DRAWING FIRE: THE PROLIFERATION OF LIBEL SUITS AGAINST CARTOONISTS

I. INTRODUCTION

There was a time when libel suits against editorial and political cartoonists[1] were rare. Today, the number of reported libel suits against cartoonists is increasing tremendously despite the fact that cartoons are considered to be expressions of opinion[2] and, therefore, constitutionally privileged. There are currently a number of cases where major public officials have brought actions against political cartoonists and their respective newspapers.[3] Whereas no American editorial cartoonist has lost any of these suits, the high cost of defending them may ultimately affect political commentary via cartoons.[4] Although attempts to censor cartoonists have existed for well over a century,[5] no one attempt has been as effective in suppressing political cartoons as today's libel litigious society. Factors such as the high costs of both libel insurance and litigation may be more capable of suppressing

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[1] For purposes of this Note, editorial cartoons will refer to those cartoons that are representative of the opinion of the publisher or editor of the newspaper or periodical, whereas political cartoons will refer more specifically to those editorial cartoons relating to governmental public figures or public issues.

[2] R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 65 (1980). Since 1984 there have been at least twelve cases reported. Keller v. Miami Herald Publishing Co., 11 Media L. Rep. (BNA) 1032 (S.D. Fla. 1984), *aff'd*, 778 F.2d 711 (11th Cir. 1985); Harris v. School Annual Publishing Co., 466 So. 2d 963 (Ala. Sup. Ct. 1985); Russell v. McMillen, 685 P.2d 255 (Colo. Ct. App. 1984); Fraternal Order of Police v. News & Sun-Sentinel, 12 Media L. Rep. (BNA) 1619 (Fla. Cir. Ct. 1985); Corcoran v. New Orleans Firefighter's Ass'n Local 632, 468 So. 2d 648 (La. App. 1985), *cert. denied*, 470 So. 2d 881 (1986); King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986); Buller v. Pulitzer Publishing Co., 684 S.W.2d 473 (Mo. App. 1984); Franklin v. Friedman, 12 Media L. Rep. (BNA) 1146 (N.Y. Sup. Ct. 1985); Celebrezze v. Dayton Newspapers, Inc., No. 88127, slip op. (Ohio Cuyahoga Cty. C.P., Dec. 18, 1986); Celebrezze v. Dayton Newspapers, Inc., No. 88127, slip. op. (Ohio Cuyahoga Cty. C.P., July 1, 1986); Wecht v. PG Publishing Co., 510 A.2d 769 (Pa. Super. 1986); Rizzo v. Philadelphia Daily News, May Term 1984, No. 227 (Philadelphia C.P. filed May 7, 1984); Killington, Ltd. v. Times-Argus Ass'n, No. S158-85 WNC (Vt. Super. Ct. 1985).

[3] Former Governor King of Massachusetts brought suit against the *Boston Globe*, lost on summary judgment, King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986), but has appealed. Telephone interview with Sal Micchiche, Assistant Executive Editor of the *Boston Globe* (Aug. 21, 1986); Former Mayor Rizzo of Philadelphia has brought an action against the *Philadelphia Daily News*. Telephone interview with Samuel Klein, attorney for Philadelphia Newspapers, Inc. (Aug. 19, 1985); Former Ohio Supreme Court Justice James Celebrezze sued the *Dayton Journal Herald*; Telephone interview with Joe Fenley, Editor-in-Chief, *Dayton Journal Herald* and *Dayton Daily News* (Oct. 15, 1985).

[4] Lamb, *With Malicious Intent: Libel and the Political Cartoonist*, TARGET: POLITICAL CARTOON QUARTERLY, Autumn 1985, at 15. Cartoonists may already be affected by this increase in litigation. *See infra* text accompanying footnotes 297-307.

[5] *See infra* text accompanying notes 19-23.

cartoons by publishers than any of the past efforts. Even more invidious are the accompanying tort claims for the intentional infliction of emotional distress and false light invasion of privacy.

Some cartoonists, as well as their editors, believe the recent increase in litigation, and its accordant spectre of similar prospective lawsuits, are affecting the expression of their opinions to the extent that they may be compelled to alter the cartoons.[6] They are also concerned that juries will award damages for the intentional infliction of emotional distress[7] or false light invasion of privacy, even though their cartoons are not libelous. In this way, juries can bypass first amendment protections.

This Note will suggest a broad standard which would prevent these libel suits against cartoonists from diluting the protections guaranteed by the first amendment. Part II of this Note will provide a historical survey of cartoons and libel law, including the leading cases and their principles. Part III will discuss libel suits presently in litigation against cartoonists. Part IV will review the major decisions from such analogous areas as parody, satire, and humor. Part V will discuss the torts of intentional infliction of emotional distress and false light invasion of privacy, including their relation to lawsuits against editorial cartoonists. Part VI will present a guideline so that first amendment protections may be preserved.

II. Historical Overview of the Political Cartoon as a Source of Litigation and Related Libel Law

The Constitution of the United States recognizes, and protects, the freedom of all individuals to express their opinions and beliefs as a fundamental premise of society.[8] Editorial cartoons are constitutionally protected expressions of opinion, rather than statements of fact, about matters of public interest concerning the political process and public officials.[9] Therefore, no liability should be imposed for an expression of political commentary.

Caricatures have been used as a device to express opinions on current affairs since the Stone Age.[10] Throughout history, from the ancient Chinese, Egyptian, Greek, and Roman Em-

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6 Duke, *If a Cartoonist's Pen Draws Blood, Victim Can Return the Favor*, Wall St. J., Aug. 2, 1985, at 1, col. 4.

7 *Id.*; *see infra* notes 225-264 and accompanying text.

8 U.S. Const. amend. I, states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

9 R. Sack, *supra* note 2, at 65.

10 S. Hoff, Editorial and Political Cartooning 16-17 (1976); *see also* Yorty v. Chandler, 13 Cal. App. 3d. 467, 471, 91 Cal. Rptr. 709, 711 (1970).

pires[11] to the present, the political cartoon has served as an effective, pointed, and sometimes stinging means of commenting on the personalities and events of the day.

Turning to earlier English cases, we find that in 1633, Sir John Austin was awarded damages for a defamatory picture published to scandalize him.[12] It was said that "[a]n *action* lies for a libel . . . and a libel may be either *per scripta* or *per signa* . . . ."[13] In another early case, innuendo[14] was declared to be sufficient for an action in libel, if it induced an "ill opinion" of the plaintiff, or caused the plaintiff to appear "contemptible and ridiculous."[15] The defendant, in that case, unsuccessfully argued that "*innuendo* cannot beget an action, nor make that certain which was uncertain before, and that [t]here was no scandal . . . ."[16] Therefore, he argued there was no libel.

In 1810, Lord Ellenborough awarded damages sufficient to recover only the value of the paint and canvas of a "picture of great value" destroyed by the defendant, because it was a "scandalous libel" against the defendant's sister and brother-in-law.[17] While some witnesses estimated the painting to be valued at several hundred pounds, Lord Ellenborough declared that "[i]f it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture."[18]

America also has a rich tradition of political cartoons. Benjamin Franklin designed the first printed American political cartoon.[19] A century later, New York's notorious "Boss" Tweed and his Tammany Hall Ring were so disturbed by the cartoons of Thomas Nast that they offered Nast $500,000 to go to Europe to study art.[20] Nast refused.[21] By the 1890's, political cartoons

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11 S. HOFF, *supra* note 10, at 18-23. A caricature of a Roman centurion is preserved in Pompeii.

12 Austin v. Culpepper, 89 Eng. Rep. 960 (1633).

13 *Id.* at 960. *Scripta* and *Signa* are the plural of *scriptum* and *signum* respectively. *Scriptum* is defined as the Latin for "a writing." BLACK'S LAW DICTIONARY 1209 (5th ed. 1979). *Signum* is Latin for "a sign; a mark; a seal." BLACK'S LAW DICTIONARY at 1239.

14 Innuendo . . . . was the technical beginning of that clause in a declaration or indictment for slander or libel in which the meaning of the alleged libelous words was explained . . . .

An "innuendo" in pleading in libel action is a statement by plaintiff of construction which he puts upon words which are alleged to be libelous and which meaning he will induce [the] jury to adopt . . . .

BLACK'S LAW DICTIONARY at 709.

15 Cropp v. Tilney, 91 Eng. Rep. 791.

16 *Id.*

17 Du Bost v. Beresford, 170 Eng. Rep. 1235 (1810).

18 *Id.*

19 Yorty v. Chandler, 13 Cal. App. 3d 467, 471, 91 Cal. Rptr. 709, 711 (1970); *see also* S. HOFF, *supra* note 10, at 31.

20 Lamb, *supra* note 4, at 17; *see* S. HOFF, *supra* note 10, at 77-78.

were a regular feature in every city newspaper throughout the country.[22] Between 1897 and 1915, the state legislatures of New York, California, Pennsylvania, Indiana, and Alabama considered anti-cartoon bills. These bills were passed only in California and Pennsylvania.[23]

Cartoonists were also included among the defendants in *Masses Publishing Co. v. Patten*.[24] Tried under the Espionage Act of 1917, the defendants were charged with conspiring to obstruct the enlistment services of the United States through cartoons depicting war as hell. Judge Learned Hand wrote:

> [N]one of the cartoons in this paper can be thought directly to counsel or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding . . . . As to the cartoons . . . the nearest is that entitled "Conscription," and the most that can be said . . . is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant.[25]

The notion of editorial and political cartoons as constitutionally protectible is a more recent one. Earlier cases reveal no such protection. Indeed, the Constitution is not even mentioned in the early cases. In *Ellis v. Kimball*,[26] the court found that unless language attributable to the plaintiff in a caricature picture was actually spoken by him, it was to be considered defamatory if it caused him "public scandal and infamy."[27]

A political cartoon was found to be "plainly defamatory" in *Brown v. Harrington*.[28] The cartoon, labeled "City Farm," showed

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21 Lamb, *supra* note 4, at 17.

22 *Id.*

23 *Id.* The California bill, in which cartoons that "reflected on character" were forbidden, was passed in 1897. Flagrantly disregarded, it was eventually repealed. *Id.*

Pennsylvania's bill was passed in 1903 in direct response to a specific cartoon campaign against a successful gubernatorial candidate. After the election, the bill was introduced into the legislature making it a crime

> for any person . . . to draw [or] publish . . . any cartoon or caricature or picture portraying, describing, or representing any person either by distortion, innuendo, or otherwise, in the form or likeness of beast, bird, fish, insect or other inhuman animal, thereby tending to expose such person to public hatred, contempt or ridicule.

Id. at 17-18. If found guilty, a cartoonist could be fined up to $1,000, or imprisoned for up to two years. After several unsuccessful suits were brought against newspapers based upon this bill, it was repealed in 1907. *Id.* at 18.

24 244 F. 535 (S.D.N.Y. 1917).

25 *Id.* at 540-41. District Judge Hand's decision was reversed on appeal. Masses Publishing Co. v. Patten, 246 F. 24 (2d Cir. 1917).

26 33 Mass. (16 Pick.) 132 (1834).

27 *Id.* at 134.

28 208 Mass. 600, 95 N.E. 655 (1911).

emaciated inmates in a state of despair as a woman brought them a tray containing a little bit of food and a teapot. The words "Poor Food," "Rancid Butter," and "Shadow Tea" were written on the tray accompanied by a statement in large print that Mayor Brown, the plaintiff in this action, forced a humane charity board out of office and replaced it with another charity board which was not cognizant of the plight of the poor.[29] This full page publication urged voters in the election, which was to take place the next day, to "repudiate" the mayor in the name of "humanity."[30] The court found that this publication held the mayor up to "ridicule and contempt" and inflicted a serious injury upon his reputation.[31] As recently as 1936, in *Doherty v. Kansas City Star*,[32] the Kansas Supreme Court held that a cartoon, which implied that the plaintiff charged exorbitant gas rates, was capable of defamatory meaning.

