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Constitutional Protection of the First Amendment Is Still Available Contrary to Falwell's Beliefs: *Hustler Magazine v. Falwell*

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NOTES AND COMMENTS

CONSTITUTIONAL PROTECTION OF THE FIRST AMENDMENT IS STILL AVAILABLE CONTRARY TO FALWELL'S BELIEFS: *HUSTLER MAGAZINE v. FALWELL*

I. INTRODUCTION

The United States Supreme Court recently held that a public figure plaintiff could not recover damages on his claim for intentional infliction of emotional distress arising from the publication of an ad parody without a showing that there was a false statement which was made with actual malice. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988).

A popular ad campaign for Campari liqueur asks celebrities about their "first time."[1] The celebrity then discusses his or her "first time" with an interviewer; it eventually becomes clear that the "first time" being discussed is actually the first time the celebrity tried Campari. *Hustler* magazine ran a parody of this advertisement in two issues,[2] depicting Reverend Jerry Falwell as the

1. Falwell v. Flynt, 797 F.2d 1270, 1272 (4th Cir. 1986).
2. *Id.* at 1272-73. The ads ran in the November, 1983 and March, 1984 issues of

celebrity and making explicit the sexual double entendre contained in the Campari ads. The parody implied that the "first time" Falwell had sex was during a "drunken incestuous rendezvous with his mother in an outhouse,"[3] and included a photograph of Falwell with the text of an alleged interview detailing the "incestuous rendezvous."[4] The depiction portrayed Falwell's mother as an "immoral" and "drunken" woman and Falwell himself as a hypocritical habitual drunkard.[5] At the bottom of the page on which the ad parody appeared, *Hustler* placed a disclaimer stating "ad parody — not to be taken seriously."[6] The corresponding title in the table of contents read "Fiction; Ad and Personality Parody."[7]

Falwell brought an action against *Hustler*, its publisher Larry Flynt, and Flynt Distributing Company,[8] to recover damages for libel, invasion of privacy[9] and intentional infliction of emotional distress.[10] The court dismissed the invasion of privacy claim by di-

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Hustler.

3. *Id.* at 1272.

4. *Id.*

5. *Id.*

6. Falwell v. Flynt, 797 F.2d 1270, 1272 (4th Cir. 1986). *Hustler* apparently intended the disclaimer to negate any potential liability on its part.

7. *Id.* Apparently, *Hustler* and its publisher were not attempting to portray Falwell in a "false light." The absence of a disclaimer or the corresponding listing of "fiction" in the Table of Contents might have resulted in liability for both *Hustler* and Flynt. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[The] knowingly false statement and the false statement made with *reckless disregard* of the truth, do not enjoy constitutional protection.").

8. Because the jury found Flynt Distributing Company not liable, it was not a party to the Supreme Court appeal. Hustler Magazine v. Falwell, 108 S. Ct. 876, 878 n.2 (1988).

9. Falwell brought his invasion of privacy claim under a Virginia statute that states in part:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person . . . for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

VA. CODE ANN. § 8.01-40 (A) (1984).

10. *Falwell*, 797 F.2d at 1272-73. Even as Falwell was suing *Hustler* and its publisher for emotional distress caused by the ad parody, he was using copies of it in mailings soliciting contributions to his ministry, the Moral Majority. *Skin Mag Loses*, A.B.A. J., Nov. 1, 1986, at 80. As a result, *Hustler* sued the ministry for infringement of its copyrights. The trial court granted summary judgment for the ministry. Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (C.D. Cal. 1985). *Hustler* then appealed to the United States Court of Appeals for the Ninth Circuit, which held that Falwell's use of the *Hustler* parody was undoubtedly "fair use." Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d

recting a verdict for the defendants.[11] Falwell also lost on his libel claim[12] because the jury found that the ad parody at issue "was so obviously false that no one could believe it."[13] The ad parody depicting Falwell could "not reasonably be understood as describing actual facts about [him] or actual events in which he participated."[14] However, the jury found for Falwell on his claim of intentional infliction of emotional distress and consequently the court rendered a judgment in his favor.[15] The jury awarded Falwell a total of $200,000 in damages for emotional distress: $100,000 in compensatory damages, and $50,000 in punitive damages to be assessed individually against each defendant.[16]

On appeal and cross-appeal[17] to the United States Court of Appeals for the Fourth Circuit, the court upheld the dismissal of Falwell's Virginia state law invasion of privacy claim based on the jury's finding that the ad parody was so ridiculous that it "was not reasonably believable."[18] The Fourth Circuit affirmed the lower court's judgment in favor of the magazine and its publisher on the libel claim because the jury found no actual representation of fact in the parody.[19] Ironically, the court then upheld the jury's finding of intentional infliction of emotional distress[20] on the premise that

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1148 (9th Cir. 1986).

11. *Falwell*, 797 F.2d at 1273.

12. *Id.*

13. Cooper, *4th Circuit Refuses 'Hustler' Request*, NAT'L L.J., Dec. 8, 1986, at 41, col.1.

14. Hustler Magazine v. Falwell, 108 S. Ct. 876, 878 (1988).

15. *Id.*

16. *Id.*

17. *See* Falwell v. Flynt, 797 F.2d at 1270. *Hustler* and Flynt appealed the award for emotional distress; Falwell appealed the dismissal of his invasion of privacy claim. *Id.*

18. Falwell v. Flynt, 797 F.2d 1270, 1278 (4th Cir. 1986). *Hustler*'s placement of the disclaimer at the bottom of the page and the designation "parody" in the Table of Contents not only took the publication out of the realm of believability but also probably negated it as a "use of Falwell's name and likeness for purposes of trade" as required to sustain a cause of action under Virginia's right of privacy statute, *supra* note 9. *Id.*

19. *Id.* at 1275.

20. *Id.* at 1275-77. The court stated that under Virginia law, to prove intentional infliction of emotional distress, the plaintiff must establish that "the wrongdoer's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with plaintiff's emotional distress; and (4) caused emotional distress that was severe." *Id.* at 1275, n.4 (citing Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (Va. 1974).

The court then analyzed, in light of these elements, the evidence presented at trial:

> In his deposition, Flynt testified that he intended to cause Falwell emotional distress. If the jury found his testimony on this point to be credible, then it could have found that Falwell satisfied the first element. Evidence of the second element, outrageousness, is quite obvious from the language in the parody and in the fact that Flynt republished the parody after this lawsuit was filed. The final

the protections afforded by the first amendment[21] were not available to the defendants.[22]

The Fourth Circuit majority opinion first analyzed the first amendment in the context of the actual malice standard of *New York Times Co. v. Sullivan*[23] and concluded that the fundamental requirement of the actual malice standard is "knowing . . . or reckless" publication of defamatory material.[24] The court implied that the first amendment would not protect the publication of a "knowingly false statement" or a "false statement made with reckless disregard of the truth."[25] The court therefore upheld Falwell's recovery for the intentional infliction of emotional distress because the jury found that Falwell's injury was proximately caused by the "intentional" or "reckless misconduct" of *Hustler*'s publisher.[26]

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elements require the plaintiff to prove that the defendant's conduct proximately caused severe emotional distress. At trial, when Falwell was asked about his reaction to the parody, he testified as follows:

A. I think I have never been as angry as I was at that moment . . . . My anger became a more rational and deep hurt. I somehow felt that in all of my life I had never believed that human beings could do something like this. I really felt like weeping. I am not a deeply emotional person; I don't show it. I think I felt like weeping.

Q. How long did this sense of anger last?

A. To this present moment.

Q. You say that it almost brought you to tears. In your whole life, Mr. Falwell, had you ever had a personal experience of such intensity that you could compare with the feeling that you had when you saw this ad?

A. Never had. Since I have been a Christian I don't think I have ever intentionally hurt anybody. I am sure I have hurt people but not with intent. I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.

A colleague of Falwell's, Dr. Ron Godwin, testified that Falwell's enthusiam and optimism visibly suffered as a result of the parody. Godwin also stated that Falwell's ability to concentrate on the myriad details of running his extensive ministry was diminished. This testimony would enable a jury to find that Falwell's distress was severe and that it was proximately caused by defendant's publication of the parody.

