Stand-Up Comedy, Joke Theft, and Copyright Law

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I. INTRODUCTION

In recent years, the application of American copyright law to the art of stand-up comedy has received steadily increasing, albeit limited, attention from legal scholars, comics, and the general public. This can be attributed to the steady rise in popularity of stand-up comedy as an art form, and high profile accusations of joke theft publicly leveled against famous comics including Robin Williams, Dane Cook, and Denis Leary.[1] Conventional wisdom dictates that copyright protection in jokes is thin, if it exists at all.[2] In reality, however, a robust copyright in jokes fully comports with the constitutional basis of American copyright law, is supported by case law, and would create parity among comedians regardless of socioeconomic status or professional success.

The notion of weak copyright protection in jokes is prevalent in legal scholarship, as well as mainstream media coverage of joke theft.[3]

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1. Larry Getlen, *Take the Funny and Run*, RADAR, Mar./Apr. 2007, at 63.

2. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.13 (Matthew Bender rev. ed. 2011).

3. *See generally* Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 113-16 (1998) (explaining that the key obstacles for comedians in copyrighting jokes are the inability to copyright an idea and that comedians can only copyright the expression of a joke's central idea); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94

Comics typically rely on the enforcement of community standards and professional norms to protect against joke theft, as opposed to legal action.[4] However widespread, this belief that jokes are unprotected disregards the few relevant court rulings, misunderstands the art of comedy, and reveals a general lack of faith in the flexibility of American copyright law. Yet, as copyright law and stand-up comedy each emerge as prominent elements of American culture, members of the public are developing an increasingly sophisticated understanding of both, and it grows ever more difficult to propagate the canard that jokes as a class are so uncreative as to be unworthy of standard legal protections.

Both recent court decisions and settlements strongly suggest that jokes are subject to the sort of copyright protection afforded other creative arts.[5] This is a positive trend because robust copyright protection for jokes will have a positive impact on comics, comedy club owners, consumers, and the economy.

Foxworthy v. Custom Tees is "the leading decision on the protection of jokes."[6] In that case, famed comedian Jeff Foxworthy sued Custom Tees for copyright infringement after discovering the company was selling tee-shirts emblazoned with his jokes.[7] Foxworthy is famous for his series of jokes that begin with the phrase "you might be a redneck if" and end with statements like "you see no need to stop at rest stops because you have an empty milk jug in the car."[8] The court held that Foxworthy's copyright claim was likely to succeed on the merits, opining: "Plaintiff clearly established at the hearing that all of the jokes . . . were

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VA. L. REV. 1787, 1801-03 (2008) (discussing the inherent difficulties in securing copyright protection for jokes pursuant to the dichotomy of ideas and expressions in copyright law); *Talk of the Nation: Joke Stealing Is No Laughing Matter, Comedians Say*, NPR.ORG (Nov. 8, 2007), http://www.npr.org/templates/transcript/transcript.php?storyid=16117576 (discussing the prevalence of joke stealing).

4. *See* Getlen, *supra* note 1, at 63 (discussing community protection from joke theft); *Take My Joke, Please: Transcript*, ONTHEMEDIA.ORG (Apr. 9, 2010), http://www.onthemedia.org/2010/apr/09/take-my-joke-please/transcript (discussing key findings of Oliar and Sprigman's research including the fact that "a norm system substitutes and supplements the law and can act as an effective incentive mechanism" and that there is a "connection between the form of protection and then the character of the creative art").

5. *See* Foxworthy v. Custom Tees, 879 F. Supp. 1200 (N.D. Ga. 1995); *see also Suing for a Punchline: Leno, NBC Target Joke Books*, transcript *available at* http://www.npr.org/templates/transcript/transcriptphp?storyID=6768724 (NPR radio broadcast Jan. 9, 2007) (discussing the lawsuit and settlement agreement between Judy Brown and Jay Leno and other comedians' jokes in Brown's books).

6. David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright*, 98 KY. L.J. 517, 524 (2010).

7. *Foxworthy*, 879 F. Supp. at 1204.

8. JEFF FOXWORTHY & DAVID BOYD, YOU MIGHT BE A REDNECK IF . . . THIS IS THE BIGGEST BOOK YOU'VE EVER READ 5 (2004).

not only his own ideas, but his own expression. His expression clearly evidenced a 'modicum of intellectual labor.'"[9] In fact, the court went so far as to state that "two entertainers can tell the same joke, but neither entertainer can use the other's combination of words."[10]

In a much earlier case, *Hoffman v. Le Traunik*, the United States District Court for the Northern District of New York implied that jokes may be subject to copyright.[11] That court held simply: "If there is any piracy in this case, it consists in the taking and use of these isolated expressions or 'gags,' as they are called, and to constitute infringement it must be established by the complainant that they were original with him."[12]

Most recently, a high-profile settlement demonstrated the viability of copyright protection in jokes.[13] Without seeking permission, writer Judy Brown edited and published nineteen collections of jokes written by famous comics, including Jay Leno, Rita Rudner, Kathleen Madigan, and Jimmy Brogan.[14]

NBC Studios and several comedians sued for copyright infringement.[15] The lawsuit, filed in federal court in November 2006, settled in January 2008 for an undisclosed sum.[16] Brown told the media:

> I greatly admire the creativity, wit and energy of stand-up comedians, and I recognize that comedy is as much an art form as other types of creative expression. . . . This is why I am settling this lawsuit by agreeing never again to publish their jokes without asking their permission to do so.[17]

After the settlement, Leno described his motivations for filing suit: "I thought it was important to make it clear that jokes are protected like any other art form."[18]

In addition to precedent, the United States Copyright Office recognizes protection for jokes. Indeed, the Compendium II of Copyright Practices states: "Jokes and other comedy routines may be registered if they contain at least a certain minimum amount of original