These views are contrary to the views expressed by the federal and state courts today,[33] including those of Massachusetts and Kansas. Courts now recognize cartoons as "rhetorical hyperbole"[34] that demand a different standard of measurement. The common law principle was that a public medium, such as a newspaper or magazine, published at its peril. This subjected the media to liability except where there existed either a qualified or absolute privilege to publish, or proof by the defendant-publisher of the truth of all discreditable statements.[35] This common law privilege did not afford adequate protection to the first amendment guarantee of freedom of the press. *New York Times Co. v. Sullivan*[36] abolished the common law

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29 208 Mass. 600.

30 *Id.*

31 *Id.* at 602.

32 144 Kan. 206, 59 P.2d 30 (1936).

33 *See* Blake v. Hearst Publications, 75 Cal. App. 2d 6, 170 P.2d 100 (1946); Yorty v. Chandler, 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970); Palm Beach Newspapers v. Early, 334 So. 2d 50 (Fla. Dist. Ct. App. 1976), *cert. denied*, 439 U.S. 910 (1978); Loeb v. Globe, 489 F. Supp. 481 (D. Mass. 1980); Ferguson v. Dayton Newspapers, 7 Media L. Rep. (BNA) 2502, (Ohio Ct. App. 1981); Miskovsky v. Tulsa Tribune, 678 P.2d 242 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984); Russell v. McMillen, 685 P.2d 255 (Colo. Ct. App. 1984); Reaves v. Foster, 200 So. 2d 453 (Miss. 1967); *see infra* notes 109-55 and accompanying text.

34 *See infra* text accompanying footnotes 47-57.

35 Absolute privilege protects otherwise actionable conduct because the defendant furthers an interest of high societal importance which is entitled to protection, even at the expense of harm to a plaintiff's reputation. When the interest in maintaining a free flow of ideas and information is of extreme importance, policy considerations may require that the defendant's immunity for false statements be absolute without regard to purpose or motive, or the reasonableness of the conduct. If the societal interest is of less importance, the immunity may be qualified and conditioned upon legitimate motives and reasonable behavior. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 815-16 (5th ed. 1984).

36 376 U.S. 254 (1964).

principle and set the stage for a new standard in libel law.[37]

In reversing an award to Sullivan, Justice Brennan's opinion invoked the broad protection inherent in the first amendment for the freedom of people to express themselves on public questions. He called for a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[38] He concluded that neither factual error, defamatory content, nor a combination of the two, "suffices to remove the constitutional shield from criticism of official conduct . . . ."[39] The silencing of criticism of official conduct through the use of civil damages was beyond constitutional boundaries. In setting forth its standard, the Supreme Court stated that:

> [t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves 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.[40]

The constitutional privilege, which extended to the press and to any other public medium, required a differentiation between private individuals and public officials or public figures.[41]

In *Gertz v. Robert Welch, Inc.*,[42] the Supreme Court finally clarified the public figure status. The status is applicable only to a person who has assumed a role of importance in the resolution of public affairs, or in affairs of general importance or concern to the people.[43] Those who seek public office assume the risk of "closer public scrutiny."[44] The Court also asserted that "[u]nder 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

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[37] New York Times Co. v. Sullivan arose against the background of the civil rights campaign in the South. The *New York Times* published an advertisement for civil rights advocates designed to raise funds to support their crusade. The advertisement referred to demonstrations in Montgomery, Alabama, and alleged that repressive counter-measures had been taken by local authorities. Sullivan, the Commissioner for Public Affairs for the City of Montgomery, who bore responsibility for the performance of the Montgomery Police, brought suit. He alleged that the averments in the advertisements of police misconduct were, in effect, allegations of his dereliction of duty. *Id.* at 258-59. The jury awarded Sullivan $500,000 in damages, the entire amount for which he asked. *Id.* at 256.

[38] *Id.* at 270.

[39] *Id.* at 273.

[40] *Id.* at 279-80.

[41] *Id.* at 267, 283 n.23.

[42] 418 U.S. 323 (1974).

[43] *Id.* at 351-52.

[44] *Id.* at 344.

conscience of judges and juries but on the competition of other ideas."[45] This principle results in the inevitable conclusion that a defamation may be actionable only if it is false. Opinions cannot be false; therefore, opinions should never be actionable even if defamatory.

The distinction between the publication of defamatory statements of fact and derogatory or defamatory expressions of opinion has always been recognized in Anglo-American law.[46] The *Restatement (Second) of Torts* 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 for the opinion."[47] This position is based on the notion that first amendment protections have rendered defamation actions based on pure opinion unconstitutional.[48] Furthermore, *Restatement (Second) of Torts* section 566 also recognizes the distinction between "pure opinions"[49] and "mixed opinions."[50] The *Restatement* states: "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct . . . ."[51] To make such a determination, the courts must look to the entire context of the communication.[52]

The Supreme Court has also made clear that the constitutional protection afforded to statements of opinion is not lost simply because the opinion is expressed through the use of figurative or hyperbolic language. In *Greenbelt Cooperative Publishing Association v. Bresler*,[53] the Court held that a newspaper report, which characterized the plaintiff's negotiating position in a meeting with the city regarding a zoning dispute, as "blackmail," could not be read liter-

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45 *Id.* at 339-40.

46 W. PROSSER & W. KEETON, *supra* note 35, at 813.

47 RESTATEMENT (SECOND) OF TORTS § 566 (1977).

48 W. PROSSER & W. KEETON, *supra* note 35, at 814.

49 Pure opinion refers to those opinions which are simply expressed and based on disclosed or assumed nondefamatory facts. RESTATEMENT (SECOND) OF TORTS § 566 comment b.

50 "Mixed opinions" refer to those opinions "apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication." *Id.*

51 *Id.* at comment c.

52 *See* Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985); Pritsker v. Brudnoy, 389 Mass. 776, 452 N.E.2d 227 (1983); Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981).

53 398 U.S. 6 (1970).

ally.[54] The Court found it "simply impossible"[55] to believe that any reader would think that either the speakers at the meetings, or the newspaper articles reporting their words, were charging the plaintiff with the actual criminal offense of blackmail.[56] "[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[57]

Similarly, the Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*[58] found that the defendant labor union's use of the word "scab" and the epithet "traitor" in a well known piece of union literature could not be taken as an assertion that the plaintiff had committed the offense of treason.[59] The Court noted that this type of "exaggerated rhetoric was commonplace in labor disputes."[60] By virtue of the broad context in which the statements were made, readers would be alerted that this was opinion, not an imputation of actual criminal conduct.[61] The " ' [d]efinition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of . . . contempt."[62] Use of the word "traitor" was "obviously used here in a loose, figurative sense . . . . Expression of such an opinion, even in the most pejorative terms, is protected . . . ."[63]

The *en banc* decision of the District of Columbia Circuit Court in *Ollman v. Evans*,[64] provided a framework to aid in the determination of whether the average reader would view a statement as one of fact or one of opinion. The court examined the totality of the circumstances in order to determine whether these statements would merit the absolute first amendment protection enjoyed by statements of opinion.[65]

Four factors were considered in the assessment of whether the average reader would view a statement as fact or opinion.[66] First, the common usage or meaning of the specific language of the challenged statement was analyzed.[67] Readers were "less likely to infer facts from an indefinite or ambiguous statement than one with a

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54 *Id.* at 14.
55 *Id.*
56 *Id.*
57 *Id.*
58 418 U.S. 264 (1974).
59 *Id.* at 284.
60 *Id.* at 286.
61 *Id.*
62 *Id.*
63 *Id.* at 284.
64 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 2662 (1985).
65 750 F.2d at 979.
66 *Id.*
67 *Id.*

commonly understood meaning."[68] Second, the court considered the degree to which the statement was verifiable, *i.e.*, whether the statement was objectively capable of proof or disproof.[69] A reader could not rationally view an unverifiable statement as conveying actual facts.[70] Third, the court examined the context in which the statement occurred.[71] A specific statement, standing alone, may appear to be factual, but viewed in its proper context, its status as opinion is apparent.[72] Fourth, the court examined the "broader social context into which the statement fit."[73] Some types of writing or speech, by custom or convention, signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. This would encompass such diverse statements as the exaggerated rhetoric of a labor dispute,[74] a satire,[75] a cartoon,[76] an allegorical painting,[77] a humor column,[78] or a review.[79]

The Second Circuit followed the *Ollman* four factor test in *Mr. Chow of New York v. Ste. Jour Azur S.A.*[80] The court concluded that a restaurant review, presented in a guide known for its "pointed commentary"[81] and liberally dosed with metaphors, exaggeration, and hyperbole, was "clearly an attempt to interject style into the review rather than an attempt to convey with technical precision literal facts

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68 *Id.*

69 *Id.* at 981.

70 *Id.*

71 *Id.* at 982.

72 Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11-14 (1970), is the leading example of the power of context to transform an ostensibly factual statement into one of opinion; *see infra* note 196 and accompanying text.

73 750 F.2d at 983.

74 Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

75 Pring v. Penthouse Int'l, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

76 Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980).

77 Silberman v. Georges, 91 A.D.2d 520, 456 N.Y.S.2d 395 (1st Dep't 1982) (exhibition of a painting which allegedly depicted the plaintiffs as muggers did not constitute libel, since the painting was obviously allegorical and symbolic and not an accusation that the plaintiffs had actually participated in an assault or attempted homicide).

78 Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376 (1980).

79 Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981) (University student newspaper reporter's overall disparagement of restaurant in a humorous review of local restaurants was an opinion. Her comment advising "[b]ring a can of Raid if you plan to eat here. And paint your neck red; looks like a truck stop. You'll regret everything you eat here, especially the BLT's," *Id.* at 72, was protected by the "fair comment" doctrine. *Id.* at 75. Reviewer's humor and stylistic flair cannot succeed in turning her opinion into defamation. *Id.* at 75); Orbach v. New York News, 3 Media L. Rep. (BNA) 2229 (N.Y. Sup. Ct. 1978) (theatre reviewer's assessment of an entertainer as a "non-professional embarrassment" and "tone-deaf mediocrity" was held to be constitutionally protectible opinion and not actionable absent proof of material falsity or actual malice).

80 759 F.2d 219, 226-27 (2d Cir. 1985).

81 *Id.* at 229.

about the restaurant."[82] The court reasoned that if the statements were understood by the average reader to be opinion, they should be entitled to the same constitutional protection as would a straightforward expression of opinion.[83]

III. LIBEL AGAINST CARTOONISTS

A. *Current Suits*

Cartoons are generally employed as a form of editorial comment on matters of public interest and typically deal with "public officials" or "public figures."[84] Political cartoons are therefore normally protected as expressions of opinion.[85]

Former Governor Edward J. King of Massachusetts has alleged that the *Boston Globe* newspaper published three false and defamatory articles and cartoons conveying the idea that he had used public funds for improper and illegal purposes, had received cash payments for his personal use and benefit, had knowingly appointed cabinet members with criminal records, was unfit and incapable of properly performing the duties and responsibilities of his office, and was unworthy of respect or esteem.[86] Gov-

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[82] *Id.* The review at issue in this case included such comments as:

> With their heavy and greasy dough, the dumplings, on our visit, resembled bad Italian ravioli, the steamed meatballs had a disturbingly gamy taste, the sweet and sour pork contained more dough (badly cooked) than meat, and the green peppers which accompanied it remained still frozen on the plate. The chicken with chili was rubbery and the rice, soaking for some reason in oil, totally insipid . . . . At a near-by table, the Peking lacquered duck (although ordered in advance) was made up of only one dish (instead of the three traditional ones), composed of pancakes the size of a saucer and the thickness of a finger. At another table, the egg-rolls had the gauge of andouillette sausages, and the dough the thickness of large tagliatelle.

Id. at 221-22.

[83] *Id.* at 229. The court believed that the reviewer's use of "metaphors" and "hyperbole" did not turn his comments into factual statements. *Id.* at 228. Only the statement that the Peking duck was served in one dish, instead of the traditional three, could be viewed as an assertion of fact. *Id.* at 229. However, Mr. Chow was unable to meet the requisite malice standard. *Id.* at 230.

[84] *See* R. SACK, *supra* note 2, at 65.