Id. at 1276-77.

21. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The due process clause of the fourteenth amendment makes the first amendment applicable to the States. Note, *The Over-Constitutionalization of Libel Law:* Philadelphia Newspapers, Inc. v. Hepps, 36 DE PAUL L. REV. 391, 392 n.5 (1987).

22. *Id.* at 1275.

23. 376 U.S. 254 (1964).

24. 797 F.2d at 1275.

25. *Id.*

26. *Id.* The evidence supporting the jury's conclusion that *Hustler* made the statement knowingly or recklessly was publisher Larry Flynt's deposition, taken by Falwell's counsel in June of 1984. The videotaped deposition was shown to the jury. *Id.* at 1273. The court identified the relevant portions of the deposition as follows:

During the deposition, Flynt identified himself as Christopher Colombus Corn-

The court noted that as a matter of law, recovery for intentional infliction of emotional distress was not precluded under Virginia law simply because Falwell failed to recover on his libel claim.[27]

The court distinguished between a claim for libel and a claim for intentional infliction of emotional distress, noting that the requisite elements for establishing each claim are different and independent of one another.[28] The court noted that Falwell had established his case of intentional infliction of emotional distress under Virginia law.[29] The Court of Appeals for the Fourth Circuit sustained the jury's verdict in favor of Falwell against *Hustler* and Flynt for the intentional infliction of emotional distress.[30]

A petitition for rehearing was filed and suggestions were made for rehearing en banc.[31] The petition for rehearing was denied.[32]

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wallis I.P.Q. Harvey H. Apache Pugh and testified that the parody was written by rock stars Yoko Ono and Billy Idol. [The deposition] also contained the following colloquy concerning the parody:

Q: Did you want to upset Reverend Falwell?

A: Yes . . . .

Q: Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?

A: He's a glutton.

Q: How about a liar?

A: Yeah. He's a liar, too.

Q: How about a hypocrite?

A: Yeah.

Q: That's what you wanted to convey?

A: Yeah.

Q: And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A: Yes.

Q: Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A: Yeah.

Q: And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A: To assassinate it.

Id.

27. *Id.* at 1276 (citing Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (en banc)).

28. 797 F.2d at 1276. According to the Court of Appeals, the defendant's theory was that "emotional distress was intended to provide tort remedies to plaintiffs who have none, but that intentional infliction of emotional distress is not available when the conduct complained of falls well within the ambit of other traditional tort liability." *Id.*

29. Falwell v. Flynt, 797 F.2d 1270, 1276-77 (4th Cir. 1986). *See supra* note 20.

30. *Id.* at 1277.

31. Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986).

32. *Id.*

Several judges filed dissenting opinions[33]; the primary dissent stated that a cause of action for intentional infliction of emotional distress could not logically arise from the publication of the instant ad parody.[34] The dissenting judge explored the importance of maintaining the availability of and protection for satirical statements in a climate favorable to political debate and concluded that one common element between a political satire and an ad parody was their aim to cause distress.[35] The dissent analyzed the tort of libel along with the tort of intentional infliction of emotional distress[36] and concluded that "malicious infliction of defamatory falsehood" is the only tort for which recovery can be had in the political arena.[37]

On *Hustler*'s appeal from the Fourth Circuit, the United States Supreme Court held, *reversed*: a public figure cannot recover damages for intentional infliction of emotional distress arising from the publication of an ad parody without proving actual malice. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988).

II. THE COMMON LAW BACKGROUND OF LIBEL SUITS

Under early common law, an individual could maintain a civil cause of action against the maker of a statement defaming him.[38] The freedoms of speech and the press guaranteed by the first amendment were not available as defenses to such an action.[39] Until *New York Times Co. v. Sullivan*,[40] an individual's interest in the enjoyment and maintenance of his good reputation outweighed

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33. *Id.* at 484. Judge Wilkinson authored this dissent. Judge Winter also wrote a dissenting opinion stating that the denial of rehearing was improper because the panel had voted to rehear "many less significant cases." *Id.* at 489. All the other dissenting judges joined in Judge Wilkinson's dissent. *Id.* at 484.

34. *Id.*

35. *Id.* at 487. The primary factor for determining the effectiveness of a parody or satire is whether it elicits "discomfiture" or successfully distorts reality. The infliction of emotional distress on the intended "target" or victim is its primary goal. *Id.*

36. Falwell v. Flynt, 805 F.2d 484, 485-89 (4th Cir. 1986).

37. *Id.* at 484. As this Note will demonstrate, Judge Wilkinson's statement of the issue was the correct one.

38. Note, Philadelphia Newpapers, Inc. v. Hepps: *A Logical Product of the New York Times Revolution*, 64 DEN. U.L. REV. 65 (1987).

39. *Id. See also* Roth v. United States, 354 U.S. 476, 483 (1957) (dictum); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

40. 376 U.S. 254 (1964). When *New York Times* was decided, the civil rights movement was at its peak. Both society and the courts were increasingly sympathetic to the cause of Black Americans; this is reflected in the *New York Times* opinion, which shielded the first amendment rights of the civil rights activists. *See infra* notes 61-75 and accompanying text.

first amendment concerns.[41]

At common law, to recover for defamation, the plaintiff only had to meet the burden of showing "falsity."[42] The courts employed a standard of strict liability to the defendant's statements.[43] Naturally, truth was a viable defense,[44] but the courts employed a strong presumption in favor of the defamed person that reputational injury followed the circulation of any allegedly defamatory statements.[45] Interestingly, however, the courts awarded punitive damages only after the plaintiff established "common law malice."[46]

The traditional defense was to claim that the defamatory statement was "privileged."[47] In matters relating to public issues or concerns, there existed a qualified privilege amounting to "fair comment."[48] Whenever this privilege was exercised in relation to public figures,[49] the court would rationalize the defendant's action by stating that the privilege emanates from the implied duty of the press to fully inform the public.[50] The courts assumed that the role of a free press was to ensure the flow of ideas and information to

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41. *Cf.* Note, *supra* note 38 at 65. The cause of action served at least two clearly identifiable purposes. First, the "vindicatory" function gave the plaintiff a remedy against libelous statments by allowing him to "brand the defamatory publication as false." Note, *supra* note 21 at 392 (citing RESTATEMENT OF TORTS § 569 comment b (1938)). The "preventive" function permitted the defamed person to forestall harm to his reputation by exposing the falsity of the defamatory statements or rumors before susutained any damage to his reputation. *Id.*

42. Note, *supra* note 21 at 392 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (1985) (White, J., concurring)).

43. *See* Note, *supra* note 38, at 65, citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113 (4th ed. 1971) (citing Hulton & Co. v. Jones (1909)); Peck v. Tribune, 214 U.S. 185 (1909); and C. LAWTHORNE, THE SUPREME COURT AND LIBEL (1981)). Note that under a strict liability standard, a criminal sanction can be imposed without a showing of criminal intent to commit the unlawful act. *See, e.g.* Smith v. Cal., 361 U.S. 147 (1959); Morisette v. United States, 342 U.S. 246 (1952).

44. *See* Note, *supra* note 21, at 393 (citing *Greenmoss Builders*, 472 U.S. at 765 (White, J. concurring)).

45. *Id.*

46. *Id.* At common law, falsity was not an element of the libel claim, but malice was presumed if the statements caused damage to plaintiff's reputation.

47. *See* Note, *supra* note 38, at 65. *See also* Branson & Sprague, *The Public Figure Private Person Dichotomy: A Flight From First Amendment Reality*, 90 DICK. L. REV. 627 (1986).

48. Branson & Sprague, *supra* note 47 at 629.

49. In 1974, the Court defined a public figure to mean "one who occupies a position of persuasive power or importance, or who has voluntarily thrust himself into the forefront of a particular public controversy in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). *See infra* notes 75-79 and accompanying text.

