Drawing the Line: An Absolute Defense for Political Cartoons

BY CHRISTOPHER LAMB

For the first time, in *Hustler Magazine v. Jerry Falwell* in 1988, the U.S. Supreme Court made the history of political cartooning central to a decision. While ruling on a magazine parody, the Court said that caricature could not be actionable unless it contained a false statement of fact that was made with actual malice: "Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages without any showing that their work falsely defamed their subject."²

*Hustler* dealt with an advertisement parody, not with a political cartoon. The two are not synonymous, and the distinction is important. While *Hustler* (and other First Amendment cases) would indeed influence the Supreme Court's decision in any case involving a political cartoon, it does not guarantee the same result. Although state courts have determined that cartoonists have considerable freedom to satirize people and issues, this, too, does not guarantee that
Jerry Falwell talks about his first time.

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

INTERVIEWER: We meant the Campari.

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

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the Supreme Court will automatically reach the same conclusion. Lower courts must defer to the Supreme Court, not vice versa. Without direct precedent, one cannot presuppose any decision by the Supreme Court, and, since 1907, the Court has not decided on the matter of the constitutional freedom of cartoonists.

While not ruling directly on a cartoon, the Court has, nevertheless, fashioned a formidable defense for the cartoonist. The Court has consistently maintained that criticism of public affairs—or political speech—be protected under the First Amendment. Additionally, the Court has emphasized that opinion and rhetorical hyperbole are generally considered protected expression. When a statement of “opinion” on a matter of public concern reasonably implies false and defamatory facts regarding public figures or private figures, the plaintiff in a libel suit must prove the statement was made with “actual malice,” or knowledge of the falsity or reckless disregard for the truth. For a political cartoonist, however, one newspaper editor said: “That’s not a definition of libel; that’s a job description. That’s what they’re supposed to do.”

This article argues that political cartoons, as political speech, should be accorded the highest level of First Amendment protection and outlines a legal framework for the protection of political cartoons in this country. Prominent First Amendment decisions by the Supreme Court, such as New York Times v. Sullivan and Hustler v. Falwell, are reviewed, then the evolution of lawsuits against cartoonists is described and the reliance of lower courts on Supreme Court decisions is discussed. The standard expressed here allows cartoonists to contribute to the dialogue of ideas free of the threat of a lawsuit. It does not, however, apply to drawings about private figures not involved in matters of public concern.

In 1964, the U.S. Supreme Court constitutionalized the libel standard. In New York Times v. Sullivan, the Court held a public official could not recover damages in a libel action brought against a critic of his official conduct unless it could be proved, by clear and convincing evidence, “that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” The Court said it thought this standard would avoid self-censorship by the press. Writing the opinion in New York Times, William Brennan said that our tradition of free press meant there should be a commitment to robust speech and that this might include caustic and free attacks on public officials.

In Gertz v. Robert Welch in 1974, the Court defined public figures as either people of widespread fame or people who have injected themselves into the debate of a public issue for the purpose of affecting its outcome. Private people, on the other hand, have fewer opportunities to counter false statements and therefore needed greater protection from the law.

The Court also said opinion was protected expression: “Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscious of judges and juries but on the competition of other ideas.”

In Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, which was decided the same day as Gertz, the Court said the use of the word “blackmail” was protected expression because “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole.” The Court, in Greenbelt Publishing Association v. Bresler, had earlier recognized that “rhetorical hyperbole,” or that which is exaggerated beyond belief, is protected expression and must be considered within its context.

While pure opinion is protected expression, the courts have not permitted the same freedom to “mixed” opinion. The Restatement (Second) of Torts defined pure opinion as that which is simply expressed and based on disclosed or assumed non-defamatory facts. Mixed opinion, on the other hand, is defined as those opinions apparently based on facts regarding the plaintiff or their conduct that have not been stated by the defendant or assumed to exist by the parties to the communication.

The Supreme Court expanded First Amendment protection in Philadelphia Newspapers, Inc. v. Hepps, where it held that a plaintiff who is a private figure must prove the falsity of a defamatory statement in a matter of public concern. To provide “breathing space” for true speech on matters of public concern, the Court said it was necessary to insulate even demonstrably false speech from liability.

In Milkovich v. Lorain Journal, the Court rejected the dicta in Gertz that provided absolute protection to opinion. It suggested that editorials, columns, and other expressions of opinion should not be constitutionally protected if they are based on information that is either incorrect or incomplete. The Court emphasized that it would protect statements about public concern that cannot be proven false. While opinions with provably false assertions are not protected, that which is clearly satirical, hyperbolic, or rhetorical is.