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9. *Foxworthy*, 879 F. Supp. at 1219 (quoting Feist Publ'ns Inc. v. Rural Tel. Serv., 449 U.S. 340, 346 (1991)).
10. *Id.*
11. Hoffman v. Le Traunik, 209 F. 375, 379 (N.D.N.Y. 1913).
12. *Id.*
13. *See* Gina Serpe, *No Kidding: Leno Gets the Last Laugh*, E! ONLINE (Jan. 23, 2008), http://www.eonline.com/news/No_Kidding_Leno_gets_the_last_laugh/57287.
14. *Suing for a Punchline: Leno, NBC Target Joke Books*, *supra* note 5.
15. *Id.*
16. Serpe, *supra* note 13.
17. *Id.*
18. *Id.*

expression in tangible form. Short quips and slang expressions consisting of no more than short phrases are not registrable."[19]

Interestingly, the perceived lack of copyright protection for jokes benefits the upper echelons of the comedy industry. The widespread misconception that jokes are precluded from copyright protection is held in large part because journalists and legal scholars are more likely to interview relatively well-known comedians and then perpetuate the perceptions of those top comics in legal scholarship and other media.[20] Comedians who have attained some level of professional success are more likely to be interviewed than their less successful colleagues for two possible reasons. First, publishers of magazines and legal journals alike will presumably be more motivated to print articles featuring interviews with prominent performers, even when anonymity is maintained, because of imputed prestige, an increased chance of making good industry contacts, and the chance for celebrity gossip. Second, the vast majority of comics who toil in obscurity are logistically difficult for journalists and legal scholars to identify and interview. Unfortunately, it is the lesser-known comics whose voices are rarely heard, though they face the most exploitation in the absence of substantive copyright protection.

In order to provide a more comprehensive perspective, this Article makes extensive use of e-mail correspondence with seven people who have worked in the comedy business anywhere from two to twenty-five years. All were promised anonymity. Four are men, and three are women. Two are gay, another two bisexual, and the others straight. They live in Los Angeles, the Northeast, and the Midwest. Of the six who reported, their ages range from twenty-nine to forty-nine. One is a comedy club owner and emcee. Another is a comedic television writer, producer, and creative consultant. The remaining five are all comics, who spend between 20 to 150 days each year touring and have performed everywhere from obscure small town bars to *The Tonight Show*. The annual income from comedy (of the four comics who reported their estimated earnings) ranges from $1000 to $50,000.

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19. COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 420.02(i) (1984).

20. For example, the authors of the only substantial journal article on the topic (Oliar & Sprigman, *supra* note 3) chose numerous people to interview at random from a listing on the Comedy Central cable channel Web site. Clearly, any performer featured on the Comedy Central Web site has attained a certain level of professional success.

II. STAND-UP COMEDY AND THE PHILOSOPHICAL UNDERGIRDINGS OF COPYRIGHT LAW

Meaningful copyright protection for jokes finds strong support in the philosophical underpinnings of Article I, Section 8, Clause 8 of the United States Constitution.[21] That clause states: "[The Congress shall have Power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[22] This language drives the utilitarian character of U.S. intellectual property law.[23] As Justice Stewart once explained: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[24] The purpose of U.S. copyright law, then, is to "achieve an optimal balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works."[25] It follows that because societies are enriched by the existence of creative works, the value of copyright protection is measured by the extent to which it is able to motivate artists to create.

More robust copyright protection for jokes is fully in line with this utilitarian framework, because it will result in a higher quantity and wider variety of materials being created by comics, thus promoting culture creation in general, and the growth and maturation of the relatively young art form of stand-up comedy in particular. Widespread acknowledgment of stronger copyright protection for jokes would economically reward comics capable of creating a relatively large body of unique material because, as the *scenes á faire* doctrine suggests, there will be less copyright protection for less original jokes that rely on common themes or stock concepts.[26]

Because of comedians' unique creative process, stronger copyright protection would also encourage the creation of more jokes. Whereas other artists can create works in private and make their own determinations about when a work is complete, a joke is only as good as its ability to make audiences laugh, which can only be gauged through

21. *See* ALFRED C. YEN & JOSEPH P. LIU, COPYRIGHT LAW: ESSENTIAL CASES AND MATERIALS 4 (2008).

22. U.S. CONST. art. I, § 8, cl. 8.

23. *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 418 (5th ed. 2007).

24. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

25. MERGES ET AL., *supra* note 23, at 419.

26. See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983).

public performance. Stronger copyright protections will reduce the risks associated with developing jokes, thereby allowing comics to test new material more often.

The expansion of copyright protection for jokes would further support the utilitarian ideals of copyright law by having a positive impact on comics as a class. In the words of Justice Stevens, our utilitarian copyright law is, in part, "intended to motivate the creative activity of authors and inventors by the provision of a special reward."[27] That "special reward" is the set of exclusive rights granted to copyright holders under § 106 of the 1976 Copyright Act.[28] This set includes the exclusive rights to copy a work, distribute copies of a work, and perform and display a work publicly.[29]

The exclusive rights to copy and distribute works and to create derivative works will better protect popular comics from misappropriation of their works. For example, in correspondence for this project, a comedian who has performed numerous times on popular television programs recalled having one of her jokes reprinted on a greeting card.[30] The joke "was nearly verbatim," she explained, noting that only two nonessential words were changed, but "[w]hen my then lawyer called to inform them, they said something like, 'So?'"[31]

John Locke's natural rights theory remains influential in American copyright jurisprudence. Locke's theory explains, "[A]s much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."[32] Based on this theory, stronger and more explicit copyright protection in jokes would have instead allowed the comic to seek remedies like any other author, or to license the work she created in the first place and profit from the derivative card herself.

