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EMOTIONAL DISTRESS, THE FIRST AMENDMENT, AND “THIS KIND OF SPEECH”: A HERETICAL PERSPECTIVE ON HUSTLER MAGAZINE V. FALWELL

PAUL A. LEBEL*

In August 1986, a panel of the United States Court of Appeals for the Fourth Circuit affirmed a $200,000 judgment for the Reverend Jerry Falwell on his claim against Hustler Magazine and its publisher, Larry Flynt, for the tort of the intentional infliction of emotional distress.¹ The lawsuit arose out of the publication of an “ad parody,” published in the November 1983 and March 1984 issues of Hustler, purporting to contain an interview with plaintiff Falwell in which he recounted, among other things, escapades such as sexual relations with his mother in an outhouse and drunkenness.² Falwell had been unsuccessful on two other tort claims arising out of the same incident: the jury found against Falwell on a libel claim,³ and an invasion of privacy claim had been dismissed on the ground that the plaintiff’s claim did not fall within the scope of the limited invasion of privacy tort action for appropriation of a person’s name or likeness that Virginia state law recognized.⁴

¹ Falwell v. Flynt, 797 F.2d 1270, reh'g and reh'g en bane denied, 805 F.2d 484 (4th Cir. 1986), rev'd sub nom. Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988). Falwell had also sued Flynt Distributing Company, the magazine’s distributor, but the jury returned a verdict for that defendant. Id. at 1272.

² The jury concluded that “no reasonable man would believe that the parody was describing actual facts about Falwell.” Id. at 1273. The significance of this finding is discussed infra notes 105-06 and accompanying text.

³ Falwell, 797 F.2d at 1273. Restrictively interpreting the Virginia “appropriation of name or likeness” statute, VA. CODE ANN. § 8.01-40 (1984), the district court dismissed the plaintiff’s claim on the basis that the appropriation of Falwell’s name “was not for purposes of trade within the meaning of the statute.” 797 F.2d at 1273. The Fourth Circuit affirmed that dismissal, adding as another ground for the decision the adoption of a new requirement for finding liability. To find liability under this requirement, the use of a public figure’s name “must take such a form that the reader would reasonably
Despite the United States Supreme Court's reversal of the Fourth Circuit's decision in favor of Falwell,\(^5\) the Court has not satisfactorily addressed many of the most significant legal issues that were raised by the dispute. The issues presented to the Court were, first, whether the first amendment places constraints on a state's tort law permitting the recovery of damages for the intentional infliction of emotional distress, and second, if the first amendment does so, what is the nature of those constitutional constraints.\(^6\)

The Court instead appeared to be distracted by a hypothetical question along the lines of whether a publisher such as The Washington Post should be liable for the emotional discomfort of a public figure intentionally caused by a publication such as a Herblock editorial cartoon.\(^7\) Stating that he could find no principled basis on which to distinguish a case of that sort from the case that was actually before the Court,\(^8\) Chief Justice Rehnquist, writing for seven of the Justices,\(^9\) concluded that Falwell could not maintain an action for damages for the intentional infliction of emotional distress without proof that a

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6. The Court's opinion stated: We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury. Id. at 879 (emphasis added).

7. The Chief Justice's opinion traces the history and remarks favorably on the importance of political cartooning. 108 S.Ct. at 881. That history is set out in an amicus brief filed on behalf of The Association of American Editorial Cartoonists. The jeopardy in which political cartooning is alleged to have been placed by the judgment for Falwell is described in that brief, Brief for Amicus Curiae, The Association of American Editorial Cartoonists at 20-30, Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988), as well as in Judge Wilkinson's opinion dissenting from the Fourth Circuit's denial of rehearing en banc, Falwell v. Flynt, 805 F.2d 484, 487 (4th Cir. 1986).

8. 108 S. Ct. at 881 (expressing doubt that there is "a principled standard" to separate the publication in the Falwell case from "more traditional political cartoons").

9. Justice Kennedy did not participate in the Falwell decision. Justice White concurred in the judgment, in a cryptic opinion in which he agreed that liability could not "be squared with the First Amendment." Id. at 883 (White, J., concurring in judgment). He did not, however, explain his reasons for that conclusion. For a discussion of Justice White's concurring opinion, see infra notes 90-91 and accompanying text.
false statement of fact had been made with "actual malice," and accordingly set aside the lower court judgment in Falwell's favor.

Unable to offer any convincing general characterization of what sort of speech the Court had before it, the Chief Justice's opinion referred vaguely, and not very helpfully, to the nondefamatory references to Falwell as "publications such as the one here at issue." The opinion also too lightly dismissed the defendant's conduct as involving simply "the publication of an ad parody offensive to" the plaintiff. In failing to convey an understanding of the precise issue, the Court was unable to provide much in the way of guidance for the conduct of future litigation, other than a fact-specific rejection of liability imposed on some indeterminate category of "this kind of speech."

This article examines the relationship between the tort of the intentional infliction of emotional distress and the first amendment, and concludes that the emotional distress tort claim should retain a more expanded role than the Supreme Court's Falwell decision appears to leave it. The route to such a conclusion requires tracing state tort law as it has been constitutionalized in other free-speech contexts and identifying the significant differences between the other torts that are restricted by the first amendment and the emotional distress tort claim asserted by Falwell. The article will offer an alternative method of constitutionalizing the emotional distress tort that adequately protects first amendment interests without resorting to the Falwell case's denigration of the importance or the legitimacy of the personal interests protected by this tort action.

This article could be subtitled a concurring rather than a dissenting opinion. It reflects the author's judgment that, applying the ele-
ments of this constitutionally acceptable emotional distress tort to the Falwell facts, the plaintiff's victory in the lower courts could not be allowed to stand. The Court's flawed or incomplete reasoning in reaching the proper result should not preclude further attention to the relationship between the first amendment and the emotional distress action. It is particularly important for the decision of later cases that the ambiguities and uncertainties generated by the Court's Falwell opinion be replaced with a clear understanding not only of why the decision in that case was correct, but also of what room remains for the successful assertion of the emotional distress claim.