50. Branson & Sprague, *supra* note 47, at 630.

members of the public in order to permit the citizens to make clear and informed decisions.[51] Of course, freedom of the press does not exist in a vacuum. Often, it comes into conflict with other constitutionally protected freedoms and with other protected interests in society.[52] For example, freedom of the press often conflicts with the societal interest of preserving the integrity of one's reputation.[53] At common law, the courts recognized the value of the plaintiff's reputation and accorded it a great deal of deference when it was threatened by defamation.[54]

However, after *New York Times Co. v. Sullivan*,[55] the unqualified protection afforded at common law no longer attached to an individual's reputation in the context of first amendment freedoms.[56] As the next section of this Note will demonstrate, *New York Times* and its progeny constitutionalized libel and related torts to afford maximum exercise of the freedoms afforded by the first amendment, particularly freedom of the press.[57] Contrary to an absolutist's belief,[58] however, the first amendment does not immunize all types of speech from government regulation.[59] The government maintains power to regulate speech in certain situations and contexts.[60] The next section of this Note explores the development of caselaw, beginning with *New York Times*, dealing with defamation in the context of first amendment freedoms.

III. The Impact of the First Amendment on Libel Claims

The landmark case *New York Times Co. v. Sullivan*,[61] presented the question of whether a state's power to award damages to a public official on his libel claim was limited by the constitutional protections of freedom of speech and freedom of the press afforded the media under the first amendment.[62] The allegedly de-

51. *See* Note, *supra* note 21, at 391-2.

52. *Id.*

53. *Id.* "[R]eputation is a protected interest even if not entirely based on truth." W. Prosser, The Law of Torts 797-99 (4th ed. 1971). "Libel, as a common law tort, granted the plaintiff the presumption of a good name." Note, *supra* note 21, at 392.

54. *See* Note, *supra* note 38, at 66.

55. 376 U.S. 254 (1954).

56. *Id. See also* Justice Rehnquist's opinion in Paul v. Davis, 424 U.S. 693 (1976)(reputation not an interest protected by due process).

57. *See* Note, *supra* note 21 at 393 and Note, *supra* note 38, at 67.

58. Note, *supra* note 21 at 393. "An 'absolutist' view of the first amendment . . . would deny all governmental power to regulate speech." *Id.*

59. *Id.*

60. *Id. See infra* note 69 and accompanying text.

61. 376 U.S. 254 (1964).

62. *Id.* at 256.

famatory statement appeared in a full-page advertisement in the *New York Times* on March 29, 1960.[63] The ad was placed in the *Times* to gain support for the civil rights movement, then facing violent opposition in some Southern states. The ad stated that in many cases, municipal officers directed violence toward civil rights marchers. No specific reference was made to any particular public official. Nevertheless, the Commissioner of Public Affairs for the city of Montgomery, Alabama sued for libel in the Alabama state courts and won.[64] He based his argument on the mention of the word "police" in the advertisement and contended that this word implicitly "referred to him as the Montgomery Commissioner who supervised the Police Department."[65] In the majority opinion written by Justice Brennan, the United States Supreme Court reversed the Supreme Court of Alabama and held that a public official could not recover damages for the publication of allegedly defamatory falsehoods pertaining to conduct in his official capacity unless the public official successfully established the element of "actual malice."[66] The libel plaintiff could establish actual malice by showing that the statement was published with actual knowledge that it was false, or that it was published "with reckless disregard for whether it was false or not."[67]

In analyzing the medium employed for the advertisement, the Court held that statements do not forfeit their first amendment constitutional protection merely because the form of publication used was "a paid advertisement."[68] The Court refuted any conten-

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63. *Id.*

64. *Id.* at 258. The official based his libel claim on the third and sixth paragraphs of a ten paragraph advertisement, which stated:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times — for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" — a *felony* under which they could imprison him for ten *years* . . . .

Id. at 257-58.

65. *Id.* at 258.

66. 376 U.S. at 279-80.

67. 376 U.S. at 279-80.

68. *New York Times*, 376 U.S. at 266. According to Justice Goldberg, the Court's opinion amply demonstrates that a liberal approach to success on libel claims could have a chil-

tion that the ad was a "commercial advertisement"[69] subject to greater restriction because "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[70]

In addition to finding that the foregoing factors were implicit in the ad,[71] the Court noted that the impact of the published advertisement on the reputation[72] of the alleged victim was another factor that the Alabama state court considered in awarding recovery for "defamatory falsehood."[73] The Court discredited the criteria used by the state court on the basis of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[74] In his concurring opin-

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ling effect on the first amendment freedoms. "[I]f newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek the support for their causes will be greatly diminished." *Id.* at 300 (Goldberg, J., concurring).

69. The Court compared the case to Valentine v. Chrestensen 316 U.S. 52 (1942) (ban on commercial handbilling upheld), and reaffirmed its stance that there must remain unbridled freedom to communicate information and disseminate opinion. *New York Times*, 376 U.S. at 265-66. *Cf.* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (ad that was not false or misleading and that disseminated information about prescription drugs to the public could not be banned because commercial sppech is not entirely outside the scope of first amendment protection); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (state had no interest in prohibiting commercial speech even though speech was not related to defendant's business); *In re* R.M.J., 455 U.S. 191 (1982) (although states retain the ability to regulate commercial speech, regulation must be no more extensive than reasonably necessary to further substantial state interests); and Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (state has interest in regulating content of speech that is misleading, but has no interest in regulating content that is not harmful; outright ban on illustrations used in ad could not stand).

70. *New York Times*, 376 U.S. at 266.

71. *Id.*

72. The word reputation has been defined as: "the character imputed to a person by those acquainted with him. General opinion, good or bad, held of a person by the community in which he resides." BLACK'S LAW DICTIONARY 677 (5th ed. 1983). However, the *New York Times* Court would not limit "speech that would otherwise be free" simply because it will cause reputational injury. *New York Times*, 376 U.S. at 272.

73. *New York Times*, 376 U.S. at 267. Under the applicable Alabama state law, the publication of words or statements which "tend to injure a person . . . in his reputation" is "libelous per se." That criteria is also satisfied if the publication brought the alleged libel plaintiff into "public contempt." *Id.*

74. *Id.* at 270. One commentator has argued that the first amendment protects seditious libel, and that this is the thrust of the *New York Times* opinion. *See* Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209.

ion, Justice Goldberg concluded that a public official is not without a remedy against a defamatory publication because he has greater access to media communication than most private citizens, and presumably can take steps to correct misinformation.[75]

Approximately ten years later, in *Gertz v. Robert Welch, Inc.*,[76] the Supreme Court affirmed its previously formulated standard for the requisite finding of "actual malice" in a defamatory publication, and clarified the standard as it applied to plaintiffs other than public officials.[77] The Court held that a state can set its own standard for imposing liability on "a publisher or broadcaster of defamatory falsehood injurious to a private individual"[78] as long as the state's standard is limited by an appropriate finding of fault.[79]

In *Gertz*, Richard Nuccio, a Chicago policeman, was convicted of second degree murder after shooting and killing Ronald Nelson.[80] In a civil lawsuit brought on behalf of Nelson against the policeman, Nelson's estate was represented by a reputable attorney named Elmer Gertz.[81] The controversy arose over an article titled: "FRAME-UP: Richard Nuccio And The War On Police,"[82] in the *American Opinion*, "a monthly outlet for the views of the John Birch Society."[83] The statements in the article contained serious inaccuracies including allegations that false testimony was used in the trial of the criminal case against Nuccio, and that the prosecution of Nuccio reflected one element of a "Communist campaign

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75. *New York Times*, 376 U.S. at 304-05 (Goldberg, J., concurring). Justice Goldberg cited Wood v. Georgia, 370 U.S. 375 (1962), for the proposition that "[u]nder our system of government, counterargument and education are the weapons available to expose [public] matters, not abridgment . . . of free speech . . . ." 370 U.S. at 389. Note that Falwell took advantage of this remedy by using the parody to solicit money from his supporters. *See supra* note 10.

76. 418 U.S. 323 (1974).

77. *Id.*

78. Historically, the courts have afforded more protection to individuals classed as private figure plaintiffs than to those meeting the public figure criteria. The latter is usually deemed to have placed himself before the public and naturally should expect criticism as a result. *Id.* at 341-6.