For purposes of a defense for cartoonists, the most important case is Hustler v. Falwell. Hustler
magazine published a parody of a Campari advertisement, where celebrities talk about the first time they drank Campari wine. In the magazine parody, Reverend Jerry Falwell said his “first time” involved not only Campari, but also included his first sexual experience, which involved incest with his mother in an outhouse. Falwell sued Hustler publisher Larry Flynt and the magazine for invasion of privacy, libel, and the intentional infliction of emotional distress. The trial court granted summary judgment for Flynt on the issue of invasion of privacy. The jury, applying the New York Times standard, found that there was no libel because the parody “could not reasonably be understood as describing actual facts.” However, the jury found that publication of the parody constituted intentional and reckless misconduct, and awarded Falwell $200,000 in damages. The Fourth Circuit Court of Appeals upheld the verdict.15

The U.S. Supreme Court unanimously overruled the appeals court. The Court said the state’s interest in protecting public figures from emotional distress was not sufficient to deny First Amendment protection that is intended to inflict emotional injury when that speech could not reasonably have been interpreted as stating actual facts about the public involved. The Court said Falwell could not collect damages because the ad parody could not be believed.16 In Hustler, the Supreme Court took pains to emphasize that it was dealing with what it termed “political speech,” which is entitled to the highest degree of protection under the First Amendment. Moreover, the Court said it was deciding the issues on the facts of the case, which dealt with a “public figure” claiming injury from political speech, not a company, such as Campari, claiming the parody was a copyright infringement.17

In recent years, however, the Supreme Court has clarified the difference between what is copyrighted material and what is fair use of that copyright. For instance, the Court said that a rap group’s graphic parody of the song, “Oh, Pretty Woman,” was a fair use of copyright, and thus protected expression. In Campbell v. Acuff-Rose Music, Inc., 2 Live Crew recorded “Pretty Woman” to satirize the original work. In Campbell, the Court held that 2 Live Crew’s parody was fair use even though it was of a commercial nature. It said that 2 Live Crew took the heart of the original song and created a distinctive new song that was not excessive in light of the song’s parodic purpose. If a work targets another for humorous or ironic effect, it is by definition a new work.18 Well-known products are highly attractive subjects for parodists, who engage in social or humorous commentary, often using common trademarks as the object of their work. For a parody of a trademark to be effective requires it be a well-known trademark.19 The doctrine of fair use gives protection to the parodist. While “noncommercial” parody receives full First Amendment protection, “commercial” parody does not. If a commercial parody targets a work for creating an effect that is humorous or ironic, the parody is considered an entirely new work, and thus receives full protection. Finally, parodies that involve political commentary or matters of public concern also are afforded con-
siderable protection. This applies directly to political cartoons.

In 1808, English chief justice Lord Ellenborough pronounced the doctrine of fair comment, which protected pure opinion and comment on public affairs. Fair comment helped cartooning to thrive in the second half of the nineteenth century in magazines such as Harper's Weekly and comic weeklies such as Puck and Judge. Their impact was so powerful that newspapers hired popular cartoonists during circulation wars. Politicians tried to stifle the cartoonists with legislation. Between 1895 and 1915, five states, New York, California, Pennsylvania, Indiana, and Alabama, considered anti-cartoon legislation. When New York City political boss Thomas Platt presented an anti-cartoon bill in the Legislature, cartoonist Homer Davenport compared him with the ignominious "Boss" Tweed in the New York Journal and Advertiser. The bill was summarily killed. Similar bills also were killed in Indiana and Alabama. California and Pennsylvania passed laws restricting the expression of cartoons, but neither achieved their intent.

In 1907, the U.S. Supreme Court ruled directly on a political cartoon for the only time in U.S. history. The Court in Patterson v. Colorado affirmed the contempt conviction of a newspaper editor for publishing editorials and a cartoon in his newspaper that impugned the reputations of judges on the Colorado State Supreme Court. The cartoon was called "Lord High Executioner" and portrayed the chief justice beheading some public officials. Another cartoon, "The Great Judicial Slaughter-House and Mausoleum," implied that justices were controlled by political bosses. The following year, President Theodore Roosevelt urged that the editors of the Indianapolis News be indicted for criminal libel for publishing editorials and cartoons that said that influential Americans profited from the building of the Panama Canal. The charges were dismissed when a federal judge in Indiana refused to extradite the editors to Washington, D.C.