By explicitly granting comics the exclusive right to perform (and therefore profit from) the jokes they have created, robust copyright protection would better protect emerging comics. As one comic interviewed for this Article explained, "Right now the rule is, the first person to get [a joke] on t.v. owns it."[33] This means that a rising comic who seeks exposure through performing in clubs and festivals runs the

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27. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

28. 17 U.S.C. § 106 (2006).

29. *Id.*

30. E-mail from Anonymous Source No. 5 to author (Mar. 28, 2010) (on file with author).

31. *Id.*

32. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 136 (Thomas L. Cook ed., Hafner Publ'g Co. 1947) (1689).

33. Interview with Kristen Becker, Stand-Up Comic, in Buffalo, N.Y. (July 29, 2009).

risk of having finalized material misappropriated by a more successful comic, who might then perform the jokes on television, thereby forcing the author to drop the material from her act. As one comic explained, "If multiple people are out there doing your material, your material is devalued, because there is a premium on originality in standup."[34] Indeed, he noted, "Joke stealing used to be more acceptable [because] someone could do a joke on the east coast in the 1930s, and someone else could do it on the west coast, and no one would know."[35] In a 2007 interview with the radio show *Talk of the Nation*, comedian Ralphie May detailed the serious impact of joke theft on comics:

> [Y]ou write 15 to 20 minutes a year, if you're lucky—and a lot of very, very popular comedians around the country can't write five new minutes a year. . . . [W]hen you get three of those minutes stolen, [they have] stolen [the] equivalent of like six months of your work.[36]

Because the author has no formal recourse (e.g., the ability to block the jokes from being repeatedly aired on television), she must stop performing her own jokes or run the risk of audiences thinking the material is either stale or stolen.

As will be discussed in more depth later, being labeled a joke thief is one of the worst things that can happen to a comic because it carries serious professional and personal consequences.[37] Therefore, enforcement of copyright laws would greatly reduce the chance of harm caused by baseless rumors, because the court system would, in many instances, provide wrongly accused comics with a mechanism for exoneration.

The utilitarian goals of copyright law would also be furthered by increased protection for jokes because it would benefit comedy consumers. While consumer confusion is more relevant to trademark analysis than to copyright, it is worth noting that because stronger protection would reduce instances of joke theft, audience members would have increased confidence that the comic they hear tell a joke actually wrote that joke. The owners of comedy clubs would also benefit because as community norms are replaced by legal standards, the burden of enforcement will shift from club owners to judges. Therefore, presumably, there will be lower costs for club owners by reducing the time and expertise currently required to book comics, which could directly benefit consumers through lower prices. Also, if owning and

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34. E-mail from Anonymous Source No. 4 to author (Apr. 15, 2010) (on file with author).

35. *Id.*

36. *Talk of the Nation: Joke Stealing Is No Laughing Matter, Comedians Say*, *supra* note 3.

37. *Take My Joke, Please*, *supra* note 4.

operating a comedy club required less money, time and expertise, there would likely be an increase in the number of comedy clubs, which in turn provides more opportunities for comics to perform and to test new material, which ultimately provides consumers with a wider variety of comedic material in a greater number of venues. By increasing public access to a greater number of works, heftier protection for jokes furthers the most essential utilitarian purpose of American copyright law.

III. The Idea/Expression Dichotomy

It is a fundamental principle of copyright law that while the expression of an idea is protected, the actual idea is unprotected.[38] This axiom is codified in § 102(b) of the 1976 Copyright Act, which states: "In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."[39] In many cases, then, the finder of fact must determine "the line between expression and what is expressed."[40] In order to draw this line, Judge Learned Hand developed the "abstractions test" in his seminal *Nichols v. Universal Pictures Corp.* opinion.[41] Judge Hand explained:

> Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about . . . but there is a point in this series of abstractions where they are no longer protected, since otherwise the [author] could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[42]

The more sophisticated each level of abstraction's framework is, the stronger the overall copyright protection, because it is more likely that those elements are original.

As an example, consider a novel written in uninteresting language, full of the most common metaphors. The book tracks one day in the life of its protagonist, a man who had trouble digesting the sandwich he ate for lunch and consequently spent the rest of the day feeling ill. Now consider James Joyce's *Ulysses*, which tracks one day in the life of a man

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38. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 711-12 (S.D.N.Y. 1987).
39. 17 U.S.C. § 102(b) (2006).
40. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
41. *Id.*
42. *Id.* (citing Holmes v. Harst, 174 U.S. 82, 86 (1899)).

named Leopold Bloom.[43] Joyce describes in striking detail the gorgonzola sandwich and glass of burgundy that Bloom consumed at lunch.[44] Then, throughout the remainder of the book, Joyce describes the mild intestinal distress that followed.[45] It is impossible to make a clean inference that either author copied the other, because the idea of becoming ill from lunch is so common, and the idea of eating a sandwich for lunch so run-of-the-mill. Those ideas could just as easily have come from the public domain.[46] Furthermore, while each book is subject to the protections of copyright, that protection is thinner in the first book, as infringement is more difficult to prove when the elements are so general that they could just as easily have been taken from the public consciousness.

