisfied the newly added and elevated standard. I understated matters earlier: this was not one thought too many; it was several.

The Supreme Court got closer to the right analysis a couple years later when it decided the *Milkovich* case, also authored by Chief Justice Rehnquist.[90] There the Court held that rhetorical hyperbole, figurative expression, and similar forms of speech are constitutionally protected. Interestingly, and not coincidentally, rhetorical hyperbole and figurative expression are among satire's favorite voices.

Still, the *Milkovich* decision includes some deep confusions and flawed arguments.[91] More importantly for our purposes, it also suffers from the same weakness I have identified in the *Hustler* case: it analyzes rhetorical hyperbole and other subjective expressions by reference to what they are *not*: they are *not factual* in nature and so the plaintiff cannot prove them false. *Milkovich*, like the *Hustler* case, fails to explain the positive benefits of the very speech it protects. This is deeply unfortunate because many of the things that *Milkovich* protects—like political viewpoints expressed on the op-ed page of a newspaper—make critical contributions to public discourse and plainly warrant the highest level of First Amendment protection.

It is true in a technical sense that the First Amendment grants a negative right—a right to be free from government abridgment of speech. This negative

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[90] *See* Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

[91] *See* Leonard M. Niehoff, *Opinions, Implications, and Confusions*, COMMUNICATIONS LAWYER Vol. 28:3 (2011) at 19.

structure may lead a court to explain First Amendment protections by reference to what the state may *not* do and by highlighting the qualities of speech that end up sheltering it by their *absence.* For example, a court might find that a plaintiff could not maintain a defamation claim against the defendant because the statement at issue was not defamatory, or was not false, or was not about the plaintiff, or was not made by the defendant—without ever breathing a word about the virtues of the speech.

The most important and influential of the Court's First Amendment opinions, however, have stressed the positive values of speech. Holmes's storied marketplace of ideas model has very little to say about the bad things that happen when you suppress speech and a great deal to say about the good things that happen when you liberate it. Louis Brandeis's famous concurring opinion in *Whitney v. California*[92] points out many of the evils of repression: "repression breeds hate [and] hate menaces stable government."[93] But it also reads like an inventory of all the important positive values speech serves:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[94]

What is the function of speech generally? Justice Brandeis tells us: " It is the function of speech to free men from the bondage of irrational fears." We find nothing even remotely like this in the *Hustler* case, even though the Court plainly thought that satire has a function and an important one at that.

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[92] 274 U.S. 357 (1927).
[93] *Id.* at 375.
[94] *Id.*

Furthermore, even though the Court's decision in *Hustler* provides a valuable tool for those who defend satire in legal actions, at bottom it reflects a fundamental misunderstanding of what satire is, why it engages us, and how it makes a distinctive and indispensable contribution to public discourse. The opinion is practically helpful, but in a deep sense misguided. Ironically, we might say that the *Hustler* decision itself is a useful untruth.

CONCLUSION

Satire won the day in the *Hustler* case, but it deserves a better monument to celebrate its victory than the opinion it got. Perhaps someday the Supreme Court will honor satire in a decision that explains and explores its value and acknowledges some of the positive reasons for its protection. To indulge in a bit of make-believe, perhaps that opinion will even throw a few mud pies at the public officials and public figures who want to use the civil justice system to suppress an art form that teaches us to think, laugh, and wince, all at the same time.

I suppose this an unlikely development, but who knows?

There is a "first time" for everything, so to speak.