In 1911, a cartoon, "City Farm," which implied that a Massachusetts mayor was hostile toward the conditions of the poor, was found to be "plainly defamatory." The cartoon showed emaciated inmates being brought a tray with a little bit of food and a teapot. The tray was labeled, "Poor Food," "Rancid Butter," and "Shadow Tea." It was accompanied by a statement that a mayor had closed a charity board and replaced it with another that was hostile to the needs of the poor. The drawing urged voters to vote against him in the next day's election in the name of "humanity." The Massachusetts Supreme Judicial Court said that the cartoon held the mayor "up to ridicule and contempt" and harmed his reputation.

During World War I, cartoons in the socialist magazine, The Masses, were considered seditious and prohibited from the mails under the Espionage Act. Judge Learned Hand agreed with the magazine. In a decision that foreshadowed the development of greater civil liberties in this country, he said: "To (equate) agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the intolerance of all methods of political agitation which in normal times is a safeguard of free government." Judge Hand's decision, however, was overturned on appeal.

Two cartoonists on The Masses were among those personally indicted under the Espionage Act but were ultimately freed after two hung juries. The offending cartoons included a drawing by Henry Glittenkamp of a skeleton measuring an Army recruit, and one by Art Young called "Having Their Fling," which showed an editor, capitalist, politician, and minister in a war dance being led by the devil. Two German-American cartoonists, who criticized U.S. participation in the war, were arrested and charged as spies in early 1918.

Cartoonists found little consistency in the courtroom during the next several decades. In 1921, the Los Angeles Record published a cartoon depicting the city's police chief holding a halo over his head with one hand and taking a bribe with the other. The California Supreme Court ruled that while the cartoon obviously accused the police chief of accepting bribes, it was still protected expression.

When a meeting between Boston Mayor James Curley and Boston Telegraph publisher Frederick W. Enright in 1926 resulted in a fist fight, Enright published a cartoon showing Curley in prison garb behind bars with the caption, "Sober Up, Jim." Though Curley had once served a prison term for taking a civil service examination for a friend, Enright was prosecuted for criminal libel because it was proven that Curley and Enright had a fight prior to the publication of the cartoon and thus the cartoon was published out of ill will. In a 1936 case, Doherty v. Kansas City Star, the Kansas Supreme Court held that a cartoon that implied that the plaintiff charged exorbitant gas rates was capable of defamatory meaning.

The Supreme Court began its process of creating a more unified and coherent libel law in 1964. Since New York Times v. Sullivan, the Court has provided a wide latitude of freedom when criticizing the conduct of public officials. In Greenbelt Cooperative Publishing Association v. Bresler and National Association of Letter Carriers v. Austin, the
Court said rhetorical hyperbole, or an exaggerated statement for effect, was protected expression.
Political cartoons are by their nature, opinions, or "rhetorical hyperbole," in other words, an artist's satiric interpretation of a news story.

The "rhetorical hyperbole" defense has regularly been applied to political cartoons. A California court first applied the "rhetorical hyperbole" protection to a political cartoon in Yorty v. Chandler. After Los Angeles Mayor Sam Yorty expressed an interest in the position of Secretary of Defense in President-elect Richard Nixon's cabinet, Los Angeles Times cartoonist Paul Conrad drew Yorty talking on the phone, saying, "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!" while four orderlies prepared to slip a straitjacket on him (see page 5). Yorty argued that the cartoon said he was suffering from insanity and should be placed in a straitjacket. The court, however, said that even the most careless reader would perceive the cartoon as "no more than rhetorical hyperbole." In Yorty, the court said:

A political cartoon which falsely depicts a public officials selling franchises for personal gain, or a judge taking a bribe, or an attorney altering a public record, or a police officer shooting a defenseless prisoner, will not be exempt from redress under the laws because the charge is depicted graphically in linear form rather than vertically in written statement. . . . On the other hand, a cartoon which depicts a fanciful, allegorical, anthropomorphical, or zoomorphical sense will not be considered libelous because it depicts a public person as a flower, a block of wood, a fallen angel, or an animal.39

The Yorty court did, however, indicate a cartoon could be libelous if it could reasonably be interpreted as an accusation of criminal activity.40 This is, however, problematic: satire is not literal truth but rhetoric. If a cartoon is considered opinion by the trial court judge, the case will be dropped; but the question of whether or not an artist knew what he drew was false is a decision for a jury.41