The title's characterization of the perspective adopted in this article as "heretical" stems from the author's sense that there is an orthodoxy in libel law practice and scholarship today. Its proponents zealously protect media interests and are quick to denounce departures from the true faith as "anti-first amendment." They seem never to have encountered an absolute privilege they didn't like, nor a qualified privilege that shouldn't be extended. The harm inflicted by speech is seldom regarded by the orthodox view as significant enough to warrant compensation. Indeed, any prospect of tort liability is seen as an intolerable threat to first amendment values. Given the Chief Justice's previous position as one of the principal opponents of this conventional view, it is ironic that the opinion for the Court in Falwell serves as something of a model of orthodox thinking about whether, and if so, how, the first amendment ought to affect novel issues.

This article admittedly comes at the issues presented by Falwell from a perspective different from the contemporary mainstream. Its author, however, would resist the suggestion that his "heretical" views on how the first amendment places limits on tort claims necessarily makes him an apostate from the belief in the importance of freedom of


The fact that the decision in Falwell was written by the Chief Justice might produce either skepticism or amazement at an apparent conversion. Resistance to the temptation to adopt a skeptical attitude is suggested in Smolla, Emotional Distress and The First Amendment: An Analysis of Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 438 (1988).
speech. Instead, as described below, the "heresy" consists of the belief that harm caused by speech is not necessarily less serious and less deserving of compensation than harm caused in other ways and that speech interests do not always outweigh the individual interests of victims of harmful speech. The protection of individual interests should be accommodated with first amendment values whenever it is possible to do so.

The celebrity of the parties to the Falwell litigation and the obnoxiousness of their conduct on this and other occasions, as well as the temptation to portray the litigation as a momentous cultural battle, create a risk of obscuring the essential simplicity of the Falwell case. An understanding of what was at stake in this litigation can be derived from a consideration of three questions. First, should a tort plaintiff be able to evade the constitutional restrictions imposed on liability for defamation by attaching the label of a different tort theory to the same course of conduct that would have supported a defamation claim? Second, if the answer to the first question is in the negative, should the constitutional restrictions on recovery for the intentional infliction of emotional distress be transferred intact from the current law of defamation? Third, if the second question is answered in the negative, what sort of constitutional limits on the emotional distress action are appropriate?

Part I of this article will consider the first two questions, showing that a negative answer is the only plausible conclusion. The critical question then becomes what constitutional restrictions ought to be imposed on the ability to obtain a tort recovery for the intentional infliction of emotional distress. Part II of the article examines the answers to that question offered by the Fourth Circuit and the Supreme Court in Falwell and explains why each of those answers is considerably less than compelling. In part III, the article will set out a scheme of constitutional protection for those whose speech is subject to attack under the intentional infliction of emotional distress tort theory. That project will consist of three steps: first, outlining the moral basis for imposing liability for the kind of tortious conduct that can be characterized as the intentional infliction of emotional distress; second, explaining how this (admittedly wide-sweeping) moral notion can

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17. A few years ago, the author referred to the Falwell/Flynt litigation as the legal equivalent of the Army-Navy game, to which the only reasonable response is to wish for each team to suffer a humiliating defeat. LeBel, The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability, 51 Brooklyn L. Rev. 281, 306 n.96 (1985). Perhaps the more contemporary analogy would have been the Iran-Iraq war.

be incorporated into the existing structure of the intentional emotional distress action; and third, identifying the elements of the tort action that lend themselves to serving as the hooks upon which can be hung a carefully-tailored constitutional protection from liability for this tort.

I. EXTENDING FIRST AMENDMENT PROTECTION INTO A NEW TORT ARENA

Recognition of an action for the recovery of damages for emotional distress distinct from compensation for a physical injury has developed largely by indirection and fairly arbitrary line drawing. Citing concerns about fraudulent claims, a flood of administratively difficult cases, and liability greatly disproportionate to culpability, courts have routinely insisted on the satisfaction of some tangible or readily identifiable prerequisite to the recovery for emotional distress. Viewed from the long-term perspective of the development of common law emotional distress actions, the Supreme Court's Falwell foray into the emotional distress field is simply another inadequate attempt to create barriers to recovery, although on this occasion the rationales for those barriers are matters of constitutional significance rather than nonconstitutional policy concerns.

The modern and most widely adopted version of the tort of intentional infliction of emotional distress was published in 1948 as a supplement to the Restatement of Torts. In its standard, recognized form, and as adopted in Virginia, the intentional infliction of emotional distress tort action requires the plaintiff to prove four major elements:

first, that the defendant acted intentionally or recklessly;
second, that the defendant's conduct can be characterized as extreme and outrageous; 24
third, that the defendant's conduct was a proximate cause of the harm that the plaintiff suffered; 25 and
fourth, that the plaintiff suffered severe emotional distress. 26

The relationship between the general category of conduct addressed by the emotional distress action and the kind of activity protected as part of the relevant first amendment freedoms frequently is fairly close. Unlike the tort of negligent infliction of emotional distress, which usually is tied to the creation of a risk of physical injury to the plaintiff 27 or to a third party, 28 the elements of the intentional emotional distress claim typically are satisfied by activity that is either exclusively or predominantly speech. 29 For example, a claim for relief for the intentional infliction of emotional distress has been recognized in situations in which a defendant has communicated threats to the plaintiff, 30 has insulted the plaintiff, 31 or has accomplished both in one communication. 32 Communications involving debt collection 33 or sex-