One common argument against strong copyright protection for comedians is that jokes are little more than bare ideas.[47] However, in stand-up comedy, as with many art forms, expression plays a crucial role. Therefore, rather than a blanket ban on copyright in jokes, courts should evaluate the strength of copyright in individual jokes through an examination of the idea/expression dichotomy. One extended example is found in the 2005 film, *The Aristocrats*, which depicts 100 comedians each telling the same notoriously dirty joke with considerable variation in the expression of each version.[48]

Each of the seven comedy professionals interviewed for this Article was asked to name the element they felt was typically most important to the success of a joke. They were provided with a list of elements, or could suggest their own. The elements listed were: "core idea of the joke," "word choice," "tone of voice during delivery," "body language during delivery," and "props used during delivery."[49] Only two respondents reported that the "idea of the joke" was the most important

43. JAMES JOYCE, ULYSSES 140-41 (Hans Walter Gabler, Wolfhard Steppe & Clans Melchior eds., 1986).

44. *Id.*

45. *Id.*

46. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

47. Madison, *supra* note 3, at 116-18; Oliar & Sprigman, *supra* note 3, at 1802-03.

48. THE ARISTOCRATS (Mighty Cheese Productions 2005).

49. *Id.*

aspect, with one indicating the idea was as important as "word choice."[50] Six respondents named expressive elements.[51]

As with works in other artistic genres, individual jokes can assign different weight to ideas and expressions. For example, it is generally accepted that an impressionist painting, which emphasizes the expression of impressions, places less emphasis on idea than a realist painting from the Hudson River School, which emphasizes the precise replication of naturally occurring vistas. In general, there are two genres of jokes, which Oliar and Sprigman have identified as "one-liner[s]" and "persona-driven narrative monologue[s]."[52] A "one-liner" is a short joke, typically presented as either one in a series of short jokes, or as an aside during the presentation of a long-form narrative. In contrast, "persona-driven narrative" jokes typically last several minutes and have a story arc.

One-liners were born out of minstrel acts and the later years of vaudeville and were further popularized during the infancy of American television.[53] Comedian Phyllis Diller was famous for her one-liners, and the Smithsonian houses her archive of more than 50,000 jokes.[54] One example of her wit: "I *love* to go to the doctor. Where else would a man look at me and say, 'Take off your clothes'?"[55] Another famous comedian, Steve Martin, is well known for his one-liners and would begin his act: "Hello. I'm Steve Martin, and I'll be out here in a minute."[56]

Narrative routines gained traction in popular culture as stand-alone works in the early 1950s.[57] The best-known example from that era may be Andy Griffith's recording of an old vaudeville comic monologue "What It Was, Was Football," which was released by Capitol Records in 1953, and remains one of the best-selling comedy albums of all time.[58] By the end of that decade, the narrative monologues had become a

50. E-mail from Anonymous Source No. 4, *supra* note 34; E-mail from anonymous source No. 3 to author (Apr. 14, 2010) (on file with author); E-mail from anonymous source No. 2 to author (Apr. 13, 2010) (on file with author); E-mail from anonymous source No. 1 to author (Apr. 3, 2010) (on file with author); E-mail from anonymous source No. 6 (Mar. 28, 2010) (on file with author); E-mail from anonymous source No. 5, *supra* note 30.

51. *Id.*

52. Oliar & Sprigman, *supra* note 3, at 1852.

53. *Id.* at 1842-50.

54. *Id.* at 1848-49.

55. PHYLLIS DILLER & RICHARD BUSKIN, LIKE A LAMPSHADE IN A WHOREHOUSE: MY LIFE IN COMEDY 10 (2005).

56. STEVE MARTIN, BORN STANDING UP 7 (2007).

57. GERALD NACHMAN, THE REBEL COMEDIANS OF THE 1950S AND 1960S, 25 (2004).

58. Patrick Winn, *Tar Heel Icon Andy Griffith Gives Archives to UNC-CH*, NEWS & OBSERVER OF RALEIGH, N.C, http://www.lib.unc.edu/fol/andy_griffith.html (last visited Oct. 29, 2011).

vehicle for social commentary.[59] Lenny Bruce is a notable pioneer of this long-form humor.[60] In contrast to comics like Diller, who typically delivered twelve punch lines per minute, performers like Bruce placed less emphasis on the number of individual punch lines, and more emphasis on using verbal and nonverbal expression to communicate philosophical points about society, the zeitgeist, and culture in general.[61] For example, in one recording of Bruce's routine *How To Relax Your Colored Friends at Parties*, almost a full minute passes before the audience lets out a collective laugh.[62]

Modern comics tend to rely heavily on long-form narrative humor and establish personas through what typically purports to be personal story telling.[63] One instance is Ellen DeGeneres's three-and-a-half-minute routine "Iroquois Indians," in which the comic describes a fictional incident from her childhood when, as a practical joke, her father pretends to sell her to a group of Iroquois (portrayed, she later discovers, by actors), and she is forced to spend nine years living in the fictional "Uriginees mountains."[64]

The idea/expression dichotomy varies from joke to joke and differs in a general way between short-form and long-form jokes. First, consider this short joke by Rita Rudner: "My mother's mother, she's a very tough cookie. Really. She buried three husbands. Two of them were just napping."[65] In *Nichols*, Judge Learned Hand applied his Levels of Abstraction analysis to the plays at issue in the case, drawing the line between idea and expression by examining the "substance" of the works—specifically, "the characters and sequence of incident."[66] The same analysis can be applied here. In the context of Rudner's joke about her grandmother, the substance of the work includes the character of her grandmother, the nature of her grandmother's actions, and the manner in which those actions are expressed. The most rudimentary idea communicated by the joke is that Rudner's grandmother murdered two of

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59. Oliar & Sprigman, *supra* note 3, at 1850.

60. *Id.* at 1850-52.

61. *Id.* at 1847-52.

62. LENNY BRUCE, *How To Relax Your Colored Friends at Parties (with Eric Miller)*, *on* LET THE BUYER BEWARE: DISC 1 (Shout! Factory 2004).

63. *See* Oliar & Sprigman, *supra* note 3, at 1852.

64. ELLEN DEGENERES, *Iroquois Indians*, *on* TASTE THIS (Atlantic 1996); *see also* ELLEN DEGENERES, THE FUNNY THING IS . . . 93-94 (2003).

65. *The Tonight Show Starring Johnny Carson* (NBC television broadcast Feb. 24, 1988); *see Rita Rudner: One Funny Lady*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2008/05/04/Sunday/main4069257.shtml..

66. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

her three husbands while they slept.[67] That idea is not inherently funny, but as anyone who has ever heard a poorly told joke can attest, the effectiveness of a joke is determined by the manner in which information is communicated. If Rudner had stood before audiences night after night and simply stated, "My maternal grandmother murdered two of her three husbands in their sleep," she probably would not have ended up on *The Tonight Show*.

Instead, Rudner communicates the idea in three distinct parts, presented in a specific order, and delivered in a particular rhythm. First, she communicates information about her character. Rudner establishes a personal, relatable connection by introducing the character as her grandmother, but she simultaneously creates tension by describing her with some distance as "my mother's mother."[68]

Rudner then describes her grandmother as "a tough cookie."[69] As an example, Rudner explains that her grandmother "buried three husbands."[70] In its colloquial meaning, the phrase "buried three husbands" only indicates that Rudner's grandmother was widowed three times over, though in the context of the preceding description of the woman as a "tough cookie" there is also an implication she may have, as result of an intense personality, driven the men to an early grave. But it becomes apparent that Rudner's choice of the word "buried" is quite deliberate when she closes with the line: "Two of them were just napping."[71] The audience discovers that Rudner meant "buried" in the literal sense and that the sweet, if "tough," woman they envisioned is actually a murderer. Indeed, the wording of each part is carefully designed to create and eliminate ambiguity and to present and destroy certainty at Rudner's discretion.

The toughest critics of copyright protection for jokes argue that comics do nothing more than articulate unprotected information and ideas.[72] Even the definitive copyright treatise contends that because "the value of a joke . . . often lies in its idea rather than its particular expression, this serves to severely limit the value of [any] copyright."[73] Yet, as Rudner's one-liner illustrates, a seemingly simple joke actually involves complex, creative choices about expression.

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67. *See The Tonight Show Starring Johnny Carson*, *supra* note 65.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See supra* note 3, and accompanying text.
73. NIMMER & NIMMER, *supra* note 2.

Additionally, even if expression was not so important, a one-liner could at least meet the minimum standard of originality required for copyright protection established by the Supreme Court in *Feist Publications v. Rural Telephone Service*.[74] In *Feist*, Justice O'Connor opined that "factual compilations [can] possess the requisite originality" to be protected by copyright if the "choices as to selection and arrangement" of the facts "are made independently by the compiler and entail a minimal degree of creativity."[75] Because copyright laws apply to even the shortest jokes, where expression is tethered so closely to idea, protection must be even stronger for persona-driven narrative jokes.

Consider the long-form, persona-driven monologue by Eddie Izzard, excerpted in the Appendix, from his television special *Dress To Kill*.[76] As with the previous example, we examine the substance of the narrative to tease apart the levels of abstraction. Here, the substance of the work includes the nature and motivation of three characters: the United States, Europe, and Britain. The substance also relies heavily on the manner in which Izzard frames those characters.

The basic idea driving Izzard's monologue is that there are fundamental differences between Europe and the United States.[77] At the next level of abstraction, Izzard introduces the more complex notion that those differences stem from history, the way each culture treats its history, and the way each culture has been impacted by its history.[78] With the third level of abstraction, Izzard suggests that the United States ignores and forgets its history, while Europe reveres, yet simultaneously cannot escape its own history; and that the United States approached the latter half of the twentieth century with spirited optimism, as Britain struggled to forge a postcolonial identity.[79] Finally, at the fourth level, Izzard explores the complex emotional relationship between Europe and the United States.[80]

This may not sound like a very funny routine, but as of November 8, 2011, twelve years after "Dressed to Kill" aired on HBO, it is the fifteenth top-selling "stand-up" DVD on Amazon.com because Izzard

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74. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
75. *Id.* at 348.
76. *Eddie Izzard: Dress To Kill* (HBO television broadcast June 13, 1999).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

manages to transform serious topics into hilarious fodder.[81] Izzard's effortless ability to blend fact and fantasy is critical to the monologue's success. Clearly, the ideas are not inherently funny; Izzard's expression is the sole source of humor. For example, Izzard chides Disney, a uniquely American company, for placing its iconic fairy tale castle at the center of Euro Disney.[82] This illustration suggests both a physical and psychological American colonization of Europe—a colonization that Izzard refers to again at the end of the sequence when he declares that Europeans "all live in castles," but adds that they nonetheless all "long for a bungalow."[83] Izzard's delicately constructed narrative allows him to express a serious topic like America's cultural impact on Europe with ridiculous statements such as "all [Europeans] live in castles," "I want to . . . discover shoes that no one's ever discovered," and "I put babies on spikes!" to a hilarious end.[84]

As the Rudner and Izzard examples illustrate, expression is more complex in long jokes, but nonetheless present in short jokes. Copyright protection thus applies to both types, but is stronger in narrative jokes than in one-liners. This is because it is more difficult to draw an inference of actual copying from substantial similarity between short jokes, since the expression in persona driven monologues is both more complex and unique.

That different jokes earn different levels of copyright protection is an invalid basis to deny all jokes copyright protection, because other types of works are also subject to varying levels of protection.[85] For instance, books can have different amounts of copyright protection, as demonstrated by the above example comparing *Ulysses* to a less creative book about a man who becomes ill after eating a sandwich. Similarly, an impressionist painting will have a different level of protection than a painting from the Hudson River school, and a four-line poem about a tree will have less protection than multiple stanzas offering a detailed depiction of a battle. Yet an author may assert a copyright in a book, a painting, or a poem. An author, then, should be allowed to assert a copyright in a joke, even though the protection may be stronger for some jokes than for others. Expression can be as important (and sometimes more important) to a joke as the central idea. Accordingly, because

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81. *Best Sellers in Comedy*, AMAZON.COM, http://www.amazon.com/Eddie-Izzard-Dress-Kill/dp/B00003CWOU/ref=sr_1_1?ie=UTF8&Qid=1322302529&sr=8=1 (last visited Nov. 8, 2011).