[85] Yorty v. Chandler, 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970); Loeb v. Globe, 489 F. Supp. 481 (D. Mass. 1980). Only when the publication is motivated by "actual malice" will the privileged expression become actionable defamation. 489 F. Supp. at 485; R. SACK, *supra* note 2, at 65. There is general agreement among the courts from various jurisdictions that the fact/opinion determination is decided by the trial judge as a question of law. If it was not clear whether the challenged cartoon was fact or opinion and could be understood by the average reader as either, the determination would then be given to the jury. Myers v. Boston Magazine Co., 380 Mass. 336, 340, 403 N.E.2d 376, 378 (1980); Keller v. Miami Herald Publishing Co., 778 F.2d 711, 714-15 (11th Cir. 1985); King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361, 2366 (Mass. Super. Ct. 1986).

[86] Complaint of Edward J. King at 24, King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986) (Civ. No. 52488). The cartoons were pub-

ernor King claimed that cartoonist Paul Szep knew, or could have ascertained with the exercise of reasonable care, that the captioned depictions were false and defamatory.[87] Szep's cartoons were accompanied by articles on the editorial pages of the *Boston Globe*. The *Boston Globe* contended that the articles and cartoons were protectible as opinion.[88] The *Boston Globe* was awarded summary judgment, and the case was dismissed.[89] The court found that the cartoons could not reasonably be interpreted as literally depicting an actual event.[90] However, Governor King has since appealed this decision.[91]

Likewise, former Mayor Frank Rizzo of Philadelphia filed an action in trespass, for defamation and false light invasion of privacy based upon an editorial cartoon published in the *Philadelphia Daily News*.[92] The editorial cartoon was published at a time when former Mayor Rizzo was in the midst of a public debate concerning his acceptance of a position as consultant to the Philadelphia Gas Works.[93] Rizzo contended that the cartoon conveyed the false and defamatory impression that he was obtaining money via extortion, that he was involved in criminal or criminally-related activity, and that the simultaneous collection of his pension from the City of Philadelphia and a consulting fee from the gas distribution facility was extracted from unwilling and defenseless taxpayers by the use of improper and/or political influence.[94]

However, the cartoon does no more than express the opinion that former Mayor Rizzo should not simultaneously collect a city pension and a consulting fee. In this respect, the cartoon appears to be constitutionally protected. Yet, Rizzo could outmaneuver the first amendment if he prevails on the false light invasion of privacy action. Rizzo claimed that as a result of the publication of the cartoon, "he was placed in a false light in the

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lished on March 12, 1981, November 9, 1979, and October 18, 1979. *King*, 12 Media L. Rep. (BNA) at 2367-69.

87 Complaint of Edward J. King, *supra* note 86, at 24.

88 Micchiche, *supra* note 3.

89 *King*, 12 Media L. Rep. (BNA) at 2379.

90 *Id.* at 2367.

91 Micchiche, *supra* note 3.

92 Complaint of Frank Rizzo at 9, 12, Rizzo v. Philadelphia Daily News, May Term 1984, No. 227, (Court of Common Pleas, Philadelphia City, filed May 7, 1984). The cartoon was originally published on February 29, 1984, and republished on March 3, and March 15, 1984. *Id.* at 8, 18 & 22. Defendant Philadelphia Newspapers, Inc. publishes the *Philadelphia Daily News*.

93 Philadelphia Daily News, Feb. 26, 1984, at 3, col. 1. Philadelphia Gas Works ("PGW") is a municipally owned utility that hired Rizzo as a consultant at a salary of $5000 per month. Rizzo would continue to collect his $45,000 annual pension from the City of Philadelphia while he advised PGW on governmental affairs and security. *Id.*

94 Complaint of Frank Rizzo, *supra* note 92, at 10.

public eye which would be highly offensive to a reasonable person, and which was, in fact, highly offensive to him."[95] He also claimed to have suffered severe emotional distress and mental anguish as a result of the cartoon's publication.[96] Although the court denied the defendant's motion to dismiss, to allow an award under these facts would strip the first amendment of its power.[97]

Former Ohio Supreme Court Justice James P. Celebrezze filed a twelve million dollar[98] lawsuit against *Dayton Newspapers, Inc.*[99] and *Journal Herald* editorial cartoonist, Milt Priggee.[100] Celebrezze claimed that he was falsely portrayed as "a ruthless gangster and underworld figure who engages in illegal acts of murder, mayhem and criminal conduct."[101] He stated that his political career was damaged by the cartoon.[102] He further contended that the defendants have "conspired and embarked on a continuous, unrelenting, deliberate, vicious, vindictive, oppressive and outrageous course of conduct to discredit him and intentionally cause him severe emotional distress."[103]

In actuality, however, the suit is one of mistaken identity. Priggee stated that the cartoon is about the plaintiff's brother, Frank Celebrezze, the current Chief Justice of the Ohio Supreme Court.[104] The cartoon, which draws a 1930's style gangland warfare scene was an allusion to a long running feud between *Frank* Celebrezze, not *James* Celebrezze, and the Ohio Bar Association.[105]

The defendant's motion to dismiss was denied for both the libel and intentional infliction of emotional distress claims.[106] However, the Ohio Common Pleas Court sustained a motion to dismiss the false light invasion of privacy claim because Ohio

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95 *Id.* at 13.

96 *Id.* at 11, 13.

97 *See infra* text accompanying notes 254-307.

98 James Celebrezze was seeking six million dollars in compensatory damages and six million dollars in punitive damages from both the newspaper and cartoonist, Milt Priggee, jointly.

99 Dayton Newspapers, Inc. publishes both *The Journal Herald* and the *Dayton Daily News*.

100 *James Celebrezze sues DNI, Priggee*, Journal Herald, Mar. 7, 1985, at 1, col. 2 [hereinafter *Celebrezze sues DNI*]. The cartoon cited in the complaint appeared August 23, 1984 in *The Journal Herald*.

101 *Id.*

102 *Id.*

103 *Id.* at 7, col. 2; Duke, *supra* note 6, at 1, col. 4.

104 Blodgett, *Drawing trouble: Cartoonists face libel suits*, 72 A.B.A. J. 26 (Jan. 1986).

105 *Celebrezze sues DNI*, supra note 100, at 7, col. 1; Blodgett, *supra* note 104.

106 Celebrezze v. Dayton Newspapers, Inc., No. 88127, slip op. at 2 (Ohio Cuyahoga Cty. C.P., July 1, 1986).

does not recognize a claim for false light.[107] The same court subsequently issued a summary judgment for the defendants, in *Celebrezze*, at the plaintiff's cost.[108] The Ohio Common Pleas Court based this later opinion "on the totality of the circumstances", finding the cartoon to be "rhetorical hyperbole" and "constitutionally protected free speech."[109] In granting summary judgment on the intentional infliction of severe emotional distress claim, the court concluded, "[I]t is the publishing of this same editorial cartoon which forms the basis of this cause of action. Since that cartoon is accorded absolute immunity under the Freedom of Speech and Press guarantees of the First Amendment . . . judgment is also rendered for defendants on this claim."[110]

Both the Supreme Court[111] and the Second Circuit[112] have recognized that different types of writing contain varied social conventions which signal to the reader whether the statement is fact or opinion.[113] In addition, the frequent placement of a cartoon on the editorial or op-ed page signals to the reader its status as opinion.

The *Restatement (Second) of Torts* addresses the issue of ridicule.[114] It applies the general rules of pure and mixed opinion to "[h]umorous writings, verses, cartoons or caricatures."[115] There

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107 *Id.*

108 Celebrezze v. Dayton Newspapers, Inc., No. 88127, slip. op. at 3 (Ohio Cuyahoga Cty. C.P., Dec. 18, 1986).

109 *Id.* at 2.

110 *Id.*

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

112 Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985).

113 *See supra* text accompanying notes 53-83.

114 RESTATEMENT (SECOND) OF TORTS § 566 comment d (1977), states:

> One common form of defamation has been ridicule that exposes the plaintiff to contempt or derision. Humorous writings, verses, cartoons or caricatures that carry a sting and cause adverse rather than sympathetic or neutral merriment may be defamatory. . . . If all that the communication 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, and an action of defamation cannot be maintained. For maintaining the action it is required that the expression of ridicule imply the assertion of a factual charge that would be defamatory if made expressly.
>
> In addition, the communication may be understood only as good-natured fun, not intended to be taken seriously and in no way intended to reflect upon the individual. Thus a narration by a toastmaster at a banquet of some entirely fictitious and ridiculous incident involving the speaker whom he is introducing is not reasonably to be understood as defamation but only as a jest. But if the same narrative is reported in a newspaper in such a way as to fail to make clear to its readers the circumstances under which it was related, it may become defamatory.

115 *Id.*

can be no defamation if a communication merely expresses a "harsh judgment"[116] on known or assumed facts, however outlandish, clever, or witty the remark.[117] However, one could be held liable for a humorous communication that *implies* defamatory facts.[118] A cartoon, unlike a photograph or painting, cannot reproduce a literal likeness of its subject. Its use of visual metaphor, imagery, allegory, and exaggeration to make a point is accepted as part of the genre. An expectation of overstatement is created. Courts must consider whether the imagery could reasonably have been understood in a literal manner.[119] It is a general conclusion that the exaggerated imagery appearing in the "cartoon" context must be recognized as hyperbole and therefore be protectible.[120]

B. *Past Suits Against Cartoonists*

Yorty v. Chandler[121] is considered the landmark decision in cartoon law. Mayor Samuel W. Yorty of Los Angeles brought a suit against the *Los Angeles Times* for what he believed was a libelous cartoon that appeared on the editorial page depicting him as insane.[122] Mayor Yorty had publicly expressed an interest in the cabinet position of Secretary of Defense in then President-elect Richard Nixon's administration.[123] The *Los Angeles Times* proceeded to publish the cartoon at issue which depicted a complacent Mayor Yorty talking on the telephone at his desk, with four mournful orderlies standing beside him. While one orderly is beckoning to Mayor Yorty, another is hiding a straight jacket behind his back. The caption reads, "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!"[124]

In his complaint, Mayor Yorty asserted that the defendants' intent was to convey to the readers that he was claiming to have been appointed Secretary of Defense, that he was claiming to be qualified to serve in such capacity, and that this assertion created an impression of insanity necessitating placement in a straight

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116 *Id.*
117 *Id.*
118 *Id.*
119 Yorty v. Chandler, 13 Cal. App. 3d 467, 472, 91 Cal. Rptr. 709, 712 (1970).
120 *See generally* 13 Cal. App. 3d 467.
121 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).
122 13 Cal. App. 3d at 469-71 (the cartoon appeared on November 19, 1968).
123 *Id.* at 469.
124 *Id.* at 471.

jacket.[125] Mayor Yorty interpreted the cartoon as a factual statement that he was suffering from a delusion and should, therefore, be placed in a straight jacket because he was insane.[126]

The court found the sole issue to be whether the cartoon was reasonably susceptible to Mayor Yorty's interpretation.[127] The California Court of Appeals affirmed the trial court's finding that the cartoon was not reasonably susceptible to a defamatory interpretation, and consequently dismissed Mayor Yorty's claim for failure to state a cause of action.[128]

The court recognized that "[t]he genius of a well-conceived political cartoon lies in its ability to communicate in graphic form a statement of editorial opinion which might otherwise require paragraphs of written material to express."[129] The court also noted the extensive use by political cartoonists of "symbolism, caricature, exaggeration, extravagance, fancy, and make-believe."[130] The use of symbolism is well known, and even the most careless reader would perceive the cartoon as "no more than rhetorical hyperbole, a vigorous expression of opinion by those who considered Mayor Yorty's aspiration for high national office preposterous."[131] Any penalty to defendants for the publication of this political cartoon would subvert the most fundamental meaning of a free press.

The *Yorty* court did indicate that it would find actionable any pictorial statements that could reasonably be interpreted as accusations of criminal activity.[132] A cartoon would be found libelous if it falsely and maliciously presented defamatory material as fact.

> A political cartoon which falsely depicts a public official 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 of libel merely because the charge is depicted graphically in linear form rather than verbally in written statement.[133]

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125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.* at 477.
129 *Id.* at 471-72.
130 *Id.* at 472.
131 *Id.* at 476-77.
132 *Id.* at 472.
133 *Id.*; *see* Gregory v. McDonald, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (where the court stated, in *dictum*, that the opinion defense does not extend to accusations of a crime). No guidelines have ever been presented by the courts regarding obscenity standards for political cartoons.

