

# REGULATING FUNNY: HUMOR AND THE LAW

Laura E. Little†

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† Professor of Law and James E. Beasley Chair in Law, Temple University's Beasley School of Law. Copyright 2009 held by Laura E. Little. Many colleagues gave me inspiration and scholarly guidance for this Article, particularly Don Harris, Jeremi Duru, and Dave Hoffman. I also owe substantial debt to Ashley Dorn, Alice Ko, and Thomas O'Rourke for their research assistance.

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## INTRODUCTION

Chuck makes a joke. The joke hurts Gladys, who complains, "That's not funny!" If Gladys presses her view, ascribing blame and demanding redress, a court matches her hurt with rules of law. Carried to its logical conclusion, this legal process regulates Chuck's joke, sending a message about whether society likes his humor. The law can regulate Chuck's joke in wildly varying ways. Depending on context, the law may insulate, tolerate, encourage, condemn, or suppress Chuck's humor.<sup>1</sup> To resolve the controversy between Chuck and Gladys, a court may even need to determine whether it agrees that Chuck's joke is—indeed—*not funny*.

The stakes are high here. To begin, where humor is stifled, the First Amendment hangs in the balance. Most potentially humorous utterances are actionable precisely because of their content—a key trigger for First Amendment protection. To a limited extent, scholars have explored this ramification of humor regulation, particularly in the context of sexual harassment litigation.<sup>2</sup> Yet even leaving aside core First Amendment values, regulating humor implicates other important concerns nowhere discussed in case law or legal scholarship.<sup>3</sup>

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<sup>1</sup> So what's the deal with the names? Comic wisdom has it that certain names and sounds are funnier than others. "Gladys," "Chuck," and words with hard consonant sounds are some of the funniest ones. See Tad Friend, *What's So Funny?: A Scientific Attempt to Discover Why We Laugh*, NEW YORKER, Nov. 11, 2002, at 78, 90.

<sup>2</sup> The choice to characterize humor regulation as a First Amendment issue tends, not surprisingly, to encourage scholarship advocating regulation reduction. See, e.g., DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 34 (2003) (describing "the corrosive effect of hostile environment law on freedom of expression"); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 491–510 (1991) (arguing that hostile work environment liability leads to unconstitutional viewpoint regulation); Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV. 3, ¶¶ 15–22 (illustrating how sexual harassment law can be unconstitutional); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?* 85 GEO. L.J. 627, 635–37 (1997) [hereinafter Volokh, *Hostile Work Environment*] (arguing that "harassment law can suppress core protected speech"). But cf. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2304–06, 2319 (1999) (asserting that harassment law's effect of censoring free expression is justified).

<sup>3</sup> With the exception of articles touching on sexual harassment litigation and the First Amendment, legal scholarship on humor is largely confined to works analyzing or cataloguing humor *in* the law or *about* the law, such as humorous opinions, lawyer jokes, or comical law review articles. See, e.g., CORPUS JURIS HUMOROUS (John B. McClay & Wendy L. Matthews eds., 1991) (compilation of humorous opinions and other legal materials); LEGAL ANECDOTES, WIT, AND REJOINDER (Edward J. Bander ed., 2007) (compilation of witty legal material); Thomas E. Baker, *A Compendium of Clever and Amusing Law Review Writings: An Idiosyncratic Bibliography of Miscellany with in Kind Annotations Intended as a Humorous*

Scholars working in social sciences, natural sciences, and the humanities document many beneficial qualities of humor, benefits as wide ranging as pain relief, social cohesion, and creativity.<sup>4</sup> That's not to say that humor doesn't have its downsides.<sup>5</sup> Prudence suggests, however, that a thoughtful decision to regulate humor should distinguish situations where humor fosters good from those where humor produces negative effects.

Given humor's significant social consequences, one might expect courts to consider these effects in rendering decisions that implicate humor. Yet courts speak explicitly to the effects of humor only sporadically.<sup>6</sup> In part, then, this Article's goal is to bring greater awareness to law's regulatory effect on humor.

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*Diversion for the Gentle Reader*, 51 *DRAKE L. REV.* 105 (2002); Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 *WM. & MARY L. REV.* 329, 330 (1991) (arguing that harassment law regulates speech on the basis of content and that courts should not recognize causes of action where "the factfinder and/or decisionmaker must arrive at a judgment . . . that harm must have occurred because the particular utterance in question is itself harm producing"); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 *B.U. L. REV.* 923, 924–28 (1985) (decrying the chilling effect of copyright, trademark, and libel laws on satiric expression); Marc Galanter, *Changing Legal Consciousness in America: The View from the Joke Corpus*, 23 *CARDOZO L. REV.* 2223 (2002) (analyzing jokes about lawyers and justice); Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 *U. MIAMI L. REV.* 693 (1987) (analyzing humor, sarcasm, and other figurative language in judicial opinions); J.T. Knight, Comment, *Humor and the Law*, 1993 *WIS. L. REV.* 897 (exploring humor—or lack thereof—in law review articles); *Symposium on Humor and the Law*, 1992 *BYU L. REV.* 313 (compiling articles parodying areas of the law, discussing funny opinions, satirizing legal education, legal academia, and legal scholarship, and listing works about these subjects).

One notable exception is a relatively short piece, Patricia Ewick & Susan S. Silbey, *No Laughing Matter: Humor and Contradictions in Stories of Law*, 50 *DEPAUL L. REV.* 559 (2000), that exposes sociological and cultural aspects of law by identifying and interpreting "humorous stories . . . that people tell about law." *Id.* at 560.

<sup>4</sup> See *infra* Part I.C for a discussion of the beneficial and detrimental effects of humor.

<sup>5</sup> See *infra* Part I.C.

<sup>6</sup> Parody provides the best vehicle for courts to discuss humor's effect. See, e.g., *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987) (noting that parody is "deserving of substantial freedom—both as entertainment and as a form of social and literary criticism" (quoting *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964))); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam) (rejecting a copyright violation and proclaiming that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody"). In evaluating legal claims involving parody, courts are, in fact, earnest in relying on formal definitions of humor set forth in dictionaries and literary theory. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (discussing the Greek definition of *parodeia* in evaluating copyright liability for alleged parody); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996) (quoting Aldous Huxley and communications scholars in stressing the role of parody in society); *L.L. Bean, Inc.*, 811 F.2d at 28 (invoking Homer, Chaucer's *Canterbury Tales*, and Voltaire's *Candide* in evaluating trademark liability for alleged parody); *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 279 n.11 (S.D.N.Y. 1992) (citing *The American Heritage Dictionary* and *Oxford English Dictionary* definitions of "parody" in evaluating trademark liability for alleged parody).

For an unusually thoughtful example of a court grappling with the importance of protecting humorous expression in an employment discrimination case, see *McIntyre v.*

But I hold greater ambition for this project. Humor occurs in most aspects of human life and, accordingly, appears in a wide variety of legal contexts. In this inaugural attempt to identify themes in humor regulation, I assess three diverse legal subjects: contract, trademark, and employment discrimination. (I briefly reckon with constitutional law, which weaves in and out of the three doctrinal contexts.) My assessment yields a rough taxonomy. As a starting point, the case law divides into two groups: instances in which the court's decision to regulate turns on whether the disputed communication is humorous and those in which the court regulates the communication irrespective of whether it is funny.

Take the joke between Chuck and Gladys. Let's say Chuck had offered to trade his car to Gladys in exchange for her walking on his back in high heels. In the first category of cases, courts actually engage with the question of whether Chuck's offer was indeed a joke. If the answer is "yes, Chuck made a joke," the law explicitly removes the communication from legal restriction—thereby protecting Chuck from civil liability. Chuck might avoid contract liability, for example, if a court decides that Chuck's statement to Gladys was no more than a drunken jest about trading his car, simply a joke rather than a legally enforceable contract.<sup>7</sup> The court's decision allows the joke (and others like it) to thrive, unfettered by legal obligations.<sup>8</sup> This analysis also occurs in trademark litigation, where courts in essence conclude that the level of jest is so high that no harm to an intellectual property interest occurs.<sup>9</sup>

It may seem fishy or wrong for courts to make the editorial judgment of whether something is humorous. Remarkably, though, the cases are often straightforward, tracking relatively formalistic legal analysis. The humor-regulating enterprise becomes more problematic, however, in the second category of humor regulation, where courts impose liability without regard to whether the communication is funny. In this category, courts instead focus on whether a commu-

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Manhattan Ford, Lincoln-Mercury, Inc., 669 N.Y.S.2d 122, 144 (N.Y. Sup. Ct. 1997) (noting that when humor "is good-natured and harmless it may relieve the tensions imposed by the pressures of daily life").

<sup>7</sup> See, e.g., *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1067 (7th Cir. 1992) ("[T]he parties to a legal transaction may always show that they understood a purported contract not to bind them; it may, for example, be a joke . . ." (quoting *In re H. Hicks & Son, Inc.*, 82 F.2d 277, 279 (2d Cir. 1936))).

<sup>8</sup> Of course, if the court incorrectly decides that the statement is *not* a jest and is therefore actionable, the court is discouraging others from making such statements in the future. The erroneous decision—and the specter that other similarly erroneous decisions will occur—thereby discourages such humorous statements.

<sup>9</sup> See *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) ("Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.").

nication is sufficiently harmful as to justify stifling it. Examples of this category are common in sexual harassment and employment cases and appear occasionally in trademark cases as well. (So, for example, a harassment issue may arise if Chuck and Gladys worked together when he spoke of trading his car.) Functionalism and indeterminacy abound in the trademark and harassment opinions; they embody inconsistencies and irrationalities, qualities common to all types of cases in which courts struggle to make difficult choices between competing alternatives.

One remarkable quality of all the humor-regulating opinions is their faithful (yet tacit) tracking of humor theory espoused by nonlegal thinkers. Humor theory provides a scholarly grounding for the dichotomy between humorous communications that avoid liability and those that do not. In particular, cases evaluating whether a particular communication is a joke that should avoid liability focus on what humor scholars denominate “incongruity” humor. By contrast, those cases regulating apparent jest—even if all were to agree that the jest is funny—concern communications that hew more closely to what scholars call “superiority” and “release” humor. Courts are more likely to protect humor based on incongruity than humor tied to superiority or release: incongruous humor thus tends to avoid law’s grip, while superiority humor or release humor triggers legal control. As with any generality of this sort, the case law does not sort perfectly. Nonetheless, understanding how the dichotomy between protected and unprotected humor operates provides a useful heuristic for case law analysis.

This Article first surveys definitions of humor and humor theories refined by philosophers, social scientists, and other nonlegal thinkers. Turning to the law, the next Part analyzes how courts treat humorous communications in contract, trademark, and sexual harassment cases, evaluating these legal categories in light of humor scholarship and mapping the coincidence between law and humor theory. This Article then assesses the beneficial and potentially detrimental consequences of courts’ current patterns in humor regulation, concluding that the law closely integrates social norms about appropriate humor—a state of affairs that should inspire both celebration and concern.

## I

### DEFINING AND THEORIZING FUNNY

No, the concept of a “humor theorist” is not part of some satire about academics. The subject of humor has in fact captured scholars’ attention for centuries.<sup>10</sup> Recent years have brought intense interdis-

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<sup>10</sup> See, e.g., *infra* notes 52, 59, 84 and accompanying text.

ciplinary study of humor.<sup>11</sup> Not surprisingly, however, academic effort has not yielded any final definition of humor.<sup>12</sup> After all, defining humor is about as ironic as defining postmodernism: the object to be defined mocks precise exposition. Humor itself rejects attempts to capture the essence of anything. Even more problematic, the process of describing humor can be counterproductive, acting as a “wet blanket.”<sup>13</sup> Because humor derives largely from emotion and intuition, attempts to bring rational cognition to bear on it can actually deflate comedy.<sup>14</sup>

Undaunted by the elusive quality of humor, scholars have produced volumes discussing what humor means for human beings. After exploring these attempts to define humor and to delineate its

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<sup>11</sup> There’s even a refereed, interdisciplinary journal of humor research and an academic group, the International Society for Humor Studies, which holds yearly conferences around the world. International Society for Humor Studies, HUMOR: International Journal of Humor Research, <http://www.hnu.edu/ishs/JournalCenter.htm#About> (last visited Apr. 3, 2009); International Society for Humor Studies, <http://www.hnu.edu/ishs/> (last visited Apr. 3, 2009). Among the disciplines represented in the interdisciplinary effort are rhetoric, semiotics, communication theory, psychoanalysis, philosophy, political science, sociology, and literature. See ARTHUR ASA BERGER, *BLIND MEN AND ELEPHANTS: PERSPECTIVE ON HUMOR* 9–16 (1995) (canvassing disciplines that might inform humor theory).

<sup>12</sup> See, e.g., BERGER, *supra* note 11, at 3 (“[H]umor continues to confound us. We’ve never figured out how to deal with it.”); HENRI BERGSON, *LAUGHTER: AN ESSAY ON THE MEANING OF THE COMIC* 1 (Cloudesley Brereton & Fred Rothwell trans., 1911) (“The greatest of thinkers, from Aristotle downwards, have tackled this little problem, which has a knack of baffling every effort, of slipping away and escaping only to bob up again, a pert challenge flung at philosophic speculation.”); Friend, *supra* note 1, at 93 (“Seeking a thoroughgoing explanation for humor is like seeking the Fountain of Youth, or the Philosopher’s Stone—it is a quest not for a tangible goal but for a beguiling idea.”); Jonathan Swift, *TO MR. DELANY* (1718), *reprinted in* 39 *THE WORKS OF THE ENGLISH POETS* 159 (Samuel Johnson ed., 1779) (“What humour is, not all the tribe / Of logick-mongers can describe . . .”).

<sup>13</sup> Ewick & Silbey, *supra* note 3 (noting that by analyzing humor “we become the ultimate wet blanket”); see also ROBERT R. PROVINE, *LAUGHTER: A SCIENTIFIC INVESTIGATION* 11 (2000) (“Philosophy is to science what alcohol is to sex: It may stir the imagination, fire the passions, and get the process underway, but the actual implementation may be flawed, and the end result may come up short.”); E.B. White, *Preface* to *A SUBTREASURY OF AMERICAN HUMOR* xi, xvii (E.B. White & Katharine S. White eds., 1941) (asserting that “[h]umor can be dissected, as a frog can, but the thing dies in the process and the innards are discouraging to any but the pure scientific mind”).

<sup>14</sup> At least for postmodernism, an attempt at definition can assist in establishing one of the messages of postmodernist theory—the message that reducing complex matters to a simple essence inaccurately portrays the nuances of existence, is inherently unreliable, and fails to account for competing perspectives. See, e.g., David J. Herman, *Modernism Versus Postmodernism: Towards an Analytic Distinction*, 12 *POETICS TODAY* 55, 75 (1991) (commenting on importance of postmodernist view that “aspects of the world [are] irreducible to any given representational scheme”); Patrick O’Donnell, *Editor’s Preface: Postmodern Narratives*, 41 *MOD. FICTION STUD.* 1, 1 (1995) (noting that one of postmodernism’s attractions lies in difficulty of defining term itself); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 *S. CAL. L. REV.* 2505, 2508–09 (1992) (venturing a definition of postmodernism, including recognition that “[t]here can be no such thing as knowledge of reality” and “all propositions and all interpretations, even texts, are themselves social constructions”).

qualities, this Part reviews three main theories of humor and then describes normative judgments about humor's effects.

## A. Defining Humor (or Not)

### 1. *Common Ground*

Scholars trying to define humor agree on a number of things. Most begin by confessing the impossibility of identifying a precise or all-encompassing definition.<sup>15</sup> Next, scholars agree that humor possesses an array of human aspects: *social*, *cognitive*, *emotional*, *psychophysiological*, and *behavioral*.<sup>16</sup> The *social* quality of humor is pervasive: even when humor occurs in an apparently nonsocial setting—such as when a solitary person is amused—the context is “pseudo-social,” as the person is likely responding to a memory or recording that involves others.<sup>17</sup> Humor's *cognitive* components include the mental processes involved in the “perception, creation, understanding, and appreciation” of humorous communication.<sup>18</sup> As for humor's *emotional* aspects, scholars mention “pleasurable feelings of amusement, exhilaration, and joy”<sup>19</sup> as well as the dark side: “greater depression and anxiety”<sup>20</sup> that humor might provoke. In related literature, psychologists have documented humor's *psychophysiological* effects to include “brain wave pattern changes,” activation of the “autonomic nervous system,” and hormone production.<sup>21</sup> For *behavioral* aspects of humor, several recent studies have focused on laughter, described as a physical act separate from humor itself<sup>22</sup> and sometimes wholly unrelated to amusement.<sup>23</sup> Other behavioral responses include “facial

<sup>15</sup> See, e.g., JON E. ROECKELEIN, *THE PSYCHOLOGY OF HUMOR* 9 (2002) (quoting various people commenting on the difficulty of defining humor).

<sup>16</sup> *Id.* at 23 (citing Rod A. Martin, *Humor and Laughter*, in 4 *ENCYCLOPEDIA OF PSYCHOLOGY* 202, 202 (Alan E. Kazdin ed., 2000)).

<sup>17</sup> ROD A. MARTIN, *THE PSYCHOLOGY OF HUMOR: AN INTEGRATIVE APPROACH* 5–6 (2007).

<sup>18</sup> ROECKELEIN, *supra* note 15, at 23 (citing Martin, *supra* note 16).

<sup>19</sup> *Id.*

<sup>20</sup> Nicholas A. Kuiper et al., *Humor Is Not Always the Best Medicine: Specific Components of Sense of Humor and Psychological Well-Being*, 17 *HUMOR: INT'L J. HUMOR RES.* 135, 144, 161–62 (2004).

<sup>21</sup> ROECKELEIN, *supra* note 15, at 23 (citing Martin, *supra* note 16, at 202).

<sup>22</sup> Antony J. Chapman & Hugh C. Foot, *Introduction to the Transaction Edition of HUMOR AND LAUGHTER: THEORY, RESEARCH, AND APPLICATIONS*, at vii, xiv (Antony J. Chapman & Hugh C. Foot eds., Transaction Publishers 1996) (1976) (noting that laughter often includes “‘challenging looks—intense with narrowed eyes’ and a ‘pleased or prideful look’” (quoting Herbert M. Lefcourt et al., *Locus of Control and the Expression of Humor*, 42 *J. PERSONALITY* 130, 136 (1974))).

<sup>23</sup> See, e.g., PROVINE, *supra* note 13, at 3 (concluding that most laughter is produced by speakers, not listeners, and typically results from factors other than witticisms); ROECKELEIN, *supra* note 15, at 40–51 (observing that laughter is often unrelated to amusement); John Tierney, *What's So Funny? Well, Maybe Nothing*, *N.Y. TIMES*, Mar. 13, 2007, at F1 (describing recent studies linking laughter with functions unrelated to humor).

grimaces, teeth-baring, guttural vocalizations, [and] postural . . . changes.”<sup>24</sup> Finally, scholars agree on the conditional nature of humor: comic appreciation depends on individual perceptions and preferences.<sup>25</sup>

## 2. *Humor Categories*

In the humor-defining enterprise, scholars have devoted much energy to listing different types. Legal scholars not being the only thinkers prone to prolific categorization efforts, philosophers, literary theorists, and psychologists have identified as many as twenty-one varieties of humor. Major categories include comedy, formal jokes, “wit, . . . satire, sarcasm, parody, puns, . . . and practical joking.”<sup>26</sup>

Scholars often put comedy in its own category, “embedded, historically, in . . . literature and the literary.”<sup>27</sup> Indeed, those studying dramatic comedy traditionally distinguished wit from humor,<sup>28</sup> a distinction shadowed in contemporary literature today. Wit was associated with intelligence, involving cleverness, ideas, and wordplay, while humor was associated with the human character, often invoking sympathy and benevolence.<sup>29</sup> Wit was also viewed as socially constructed and allied with the intellectual thought, while humor was regarded as more natural and allied with the imagination.<sup>30</sup> Not surprisingly, the two categories had social connotations, with wit associated with upper classes and humor being “a more bourgeois, middle-class concept, as-

<sup>24</sup> ROECKELEIN, *supra* note 15, at 23 (citing Martin, *supra* note 16, at 202).