24. The language in the text is from the RESTATEMENT, supra note 21. The Virginia version of this element of the tort claim states that "the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." Womack, 215 Va. at 342, 210 S.E.2d at 148.
25. RESTATEMENT, supra note 21.
26. Id.
27. Emotional distress as a result of being within the zone of danger of physical injury from the defendant's conduct is one of the more commonly recognized negligent infliction of emotional distress actions. See, e.g., Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984).
28. Bystander recovery by a plaintiff who was not herself subjected to the risk of physical injury from defendant's conduct has been recognized in cases such as Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
29. One could attempt to distinguish speech from conduct, and then limit the scope of the emotional distress tort claim to the latter category. The difficulty of drawing that distinction in a meaningful and manageable fashion, as well as the presence of both elements in most situations, suggest that the exercise is not worth the effort. See Coldwell Banker Residential Real Estate Serv. v. Missouri Real Estate Comm'n, 712 S.W.2d 666 (Mo. 1986) (disagreement between majority and dissent about use of speech/conduct distinction).
30. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (plaintiff was told to accede to union demands or face beating and damage to his property). See generally Pearson, supra note 19.
31. Slocum v. Food Fair Stores, 100 So. 2d 396 (Fla. 1958) (plaintiff was told "you stink to me" by defendant's employee).
ual solicitation or both have also served as the basis of emotional distress claims. Practical jokes at the expense of the plaintiff constitute another category of communications that can support an emotional distress claim.

The speech foundation of many, if not most, intentional infliction of emotional distress claims might lead to an initial assumption that all such claims should be subjected to constitutional restrictions. However, a consideration of a distinction in the kinds of speech that can produce emotional distress provides a preliminary classificatory device of some utility. The intentional infliction of emotional distress typically involves communication of something to the plaintiff. The kind of conduct involved in the Falwell case presents the different matter of a communication about the plaintiff. In deciding that the constitution places limits on liability for tort claims based on theories of defamation and invasion of privacy, the Supreme Court has had before it only cases involving speech that is primarily about the plaintiff. This is because the principal tort claims on which the Court had imposed constitutional limitations each contained an element requiring communication to someone other than the tort plaintiff.

The distinction between speech-to and speech-about can be employed as the first step in devising a way to determine whether the constitutional protection of freedom of speech should restrict tort liability for the intentional infliction of emotional distress. Restrictions could be conditioned on a threshold showing that something more than speech-to the plaintiff was involved. That threshold would introduce into the emotional distress claim an element similar to the publi-
cation element of the defamation and invasion of privacy torts. A failure to cross that threshold would indicate that a particular emotional distress claim was distinguishable enough from the other constitutionalized speech torts that constitutional protection would not have to be afforded the activity causing the emotional distress. In the case of pure speech-to, that is, speech that does not reach an audience beyond the person to whom it is directed, the "public debate" rationale for the decision in *New York Times Co. v. Sullivan*41 would not be implicated, thus leaving the proponent of first amendment protection with the burden of providing a plausible alternative reason to impose constitutional limitations on liability.42

As with many supposedly bright-line demarcations between categories of cases, the speech-to and speech-about characterizations may be both weaker and stronger than they initially appear to be. The distinction would leave unaffected the tort law precedents in such cases as bill collector harassment or practical jokes of the false-report-of-an-injury-to-a-relative ilk. Even those speech-to fact patterns, however, are easily susceptible to a modification that brings them within the scope of the speech-about characterization. When the collection agency calls the plaintiff's place of employment, for example, an implicit negative message about the plaintiff can be conveyed. Similarly, the plaintiff whose humiliation in the course of a practical joke occurs in public is someone about whom a negative message has at least implicitly been conveyed.

Because speech to a person may have incidental affects that reach a wider audience, the application of any guideline based on the distinction between speech-to and speech-about may very well have to focus on the primary thrust of the communication. Furthermore, a communication that primarily is speech about a person may reach that person, as was the case of the publication in *Hustler* which was brought to Falwell's attention.43 As long as the limited utility of the speech-to/speech-about dichotomy is acknowledged, however, it can serve as a useful way to remove from constitutional scrutiny at least some tortious conduct traditionally subject to the intentional infliction of emotional distress claim.

41. 376 U.S. 254, 270 (1964) (declaring "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

42. The use of other free speech rationales for this purpose is illustrated in R. SMOLLA, supra note 18. The weakness in those other rationales is related to their inability to identify some unique property of speech that identifies it as entitled to special protection from legal responsibility for the harm that it causes to another person. See generally F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

43. See R. SMOLLA, supra note 18, at 1.
Assuming that a communication that is primarily speech-to is treated as raising no substantial constitutional problems, the more significant question is whether speech-about is always subject to constitutional protection. As long as it is understood that an affirmative answer to that question does not necessarily commit one to any particular regime of protection, a consideration of the implications of a negative answer should make it clear that the affirmative answer is correct.

A hallmark of the common law pleading systems from which contemporary law has evolved was a hypertechnical insistence on the selection of just the right writ and the use of precisely the right language with which to plead and prove one's case. The question of whether a plaintiff should be entitled to recover was sometimes treated as secondary to the question of whether the plaintiff exercised the correct options in the pleading stage of the litigation. In such a system, a party who deserved compensation could be denied any recovery simply because of improper pleading technique.

Modern procedural rules for civil actions are more in tune with common sense and fairness in attaching less significance to pleading technicalities. Indeed, in some instances, the historically distinct substantive requirements of different claims for relief have been relaxed in ways that make the selection and the availability of a particular tort theory less important than those matters might previously have been. It is against this background, which might be described as a commitment to the resolution of disputes on essential rather than peripheral bases, that one should consider the adverse consequences of

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44. The assumption might be more narrowly phrased as one about the type of constitutional problem addressed in the Sullivan line of cases, concerning the deterrent effect on speech about matters of public concern. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) ("every . . . case in which this Court has found constitutional limits to state defamation laws . . . involved expression on a matter of undoubted public concern").


47. See, e.g., Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960). In Martin, the Supreme Court of Oregon relaxed the traditional trespass to land requirement that a tangible invading agent was necessary in order to permit a trespass claim to proceed. That decision enabled the plaintiff to obtain a larger recovery than would have been obtainable under a more plausibly applicable private nuisance theory, due to the longer limitations period associated with the trespass action than with nuisance under that state's law.