In *Loeb v. Globe Newspaper Co.*,[134] the court granted the *Boston Globe*'s motion for summary judgment and dismissed the complaint.[135] Loeb, as publisher of the *Manchester Union Leader*, was a "public figure."[136] His newspaper gained national attention for its coverage of the 1972 New Hampshire Presidential Primary.[137] Both Loeb and his newspaper were the subject of several pieces in the *Boston Globe*, among which was a cartoon depicting him with a cuckoo springing from his forehead.[138] The court again recognized an explicit editorial freedom to publish an opinion in the discussion of public figures.[139] The court explicitly stated that no legal remedy is available to public figures who are subjected to negative criticisms as long as the critics neither knowingly nor recklessly misstate facts.[140] Only factually inaccurate statements are within the realm of actionable libel.[141]

However, should there be a minor mistake of fact in an allegedly libelous cartoon, a court may still grant summary judgment in favor of the defendants.[142] The court in *La Rocca v. New York News, Inc.* would not allow the concept of fair comment to be defeated by errors insignificant in the context of the libelous material as a whole.[143] However, even a jury award of compensatory and punitive damages may often be reversed after an appellate court has carefully scrutinized issues such as the fact-opinion distinction, or the plaintiff's burden of showing falsity and actual malice.[144]

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134 489 F. Supp. 481 (D. Mass. 1980).
135 *Id.* at 488.
136 *Id.* at 485.
137 *Id.* at 483.
138 *Id.*
139 *Id.* at 485.
140 *Id.*
141 *Id.*
142 La Rocca v. New York News, Inc., 156 N.J. Super. 59, 383 A.2d 451 (1978). In *La Rocca* two policemen and their wives filed a libel action against a newspaper alleging that an article, editorial, and cartoon had defamed them. After receiving a complaint charging a school teacher with assault and battery of a student, the policemen went to the school, where they arrested the teacher and escorted him out in handcuffs. In a newspaper article two weeks later, the mayor was critical of the manner in which the arrest was effected. 156 N.J. Super. at 61. The principal criticism was that the teacher should not have been arrested at the school and that handcuffs should not have been used. 156 N.J. Super. at 61. In a cartoon appearing the next day, a policeman was portrayed in a dunce cap. The cartoon was entitled "Not Too Smart," and the words "classroom arrest of teacher" were printed next to the handcuffs held by the policeman. Since the arrest did not take place *in* the classroom the cartoon was erroneous. Nevertheless, as the mistake was minor and unrelated to the "gist or sting" of the alleged libel, summary judgment was entered for the defendant. 156 N.J. Super. at 63.
143 156 N.J. Super. at 62.
144 *See* Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50 (Fla. Dist. Ct. App. 1976), *cert. denied*, 439 U.S. 910 (1978). The court reversed a jury verdict of $1,000,000 in compensatory and punitive damages in favor of the Superintendent of Schools. *Id.* at 54. The court found that many of the written articles and cartoons, although caustic and

Efforts to distinguish the standards required to bring an action against a newspaper for its allegedly libelous articles, editorials, and cartoons have been attempted.[145] With respect to news articles, a plaintiff would be required to prove that they were published with actual malice.[146] This was the standard required by *New York Times Co. v. Sullivan*.[147] Editorials and editorial cartoons as opinions, however, cannot be evaluated under the actual malice standard because they are protected under the constitutional standard of free expression as guaranteed by the first amendment.[148] Cartoons have been held to be non-libelous, despite the viciousness with which the cartoons may depict a plaintiff and the concomitant personal embarrassment they may cause.[149]

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pejorative, still had a basis in fact, and thus were not false. *Id.* at 53. Furthermore, the court stated that most of the articles and cartoons fell in the category of "rhetorical hyperbole" or the "conventional give and take in our economic and political controversies." *Id.*

A typical cartoon depiction would include the toppling of school buildings under the plaintiff's leadership. After the plaintiff submitted a plan for reducing the number of new teachers to be hired by about four hundred, a cartoon depicted the plaintiff chopping off heads while surrounded by Lizzy Borden, Henry VIII, and Jack the Ripper. *Id.* While the court described most of the articles and cartoons as "slanted, mean, vicious and substantially below the level of objectivity that one would expect of responsible journalism," *id.*, no evidence clearly and convincingly demonstrated that any one of the articles contained a false statement of fact made with actual malice as required by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to support a libel action by a public official. *Id.* at 53; *see supra* text accompanying notes 31-35.

The appellate court in Corcoran v. New Orleans Firefighter's Ass'n Local 632, 468 So. 2d 648 (La. Ct. App. 1985), also reversed a jury award granted for an allegedly libelous cartoon.

145 *See* Ferguson v. Dayton Newspapers, 7 Media L. Rep. (BNA) 1396 (Ohio C.P. 1981). The cartoons depicted the plaintiff as a skunk, witch, rat, and liar. *Id.* at 1398.

146 *Id.*

147 376 U.S. 254 (1964).

148 7 Media L. Rep. (BNA) at 1398; *see supra* text accompanying notes 36-41.

149 7 Media L. Rep. (BNA) at 1398 (summary judgment was granted in favor of Dayton Newspapers because the court did not believe that a reasonable jury could find actual malice with convincing clarity, despite the plaintiff's contentions that the editorials and cartoons were published out of malice, with total disregard for the truth, and probable ill will by the newspaper editors).

See also Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540 (W. Va. Cir. Ct. 1983). The thrust of the editorial and cartoon was local reaction to the impending nomination of the plaintiff as United States Attorney for the Southern District of West Virginia. The court first concluded that a person under consideration for appointment to a public office, such as United States Attorney, is deemed to be a public figure. *Id.* at 2542. This was necessary so as not to chill the dissemination of information and to allow the public as much knowledge as possible about an impending appointment to a public office. *Id.* at 2543.

The court viewed the cartoon as "artistic rhetorical hyperbole." *Id.* at 2545. It depicted the plaintiff as a circus animal trainer, with a whip and chain in his hand, attempting "to control an elephant, perched on a pedestal, wrapped in a corset, fanning herself with a parasol snuggled in her trunk." *Id.* The plaintiff objected to the cartoon's insinuation of offensive sexual impropriety on his part. *Id.* But the court viewed the cartoon as an obvious allegorical means to convey an editorial opinion that demanded that the reader extract its message through his or her own reasoning or interpretation. *Id.* at 2546. The manifest meaning of the cartoon was believed to be that this impending

Similarly, a candidate for the United States Senate failed to show the requisite constitutional malice to maintain a libel action against a newspaper. The newspaper had published articles and cartoons accusing him of engaging in "sewer politics" in connection with a question he posed regarding his opponent's sexual preferences.[150] The editorial was protected as an expression of opinion. The court held that all of the publications before it, including the cartoon, were "clear and unequivocal in their meaning and import and therefore immutable to innuendo."[151]

The court would not allow innuendo, which may explain the meaning of the allegedly libelous publication, "to enlarge th[e] meaning or to attribute to it a meaning which it will not bear."[152] The court concluded that neither an unembellished presentation of the cartoon, nor the addition of any possible innuendo, imparted to the plaintiff the commission of the crime of sodomy.[153] When viewed in its most derogatory context, the cartoon did no more than express an opinion of the plaintiff's political tactics.[154]

Private citizens have not met with better success in their libel suits than have public officials or public figures.[155] A suit may be dismissed for failure to state a claim if the court holds that the complaint alleges no facts from which a jury could conclude that the drawing constituted libel *per se*.[156] More frequently, however, a de-

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appointment could potentially precipitate a serious "schism" in the Republican Party. Viewed in its most unfavorable light, the cartoon merely charges the plaintiff with the use of aggression toward Republicans. "Far worse is written and spoken daily by political commentators." *Id.* The court was unable to find the cartoon reasonably susceptible to the plaintiff's defamatory interpretation. *Id.* Thus, the court granted the newspaper's motion for summary judgment on both the libel and false light invasion of privacy actions. *See also* Russell v. McMillen, 685 P.2d 255 (Colo. Ct. App. 1984). The court affirmed summary judgment in favor of the defendants. The cartoon could not sustain a libel action as it was merely a symbolic expression of opinion espoused in the accompanying article and editorial.

150 Miskovsky v. Tulsa Tribune Co., 678 P.2d 242 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984). The plaintiff asked Governor Boren, the frontrunner in the Oklahoma Senate race, whether Boren was homosexual or bisexual.

151 678 P.2d at 249 (quoting Kee v. Armstrong, Byrd & Co., 75 Okla. 84, 182 P. 494, 500 (1919)). The plaintiff, in *Miskovsky*, argued in his brief that "[t]he scurrilous effigy clearly shows a character that looks like the Appellant sucking upon a sewer pipe; and, coincidentally the end of that sewer pipe that he is sucking on just happens to have the appearance of a male penis." 678 P.2d at 249. Holding a plunger at the other end of the sewer pipe was appellant's opponent.

152 678 P.2d at 250.

153 *Id.*

154 *Id.*

155 *See* Mullenmeister v. Snap-On Tools Corp., 587 F. Supp. 868 (S.D.N.Y. 1984). An automotive tools salesman brought a libel action against his former employer arising out of the salesman's alleged depiction as a Nazi in a cartoon appearing in defendant's in-house newsletter. *Id.* at 870.

156 Libel *per se* refers to a libel which is actionable without the requisite pleading and proof of damages to the plaintiff's reputation. Damage is conclusively presumed to exist

fendant's motion for summary judgment is granted. Such a decision is often based upon a finding that the cartoon in question is protectible as opinion.[157]

IV. Analogous Forms of Humor

The reasoning employed by the courts in defamation actions in analogous areas of humor is similar to that used in cartoon cases. Indeed, the cartoon's humor has its basis in satire. In *Polygram Records v. Superior Court (Rege)*,[158] a wine producer brought an action on several grounds, including personal defamation, intentional and negligent infliction of emotional distress, and invasion of privacy.[159] The focus of the litigation was a joke told by comedian Robin Williams during a live comedy performance at a San Francisco nightclub, which was recorded and distributed in both audio and video format.[160] The court held that the joke was not defamatory as a matter of law.[161] The court

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from the publication of the libel itself. Therefore, no evidence is required to show an actual impairment to the plaintiff's reputation or other harm. W. Prosser & W. Keeton, *supra* note 35, at 795. Some courts have held that if a statement is libelous on its face it is libel *per se*. R. Sack, *supra* note 2, at 14. However, if reference to extrinsic facts are required to establish a defamatory meaning, special damages must be pleaded. R. Sack, *supra* note 2, at 101. *Mullenmeister* held that in the absence of allegations and proof of special damages, under New York law, the complaint fails to state a cause of action for libel. Because the drawing was made for commercial purposes, a reasonable jury would not construe it as a statement evincing racist or anti-Semitic views held by Mullenmeister. *Mullenmeister*, 587 F. Supp. at 874. The drawing was susceptible to an interpretation only as a crude attempt to identify the plaintiff as the competitor's representative. The use of the swastika was merely symbolic of Mullenmeister's German heritage, albeit carrying disparaging connotations. It is the context in which a symbol is used and not the symbol which is determinative of whether an action may exist. "But nasty epithets, however vitriolic, are not libelous." *Id.* at 875.

157 *See* Keller v. Miami Herald Publishing Co., 11 Media L. Rep. (BNA) 1032 (S.D. Fla. 1984), *aff'd*, 775 F.2d 711 (11th Cir. 1985). The court granted defendant-newspaper's motion for summary judgment by concluding that the "editorial cartoon is pure opinion as a matter of law and is based on publicly available information . . . not capable of interpretation as a defamatory statement of fact." *Id.* The court made specific note that the cartoon did not accuse the plaintiff of any criminal wrongdoing. *Id.* The plaintiff was involved with a nursing home closed by the state as a substandard facility. Therefore, the court found a basis in fact for the cartoon and even stated that the cartoon "if anything, understated the conditions of the nursing home." *Id.; see also* Harris v. School Annual Publishing Co., 466 So. 2d 963 (Ala. 1985), in which the Alabama Supreme Court affirmed the trial court's grant of summary judgment. A teacher brought suit against the school's yearbook publishers when a picture of a monkey eating a banana, with the caption "out munching," was inserted in place of her photograph. The court found the caricature not to be reasonably susceptible to a defamatory meaning.