<sup>25</sup> See, e.g., TED COHEN, JOKES: PHILOSOPHICAL THOUGHTS ON JOKING MATTERS 12 (1999) (explaining that jokes can work only with certain audiences and are usually directed only at those audiences); Chapman & Foot, *supra* note 22 (explaining that the “type” of individual hearing a joke is important to the appreciation of humor; qualities such as “control, conservatism, and sensation-seeking” are important, as are an individual’s concerns of “sex, aggression, and affiliation”); Jerry Palmer, *Parody and Decorum: Permission to Mock*, in BEYOND A JOKE: THE LIMITS OF HUMOUR 79, 80 (Sharon Lockyer & Michael Pickering eds., 2005) (“[H]umour needs to be both understood and permitted in order to be a joke . . .”).

<sup>26</sup> ROECKELEIN, *supra* note 15, at 13.

<sup>27</sup> *Id.* at 56.

<sup>28</sup> MICHAEL BILLIG, LAUGHTER AND RIDICULE: TOWARDS A SOCIAL CRITIQUE OF HUMOUR 61 (2005); MARTIN, *supra* note 17, at 23.

<sup>29</sup> MARTIN, *supra* note 17, at 23; see also BILLIG, *supra* note 28, at 61. Billig explains that the word “humor” derives from the psychological term “humours,” which referred to bodily fluids thought to bestow certain temperaments on individuals. *Id.* at 61–62. Thus, “a ‘humorist’ was not originally a comical writer but a person with an extreme character that seemed to comprise a single humour rather than a balance of various humours.” *Id.* at 62.

<sup>30</sup> ROECKELEIN, *supra* note 15, at 27; see also JOHN MORREALL, TAKING LAUGHTER SERIOUSLY 64 (1983) (noting the view that the term “humor” describes “‘what is observed,’” while “wit” occurs within the observer’s mind (quoting RICHARD BOSTON, AN ANATOMY OF LAUGHTER 60–61 (1974))).

sociated with universality and democracy.”<sup>31</sup> Although the suggestion that some funny communications are more socially desirable than others remains important for understanding humor in general and legal regulation in particular, the term “humor” has now become “the umbrella term for all things laughable.”<sup>32</sup>

Another distinct category of humor is formal jokes, defined as “prepackaged humorous anecdotes that people memorize and pass on to one another.”<sup>33</sup> Scholars note that jokes come and go with the fashions and, in fact, are currently out of favor.<sup>34</sup> Much literature reflects the view that women tend to dislike formal jokes.<sup>35</sup> Expanding on this observation, some thinkers have opined that the prominence of the formal joke as a vehicle for humor has diminished as women’s role in society has changed.<sup>36</sup>

Jokes are sometimes grouped with puns and riddles. Riddles involve a guessing game, and punning is word play.<sup>37</sup> Unlike riddles and puns, however, jokes do not necessarily have a linguistic connection.<sup>38</sup> This is particularly true for practical jokes, which are normally viewed as “tricks” played “on another person that would normally be viewed as rather unkind.”<sup>39</sup> Puns are allied with wit and therefore enjoy preference in humor literature.<sup>40</sup>

Satire, sarcasm, and parody are related: all are aimed at derision<sup>41</sup> and do not always operate subtly.<sup>42</sup> All three can contain other types of humor, such as exaggeration and ridicule.<sup>43</sup> Yet, while joviality may accompany parody, the same is not true for satire and sarcasm. As one author observes, “[L]aughter is not the chief aim of the satirist,

<sup>31</sup> MARTIN, *supra* note 17, at 23; *see, e.g.*, DANIEL WICKBERG, *THE SENSES OF HUMOR: SELF AND LAUGHTER IN MODERN AMERICA* 59 (1998) (observing that an “aristocratic/bourgeois split” was always present in the “wit/humor distinction”).

<sup>32</sup> MARTIN, *supra* note 17, at 23.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *See* Warren St. John, *Seriously, The Joke Is Dead*, N.Y. TIMES, May 22, 2005, § 9, at 1 (reporting the view that the joke-telling population changes with cultural shifts).

<sup>35</sup> *See, e.g.*, HERBERT M. LEFCOURT, *HUMOR: THE PSYCHOLOGY OF LIVING BUOYANTLY* 158 (2001) (reporting on clinical studies demonstrating that women favor anecdotal humor).

<sup>36</sup> Warren St. John, *supra* note 34 (describing joke telling as generally a masculine pursuit that diminished in popularity with women’s changing roles).

<sup>37</sup> ROECKELEIN, *supra* note 15, at 64–65.

<sup>38</sup> *Id.* at 66 (“The term *joke*—when applied to a story or remark—suggests something designed to promote good humor, especially an anecdote with a humorous twist . . .”).

<sup>39</sup> MARTIN, *supra* note 17, at 126.

<sup>40</sup> *See id.* at 45 (“[P]uns have their origins in ancient ‘duels of wits.’”); ROECKELEIN, *supra* note 15, at 65 (discussing the wide use of puns as a literary device).

<sup>41</sup> ROECKELEIN, *supra* note 15, at 61–62.

<sup>42</sup> LAUGHING MATTERS: A SERIOUS LOOK AT HUMOUR 76 (John Durant & Jonathan Miller eds., 1988).

<sup>43</sup> *See, e.g.*, BERGER, *supra* note 11, at 74–75 (noting that parody can use “ridicule and exaggeration”).

nor is the effect of . . . satire to provoke loud laughter.”<sup>44</sup> Another important factor distinguishing parody from satire and sarcasm is “intertextuality.”<sup>45</sup> Unlike a satire or sarcastic statement, a parody overlaps with the text serving as the its object. This overlap, which allows the audience to recognize the original text within the parody,<sup>46</sup> can take the form of expressive style, characteristics of a particular genre (e.g., science fiction, fairy tale, folk song), or a specific text (e.g., *Star Trek* or *Snow White*).<sup>47</sup> Whatever the parody’s form, however, theorists are more upbeat about parody than satire and sarcasm, noting its ancient pedigree and service as social commentary.<sup>48</sup> Yet the moniker “parody” is not alone sufficient for society to celebrate parody. A quality key to social approval is “decorum,” which parody may breach by mocking a “deeply held public value” such as “veneration for the war dead.”<sup>49</sup>

### B. Three Theories of Humor

Theories for what constitutes humor proliferate. Three long-standing theories predominate: the superiority, incongruity, and release theories.<sup>50</sup> Although contemporary humor theorists have reached beyond the received wisdom of a tripartite structure to humor,<sup>51</sup> the three theories still enjoy mainstream status. Moreover, while each of the three theories has a separate history, the three often operate simultaneously, sometimes all explaining the comedy in one communication. In this subpart, I provide an overview the three theories and then provide an illustration of their overlap.

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<sup>44</sup> ROECKELEIN, *supra* note 15, at 62 (citing J.Y.T. GREIG, *THE PSYCHOLOGY OF LAUGHTER AND COMEDY* 174–98 (1969)).

<sup>45</sup> Peggy Zeglin Brand, *Parody*, in 3 *ENCYCLOPEDIA OF AESTHETICS* 441, 442 (Michael Kelly ed., 1998); *see also* Palmer, *supra* note 25, at 81 (referring to this quality as “intertextuality”).

<sup>46</sup> Brand, *supra* note 45 (“Unlike forms of satire or burlesque that do not make their target a significant part of themselves, parody allows for comedy that laughs ‘both at and with its target.’” (quoting MARGARET A. ROSE, *PARODY/META-FICTION: AN ANALYSIS OF PARODY AS A CRITICAL MIRROR TO THE WRITING AND RECEPTION OF FICTION* (1979))).

<sup>47</sup> *See* BERGER, *supra* note 11, at 74–75 (discussing how parody must play on the “distinctive identity” of a text).

<sup>48</sup> *See id.* at 75 (“[P]arody is nothing new and parody is one of the most important techniques utilized by humorists . . .”).

<sup>49</sup> Palmer, *supra* note 25, at 93.

<sup>50</sup> *See, e.g.*, Friend, *supra* note 1, at 80, 93 (describing the three different theories and identifying them as “history’s three favorite comedy theories”). Consider the following encapsulation of the three: “The Renaissance brought Hobbes’s superiority theory (laughter marks the sudden attainment of power over someone else), which gave way first to Kant’s incongruity theory (laughter occurs when perceptions don’t conform to logical expectations), and, finally, to Freud’s relief theory (laughter releases pent-up nervous energy).” Emily Eakin, *If It’s Funny, You Laugh, but Why?*, *N.Y. TIMES*, Dec. 9, 2000, at B7.

<sup>51</sup> *See* Friend, *supra* note 1, at 81–82 (discussing more recent theories of humor).

### 1. *Superiority Theory*

The superiority theory arguably enjoys the longest lineage of all, and is identified with ancient thinkers (Aristotle, Plato, Socrates, and Cicero) who associated humor with aggression and described it as a mechanism of disparaging others to enhance one's own sense of well-being.<sup>52</sup> Plato, for example, argued that weak individuals deploy humor only where they are unlikely to face counterattack.<sup>53</sup> Echoing this disdainful tone, Socrates admonished that society must tightly control laughter, particularly laughter that mocks authority as well as "philosophical notions of truth and beauty."<sup>54</sup>

Characteristically, Thomas Hobbes embraced a similarly negative view and is credited with developing superiority theory itself.<sup>55</sup> Hobbes focused on human egocentricity and the quest for power, suggesting that individuals find amusement only if a communication or event prompts them to feel personally successful or if the event gives them the perception that another appears inferior.<sup>56</sup> In humor literature's most famous passage, Hobbes states: "*Sudden Glory*, is the passion which maketh those *Grimaces* called LAUGHTER; and is caused either by some sudden act of their own, that pleaseth them; or by the apprehension of some deformed thing in another, by comparison whereof they suddenly applaud themselves."<sup>57</sup> In other words, laughter for Hobbes is no more than basking in one's victory or superiority over another.<sup>58</sup>

### 2. *Incongruity Theory*

As originally developed, incongruity theory rescued humor from the negative spirit of superiority theory. Identified with Immanuel Kant and Arthur Schopenhauer, incongruity theory suggests that humor arises from the juxtaposition of two incongruous or inconsistent

<sup>52</sup> See, e.g., Martin, *supra* note 16, at 202–03; see also Chapman & Foot, *supra* note 22, at 1, 1 (observing that Cicero, Quintilian, and Aristotle believed that laughter has its basis in "shabbiness or deformity" and is "degrading to morals, art and religion, a form of behaviour from which civilized man should shrink"). But cf. BILLIG, *supra* note 28, at 38 ("Neither Plato nor Aristotle described their views on humour as 'theories'").

<sup>53</sup> Dolf Zillmann & Joanne R. Cantor, *A Disposition Theory of Humour and Mirth*, in HUMOR AND LAUGHTER, *supra* note 22, at 93, 94 ("Plato made the weak and helpless a prime target of ridicule and a risk-free source of social gaiety.").

<sup>54</sup> BILLIG, *supra* note 28, at 41–42.

<sup>55</sup> See Eakin, *supra* note 50.

<sup>56</sup> THOMAS HOBBS, LEVIATHAN 48 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651).

<sup>57</sup> *Id.* Hobbes further states that this inclination is common among those who "are conscious of the fewest abilities in themselves; who are forced to keep themselves in their own favour, by observing the imperfections of other men." *Id.*

<sup>58</sup> See R.E. Ewin, *Hobbes on Laughter*, 51 PHIL. Q. 29, 29–30 (2001) (discussing Hobbes's analysis of laughter).

phenomena.<sup>59</sup> Viewed in this way, humor takes on the air of accomplishment, joining company with unlikely turns of mind such as artistic creativity and scientific discovery.<sup>60</sup> Of the three theories, incongruity theory is the most complex and perhaps the most mysterious.

Humorous incongruity can manifest in myriad, seemingly unrelated ways. For example, incongruity might result because a communication suddenly alters perspective or point of view. The alteration can simply deviate from the information contained in the foundation, or “setup,” for the humor—as in the following joke:

O’Riley was on trial for armed robbery. The jury came out and announced, “Not guilty.” “Wonderful,” said O’Riley, “does that mean I can keep the money?”<sup>61</sup>

The “setup” for this joke suggests that, having been acquitted of armed robbery, O’Riley would not be inclined to admit to the crime.<sup>62</sup> Hence, O’Riley’s admission comes as a surprise. Literary theorist Henri Bergson characterizes this type of incongruity as a form of inversion where the comic depicts characters in one situation and then reverses their roles.<sup>63</sup> Classic American examples appear in good-news/bad-news jokes:

General George Washington at Valley Forge to his troops: “The good news is that you’re going to get a change of underwear. The bad news is that you have to change it with the man next to you.”<sup>64</sup>

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<sup>59</sup> See Martin, *supra* note 17, at 203.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 63 (quoting Jerry M. Suls, *A Two-Stage Model for the Appreciation of Jokes and Cartoons: An Information-Processing Analysis*, in *THE PSYCHOLOGY OF HUMOR: THEORETICAL PERSPECTIVES AND EMPIRICAL ISSUES* 81, 90 (Jeffrey H. Goldstein & Paul E. McGhee eds., 1972)).

<sup>62</sup> Isaac Asimov suggests that humor readily results where the alteration produces “anticlimax.” ISAAC ASIMOV, *ISAAC ASIMOV’S TREASURY OF HUMOR* 4 (1971). Asimov uses the following as an example:

“Oh, poor Mr. Jones,” mourned Mrs. Smith. “Did you hear what happened to him? He tripped at the top of the stairs, fell down the whole flight, banged his head, and died.”

“Died?” said Mrs. Robinson, shocked.

“Died!” repeated Mrs. Smith with emphasis. “Broke his glasses, too.”

*Id.* at 3. The change in point of view is from tragedy (death) to mere inconvenience (broken glasses).

<sup>63</sup> BERGSON, *supra* note 12, at 94 (“Picture to yourself certain characters in a certain situation: if you reverse the situation and invert the rôles, you obtain a comic scene.”). Bergson also describes a similar play, which he calls *reciprocal interference of series*: “A situation is invariably comic when it belongs simultaneously to two altogether independent series of events and is capable of being interpreted in two entirely different meanings at the same time.” *Id.* at 96.

<sup>64</sup> JOSEPH BOSKIN, *REBELLIOUS LAUGHTER: PEOPLE’S HUMOR IN AMERICAN CULTURE* 15–16 (1997) (describing good-news/bad-news jokes as a form of incongruity humor).

In a similar manner, the information serving as a joke's foundation might derive from an unstated assumption or perceived reality commonly shared in a culture. Take, for example, an assumption that men should be the aggressors in romantic relationships with women. For those embracing this assumption, humor may result from depictions of a "domineering woman attacking a submissive man."<sup>65</sup> Or the incongruity might simply result when the familiar is placed in a foreign, unfamiliar context.<sup>66</sup> Although pioneering his own theory of humor (discussed below), Freud suggests other mechanisms that create incongruity: "the coupling of dissimilar things, contrasting ideas, 'sense in nonsense', [and] the succession of bewilderment and enlightenment."<sup>67</sup>

Although empirically one might conclude that incongruity often accompanies comedy, this observation does not "[o]n its own . . . explain why the perception of incongruity should be followed by a sense of pleasure and laughter."<sup>68</sup> As one author observes, incongruity is an "ingredient in such unfunny phenomena as poetic metaphors, magic tricks, and . . . whodunit thrillers."<sup>69</sup>

Several explanations for the connection between humor and incongruity suggest themselves. First, incongruity is inherently interesting, i.e., intellectually provoking, unusual, and ear catching. In addition, incongruity is often full of mental action.<sup>70</sup> For example, an incongruous line in a joke often prompts the audience to refer back to the joke's original setup, a process inspiring spontaneous mental exercise. Take, for example, the following statement by an older person:

I still have sex at 74. I live at [number] 75, so it's no distance for me.<sup>71</sup>

In processing the joke, the audience must double back to the setup "I still have sex at 74" and reevaluate its significance.<sup>72</sup> Sometimes called

<sup>65</sup> Lawrence La Fave et al., *Superiority, Enhanced Self-Esteem, and Perceived Incongruity Humour Theory*, in HUMOR AND LAUGHTER, *supra* note 22, at 63, 84.

<sup>66</sup> See BERGSON, *supra* note 12, at 112 (asserting that "comic meaning is invariably obtained when an absurd idea is fitted into a well-established phrase-form").

<sup>67</sup> SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 14 (James Strachey ed. & trans., 1960) (1905).

<sup>68</sup> BILLIG, *supra* note 28, at 76.

<sup>69</sup> Tony Veale, *Incongruity in Humor: Root Cause or Epiphenomenon?*, 17 HUMOR: INT'L J. HUMOR RES. 419, 424 (2004).

<sup>70</sup> See *id.* at 420–21 (describing the process of mental backtracking in response to an incongruity); see also BILLIG, *supra* note 28, at 65 (explaining that incongruities "requir[e] the listener to make an abrupt cognitive reorganization").

<sup>71</sup> Veale, *supra* note 69, at 420 (presenting and analyzing this joke).

<sup>72</sup> See *id.* ("The listener, who is unaware of the ambiguity at first, is thus forced to backtrack and recreate an alternative mapping between the surface and deep levels of the narrative.").

a “recoil,”<sup>73</sup> this mental process reflects surprise, unexpected insight, and sometimes even an emotional roller coaster. As Robert Provine argues, however, the laughter provoked by the surprise and emotional tumult is not definitive evidence of humor.<sup>74</sup> Nonetheless, an audience’s mental cooperation with a humorist—anticipating that the humorist seeks to make them laugh, but unsure of how the humorist will do so until the punch line arrives—is usually a pleasurable one.<sup>75</sup> In many cases, pleasure also results from the “good guy wins” tone of many attempts at humor, which “up-end” perceptions of reality, thereby creating a hearty challenge to hierarchy and communicating a form of “justice.”<sup>76</sup>

So far, then, the explanations for why incongruity can produce humor are intellectual provocation, mental exercise, colorful or ear-catching contexts, emotional workouts, and social critique. Coming at the connection between incongruity and humor from another perspective, some psychiatrists and psychologists hypothesize that incongruity must combine with another condition for humor to result.<sup>77</sup> Examples of necessary conditions include: the incongruity “must occur suddenly,” the incongruity “must take place in a playful and non-threatening context,” or the incongruity must ultimately “be resolved” or “make sense.”<sup>78</sup> The following dangling modifier illustrates this latter proposition:

Because of their sandy bottoms, tourists enjoy New Jersey beaches.

At first blush, one might read this sentence as depicting the New Jersey vacation scene, describing the fine quality of the New Jersey shore. The humor arises—at least partially—from the incongruity of discussing sand-encrusted human buttocks. The joke is complete, however, only upon realizing the author’s grammatical mistake: “because of their sandy bottoms” is meant to modify “beaches” and not

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<sup>73</sup> *Id.*

<sup>74</sup> PROVINE, *supra* note 13, at 3 (concluding that most laughter is produced by speakers, not listeners, and typically results from factors other than witticisms).

<sup>75</sup> Victor Raskin & Salvatore Attardo, *Non-Literalness and Non-Bona Fide in Language: An Approach to Formal and Computational Treatments of Humor*, 2 PRAGMATICS & COGNITION 31, 35–37 (1994) (discussing recoil effect and describing how listeners will “look for the necessary ingredients of the joke in the speaker’s utterance”); see Ewick & Silbey, *supra* note 3, at 561 (explaining that because humor often places two or more disparate elements in competition, humor enjoys a “quality of suspense”).

<sup>76</sup> See Ewick & Silbey, *supra* note 3, at 561.

<sup>77</sup> See MARTIN, *supra* note 17, at 64 (noting that not all incongruities are humorous and discussing what is necessary to make an incongruity humorous).

<sup>78</sup> *Id.* at 64–65 (surveying various theories). Independent humor theories also share these observations. For example, two theories related to incongruity theory are the surprise theory of humor, which focuses on “sudden, unexpected positive events” and the ambivalence theory, which focuses on simultaneously occurring, yet inconsistent, emotions. LEON RAPPOPORT, PUNCHLINES: THE CASE FOR RACIAL, ETHNIC, AND GENDER HUMOR 17–18 (2005).