79. 418 U.S. at 347.

80. *Id.* at 325. Nelson was a 17 year old criminal suspect. The shooting occurred at a time when the police were "the subject of attacks within the community." Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998-1000 (N.D. Ill. 1970).

81. Gertz v. Robert Welch, Inc., 418 U.S. at 323, 325 (1974).

82. *Id. Cf.* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988). In *Hustler*, there was a disclaimer on the page where the ad parody appeared and the accompanying title in the table of contents was accurately labeled "FICTION."

83. 418 U.S. at 325.

against the police."[84] The managing editor of the *American Opinion* had "made no attempt to verify or substantiate the charges against petitioner."[85]

The *Gertz* Court distinguished *New York Times* and concluded that a different standard of liability must be used for a libel claim brought by a private figure plaintiff, due to the unavailability of an adequate remedy.[86] In contrast to public figures, private figure plaintiffs generally do not have access to the media to rebut false statements or defamatory publications.[87] Consequently, where the plaintiff is a private figure, the state may have a greater interest in protecting him because he is often more vulnerable to reputational injury.[88]

In the majority opinion written by Justice Powell, the Court emphasized that the plaintiff's failure to meet the "public figure" criteria meant that the state could use a less demanding showing than that required by *New York Times* when it sought to impose liability for defamatory falsehood on a publisher or broadcaster.[89] The Court reasoned that private individuals should be compensated for injury to their reputation whenever there was "a strong and legitimate state interest."[90] Fault was still required in awarding damages for the defamatory publication because state courts

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84. *Id.* at 326. The Court outlined the inaccurate statements as follows:

> The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

Id.

85. *Id.* at 327. The *American Opinion*'s managing editor was even more culpable because he:

> appended an editorial introduction stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harasses Nuccio." Respondent placed the issue of the American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Id.

86. *Id.* at 344. "The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Id.*

87. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 304-05 (1964) (Goldberg, J. concurring).

88. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

89. *Id.* at 348.

90. *Id.* at 348-49.

cannot allow recovery based upon presumed[91] or punitive damages unless liability is based on either "a showing of knowledge of falsity or reckless disregard for the truth."[92] Although the public figure plaintiff's failure to show "actual malice" still precludes any recovery of punitive damages,[93] private figures are not required to meet the *New York Times* standard.[94]

The policy rationale for awarding punitive damages in private civil litigation is to deter the defendant and others from future reprehensible conduct by imposing private fines.[95] The Court cautioned that publishers and broadcasters cannot be held liable for punitive damages if the applicable state law establishes a less demanding standard of liability for defamatory publication.[96] The Court reaffirmed its longstanding position against the development of media self-censorship which undoubtedly would arise if the jury were able to use unbridled discretion in imposing punitive damages.[97] As such, a private plaintiff who has been defamed can recover only compensatory damages for his actual injury as demonstrated at trial.[98]

In 1976, the "actual malice" standard of *New York Times* was again held inapplicable in a defamation case brought by a private figure plaintiff. In *Time, Inc. v. Firestone*,[99] the wife of a member of a wealthy industrial family brought a libel action against the publisher of a weekly news magazine that published some defama-

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91. Presumptive damages are the equivalent of exemplary or punitive damages. BLACK'S LAW DICTIONARY 353 (5th ed. 1985).

92. *Gertz*, 418 U.S. at 349.

93. *Id.* at 350. *See supra* notes 61-75 and accompanying text.

94. *Id.* at 348.

95. *Gertz*, 418 U.S. at 350.

96. *Id.* State courts can only impose punitive damages if the plaintiff shows that the criteria outlined by the United States Supreme Court have been met.

97. *Id.* The Court supported its position on the award of punitive damages with the following analysis:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter future occurrence.

Id.

98. *Id.*

99. 424 U.S. 448 (1976).

tory false reports relating to the grounds of plaintiff's divorce proceedings.[100] The *Firestone* Court analyzed the word "actual malice" to mean that the publisher had either knowledge of the "falsity," or had recklessly disregarded the possible falsity of the statement.[101] The Court stated that a private figure plaintiff did not have to satisfy the "actual malice" standard required of public figures because the private figure had been "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[102] She could not be classified as a public figure because there was no evidence that she had voluntarily thrust herself into the public arena or that she had tried to influence the resolution of controversial public issues.[103]

The *Firestone* Court established the foundation for succeeding in an action for intentional infliction of emotional distress.[104] The Court emphasized that actual compensable injury was not limited to reputational injury in a defamation action.[105] The Court then clarified its position by stating: "States could base awards on elements other than injuries to reputation, specifically . . . personal humiliation and mental anguish and suffering . . . injuries which might be compensated consistently with the Constitution upon a showing of fault."[106]

After *Firestone*, it appears that a plaintiff in an action for intentional infliction of emotional distress can base his argument for recovery in tort on such compensable factors as personal humiliation and mental anguish and suffering. These factors are subjective[107]; the use of the "personal humiliation" factor pertains primarily to the resulting impact on the particular victim.[108] In

100. *Id.* at 452. The report was published in the Milestone section of Time magazine, a section that reports recent details about the private lives of public figures.

101. *Id.* at 453.

102. *Id.* at 453-55.

103. *Id.* If a plaintiff voluntarily assumes a public stance on public issues, the courts usually class him as a "public figure." For example, in *Hustler Magazine*, there was ample evidence to support the classification of Falwell as a "public figure" because he had voluntarily placed himself before the public on numerous occassions. *See, e.g.*, Falwell v. Penthouse Int'l Ltd., 521 F. Supp. 1204, 1205 (W.D. Va. 1981). The Reverend Jerry Falwell is an evangelical fundamentalist minister who broadcasts his weekly sermons not only on national news network systems but also internationally in Canada and the Caribbean. As such, he is recognized by millions of viewers. These national viewers and listeners provide a constant source of funding for Falwell's ministry in the form of contributions. Falwell has consistently spoken out on issues of public concern. *Id.* at 1205.

104. *See infra* notes 113-136 and accompanying text.

105. 424 U.S. at 460.

106. *Id.*

107. *See infra* note 135 and accompanying text.

108. *Firestone*, 424 U.S. at 460.

contrast, reputation evidence depends on the perception or impressions of others, an objective standard.

Finally, in 1986, the Court once again had an opportunity to examine its position on defamation in *Philadelphia Newspapers, Inc. v. Hepps*.[109] In *Philadelphia Newspapers*, a private figure plaintiff brought an action for defamation against a newspaper owner and two of its reporters who had written articles implicitly linking plaintiff with organized crime.[110] In reversing the Supreme Court of Pennsylvania,[111] the United States Supreme Court held that the private plaintiff had the burden not only of proving fault, but also had the burden of establishing the falsity of the published or spoken statements.[112] The Court was emphatic in expanding its earlier position by stating that the protections afforded by the first amendment would even protect some defamatory falsehoods in order to protect free speech on public matters.[113]

IV. A Survey of the Tort of Intentional Infliction of Emotional Distress Against the Background of Both the Common Law and First Amendment Standards for Libel Claims

The preceding discussion has explored the standards for recovery on a libel claim under both the common law standards and

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109. 106 S. Ct. 1558 (1986).

110. *Id.* at 1560. The *Inquirer*, a Philadelphia newspaper, published a series of five articles which appeared in its publication between May, 1975 and May, 1976 concerning a group of franchise stores and its "principal stockholder," Hepps. *Id.* The Court outlined the relevant facts:

> The articles discussed a state legislator, described as "a Pittsburgh Democrat and convicted felon," whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty." The stories reported that federal "investigators have found connections between Thrifty and underworld figures," that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime"; and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board . . . ." A grand jury was said to have been investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[w]hether the chain received special treatment from the [state governor's] administration and the Liquor Control Board."

Id.

111. *Id.* at 1561. The Pennsylvania Supreme Court reviewed *Gertz* and concluded that only a showing of fault is necessary to recover on a defamation claim. The state court erroneously concluded that "a showing of fault did not require a showing of falsity" and went on to hold that "to place the burden of showing truth on the defendant did not unconstitutionally inhibit free debate." It remanded the case for a new trial, but the United States Supreme Court noted probable jurisdiction and subsequently reversed. *Id.*

112. *Id.* at 1565.