158 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985); *see infra* notes 265-66 and accompanying text.

159 216 Cal. Rptr. at 253.

160 *Id.*

161 *Id.* at 261. The plaintiff, Rege, sold and distributed "Rege" brand wines from his San Francisco store, Rege Cellars. Both the video and audio versions of the joke contained the following words: "[t]here are White wines, there are Red wines, but why are

adopted the petitioner's claim that the joke was "told during an obvious comedy performance, is a form of irreverant social commentary, is not taken seriously, and thus does not affect reputation in a manner actionable in defamation."[162] The court rejected the theory that comedy should be declared a form of expression *categorically* protected by the first amendment.[163] This theory was based upon the notion that "humor is a useful and even necessary form of social commentary, comparable in certain respects to political speech and religious expression . . . [and] that comedy is, virtually by definition, not taken seriously or literally."[164] The court recognized that, in certain circumstances, the ridicule involved in caricature, satire, or other forms of humor, may convey a defamatory meaning. In these instances the ridicule may be actionable, irregardless of whether the words are understood in a literal sense or even believed to be true.[165] The threshold inquiry should simply be whether those who received the communication in question could reasonably construe it as defamatory.[166]

The court in *Polygram Records* relied on *Arno v. Stewart*,[167] which held that allegedly defamatory language should be regarded:

> according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication.[168]

In *Arno*, the plaintiff alleged that the host of a television dance show had referred to him as an "iron-clad singing member of the Mafia,"[169] and had thereby "identified him as a member of 'a hered-

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there no Black wines like: REGE a MOTHERFUCKER. It goes with fish, meat, any damn thing it wants to." *Id.* at 253.

162 *Id.* at 257.

163 *Id.*

164 *Id.* at 257-58.

165 *Id.* at 258.

166 *Id.* at 259. Considerations such as the humorous intent of the publisher, the comedic context in which the publication occurred, or the nature of audience response all bear upon whether the communication in question could reasonably be considered defamatory.

167 245 Cal. App. 2d 955, 54 Cal. Rptr. 392 (1966). Arno v. Stewart based its analysis on an earlier court decision, Bettner v. Holt, 70 Cal. 270, 11 P. 713 (1886), *quoted in* Arno v. Stewart, 245 Cal. App. 2d at 959, 54 Cal. Rptr. at 396 (1966).

168 11 P. at 715.

169 54 Cal. Rptr. at 394.

itary Sicilian organization, conspiratorial in nature, violent in deed, and criminal in every aspect.' "[170] Evidence revealed, however, that the reference to "Mafia" had been frequently used as a gag in a jocular manner by other entertainers, and that in this instance it was made in a high spirited and amiable environment and was greeted with laughter by all.[171] If it is assumed that the remark and its setting were transmitted to viewers then the entire auditory and visual impression was open to the defendant's interpretation that the remarks at issue were merely spoken in jest.[172]

In sharp contrast to the aforementioned cases is the trial court opinion in *Salomone v. Macmillan Publishing Co.*[173] The court proposed that words appearing in a publication purporting to be a parody might be the subject of a damage claim for defamation.[174] At issue was a four page parody, *Eloise Returns*,[175] which related the story of a young woman living at the Plaza Hotel.[176] The parody was an updated version of the popular children's book, *Eloise*.[177] In the original text the manager of the Plaza Hotel is referred to by his true name, Mr. Salomone.[178] In the parody, the reference to Mr. Salomone is now on the cover. On the original cover, a child scrawled the name "Eloise" with pink lipstick on a mirror above a marble fireplace. On the cover of the updated version, a young woman has scribbled "raunchy graffiti" on the hotel walls.[179] On the mirror above the fireplace she has written with pink lipstick, in lettering identical to that on the original cover, "Eloise Returns." Immediately below the title, in smaller letters, are the words "Mr. Salomone was a child molester!!"[180] Mr. Salomone brought suit seeking $1,000,000.[181] The court concluded that the question was appropriate for presentation to a jury for consideration in determining whether the words constituted non-actionable humor or com-

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170 *Id.* at 395.

171 *Id.* at 396.

172 *Id.*

173 97 Misc. 2d 346, 411 N.Y.S.2d 105 (Sup. Ct. 1978), *rev'd on other grounds*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1st Dep't 1980).

174 97 Misc. 2d at 347.

175 *Id.* at 348.

176 *Id.*

177 *Eloise* is the fictional story of a precocious six year old girl who lives at the Plaza Hotel in New York. K. THOMPSON, ELOISE (1955). A Hilary Knight portrait of Eloise was unveiled in 1964, and is prominently displayed in the lobby of the Plaza Hotel. E. BROWN, THE PLAZA 1907-1967 IT'S LIFE AND TIMES 160 (1967).

178 At the time of this action, Mr. Salomone was the manager at the New York Hilton Hotel. 97 Misc. 2d at 347.

179 *Id.* at 348.

180 *Id.*

181 *Id.*

pensable libel.[182] The issue here was analogous to the more usual jury determinations of veracity, reasonableness, and obscenity.[183] When the intent is humor, but humor at the expense of a sensitive person, the right to freedom of expression conflicts with the right of privacy and freedom from undue defamation.[184]

The principle is well settled that a defamatory statement must be considered within its contextual framework;[185] but the court questioned whether there was a recognized exception to the law of libel when words otherwise defamatory are uttered in a humorous context.

> [C]ommon sense tells us there must be [an exception]. Humor takes many forms—sheer nonsense, biting satire, practical jokes, puns (clever and otherwise), one-liners, ethnic jokes, incongruities and rollicking parodies, among others. Laughter can soften the blows dealt by a cruel world, or can sharpen the cutting edge of truth. Without humor—the ability to recognize the ridiculous in any situation—there can be no perspective. Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract.[186]

Although humor may be recognized as a defense in a libel suit,[187] a libel defendant is not absolved from damages merely by an assertion that the intent of his statement was humor. "Humor is intensely subjective. Blank looks or even active loathing may be engendered by a statement or cartoon that evokes howls of laughter from another."[188]

Parody, like a cartoon, aims to amuse and expose by imitating life in a grandiose manner. "Its essence is distortion and exaggeration . . . . [L]ike the warped and curved mirrors in a carnival fun house, [parody] depends upon the grotesque for its effects."[189]

Nevertheless, a cartoonist or writer resorting to parody should heed the advice given in an early Irish case.[190] "If a man in jest con-

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182 *Id.* at 352.
183 *Id.* at 351-52.
184 *Id.* at 347.
185 *Id.* at 350; *see also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985).
186 97 Misc. 2d at 349-50.
187 *Id.* at 350.
188 *Id.*
189 *Id.*
190 Donoghue v. Hayes, 1837 Ir. R. (Hayes) 265 (Ex. 1831).

veys a serious imputation, he jests at his peril."[191] A private person should not be subjected to the same degree of parody and satire as a public figure.[192] A jury had the ultimate burden of determining whether the humorous use of Mr. Salomone's name was within legitimate limits, or was so inexcusably distasteful as to warrant damages.[193] The court found that it was beyond the scope of its authority to impose its values on the work in issue. On appeal, however, the court precluded Mr. Salomone from any recovery of damages, as the publisher of the parody did not realize the character was based upon a real person. The case was dismissed as Mr. Salomone was unable to show any actual damages, other than embarrassment and anguish.[194]

Pring v. Penthouse International, Ltd.[195] relied on the "reasonably understood" test as articulated by the Supreme Court[196] to determine whether the charged portions of a sexual fantasy, which appeared in defendant's magazine, could be reasonably understood as descriptive of actual facts about the plaintiff or actual events in which she participated.[197] If the facts and events could not be reasonably understood, then the charged portions could not be taken literally. The court would not limit the constitutional doctrine to public figures.[198] Since the charged portions of the story described a physically impossible event occurring in a preposterous setting, any reader would have understood the charged portions to be nothing more than pure fantasy.[199] The court reversed a jury verdict for the plaintiff,[200] and dismissed the action on the basis of the "reasonably understood" test.[201]

The court refused to accept that anyone would believe levitation could be accomplished by oral sex before a national television

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191 *Id.* at 266 (quoted in *Salomone*, 97 Misc. 2d at 351).
192 *Salomone*, 97 Misc. 2d at 352.
193 *Id.*
194 Salomone v. Macmillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441, 442 (1st Dep't 1980).
195 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).
196 *Id.* at 441-42; *see* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); *see supra* notes 53-57 and accompanying text; *see also* Old Dominion Branch, No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); *see supra* notes 58-63 and accompanying text. The "reasonably understood" test requires that words used in a loose, figurative sense must be literally accepted as statements of truth rather than dramatic representations of controversy. 418 U.S. at 284. If the statement conveys a false representation of fact that is reasonably inferable then the statement may be libelous. But if the statement could not reasonably be inferred as a factual representation considering its context, it cannot be libelous. 418 U.S. at 286.
197 695 F.2d at 439.
198 *Id.* at 442.
199 *Id.* at 443.
200 *Id.*
201 *Id.*

audience. Although a jury found the plaintiff to be the "Miss Wyoming" about whom the *Penthouse Magazine* fantasy was written, the court allowed *Penthouse* to escape liability by claiming that the article was fiction and fantasy.[202] The court acknowledged the magazine's first amendment rights, although it recognized that:

> the story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. . . . The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. . . . The magazine itself should not have been tried for its moral standards. Again, no matter how great its divergence may seem from prevailing standards, this does not prevent the application of the First Amendment.[203]

The same article spurred another action in *Miss America Pageant, Inc. v. Penthouse International, Ltd.*[204] The New Jersey District Court held that the magazine article was not in its nature constitutionally protected as parody, satire, or humor,[205] and the plaintiff would be required to show actual malice to prevail.[206] Since the plaintiff failed to present evidence of actual malice, the court granted defendant's motion for summary judgment.[207] The jury finding of actual malice *vis-à-vis Pring* in the Wyoming action[208] was not recognized as a finding of actual malice *vis-à-vis* the Miss America Pageant.[209]

However, the *Pring* standard was used as the basis of the New York Supreme Court's dismissal of a complaint for failure to state a

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202 *Id.* The trial court submitted to the jury only the issue of whether the plaintiff could be identified by a preponderance of the evidence. *Id.* at 442. It did not submit the "reasonably understood" issue to the jury. *Id.* The Tenth Circuit found the trial court's treatment of the story as a statement of fact rather than fiction to be an error. *Id.* By treating the story as fantasy, the "reasonably understood" test was applicable. *Id.* at 443.

203 *Id.*; *see also* Federation of Turkish-American Societies, Inc. v. American Broadcasting Cos., 620 F. Supp. 56 (S.D.N.Y. 1985), which found that the first amendment protected offensive utterances as comprehensively as it protected "the bland and uncontroversial. In a free society, it cannot be otherwise." *Id.* at 58. This suit involved an effort by an organization representing Turkish-American interests to enjoin the distribution or showing of the film *Midnight Express* (Columbia Pictures Industries, Inc. 1978), which portrayed certain Turkish officials in an unflattering manner. In addition, compensatory and punitive damages were sought. *Id.* at 57.

204 524 F. Supp. 1280 (D.N.J. 1981).

205 *Id.* at 1282.

206 *Id.* at 1281.

207 *Id.* at 1288.

208 695 F.2d at 438; *see supra* notes 195-203 and accompanying text.