48. That this commitment is substantially less than whole-hearted is demonstrated by the vitality and manipulability of such justiciability doctrines as the law of standing. See generally Nichol, Rethinking Standing, 72 Cal. L. Rev. 68 (1984).

It should also be noted that the popular perception of many constitutional guarantees, particularly in the criminal procedure arena, views them as "technicalities." The argument from essence presented in the text is not intended to extend beyond the specific context of the pleading characterization of what happened to a plaintiff.
conditioning constitutional protection on the particular tort theory the plaintiff chooses to pursue.

In considering how a pleading characterization should affect liability, one needs to distinguish two types of cases, drawing the distinction on the basis of their relationship to the defamation action that the Supreme Court initially subjected to first amendment limitations. In the first situation, the circumstances out of which the claim arose would be susceptible to a characterization as involving a defamatory publication. In this situation, the plaintiff pleads a different tort theory as an alternative to the defamation theory that would clearly be subject to constitutional restrictions of some sort. In the second situation, however, the circumstances out of which the claim arose would not lend themselves to a defamation characterization. The pleading of a tort theory other than defamation may be the only way in which a plaintiff could recover in this situation.

The first situation, which will be labelled the pleading of a redundant alternative to a defamation claim, presents the easiest case for subjecting the nondefamation tort action to constitutional restriction. Permitting the plaintiff to select an alternative (nondefamation) theory to escape first amendment scrutiny of a claim that would have received such scrutiny if pleaded as a defamation action carries with it all the arbitrariness and potential for abuse associated with the hypertechnical forms of action of a discredited age of common law pleading. The second situation, which will be called a nonevasive alternative, may require more in the way of a justification for the imposition of constitutional restraints on liability. If this sort of claim is not used simply as a way to get around the constitutional barriers that a defamation plaintiff would face, one might question why it should be subject to constitutional limitations at all. In answering that question, it must be emphasized that the focus at this stage of the analysis is only on whether there should be any constitutional limitations, and not on the very different issue of what the constitutional limitations ought to be.

The successful assertion of tort claims requires proof of a combination of elements, two of which are crucial for an understanding of

49. The variety of these situations, with their attendant protections, is described in LeBel, supra note 38, and in Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytical Primer on the Future Course of Defamation, 75 GEO. L. J. 1519 (1987).

50. The author has previously proposed a reform of the law of defamation that calls for treating damages for the emotional distress produced by a defamatory publication as an element of recovery that would be just as much an inherent part of the defamation action as the more traditional element of damages for injury to reputation. See LeBel, supra note 38, at 297-304. Adoption of that reform would make it much easier to identify the occurrence and to administer the litigation of the redundant alternative tort claim described in the text.
the issue under consideration here. Every tort claim requires both some liability-forming conduct on the part of the defendant and some particular legally cognizable harm to the plaintiff. These elements can be either very general, as in the case of a negligence claim, or very specific, as is the case for the various intentional torts. In the context of a defamation claim, the required liability-forming conduct consists of the publication of a statement that is capable of injuring the reputation of the plaintiff. Reputational harm is not a constitutional prerequisite to recovery; rather, it is the communication's potential for inflicting such harm that is the gravamen of the tort claim for defamation. The first of the categories described above, the redundant alternative pleading, could be fashioned simply by failing to allege the reputational harm potential of the challenged speech, even if that capacity was demonstrable. Indeed, such a demonstration should suffice to bring the nondefamation claim within the scope of the same constitutional restrictions that would be imposed on the defamation claim. For the reasons that will be described below, that scenario was not what was presented in the Falwell situation.

The compelling argument for subjecting even nonevasive alternative tort claims to first amendment scrutiny can be understood if one focuses on the characterization of the content of the speech that is coincidently capable of injuring reputation, rather than on the fact that reputational injury is a possible result of the speech. Contemporary constitutional limitations on tort liability focus on speech that involves "a matter of public concern." Precisely what is a matter of public concern has not yet been adequately addressed by the Court. The important point for this analysis is that, however one might determine what speech involves a matter of public concern, there is no necessary link between that speech and reputational harm. In other words, what is critical to the assertion of constitutional protection is the

51. The liability-forming conduct may be described simply as a failure to exercise reasonable care, and the compensable harm is generally any physical injury to the person or the property of the plaintiff.

52. A claim for the intentional tort of battery, for example, requires liability-forming conduct that consists of an intent to inflict a harmful or an offensive contact, or to cause the imminent apprehension of such contact. The harm must be either a harmful or an offensive contact. See generally RESTATEMENT (SECOND) OF TORTS §§ 13-20 (1965).

53. See id. at § 559 comment d (1977) ("To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect") (emphasis added).


55. See supra note 49.

56. See infra notes 105-08 and accompanying text.


58. See Dun & Bradstreet, 472 U.S. at 785 (Brennan, J., dissenting).
public-issue content of the speech and not any particular capacity for reputational harm. The fact that a nondefamation tort claim does not implicate the reputation of a plaintiff is therefore not a compelling reason for that claim to escape constitutional restraint.

The conclusion called for by the discussion in this section of the article is that as long as a tort claim arises out of speech that involves a matter of public concern, the rationale for first amendment protection is, or at least ought to be, presumptively satisfied. As suggested earlier, however, the nature of that first amendment protection is a matter that requires much more careful attention than it has received from either of the appellate decisions that have differed on the acceptability of the district court judgment for Falwell on the intentional infliction of emotional distress claim that he asserted against Flynt and Hustler Magazine. The next section of the article examines the Fourth Circuit and Supreme Court decisions and explains why each was inadequate.

II. THE LIMITED UTILITY OF THE DEFAMATION EXPERIENCE

Both the Fourth Circuit and Supreme Court decisions in Falwell drew heavily on the experience developed over two decades in the application of first amendment constraints on tort recovery under a defamation theory of liability. Unfortunately, as this section of the article demonstrates, that experience is of much more limited utility in fashioning constitutional restrictions on emotional distress tort recovery than either of the appellate decisions recognized. Following this section's critique of both appellate Falwell decisions, the article will offer a different model of the manner in which the first amendment should limit recovery under the intentional infliction of emotional distress theory.