113. *Id.* at 1564-65.

in the context of the first amendment. As the following analysis will show, the criteria for recovery for the tort of intentional infliction of emotional distress involves a relatively "limited, spotty, and ill-defined landscape, probably due to the strict pleading requirements imposed by the courts."[114] It appears that some of the constitutional policies which the Court has expressed in the libel and defamation cases could be considerably undermined by allowing a defamed plaintiff to recover under the tort of intentional infliction of emotional distress, at least with respect to matters of public concern. The first amendment protections formulated in *New York Times* in relation to defamation can be limited under this tort,[115] where the injured plaintiff can easily draw on the sympathy of the jurors.

As the preceding discussion has shown, strong public policy considerations have compelled the Court to caution against the unbridled exercise of jury discretion which might limit free speech in inappropriate circumstances.[116] The Court has long feared that the imposition of enormous and excessive penalties against the speaker or the writer could create a situation of deliberate media self-censorship.[117] At least in the public figure context, a court must examine more critically, claims alleging both libel and intentional infliction of emotional distress, and only allow recovery for the tort of intentional infliction of emotional distress *after* the plaintiff has established his libel claim under the stricter standards required for recovery in the context of the first amendment.[118] The libel stan-

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114. Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 25 (1983).

115. *Id.* Mead notes that pleading this relatively new tort either alone or in addition to a claim for defamation could lead to the circumvention of many of the defenses allowed under a claim for intentional infliction of emotional distress. *Id.* at 24.

116. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

117. *See supra* note 96.

118. *E.g.*, Mead, *supra* note 114, at 50 (citing Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978)). In *Beresky*, a small local newspaper printed several articles alleging that plaintiffs' son had died of a drug overdose, was a fugitive from justice for failing to appear at a court hearing for his arrest for possession of a hypodermic needle; and was arrested on several other charges including burglary. Later, the paper published a letter to the editor in which the author alleged that Mrs. Beresky had had several cancer-related surgeries. The Bereskys sued for, *inter alia*, defamation. The Illinois Court of Appeals did not employ the balancing test to weigh the interest of the plaintiffs in maintaining their emotional security against the public interest, but the court nevertheless affirmed the lower court's dismissal of the plaintiffs' emotional distress claim and concluded that the cause of action would not lie against the defendant where the plaintiff had failed to show that the publication was extreme or outrageous enough to impose liability. *Id.* at 50.

Mead cites a second case, Weingarten v. Block, in which the plaintiff, a former city attorney, was classed as a public official and a public figure in his action alleging both emo-

dard used by the Court requires a showing of "actual malice"; that is, knowledge that the statement was false, or was nevertheless made with reckless disregard as to its possible falsity.[119] The test is a two-part test in which the plaintiff must prove not only fault, but also falsity.[120]

Notably, the test for libel is not outrageousness. Rather, the outrageousness standard is used as an equivalent term for describing the tort of intentional infliction of emotional distress.[121] The tension between the tort and libel causes of action is evident in *Hustler v. Falwell*: Flynt's conduct is admittedly outrageous and intentional,[122] yet as a media defendant, he is entitled to protection behind the actual malice shield. Courts are reluctant to allow recovery for intentional infliction of emotional distress when the victim is a public figure, and a media defendant is involved. Any other outcome would defeat the common law privilege by awarding recovery based on specified damages under this tort theory.[123] The

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tional distress and defamation. The California Court of Appeals summarily dismissed the count for emotional distress and noted the plaintiff's presumption that the claim for intentional infliction of emotional distress would fail as long as he failed to recover on his libel claims. Mead, *supra* note 114 at 47 (citing Weingarten v. Block, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701 (1980)).

119. New York Times Co. v. Sullivan, 376 U.S. at 279-80.

120. *See* Note, *supra* note 21, at 402. The test is not whether the statement was outrageous. *See also* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 (1986).

121. Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 n.2 (1982) (citing Contreras v. Crown Zellerbach, Inc., 88 Wash. 2d 735, 737 n.1, 565 P.2d 1173, 1174 n.1 (1977)(en banc)).

The tort of intentional infliction of emotional distress consists of four elements: "extreme and outrageous conduct, culpability consisting of an intent or a reckless disregard of a high degree of probability that emotional distress will follow, severe emotional distress, and causation." Note, *First Amendment Limits on Tort Liabilty For Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1750 (1985). A court can impose liability on an individual for causing emotional distress upon a finding that the individual intentionally or recklessly produced severe emotional distress in the victim through his extreme and outrageous conduct. Delgado at 133 n. 2 (quoting RESTATEMENT OF TORTS § 46 (1) (1965)).

122. Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986). *See supra* note 26.

123. A different result might occur with regard to racial insults because the victim is usually a member of a racial minority who might have even less access to the media than a private figure who is a member of the majority population. One author also notes that racial insults inflict psychological harm upon the victim, immediately cause harm or emotional distress, and infringe upon the individual's dignity. *See* Delgado, *supra* note 121 at 146. The Court has long held that racial insults are not protected by the constitution because such expressions do not add anything to debates and discussion relating to public matters. Unlike the disputed ad parody, racial insults only serve to hinder useful public discussions and increase the potential for a breach of the peace. With a few minor exceptions, the racial insult is communicated only to the victim. However, with regard to public figures one is more apt to observe the victim appearing before the public to communicate his outrage or to rebut the defamatory statements. Also, the publication of defamatory statements about a

Court has implicitly stated that it would expect to see jurors attempting to protect the defamed plaintiff rather than uphold the constitutionally guaranteed freedom afforded to the press.[124] The plaintiff's ability to exploit the sympathy of the jurors,[125] coupled with the absence of first amendment policy considerations, cautions against allowing recovery on the tort of intentional infliction of emotional distress involving media defendants. To do otherwise could severely limit debate on public issues and eventually undermine first amendment freedoms. There are additional first amendment policy considerations that underlie the Court's refusal to impose liability for intentional infliction of emotional distress based solely upon words.[126] The Court's refusal to allow recovery for intentional infliction of emotional distress in this circumstance is grounded partly in its fear of opening the proverbial floodgates of litigation and the fear of a corresponding increase in fraudulent claims.[127] Yet, despite this clearly announced policy, the courts have not acted in a fashion suited to acieving these aims. For instance, at least one court has held that the allegations by the plaintiff that the defendant intended to cause him humiliation and mental anguish by his malicious and intentional conduct sufficiently stated a cause of action against the defendant under the extreme and outrageous standard of the tort of intentional infliction of emotional distress.[128]

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public figure inevitably will lead to discussion of its truthfulness or lack thereof in the public arena. In a few cases, a public figure might act physically against the media defendant. Overall, however, there is only a slight possibility of such a physical reaction because the public figure will not want to react in a way that might place him in an unfavorable light before the public eye. Notably, the slight possibility of a breach of the peace is outweighed by the Court's concern to stimulate public discussion or debates among members of the public.

124. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). *See also* Mead, *supra* note 114, at 30. For examples of cases demonstrating jurors' willingness to allow recovery, see Gallella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), *modified*, 487 F.2d 986, 993-94 (2d Cir. 1973); and Firestone v. Times, Inc., 305 So. 2d 172 (Fla. 1974), *vacated*, 424 U.S. 448, 460-61 (1976).

125. Mead, *supra* note 114, at 63.

126. *See* Delgado, *supra* note 121, at 153.

127. *Id.* at 157.