209 524 F. Supp. at 1287-88.

cause of action in *Franklin v. Friedman*.[210] The plaintiff, talk show host Joe Franklin, claimed he was defamed by a cartoon appearing in *Heavy Metal Magazine*, an " 'adult illustrated fantasy magazine.' "[211] The comic strip depicted a diminishing Joe Franklin. The court, adhering to *Pring*, stated "[t]he test of whether a statement of fact was made about the plaintiff is '. . . whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events . . . .' "[212] The comic strip format of this alleged defamation could not be taken as a serious or factual statement, just as the caricature of the plaintiff physically shrinking could not be taken as a factual indication of Franklin's diminishing stature as a television personality. Therefore, the fictitious firing of plaintiff because of this "catastrophic physical shrinkage" was also logically incapable of being interpreted as factual.[213] In addition, the court found that the cartoon could not be declared defamatory, even if false, because it did not communicate anything about the plaintiff himself. It was the alleged attitude of his viewers and the chairman of the board that was expressed in the comic strip. A statement that viewers do not like his television show, even if false, does not libel the plaintiff because it does not expose him to the "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace" necessary to prevail in a defamation action.[214]

The "reasonably understood" test was also the basis for the court's decision in *Myers v. Boston Magazine Co.*[215] This case involved a magazine article which described a local television sports announcer as the "worst" sports announcer in Boston and as the " 'only newscaster in town who is enrolled in a course for remedial speaking.' "[216] The remarks appeared in a section entitled *Best & Worst: SPORTS* with several cartoons appearing on the page, suggesting that the expressed opinions would have an especially jocular predisposition and whimsical tone. It was clear to the court that the statements were to be viewed as opinion.[217] Taken in its total context, no reader could reasonably conclude that the statement regarding plaintiff's enrollment in a remedial speaking course was an

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210 12 Media L. Rep. (BNA) 1146 (N.Y. Sup. Ct. 1985).
211 *Id.* at 1146.
212 *Id.* at 1147 (quoting *Pring*, 695 F.2d at 442).
213 12 Media L. Rep. (BNA) at 1147.
214 *Id.* at 1148 (quoting Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933)).
215 380 Mass. 336, 403 N.E.2d 376 (1980).
216 403 N.E.2d at 377.
217 *Id.* at 379-80.

assertion of fact.[218]

The magazine defendants sued by television personalities Joe Franklin and "Jimmy" Myers were both granted their motions to dismiss.[219] In these actions the thrust of the allegedly libelous material was humor. However, the newspaper defendants sued by major political figures, such as former Governor King[220] of Massachusetts, former Mayor Rizzo[221] of Philadelphia and former Ohio Supreme Court Justice James Celebrezze[222] were all denied their motions to dismiss. The intent of their allegedly libelous cartoons was criticism, as well as the humor inherent in a cartoon. They were all required to proceed into discovery before they could move for summary judgment. Political cartoons in this respect receive less first amendment protection; motions to dismiss were not immediately granted based upon the cartoon's status as constitutionally protected opinion. Perhaps the courts were responding more to the vituperative nature of the criticism than the constitutional privilege due to expressions of opinion.

In the context of parody and satire, the courts appear to have considerable difficulty in extending the penumbra of the first amendment to cover more private plaintiffs such as Mr. Salomone[223] or Kimerli Pring, "Miss Wyoming."[224] It was only after a trial and a jury award was granted that the appellate courts reversed the jury verdict and found the allegedly libelous material not to be susceptible to a defamatory interpretation. The trial courts, by finding for plaintiffs in these latter cases, seemed to respond more to the embarrassment caused by the publications and the satirist's appropriation of a name or likeness to promote his own efforts.

V. Tort Actions Used to Circumvent First Amendment Protections in Libel Suits

A. *Intentional Infliction of Emotional Distress*

A review of the history of libel suits against political cartoonists exemplifies the comprehensive level of first amendment protection available to cartoonists and their publishers. However, in some recent cases, defendants' motions to dismiss have been de-

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218 *Id.* at 379.
219 *See supra* notes 210-218 and accompanying text.
220 *See supra* notes 86-91 and *infra* note 225 and accompanying texts.
221 *See supra* notes 92-97 and *infra* note 225 and accompanying texts.
222 *See supra* notes 98-110 and *infra* note 225 and accompanying texts.
223 *See supra* notes 173-94 and accompanying text.
224 *See supra* notes 195-203 and accompanying text.

nied.[225] In addition, these cases have included charges of intentional infliction of emotional distress or false light invasion of privacy in their complaints.[226]

The intentional infliction of mental disturbances by extreme and outrageous conduct began to receive recognition as a separate cause of action around 1930.[227] The rule that emerged was that liability existed for conduct of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind, and which exceeds all bounds usually tolerated by decent society.[228]

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225 The *Boston Globe* was denied a motion to dismiss before discovery. Micchiche, *supra* note 3. It was only after discovery was completed that its renewed motion for summary judgment was granted. King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986). Similarly, motions to dismiss were denied to both the Philadelphia Newspapers, Inc. and the Dayton Newspapers, Inc. on the libel actions. Klein, *supra* note 3; Celebrezze v. Dayton Newspapers, Inc., No. 88127, slip. op. (Ohio Cuyahoga Cty. C.P., July 1, 1986). However, defendant's motion for summary judgment was granted and the entire case dismissed in the Ohio action. Telephone interview with Robert E. Portune, Counsel to Dayton Newspapers, Inc., (December 23, 1986); *see supra* text accompanying notes 108-110. The Rizzo action is still in the discovery stage; after completion of discovery, defendants plan to move for summary judgment. Telephone interview with Katherine Hatton, Counsel for Philadelphia Newspapers, Inc. (Nov. 4, 1986).

226 Frank Rizzo's complaint alleges false light invasion of privacy in Paragraphs 37, 52, 67, and 82 and intentional infliction of emotional distress in Paragraphs 32, 38, 47, 49, 68, and 83. Frank Celebrezze also alleged false light invasion of privacy and intentional infliction of emotional distress. *See supra* notes 106-10 and accompanying text; *see also* Wecht v. PG Publishing Co., 510 A.2d 769 (Pa. Super. Ct. 1986) (libel claim dismissed but case remanded on privacy claim); Buller v. Pulitzer Publishing Co., 684 S.W.2d 473 (Mo. Ct. App. 1984) (false light privacy claim as well as libel claim).

227 W. PROSSER & W. KEETON, *supra* note 35, at 55, n.1.

228 RESTATEMENT (SECOND) OF TORTS § 46 (1977) reads:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
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> . . . .
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> Comment:
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> d. . . . It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice" . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" . . . .
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> . . . .
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> f. The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. . . . [M]ajor outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.

There is a paradox in an emotional distress claim for a political cartoon. The inherent power of a cartoon is its sense of outrage to all its viewers; its symbolic exaggeration endows it with humor. It is a contradiction to hold a cartoonist liable for the infliction of emotional distress. A cartoonist aims for outrage, which is the essence of an emotional distress claim. If a political cartoonist would be liable for emotional distress to the subjects of cartoons, the result would be a chilling effect devastatingly inconsistent with the protection afforded by the first amendment. This potential chill upon a cartoonist's creativity necessitates a different standard of measurement. Cartoons need to be measured not by the outrage one feels when viewing them, but by a standard dictated by a sense of decency. As long as the cartoon is not found to be offensive to a person of ordinary sensibilities, no award should be given to the subject of a political cartoon. If a cartoon is capable of being viewed as an expression of an opinion of the specific publication, the cartoonist should not be liable for emotional distress damages.

Recently, the Fourth Circuit sustained a jury award of $200,000 to Jerry Falwell on an emotional distress claim.[229] The court upheld the lower court's finding that *Hustler Magazine* had intentionally published the parody to cause emotional distress to Falwell.[230] However, the parody which featured Mr. Falwell was found to be non-libelous.[231] Although the parody was not a cartoon, the two mediums are analogous. *Hustler Magazine* published a parody of an advertisement for Campari liquor that prominently featured a photograph of Falwell. Entitled "Jerry Falwell talks about his first time," the *Hustler* parody patterned itself on the genuine Campari advertisements, which consist of interviews with famous people about their "first time" with Campari. The satire incorporated the advertisements' general layout and design, the same format in its text, as well as the same general tone of *double entendre*. In the parody, however, Falwell's "first time" involved not only Campari, but also an outright sexual experience with his mother in an outhouse. A disclaimer, reading, "AD PARODY-NOT TO BE TAKEN SERIOUSLY," appeared in very small print at the bottom of the page. Falwell's lawsuit against *Hustler*, the magazine's publisher, Larry Flynt, and Flynt Distributing Company, asserted claims for libel, invasion of

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229 Falwell v. Flynt, 13 Media L. Rep. (BNA) 1145 (4th Cir. 1986).

230 *Id.* at 1148.

231 *Id.* at 1145; *see also* Duke, *supra* note 6, at 1, col. 4.

privacy, and the intentional infliction of emotional distress.[232] The jury specifically found as part of a special verdict that *Hustler* could not reasonably be understood to have described actual facts or events involving Falwell.[233] Nevertheless, the jury awarded him $200,000 for emotional distress.[234] The trial court had earlier directed a verdict for *Hustler* on the invasion of privacy claim.[235]

Although the court found that defendants were entitled to the same level of constitutional protection for both their libel and intentional infliction of emotional distress claims, it refused to literally apply the actual malice standard in an emotional distress action.[236] An emotional distress claim is not concerned with the issue of fact or opinion but rather with the conduct itself that results in an outrageous publication. If the gravamen of the defendant's conduct was to intentionally cause the plaintiff emotional distress then he was liable for this conduct.[237] Defendants argued that the tort of intentional infliction of emotional distress was developed to provide a remedy to plaintiffs who could find no other cause of action. The tort is not an available remedy when the offending conduct falls within another, well-defined legal doctrine. However, the Fourth Circuit rejected this argument while recognizing its acceptance in other jurisdictions.[238]

This decision has serious ramifications for political cartoonists. By their very nature, political cartoons aim to be outrageous and to make a strong statement. Graphics may often have a more powerful effect than words.[239] The old adage that "a picture is

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232 13 Media L. Rep. (BNA) 1145 (4th Cir. 1986).

233 *Id.* at 1146.

234 *Id.* After Falwell initiated the suit, *Hustler Magazine* republished the parody. Defendant Flynt, in a videotaped deposition, admitted that he published the parody to upset Falwell, and to "assassinate" his integrity. *Id.*

235 *Id.*

236 *Id.* at 1147.

237 *Id.* at 1148.

238 *Id.*

239 Judge Learned Hand in Burton v. Crowell Publishing Co., 82 F.2d 154 (2d Cir. 1936), was principally concerned with the "special sting" accompanying a publication of visual ridicule. In that case, a crude optical illusion in a photograph was held libelous because it subjected the plaintiff to "ridicule" and "contempt."

> It would be hard for words so guarded to carry any sting, but the same is not true of caricatures .... Such a caricature affects a man's reputation, if by that is meant his position in the minds of others; the association so established may be beyond repair; he may become known indefinitely as the absurd victim of this unhappy mischance. Literally, therefore, the injury falls within the accepted rubric; it exposes the sufferer to "ridicule" and "contempt."
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> ....
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> ... because the picture taken with the legends was calculated to expose the plaintiff to more than trivial ridicule, it was prima facie actionable; that the

worth a thousand words" is familiar to all. Floyd Abrams has said that "the point is to make the subject a victim . . . . The Falwell case is dangerous for political cartoonists because it represents an end-run around First Amendment protections."[240]

In granting a motion to dismiss an action alleging the impropriety of the inclusion of "Polish" jokes in the motion picture *Flashdance*, the Northern District Court of Illinois[241] held that the recitation of ethnic jokes did not acquire the requisite degree of outlandishness to find liability. Adhering to the *Restatement (Second) of Torts*, the court noted that the reasonable reaction to these jokes lacked the requisite severity as a matter of law.[242] Mere insults and indignities could not be deemed extreme and outrageous conduct.[243] The defamation action was also dismissed.[244]

B. *False Light Invasion of Privacy*

Plaintiffs in libel actions also frequently seek redress through false light invasion of privacy claims.[245] An action for defamation seeks to protect a person's interest in a good reputation, whereas an action for false light invasion of privacy is concerned with protecting a person's interest in being let alone, and is available when there has been publicity that is highly offensive.[246] This tort form is analogous to defamation, in that the statement which gives rise to the cause of action must be untrue.[247] Indeed, several courts have explicitly stated that the same first amendment considerations apply to false light invasion of privacy, intentional infliction of emotional distress, and defamation actions.[248] *The Restatement (Second) of Torts* recognizes that the publicity must be

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fact that it did not assume to state a fact or opinion is irrelevant; . . . in consequence the publication is actionable.