This section's discussion of the Falwell decisions proceeds from the premise that constitutional protection of the defendants' publication was necessary to prevent Falwell's recovery. As will be demonstrated at the beginning of the next section of the article, a plausible argument can be made that this premise is flawed, and that the case need not have been decided on constitutional grounds. Even if one accepts the premise that the first amendment had to be invoked to prevent Falwell's recovery, however, the manner in which the appellate courts applied first amendment protection to the defendants can be criticized in ways that are useful in constructing a different method of limiting recovery for emotional distress in speech-about cases. Because the mistakes of the Fourth Circuit appear to influence the

59. See infra notes 109-22 and accompanying text.
60. Implicit in this discussion is the earlier distinction between speech-to and speech-about, and
Supreme Court's perspective on the case, the court of appeals decision will be analyzed first.

The Fourth Circuit opinion addressed two constitutional arguments asserted by the defendants: first, that recovery was impermissible without a showing of the "actual malice" required in public plaintiff defamation cases, and second, that the speech was entitled to absolute immunity as an expression of opinion. Rejecting both of those arguments, the court of appeals concluded that the judgment entered on the verdict for the plaintiff was consistent with the first amendment.

The first of the two constitutional arguments raised by the defendants—that the emotional distress plaintiff must prove "actual malice"—requires more attention than the other, because it was in their treatment of that argument that the Fourth Circuit and the Supreme Court reached different but equally erroneous conclusions in Falwell. The Fourth Circuit followed a simple reasoning process in order to arrive at its conclusion that the plaintiff did not have to prove the "actual malice" initially demanded in New York Times Co. v. Sullivan. In Sullivan, the Supreme Court held that a public official plaintiff could not recover damages for defamatory statements about his official conduct unless those statements were proved by clear and convincing evidence to have been made with knowledge that they were false or with reckless disregard of whether they were true or false. "Actual malice" was the label selected by the Court for the fault element imposed on public official defamation plaintiffs, and subsequently extended to plaintiffs characterized as public figures.

In Falwell, the Fourth Circuit decided that: (1) the significance of the Sullivan case was its transformation of libel from a strict liability to a high culpability tort; (2) the tort of intentional infliction of emotional distress already included a high level of culpability as a necessary element; and therefore (3) the culpability requirement contained

the application of constitutional restraints only to recovery for the latter. See supra notes 37-46 and accompanying text.

61. Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986).
62. Id. at 1273-74.
64. Id. at 280.
65. See generally LeBel, supra note 38, at 254-59.
66. Falwell v. Flynt, 797 F.2d 1270, 1275 (4th Cir. 1986) ("When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove").
67. Id. ("The first of the four elements of intentional infliction of emotional distress . . . [intentional or reckless misconduct] is precisely the level of fault that New York Times requires in an action for defamation") (emphasis added).
in the prima facie case for an intentional infliction of emotional dis­
tress claim provided the protection to the defendants that the Consti­
tution had previously been found to demand in the libel context. While the reasoning process used by the court may appear to be valid, careful reflection reveals that the process is built on faulty premises.

The court of appeals opinion attaches undue significance to the level of culpability that was declared in the Sullivan line of cases to be a constitutional prerequisite to recovery on a defamation claim by a public official or public figure plaintiff. Finding that same level of culpability in the emotional distress action, the court reaches the dual conclusion that the kind of culpability required by Sullivan need not be proven in an emotional distress action and that the proof of the emotional distress action's kind of culpability serves the same constitutional protection function as the Sullivan "actual malice" requirement. The first of those conclusions, despite the Supreme Court's rejection of it, is arguably correct, but for reasons other than those relied on by the Fourth Circuit. The second conclusion is incorrect, and provides an opportunity to begin reshaping the constitutional protection afforded to an emotional distress defendant.

The significance of the Sullivan line of cases extends beyond the mere fact that a heightened fault requirement was attached to what had traditionally been a strict liability tort claim. Of much greater significance is the type of fault that was adopted as a constitutional prerequisite to recovery. "Actual malice" is a state of mind that displays fault regarding the truth or falsity of the communication. The Supreme Court tailored this type of fault element to meet the specific concerns that were implicated by the finding of liability in the lower courts in the Sullivan case. Of special concern was the possibility that liability for innocent misstatements of fact would make the publisher the guarantor of the accuracy of what was said, which in turn would create a climate in which the publication of important statements would be "chilled" if the accuracy of those statements could not easily be guaranteed by their publisher. In order to reduce the deterrence to publication posed by an application of the tort law rules applied by the state courts in Sullivan, the Supreme Court decided that liability could only be imposed on a defendant who had been proven by clear

68. Id. ("We . . . hold that when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless miscon­
duct has proximately caused the injury complained of").
69. See supra note 65.
70. See supra note 66.
71. See infra notes 85-88 and accompanying text.
and convincing evidence to have published with knowledge of falsity or with reckless indifference to the truth or falsity of the communication.73 While that “actual malice” finding may be characterized as intent or recklessness, and thus apparently making it analogous to an intent or recklessness element of a different tort action, the specific nature of the “actual malice” state of mind needs to be recognized as constituting “intent to misstate a fact” or “recklessness as to the truth or falsity of a fact.”