128. Alcorn v. Anbro Engineering, Inc., 2 Cal. App. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1976). In *Alcorn*, plaintiff was a black truck driver who, in his capacity as Teamsters' Union shop steward, advised a fellow driver not to drive an unsafe truck. Plaintiff's supervisor, who was white, became angry at this advice, and in the course of expressing his anger at the plaintiff, called him a number of racially degrading names, including "a goddam nigger." Plaintiff became ill as a result of the confrontation and eventually sued for emotional distress. The *Alcorn* court noted that the relationship of the parties was one of employer/employee and the allegations regarding the victim's particular susceptibility to emotional distress, coupled with the noticeable trend in greater developments in social consciousness

One commentator argues that the real threat of allowing recovery for the tort of intentional infliction of emotional distress against media defendants is that it is closely associated with and continually used with other closely related torts.[129] In fact, intentional infliction of emotional distress is so closely associated with other torts that whenever a defamation claim is coupled with a claim for emotional distress, the claims "often rise and fall together."[130] It is worth noting that the actual malice element of a defamation claim has a parallel requirement in the tort of intentional infliction of emotional distress. Furthermore, a finding of actual malice would allow recovery not only for the actual damages arising from plaintiff's mental suffering, but punitive damages as well.[131] In short, a plaintiff must prove that the defendant had actual intent and knowledge, or was reckless, before he can recover punitive damages under his claim alleging intentional infliction of emotional distress.[132]

The standard requiring a finding of actual malice for recovery under a tort cause of action is essential to properly maintain constitutionally protected freedoms.[133] As such, the standard of outrageousness has been strictly construed whenever the Court is confronted with a public figure plaintiff and a media defendant.[134] The outrageous conduct giving rise to tort liability has been classed as conduct which is "so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community," perhaps in an attempt to equate it to the actual malice standard.[135]

A major drawback of extending the emotional distress tort to the public figure plaintiff and the media defendant relates to the balancing method employed by courts, which favors the rights of the individual without deferrence to first amendment freedoms.[136] The Court consistently has balanced the interest of the public fig-

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made the racially derogatory term particularly offensive.

129. *See* Mead, *supra* note 121, at 31.

130. *Id.* at 47.

131. *Id.* at 52 (citing Cape Publications v. Bridges, 387 So. 2d 436 (Fla. 5th Dist. Ct. App. 1980), *rev'd on remand*, 423 So. 2d 426 (Fla. 5th Dist. Ct. App. 1982), *cert. denied*, 464 U.S. 893 (1983).

132. *Id.*

133. *See supra* note 103.

134. Mead, *supra* note 114, at 53.

135. *Id.* (citing Beresky v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978) where the court noted that liability cannot be extended to "mere insults, indignities, threats, annoyances, petty oppressions or trivialities.").

136. *Id.* (citing Ross v. Burns, 612 F.2d 271 (6th Cir. 1980)).

ure in the continued maintenance of his good reputation against the stronger public policy favoring free and unbridled debate in the political or public arena. In an area dealing with public issues or public figure plaintiffs, the Court is unlikely to allow recovery against the media defendant.

V. The Litigants' Arguments Before The Supreme Court

Hustler Magazine v. Falwell presented the Court with an opportunity to review its policy on defamation in a situation where the private plaintiff's interest in maintaining his good reputation is in direct conflict with a media defendant's first amendment rights.

A. Petitioner's Argument

The protections afforded by the first amendment of the United States Constitution cannot be submerged under any disguised state-defined statutory or legal standards. In this case, the alleged victim meets the criteria defining a public figure and cannot now bring a claim under the tort of intentional infliction of emotional distress because he has invited public discussion by his voluntary act of entering the public or political arena and taking a stance on controversial issues.[137] Petitioners cautioned the Court to refrain from restricting the protections afforded the press by the first amendment and reminded the Court that even statements categorized as "ill will" enjoyed protection.[138] The policy rationale underlying the first amendment is to permit "uninhibited, robust, and wide-open" debate and discussion of issues which impact on the general public. The attainment of such a goal often involves even "vehement, caustic, and sometimes unpleasantly sharp attacks" on individuals in government, public officials and public figures.[139] One traditional vehicle for conveying opinion on political and social discourse involves humorous publications similar to the ad parody.[140] In this case, the jury had returned a verdict in favor

137. Petitioner's Brief on Certiorari, 797 F.2d 1270 (4th Cir. 1986) (No. 86-1278) *Hustler*, 108 S. Ct. 876, at 33. *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Lousiana, 379 U.S. 64 (1964).

138. *Id.* at 32. (citing *New York Times*, 376 U.S. at 275 n.15).

139. *Id.* at 32.

140. *Id.* at 28. For instance:

> Early in his career, Benjamin Franklin followed the lead of Jonathan Swift and, in an early edition of *Poor Richard's Almanack*, reported the imminent death of a rival publisher. When his competitor protested that he was not dead, Poor Richard responded that he was indeed "really infunct and dead." W. Blair, Horse Sense in America, 17-18 (1942). Such conduct would appear to qualify as

of defendants, Hustler and Flynt, due to the protections afforded by first amendment freedoms which are maintained by requiring a showing of actual malice as a prerequisite for recovery by a public figure on a defamation- related claim.[141]

Falwell would have liked the Court to adopt Justice Stevens's dissent in *Philadelphia Newspapers, Inc. v. Hepps*[142] in which he stated that the first amendment does not protect "deliberate, malicious character assassination."[143] Yet the majority of the Court has correctly held that even character assassination appearing in the form of political humor should be given substantial protection because it provides an outlet for "disguised aggression against moral and religious pretensions in politics."[144] Parodists must be allowed to continue to exercise their right to creatively criticize symbols and names which have become a pervasive part of the American society.[145] Traditionally, the American society has been described as a free society wherein one could uninhibitedly discuss and comment upon major issues without fear of being sanctioned for such speech. Recognizing this assumption, the Court attempted to draw some limits encompassing "the lewd and obscene, the profane, the libelous, and the insulting or fighting words."[146] These kinds of words, which tend to "inflict injury or tend to incite an immediate breach of the peace," are outside of the constitutional protection of the first amendment.[147] The Court always must employ a balancing test to weigh the individual's interest in conveying his opinions in an outrageous and obscene manner against the interest of the state in maintaining public order and morality in society.[148] The strong public policy rationale makes it unlikely that the Court would give priority to the state's interest in suppressing such speech, even where the content of the published matter furthers "only slightly" the search for truth.[149]

In *Hustler Magazine*, the words and the photograph in the ad

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intentional infliction of emotional distress under the standards enunciated by the Courts of Appeals.

Id. at 28 n.30.

141. *Id.* at 25-26.

142. 106 S. Ct. 1558, 1565-71 (1986).

143. Respondent's Brief on Certiorari, 797 F.2d 1270 (4th Cir. 1986) (No. 86-1278), *Hustler*, 108 S. Ct. 876, at 33.

144. Pet. Brief for Cert. at 27.

145. *Id.* at 28.

146. *Id.* at 20.

147. *Id.*

148. *Id. See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1941).

149. *Id.*

parody do not appear to exemplify the type of words which the Court had in mind when it drew its limits on any type of speech which could possibly incite a breach of the peace.[150] Historically, media such as the ad parody have been employed to convey worthwhile ideas, stimulate discussions, and facilitate debates on public matters. This longstanding policy outweighed any interest Falwell may have against public criticisms.

B. Respondent's Arguments

Respondent agrees that a balancing approach is necessary to meet constitutional requirements.[151] However, *Hustler* argues for the test applied to defamation cases and urges that because there was no falsity in its ad parody, there can be no malice as required by *New York Times*.[152] Respondent, however, urges that such a blind application of the constitutional rule is improper.

The *New York Times* decision arose in the context of defamation and "should not be liberally and mechanically applied to all other torts," particulary those where the truth of the statment is irrelevant.[153] It is not properly applied to claims for intentional infliction of emotional distress. This tort theory requires a more subjective inquiry into issues such as self-image and personal feelings than the inquiry required by defamation or other torts.[154] The difference between libel and emotional distress is important: *intent* to cause injury is not an element of a defamation claim, whereas it is the gravamen of a claim for intentional infliction of emotional distress.[155]

Further, the first amendment has never been used to shield the media from other tort or criminal liability incurred in the course of carrying out its responsibility to inform the public.[156]

Hustler's ad parody had no constitutional value[157] and was expressed in a culpable, intentional manner offensive to first amendment principles.[158] Therefore, the state's interest in protecting Reverend Falwell against *Hustler*'s intentional infliction of emo-

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150. *Id.* at 31. *See also supra* note 165 and accompanying text.