Id. at 155-56.

240 Duke, *supra* note 6, at 1, col. 4.

241 Pawelek v. Paramount Studios Corp., 571 F. Supp. 1082 (N.D. Ill. 1983).

242 *Id.* at 1085.

243 *Id.*; *see* W. PROSSER & W. KEETON, *supra* note 35, at 59.

244 *Id.* at 1086.

245 *See* Martin v. Municipal Publications, 510 F. Supp. 255 (E.D. Pa. 1981); Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540 (W. Va. Cir. Ct. 1983); Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984), *cert. denied*, 469 U.S. 883 (1984). James Celebrezze had sought damages for false light invasion of privacy against Dayton Newspapers, Inc. The court sustained the defendant's motion to dismiss because Ohio does not recognize the false light action. *See supra* notes 106-107 and accompanying text.

246 W. PROSSER & W. KEETON, *supra* note 35, at 864.

247 *See* RESTATEMENT (SECOND) OF TORTS § 652 comment a & b (1977).

248 Lerman v. Flynt Distrib. Co., 745 F.2d 123, 135 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985); Pring v. Penthouse Int'l Ltd., 695 F.2d 438, 442 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

the kind that would be highly offensive to a reasonable person.[249]

In *Martin v. Municipal Publications*,[250] a plaintiff brought an action alleging that *Philadelphia Magazine* published a defamatory photograph of him wearing his "Mummer's" costume[251] bearing a caption that read: "Dead animal of the month. A New Year's tribute here to all the ostriches who gave their tails to make the world free for closet transvestites from South Philly to get themselves stinking drunk. Have a nice year."[252]

The court denied the defendant's motion for summary judgment.[253] The court concluded that it was for a jury to decide whether the appearance of the photograph in the humor section of the magazine was so obviously humorous that readers would not have seen it as defamatory.[254] The jury would also have to consider the plaintiff's claims of false light invasion of privacy and intentional infliction of emotional distress.[255] Furthermore, the court found sufficient evidence from which a jury could reasonably find that the publication of the photograph without the plaintiff's permission constituted extreme and outrageous conduct.[256]

In *Braun v. Flynt*,[257] a jury awarded damages, under both defamation and false light invasion of privacy theories, to a novelty entertainer who performed an act with a swimming pig at an amusement park. *Chic*, a hard-core pornographic men's maga-

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249 RESTATEMENT (SECOND) OF TORTS § 652E states:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
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> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
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> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

250 Martin v. Municipal Publications, 510 F. Supp. 255 (E.D. Pa. 1981).

251 The photograph was taken on January 1, 1978, when plaintiff marched in the annual Philadelphia Mummer's Parade as a member of a string band. Defendant did not have plaintiff's permission to publish the picture. *Id.* at 257. Plaintiff was not a public figure—he was one of 15,000 Mummers. *Id.* at 258. A "Mummer" is defined as one who wears a mask or fantastic disguise, especially on Christmas, New Year's, and other festive occasions. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 941 (1966).

252 510 F. Supp. at 257.

253 *Id.* at 257.

254 *Id.* at 258.

255 *Id.* at 259.

256 *Id.* at 260. In contrast, the court in Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540 (W. Va. Cir. Ct. 1983), could not conclude that the cartoon was reasonably susceptible to the defamatory interpretation given by the plaintiff, as required by the RESTATEMENT (SECOND) OF TORTS § 652E, and thus granted summary judgment to the defendant on the false light invasion of privacy claim. *Id.* at 2546; *see supra* note 149 and accompanying text.

257 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984).

zine, published a picture of the plaintiff[258] performing her act at the park, in its "Chic Thrills" section, which was mainly devoted to photographs or cartoons of an overtly sexual disposition.[259] In upholding the jury award, the court found no first amendment protection for the magazine.[260] The plaintiff was a private individual, not a public figure.[261] The jury found that *Chic* published plaintiff's picture in a highly offensive manner.[262] The court also found *Chic* liable to the plaintiff by virtue of its reckless disregard of her right to freedom from unwarranted publicity and its creation of a false impression.[263] While there was no falsity involved here, the contextual appearance of plaintiff's picture in a hard-core pornographic magazine was deemed actionable as libel and false light invasion of privacy.[264]

VI. Analysis of the Current State of Libel Suits Against Cartoonists

Just as the court in *Polygram Records, Inc. v. Superior Court (Rege)*,[265] found that no defamatory meaning could be attributed to a joke in light of the occasion at which it was delivered,[266] or as the Supreme Court found, in *Greenbelt Cooperative Publishing Association v. Bresler*,[267] that certain language is no more than "rhetorical hyperbole," a cartoon should not be deemed defamatory as a serious statement of fact.[268] Courts should also preclude any damage awards for intentional infliction of emotional distress or false light invasion of privacy, which would dilute the first amendment protections of editorial cartoonists. Although these tort claims are separate causes of action, with separate burdens of proof, the end result of allowing a plaintiff to prevail on emotional distress and false light claims is the same as if he had pre-

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258 *Chic* obtained the photograph through the use of deceitful tactics. 726 F.2d at 247-48.

259 *Id.* at 247.

260 *Id.* at 249-50.

261 *Id.* Defendant tried to assert that Braun was a public figure in an attempt to receive the heightened protection granted under the more rigorous first amendment standard for public figures.

262 *Id.* at 252.

263 *Id.*

264 *Id.* at 250. However, because the jury's award for damages was duplicative, the court vacated and remanded for retrial on the damages issue. *Id.* at 258. The court stated that if Braun waived her right to a retrial, the Fifth Circuit would instruct the district court to enter a judgment for the plaintiff based upon the jury verdict which gave both actual and punitive damages for false light invasion of privacy. *Id.*

265 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985).

266 216 Cal. Rptr. at 260.

267 398 U.S. 6, 14 (1970).

268 *See supra* notes 84-157.

vailed on his libel claim. If a plaintiff receives a damage award on one of these tort claims, even if the defamation claim is dismissed, the freedom of the cartoonist is ultimately chilled. Since the cartoon remains the catalyst for all of these claims, the cartoon must receive near absolute protection.[269]

Cartoonists have expressed concern over the propensity of public figures to bring suit. The threat of suits may hinder their freedom of expression.[270] The danger from the invidious chilling effect which results from lawsuits is the fact that something that "ought" to be expressed may no longer be voiced. Deterred by a fear of punishment, a cartoonist may refrain from graphically expressing something that lawfully could be, and perhaps should be, depicted. The result is a general societal loss.[271]

Although no American editorial cartoonist has lost a libel suit, in 1979 a Canadian court found that a cartoon by Bob Bierman "depicted the plaintiff as a person with a love of cruelty who enjoyed causing suffering to defenseless creatures"[272] and awarded the plaintiff $3,500.[273] That decision was overturned in 1980 by the high court of British Columbia which found that although a cartoon could be interpreted as defamatory, it was still "fair comment on a matter of public interest."[274]

Whereas private individuals have been allowed to go before a jury in a defamation action, a public figure must meet the difficult actual malice standard to prevail in a libel action.[275] Even in cases involving private individuals, the only case in which the plaintiff had a jury award upheld was *Braun v. Flynt*,[276] involving a swimming pig novelty act featured in a pornographic magazine.

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269 Nevertheless, the larger established media have rejected absolute privilege for themselves. Their concern is that the less responsible media would flourish under the absolute privilege doctrine and that the credibility of the press in general would suffer. Franklin, *Public Officials and Libel: In Defense of New York Times Co. v. Sullivan*, 5 CARDOZO ARTS & ENT. L.J. 51, 65 (1986); *see infra* note 284 and accompanying text.

270 Paul Szep has complained that "[t]here's a sense now that you can't go as far as you used to." Duke, *supra* note 6, at 14, col. 6. Mr. Szep has expressed the feeling that he must be more careful about what he does and how he does it: "[b]eing sued for libel has a chilling effect." Blodgett, *supra* note 104, at 26. One commentator has defined a chilling effect as "occur[ring] when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 693 (1978).

271 Schauer, *supra* note 270, at 693.

272 Lamb, *supra* note 4, at 19-20.

273 *Id.*

274 *Id.* at 20.

275 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974).

276 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984); *see supra* notes 257-64 and accompanying text.

In *Salomone v. Macmillan Publishing Co.*,[277] the lower court granted the plaintiff the right to a jury trial.[278] This decision was later reversed on other grounds and the case dismissed.[279] Most cases are rightly dismissed before they reach the trial stage. Yet, in those cases where an obscenity or moral issue exists, a jury, not a judge, should be engaged to apply the standard of the "reasonably understood" test advocated by so many courts.[280]

Political cartoons by their nature deal with controversial issues on sensitive topics and almost exclusively involve public figures. It must be recognized that along with the benefits received by public officials, such as power, fame, adulation, loyalty, and recognition, come the burdens which may include unrelenting public scrutiny and criticism.[281]

> [C]riticism may seem to the elected official to be unwarranted, unpleasant . . . and totally incorrect. . . . mean, spiteful, vehement, vindictive, vituperative and oppressive. . . . [U]nder our system of government and particularly under the precepts of the First Amendment . . . the elected official is expected to be able to withstand even the most virulent criticism and complaint, so long as it is made within prescribed constitutional boundaries . . . .[282]

One cartoonist described his craft by stating that "[c]ontroversy is what editorial cartooning is all about."[283] Since cartoons are considered to be expressions of opinion, their protection should be nearly absolute.[284] Yet, some standards need to be developed. Certainly, obscenity and lewdness need not be protected.[285] The edi-

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277 97 Misc. 2d 346, 411 N.Y.S.2d 105 (N.Y. Sup. Ct. 1978), *rev'd on other grounds*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1st Dep't 1980); *see supra* notes 173-94 and accompanying text.

278 *See* 97 Misc. 2d at 351-52.

279 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980); *see supra* text accompanying note 194.

280 *See* 97 Misc. 2d at 351-52.

281 King v. Globe Newspapers Co., 12 Media L. Rep. (BNA) 2361, 2378 (Mass. Super. Ct. 1986).

282 *Id.* at 2378-79. The solution for the super-sensitive in the political arena was best articulated by Harry S. Truman: "If you can't stand the heat, don't go in the kitchen." *Id.* at 2379 n.29.

283 Cartoonist Charles Bissell, *quoted in* S. HOFF, *supra* note 10, at 169 (1976). When a *Philadelphia Inquirer* editor learned that former Governor King charged that cartoonist Paul Szep had held him up to ridicule he was reported to have said, "My goodness, a political cartoonist holding up a politician to ridicule. That's not libel, that's a job description." Lamb, *supra* note 4, at 21.

284 "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. . . . Only a free and unrestrained press can effectively expose deception in government." New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

285 "Obscenity is not protected by the freedoms of speech and press." Roth v. United States, 354 U.S. 476, 481 (1957).

tors of the *Boston Globe* and the *Dayton Daily News* and *Journal Herald* judge a cartoon by a standard of taste and appropriateness.[286] The *Boston Globe* editor did indicate that he does not like cartoons that "make fun of groups, just people, and if that person is the governor of the Commonwealth, all the better."[287] It is a very subjective standard; if the editor understands the cartoon and finds humor in it, it will be published.[288] Yet, the *Miskovsky v. Tulsa Tribune*[289] court did not address the obscenity aspect of the cartoon. This court only ruled that it was protected as an expression of opinion.[290] "[T]he cartoon . . . neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does no more than express the writer's opinion . . . ."[291] This cartoon should have been brought before a jury under the test proposed by this Note.

The *Yorty v. Chandler*[292] court also acknowledged that a cartoon may be declared libelous if misrepresentations are maliciously presented as fact.[293] However, this is a contradiction of terms—exaggeration and satire are the tools of the cartoonist. Just as rhetorical hyperbole and privileged opinion are found to be nonactionable, the same treatment should be accorded to parody and satire.[294] In Governor King's complaint against the *Boston Globe* he contended that the cartoons conveyed a sense of his acceptance of cash payments for his personal use and benefit.[295] Had King met the actual malice standard and proved his contentions, he could have prevailed on the merits.