Other courts have since applied the "rhetorical hyperbole" defense in ruling that cartoons are protected expression. In Keller v. Miami Herald, for instance, a Florida court ruled that a cartoon was "pure opinion." The plaintiff sued the Miami Herald over a cartoon (pictured at left) that exaggerated the conditions of a nursing home, which was closed by the state and its proprietors were investigated for criminal misconduct. The nursing home was identified in the cartoon with a condemnation notice. Also included were three men depicted as gangsters, each carrying a sack with a dollar sign on it, and one of the men was saying, "Don't worry, boss, we can always reopen it as a haunted house for the kiddies." The court, in granting a summary judg-

![Cartoon of Miami Herald](https://example.com/cartoon.png)

"Don't Worry, Boss, We Can Always Reopen It as a Haunted House," Jim Morin, Miami Herald, 29 October 1980
ment for the defendant, said that the facts surrounding the case "had been well-publicized so that the newspaper's readers were aware of the series of events upon which the cartoonist based his opinion."42

William Loeb, the late publisher of the Manchester Union Leader, sued the Boston Globe over a cartoon called, "The Thoughts of Chairman Loeb," which pictured the publisher, eyes askew, with a cuckoo springing from his forehead. While the cartoon was obviously literally incorrect, the court decided it was "an opinion and not a diagnosis."43 A Massachusetts court used the same rationale in King v. Globe Newspaper Co. It said a cartoon depicting the state's governor dressed in gangster attire while being handcuffed to a police officer, who was reading a list of the governor's controversial political appointments to a desk sergeant, could not reasonably be interpreted as saying the governor was criminal or unethical.44

Other political cartoons have been similarly protected. An Ohio county administrator sued the Dayton, Ohio, newspapers over a series of news stories, editorials, and cartoons (see above) that depicted her as a liar, skunk, rat, and witch, but the court found it protected expression, regardless of their viciousness.45 In Palm Beach Newspapers, Inc. v. Early, a Florida appellate court called a cartoon mean-spirited, but said it was "rhetorical hyperbole" and thus protected expression.46 In Russell v. McMillan, a court ruled that a cartoon was "clearly a symbolic expression of the opinion espoused in the accompanying article and editorial."47 Restatement of Torts said that if all a cartoon does "is to express a harsh judgment upon known or assumed facts, there is no more than an expression of opinion of the pure type."48

In granting summary judgment for a newspaper that published a cartoon critical of a ski resort, a Vermont court said the drawing expressed a harsh judgment upon known or assumed facts, and was thus protected.49 The cartoon satirized a ski resort that wanted to make snow using sewer waste (see page 9). The state Supreme Court of Oklahoma said a cartoon was not libelous in Miskovsky v. Oklahoma Publishing Co. The Oklahoma City Times published a cartoon that inferred that a candidate for the U.S. Senate influenced another man to ask his opponent if he were a homosexual during a press conference (see page 10). The court said that the newspaper did not know that the cartoon was false.50

While courts have said that cartoons that imply defamatory facts were not protected, they have been reluctant to punish cartoons that do just that. In La Rocca v. New York News, the court said that should there be a minor mistake of fact in an allegedly libelous cartoon, a court may still grant a summary judgment in favor of the cartoon. In La Rocca, two
policemen sued a newspaper for libel, alleging that an article, editorial, and cartoon defamed them. The police officers arrested a teacher for assault and escorted him from the school. In a cartoon the next day, the officers, who were drawn wearing dunce caps, were shown handcuffing the teacher in the classroom. The arrest did not occur in the classroom, yet the court said the mistake was minor and unrelated to the gist of the alleged libel.51

But in Buller v. Pulitzer Publishing Company, a cartoon, which was based on an article, portrayed a psychic as lacking integrity. The Missouri Court of Appeals determined that the article and cartoon that injured the reputation of the psychic, a private figure, were libelous per se. The court said that if the psychic's business were a matter of public concern, there would be no libel.52 There is an important distinction between Buller and other suits against cartoonists. It involved a private figure, not a public figure or public official, who was not involved in a matter of public concern.