“tourists.”<sup>79</sup> Of course, Sigmund Freud might explain the humor here by pointing to the allusion to a naked, intimate body part.<sup>80</sup> To that theory I now turn.

### 3. Release Theory

According to release theory, humor taps into repressed sources of pleasure,<sup>81</sup> pressure,<sup>82</sup> or anxiety.<sup>83</sup> Thus, a communication’s funny quality arises because it induces laughter and, with it, a release of repressions. Sometimes called “relief theory,” release theory is most often identified with Sigmund Freud and English philosophers Alexander Bain and Herbert Spencer.<sup>84</sup> Bain and Spencer focused on the quality of humor provoking a “release of nervous energy.”<sup>85</sup> As Bain explained, humor’s embrace of “degradation” or its celebration of mischief prompted this release.<sup>86</sup>

Freud embossed this energy release notion onto his view that jokes express taboo desires.<sup>87</sup> He likened jokes to dreams—both of which work by analogy or allusion, defeating logic and actual meaning to elude the human inner censor.<sup>88</sup> His joke theory distinguishes between a “non-tendentious” (or innocent) and a “tendentious” joke.<sup>89</sup> For Freud, a non-tendentious joke is an “aim in itself” and generally achieves only a “slight smile,” while a tendentious joke is either “hostile,” “cynical,” “s[k]eptical,” or “obscene.”<sup>90</sup> By obscene, Freud

<sup>79</sup> See MARTIN, *supra* note 17, at 65, which provides a similar explanation for the following joke:

An English bishop received the following note from the vicar of a village in his diocese: “Milord, I regret to inform you of my wife’s death. Can you possibly send me a substitute for the weekend?”

*Id.* (quoting VICTOR RASKIN, SEMANTIC MECHANISMS OF HUMOR 106 (1985)).

<sup>80</sup> FREUD, *supra* note 67, at 98 (“By the utterance of the obscene words it compels the person who is assailed to imagine the part of the body . . . in question . . .”).

<sup>81</sup> See *id.* at 95.

<sup>82</sup> BILLIG, *supra* note 28, at 86.

<sup>83</sup> JOHN LIMON, STAND-UP COMEDY IN THEORY, OR, ABJECTION IN AMERICA 39 (2000) (observing that a joke can release anxiety and fear about such matters as miscegenation and homoeroticism).

<sup>84</sup> See, e.g., BILLIG, *supra* note 28, at 86 (tracing release theory to a dispute between Bain and Spencer); MURRAY S. DAVIS, WHAT’S SO FUNNY?: THE COMIC CONCEPTION OF CULTURE AND SOCIETY 7 (1993) (naming Freud and Spencer as the founders of the release theory).

<sup>85</sup> BILLIG, *supra* note 28, at 91.

<sup>86</sup> *Id.* at 95–98.

<sup>87</sup> FREUD, *supra* note 67, at 101.

<sup>88</sup> See *id.* at 107 (drawing a similarity between the way dreams and jokes mask underlying thoughts).

<sup>89</sup> *Id.* at 94.

<sup>90</sup> *Id.* at 96–97, 115. Freud also explored a similar distinction between harmless wit and tendency wit. See *id.* at 90–116. According to this distinction, harmless wit (analogous to non-tendentious humor) simply uses cleverness to amuse. Tendency wit (aligned with tendentious humor) seeks to achieve other purposes, such as to ridicule some person, group, or thing. *Id.*; see also Charles R. Gruner, *Wit and Humour in Mass Communication, in*

meant a joke exposing “sexual facts and relations.”<sup>91</sup> The other three categories—hostile, cynical, and skeptical—are more general in subject matter. According to Freud, hostile jokes tend to focus on particular persons and can be overtly aggressive, defensive, or designed to enlist a third person against an enemy.<sup>92</sup> Cynical jokes have similar effects yet focus criticism on institutions, “morality or religion,” or well-established life views.<sup>93</sup> While similar to cynical and hostile jokes, skeptical jokes do not attack persons, institutions, or belief systems. Rather, skeptical jokes challenge something core to human existence—“the certainty of our knowledge itself.”<sup>94</sup>

Having identified these various categories, Freud nonetheless recognized that the purpose or subject matter of tendentious jokes does not alone create humor and identified other characteristics necessary to render a communication funny.<sup>95</sup> In creating this taxonomy of humorous characteristics, his approach resembles incongruity theory, citing techniques such as coupling unlikely phenomena<sup>96</sup> and making use of “faulty,” nonsensical, or absurd thinking.<sup>97</sup> As in all aspects of his work, Freud’s humor theory influenced other scholars enormously. His notion that jokes serve as a vehicle for release, however, has had the greatest lasting impact. In fact, scholars have expanded the idea that jokes release sexual tensions into other taboo or sensitive subjects, such as excretion and death.<sup>98</sup> Similarly, contemporary theories observing humor’s role in venting existential angst also reflect his thinking on skeptical humor.<sup>99</sup>

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HUMOR AND LAUGHTER, *supra* note 22, at 287, 288 (describing the dichotomy between harmless wit and tendency wit).

<sup>91</sup> FREUD, *supra* note 67, at 97.

<sup>92</sup> *Id.* at 96–97, 115.

<sup>93</sup> *Id.* at 108–09.

<sup>94</sup> *Id.* at 115. As an example of this last category, Freud cites the following example: Two Jews met in a railway carriage at a station in Galicia. “Where are you going?” asked one. “To Cracow”, was the answer. “What a liar you are!” broke out the other. “If you say you’re going to Cracow, you want me to believe you’re going to Lemberg. But I know that in fact you’re going to Cracow. So why are you lying to me?”

*Id.* at 115.

<sup>95</sup> *Id.* at 117.

<sup>96</sup> See, e.g., *id.* at 120.

<sup>97</sup> *Id.* at 124–27. Of course, Freud observed other techniques with no apparent relation to incongruity, such as “brevity” and repetition of sound and concepts. *Id.* at 14, 122. For other citations to these techniques, see BERGSON, *supra* note 12, at 72–76, 90–93 (noting that repetition is a key feature of comedy, whether it be words or circumstances); WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 2, sc. 2 (“Therefore, since brevity is the soul of wit, / And tediousness the limbs and outward flourishes, I will be brief . . .”).

<sup>98</sup> See, e.g., Vassilis Saroglou & Lydwine Anciaux, *Liking Sick Humor: Coping Styles and Religion as Predictors*, 17 HUMOR: INT’L J. HUMOR RES. 257, 257, 266 (2004) (presenting study demonstrating that appreciation of jokes about death, disease, deformity, and disabled persons is positively related to coping styles).

<sup>99</sup> Consider the following:

#### 4. *The Three Theories Work Together*

Each of the three humor theories possesses a distinct analytical heritage. The three are not, however, mutually exclusive; one can easily combine them in analyzing the source of the “funny” in a particular communication. Some humor theorists have even tried to develop a synthesized framework, which attempts to integrate two or more of the main theories into one framework.<sup>100</sup> More common are those analysts who do not attempt to splice the theories together but nonetheless find use for each in explaining one communication. For example, literary theorists dissecting Mark Twain’s writings have found in them the release of “the repressed tension imposed by civilization’s ideals,”<sup>101</sup> an attempt “to reveal incongruities . . . inherent in life and in oneself,”<sup>102</sup> and social commentary, infused with defiance and disdain for others.<sup>103</sup> Similarly, British scientist Richard Wiseman, who conducted an Internet humor study, used the following joke to illustrate how the theories can operate simultaneously:

Two hunters are out in the woods when one of them collapses. He doesn’t seem to be breathing and his eyes are glazed. The other guy whips out his phone and calls the emergency services. He gasps, “My friend is dead! What can I do?” The operator says “Calm down. I can help. First, let’s make sure he’s dead.” There is a silence, then a shot is heard. Back on the phone, the guy says “OK, now what?”<sup>104</sup>

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Despite our wish to separate the humor from the nihilism and see it as a redemptive impulse in a world becoming meaningless, couldn’t it be possible that humor, and the responsive laughter it both needs and provokes, is itself the very essence of nihilism. Far from being separate from nihilism, the responsive laughter is an abrupt physical release of the repressed tension imposed by civilization’s ideals—a release made possible by the humorist’s exposure of the *absence of meaning* in existence.

JAMES M. COX, *Introduction to the 2002 Edition of MARK TWAIN: THE FATE OF HUMOR*, at xv (Univ. of Mo. Press 2002) (1966).

<sup>100</sup> See, e.g., DAVIS, *supra* note 84, at 7 (explaining how the three theories supplement one another in explaining how humor is perceived, expressed, and felt); La Fave et al., *supra* note 65, at 89 (synthesizing superiority and incongruity theories).

<sup>101</sup> COX, *supra* note 99.

<sup>102</sup> DON FLORENCE, *PERSONA AND HUMOR IN MARK TWAIN’S EARLY WRITINGS* 11 (1995).

<sup>103</sup> See, e.g., James M. Cox, *Yankee Slang*, in *MARK TWAIN’S HUMOR: CRITICAL ESSAYS* 271, 274 (David E.E. Sloane ed., 1993) (describing Twain’s preface in *Huckleberry Finn* as “defiant and nihilistic”); Shelley Fisher Fishkin, “*The Tales He Couldn’t Tell*,” in *MARK TWAIN’S HUMOR*, *supra*, at 359, 374 (describing vehicles Twain used to expose society’s “absurd” assumptions); Clyde Grimm, *The American Claimant: Reclamation of a Farce*, in *MARK TWAIN’S HUMOR*, *supra*, at 313, 318 (describing Twain’s work in *The American Claimant* as transforming the story from “meaningless farce into thoroughgoing political and social satire”).

<sup>104</sup> LaughLab.co.uk, <http://www.laughlab.co.uk/> (follow “The winning joke” hyperlink) (last visited Apr. 4, 2009); see also Friend, *supra* note 1, at 93 (quoting and analyzing the joke).

Identifying this as the “world’s funniest joke,” Wiseman maintains that the joke supports the three theories because the listener and joke teller feel superior to the stupid hunter, the hunter’s misunderstanding of the operator is incongruous, and the joke enables laughter about an uncomfortable subject, death.<sup>105</sup>

Unlike this joke, the case law examples analyzed below illustrate that—sometimes—an integrated joke or parody does not parse naturally into distinct humor categories.<sup>106</sup> Nonetheless, the three categories of humor remain useful heuristics for analyzing whether courts privilege certain types of humor over others.

### C. The Normative Judgment of Nonlegal Thinkers: How Does Humor Fare?

Contemporary nonlegal humor scholarship is rich and thus resists distillation. Generally, however, humor—and its beneficial role in society—receives wide praise. Scholars’ negative judgments tend to focus on superiority and release humor.<sup>107</sup> With some exceptions, social scientists, natural scientists, and humanities scholars find the greatest value in incongruity humor, mixed value in release humor, and frequent problems with superiority humor.<sup>108</sup> Evidence of aggressive superiority often spawns criticism, although scholars sometimes find a double-edged character to humor that at first blush might appear overwhelmingly positive or negative.<sup>109</sup>

Consequentialism characterizes contemporary normative analysis of humor.<sup>110</sup> And the catalogue of positive consequences is particularly broad. For individual well-being, scholars have identified humor as a potent coping device, which affords an “alternate perspective” to

<sup>105</sup> LaughLab.co.uk, *supra* note 104 (explaining that the joke has universal appeal across nationalities, genders, and ages); *see also* Friend, *supra* note 1, at 93 (reporting on Wiseman’s analysis).

<sup>106</sup> *See infra* Part II.

<sup>107</sup> *See, e.g.*, Kuiper et al., *supra* note 20, at 139–41 (describing research addressing both the positive and negative dimensions of humor).

<sup>108</sup> *See, e.g.*, BILLIG, *supra* note 28, at 57–85 (describing the historical, sociological, and philosophical connections between incongruity humor on one hand and high social rank, education, and “gentlemanly laughter” on the other hand); *id.* at 158–68 (explaining both salutary benefits and dangers that Freud identified in “tendentious” humor concerning taboo topics such as sex and ethnicity); Kuiper et al., *supra* note 20, at 139–41 (describing psychological analysis of humor based on superiority, which tends to be “boorish,” based on a “mean-spirited and sarcastic style of poking fun at others,” and “maladaptive”); Zillmann & Cantor, *supra* note 53, at 93–94 (describing various philosophers’ negative views of superiority humor, which is thought to reflect a “shallow morality” and “satanic spirit” in humans). *See also infra* notes 126–44 and accompanying text for further discussion of relevant authorities.

<sup>109</sup> *See, e.g.*, ROECKELEIN, *supra* note 15, at 143–44 (reviewing different approaches to superiority theory).

<sup>110</sup> *See, e.g.*, Martin, *supra* note 16, at 203–04 (noting the increase of research on the psychological and physical benefits of humor and laughter).

persons confronting situations fraught with fear, sadness, or anger.<sup>111</sup> This alternate perspective allows us to embrace our limitations,<sup>112</sup> to become indifferent to them,<sup>113</sup> or to conquer them.<sup>114</sup> As such, humor can transform the bad (human limitations) into the good (human strengths). Comedians are deemed to possess special transformative skills upon encountering tragedy, as they “are highly motivated to negate it and transmute it into something pleasant and funny.”<sup>115</sup> In this regard, humor can moderate stress because humor’s new perspective encourages people to cast a congenial light on stressful situations. Similarly, pleasurable emotions associated with humor may reduce stress-related emotions and accompanying physiological changes.<sup>116</sup>

A large measure of humor’s positive consequences is thought to derive from its social nature. Humor assists with stress management in part because it enhances human relationships. How does it do this? Humor makes us feel as though “we are part of the [humorist’s] intellectual in-crowd, and generally [puts] us in a good mood, . . . make[s] us feel good about ourselves . . . [and mitigates] our defenses.”<sup>117</sup> Interestingly, humor is most effective where parties share the background for a joke. The shared knowledge creates intimacy between the joke teller and the listener, thereby enhancing the humor.<sup>118</sup> For this reason, analysts posit that preexisting shared knowledge of the object of parody is necessary for true parody to succeed.<sup>119</sup>

This notion of shared intimacy may explain scholars’ general preference for incongruity humor. In order for parties to a joke to appreciate the incongruity emerging from the joke’s juxtaposition of two phenomena, the parties need shared knowledge of what likely

<sup>111</sup> *Id.* at 203.

<sup>112</sup> See COHEN, *supra* note 25, at 41 (“When we laugh at a true absurdity, we simultaneously confess that we cannot make sense of it and that we accept it. Thus this laughter is an expression of our humanity, our finite capacity, our ability to live with what we cannot understand or subdue.”).

<sup>113</sup> See BERGSON, *supra* note 12, at 5 (observing that when we “look upon life as a disinterested spectator[,] many a drama will turn into a comedy”).

<sup>114</sup> See COHEN, *supra* note 25, at 40 (“Humor in general and jokes in particular are among the most typical and reliable resources we have for meeting . . . devastating and incomprehensible matters.”).

<sup>115</sup> ROECKELEIN, *supra* note 15, at 58.

<sup>116</sup> Martin, *supra* note 16, at 203.

<sup>117</sup> Katrina Triesenberg, *Humor Enhancers in the Study of Humorous Literature*, 17 *HUMOR: INT’L J. HUMOR RES.* 411, 413 (2004).

<sup>118</sup> COHEN, *supra* note 25, at 28 (explaining that a shared background of understanding “is the foundation of the intimacy that will develop if your joke succeeds, and the hearer then also joins you in a shared response to the joke”).

<sup>119</sup> See, e.g., ROECKELEIN, *supra* note 15, at 62 (noting that parody loses its “effect when the original, or object of attack, is not well known” (citing GREIG, *supra* note 44, at 174–98)); Palmer, *supra* note 25, at 81–82 (noting that parody operates where actual text serving as the object of the parody and parody itself have sufficient overlap).

pairings the phenomena usually enjoy.<sup>120</sup> Thus, incongruity humor builds on and reinforces the parties' connection to each other by acknowledging their shared understanding.

Despite the impressive catalogue of humor's beneficial consequences, empirical studies identify unexpected limitations. Studies are equivocal on the persuasive value of humor<sup>121</sup> as well as its link to good health. Within the humor literature, received wisdom has long assumed a link between humor and good physical health.<sup>122</sup> Scholars propose many reasons for this link: physiological changes in the body that accompany laughter, increases in "the positive emotional states accompanying humor and laughter," decreases in the "adverse effects of psychosocial stress on health," and an increase in "social support," by reducing conflicts and enhancing positive feelings in others.<sup>123</sup> While these hypotheses are intuitively appealing, actual empirical support for the link between humor and health could be stronger.<sup>124</sup> Promising evidence does, however, firmly document one positive physical effect of humor: increased pain tolerance.<sup>125</sup>

Several thinkers studying the link between humor and well-being differentiate between humor styles that are beneficial and those that are detrimental to well-being.<sup>126</sup> These studies tend to invoke superiority theory in analyzing negative, maladaptive humor styles.<sup>127</sup> Maladaptive styles contrast with positive, socially adaptive styles of humor, which can generate an amused response from others and build affiliations among persons but nonetheless enhance the humorist's status (although not at the expense of others).<sup>128</sup> Maladaptive humor, on the other hand, tends to be self-defeating, belabored, aggressive, or impolite.<sup>129</sup> One recent study concluded that humor with adaptive

<sup>120</sup> See COHEN, *supra* note 25.

<sup>121</sup> See, e.g., Gruner, *supra* note 90, at 289, 301 (noting a general lack of support for humor's persuasive effect as well as more specific conclusions that might be drawn regarding satire).

<sup>122</sup> See Rod A. Martin, *Sense of Humor and Physical Health: Theoretical Issues, Recent Findings, and Future Directions*, 17 HUMOR: INT'L J. HUMOR RES. 1, 1–2, 14 (2004).

<sup>123</sup> *Id.* at 4, 5.

<sup>124</sup> See, e.g., Nicholas A. Kuiper & Sorrel Nicholl, *Thoughts of Feeling Better?: Sense of Humor and Physical Health*, 17 HUMOR: INT'L J. HUMOR RES. 37, 38 (2004) (reporting that empirical evidence is "surprisingly weak" for hypothesis that a greater sense of humor is linked to better health).

<sup>125</sup> See Karen Zweyer et al., *Do Cheerfulness, Exhilaration, and Humor Production Moderate Pain Tolerance?: A FACS Study*, 17 HUMOR: INT'L J. HUMOR RES. 85, 86–92 (2004) (describing past literature on correlation and reporting results of study in which pain tolerance increased after watching a "humorous film").

<sup>126</sup> See, e.g., Martin, *supra* note 122, at 14 (describing a "multidimensional approach to sense of humor, distinguishing between aspects of humor that are potentially beneficial to well-being and those that are potentially detrimental").

<sup>127</sup> Kuiper et al., *supra* note 20, at 139–41.

<sup>128</sup> *Id.* at 135, 140–41.

<sup>129</sup> *Id.*

components was associated with “greater self-esteem, lower depression and anxiety levels, and more positive self-competency judgments.”<sup>130</sup> Maladaptive humor correlated with negative psychological effects such as greater depression and anxiety.<sup>131</sup>

Both maladaptive humor and adaptive humor reinforce themselves through feedback loops: empirical studies suggest that exposure to nonhostile humor reduces subsequent aggression by previously angered individuals, whereas exposure to hostile humor actually enhances aggressive behavior.<sup>132</sup> Individuals can be deceived, however, because disparagement humor camouflages the hostility or *Schadenfreude* one might experience upon observing ill luck befall an individual whom one dislikes.<sup>133</sup> Additional studies introduce further nuance to this binary adaptive/maladaptive formula. For example, several thinkers have observed that apparently negative humor can have positive consequences because aggressive and sarcastic humor, while damaging “one’s relationships and potential social support,” can relieve one’s own tension and stress.<sup>134</sup> Along similar lines, superiority humor might benefit the self-esteem of those portrayed in the superior position.<sup>135</sup>

Negative humor can have similarly double-edged consequences for groups. On one hand, a “common history of word play” can establish group identity.<sup>136</sup> Even negative humor—humor based on a group’s superiority—can help establish group solidarity and reinforce cohesion. Of course, non-group members can suffer because “group boundaries may . . . be erected and patrolled by ‘humorously’ degrading those who are *outside*.”<sup>137</sup> Humor integrates and alienates segments of society in other ways as well. Not only can humor enable community members to resolve social tensions through humorous

<sup>130</sup> *Id.* at 135. Interestingly, one study showed a correlation between a strong capacity to cope with stress through emotional expression (such as emotional support, venting, and social support) and an appreciation of “sick humor” (defined as humor that “makes fun of death, disease, deformity, and the handicapped”). Saroglou & Anciaux, *supra* note 98, at 257, 266.