Proving falsity in a cartoon is a formidable task. Cartoons are

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286 Telephone interview with Martin F. Nolan, Editor of the *Boston Globe* (Mar. 10, 1986). Telephone interview with Brad Tillson, Editor of Dayton Newspapers, Inc. (Mar. 10, 1986).

287 Nolan, *supra* note 286.

288 *Id.*

289 678 P.2d 242 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984); *see supra* text accompanying notes 150-54.

290 *Id.* at 247.

291 *Id.* at 250.

292 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).

293 13 Cal. App. 3d at 472. A political cartoon falsely depicting a public official selling franchises for personal gain, a judge accepting a bribe, an attorney altering a public record, or a police officer shooting a helpless prisoner would not be exempt from redress merely because the charge was depicted graphically rather than verbally. *Id.* at 472.

294 *See* Dorsen, *Satire and the Law of Libel*, in 1985 ENTERTAINMENT PUBLISHING AND THE ARTS HANDBOOK 273 (R. Eubanks ed.) where the author argues that the purpose of the law of libel is to protect individual dignity. Parody and satire do not affect one's standing in the community but rather embarrass by ridicule. This harm to reputation is different from the harm resulting from a false statement.

295 Complaint of Edward J. King, *supra* note 86, at 24.

almost self-protectible in their use of exaggeration, symbolism, and comedic elements—all open to the subjective interpretation of the viewer. It should be apparent from the cartoon's context that no reasonable reader could interpret it as a statement of fact.[296] For this reason, the defendant should be relieved of the burden of litigation by a finding that the cartoon is not defamatory as a matter of law. In addition, editorial cartoons should enjoy absolute constitutional protection as expressions of opinion with only an obscenity standard to follow. A plaintiff who cannot prevail in defamation should not be allowed to prevail on either emotional distress or false light claims.

One problem faced by defendants may be the very nature of libel litigation itself. People in the media are increasingly concerned that the growing number of lawsuits, large damage awards, and expensive litigation costs will create a chilling effect,[297] despite the fact that the media wins ninety percent of these suits.[298] This is especially true for smaller media defendants because the cost of defending a claim may result in bankruptcy.[299] Libel insurance premiums have also increased for all media even though relatively few cases incur massive legal fees and costs. With this increase in premiums has come a diminution of coverage.[300]

While political cartoonists enjoy almost absolute protection,[301] editors carefully review their work. Paul Szep has said:

> To the *Globe's* credit, they have never imposed limitations on my creative freedom. I show my editor a rough [draft] which he checks for libel and/or bad taste. In the course of a year, we may also show the lawyers a cartoon. Obviously, one learns to discipline himself. The *Globe* and I have a very successful marriage; we disagree very little editorially, and when that happens, they either run the cartoon on the editorial page or on the Op-Ed page.[302]

Counsel for the *Philadelphia Daily News* has commented that

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296 *See* Yorty v. Chandler, 13 Cal. App. 3d 467, 472, 91 Cal. Rptr. 709, 711 (1970); *see also supra* notes 121-33 and accompanying text.

297 "A suit puts the paper on the defensive. . . . A quarter-million dollars might be spent before you even get out of the box. Whether you win or lose isn't so much the case; it's the cost of the suit." Blodgett, *supra* note 104, at 26 (quoting Paul Szep).

298 Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985).

299 Franklin, *supra* note 269, at 64.

300 *Id.*; *see also* Garbus, *The Cost of Libel Actions—Pressure Not to Publish*, N.Y.L.J. July 17, 1986, at 1, col. 3.

301 No American editorial cartoonist has lost a libel suit to date. *See* Lamb, *supra* note 4, at 19.

302 *Quoted in* S. HOFF, *supra* note 10, at 330.

"there is an attempt to silence the press through an onslaught of public official lawsuits, so the press is being very careful to avoid falling into the pitfall of being chilled."[303] However, the editors of the *Boston Globe*, the *Dayton Daily News*, and the *Journal Herald* do not reflect a sense of being chilled. Cartoons about the plaintiffs continued even after the suits were initiated.[304] This is not true of all newspapers. The *Barre-Montepelier Times Argus* ceased publishing cartoons which poked fun at Killington, Vermont's largest ski resort, for wanting to change state laws to allow the making of snow from sewer waste.[305] And in 1985, a "Doonesbury" series on Frank Sinatra by Garry Trudeau was cancelled, or altered, by many newspapers, over concerns that it was libelous. This occurred despite assurances from "Doonesbury" 's distributor, Universal Press Syndicate, that the particular strip had been checked for possible libelous material upon Mr. Trudeau's request.[306] One editor believes that the courts have turned libel into "therapy for losing politicians, primal scream therapy . . . you can't let it bother you, you try not to."[307]

The Iowa Libel Research Project was an effort to determine the feasibility of developing nonlegal alternatives to libel litigation.[308] The project found that libel plaintiffs do not initiate their suits to win money damages but rather bring suit to restore their reputations or to punish the media.[309] In addition, they do not claim financial loss due to the alleged libel but rather sue for emotional suffering.[310]

The Libel Research Project also found that the libel suit itself

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303 Blodgett, *supra* note 104, at 26 (quoting Samuel Klein).

304 Nolan, *supra* note 286; Tillson, *supra* note 286.

305 Lamb, *supra* note 4, at 16.

306 *Id.* at 21.

307 Nolan, *supra* note 286. Mr. Nolan suggested that insurance companies should countersue the plaintiffs for "frivolous suits." Indeed, Dayton Newspapers did consider a countersuit against James Celebrezze; and, the *Barre-Montpelier Times Argus* has filed a countersuit against the Killington Ski Resort. Lamb, *supra* note 4, at 16.

308 The preliminary results of this study were published in several essays appearing in *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215 (1985).

309 Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985).

310 *Id.* at 220. Interestingly, the study found that roughly half of the libel plaintiffs would contact the media directly before they contacted an attorney. Because of this, the study found a major alternative to litigation existed in the newsroom. They concluded that if more editors recognized the importance of the way they handle complaints and its direct bearing on whether they ultimately are sued for libel, the media would develop specific policies and procedures for addressing complaints, including an emphasis on courtesy in dealing with complaints and in-house training in human relations. *See generally* Cranberg, *Fanning the Fire: The Media's Role in Libel Litigation*, 71 IOWA L. REV. 221 (1985).

represents effective vindication for the plaintiff.[311] While less than ten percent of media libel cases are won in court, plaintiffs feel they do win, albeit by their own standard, not the judicial system's.[312] Since the correction of a misrepresentation and its reputational damages may serve as principal motivation, ultimate judicial victory, although desirable, is not a required precondition. "The suit is a symbolic means of vindicating the claim of falsehood, and it is the act of suit that largely accomplishes this."[313] The act of initiating a suit, independent of its result, is an effective and public form of reply. Plaintiffs use the judicial system to legitimize their claims of falsity.[314] While a final judgment may settle the question of liability between the parties, the judicial proceeding and its concomitant publicity will provide a sufficient forum for the "victim" of an allegedly libelous cartoon to air his objections publicly, at no or little cost to him.

One factor that enables plaintiffs to afford libel litigation is that most, including the "public official" plaintiffs, sue on contingency fee arrangements.[315] Therefore, as it is relatively inexpensive for libel plaintiffs to sue, the media defendants must bear the costs of the suit.[316] Nevertheless, legal fees in some of the more publicized cases have been estimated to reach millions of dollars for each party.[317]

Considerable time is spent in litigation. Pretrial motions are made in virtually every case and the decisions on these motions are then appealed in advance of trial.[318] Fewer than twenty per cent of

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311 Bezanson, *supra* note 298, at 228.

312 *Id.*

313 *Id.* at 228-29.

314 *Id.* at 228.

315 *Id.*

316 *Id.*; *see* Franklin, *supra* note 269, at 63-65. The author discusses the tremendous costs imposed upon media defendants despite the fact that the plaintiffs' claims often fail in the end.

317 *See* Franklin, *supra* note 269, at 63, n.65. Ariel Sharon is estimated to have spent up to $1.5 million and *Time Magazine* well over $1 million. Estimates of the cost of General Westmoreland's case have been as high as $7 million for the plaintiff and $10 million for the defendant.

318 In King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986), an initial motion for summary judgment was denied as was a subsequent motion for a rehearing or certification to the appeals court. After pre-trial discovery was completed, the *Boston Globe* renewed its motion for summary judgment. It was on this renewed motion, over two years after King filed his complaint, that summary judgment was granted to the defendant, Globe Newspaper Co. *Id.* An appeal by King is pending. Micchiche, *supra* note 3; *see* King v. Globe Newspaper Co., 12 Media L. Rep. at 2361.

In Celebrezze v. Dayton Newspapers, Inc., No. 88127 slip op. (Ohio Cuyahoga Cty. C.P., July 1, 1986), the defendant's motion to dismiss was denied in July, 1986, more than a year after James Celebrezze filed his complaint. The court imposed a cutoff date for discovery of September 30, 1986. A motion for summary judgment was filed October 15. Plaintiffs were given until November 13 to respond. Defendants were granted

the cases ever reach trial.[319]

The issue of constitutional privileges also encourages suits by public figures. Since plaintiffs need not fear prompt adjudication on any of the substantive issues of the dispute, litigation may serve as an effective way to legitimatize an unsupported claim of falsity. The plaintiff need not fear that his claim will be compromised by a finding that what was said was the truth.[320] In only about one-half of the trials are issues other than privileges even addressed.[321] And virtually all cases tried are later appealed.[322]

Suggestions for limiting libel actions are numerous. One prominent libel attorney has suggested that publishers promptly and prominently correct any errors should the requisite proof of their falsity be presented to them.[323] Perhaps a newspaper could print an explanation of the humor intended in the cartoon and a disclaimer of any innuendo in order to avoid a libel suit. There have been cases in which newspapers have published apologies or clarifications to ward off suits.[324] This is necessary only in cases where the likelihood is greater that false meaning could be attributed to the cartoon. In addition, it has been suggested that a ceiling be set for damages for emotional injury caused by libel.[325] Legislation could be enacted to limit punitive damages.[326] However, this should only apply in those cases where the plaintiff can show a libel present in the cartoon.

VII. CONCLUSION

This Note has attempted to set a standard for the determination of whether an editorial cartoon may be found defamatory. Interpretations of a cartoon must be bound to the contextual clues inherent in the cartoon medium. These clues include exag-

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their summary judgment motion on November 17, 1986, three weeks before the scheduled trial date of December 8, 1986. Telephone interviews with Robert E. Portune, Counsel to Dayton Newspapers, Inc. (Nov. 3, 1986, Dec. 23, 1986).

In the *Rizzo* suit, discovery has been continuing for over a year. Telephone interview with Katherine Hatton, Counsel to Philadelphia Newspapers, Inc. (Nov. 4, 1986).

319 Bezanson, *supra* note 298, at 231.

320 *Id.* at 230-31.

321 *Id.* at 231.

322 *Id.*

323 Abrams, *Why We Should Change the Libel Law*, N.Y. Times, Sept. 29, 1985, § 6 (Magazine), at 93.

324 Duke, *supra* note 6, at 14, col. 6.

325 Abrams, *supra* note 323, at 93. This would be similar to the ceiling set on medical malpractice cases in California. Floyd Abrams suggests limiting recovery for emotional injury due to libel to $100,000. Actual losses of income would be allowed up to their total amount and punitive damages abolished, according to his plan. *Id.*

326 Montana has enacted legislation to limit punitive damages to $25,000 or 1% of the defendant's net worth, whichever is greater. MONT. CODE ANN. § 27-1-221(6)(b) (1985).

geration, outrage, parody, and satire. Only if a cartoon could be "reasonably understood" as rendering a defamatory statement should a plaintiff be allowed to prevail in his libel action. A guideline has been suggested whereby libel in a cartoon action would be allowed only where a breach of the obscenity standard is present. In addition, the frequently accompanying tort claims of intentional infliction of emotional distress and false light invasion of privacy would have to meet the same standard as the defamation action in order for the plaintiff to prevail. Otherwise, the very purpose of the first amendment to assure that public debate be "uninhibited, robust and wide open"[327] will be defeated.

Donna Stricof Kramer

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[327] New York Times Co. v. Sullivan, 376 U.S. at 270.