Despite repeated assurances from the courts that cartoons are protected expression, lawsuits against cartoonists proliferated during the 1980s.53 As lawsuits increased, so did the cost of defending them. Libel suits do not have to be effective in court to chill expression. Factors such as the high cost of both libel insurance and litigation can be a greater deterrent for cartoonists than a jury verdict.54

While Hustler v. Falwell did not directly concern a political cartoon, but rather a magazine parody, the decision had ramifications for cartoonists. If "the emotional distress" claim had been accepted by the Supreme Court, it would have been "tantamount to the end of commentary in this country," one cartoonist said.55 In an amici curiae brief to the Supreme Court, the Association of American Editorial Cartoonists said that political satire was uniquely vulnerable to this tort "because satire's instrument is the direct, often crude and tasteless, ad hominem attack." The Court said that the Hustler caricature was at best a distant cousin to the political

“Uh-Oh—Looks Like the Snow-Making Machines are Clogged Again,”
Tim Newcomb, Barre-Montpelier Times-Argus, 4 April 1985
cartoon, that if it were possible to separate one from
the other, public discourse would not suffer by
penalizing Flynt, "but we doubt that there is any
such standard." In rejecting the tort of intentional
infliction of emotional distress, the Court said that a
contrary decision would subject political cartoonists
and satirists to damages without showing that their
work falsely defamed their subject.\textsuperscript{56} \textit{Hustler}
affirmed the freedom of cartoonists and must be
credited, in some part, with ending the trend of law-
suits against cartoonists.\textsuperscript{57}

Another issue that may eventually have to be
addressed is the protection that cartoonists have
when dealing with copyrights and registered trade-
marks. The fact pattern in \textit{Campbell v. Acuff-Rose}
differs from that of a political cartoon that may spoof
the president's health-care reform package by using
a parody of a slogan used by an aspirin manufactur-
er. In \textit{Campbell}, the Court dealt with a commercial
parody, which has partial First Amendment protec-
tion in matters of copyright infringement, while non-
commercial parody has full First Amendment protec-
tion in matters of copyright infringement. A political
cartoon is noncommercial speech and should have
First Amendment protection. It also has been
argued that companies that promote their trade-
marks widely can be analogized to public figures in
a defamation case. By the nature of their activities,
the owners of such trademarks have injected them-
selves into the public eye and should not therefor
complain if their efforts are so successful that a par-
ody of their protect is well understood by the
public.\textsuperscript{58}

It is doubtful that any type of political cartoon-
ing about public officials, public figures, or genuine
matters of public concern lacks constitutional pro-
tection under the First Amendment, given decisions
by the U.S. Supreme Court over the last thirty years.
This standard allows cartoonists to contribute to the
dialogue of ideas free of nuisance lawsuits, which
may be brought merely to intimidate the cartoonist
and his or her newspaper from publishing further
drawings, and thus infringe on the value of dialogue
regarding matters of social concern.

In \textit{Hustler}, the Supreme Court took pains to
emphasize that it was dealing with what is termed
"political speech," which is entitled to the highest
degree of protection under the First Amendment.\textsuperscript{59}
Political cartoons, by their nature, deal with contro-
versial issues on sensitive topics and involve public
officials and public figures. They criticize the con-
duct of politicians and other public officials, and
therefore are accorded broad protection under the \textit{New York
Times} standard, which
requires "actual malice," or
that a statement is intentionally
false.\textsuperscript{60}

But proving that cartoons
contain factual statements that
are false is a formidable task.\textsuperscript{61}
A political cartoon—like any
satire—misrepresents facts. All
satire involves a departure
from literal truth, a reliance on
what might be called "satiric
fiction."\textsuperscript{62} Unlike a photo-
graph, which is a literal repre-
sentation of an actual event, a
political cartoon exaggerates
an actual event by using
hyperbole. Cartoons appear in
a setting that make it obvious
that they are intended to be
humorous, fantastic, or allegor-

\begin{center}
\textbf{"Isn't that right, Anthony?"}
\end{center}

\begin{center}
\textit{Chan Lowe, Oklahoma City Times},
11 August 1978
\end{center}
ical, and that they should not be taken literally, and thus cannot be considered libelous because they are "rhetorical hyperbole," and this, according to the Supreme Court, protected expression.63 ø

NOTES:
14. Milkovich, supra note 3, at 1, 19.
15. Hustler, supra note 2, at 46.
16. Hustler, supra note 2, at 46.
20. Spellman, 46.
31. Title XII of the Espionage Act forbade mailing any matter violating the Act, or advocating treason, insurrection, or forcible resistance to any law of the United States. See The Espionage Act, Stat. 217 (1917).
35. Snively v. Record, 185 Cal. 565 (1921)
40. Yorty v. Chandler, 472.
41. Spellman, 53.
48. Restatement, 556.
55. Lamb, 15.
56. Hustler, supra note 2, at 51-52.
57. Media Law Reporter reports no new lawsuits against cartoonists since Hustler Magazine v. Falwell.
58. Welkowitz, 72.
59. Welkowitz, 69.
63. Milkovich, supra note 3, at 19.