<sup>131</sup> Kuiper et al., *supra* note 20, at 135–36, 160–62.

<sup>132</sup> Robert A. Baron, *Aggression-Inhibiting Influence of Sexual Humor*, 36 J. PERSONALITY & SOC. PSYCHOL. 189, 190 (1978) (reporting the results of experiments investigating the existence of a possible link between humor and aggression).

<sup>133</sup> Dolf Zillmann & Jennings Bryant, *Misattribution Theory of Tendentious Humor*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 146, 150 (1980).

<sup>134</sup> Martin, *supra* note 122, at 16 (discussing hypothesized mechanisms for the link between humor and health); *see also* FREUD, *supra* note 67, at 102–03 (explaining that hostile humor can allow the humorist to release emotional tension and to purge hostile impulses).

<sup>135</sup> La Fave et al., *supra* note 65, at 87.

<sup>136</sup> Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 L. & SOC. INQUIRY 1151, 1165 (2000) (discussing insider humor, group solidarity, and identity).

<sup>137</sup> *Id.*

“collaborative activities,”<sup>138</sup> but it can also disrupt a community’s social organizations “by giving voice [to the community’s] inconsistencies and irrationalities.”<sup>139</sup>

Humor’s two-sided nature has important ramifications for group politics that implicate stereotypes, discrimination, and dynamics between insiders and outsiders. In its most nefarious form, humor enables a humorist to indulge in superiority by degrading a group through racial, gender, or ethnic jokes. The reinforced sense of superiority may in turn foster the humorist’s belief that she is acting “with impunity.”<sup>140</sup> Yet social scientists argue that the functions of group humor are complex; scholars have reached no consensus on whether it enhances prejudice.<sup>141</sup> Many observe that racial, gender, and ethnic humor helps groups manage problems of role, power, and conflict.<sup>142</sup> As in other areas where humor provides a vehicle for releasing tensions related to taboo subjects, humor also allows different groups to explore racial and gender differences without necessarily being hostile. Artfully deployed, humor can even serve “to release the pressure of inhibition” while leaving in place the inhibition’s function “in non-comic circumstances.”<sup>143</sup> And finally, humor provides an important weapon for subordinate groups fighting social oppression.<sup>144</sup>

Given that law operates as an instrument of power, these observations about humor and group politics are particularly crucial for thoughtfully negotiating legal battles. Whether by conscious choice or intuition, courts frequently show sensitivity to these observations in deploying legal rules. To these legal examples I now turn.

## II

### REGULATING FUNNY: CONTRACT, TRADEMARK, AND DISCRIMINATION LAW

I review here a sample of civil disputes concerning humorous (or putatively humorous) communications. This Part surveys three dramatically different legal areas: contract, trademark, and sexual harass-

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<sup>138</sup> MICHAEL MULKAY, ON HUMOUR: ITS NATURE AND ITS PLACE IN MODERN SOCIETY 153 (1988) (discussing the correspondence between humor and social structure).

<sup>139</sup> *Id.*

<sup>140</sup> ROECKELEIN, *supra* note 15, at 22 (quoting RAYMOND J. CORSINI, THE DICTIONARY OF PSYCHOLOGY 456 (1999)).

<sup>141</sup> See, e.g., BOSKIN, *supra* note 64, at 38 (observing that humor can both “reinforce pejorative images” and “facilitate[ ] the inversion of such stereotypes”).

<sup>142</sup> See, e.g., COHEN, *supra* note 25, at 44 (noting that the oppressed commonly make jokes about their oppressors); Charles Winick, *The Social Contexts of Humor*, 26 J. COMM. 124, 127–128 (1976) (observing how humor can assist groups in managing power conflicts), cited in ROECKELEIN, *supra* note 15, at 68.

<sup>143</sup> JERRY PALMER, TAKING HUMOUR SERIOUSLY 61 (1994).

<sup>144</sup> See BOSKIN, *supra* note 64, at 39 (analyzing rebellious humor).

ment in employment. I chose these areas as representative legal categories, derived from separate pillars of civil law: contract, property (represented by trademark infringement and dilution), and tort (represented—albeit roughly—by sexual harassment).<sup>145</sup> The three categories also illustrate legal principles derived from varying governmental power structures in American jurisprudence. Contract law exemplifies a largely common law subject, while trademark and sexual harassment have substantial statutory frameworks that inform their content. All three areas touch the lives of a diverse assortment of ordinary citizens, yet many cases also implicate large-scale business interests. Moreover, the three areas derive from diverse sources of authority. I use contract law to represent state law. Sexual harassment and trademark laws have mongrel characters, but I nonetheless emphasize their federal law origins by reporting primarily on federal cases. Finally, all three provide a mixture of private and public law principles.

Despite differences among these legal categories, all three show similar attitudes toward humor. Most prominently, all three reflect the law's tendency to step aside where incongruity forms the foundation for a humorous communication. Trademark and sexual harassment litigation also heavily regulate humor based on the superiority of one group (or person) over another and humor focusing on a taboo subject matter associated with "release" humor. In tracing these patterns, I start with contract cases before turning to trademark and sexual harassment cases.

## A. The Law Steps Aside: Contract

### 1. *Joke Versus Contract*

Standard doctrine in contract law holds that a "contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."<sup>146</sup> In evaluating the operative acts, the law employs an objective standard, assessing "the reasonable meaning of . . . words and acts" to

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<sup>145</sup> The U.S. Supreme Court has held that employment discrimination awards under Title VII are not tort remedies for the purpose of the federal tax code. *United States v. Burke*, 504 U.S. 229, 240–42 (1992) (concluding that back pay remedies for gender-biased salary schedules are not "damages received . . . on account of personal injuries" under the tax code). Some have argued, however, that this specific holding was fashioned only for interpreting the role of economic damages in the tax code and does not undermine the connection between dignitary harms of sexual harassment and tort laws. *See id.* at 254 (O'Connor, J., dissenting) ("Title VII offers a tort-like cause of action to those who suffer the injury of employment discrimination."); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 451 n.39, 510 n.394 (1997) (advocating the position that employment discrimination offers important tort analogies and noting the narrow reach of the *Burke* holding).

<sup>146</sup> *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911).

determine whether they “manifest an intention to agree.”<sup>147</sup> Thus, it is the “appearance of intent that matters most.”<sup>148</sup> In the context of humor, this means that “a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.”<sup>149</sup>

How does a court make this evaluation about jest? The cases provide little guidance, leading one first to conclude that a “gut check” provides the relevant inquiry. In the analysis that does appear, courts focus on whether the parties’ actions are congruent with the conclusion that they intended to form a contract. If, upon analysis, the court finds a disconnect between the two (the parties’ actions and their contractual intentions), then the court generally holds that the parties did not form a contract. Thus, the court in essence embosses humor theorists’ incongruity theory on the litigation facts to test for the existence of a contract. If the incongruity test exposes humor, then the court is more likely to refuse contractual obligation.

Joke versus contract disputes have a long lineage. At one time, suits often arose in the context of sham marriages.<sup>150</sup> Conflict continues to occur frequently as part of advertised contests.<sup>151</sup> Although several high-visibility cases settled out of court,<sup>152</sup> reported decisions indubitably influence these settlements and have had a significant impact on the study of and debate on contracts doctrine.<sup>153</sup>

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<sup>147</sup> Luebbert v. Simmons, 98 S.W.3d 72, 78 (Mo. Ct. App. 2003) (citing *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954)).

<sup>148</sup> Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354 (2007) (criticizing the objective approach to contract formation).

<sup>149</sup> *Lucy*, 84 S.E.2d at 522.

<sup>150</sup> See, e.g., *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 880–82 (S.D. Tex. 1970) (surveying sham-marriage case law), *aff’d*, 440 F.2d 1163 (5th Cir. 1971); A. Della Porta, Annotation, *Validity of Marriage as Affected by Intention of the Parties That It Should Be Only a Matter of Form or Jest*, 14 A.L.R.2d 624 (1950).

<sup>151</sup> See, e.g., *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999) (deciding a dispute over alleged offer to provide fighter jet in return for Pepsi Points); *Graves v. N. N.Y. Publ’g Co.*, 22 N.Y.S.2d 537 (N.Y. App. Div. 1940) (deciding dispute over alleged offer to the person who would provide the newspaper with the phone number of Western Union); *Barnes v. Treece*, 549 P.2d 1152 (Wash. Ct. App. 1976) (deciding dispute surrounding public offer by officer of a punchboard corporation to reward anyone who finds a “crooked” punchboard).

<sup>152</sup> In one case, *Berry v. Gulf Coast Wings, Inc.*, No. 01-2642 (Fla. Cir. Ct. filed July 24, 2001), a Hooters waitress apparently encountered success in settling a case in which her supervisor offered a “Toyota” to the person who sold the most beer but then offered only a doll of the *Star Wars* character Yoda (a “toy Yoda”) to the best performing waitress. Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 Nev. L.J. 526, 527 (2003) (summarizing *Berry*). In another recent dispute not yet resolved on the merits, two radio listeners sued a rock station after being denied an announced cash prize for permanently tattooing the station’s logo on their foreheads. See *id.* at 559.

<sup>153</sup> See Rowley, *supra* note 152, at 526 n.2, 527 n.7 (noting how *Berry* sparked a lively debate on a contract professors’ Listserv and that *Lucy* consistently appears in contracts case books).

Four reported decisions illustrate particularly well how courts rely on their own form of incongruity theory in evaluating claims of enforceable contract. First, in *Lucy v. Zehmer*,<sup>154</sup> the court enforced an allegedly comedic exchange between the parties, basing its conclusion that no joke existed on the congruence between the parties' actions and the existence of a real agreement. Finding "persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter," the court cited the parties' extended discussion over the contract, one party's objection to grammatical specifics in the document, the insistence that it be signed by husband and wife, and the detailed terms established.<sup>155</sup> This approach of evaluating the consistency between the parties' actions and those expected in a real contract is mirrored in *McKinzie v. Stretch*.<sup>156</sup> There, the court reasoned that one party's "codding" that he got the best of a bargain was "not such an unusual or inconsistent thing as should discredit the allegation of a bargain in fact."<sup>157</sup>

Similar reference to society's expectations of the usual scope of contract obligations appeared in the (otherwise very unusual) decision in *Woo v. Fireman's Fund Insurance Co.*<sup>158</sup> In that case, an oral surgeon (Dr. Woo) operating on an anesthetized employee temporarily implanted fake boar tusks in the employee's mouth, propped the employee's eyes open, photographed her, and subsequently shared the photographs with others in the office.<sup>159</sup> The employee sued, and Dr. Woo's liability insurance carrier refused to cover the suit.<sup>160</sup> Finding that Dr. Woo's actions were sufficiently consistent with his role as a dental surgeon as to fall within the scope of the liability policy, the Washington Supreme Court invoked its own common sense notions of congruity and consistency.<sup>161</sup> According to the court, Dr. Woo's attempt at humor was adequately "integrated into and inseparable from" dental procedure as to be covered by the insurance contract.<sup>162</sup>

An even clearer example of incongruity analysis in a contract decision is *Leonard v. PepsiCo*,<sup>163</sup> which concerned a promotional cam-

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<sup>154</sup> 84 S.E.2d 516 (Va. 1954).

<sup>155</sup> *Id.* at 521.

<sup>156</sup> 53 Ill. App. 184 (Ill. App. Ct. 1893).

<sup>157</sup> *Id.* at 184, 185.

<sup>158</sup> 164 P.3d 454 (Wash. 2007).

<sup>159</sup> *Id.* at 457.

<sup>160</sup> *Id.* at 458.

<sup>161</sup> *Id.* at 461.

<sup>162</sup> *Id.* Because *Woo* arises in the unique context of an insurance contract, it differs from the other examples because the court's finding that contract principles apply has the effect of actually protecting the challenged humor. The Washington Supreme Court's approach, however, is consistent with the other cases because the court implicitly arrived at congruity analysis in ascertaining whether contractual principles applied.

<sup>163</sup> 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

paign encouraging consumers to collect "Pepsi Points" and redeem them for merchandise. As part of the campaign, PepsiCo ran a television commercial suggesting one could redeem Pepsi Points for a Harrier Jet. The commercial ends with a teenager emerging from a trip to school in a Harrier Jet, exclaiming, "Sure beats the bus."<sup>164</sup> Next, the words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS" followed by "Drink Pepsi—Get Stuff."<sup>165</sup>

The plaintiff resolved to obtain the jet, deciding to raise the money needed to buy the requisite number of Pepsi points. Amazingly, he somehow succeeded in raising significant funds, presenting PepsiCo with a check for \$700,008.50 and fifteen actual Pepsi Points.<sup>166</sup> When Pepsi refused to produce the jet, the plaintiff sued. In evaluating the plaintiff's insistence that the commercial was a serious offer, the court acknowledged that it needed to "explain why the commercial is funny"<sup>167</sup> and hence not a legally enforceable offer. To that end, the court canvassed the commercial for incongruities, finding many: the suggestion that Pepsi merchandise can inject the drama of "military and espionage thrillers" into otherwise "unexceptional lives," the "highly improbable pilot" in the form of a teenager who "could barely be trusted with the keys to his parents' car," the "exaggerated adolescent fantasy" reflected in "traveling to school in a Harrier Jet," the mismatch between school transportation and a piece of military equipment designed to "attack and destroy surface targets," and the improbability that one could actually "drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years . . . )."<sup>168</sup>

## 2. *Incongruity's Relationship to Contract Doctrine*

In these wildly different contexts from varying times, the courts invoked remarkably consistent references to incongruity in evaluating whether to attach contract liability. But the precise legal inquiry—did the defendant intend to be bound by contract?—does not require resort to incongruity theory rather than other approaches to humor. For example, the court could analyze the defendant's intent by reference to whether he was trying to assert superiority by making fun of the plaintiff. Or the court could evaluate whether the defendant's actions could be explained by some attempt to release anxiety or hostility toward the plaintiff in the form of a jest.

Why do the courts favor incongruity theory? One might hypothesize that the courts instinctively perceived that incongruity notions are

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<sup>164</sup> *Id.* at 119.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 128.

<sup>168</sup> *Id.* at 128–29.

most consistent with contract law's preference for objective rather than subjective evidence of intent; my theory here is that incongruity—the unlikelihood of a phenomenon—might be based more on collective social judgments than on individual subjective judgments. Yet an objective approach to intent would not have prevented courts from evaluating the defendant's outward manifestations for signs of ridicule or chiding that are consistent with commonly known kinds of release or superiority humor and inconsistent with an intent to be bound by contractual obligation.<sup>169</sup> The absence of this type of discussion in the contracts cases is notable. I conclude, therefore, that the courts privileged incongruity theory over release or superiority humor for reasons that are not wholly explained by contract doctrine.

Contract law's consistent reference to incongruity is not perfectly reproduced in the case law concerning trademark and sexual harassment analyzed below. That is not to say, however, that decisions reckoning with whether trademark or sexual harassment laws should regulate allegedly funny communications do not reflect incongruity theory.<sup>170</sup> Moreover, both trademark and sexual harassment laws actively discourage release and superiority theory, thereby indirectly preferring humor based on incongruity.<sup>171</sup>

## B. The Law Steps Aside Only Sometimes: Trademark

Plaintiffs claiming interference with an intellectual property right protected by trademark law use several legal theories to establish liability. Humor regulation commonly occurs in suits pursuing two theories: trademark infringement and trademark dilution. As with contract claims, courts adjudicating infringement and dilution claims tend to evaluate whether attempted humor is sufficiently successful as to remove the claim from legal liability. Courts accord privileged treatment to humor based on incongruity in infringement cases.<sup>172</sup> In both infringement and dilution litigation cases, courts show enhanced readiness to regulate release and superiority humor, although the case law is unpredictable.<sup>173</sup> Interestingly, in both the infringement and dilution contexts, courts honor the tendency of American culture to treasure parody. This parody protection often evinces tolerance for superiority humor based on ridicule.<sup>174</sup> Relatively strict requirements,

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<sup>169</sup> In fact, in *McKinzie v. Stretch*, 53 Ill. App. 184 (Ill. App. Ct. 1893), the court actually rejected an opportunity to use release or superiority analysis when it evaluated one party's "codding" of another, not as signs of a joke, but as evidence of contractual intent.

<sup>170</sup> See *infra* subparts II.B., II.C.

<sup>171</sup> See *infra* subparts II.B., II.C.

<sup>172</sup> See *infra* notes 219–24 and accompanying text.

<sup>173</sup> See *infra* notes 219–24, 239–42 and accompanying text.

<sup>174</sup> See, e.g., *infra* note 220 and accompanying text.

however, circumscribe this tolerance, requirements that protect that quality of parody yoked to notions of incongruity.<sup>175</sup>

### 1. *Trademark Infringement*

Registered trademark holders may bring federal statutory claims for infringement of a registered mark.<sup>176</sup> Although owners of unregistered marks must avail themselves of state common law in pursuing an infringement action, the relief available is usually the same as in federal actions, as the principles governing the state and federal infringement theories are “substantially congruent.”<sup>177</sup>

Trademark infringement causes of action are designed to protect against harm both to consumers who may be misled into buying something they did not expect and to trademark owners who are deprived of sales.<sup>178</sup> Key to the cause of action is consumer confusion about the source of the defendant’s goods; specifically, courts evaluate the “likelihood of confusion” between the product protected by a trademark and the challenged product or communication.<sup>179</sup> A humor question arises where the alleged infringer claims that the purported infringement is actually a parody of the protected mark.

In evaluating the infringement issue, courts usually invoke incongruity analysis in order to evaluate the humorous quality of the challenged product or communication.<sup>180</sup> Indeed, in the abstract, the very nature of the “likelihood of confusion” test dovetails with the concept of incongruity. If the alleged infringement is congruent with a reasonable interpretation of the qualities or purposes of the protected product, then a consumer may confuse the two. If, on the other hand, the connection between the alleged infringement and the protected product is too outlandish, unexpected, or implausible, then a consumer would not reasonably confuse the two. As one treatise explains: when the challenged product amounts to a true parody, an

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<sup>175</sup> See, e.g., *infra* note 221 and accompanying text.

<sup>176</sup> See 15 U.S.C. § 1114 (2006).

<sup>177</sup> *Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 633 F.2d 912, 916 (9th Cir. 1980); see also *TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876, 881 (7th Cir. 1997) (noting that similarities between state and federal trademark infringement claims made a magistrate’s failure to specify a basis for her decision understandable); *Mytee Prods., Inc. v. H.D. Prods., Inc.*, No. 05CV2286 R(CAB), 2007 WL 1813765, at \*8 (S.D. Cal. Jun. 22, 2007) (analyzing only the plaintiff’s federal trademark claim and finding summary judgment inappropriate for substantially similar federal and state claims). The federal Lanham Act also provides an unfair competition cause of action for holders of unregistered marks. 15 U.S.C. §§ 1051–1129 (2006).

<sup>178</sup> See ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 29.1, at 637 (2003). Trademark protection derives from federal law (primarily the Lanham Act) and state law antidilution statutes. *Id.* § 29, at 636, § 30.5, at 718.

<sup>179</sup> *Id.* § 29.1, at 637.

<sup>180</sup> See *infra* notes 189–238 and accompanying text.

infringement cause of action will not succeed because “consumers automatically understand that trademark owners rarely will make fun of themselves or license others to do so.”<sup>181</sup> In other words, consumers understand that it would be *incongruous* for the profit-maximizing producer of a protected product to undercut the product.