82. *Eddie Izzard: Dress To Kill*, *supra* note 76.

83. *Id.*

84. *Id.*

85. For example, books are subject to varying levels of copyright protection.

copyright law is capable of assessing an individual work's idea/expression dichotomy and applying the law as warranted, jokes should be eligible for copyright protection.

IV. MERGER DOCTRINE

Another common argument against copyright protection for jokes is that even if a joke constitutes expression, the expression is so closely linked to the joke's central idea that copyright is prohibited by what is known as the merger doctrine.[86] The merger doctrine applies when an idea is capable of being expressed in so few ways that protection of that expression would further protect the actual idea.[87] However, because the central idea of a joke can usually be expressed in a wide variety of ways, the merger doctrine would typically have no place in the application of copyright law to jokes.

When the expression of an idea is necessarily limited by the nature of the idea, that expression is unprotected.[88] This is because, with an idea that can only be expressed in a limited number of ways, "to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. . . . [T]he subject matter would be appropriated by permitting the copyrighting of its expression."[89] Put another way:

> The fundamental copyright principle that only the expression of an idea and not the idea itself is protectable, has produced a corollary maxim that even expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.[90]

In the majority of instances, there are a wide variety of ways available to express any idea that forms the basis of a joke. Jokes that rely on puns or similar forms of word play may be a notable exception. For example, there is a limited number of ways to express the idea driving this one-liner: "Last night I dreamed I was a muffler, and I woke up exhausted." In general, however, jokes that are not directly about language can be expressed in multiple ways.

The seven comedy industry professionals surveyed for this project were each asked: "With comics in general, in your opinion, how often do you think the core idea of a joke could be expressed in more than one

86. MADISON, *supra* note 3, at 116-88.
87. Yen & Liu, *supra* note 21, at 64.
88. Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967).
89. *Id.*
90. YEN & LIU, *supra* note 21, at 64.

way?"[91] One responded "sometimes," another responded "most of the time," four responded "almost always," and one responded "always."[92] The fact that six of the respondents indicated a belief that a joke can be expressed more than one way more often than not strongly suggests that caution should be used before deciding the merger doctrine precludes copyright protection for jokes.

As an example, consider the idea that there is something inherently ridiculous in the notion of catching a fish only to return it to its habitat. Comedians Mitch Hedberg and Ellen DeGeneres have each performed very different jokes based on this central idea. Hedberg's joke:

> You know on t.v. when they have a fishing show . . . and they catch the fish but they let it go? They don't want to eat the fish, but they do want to make it late for something.
> — "Where were you?"
> — "I got caught!"
> — "Liar! Let me see the inside of your lip."[93]

DeGeneres' joke:

> These people that fish, they say, "oh, I catch 'em, I throw 'em back in." I catch them but I throw them back in. What kind of reasoning is this? That's kind of like driving a car, hitting a pedestrian: "Oh go ahead! I just wanted to see if I could hit you. Gotcha! Go on." [Turns to friend.] "See the size of him? Give me a beer."[94]

Clearly, in this instance, the same basic idea diverged significantly. It is therefore inappropriate to conclude that copyright protection in all, or even most, jokes would be limited by the merger doctrine. Courts should consider application of merger doctrine to jokes on a case-by-case basis.

V. Independent Creation

Another popular argument against strong copyright protection for jokes is that it might sometimes be difficult to infer actual copying through substantial similarity, because there will be a strong likelihood of independent creation.[95] The comedy industry professionals surveyed for this project were each asked: "In general, how often do you think comics create jokes that could not be independently created by another comic?" All offered the same response: "sometimes."[96]

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91. *See* sources cited *supra* note 50.
92. *Id.*
93. *The Late Show with David Letterman* (CBS television broadcast Feb. 8, 2002).
94. *One Night Stand* (HBO television broadcast Feb. 24, 1990).
95. Oliar & Sprigman, *supra* note 3, at 1804.
96. *See* e-mails, *supra* note 50.

Even Oliar and Sprigman concede that the potential for widespread independent creation primarily impacts topical humor.[97] To illustrate this point, Oliar and Sprigman cite four comics who each told very similar jokes about the proposal to build a fence along the border shared by Mexico and the United States.[98] The earliest incarnation was told by Ari Shaffir in March 2004:

> [California Governor Arnold Schwarzenegger] wants to build a brick wall all the way down [to the] California/Mexico border, like a twelve-foot high brick wall, it's like three feet deep, so no Mexicans get in, but I'm like "Dude, Arnold, um, who do you think is going to build that wall?"[99]

In January 2006, Carlos Mencia was the next to tell a version of the joke: "Um, I propose that we kick all the illegal aliens out of this country, then we build a super fence so they can't get back in and I went, um, 'Who's gonna build it?'"[100]

Then, in October 2006, D.L. Hughley incorporated a similar joke into his act: "Now they want to build a wall to keep the Mexicans out of the United States of America, I'm like 'Who gonna build the mother****er?'"[101] Finally, in November 2006, George Lopez performed this joke: "The Republican answer to illegal immigration is they want to build a wall 700 miles long and twenty feet wide, okay, but 'Who you gonna get to build the wall?'"[102]

The complicating factor in this particular example is that Mencia only began performing his version of the joke after a week of touring with Shaffir, the first performer of the joke.[103] Oliar and Sprigman acknowledge that, if Shaffir's allegations that Mencia copied the joke were proved true, a lawsuit might have been successful.[104]

This instance suggests that the two-part infringement standard, famously delineated in *Arnstein v. Porter*, would be effective when applied to joke theft.[105] As the *Arnstein* court explained, copyright infringement will be found when actual copying and improper appropriation of the original work are present.[106] When direct proof of