151. Resp. Brief on Cert. at 11.

152. *Id.* at 11-12.

153. *Id.* at 8. *See also id.* at 50 ("while falsity is an essential feature of a libel claim, it is not an element of claim for the intentional infliction of emotional distress.").

154. *See Id.* at 23.

155. *Id.* at 28.

156. *Id.* at 19 (quoting Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971)).

157. *Id.* at 20.

158. *See id.* at 31.

tional distress outweighs *Hustler*'s right to exercise first amendment freedoms.[159]

VI. The Supreme Court's Analysis

In *Hustler Magazine v. Falwell*,[160] the Supreme Court had to determine whether it would allow recovery for emotional harm allegedly caused to a public figure by the publication of an ad parody at the expense of first amendment freedoms.[161] The Court held that in order for a public figure to recover for intentional infliction of emotional distress arising from publications such as the ad parody, the plaintiff must establish actual malice by a showing that the statement was made with knowledge that it was false or "with reckless disregard as to whether or not it was true."[162] The Court began its analysis by reviewing its policy of viewing libel claims in light of the strong public policy considerations in favor of free and wide-open debates on matters of public concern.[163] The Court noted that an important part of individual liberty involved the "freedom to speak one's mind," which is a fundamental aspect of the common search for truth in society.[164] The Court noted that American citizens have the right to criticize public figures and public measures.[165] In examining the *New York Times* standard of recovery for reputational injury,[166] the Court emphasized that free debate inextricably carries with it the potential for false statments, but some "breathing space" must be allowed for the continued exercise of the first amendment freedom of expression.[167] The Court concluded that this "breathing space is ensured by the two prong test requiring both a showing of falsity and a showing of culpability in order to successfully recover on a libel claim."[168]

In addressing the *Hustler* facts, the Court once again em-

159. *See id.* at 20-23.

160. 108 S. Ct. 876 (1988).

161. *Id.* at 879.

162. *Id.* at 882.

163. *Id.* at 879.

164. *Id.* at 879-80 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984)).

165. 108 S. Ct. 879-80 (citing Justice Warren's concurring opinion in Associated Press v. Walker, decided with Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967); and Baumgartner v. United States, 322 U.S. 665, 673-74 (1944) (Frankfurter, J. writing for the majority)).

166. Hustler Magazine v. Falwell, 108 S. Ct. 876, 880 (1988). *See also* New York Times Co. v. Sullivan, 376 U.S. 254 at 279-80, and *supra* notes 61-75 and accompanying text.

167. *Hustler Magazine*, 108 S. Ct. at 882 (1988) (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 727, 772 (1982) (quoting *New York Times*, 376 U.S. at 272)).

168. *Id.*

ployed its first amendment balancing test and found that the strong concern for maintaining free debate on public matters demands constitutional protection even for acts done with improper motive.[169] In applying this principle to the instant case, the Court found that bad motives, such as the type demonstrated by the actions of the publisher, Larry Flynt, might control in an ordinary action for tort liability, but did not play a significant role in imposing liability when the case involved a public figure plaintiff and a media defendant.[170]

The Court then discussed the role played by political cartoonists[171] and satirists in debate on public matters, and concluded that in the absence of showing both fault and falsity, these special individuals would be subject to extensive damage awards arising solely from their work.[172] The Court feared that political discourse might be severely lessened without cartoonists and satirists because "graphic depictions, [caricature],[173] and satirical[174] cartoons have historically played a major role in public and political debate."[175] According to the Court, speech in these alternative media for political commentary undoubtedly is "calculated to injure the feelings of the subject of the portrayal,"[176] but individuals in society would

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169. *Id.* at 880-81. The Court also cited Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that the first amendment protected an expression of a speaker or a statement of a writer even when he was motivated by hatred or ill will because the strong public policy considerations outweighed other competing interests.). 108 S. Ct. at 880-81.

170. 108 S. Ct. at 881.

171. *Id.* The Court quoted a cartoonist who once stated that: "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politicians on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." *Id.* (citing Long, *The Political Cartoon: Journalism's Strongest Weapon*, THE QUILL, 56, 57 (Nov. 1962)).

172. *Id.* at 881.

173. The Court notes Webster's definition of a caricature as "the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect." *Id.* (citing WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).

174. Traditionally, political commentators have employed satirical speech to criticize public figures. Petitioner's Brief on Certiorari, 797 F.2d 1279 (4th Cir. 1986) (No. 86-1278), *Hustler*, 108 S. Ct. 876, at 34. Others have used satire to attack the view of the world held by some people as one with a distinct division between evil and good. *Star*, December 15, 1987, at 30. A satirical work is one used as a vehicle "to expose vice or folly" and can accurately be described as biting, witty, ironical, and sarcastic. THE MERRIAM—WEBSTER DICTIONARY 617 (1962). The main aim of a parody is to successfully imitate the work of another in a satirical manner. *Id.* at 508.

175. 108 S. Ct. at 881.

176. *Id.* The Court noted:

> Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's

not have enjoyed unbridled political discourse without them.[177]

Once again, in 1988, the Court reaffirmed its longstanding policy in favor of free and extensive public debates. The Court found that the outrageousness standard[178] employed in the usual tort action for intentional infliction of emotional distress was clearly inapplicable when the parties were a public figure plaintiff and a media defendant. Such a standard would circumvent its policy of refusing to award damages based primarily on the allegation that the listener or plaintiff suffered "an adverse emotional impact" as a result of the speech.[179]

> Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. "Boss" Tweed and his corrupt associates in New York City's "Tweed Ring." It has been described by one historian of the subject as "a sustained attack which in its passion and effectiveness stands alone in the history of American graphic art." Another writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners."

Id. at 881 (citations omitted).

177. 108 S. Ct. at 881. The Court stated:

> Despite their sometime 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. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate. Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memoralized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Id.

178. The Court states that in the public arena, the utilization of the outrageousness standard inevitably would allow jurors to impose liability "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression" because there is a subjective element inherently embedded in the term "outrageous."
108 S. Ct. at 881-82.

179. *Id.* at 882. The Court cites NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982), for the proposition that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." The Court also stated that it would not limit the exercise of public expressions merely because the ideas are offensive to some people (citing Street v. New York, 349 U.S. 576, 592 (1969)). In order to highlight this point, the Court stated:

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense that consequence is a reason for according it constitutional protection. For it is a central tenet of the first amendment that the government must remain neutral in the marketplace of ideas.

Id. (citing Fed. Communications Comm'n. v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978)).

The Court's apparent liberal approach does not apply to all speech; the Court notes that absolute protection is not afforded to those expressions which are shocking, offensive, and vulgar.[180] The Court noted that the expressions in *Hustler*'s ad parody did not fall within any of these narrow exceptions to the general principles of the first amendment.[181] The central core of the Court's analysis revolved around the fact that in this instance, the first amendment protections precluded the award of damages to the public figure although undoubtedly he had suffered emotional distress.[182] Justice White concurred in Justice Rehnquist's majority opinion, stating that the Court of Appeals judgment penalizing the publication of the ad parody cannot be rationalized under first amendment principles.[183] The concurring justice thought that the Court should not have relied so heavily on *New York Times* which dealt mainly with a defamatory statement; *New York Times* is clearly inapplicable in the instant case where the jury found that there was no assertion of actual fact in the ad parody.[184]

VII. A Critical Analysis

As early as the common law era, the courts recognized that the state had a legitimate interest in the right of a private figure to maintain his good reputation free from defamation when he had not voluntarily thrust himself into the public eye by commenting on matters of public concern.[185] The preceding discussion of common law assumptions and values[186] made clear that the common law courts gave the media and the press a "qualified privilege" in recognition of the press or media's duty to convey information and stimulate discussions on public issues.[187]

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180. 108 S. Ct. at 882 (citing *Pacifica Foundation*, 438 U.S. at 747). In *Pacifica Foundation*, the Court expressly limited expressions that were vulgar, offensive, and shocking; they are not entitled to constitutional protections. *Hustler*, 108 S. Ct. at 882 (citing *Pacifica Foundation*, 438 U.S. at 747). Additionally, a state court can lawfully punish an individual for using speech which falls outside the constitutionally protected interests if the use of these "fighting words" would inflict injury by its very utterance or tend to lead to a breach of the peace. *Hustler*, 108 S. Ct. at 882 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). In short, the Court recognized that not all types of speech are entitled to equal first amendment protection. 108 S. Ct. at 882 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985)).