A defendant generally asserts a parody defense to establish that consumers would not likely confuse the protected product with the challenged product or communication.<sup>182</sup> This argument may have force beyond simply negating an element of the plaintiff’s claim, however, because of the solicitude accorded to parody under First Amendment case law.<sup>183</sup> This respect is most potent where the parody expresses messages implicating core First Amendment values, such as political and other noncommercial speech.<sup>184</sup> Yet courts have determined that defendants enjoy First Amendment protection well beyond traditional political contexts: commercial speech can be protected,<sup>185</sup> and a defendant may enjoy First Amendment protection by asserting that a trademark (such as “Barbie”) has a significant cultural role or that artistic expression hangs in the balance.<sup>186</sup> Despite the force of the First Amendment arguments, infringement courts invoke them only sporadically.<sup>187</sup>

Beyond the specific protections of the First Amendment is a general sense that parody is an integral component of American culture that should be treasured and protected, even in the face of a claim of harm.<sup>188</sup> While parody’s special status may derive in part from its historical, political, and literary pedigree, parody’s connection with in-

<sup>181</sup> SCHECHTER & THOMAS, *supra* note 178, § 29.3.3, at 664.

<sup>182</sup> *See id.*

<sup>183</sup> 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:147 (4th ed. 2008).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See, e.g.,* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 807 (9th Cir. 2003) (finding artistic expression implicated in use of “Barbie” mark, which has transcended its original purpose and entered “‘public discourse and become an integral part of our vocabulary’” (quoting Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 900 (9th Cir. 2002))).

<sup>187</sup> *See generally* Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008) (arguing that courts should apply First Amendment analysis to more trademark infringement cases).

<sup>188</sup> *See, e.g.,* Anheuser-Busch, Inc. v. Balducci Publ’ns, 28 F.3d 769, 776 (8th Cir. 1994) (stating that trademark analysis begins with “the recognition that parody serves as a ‘humorous form of social commentary and literary criticism that dates back as far as Greek antiquity’” (quoting L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 28 (1st Cir. 1987))); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 156–57 (Tex. 2004) (finding that an objective test of reasonableness in a defamation action is necessary to give parody and satire the breathing space they require). Adopting a contrasting tone, one treatise writer has explained that “the cry of ‘parody!’ does not magically fend off otherwise legitimate claims of trademark infringement . . . . There are confusing parodies and non-confusing parodies . . . . A non-infringing parody is merely amusing, not confusing.” MCCARTHY, *supra* note 183, § 31:153.

congruity may explain its favored status in court decisions. As one nonlegal theorist opines, "The best parodies suggest a secret similarity between realms presumed to be very different, such as religion and computers . . ." <sup>189</sup> Trademark cases reflect this same judgment about parody. Indeed, courts adjudicating parody arguments in trademark infringement cases often track incongruity theory in evaluating facts. Thus, for example, in *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, <sup>190</sup> the court rejected an infringement claim by exploring the stylistic inconsistencies between the actual trademark of Jordache jeans and the allegedly infringing mark: the actual mark was small, in subtle colors, and featured a horse's head; the allegedly infringing mark was a "large, brightly colored pig head and two hooves, giving the appearance that a pig is peering over the back pocket." <sup>191</sup>

Other infringement cases similarly compare the consistency between the protected product and the allegedly infringing activity, assessing any aesthetic connection between the two and the likelihood that the plaintiff would engage in the challenged activity. <sup>192</sup> Where the aesthetic connection is strong, but not identical, the parody is deemed successful and legal protections are more likely to attach. The parody succeeds only after first establishing an overlap with the protected product and then presenting an incongruity. As trademark courts explain, parody juxtaposes "the irreverent representation of

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First Amendment case law also illustrates an affection for parody, as illustrated in the following intentional infliction of emotional distress case:

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. . . . From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–56 (1988).

<sup>189</sup> DAVIS, *supra* note 84, at 22; *see also* Palmer, *supra* note 25, at 81–82 (tracing the historic roots of parody and noting that "arguably, it was the element of comic incongruity in parody which distinguished it from other forms of imitation").

<sup>190</sup> 828 F.2d 1482 (10th Cir. 1987).

<sup>191</sup> *Id.* at 1485.

<sup>192</sup> *See, e.g.,* *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (reasoning that no infringement takes place where protected mark concerns an ordinary manufactured product and alleged infringing activity is an artistic title); *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1229–32 (7th Cir. 1993) (comparing product uses, marketing channels, product quality, and aesthetic similarities of message and finding a possibility of confusion where parodist used slogan JUST DID IT together with the MIKE mark to parody the slogan JUST DO IT associated with NIKE mark); *Universal City Studios, Inc. v. T-Shirt Gallery, Ltd.*, 634 F. Supp. 1468, 1477 (S.D.N.Y. 1986) (denying preliminary injunction against defendant distributing T-shirts featuring "Miami Mice," which "lightheartedly focus on two comical mice . . . who do not evoke the themes of crime and violence," where plaintiff's television show "Miami Vice" portrayed "tough, courageous, and stylish detectives who fight against notoriously evil criminal figures"); *Gucci Shops, Inc. v. R. H. Macy & Co.*, 446 F. Supp. 838, 839–41 (S.D.N.Y. 1977) (finding preliminary injunction appropriate to prevent defendant from producing diaper bags with words and markings confusingly similar to plaintiff's trademarks).

the trademark with the idealized image created by the mark's owner."<sup>193</sup> By playing on the "idealized image," the trademark parody takes advantage of the pleasurable sense of shared knowledge between joke participants, which humor theorists identify as one of humor's important social benefits.<sup>194</sup>

Trademark courts are precise about how this shared knowledge should manifest if a trademark parody is to escape liability. In language drawn from dictionaries and the work of humanities scholars, courts define parody as an "artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule"<sup>195</sup> and recognize that parodies satisfying this definition bear inherent contradictions or incongruities. As courts often state, "A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody."<sup>196</sup> Thus, a parody must navigate a fine line between mimicry and deviation. Where the parody comes too close to mimicry, liability is likely: "[T]he parody has to be a takeoff, not a ripoff."<sup>197</sup> Stated differently, where a parody insufficiently distances itself from the original protected mark, courts consider it "a poor parody . . . vulnerable under trademark law, since the customer will be confused."<sup>198</sup> Alternatively, where too much deviation occurs, liability is also likely. Thus, for example, where the parody does not directly concern the protected product or mark, but instead just uses the mark as a means to make a

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<sup>193</sup> *L.L. Bean, Inc.*, 811 F.2d at 34; *see also* *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001) (applying same definition).

<sup>194</sup> *See supra* notes 117–20 and accompanying text for discussion of this beneficial consequence of humor.

<sup>195</sup> *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003); *Lyons P'ship v. Giannoulas*, 179 F.3d 384, 388 (5th Cir. 1999). Although courts in trademark actions routinely invoke this definition, the U.S. Supreme Court first adopted it in the copyright context. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (quoting *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1317 (3d ed. 1992)). *See supra* note 6 for further discussion of courts' use of nonlegal scholarship in evaluating parody claims.

<sup>196</sup> *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (quoting *People for the Ethical Treatment of Animals*, 263 F.3d at 366) (internal quotation marks omitted); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989); *see also* *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 777 (8th Cir. 1994) (finding an infringement because defendant's use of plaintiff's mark "conveys that it is the original, but . . . founders on its failure to convey that it is not the original").

<sup>197</sup> *Nike, Inc.*, 6 F.3d at 1228.

<sup>198</sup> *Cliffs Notes, Inc.*, 886 F.2d at 494; *see also* Rochelle Cooper Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity* 11 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 06-30; Law & Econ. Research Paper Series, Working Paper No. 06-39, 2006), available at <http://ssrn.com/abstract=929534> ("[T]he more thoroughly expressive the use—the more the mark has been recoded or distorted—the harder it has been to convincingly argue that consumers will likely be confused.").

joke, courts are more willing to attach liability.<sup>199</sup> In other words, the would-be parodist wishing to avoid liability must setup an incongruity—present the original and cast it in an unanticipated or unlikely light. Through this requirement, trademark doctrine artfully tracks the line between parody and satire mapped in the nonlegal humor literature.<sup>200</sup>

*Anheuser-Busch, Inc. v. L & L Wings, Inc.*<sup>201</sup> analyzed the internal contradiction requirement. The court rejected a challenge to a verdict favoring a defendant who had modeled a T-shirt after the Budweiser label, declaring Myrtle Beach to be the “King of Beaches.”<sup>202</sup> Concluding the T-shirt was “readily recognizable as a parody,”<sup>203</sup> the court explained that a jury could reasonably conclude that consumers would not likely believe that Anheuser-Busch sold or sponsored the T-shirt. The court thus protected the attempted humor because it succeeded as true parody: “Successful trademark take-offs dispel consumer confusion by conveying just enough of the original design to allow the consumer to appreciate the point of the parody.”<sup>204</sup> Finding the parody effective because the T-shirt conveyed some of the original Budweiser label design, the court appeared to appreciate that humor operates most effectively where it draws on shared knowledge of the participants in the joke.<sup>205</sup> Stated differently, the court may have chosen to protect the humor from legal regulation because it reinforced an important sense of shared knowledge among members of American culture.

It is, of course, no coincidence that incongruity analysis is relevant to the likelihood-of-confusion inquiry as well as a parody claim: defendants make a parody argument to negate the plaintiff’s claim of likelihood of confusion. The incongruity analysis, however, seems to accomplish more than simply implementing the doctrinal requirements of trademark. Rather, the analysis protects those parodies that foster deeper understanding of a phenomenon, while communicating to the audience that they are simply a jest.

Complications emerge where the alleged infringements extend beyond wholesome themes into taboo areas. Here, the cases become less predictable and less clearly aligned with incongruity analysis.

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<sup>199</sup> See, e.g., *Elvis Presley Enters., v. Capece*, 141 F.3d 188, 200 (5th Cir. 1998) (finding defendants liable for using Elvis Presley trademarks where they sought to parody the Las Vegas lounge scene of the sixties rather than Elvis Presley himself).

<sup>200</sup> See *supra* text accompanying notes 42–48 for discussion of humor theory on satire and parody.

<sup>201</sup> 962 F.2d 316 (4th Cir. 1992).

<sup>202</sup> *Id.* at 319.

<sup>203</sup> *Id.* at 321.

<sup>204</sup> *Id.*

<sup>205</sup> See COHEN, *supra* note 25, at 28.

While defendants may find humor in the parodies, courts are often not amused, identifying a trademark violation but frequently providing little or no reasoning for holding that the plaintiff demonstrated the requisite level of confusion necessary to establish infringement. Even if strong incongruity is arguably present, the court might find a trademark infringement, presumably concerned that harm results because the parody is *not* good-natured fun.

In an early example, a federal district court held that a defendant who distributed items marked with the “GE” monogram and the words “Genital Electric” violated the General Electric trademark, summarily finding a “great probability of confusion among the general public.”<sup>206</sup> Similarly, the court of appeals identified a trademark violation in *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*,<sup>207</sup> where the defendant had produced a pornographic film with women wearing Dallas Cowboys Cheerleaders uniforms engaged in sex acts. Although one could interpret this as a parody of provocative half-time performances during actual football games, the court of appeals, noting the “sexually depraved” nature of the film, found an infringement.<sup>208</sup>

The *General Electric* and *Dallas Cowboys Cheerleaders* courts evinced less concern with analyzing incongruity and likelihood of confusion than courts in other parody cases where the alleged infringement’s subject matter did not venture into morally dubious territory.<sup>209</sup> One

<sup>206</sup> *Gen. Elec. Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. (BNA) 1036, 1036–37 (D. Mass. 1979). In so holding, the district court noted that the monogram on defendant’s products was “virtually identical to plaintiff’s trademark.” *Id.* at 1036. The court did not explain, however, how the public would ever think that General Electric Company would market products using the word “genital.”

The *General Electric* court cited as precedent *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972), where the court enjoined the defendant from selling a poster depicting an exact reproduction of Coca-Cola’s trademark with the script letters “ine” replacing “-Cola,” so that the poster read “Enjoy Cocaine.” *Gen. Elec. Co.*, 205 U.S.P.Q. at 1036–37. Unlike in *General Electric*, however, the *Coca-Cola* holding rested on actual evidence that irate consumers believed that the soft-drink company endorsed the cocaine posters. *Coca-Cola*, 346 F. Supp. at 1189 n.9. Nevertheless, one could explain the *Coca-Cola* result—as one can for many trademark cases—by concluding that the taboo context for the case rendered the parody not funny for the court. More recent experience reflects this sentiment, with the Food and Drug Administration and state attorneys general taking action against a company marketing an energy drink called “Cocaine.” See Alfonso Serrano, “Cocaine” Pulled from Shelves Nationwide, CBS NEWS, May 7, 2007, <http://www.cbsnews.com/stories/2007/05/07/health/main2772524.shtml> (last visited Mar. 17, 2009). Speaking of the energy drink, the Connecticut attorney general stated, “Our goal is to literally flush Cocaine down the drain across the nation.” (By contrast, the beverage company stated: “We like to think we have a great sense of humor.”) *Id.*

<sup>207</sup> 604 F.2d 200, 202–03 (2d Cir. 1979).

<sup>208</sup> *Id.* at 205–06.

<sup>209</sup> One treatise suggests that, for morally dubious parodies, courts might worry about financial harm to the plaintiff resulting from association with the parody. SCHECHTER & THOMAS, *supra* note 178, § 29.3, at 666–67 (making this argument for *Dallas Cowboys* and

could in fact brand the topics parodied in *General Electric* and *Dallas Cowboys Cheerleaders* as aligned with release humor, thereby illustrating courts' greater inclination to regulate release humor than incongruity humor unrelated to taboo topics. Across the universe of trademark cases on taboo topics, however, the results are not clear cut; for parodies featuring topics associated with release humor, infringement cases reflect unpredictable "know-it-when-I-see-it"<sup>210</sup> judgment calls about confusion. For example, a similar case brought by the Girl Scouts of America does not reflect the *General Electric* and *Dallas Cowboys Cheerleaders* perspective. There, the Girl Scouts lost an infringement action based on a poster featuring a girl wearing a Junior Girl Scout uniform, with her hands clasped above her pregnant abdomen and the slogan "BE PREPARED" appearing next to her hands.<sup>211</sup> Invoking incongruity analysis to assess the infringement claim, the court first evaluated the presence of the Girl Scout name, slogan, and distinctive trefoil design on the poster.<sup>212</sup> The court also noted that the Girl Scouts organization produced posters distributed to the public.<sup>213</sup> Nevertheless, comparing the poster to a situation where one might attempt to abuse the Girl Scout mark in selling cookies, the court ultimately stated that a member of the public using "rational analysis" would not "believe that the Girl Scouts are the authors of the poster."<sup>214</sup>

*Girl Scouts* may be a harbinger of the contemporary trend toward tolerating release humor, relying simply on incongruity analysis even for parodies that use taboo themes. In fact, at least one court has arguably elevated such a trend to the realm of doctrine, stating that a parody's unsavory or controversial quality will render the parody less capable of causing public confusion and therefore less susceptible to

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*Coca-Cola*). Indeed, one might hypothesize that courts were concerned primarily with injury from tarnishment rather than actual infringement. This may be a particularly salient motivation where a plaintiff is unable to establish the heightened requirements for tarnishment liability. Whatever the courts' motivations, however, they found infringement liability in both cases. See *Dallas Cowboys Cheerleaders*, 604 F.2d at 207; *Coca-Cola*, 346 F. Supp. at 1192-93.

<sup>210</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

<sup>211</sup> *Girl Scouts of the U.S. v. Personality Posters Mfg. Co.*, 304 F. Supp. 1228, 1230 (S.D.N.Y. 1969); see also *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 747 (S.D.N.Y. 1980) (finding no copyright violation for parody of "I Love New York" jingle using words "I Love Sodom"), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).

<sup>212</sup> *Girl Scouts*, 304 F. Supp. at 1231.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

infringement liability.<sup>215</sup> Despite society's increasing disposition toward tolerating taboo subject matter,<sup>216</sup> the infringement case law still more fully embraces wholesome parody and takes on a far more indeterminate quality in analyzing taboo topics,<sup>217</sup> even in cases invoking the First Amendment.<sup>218</sup>

In conclusion, then, the trademark infringement cases reflect the dichotomy traced elsewhere in the law. Where nontaboo subjects are concerned, the courts' trademark analysis focuses nearly exclusively on incongruity.<sup>219</sup> If a modicum of reasoning can establish that the parody would not confuse the consumer, the court upholds the parody under incongruity theory.<sup>220</sup> Where this occurs, the law conveys tolerance for superiority humor, because, after all, parody usually operates by poking fun at or ridiculing something.<sup>221</sup> My thesis is that this tolerance occurs only where the court finds sufficient incongruity to withhold regulation. In other words, the incongruity serves as a policing mechanism, keeping the ridicule on safe turf.<sup>222</sup> Yet, as soon

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<sup>215</sup> Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 972 (C.D. Cal. 2007) (“[T]he more distasteful and bizarre the parody, the less likely the public is to mistakenly think that the trademark owner has sponsored or approved it.”).

<sup>216</sup> See, e.g., Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71 (1992) (“Virtually all parodies are humorous and many people may prefer a humorous to a serious version, especially when the ‘serious’ version is itself . . . without moral or intellectual pretension. Some parodies are erotic . . . [and] may supply the demand for the original on the part of the segment of the population that likes its entertainment spiced with sex.”); Jessica Taran, *Dilution by Tarnishment: A Case for Vulgar Humor*, 7 INTELL. PROP. L. BULL. 1, 10 (2002) (arguing that both vulgar humor and “higher” art “deserve the same level of protection”).

<sup>217</sup> See, e.g., *Lamparello v. Falwell*, 420 F.3d 309, 311, 317 (4th Cir. 2005) (finding no infringement where website known as www.fallwell.com contained arguments about Reverend Jerry Falwell’s “untruths about gay people” and cited portions of the Bible favoring Falwell’s “gay and lesbian neighbors”); *Lyons P’ship v. Giannoulas*, 179 F.3d 384, 386, 390 (5th Cir. 1999) (finding no infringement for parody where sports mascot in the form of a giant “[c]hicken would flip, slap, tackle, trample, and generally assault the Barney look-alike”).

<sup>218</sup> See Pratheepan Gulasekaram, *Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works*, 80 WASH. L. REV. 887, 913–15 (2005) (noting problems with “line-drawing” and inconsistent results in trademark cases “related to drug use, sexuality, obscenity, and noxious behavior”). See generally Dreyfuss, *supra* note 198, at 16–18 (noting unpredictable results of First Amendment defense in trademark infringement suits against parodies of trademarked material, resulting in risk “for any one who is contemplating an investment in expressive use”).

<sup>219</sup> See, e.g., *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 127–30 (S.D.N.Y. 1999).

<sup>220</sup> See, e.g., *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 319–22 (4th Cir. 1992).

<sup>221</sup> See, e.g., *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 901–02 (N.D. Cal. 2002) (denying motion for preliminary injunction against production of the pornographic film *Starballz* after finding *Starballz* to be parody of *Star Wars* “in that it is a ‘literary or artistic work that broadly mimics an author’s characteristic style and holds it up to ridicule’” (quoting *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997))).

<sup>222</sup> This policing mechanism includes the legal requirement that “the very thing being sold”—such as the poster, T-shirt, or film—“is the parody itself.” SCHECHTER & THOMAS,

as other elements seep in—such as taboo subjects—the policing mechanism breaks down and liability more likely attaches to the parody.<sup>223</sup> By necessity, the uncertain nature of infringement case law tempers this conclusion. Viewed collectively, infringement case law gives the impression of a free-for-all, incorporating scattered factors unrelated to the type of humor at issue—such as First Amendment values, the noncommercial nature of the parody, and alternative avenues of expression.<sup>224</sup> Nonetheless, the parody/likeness-of-confusion doctrines and many case results establish that incongruity humor inspires the law to step aside and release humor fosters results that, although unpredictable, are more welcoming of legal regulation.