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97. Oliar & Sprigman, *supra* note 3, at 1805.
98. *Id.* at 1804-05.
99. *Id.* at 1804.
100. *Id.*
101. *Id.*
102. *Id.* at 1804-05.
103. *Talk of the Nation: Joke Stealing Is No Laughing Matter, Comedians Say*, *supra* note 3.
104. Oliar & Sprigman, *supra* note 3, at 1805.
105. *See* 154 F.2d 464 (2d Cir. 1946).
106. *Id.* at 468.

actual copying is unavailable, it may yet be established circumstantially through a dual showing of substantial similarity and access.[107] If access cannot be proved, actual copying can still be circumstantially established if "the similarities" between two works are "striking."[108]

VI. THE CURRENT STATE OF THINGS

As highlighted above, due to the lack of substantive copyright protection, comedians regulate through a system of community norms.[109] "The major norm that governs the conduct of most stand-up comedians," Oliar and Sprigman note, "is a strict injunction against joke stealing."[110]

The industry professionals I consulted all agreed that there is a very strong stigma against the misappropriation of jokes. When asked to describe their thoughts on, and community reaction to, joke theft, the responses were unambiguous: "Stealing is bad and wrong, harmful to the individual being stolen from and to the state of standup [sic] comedy in general."[111] "It is a terrible crime . . . and cowardly."[112] "It is the work of the uninspired."[113] "It's very, very, very, very bad."[114] "Generally, it is seen as a sin of sorts."[115] "I think we all think it's heinous but I shouldn't speak for all of us."[116]

Descriptions of potential consequences for joke theft were similarly strong: "[Joke theft is an] easy way to get blackballed."[117] "It's a great way to get a horrible reputation in a tight-knit industry where your reputation means a lot."[118] "I think most [comics] would kick an ass over it."[119] As Oliar explained in a recent interview with the radio program *On The Media*:

> [Comedians use] a system of social norms that help them protect their rights in jokes and bits. . . . The major sanction is reputation. . . . In that business, reputation is everything. And if you have a bad reputation, agents are not gonna to want to represent you. Club owners might not want to have you in their club. People are not going to be willing to work with you

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107. *Id.*
108. *Id.* at 468-69.
109. *Take My Joke, Please: Transcript*, *supra* note 4.
110. Oliar & Sprigman, *supra* note 3, at 1812.
111. E-mail from Anonymous Source No. 4, *supra* note 34.
112. E-mail from Anonymous Source No. 1, *supra* note 50.
113. E-mail from Anonymous Source No. 3, *supra* note 50.
114. E-mail from Anonymous Source No. 2, *supra* note 50.
115. E-mail from Anonymous Source No. 3, *supra* note 50.
116. E-mail from Anonymous Source No. 5, *supra* note 30.
117. E-mail from Anonymous Source No. 3, *supra* note 50.
118. E-mail from Anonymous Source No. 2, *supra* note 50.
119. E-mail from Anonymous Source No. 1, *supra* note 50.

> on a comedy bill . . . and if you can't find other people who are willing to share the stage with you, you're pretty much gonna be out of work. . . . [T]he last enforcement mechanism is physical violence or threats of physical violence.[120]

One shortfall of the community norms system is that it fails to provide effective recourse against theft by noncomics, such as television writers. Indeed, one of the comedians consulted for this Article had one joke misappropriated by writers on two different shows.[121] She related the tale with a sense of resignation.[122] The first time it happened, she saw the joke in a commercial for a popular CBS sitcom. She knew the show-runner, so she called him.[123] "Basically," she reported, "he said 'sorry.'" The second time, a family member heard the joke on Saturday Night Live.[124] "Well," she remarked, "I did it on Letterman at least 15 years ago."[125] Perhaps, then, it is no surprise that the television writer surveyed for this project expressed active hostility towards the expansion of copyright in jokes.[126]

The norms established within the comedy community also suffer from a lack of due process. This problem, however, could be remedied by recognized copyright protection for jokes. Copyright protection of jokes would preclude the unfortunate circumstances when a comic who is the victim of joke theft is actually accused of stealing his own material from the real thief. One respondent told me he is "sure there are owners and bookers who have blackballed the wrong comic."[127] Another difficulty is that the incredible stigma can last for years beyond the alleged occurrence of theft.[128] Oliar and Sprigman vividly illustrate this point:

> Comedian Robin Williams has admitted that he avoids entering comedy clubs because he does not want to ever again be subject to a charge of joke stealing. If Williams, winner of three Grammy awards for best comedy album, is unable to enter comedy clubs ten years after he has been accused

120. *Take My Joke, Please: Transcript*, *supra* note 4.
121. E-mail from Anonymous Source No. 5, *supra* note 30.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. E-mail from Anonymous Source No. 6, *supra* note 50.
127. *Id.*
128. Oliar & Sprigman, *supra* note 3, at 1838. Williams' notorious reputation for joke stealing was mentioned by multiple comics interviewed for this project, and a Google search of the terms "Robin Williams joke thief" generates more than 2.7 million hits.

> of joke stealing, then we might worry that, on occasion, the norms system overdeters.[129]

Notably, the protections offered by the community norms also reach beyond the protections of copyright law by granting comics a monopoly in not only the expression of a joke, but also in relatively novel ideas.[130]

Overprotective norms are ultimately detrimental to the art of stand-up comedy because the market becomes less competitive. For instance, when a comic accused of joke stealing is shunned and his career is destroyed as a result of an accusation of joke theft, the result is an artificial lowering of the number of comics participating in the comedy market. The marketplace should allow comedy consumers to, for example, find the comic who can tell the best joke about a fish being returned to its lake after being caught, not just the first comic who can tell a joke based on that premise.

VII. CONCLUSION

As the art of stand-up comedy matures and the business of stand-up comedy expands, a well-defined legal structure can create a market that simultaneously protects comics, encourages creative output, and benefits the general economy. This legal structure already exists in the form of copyright law.