181. 108 S. Ct. at 882.

182. *Id.* at 882-83.

183. *Id.* at 883.

184. *Id.*

185. *See supra* notes 38-45 and accompanying text.

186. *See supra* notes 38-54 and accompanying text.

187. Branson & Sprague, *supra* note 51.

The *Philadlphia Newspapers* Court must have viewed the plaintiff's interest as relatively insignificant because it abandoned the fundamental common law assumptions favoring the private figure by finding that the individual's interest had been outweighed by the first amendment freedoms. Thus, it appears as if the Court has replaced the common law privilege afforded to the press with an equivalent privilege appearing in the form of first amendment freedoms.

The *Philadelphia Newspapers* decision was influenced by the development of the balancing test employed by the Court when faced with the exercise of first amendment freedoms relating to important public matters. Beginning with *New York Times*, the Court has attempted to balance the common law value of the individual's interest in maintaining his good reputation against its policy favoring the allowance of uninhibited exercise of first amendment freedoms. In employing this balancing approach, the Court implicitly rejected the common law premise that an individual's interest in maintaining his good reputation lies at the heart of allowing recovery for defamatory falsehood.[188] In effect, the Court undermined the strong common law presumption that a defamatory false or libelous statement against an individual simultaneously caused damage to his reputation[189] in favor of its policy of allowing uninhibited free speech.

The Court's holding in *Hustler Magazine* is directly related to common law principles, and merely serves to reaffirm and expand the Court's precedents. The *Philadelphia Newspapers* Court implied that it would be inclined to protect some defamatory falsehoods in order to fully effectuate the proper exercise of first amendment freedoms.[190] That Court further stated that, in addition to showing fault, a private figure plaintiff also must show falsity.[191]

The Supreme Court relied heavily on the *New York Times* standard and its progeny in deciding *Hustler*. When the *New York Times* standard was applied,[192] the second prong, requiring actual

188. *See* Note, *supra* note 38, at 66.

189. *See supra* note 49.

190. *Philadelphia Newspapers*, 106 S. Ct. 1558 (1986).

191. *Id.* at 1561.

192. In his concurrence in *Hustler*, Justice White agreed with the balancing test employed by the majority and its conclusion that the first amendment freedoms prevented the Court from imposing liability on *Hustler* and its publisher because that would effectively penalize them for publishing the disputed ad parody. *Hustler*, 108 S. Ct. 876, 883 (White, J. concurring). In his short concurring opinion, however, Justice White looked unfavorably on the Court's decision to apply the *New York Times* standards, which dealt with defamatory

malice was met as demonstrated by Flynt's testimony at trial.[193] Noticeably, however, the allegations[194] in the disputed ad parody failed to meet the first prong of the *New York Times* test regarding falsity, in part because they were not representations of fact. The allegations in the ad, though certainly serious, did not appear to be as extreme or as severe as the allegations in some of the prior defamation cases in which the Court had denied recovery.[195] For the Court, *Hustler* fell doctrinally *within* established law, not outside of it.

Following its earlier precedents, the Court subjectively examined the issues dealing with the publication of the ad parody, and despite the Court of Appeals's findings of bad motive on the part of *Hustler's* publisher,[196] it held that the publication of the ad parody nevertheless was protected by the first amendment.[197] The Court further noted that the ad parody was somewhat similiar to political cartoons and caricatures which historically have been used to explore "unfortunate physical traits or politically embarrassing events."[198] The Court examined the ad parody in the broad context of the first amendment freedoms favoring uninhibited discussion and comment on public matters, and found that its longstanding policy considerations extremely outweighed the public figure's interest in maintaining his allegedly good reputation.

Notably, the *Hustler* Court refused to allow a public figure plaintiff to assert an independent cause of action[199] for intentional infliction of emotional distress in the absence of a finding of defamation.[200] In contrast to the cases dealing with race relations,[201]

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falsehood, to the instant case where there was no assertion of facts in the published ad parody. *Id.* He completely ignores the strong public policy considerations underlying the Court's prior holdings in defamation cases. For instance, in *New York Times*, the Court protected an allegedly false statement made by a media defendant in regard to a public official in his public capacity, in order to fully effectuate its policy in favor of the uninhibited exercise of first amendment freedoms. In that case, the Court held that a public official must prove that a media defendant had actual malice in making the defamatory false statements. Thus, it would appear that the *New York Times* standard requires a dual finding of a false statement coupled with the defendant's actual malice.

193. *See supra* note 22 and accompanying text.

194. *See supra* notes 8 and 9.

195. *See supra* notes 24 and 115.

196. Falwell v. Flynt, 797 F.2d 1270, 1273 (1986).

197. Hustler Magazine v. Falwell, 108 S. Ct. 876, 882-83 (1988).

198. *Id.* at 881.

199. *See* Delgado, *supra* note 123, arguing in favor of creating an independent cause of action for racial insults.

200. It is surprising that the Court did not examine the Court of Appeals's conclusion that a plaintiff could succeed on his cause of action for intentional infliction of emotional distress after he had lost on his libel claim. *See supra* note 28. The Court's analysis mainly

the Court would not allow a public figure to have an independent cause of action for intentional infliction of emotional distress in the absence of defamation because of the availability of other remedies.[202] In sum, strong public policy considerations (concern over media self-censorship and restricted debates on public issues) cautioned against a contrary result.

However, it is the opinion of this Note that the Court could have achieved its stated aims without importing the *New York Times* standard into the area of intentional infliction of emotional distress. The *Hustler* Court also could have found that the event depicted in the ad parody did not state a cause of action against the media defendant by using a narrower conceptual framework. If the Court had looked more closely, it could have found that the event depicted in the ad parody was clearly related to issues that concern the public figure plaintiff, the Reverend Jerry Falwell, in his capacity as a nationally renowned fundamentalist minister. The Court consistently has maintained that anyone who holds a position of persuasive power in society, as Falwell undoubtedly does, and voluntarily states his opinions on public issues including moral conduct, as Falwell frequently has, cannot be heard to complain when his views or opinions are criticized in the public arena, nor when his credibility to speak to such an issue is questioned, as it was in the *Hustler* ad. Therefore, the Court could have held that, as a matter of law, a public figure subject to this sort of intensive criticism cannot claim intentional infliction of emotional distress.

VIII. CONCLUSION

The underlying rationale behind prior United States Supreme Court decisions was that no unnecessary limitations should be imposed on the expression of ideas relating to public issues because such restrictions forseeably could lead to media self-censorship and possible social unrest. Members of the general public and of the media should not be denied the opportunity to openly criticize public figures through relatively harmless publications such as the

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focused on the first amendment freedoms without any substantial consideration for competing issues.

201. *See, e.g.*, Delgado, *supra* note 123.

202. *See supra* note 78 and accompanying text. In limiting the public figure to the available remedies pronounced by the Court in prior defamation cases, the Court was in effect informing the lower courts that they must employ the relatively higher federal standards when confronted with a public figure plaintiff and a media defendant. In effect, the Court was guaranteeing that the lower courts would not undermine the constitutional protections that the Court has consistently afforded to first amendment freedoms.

ad parody. The *Hustler* Court was compelled by its precedent, and by the framework of the American political history to maintain the maximum allowable protections for statements made in alternative public media. The continued availability of constitutional protections for first amendment freedoms demanded that the *Hustler* Court reach this conclusion, but it could have done so by finding that, as a matter of law, Falwell, as a public figure plaintiff necessarily subject to criticism and questioning of his credibility to speak to certain issues, could not be heard to complain of intentional infliction of emotional distress.

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* The author would like to dedicate this article to her mother, Leila S. Froome, who has provided constant encouragement and support to her throughout all her educational pursuits.