## 2. *Trademark Dilution*

The theory of dilution litigation holds that just because a parody might not mislead a consumer into believing a trademark holder would ridicule its own symbols, dilution may nonetheless harm the trademark holder by “lessening the ‘commercial magnetism’ or ‘magic’ of the mark by either associating it with a multiplicity of diverse sources, or by associating it with something distasteful or off-putting.”<sup>225</sup> Like infringement litigation concerning taboo topics, dilution litigation yields varying results.<sup>226</sup> Part of the explanation for the divergent results in dilution cases comes from the fact that many dilution claims arise under state law. Because state laws vary, different

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*supra* note 178, § 30.6, at 719 (interpreting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25(2) (1995)); *see, e.g., Dr. Seuss Enters.*, 109 F.3d at 1400–01 (applying rule that parody must make fun of original work itself). In other words, a parody avoids legal regulation only where it pokes fun at “the parodied work” rather than using that work to attack something else. Posner, *supra* note 216, at 67 (arguing that the copyright exemption for parodies “should not extend to cases in which the parody does not attack the parodied work but rather uses that work to attack something else”); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 & n.14 (1994) (recognizing copyright rule that a work is not entitled to special consideration as a “parody” unless it targets the plaintiff’s work).

Analyzed in light of humor theories, this principle is neutral in its approach to superiority humor because it does not regulate the degree of ridicule in society, but rather only the mechanism for expressing ridicule. The rule arguably reinforces the preference for humor based on incongruity and contradiction because it flows from the requirement that an acceptable parody must mimic a phenomenon at the same time it ridicules that phenomenon. Nonlegal materials identifying the qualities of parody, however, do not universally reflect this requirement. *See* Palmer, *supra* note 25, at 80 (asserting that the purpose of parody “may be mockery of the original, mockery of some other associated entity, or mere playful allusion”).

<sup>223</sup> *See, e.g., Gen. Elec. Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. (BNA) 1036, 1037 (D. Mass. 1979).

<sup>224</sup> *See* Taran, *supra* note 216, at 3 (analyzing infringement claims against unwholesome parodies and “finding that the potential harm caused by such vulgar humor does not justify the chilling effect that the inconsistent legal doctrine of tarnishment has on otherwise unhindered free speech”).

<sup>225</sup> SCHECHTER & THOMAS, *supra* note 178, § 30.6, at 719.

<sup>226</sup> Taran, *supra* note 216, at 4–5 (reporting inconsistent antidilution case law).

legal requirements govern the cases, yielding different results. Although one might have expected the differences among results to diminish after the 1995 enactment of the federal statute authorizing a federal dilution cause of action, case results continue to vary.<sup>227</sup>

As dilution law evolved, courts and scholars identified two theories: blurring and tarnishment.<sup>228</sup> Blurring occurs when consumers might identify one trademark with two separate sources (as opposed to infringement, which causes consumers to identify similar marks with one source).<sup>229</sup> Blurring causes an injury arising from the mark's value diminishing, not from consumer confusion.<sup>230</sup> By contrast, tarnishment causes an injury arising because the diluting product creates negative associations with the protected mark.<sup>231</sup> Most case law grappling with parodies deals with the tarnishment theory.<sup>232</sup> Courts have even observed that parodies tend to increase rather than decrease public identification of marks, thereby undermining blurring as a liability theory.<sup>233</sup>

Despite variety in results, cases reveal that the success of a dilution cause of action often turns on the taboo or unsavory quality of the humor. Thus, where the humor's subject matter is condoms<sup>234</sup> or

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<sup>227</sup> Cf. Dreyfuss, *supra* note 198, at 11–15 (reporting on courts' growing skepticism of liability for dilution under the Federal Trademark Dilution Act of 1995).

<sup>228</sup> See, e.g., *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 45 (2d Cir. 1994) (identifying a dilution theory to supplement blurring and tarnishment that applies when a competitor makes alterations to a mark in order to diminish its favorable attributes).

<sup>229</sup> 4 McCARTHY, *supra* note 183, § 24:69 (defining dilution by blurring).

<sup>230</sup> *Id.* McCarthy refers to a restaurant using the famous mark TIFFANY as an example where no confusion would result because consumers assume that the jewelry store is not running the restaurant and simply think the restaurant is trying to sound high class. However, the result would undermine the "unique and distinctive link between the word TIF-FANY and a certain chain of fashionable jewelry stores." *Id.*

<sup>231</sup> *Id.* § 24:70 (defining dilution by tarnishment).

<sup>232</sup> *Id.* § 24:90 (reviewing cases for tarnishment theory). See, e.g., *N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel, LLC*, 293 F.3d 550, 558–59 (2d Cir. 2002) (upholding grant of summary judgment on blurring claim but finding factual issue that parody might be actionable under tarnishment theory).

<sup>233</sup> See, e.g., *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 506 (2d Cir. 1996) (finding that defendant's merchandising of puppet character named Spa'am, a parody of plaintiff's luncheon meat, would lead to greater public identification of plaintiff's trademark); *World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 441 (W.D. Pa. 2003) (finding that defendant's parodies of plaintiff's wrestling characters, sold as T-shirts and other forms of consumer merchandise, would more likely increase rather than decrease public identification of plaintiff's trademark). Courts also tend to refer to the "broad" quality of the humor in a parody in determining that blurring does not occur. See, e.g., *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 421–23 (S.D.N.Y. 2002) (rejecting blurring claim and describing as "broad" humor a parody of Tommy Hilfiger products by a pet fragrance called "Timmy Holedigger").

<sup>234</sup> See *Am. Express Co. v. Vibra Approved Labs. Corp.*, 10 U.S.P.Q.2d (BNA) 2006, 2007, 2012–13 (S.D.N.Y. 1989) (finding preliminary injunction appropriate for dilution claim where defendant produced a condom carrying case featuring gladiator head with words "America Express" and "Don't Leave Home Without It").

oral sex,<sup>235</sup> for example, courts are more likely to find dilution than where the subject matter concerns a high-pitched voice imitating a Barbie doll<sup>236</sup> or pet dog products bearing parodies of high-end product names.<sup>237</sup> For dilution cases that rely on the tarnishment theory, this result is not surprising. After all, the general purpose of the tarnishment theory is to redress injuries caused by degrading a mark's positive associations and using it for "unwholesome or degrading goods or services."<sup>238</sup> Intolerance for release humor is not only an inherent part of the dilution cause of action, but it also defines its reason for being. Faithfully executing the law's intent, courts have found dilution by tarnishment where a defendant used a plaintiff's trademark in the context of humor based on bodily functions and drug culture as well as adult cartoons, websites, live entertainment, and movies.<sup>239</sup> As in the infringement setting, tarnishment cases are unpredictable, with parodies on relatively uncontroversial subjects sometimes becoming entangled in the liability net<sup>240</sup> and unsavory subject matter occasionally avoiding capture.<sup>241</sup> On balance, however, the tarnishment cases tend to regulate release humor more than other types.

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<sup>235</sup> See *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. (BNA) 124, 125–26, 135 (N.D. Ga. 1981) (finding injunctive relief appropriate under dilution theory where defendant depicted plaintiff's "Poppin' Fresh" and "Poppie Fresh" characters "engaged in sexual intercourse and fellatio"); see also *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942, 944, 956 (N.D. Ill. 2002) (issuing preliminary injunction under tarnishment theory where website operated by King VelVeeda, [www.cheesygraphics.com](http://www.cheesygraphics.com), purported to parody the cheese product "Velveeta" and featured photos of nude women in sexually suggestive poses).

<sup>236</sup> See *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (rejecting a dilution claim where rock group featured a high-pitched voice as the voice of a Barbie doll). See generally Taran, *supra* note 216, at 3 (arguing that tarnishment litigation "allows courts to exercise viewpoint discrimination to censor vulgar matter").

<sup>237</sup> *Louis Vuitton Malletier v. Haute Diggity Dog, LLC*, 507 F.3d 252, 268 (4th Cir. 2007) (affirming dismissal of dilution by tarnishment claim under federal law based on "Chewy Vuiton" dog toys with names such as "Chewnel #5" and "Dog Perignonn"); *Tommy Hilfiger Licensing*, 221 F. Supp. 2d at 422–23.

<sup>238</sup> 4 McCARTHY, *supra* note 183, § 24:70. But cf. *Hormel Foods Corp.*, 73 F.3d at 507 (stating that although tarnishment occurs when a "likeness is placed in the context of sexual activity, obscenity, or illegal activity," it "is not limited to seamy conduct").

<sup>239</sup> See 4 McCARTHY, *supra* note 183, § 24:89 (listing these as tarnishment categories).

<sup>240</sup> See, e.g., *N.Y. Stock Exch., Inc. v. N.Y., N.Y. Hotel, LLC*, 293 F.3d 550, 555–58 (2d Cir. 2002) (finding possibility of viable tarnishment claim where defendant used the term "New York \$lot Exchange" as an "obvious pun" on the term "New York Stock Exchange"); *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 771–72, 777–79 (8th Cir. 1994) (finding possibility of viable tarnishment claim when humor magazine ran parody ad featuring "Michelob Oily" as a commentary on an oil spill near an Anheuser-Busch brewery). For a set of cases in which dilution claims against parodies of uncontroversial subjects were rejected, see *Louis Vuitton Malletier*, 507 F.3d at 268; *Tommy Hilfiger Licensing*, 221 F. Supp. 2d at 422–23.

<sup>241</sup> See *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 899 (N.D. Cal. 2002) (finding animated pornographic film *Starballz* a parody of Star Wars films and rejecting dilution by tarnishment liability).

Although the dilution cases reflect a less explicit preference for humor based on incongruity than the infringement cases, the dilution cases do embrace the treasured status of parody with equal (and perhaps even greater) vigor. In dilution cases, the balance necessary to evaluate whether a parody dilutes the goodwill and reputation associated with a particular trademark often inspires strong statements about parody's importance in human society.<sup>242</sup> Courts often link this historical factor with First Amendment protections as well.<sup>243</sup> Perhaps more importantly, the dilution statute makes an explicit exception for parodies.<sup>244</sup> Thus, while tarnishment cases do not accord preferred treatment to all incongruity humor, they generally avoid liability for a type of humor with roots in incongruity—parody. And, to that extent, tarnishment cases ultimately privilege incongruity humor—the backbone of parody's definition.<sup>245</sup>

### C. The Law Often Steps In: Sexual Harassment in Employment

Sexual harassment law stacks the deck against superiority and release humor. In fact, the liability theory here focuses almost exclusively on a subject associated with release humor: sex.<sup>246</sup> Moreover, sexual harassment claims involving humor seek to remedy oppressive statements and actions creating a hostile working environment. Cases focus on speech and expressive conduct that belittle the joke's target and often manifest as an attempted joke.<sup>247</sup> As such, hostile environ-

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<sup>242</sup> See, e.g., *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 27–28 (1st Cir. 1987) (citing importance of parody to social commentary in rejecting a dilution claim based on an article depicting “L.L. Bean’s Back-To-School-Sex-Catalog”); *Fisher v. Dees*, 794 F.2d 432, 437–38 (9th Cir. 1986) (concluding that “[d]estructive” parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author”).

<sup>243</sup> See *L.L. Bean*, 811 F.2d at 29, 33–34 (holding that dilution claim must yield to First Amendment interests).

<sup>244</sup> 15 U.S.C. § 1125(c)(3)(A)(ii) (2006) explicitly excludes “[a]ny fair use . . . of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with . . . parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner” from the category of actionable blurring or tarnishment claims. As pointed out in *Louis Vuitton Malletier*, 507 F.3d at 266, this exclusion for parody is not absolute, excluding from its coverage parody that is used as a trademark (“designation of source”) itself.

<sup>245</sup> This privilege is circumscribed, as the regulatory sweep of dilution law extends only to commercial speech. See *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005) (explaining that the Federal Trademark Dilution Act of 1995 applies only to commercial use of a trademark to protect First Amendment concerns). Parody, however, does more than fuel a commercial transaction; it is therefore noncommercial expression and outside the ambit of trademark dilution law. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9th Cir. 2003).

<sup>246</sup> See *supra* text accompanying notes 87–98.

<sup>247</sup> See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998) (involving sexual harassment claim in which plaintiff was picked on and called “a name suggesting homosexuality”).

ment sexual harassment claims reflect the law's readiness to regulate superiority humor. By contrast, the sexual harassment cases show an inclination *not* to regulate where incongruity humor is central to the claim.

### 1. *Elements of a Sexual Harassment Claim*

The federal statute prohibiting sex discrimination in employment, Title VII of the Civil Rights Act of 1964, protects against sexual harassment, including quid pro quo sexual harassment and hostile environment sexual harassment.<sup>248</sup> Of the two types, hostile environment harassment is the most likely to involve humor. Unlike a quid pro quo sexual harassment claim, a claim for hostile environment sexual harassment arises even if the harasser did not put the claimant in the position of providing sex to keep her job.<sup>249</sup> Several states have statutes derived from Title VII, and state courts frequently use Title VII case law to interpret their own statutes in evaluating hostile environment claims.<sup>250</sup> The state cases that I cite in this section fall within this category.

For a sexual harassment claim to succeed, Title VII requires that the harassment arise "because of" the plaintiff's membership in one of the protected classes.<sup>251</sup> An employer violates Title VII when, "because of" the employee's membership in a protected class, the employer causes the workplace to be "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment."<sup>252</sup> The "because

<sup>248</sup> 42 U.S.C. § 2000e-2(a) (2006), which reads in part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

<sup>249</sup> See THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 118–20 (2001) (describing quid pro quo sexual harassment as the termination or disadvantaging of an employee who refuses a blatant demand from a supervisor for sexual favors, and distinguishing hostile environment harassment, which is not necessarily sexual).

<sup>250</sup> See, e.g., *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 414 (D.N.J. 1996) ("The New Jersey courts have consistently recognized the influence of Title VII law in interpreting the NJLAD [New Jersey Law Against Discrimination].").

<sup>251</sup> See 42 U.S.C. § 2000e-2(a)(1); see also *Oncale*, 523 U.S. at 78 (noting that, in the sexual harassment context, Title VII prohibits discrimination "because of . . . sex"); HAGGARD, *supra* note 249, at 59 ("The operative language of Title VII is that no employer shall discriminate against any employee *because of* certain characteristics.").

<sup>252</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation and internal quotations omitted).

of” requirement focuses sex discrimination claims on a subject matter of release humor: sex.

Emphasizing that Congress did not intend Title VII to impose “a general civility code for the American workplace,”<sup>253</sup> the U.S. Supreme Court has admonished that occasional abusive comments, gender-related jokes, and teasing do not necessarily make a hostile environment.<sup>254</sup> Whether a workplace environment is hostile is an inquiry that focuses on context, looking at factors such as the frequency and severity of the discriminatory conduct, whether it “unreasonably” interferes with an employee’s work performance, and whether it affects the employee’s psychological well-being.<sup>255</sup> Economic, personal, or psychological harm are relevant but not necessary for a plaintiff to succeed. The inquiry requires “careful consideration of the social context in which particular behavior occurs.”<sup>256</sup> Significantly, a U.S. Department of Labor pamphlet states that actionable harassment can arise if a coworker makes sexual jokes that make it hard to work.<sup>257</sup> The Supreme Court has emphasized that “simple teasing, offhand comments and isolated incidents (unless extremely serious)” will not themselves suffice.<sup>258</sup>

## 2. *Sexual Harassment Cases Compared with Trademark and Contract Cases*

The context for sexual harassment humor in the workplace has different parameters than humor in a mass setting, such as that adjudicated in trademark cases and the contract cases dealing with advertisements. The workplace context fosters interpersonal jockeying, which does not color mass-produced parodies or other public humor. Thus, for example, interpersonal humor can function as “an oblique display of power and control disguised as good fun.”<sup>259</sup> In the context of interaction between sexes, the subtleties are complex. One commentator described the power dynamic as follows:

[T]he target [of apparent humor] is left with the awkward question: Is it an insult or just a joke? If the former, one should protest or risk being seen as a pushover. Yet to take a joke seriously signals one’s

<sup>253</sup> *Oncale*, 523 U.S. at 80.

<sup>254</sup> *See id.* at 81.

<sup>255</sup> *Harris*, 510 U.S. at 23.

<sup>256</sup> *Oncale*, 523 U.S. at 81.

<sup>257</sup> U.S. DEP’T OF LABOR, *Sexual Harassment; Know Your Rights* (1994), available at <http://www.empowermentzone.com/harass.txt> (last visited Apr. 5, 2009). For works that cite or discuss the brochure, see BERNSTEIN, *supra* note 2, at 26; Volokh, *Hostile Work Environment*, *supra* note 2, at 633.

<sup>258</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation and internal quotation marks omitted).

<sup>259</sup> Quinn, *supra* note 136, at 1163.

chains and potentially marks one as socially clumsy and overly sensitive. This ambiguity serves to bound the target's response . . . .<sup>260</sup>

Given this context, it comes as no surprise that employment law regulates attempts at humor that are easily characterized as superiority humor. Moreover, the power politics of sexual harassment cases—deeply rooted in sex roles, personal relationships, and workplace dynamics—is not necessarily present in either the trademark cases or the contract cases. From the point of view of humor regulation, sexual harassment makes possible a range of injuries and involves group implications not at play in the contract and trademark contexts. The workplace context implicates complex questions about the double-edged (adaptive/maladaptive) effect of humor and its feedback loops,<sup>261</sup> questions that are largely absent in trademark and contract litigation. Thus, the humor presents issues relating to gender, sexuality, and the function of humor in the workplace—all issues about which nonlegal scholars have generated a rich literature.<sup>262</sup>

Humor theorists' work on gender, sexuality, and employment provides an important complement to existing legal literature on sexual harassment claims and the First Amendment.<sup>263</sup> For the purpose

<sup>260</sup> *Id.*

<sup>261</sup> See *supra* notes 126–44 and accompanying text for a general description of these phenomena.

<sup>262</sup> For a discussion of gender and humor, see, for example, REGINA BARRECA, *THEY USED TO CALL ME SNOW WHITE . . . BUT I DRIFTED: WOMEN'S STRATEGIC USE OF HUMOR* (1991); COHEN, *supra* note 25, at 69 (postulating that women tend not to be joke tellers because they might “have other conversational devices for establishing and maintaining intimacy, while for at least some men, joke-telling is a primary device of this kind”); Martin D. Lampert & Susan M. Ervin-Tripp, *Risky Laughter: Teasing and Self-Directed Joking Among Male and Female Friends*, 38 J. PRAGMATICS 51, 51 (2006) (studying humor in conversation as it relates to gender role expectations about “aggression, power, and self-disclosure”).

For a discussion of sexuality and humor, see, for example, Chapman & Foot, *supra* note 22, at xi (reporting that social scientists have found that sexual activity and enjoyment most directly determine the appreciation of sexual humor); Baron, *supra* note 132 (predicting that “nonexploitative sexual humor would prove more effective in reducing subsequent aggression than exploitative sexual humor”).

For a discussion of humor and the workplace, see, for example, PALMER, *supra* note 143, at 59 (noting one social scientist's conclusion that humor “functions to ease tensions caused by the contradiction between hierarchy and collegiality”); Martin, *supra* note 16, at 203 (arguing that humor's ability to strengthen human relationships and to provide enhanced feelings of closeness and links with others is beneficial to moderating stress); Joseph Alan Ullian, *Joking at Work*, 26 J. COMM. 129 (1976) (analyzing how banter and joking help organizations remain stable in the face of change), cited in ROECKELEIN, *supra* note 15, at 68.

<sup>263</sup> The interrelationship between Title VII and First Amendment rights is well documented in law review literature. See, e.g., Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 580, 597 (2001); Volokh, *Hostile Work Environment*, *supra* note 2. Judicial decisions, however, have less to offer on this issue. See Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1759 (2007) (noting that “[t]he pages of the Federal Reporters . . . remain amazingly light” on the relationship between the First Amendment and Title VII).

of this inaugural effort to analyze the law's attempt to "regulate funny," however, I leave analysis of this important material for future study. Instead, to provide a focused and coherent comparison with trademark and contract law, I review the harassment cases with an eye toward identifying the types of humor courts choose to regulate.