The culpability element of the intentional infliction of emotional distress tort is substantially different from the “actual malice” requirement of the Sullivan line of cases. Intent in this context refers to the intent to produce the consequence of emotional distress, and ought to be satisfied with proof of either of the Restatement versions of intent—a purpose to cause such a consequence or a knowledge that the consequence was substantially certain to occur.74 Recklessness in this context is a heightened version of negligence, requiring proof from which it can be inferred that the plaintiff acted in spite of a high probability that emotional distress would be produced by the speech.75 Nothing in the emotional distress tort necessarily involves a culpable state of mind with regard to the truth or falsity of a statement of fact. Conversely, the state of mind that would constitute intent or recklessness in the emotional distress context would not necessarily be relevant to the issue of “actual malice” in the defamation setting. “Actual malice” focuses exclusively on fault as to falsity, while the intent and recklessness elements of other tort claims are concerned with fault as to the harmful consequence. Reliance as sufficient protection on proof of that latter kind of fault, which would be an intent or recklessness with regard to injuring the reputation of a plaintiff, was rejected in the Sullivan line of decisions in favor of the focus on the state of mind with regard to the truth or falsity of the communication.76

Once it is understood that there is a significant difference between “actual malice” and the culpability element of the emotional distress tort claim, two questions remain. First, does the “actual malice” requirement make sense as a prerequisite to recovery for emotional dis-

73. Id. at 279-80. The Sullivan case dealt only with defamatory speech that was alleged to be about the official conduct of a public official. Later extensions of the “actual malice” rule to litigation arising from defamatory statements about other types of plaintiffs are described in LeBel, supra note 38, at 254-59.
74. See RESTATEMENT (SECOND) OF TORTS § 8A (1965).
75. See id. at § 500.
76. The distinction is often drawn in the cases as a difference between “actual malice” as defined in Sullivan and what now needs to be referred to as “common-law malice,” in the sense of ill will toward, or intent to injure, the plaintiff. See, e.g., Cantrell v. Forest City Publishing, 419 U.S. 245, 251-52 (1974) (distinguishing “actual malice” from “common-law malice”).
tress? Because the Supreme Court answered that question affirmatively, the discussion of that issue will be taken up in the context of a comprehensive analysis of that Court's decision. The second question is whether the court of appeals was correct in its conclusion that the culpability element of the emotional distress claim provides sufficient protection for the first amendment interests liability under this tort theory threatens. Arriving at the proper negative answer to that question requires a shift from the Fourth Circuit's narrow focus on what seems to be the same level of culpability shared by the two fault standards to an inquiry recognizing that different consequences might very well flow from requiring proof of different types of culpability.

The previously established distinction between fault-as-to-falsity and fault-as-to-harmful-consequence is important not simply as a matter of academic interest. Its significance lies in the functional role that a culpability requirement plays in establishing the contours of a tort claim. The "actual malice" fault element injected by the Sullivan line of cases into public plaintiff defamation actions focuses on the defendant's state of mind regarding the truth or falsity of the communication as a means of protecting constitutionally valuable true speech that might be deterred by a strict liability rule. Imagining a spectrum (see Figure 1) in which true speech is divided from false speech, the Sullivan court was concerned about protecting and promoting all the constitutionally valuable speech on the true side of the dividing line. In order to provide that protection, false speech is also constitutionally protected as long as the defendant did not have the requisite degree of culpability about the truth or falsity of what was said. From the standpoint of the publisher, therefore, what is protected is innocent—or in the case of speech about a public official or a public figure, negligent—misstatements of fact, even though those misstatements have no constitutional value. If the goal is one of encouraging, or at least not discouraging, true speech, then it makes some sense to have a culpability element that makes liability turn on the one thing that a po-

78. See infra notes 85-93 and accompanying text.
80. This is represented on Figure 1 as the speech to the left of the line dividing "no liability" from "liability" and to the right of the line dividing "true speech" from "false speech."
81. The Supreme Court has stated explicitly that false statements of fact have no constitutional value. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). For a suggestion that this view is not necessarily correct, see LeBel, supra note 38, at 290 n.209. See also L. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 53-58 (1986).
A potential defendant can control, which is that defendant's own state of mind regarding the truth or falsity of what is being communicated.

**FIGURE 1.**

**Constitutional Protection of Defamatory Speech**

<table>
<thead>
<tr>
<th>no liability</th>
<th>liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>innocent or negligent</td>
<td>“actual malice”</td>
</tr>
</tbody>
</table>

The kind of culpability involved in the intentional infliction of emotional distress—either an intent to cause emotional distress or recklessness about the production of that result—does not protect constitutionally valuable speech as much as the fault-as-to-falsity rules of the *Sullivan* line of cases. Some of the most important speech in our society may in fact be uttered with just the kind of culpability that is required for the emotional distress tort action. The recognition of this fact is undoubtedly what led the Supreme Court to comment on its inability to distinguish vehement political rhetoric and caustic satire from *Hustler*’s attack on Falwell.82

To look at the matter of potential liability once again from the standpoint of the publisher, the Fourth Circuit’s rule protects speech that innocently or negligently produces emotional distress. The faulty parallel between the Fourth Circuit’s culpability decision and the effect of the “actual malice” rule is easily demonstrable. As described above, the “actual malice” rule attempts to prevent the chilling of true speech by extending constitutional protection to some false speech. The Fourth Circuit’s rule operates to protect some speech that (innocently or negligently) causes emotional distress. If the Fourth Circuit is correct in its assertion that the relevant concern is the level of culpability, so that the intent or recklessness fault element of the emotional distress action is a legitimate substitute for the “actual malice” re-

82. 108 S. Ct. at 881.
quirement, the equivalent spectrum in this context (see Figure 2) would depict the difference between speech that does not cause emotional distress and speech that does. To depict the liability possibilities along that spectrum would make it appear that the constitutional value the Fourth Circuit’s rule protects would be the publication of speech that does not cause emotional distress. In order to prevent the chilling of some of this kind of speech, the Constitution would be seen as protecting speech that does cause emotional distress, as long as it does so only innocently or negligently. This faulty parallel to the Sullivan rationale for the “actual malice” rule suggests the need to look for an alternative explanation of the relationship between first amendment interests and the threat posed by unrestrained liability under the intentional infliction of emotional distress tort claim.\textsuperscript{83}

FIGURE 2.