Predictably, those who benefit from the current lack of optimized structure are reluctant to support an increase in copyright protection in jokes. The television writer and producer interviewed for this project was asked: "What would be the impact on stand-up comedy if comics could sue each other for joke theft with a realistic chance of winning?"[131] In response, he described an apocalyptic vision:

> Probably more harm than good. People would see a new revenue stream and start suing left and right. Then you would need some kind of malpractice insurance, and the business would become highly contentious, litigious, and bitter. Comics would not want other comics watching them in clubs because that could create grounds for a lawsuit or evidence of some kind. It would inhibit creativity, not enhance it.[132]

The concerns the writer and producer expressed are unlikely to be realized, particularly because copyright has evidently not impacted any other genre in the manner described. His vision is rooted less in reality

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129. *Id.*
130. *Id.* at 1822-23.
131. E-mail from Anonymous Source No. 6, *supra* note 50.
132. *Id.*

than in a belief that the law corrupts, and otherwise respectable comics will be reduced to soulless, litigious shells of their former selves. The most basic purpose of law is to establish order, not to generate chaos. Indeed, society's interest in law stems from its interest in order, and a utilitarian function of all laws is to reduce societal tension and improve order. Copyright law in particular has been, and continues to be, meticulously crafted specifically to provide incentive for artists to create cultural works and stimulate the economy, in part by providing those artists with the tools necessary to defend the rights granted to them by that law.[133]

Rather than incite Armageddon, increased copyright protection for jokes will bring positive social change by creating parity among comics, allowing comics to settle disputes without needlessly ruining careers for lack of due process, affording comics an opportunity to enforce author rights beyond the confines of the stand-up community, and by opening up a tight-knit business.

Currently, established comics can easily exploit emerging comics, without fear of consequence, by stealing their material and performing it on television. Because the ability to enforce community norms against misappropriation largely relies on the wronged comic's ability to convince others in the industry to ostracize the alleged thief, comics are at a disadvantage if they are new to the business because they lack professional contacts and social clout. Therefore, the ability to instead enforce copyright law through the impartial court system will allow for appropriate remedies determined through due process. While the ability of comics to fund lawsuits may be questionable, the interviews conducted for this project suggest this may be less of a barrier than commonly thought. In fact, five of the seven respondents reported having previously hired a lawyer, and only one respondent reported being entirely unable to access legal services.[134]

The court system would also allow comics to assert their rights against infringers operating outside the realm of community norms. Indeed, there have already been examples of the legal system curbing the infringement of jokes—notably the *Foxworthy* case and the Judy Brown settlement discussed earlier.[135]

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133. *See* MERGES ET AL., *supra* note 23, at 391.

134. E-mail from Anonymous Source No. 3, *supra* note 50. Comic reported he is unable to afford an attorney, has no access to free legal services, does not have a friend or relative who is an attorney and would be willing offer free or low cost representation, and does not have a friend or relative who would be willing to pay for an attorney. *See id.*

135. Foxworthy v. Custom Tees, 879 F. Supp. 1200 (N.D. Ga. 1995); *see also Suing for a Punchline: Leno, NBC Target Joke Books*, *supra* note 5.

Finally, enhancing copyright protection for jokes would serve the economically utilitarian function of opening a close-knit industry. As long as the world of stand-up can only be regulated by community norms, that world will necessarily have to remain small enough for such informal regulation to be feasible. The opening of the community might be the most controversial consequence among comics, many (if not most) of whom enjoy the camaraderie and other benefits that come with membership in the relatively closed world of stand-up comedy.[136] Still, from an economic, market-based utilitarian perspective, this consequence would be ideal, because more comics means more culture creation, more comedy clubs, more comedy consumers, and therefore more economic stimulation. Enhanced copyright protection for jokes would also support the Lockean and Hegelian philosophical approaches to intellectual property law, by allowing comics to control creative works that they passionately want to protect from unauthorized misuse.

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136. *See* Oliar & Sprigman, *supra* note 3, 1816.

APPENDIX

Excerpt from *Eddie Izzard: Dressed to Kill*
(HBO television broadcast June 13, 1999).
Edited for length and language.

I grew up in Europe, where the history comes from. Oh, yeah. You tear your history down, man! "30 years old, let's smash it to the floor and put a car park here!" I have seen it in stories. I saw something in a program on something in Miami, and they were saying: "We've redecorated this building to how it looked over 50 years ago!" And people were going: "No, surely not, no. No one was alive then!"

Well, we got tons of history lying about the place, big old castles, and they just get in the way. We're driving—"Oh, a f***ing castle! Have to drive around it!" Disney came over and built Euro Disney, and they built, you know the Disney castle there, and it was, "you better make it a bit bigger, they've actually got them here, and they're not made of plastic!" We got tons of them, because you think we all live in castles, and we do all live in castles! We all got a castle each. We're up to here with f***ing castles! We just long for a bungalow or something.

I grew up in the 70's, when the career advisor used to come to school, and he used to get the kids together and say: "Look, I advise you to get a career. What can I say? That's it." And he took me aside, he said, "What you want to do, here? What you want to do? Tell me! Tell me your dreams!"

"I want to be a space astronaut! Go to outer space, discover things that have never been discovered!"

He said, "look, you're British, so scale it down a bit, all right?"

"Alright, I want to work in a shoe shop, then! Discover shoes that no one's ever discovered! Right in the back of the shop, on the left."

And he said, "Look, you're British, so scale it down a bit, all right?" [. . . .]

So that was it. There was a spirit of ex-empire, . . . of "things can't be done!" Whereas in America, I thought there was a spirit of "can be done!" The pioneer thing.

"Go do it! What do you want to do?"

"I want to put babies on spikes."

"Go then! Go!"

It's the American Dream! "Hi! I'm Crazy Eddie! I put babies on spikes!"