### 3. *Humor in the Sexual Harassment Cases*

While searching the sexual harassment cases for details about the humor at issue in the suit, I often encountered obstacles in the way the opinions describe the humor. Often, case reports refer only to euphemisms such as "off-color jokes" or "sexual comments and innuendo,"<sup>264</sup> without describing the precise content. In many cases, decisions reflect the recent trend toward summarily rejecting employment discrimination claims, with courts citing insufficient hostility or severity in the harassing environment.<sup>265</sup> Illustrating this trend, Judge Richard Posner reacted as follows to a plaintiff's complaint about her supervisor's sexual humor:

It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the supervisor's] patter substantially more distressing than . . . heat and cigarette smoke . . . .<sup>266</sup>

The courts have thus set a high bar on the gravity of offense necessary to state a claim. Accordingly, where courts do find actionable misconduct, the misconduct is often accompanied by physical bullying, thus making extensive analysis of the oral communications less necessary and rendering the cases less pertinent to this study.<sup>267</sup>

Cases detailing the precise content of communications at issue usually depict superiority and release humor. As noted above, the tendency of challenged communications to fall into these categories is not surprising because the cause of action requirements channel claims toward offending comments of this kind. In cases involving superiority and release humor, courts tend to determine that the humor was either sufficiently pervasive to pollute the workplace environ-

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<sup>264</sup> See, e.g., *Saltzberg v. Med. Weight Loss Ctr., Inc.*, No. 01-P-1438, 2003 WL 22510331, at \*2, \*4 (Mass. App. Ct. Nov. 5, 2003).

<sup>265</sup> See, e.g., Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination as a Claiming System*, 2005 WIS. L. REV. 663, 675–80, 691 (documenting how courts are limiting availability of sexual harassment and other discrimination claims).

<sup>266</sup> *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

<sup>267</sup> See, e.g., *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 375, 377–79 (Fla. Dist. Ct. App. 2004) (using federal hostile environment law to find liability under state statute where harassing coworker tapped plaintiff, made repeated kissing noises, and "rammed his erect penis into her buttocks").

ment<sup>268</sup> or insufficiently frequent or severe to merit the imposition of liability.<sup>269</sup>

Two classic cases in which the court found superiority and release humor providing a basis for hostile environment liability are *Harris v. Forklift Systems, Inc.*<sup>270</sup> and *Robinson v. Jacksonville Shipyards, Inc.*<sup>271</sup> In *Harris*, the U.S. Supreme Court described a workplace where a supervisor frequently uttered to the plaintiff, "You're a woman, what do you know," suggested that the two of them "go to the Holiday Inn to negotiate [plaintiff's] raise," and queried in response to the plaintiff's success with a sale, "What did you do, promise the guy . . . some [sex] Saturday night?"<sup>272</sup> Although the Court did not characterize these putative jokes as asserting superiority, it found in them sufficient hostility to merit remanding the case for further consideration of sexual harassment liability.<sup>273</sup> The district court in *Robinson* more directly characterized the humor in that case as asserting superiority.<sup>274</sup> Evaluating a host of comments such as, "Hey pussycat, come here and give me a whiff" and "she's sitting on a goldmine," the *Robinson* court stated that "sexual joking" of this kind is likely to lead to the "stereotyping of women in terms of their sex object status."<sup>275</sup>

A recent decision evaluating similarly pervasive sexual humor was the only case I found in *any* area of law that explicitly references humor theory: *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*<sup>276</sup> *McIn-*

<sup>268</sup> For an example of an appellate court finding jokes so "deeply offensive" and "egregious" as to require the lower court to enter judgment for the plaintiff "since no other result would be consistent with the record," see *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1010, 1012 (7th Cir. 1994). Indeed, a court's characterization of comments as "vulgar," "humiliating," "demeaning," or "sexist" currently appears to be a necessary condition for liability. See, e.g., *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1035, 1038 (9th Cir. 2005) (reversing grant of summary judgment on basis of "demeaning" and "sexist" comments); *Rush v. Speedway Buick Pontiac GMC, Inc.*, 525 F. Supp. 2d 1265, 1274-75 (D. Kan. 2007) (denying summary judgment motion where manager's comments were "deplorable," "humiliating," "vulgar," and "sleazy").

<sup>269</sup> See, e.g., *Greene v. A. Duie Pyle, Inc.*, 170 F. App'x 853, 854-56 (4th Cir. 2006) (finding no hostile work environment where workplace contained *Penthouse* and *Playboy* magazines and at least fifteen sexually oriented faxes, cartoons, and e-mails); *Nowak v. Lowe's Home Ctrs., Inc.*, No. 05-CV-6273T, 2007 WL 894214, at \*1-2, \*5 (W.D.N.Y. Mar. 21, 2007) (finding an allegation of hostile environment insufficient when based on one comment from supervisor to plaintiff that he would "like to whip her cream" and two jokes not directly concerning the plaintiff).

<sup>270</sup> 510 U.S. 17 (1993).

<sup>271</sup> 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>272</sup> *Harris*, 510 U.S. at 19.

<sup>273</sup> *Id.* at 23.

<sup>274</sup> *Robinson*, 760 F. Supp. at 1504-05 (finding credible the testimony of plaintiff's expert witness who testified as to the "power structure or hierarchy in the work environment" and how "persons in the positions of power" can create an "in-group/out-group effect" that can trivialize valid complaints of female employees).

<sup>275</sup> *Id.* at 1498, 1500, 1504-05.

<sup>276</sup> 669 N.Y.S.2d 122, 124 & n.1 (N.Y. Sup. Ct. 1997) (referring to the works of Sigmund Freud and Jerry Palmer).

tyre describes coworker comments alluding to the plaintiff's gender and sexuality: "laughingly" quipping that the plaintiff "used [her] miscarriage as an excuse to miss work," stating that plaintiff was obviously pregnant because her "tits were larger," and referring to the plaintiff as a "bitch on a broom."<sup>277</sup> Finding liability for hostile environment harassment, the court said this humor reflected "barnyard type cruelty," sometimes based on the "misfortune of others."<sup>278</sup> Concluding that the law should punish the comments, the court even opined that the challenged statements "[t]'aint funny."<sup>279</sup> These characterizations make plain that the court's liability determination rested on the evidence of superiority and release in the challenged comments.

Tracking trends in the contract and trademark areas, sexual harassment cases suggest that incongruity humor—where present—helps inoculate allegedly harassing communications from liability even in the face of release and superiority humor. Two cases illustrate this apparent protective effect of incongruity humor. In *Nitsche v. CEO of Osage Valley Electric Cooperative*,<sup>280</sup> the court evaluated pervasive "unwanted sexual banter" by a male foreman directed at another male foreman.<sup>281</sup> Some of the offensive conduct in *Nitsche* appears in other cases where courts found an actionable hostile environment: the harassing foreman read *Playboy* magazine in the plaintiff's presence, "referred to female genitalia using crude slang names, pretended he had a pubic hair in his mouth, and made lewd comments concerning women."<sup>282</sup> Yet the *Nitsche* court found no sexual harassment liability, citing examples of humor with incongruous overtones: the harassing foreman asked the plaintiff "how many wheels a menstrual cycle had," accused the male plaintiff of needing a pap smear, and posted a picture of a donkey with a drawing of a penis over a coworker's engagement photo.<sup>283</sup> Apparently appreciating the absurd juxtaposition of concepts in this humor, the *Nitsche* court adopted a sympathetic tone, describing the donkey/penis joke as a "caricature," and the other quips as evidence of the harasser's "repertoire of ribaldry."<sup>284</sup> In this

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<sup>277</sup> *Id.* at 125.

<sup>278</sup> *Id.* at 129.

<sup>279</sup> *Id.* at 131 & n.5 (quoting the radio program "Fibber Magee and Molly").

<sup>280</sup> 446 F.3d 841 (8th Cir. 2006).

<sup>281</sup> *Id.* at 844. Sexual harassment remains a viable claim for same-sex harassment, although the inference that challenged conduct amounts to a proposal of sexual activity may not be available if the harasser is not homosexual. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("The [inference of discrimination] would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was a homosexual.").

<sup>282</sup> *Nitsche*, 446 F.3d at 843.

<sup>283</sup> *Id.* The harassing foreman had also composed a poem to ridicule plaintiff's error in allowing molasses to fall off his truck. Although not literally reflecting incongruity, the poem has an absurd tone—if not an absurd topic. *Id.* at 844 n.2.

<sup>284</sup> *Id.* at 846.

“repertoire” the humor most personally offensive to the plaintiff had the most incongruous elements. Presumably, the *Nitsche* court found that this incongruity softened the comments’ hostility enough to avoid liability.

In the second case concerning incongruous humor, *Lyle v. Warner Brothers Television Productions*,<sup>285</sup> the court adjudicated a sexual harassment claim by a comedy writers’ assistant who helped prepare the television program *Friends*. While acknowledging the graphic sexual comments pervasive in the workplace, the court rejected the claim largely because the defendants uttered the comments in a context “where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes.”<sup>286</sup> In the *Lyle* court’s view, this context depersonalized the sex talk, thereby rendering it “nondirected” and thus insufficiently severe to justify liability.<sup>287</sup> One might easily conclude, however, that this “nondirected” quality arose as much from the incongruous nature of the humor as from the sexualized quality of the scripts the writers produced. For example, the offending humor included playful alterations on an inspirational calendar in the workplace, with the writers “changing . . . the word ‘persistence’ to ‘pert tits’ and ‘happiness’ to ‘penis.’”<sup>288</sup> (The humor in these alterations presumably arises in part from the unlikelihood that an innocent inspirational calendar would feature human sexual parts.) Similarly, comments that were indeed personal—i.e., directed at staff members—but nonetheless minimized by the court, also had incongruous character. For example, the writers referenced the infertility of an actress on the show, joking that “she had ‘dried twigs’ or ‘dried branches in her vagina.’”<sup>289</sup> The absurdity of this vivid image no doubt inspired the court to connect it with the “creative process” and minimize its contribution to a hostile working environment.<sup>290</sup>

Possible evidence of courts privileging incongruity humor also appears in cases evaluating puns. Theorists characterize puns as incongruity humor because they connect otherwise disparate phenomena.<sup>291</sup> In several recent cases, courts focused on puns that allegedly comprised harassment and found that the harassment was

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<sup>285</sup> 132 P.3d 211 (Cal. 2006).

<sup>286</sup> *Id.* at 226.

<sup>287</sup> *Id.* (“[T]he defendant writers’ nondirected sexual antics and sexual talk did not contribute to an environment in which women and men were treated disparately.”).

<sup>288</sup> *Id.* at 218.

<sup>289</sup> *Id.* at 217.

<sup>290</sup> *See id.* at 226.

<sup>291</sup> *See supra* notes 37–40 and accompanying text for further discussion of the literature on puns.

insufficiently severe to merit liability. For example, courts rejected liability where plaintiffs were exposed to:

\*jokes about President Clinton, which included “a list of ‘Ben & Jerry’s New Presidential Ice Creams’ containing word-plays on names of ice cream flavors, implying either sex or impeachment”;<sup>292</sup>

\*a reference to prosciutto ham as “prostitute ham”;<sup>293</sup>

\*a quip that by wearing a sleeveless shirt, the plaintiff was “enforcing [her] 2nd amendment rights . . . to bare arms”;<sup>294</sup>

\*a reference to rubber bands as “rubbers.”<sup>295</sup>

While these examples suggest court preferences for incongruity humor, any conclusion that courts adjudicating sexual harassment claims systematically bestow direct protection on this humor is tenuous. The presence of mitigating factors in some cases along with the dearth of extensive discussion of humorous remarks in others undermines any sweeping conclusion. The perception that incongruous humor receives direct, solicitous treatment is only anecdotal. What *is* clear, however, is that courts applying sexual harassment doctrine focus primarily on regulating (and condemning) release and superiority humor. In so doing, they indirectly privilege incongruity humor in the eyes of the law.

### III

#### REGULATING FUNNY: CAUSE FOR CELEBRATION AND CONCERN

The overlap between law and humor theory is striking. Courts, like nonlegal theorists, favor incongruity humor and disfavor release and superiority humor.<sup>296</sup> Courts integrate scholarly definitions of parody and satire into legal doctrines, and puns receive favored status in both law and theory. And all this appears in opinions with almost no direct citation to preexisting nonlegal scholarship. What’s the explanation for this overlap? Erudition of the judiciary? Common sense? Dumb luck? I vote for common sense. And, as it turns out, this sharing of “common sense” between courts and humor theorists

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<sup>292</sup> Hoffman v. Lincoln Life & Annuity Distributions, Inc., 174 F. Supp. 2d 367, 376 (D. Md. 2001).

<sup>293</sup> Augustin v. Yale Club of N.Y. City, No. 03-CV-1924 (KMK), 2006 WL 2690289, at \*6 (S.D.N.Y. Sept. 15, 2006), *aff’d* 274 F. App’x 76 (2d Cir. 2008).

<sup>294</sup> Martinez v. Rapidigm, Inc., No. CV-02-1106, 2007 WL 965899, at \*2 (W.D. Pa. Mar. 29, 2007) (internal quotations omitted).

<sup>295</sup> Goede v. Mare Rest., No. 95 C 5238, 1995 WL 769766, at \*1 (N.D. Ill. Dec. 29, 1995). For an exception to the trend of discounting the harassing nature of puns, see *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256 (10th Cir. 2005). In that case, the plaintiff’s supervisor and coworkers, alluding to her surname, gave her the nicknames “Ivanna Dick” and “Granny Dick.” The plaintiff, who kept a collection of stuffed cats on her desk, was also told that “Ms. Dick had a ‘pussy.’” *Id.* at 1261.

<sup>296</sup> See *supra* note 108 and accompanying text.

cuts two ways, offering both cause for celebration and cause for concern about current patterns of regulating humor.

### A. Cause for Celebration

#### 1. *The Different Faces of Common Sense*

The “common sense” explaining the confluence of case law and humor theory has at least three different faces: logic, humor’s intrinsic qualities, and social norms. The logical foundation of common sense derives from societal contexts in which courts create legal definitions of claims and defenses. The notion of humor’s intrinsic qualities proposes that truly funny utterances may tap into “humor receptors” found within all human psyches. Finally, social norms refer to shared cultural preferences about humor.

The legal material summarized above outlines logical connections between legal requirements (such as the definition of a cause of action) and humor scholarship. Take, for example, sexual harassment law’s focus on regulating superiority humor. Sexual harassment law is a species of the law of wrongs, designed to impose liability in order to remedy a personal injury.<sup>297</sup> The decision to regulate representations of an individual as inferior is hardly surprising, given civil law’s function of imposing liability to remedy a “hurt.” Since advanced human society seeks to reduce conflict, law has a mechanism for discouraging hurtful behavior that might promote conflict. As citizens of the same society as lawmakers, academics in nonlegal disciplines also focus on humor with conflict-creating potential, expending considerable effort to explain it.<sup>298</sup> Accordingly, nonlegal scholars have refined a theory of superiority humor with analytical kinship to another human context—legal regulation. Sexual harassment is but one example where the overlap of law and humor scholarship derives from the simple fact that both endeavors concern humanity.

The second possible face of common sense is more contestable. Many suggest that no consensus definition of humor exists because perception of humor is largely intuitive, thereby avoiding precise description.<sup>299</sup> To the extent that this intuition results from an intrinsic human quality (something one might call a “funny bone”), one could argue that legal regulators and humor theorists are simply operating with the same hard-wired understanding of how humor operates. Under this view, incongruity humor arguably stimulates this shared funny bone more effectively than any other type. Proof of

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<sup>297</sup> See note 145 for further discussion of this proposition.

<sup>298</sup> See, e.g., Baron, *supra* note 132 (describing the results of an experiment designed to test male responses to sexual humor).

<sup>299</sup> See, e.g., Ewick & Silbey, *supra* note 3, at 559–60 (discussing anthropological, psychological, and linguistic perspectives on the nature of humor).

such a funny bone, however, has so far eluded cognitive scientists and other humor theorists.

Common sense's third face—social norms—is likely the most important because its explanatory potential survives regardless of whether one proposes that humor is constructed entirely from contingent perceptions of human society<sup>300</sup> or believes that every human psyche harbors an intrinsic funny bone waiting for stimulation. Understanding of social norms suggests that both legal thinkers and humor theorists prefer the same types of humor because humor appreciation is imbued with cultural preferences that the two groups happen to share. I explore the ramifications of this thesis below.

## 2. *Confluence Among Social Norms, Law, and Humor Theory*

One can define a social norm “as an obligation backed by a *nonlegal* sanction . . . such as criticizing, blaming, refusing to deal or shunning . . . [imposed by persons who] are not state officials.”<sup>301</sup> Within the humor context, a norm can reflect views on moral judgments (such as the taboo against sexist jokes or racial epithets), manners (such as discouraging children from ridiculing another child's clothes in her presence), and taste (such as avoiding jokes about the World Trade Center terrorist attacks on September 11, 2001).<sup>302</sup> Since humor theorists and legal thinkers write against the background of shared moral judgments, manners, and tastes, one might expect them to hold consistent views about what humor best promotes social well-being. In other words, one would predict that law and nonlegal academic writing express similar social norms.

Much commends law's tendency to incorporate social norms. One can expect citizens to more fully comply with legal rules when the law tracks their shared values and understanding. When law and

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<sup>300</sup> See, e.g., Quinn, *supra* note 136, at 1164 (arguing that the “definitions of what is funny or what is insult are socially constructed and embedded within existing power relations”).

<sup>301</sup> Robert Cooter, *Do Good Laws Make Good Citizens?: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1580 (2000); see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both”).

One need not necessarily confine social norms to the nonlegal context. See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914, 915 (1996) (stating that “we might, very roughly, understand ‘norms’ to be social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done” and noting that norms can be “codified in law”). The nonlegal definition, however, helps to emphasize the notion that law integrates attitudes developed outside the legal context.

<sup>302</sup> See Sunstein, *supra* note 301, at 914 (discussing norms for “good manners,” “morally abhorrent views,” and “moral commitments”); Michael Ventre, *Is it Still Too Soon for Jokes About Sept. 11?*, MSNBC, Sept. 9, 2008, <http://www.msnbc.msn.com/id/26596867/> (describing the hostile audience reaction to Gilbert Gottfried's Sept. 11 joke).

social values overlap, legal principles are more likely to appeal to citizens and garner their respect.<sup>303</sup> Moreover, courts promote predictability by incorporating social norms into their decision making because citizens can anticipate legal regulations based on shared attitudes about appropriate behavior.<sup>304</sup>

For humor theory, social notions of appropriate behavior inform the structure and definitions theorists emboss on different forms of humor.<sup>305</sup> Understanding how the law reflects these theories can yield greater appreciation for what courts and other regulators are accomplishing. The theories can also provide guidance to lawyers who need to predict how courts might resolve a controversy, understand existing case law, and gather raw material for advocacy. Similarly, a court evaluating whether to protect a particular communication (and wishing to avoid reversal on appeal) may usefully inquire whether the communication reflects incongruity, superiority, release humor, or some other category identified by humor theorists. Where understanding the humor categories can clearly guide litigants, attorneys, and courts in the course of dispatching life's duties, humor regulation becomes an instance where legal rules—through the sometimes hapless machinery of the common law—can produce effective and efficient results.<sup>306</sup>

That's the good news for lawyers, judges, and those subject to legal regulation (i.e., everyone). Self-conscious evaluation of potential humor regulation in light of humor theories promises to guide decision makers choosing among alternatives. What's more, this Article's positive analysis announces equally upbeat news for humor theorists—illustrating how a human institution (the American legal system) validates the relevance and accuracy of humor research from the social sciences, humanities, and natural sciences.<sup>307</sup> Moreover, to

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<sup>303</sup> See Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 937 (2004) (“Straightforward, uncomplicated legal principles are more likely to appeal to the minds and intuitions of the governed, to resonate within them, and to garner the respect and emotional attachment that ensure that citizens will actually honor and obey the law.”).

<sup>304</sup> See, e.g., McAdams, *supra* note 301, at 341 (“Norms are a vitally useful tool for explaining behavior and predicting the effect of legal rules.”).

<sup>305</sup> See subpart I.B.

<sup>306</sup> I take no position on whether the common law's incorporation of humor theory ultimately promotes the most efficient results that law can accomplish. See, e.g., Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2062 (2001) (delineating ways in which law can ensure an efficient equilibrium where social norms may not be effective in doing so). Instead, I argue only that efficiency results from the overlap between law and social norms because the overlap helps to ensure that law is more understandable, respectable, and predictable.