*The Flawed Protection Scheme of the Fourth Circuit’s Decision*

This exercise in tracing the reasoning behind the “actual malice” requirement and in finding such reasoning inapplicable to the emotional distress context reveals that the Fourth Circuit’s focus only on the levels of culpability involved in an intentional tort and in the “actual malice” standard is incomplete. A constitutional fault rule for the emotional distress tort action that does not focus on the kind of fault as well as the level of fault does not serve the same protective function as the “actual malice” rule of the law of defamation. Although the Fourth Circuit’s method of drawing a parallel to the Sullivan fault standard is unsuccessful, the attempt to construct a parallel provides an instructive lesson for the development of a properly constitutional-

\textsuperscript{83} An alternative model is depicted in figure 3, *infra* p. 352.
ized emotional distress tort, that is pursued below.\textsuperscript{84} The analysis of the Fourth Circuit's opinion, however, demonstrates that a fault element focusing only on the state of mind of the defendant with regard to causing harm to the plaintiff provides an insufficient shield for speech that should receive constitutional protection.

What emerges is a conclusion that the Court of Appeals asked the wrong question. Instead of asking whether the intentional infliction of emotional distress tort action required the same level of fault as the constitutionalized public plaintiff defamation action, the court should have asked whether the intentional or reckless misconduct culpability element of the emotional distress action was as effective at protecting constitutionally valuable speech as the "actual malice" requirement. Because the answer to that question is no, the Supreme Court was correct in rejecting the Fourth Circuit's reliance on the fault element of the emotional distress action.

However correct the Supreme Court was in rejecting the rationale for the Fourth Circuit's decision, the Court's performance was marred by its failure to appreciate the problems created by adopting a fairly uncritical attitude toward incorporating into the emotional distress context the specific details of the constitutional protection developed for defamatory speech. The Supreme Court held that Falwell could recover only if he proved that a false statement of fact had been published with "actual malice."\textsuperscript{85} That holding distorts the treatment of the issues presented to the Court in two different ways. First, the kind of fault embodied in the "actual malice" standard has no particular relevance to an emotional distress action. As already explained, fault as to falsity has no necessary relationship to intent or recklessness with regard to the infliction of emotional distress.\textsuperscript{86} Furthermore, the conceptual thrust of the emotional distress claim does not depend on any showing of the communication of false statements of fact. As a result of the grafting of a new "false factual statement" requirement onto the emotional distress action,\textsuperscript{87} the Court has created a hybrid tort action that inadequately protects individuals from harmful conduct designed to injure them.

Second, the Court's implication that a false statement of fact is the only kind of speech that is actionable is unwarranted. The Court has transformed a description of the kind of speech that is conditionally constitutionally privileged (that is, defamatory statements) into an

\textsuperscript{84} See infra notes 140-54 and accompanying text.

\textsuperscript{85} Falwell, 108 S. Ct. at 882.

\textsuperscript{86} See supra notes 72-76 and accompanying text.

\textsuperscript{87} The Fourth Circuit was correct in recognizing that the application of the "actual malice" requirement would accomplish this. See Falwell v. Flynt, 797 F.2d 1270, 1275 (4th Cir. 1986).
exhaustive description of the kind of speech that might have liability attached to it. Such a transformation must rest at least implicitly on a conclusion that any harm caused by speech other than a false statement of fact must necessarily be less significant than the social value that is attached to that speech. While that conclusion may legitimately be reached on a case-by-case evaluation, this is not an appropriate instance or the proper level of abstraction for the Court to use the categorical determinations employed elsewhere in the constitutionalization of speech torts. Given the faulty premises from which the Court's holding emerged, its opinion is a matter of limited precedential value, largely confined to the facts of the *Falwell* case, until the Court returns to the issue of how to set first amendment restrictions on recovery for the intentional infliction of emotional distress.

The Supreme Court's decision to incorporate the "actual malice" standard developed in the defamation context into the emotional distress tort action represents nearly as poor an appreciation of how that standard functions as was displayed by the Fourth Circuit. On that point, the opinion of Justice White concurring in the judgment in *Falwell* is surely correct. What is missing from that concurring opinion, however, is any explanation of why "the decision in *New York Times v. Sullivan* . . . has little to do with this case." The reason why the *Sullivan* decision has little to do with the *Falwell* case is simple: the emotional distress claim asserted by Falwell is sufficiently different from a defamation claim that the rules adopted for defamation claims do not fit in the emotional distress context. What the Court failed to grasp was the nature and the significance of that difference. The Court's basic error was treating alike categories of claims that are not alike.

Correcting the Court's error requires a careful consideration of the distinction drawn earlier between redundant and nonevasive alternatives to a defamation claim. Before explaining how to apply the distinction between redundant and nonevasive alternatives, however, it

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88. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) (refusing to strike the balance between "needs of the press and the individual's claim to compensation" on a case-by-case basis, and instead laying down "broad rules of general application"). In this case, the implicit *Falwell* rule—to the effect that there can be no liability for anything that is not a false statement of fact—is adopted without even the broad type of balancing that the Court performed in *Gertz*. The alternative approach described below proceeds from the premise that individual harm may outweigh the value even of speech that does not communicate a false statement of fact. The important inquiry is whether particular speech has value. That determination ought not to be made on the basis of a general dichotomy between false statements of fact and all other speech.

89. 108 S. Ct. 876, 883.

90. *Id.*

91. *See supra* notes 49-50 and accompanying text.
would be helpful to provide a preliminary statement of the general rules that should be followed.

Alternative tort claims that are properly characterized as redundant ought to be treated in the same way. In this setting, that rule means that the pleading of alternative claims should be collapsed into one claim, so that the highest level of constitutional protection recognized for any of the alternatives ought to govern the outcome of all the alternatives. Nonevasive alternatives, on the other hand, ought not to be treated as identical. Accordingly, when faced with a nonevasive alternative to a defamation claim the Court should determine what sort of constitutional restriction to impose on that alternative tort claim, rather than simply transfer the defamation restrictions to a context in which they do not fit.