<sup>307</sup> Presumably, this is also good news for perennially insecure legal academics, who for once can see how *their* discipline supports the social sciences, humanities, and natural sciences—rather than vice versa.

the extent that humor scholars advocate for the individual and social benefits of incongruity humor, one might even say that the law's special solicitude for that humor reinforces those beneficial effects (and supports the advocacy).

## B. Cause for Concern

Alas, I am not entirely sanguine—the potential salutary effects of humor theory's overlap with common law does not end the analysis. As a normative matter, I question whether traces of the three humor theories in American law predict the best long-range future for humor regulation. For one thing, the burgeoning humor literature and nuanced theories that now provide usual fare for humor theorists suggest that more refined analysis waits for law to use it.<sup>308</sup> Moreover, even assuming that the tripartite humor scheme were the current “gold standard,” the law should not necessarily always favor incongruity humor and disfavor the two others. The tripartite scheme does not restrict courts to the boundaries of general social norms. Instead, regulating humor casts courts in the role of monitoring taste, a perilous enterprise in a free society,<sup>309</sup> particularly when done unconsciously. Although thoughtful use of the three theories might guide courts in making difficult choices and assist lawyers in providing advice and predicting litigation outcomes, humor embodies complexities beyond the theories' reach and courts' understanding.<sup>310</sup> As documented by both legal and nonlegal scholars, humor both reflects and perpetuates complex power dynamics that are difficult to predict and dangerous to regulate.<sup>311</sup>

### 1. *Regulating Taste*

By “taste,” I mean a sense of decorum for what is appropriate in a given context—informed by personal preference as well as community standards.<sup>312</sup> Although the line between taste and social norms is

<sup>308</sup> Some theorists have presented new, comprehensive theories. See, e.g., Thomas C. Veatch, *A Theory of Humor*, 11 *HUMOR: INT'L J. HUMOR RES.* 161, 161–62 (1998). Other theorists have focused on refining existing understandings of the three categories. See, e.g., La Fave et al., *supra* note 65 (refining superiority theory); Veale, *supra* note 69, at 420 (refining incongruity theory).

<sup>309</sup> See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) (asserting that judgments about taste are “not for the Government to decree”); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (stating in the context of a copyright decision that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits”).

<sup>310</sup> See *Bleistein*, 188 U.S. at 251.

<sup>311</sup> See *supra* notes 136–44 and accompanying text; *infra* notes 323–38 and accompanying text.

<sup>312</sup> In his study of parody, Jerry Palmer captures the idea of taste through his description of “decorum.” See Palmer, *supra* note 25, at 93. Palmer defines decorum as “the ap-

blurred, my discussion here confines taste to evaluating whether an expression is proper or fitting to an occasion. To inform their judgments about taste, judges need not confine themselves to broadly held norms.

Of the three areas of law I evaluate in this study, trademark and sexual harassment law furnish the most obvious opportunity for courts to regulate taste. In both substantive areas, courts canvass the facts of cases before them for evidence of humor that imposes harm. This, of course, is entirely reasonable given the civil law's goal of ensuring that perpetrators of injury put injured parties in the position they would have occupied were it not for the wrongs perpetrated.<sup>313</sup> Problems arise, however, because the analysis of whether a legally remediable injury has occurred requires the court to evaluate whether the "hurt" flowing from humor is legitimate. During this legitimacy determination, courts make judgments about taste. So, for example, courts ask whether a parody is so sleazy as to derogate the defendant's mark or confuse consumers.<sup>314</sup> And courts evaluate whether sex jokes are so over-the-top as to position workplace humor beyond what Judge Posner describes as the level of "sex-saturated vulgarity" that American plaintiffs are now expected to tolerate.<sup>315</sup> In this study, we have seen courts characterize humor as "depraved,"<sup>316</sup> "vulgar," "deplorable,"<sup>317</sup> "tasteless, boorish,"<sup>318</sup> or even evincing "barnyard type cruelty" that "[t]'aint funny."<sup>319</sup>

While the sexual harassment and trademark cases bear the most direct evidence of taste regulation, the contract cases also show similar potential. Contract cases evaluate whether a putative joke is sufficiently funny to remove it from contract regulation. In effect, the court's task is to ensure that plaintiffs do not get a reward for failing to

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propriateness of expression to themes and settings." *See id.* Palmer describes an illustrative breach of decorum as the erection of the "parody of a war memorial." *Id.* The breach arises because "[w]ar memorials have a clear stylistic unity . . . they are always solemn, and use forms that are locally considered appropriate for commemoration." *Id.*

<sup>313</sup> *See, e.g.,* Pizani v. M/V Cotton Blossom, 669 F.2d 1084, 1088 (5th Cir. 1982) ("The purpose of compensatory damages . . . is to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred." (internal quotations omitted)).

<sup>314</sup> *See, e.g., supra* notes 206–09 and accompanying text for evaluation of the "sexually depraved" nature of the humor in the *Dallas Cowboys Cheerleaders* case.

<sup>315</sup> *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

<sup>316</sup> *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

<sup>317</sup> *See supra* note 268 for various courts' characterizations of "vulgar" and "deplorable" humor.

<sup>318</sup> *Champagne v. Norton*, No. 4:06-cv-024, 2007 WL 1434899, at \*7 (D.N.D. May 14, 2007).

<sup>319</sup> *See McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 669 N.Y.S.2d 122, 129, 131 (N.Y. Sup. Ct. 1997). *See supra* notes 276–80 and accompanying text for further discussion of this case.

“take a joke.”<sup>320</sup> In deciding whether a defendant produced a true joke, courts have the opportunity to project notions of decorum on the attempted humor.

Many problems arise from taste regulation. First, a court may apply a standard of taste that deviates from mainstream or consensus views.<sup>321</sup> Mainstream views may be difficult to identify and subject to varying interpretation; indeed, the striking indeterminacy in the trademark cases suggests difficulties in identifying a uniform standard of propriety. A second, related problem is the strong likelihood in a pluralist society that tastes differ across social strata and that courts systematically prefer one social class’s tastes over another. Courts’ preference for incongruity humor might be symptomatic of this—with courts identifying incongruity with “wit,” a form of humor long associated with privileged upper classes.<sup>322</sup>

Even where courts might identify a high degree of social consensus to condemn particular humor, prudence counsels them to hesitate before transforming condemnation into law. Echoing wisdom also expressed by such legal thinkers as Robert Cover,<sup>323</sup> philosopher Ted Cohen observes: “some jokes on some occasions, and maybe some jokes on all occasions, are . . . ‘in bad taste,’ and should be thought of as morally objectionable. . . . [But n]ot everything you dislike is illegal, or should be.”<sup>324</sup>

Creating legal rules through litigation may also have the unintended effect of suppressing humor that promises individual and social benefit. When courts enter judgments adjudicating specific parties’ rights, they also send a warning to others considering similar activities. Responding to this message of deterrence, citizens may overreact—allowing for an unnecessarily large buffer between their own activity and activity specifically proscribed by legal rule. The law’s regulatory effect is thus broader than the letter of the law. Whether evaluating the wisdom of a corporate advertising campaign, creating a parody of a protected trademark, or drafting sexual harassment poli-

<sup>320</sup> See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

<sup>321</sup> Indeed, the law’s proscriptions reflect norms that are sometimes contrary to the beliefs held in society. See C.A. Harwell Wells, Note, *The End of the Affair?: Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1808–11 (2001) (exploring how individuals continued to duel despite the legislatures’ passage of anti-dueling laws).

<sup>322</sup> See *supra* note 31 and accompanying text for discussion of the class connotations of humor categories.

<sup>323</sup> See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are . . . but a small part of the normative universe that ought to claim our attention.”).

<sup>324</sup> COHEN, *supra* note 25, at 75, 82–83. (“Not everything you dislike is immoral. But something’s being legal and morally acceptable doesn’t mean you have to think it is OK. Nor does it mean you have to put up with it.”).

cies, decision makers labor under the weight of risk aversion and difficulties distinguishing between lawful and lawless humor.<sup>325</sup>

Legal scholars document this over-regulation in the employment discrimination context, where corporate culture generally pursues a conservative (i.e., cautious) path.<sup>326</sup> Management responds to sexual harassment laws “by reinterpreting [the law’s] ideals and infusing them with managerial values.”<sup>327</sup> In this way, the goal of avoiding sex discrimination in employment can transform into a general mission of removing all sexuality and laughter from the workplace<sup>328</sup>—a result that can impoverish work as a source of meaning and joy in employees’ lives.

## 2. *Humor’s Complexity*

As trumpeted in First Amendment rhetoric, regulation of expression risks muting outlying values and tastes, which society might beneficially evaluate and debate.<sup>329</sup> The resulting silence may fuel what one legal theorist describes as law’s “norm-destroying capacity.”<sup>330</sup> That is, through the process of legal compliance, law privileges mainstream ideas at the expense of those closer to the fringe. Although fringe or unpopular ideas might support beneficial social norms—or at least act as a clarifying foil for them—the ideas remain unexpressed, and beneficial norms are consequently less vibrant. Reducing the array of goods available in the market place, the theory holds, harms beneficial norms and ideas that *are* expressed.

For hurtful communication such as that regulated in contract, trademark, and sexual harassment litigation, the answer is not necessarily a complete moratorium on regulation by law in favor of regulation by the marketplace of ideas. As Lawrence Lessig observes, not all

<sup>325</sup> See, e.g., Nielsen & Nelson, *supra* note 265 (documenting how employers, lawyers, and insurers inflate the risk of employment discrimination litigation); Bernard J. Wolfson, *Office Chat About Clinton Scandal Could Create Harassment Minefield*, ORANGE COUNTY REG., Oct. 5, 1998, at A1 (noting difficulties “distinguishing between legitimate workplace conversation and subjects that are still off-limits”).

<sup>326</sup> See, e.g., BERNSTEIN, *supra* note 2, at 25 (“Prudent employers still feel compelled . . . to enforce speech guidelines that go well beyond what the letter of the Supreme Court precedent requires.”).

<sup>327</sup> Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2088 (2003). Eugene Volokh makes this point as well. See, e.g., Volokh, *Hostile Work Environment*, *supra* note 2 (“[Some] employers . . . consequently suppress any speech that might possibly be seen as harassment, even if you and I would agree that it’s not severe or pervasive enough that a reasonable person would conclude that it creates a hostile environment.”).

<sup>328</sup> Schultz, *supra* note 327, at 2069–70.

<sup>329</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 35–36 (1973) (recognizing that the “harsh hand of censorship of ideas” may stifle expression both “good or bad, sound or unsound”).

<sup>330</sup> Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057 (1996).

ideas have the same dynamic in human society.<sup>331</sup> Lessig reasons that the free trade concept works best for “truths” that can be verified in nature (such as the sum of two and two).<sup>332</sup> For matters that humor regulation focuses on—such as workplace practices that reinforce the view that women are inferior to men—the marketplace analogy breaks down, since these matters are contingent on social definition. Lessig explains that, for some phenomena, a reality exists separate from what we say about it (two plus two equals four, no matter how much one might *say* something different).<sup>333</sup> Yet for other phenomena (such as the appropriate view of women), the reality is “in an important sense constituted by what we say about it.”<sup>334</sup> Indeed, recognizing this dynamic in *Robinson v. Jacksonville Shipyards, Inc.*,<sup>335</sup> the court understood that “sexual joking” can stereotype women “in terms of . . . sex object status.”<sup>336</sup> For these reasons, the welfare of a social organization is not necessarily served by abdication of all regulation on the expression of ideas.

Lessig’s distinctions among idea types inject complexity into the enterprise of identifying optimal legal regulation for hurtful expression. This complexity multiplies in the context of humor, which has a mysterious character with diverse human aspects (social, cognitive, emotional, psychophysiological, and behavioral).<sup>337</sup> One of the trickiest parts of humor is its paradoxical quality. Indeed, theorists have shown that humor can be simultaneously confining and liberating, emotional and cerebral, as well as loving and aggressive.<sup>338</sup> Whatever its object, humor “can operate for or against, [and can] deny or affirm.”<sup>339</sup> In the context of discrimination, humor can not only “reinforce [ ] pejorative images,”<sup>340</sup> but it can also “inver[t] . . . such stereotypes,” thereby shedding honest insight into prejudice.<sup>341</sup>

Humor’s bipolar nature creates a puzzling dynamic for regulators concerned with compensating hurt, increasing efficiency, and

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<sup>331</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1036–37 (1995) (discussing “the marketplace muddle” as it relates to the distinction between truths of “nature” and understanding created by “social reality”).

<sup>332</sup> *Id.* at 1037.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>336</sup> *Id.* at 1504–05.

<sup>337</sup> See ROECKELEIN, *supra* note 15, at 23 (citing Martin, *supra* note 16), and *supra* notes 10–25 and accompanying text for a discussion of humor’s many aspects.

<sup>338</sup> See, e.g., BILLIG, *supra* note 28, at 17–19 (linking to humor the dialectic of love and aggression); MEL WATKINS, ON THE REAL SIDE: A HISTORY OF AFRICAN AMERICAN COMEDY 18 (Lawrence Hill Books 1999) (1994) (observing that white people view black laughter as both a source of paranoid concern and a “source of comfort” and amusement).

<sup>339</sup> BOSKIN, *supra* note 64, at 38.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

preventing harm. On one hand, these aims counsel regulators to be particularly watchful of humor's aggressive side. Yet this aggressive quality also enables humor to serve its own important policing functions. This policing capacity comes from humor's pugnacious side, which enables humor to push boundaries and question received wisdom.<sup>342</sup> As George Orwell asserted, "Every joke is a tiny revolution."<sup>343</sup> Regulators thus face a dilemma because the same quality that makes humor useful to society also makes it capable of significant harm.

One response to this dilemma posits that humor operates as its own check, providing a system of self-regulation that counsels a hands-off approach to legal regulation. As is usually the case with humor, however, this ready answer is overly simplistic. Humor's self-regulating quality operates as a rolling dialectic, a prism of reflections and contradictions that creates shifting groups of insiders and outsiders.<sup>344</sup> While insiders might use humor to belittle outsiders, outsiders might deploy humor to challenge social hierarchy. This outsider humor can make fun of the conventional, critiquing collective judgments as well as mocking mainstream norms and behaviors. When this mockery is appreciated by a group that shares in the laughter and fun, the humor starts to create a new community of insiders. But, when subsequently redeployed to the exclusion of others, the humor creates a new group of outsiders—those who either personally serve as the "butt" of the jokes, who do not think the jokes are funny, or who are members of the group that the jokes mock.<sup>345</sup>

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<sup>342</sup> Michael Pickering & Sharon Lockyer, *Introduction: The Ethics and Aesthetics of Humor and Comedy*, in BEYOND A JOKE, *supra* note 25, at 1, 14 (pointing out humor's potential for challenging orthodoxies).

<sup>343</sup> GEORGE ORWELL, 3 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 284 (Sonia Orwell & Ian Angus eds., 1968).

<sup>344</sup> In addressing humor's paradoxical quality, Professor Michael Billig finds guidance in Herbert Marcuse's notion of the "dialectic of civilization," which concerns a cyclical process of repression and rebellion within society. See BILLIG, *supra* note 28, at 242 (citing HERBERT MARCUSE, *EROS AND CIVILIZATION* 78–105 (2d ed. 1974)). Billig concludes that no permanent equilibrium exists between humor and seriousness and that "[e]ach needs the other for its existence, even as they struggle for momentary supremacy." *Id.* See *supra* notes 126–44 and accompanying text for further discussion of humor's double-edged quality and capacity to generate "feedback loops."

<sup>345</sup> Tierney, *supra* note 23, at F6 ("Laughter can be used cruelly to reinforce a group's solidarity and pride by mocking deviants and insulting outsiders, but mainly it's a subtle social lubricant. It's a way to . . . make clear who belongs where in the status hierarchy."). Beth Quinn is particularly eloquent in describing how this phenomenon operates for sexual harassment:

When men use sexist humor as a medium of masculine solidarity, woman coworkers are in the contradictory position of needing to be in-group as coworkers, yet find themselves to be out-group as women. . . . In this context, men may gain power over an individual woman by calling attention to her difference, that is, to her *womanliness*. . . . In the case of insider humor, however, that the humor is sexist or overtly sexual may be of secondary

One might conclude that legal regulation is not only incapable of controlling this fluctuating power balance but also unnecessary given the self-regulating system. Yet even if this were hypothetically true on an aggregate or meta-level,<sup>346</sup> a hands-off approach is not justified. Courts must respond to complaints of real harm to individual people. In addition, humor's mysterious nature undermines any guarantee that the dialectic operates so elegantly or effectively. Outsiders might not always succeed in harnessing humor's force to challenge power relations in society. What is "funny" coming from a powerful person is not always "funny" coming from the disempowered. Moreover, humor is neither predictable nor accurate in its regulatory function.<sup>347</sup> Instead, as Henri Bergson notes, humor occurs "spontaneously."<sup>348</sup> He explains,

[I]t does not therefore follow that laughter always hits the mark or is invariably inspired by sentiments of kindness or even of justice. . . . [L]aughter is simply the result of a mechanism set up in us by nature or, what is almost the same thing, by our long acquaintance with social life. . . . Laughter punishes certain failings somewhat as disease punishes certain forms of excess, striking down some who are innocent and sparing some who are guilty . . . . In this sense, laughter cannot be absolutely just.<sup>349</sup>

Thus, although in many instances, the natural oscillation between negative and positive humor might perform important checking functions, humor alone cannot be trusted to avoid the type of serious personal harm for which courts generally deploy their resources. Therefore, despite humor's elusive and complex nature, regulation is necessary.

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concern. The main harm lies in the continual reassertion of a woman's outsider status.

Quinn, *supra* note 136, at 1175–77.

<sup>346</sup> Humor theorists Michael Pickering and Sharon Lockyer present an analysis suggesting that outside regulation (presumably by law, social norms, or both) is actually necessary for humor's existence:

Paradoxically, making offensive jokes about others with total impunity would mean that there are no boundaries to push at any more. This would lead to the defeat of humour . . . . Humour is only possible because certain boundaries, rules and taboos exist in the first place. Their existence, along with the satisfaction and sense of agency gained in overcoming them, are equally vital to why we laugh.

Pickering & Lockyer, *supra* note 342, at 14–15.

<sup>347</sup> *Cf.* COHEN, *supra* note 25, at 70 ("[W]hen [Mark Twain] said 'Against the assault of laughter nothing can stand,' he neglected to note that some things should remain standing.").

<sup>348</sup> BERGSON, *supra* note 12, at 198.

<sup>349</sup> *Id.* at 197–98.

## CONCLUSION

Humor presents a remarkable case study in the brilliance and foibles of the common law system. Through the lenses of contract, trademark, and sexual harassment cases, we see courts fumbling their way to the same wisdom that humor theorists took centuries to develop. Thus, preferences for incongruity humor, penalties for release and superiority humor, as well as celebrations of parody and protections for puns are now well established in legal doctrine. And all this occurs while courts engage in the important governmental function of tailoring remedies for individual harms and signaling rules for all citizens to fashion their behavior. Yet this apparently spontaneous confluence of humor theory and law also creates an opportunity for grave harm to society with court decisions stifling a host of beneficial forces. Creativity, self-regulation in social relations, and personal pleasure in comedy are only a few of the benefits that courts might undermine.

The question, then, becomes how to strike a balance. How do we guide courts to interfere only where humor becomes too hateful, too superior, too inane, or too foul to regulate social ills or bring sufficient benefit to anyone? Thankfully, at least three important bodies of knowledge stand ready to assist. First, a rich literature of law and social norm theory awaits further mining.<sup>350</sup> Next is the vast library of First Amendment studies. In this Article, I gave First Amendment principles a wide berth—concerned that the blinding, sometimes categorical, nature of First Amendment jurisprudence might distract from subtle problems presented by humor regulation. Yet First Amendment literature obviously provides important insights and mandates for humor regulation that were developed after years of struggles with hate speech and other potentially harmful communication. These two bodies of work, however, cannot alone inform the task of understanding humor's sources, internal functions, and effects in society. Only with the help of the humor theorists can courts successfully navigate humor's mysteries as they dispatch their duty to regulate "funny."

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<sup>350</sup> See *supra* notes 301–04 for a sampling of law and social norm literature.