For those general rules to have any utility, it is necessary to be able to identify which type of alternative is present in a particular tort action. The purpose of the distinction is to separate those nondefamation tort claims that are mere evasions of constitutional restrictions from those that are something more. It should be understood that the last phrase is deliberately "something more," rather than "something else." A nonevasive tort claim is, of course, on one level a way around the barriers that stand between the plaintiff and recovery. If the only factor in classifying the alternatives was the intent of the plaintiff to recover under a theory that avoids barriers associated with another theory, then all nondefamation claims arising out of a set of facts in which a defamation claim has some minimum plausibility would be classified as redundant. As used in this context, however, the distinction between redundant and nonevasive claims refers not to the intent to find another way to recover, but rather to the presence of a factual predicate for a claim that does not simply correspond to the defamation predicate.

As mentioned earlier, fault-based tort claims share two general features that are relevant to the distinction suggested here. First, they consist of a particular kind of wrongful conduct, and second, they produce a particular kind of invasion of a legally protected interest. The difference between redundant and nonevasive tort claims might be expressed in terms of those two features in this way: If the conduct and the harm asserted in multiple tort claims are identical, then multiple tort claims can be classified as redundant despite the ability to charac-

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92. There is an implicit assumption in the statement in the text that the higher levels of constitutional protection are associated with the defamation claims. To the extent that the assumption proves to be ungrounded, see infra notes 98-104 and accompanying text, the general rule stated in the text might alternatively be read in a way that substitutes "most carefully thought out" for "highest."

93. See supra notes 51-54 and accompanying text.
terize one or more elements of the tort claims in different ways. A couple of examples will illustrate the distinction, which can then be applied to the facts of the *Falwell* case.

Suppose that my name is put forward as a nominee for appointment as a federal judge, and that a faculty colleague writes a letter to the editor of the local newspaper asserting that I have been using cocaine in the faculty lounge. That letter contains a false (trust me!) and defamatory statement, published to a third person, capable of doing great damage to my reputation. The wrongful conduct of my colleague consists of publishing a false statement capable of causing injury to my reputation, which is the gravamen of the tort of defamation.94 The harm caused by that conduct can consist of a number of different effects, all of which the law of defamation recognizes as legally cognizable harms. Those effects include such matters as reputational injury, special damages (in the sense of actual loss attributable to the reputational injury—the withdrawal of the nomination, for example), and actual injury other than reputational injury (such as emotional distress).95

The facts underlying my defamation claim in this hypothetical also may be characterized as extreme and outrageous conduct by my colleague that might cause me to suffer severe emotional distress. An intentional infliction of emotional distress claim would nevertheless be classified as redundant in this instance for two reasons. First, exactly the same conduct on the part of the defendant that serves as the basis of the defamation claim also serves as the basis of the emotional distress claim. On this occasion, the extreme and outrageous conduct by the defendant consists of the publication of the false statement capable of causing injury to my reputation. Second, the law that governs the disposition of the defamation claim allows me to recover for the interference with my interest in freedom from emotional distress, even if no actual injury to reputation is established. Even if I cannot prove that my reputation was injured, damages for emotional distress are a compensable type of actual injury for which the Supreme Court has found recovery to be constitutionally permissible.96 The difference between the defamation claim and the emotional distress claim lies first in the characterization of the defendant's conduct in a particular way, that is, as extreme and outrageous rather than as publication of a defamatory statement. The second difference between the emotional distress claim and a defamation claim lies in the identification of an indepen-

94. See supra note 53 and accompanying text.
96. See supra note 54.
dently protectable legal interest in freedom from emotional distress rather than just the interest in the preservation of reputation. Under the first of the general rules proposed above, because the alternative claims can be characterized as redundant, the emotional distress claim should be collapsed into the defamation claim, and the liability of the defendant determined under the constitutional restrictions associated with defamation.

Another example of how to identify a redundant alternative tort claim involves a situation in which the plaintiff asserts a false light invasion of privacy claim. Commentators and courts have attempted to explain the distinction between a false light claim and a defamation claim arising from the same conduct. The more plausible attempts to distinguish the claims point to the difference between an interest in privacy and an interest in reputation.97 As long as the two characteristic factors identified above are present, however, it would be appropriate to characterize the false light claim as a redundant alternative. That characterization follows from the identification of identical conduct on the part of the defendant (publication of a false statement that tends to injure the reputation of the plaintiff) which typically underlies both claims, and from the determination that the different interest invasion protected by the false light claim (the harms associated with having one's privacy invaded by being presented to the public as something other than what one is) is compensable within the defamation claim. In circumstances in which a false light claim can be characterized as a redundant alternative to a defamation claim, there is no reason to permit the false light privacy claim to operate as a means of avoiding the constitutional protections that have been developed for defamatory speech.

Further evidence of the analytical utility of the distinction between redundant and nonevasive alternatives is provided by the Supreme Court's treatment of the constitutional restrictions imposed on false light claims. At the time of its first consideration of the false light claim,98 the Court had adopted the "actual malice" rule for public official defamation plaintiffs,99 but had yet to consider the various other issues that flowed from that initial decision.100 At that time, the

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Court extended to the false light privacy defendant the same constitutional protection that it had given to defamation defendants, namely, the restriction of liability to a claim based on a communication that was published with "actual malice." \(^{101}\) Subsequently, distinctions among types of plaintiffs \(^{102}\) and kinds of speech \(^{103}\) were introduced into the defamation context as bases for the adoption of different sorts of constitutional rules, but similar distinctions have yet to be adopted by the Supreme Court in the false light context. \(^{104}\)

The two examples discussed so far have presented alternative tort claims that should be characterized as redundant. Under the rule proposed here, those claims should be subjected to the constitutional restrictions associated with the defamation claim. \(^{105}\) What remains for consideration is the hypothesis that the emotional distress claim in the Falwell case is not a redundant alternative to a defamation claim. As a nonevasive alternative, the emotional distress claim would therefore require the development of its own constitutional regime distinct from the defamation claim.

A redundancy characterization requires the alternative tort claim to be based on the same wrongful conduct and to cause a kind of harm that is compensable within the framework of a defamation claim. For a defamation claim to be available, the defendant must have published a false statement of fact capable of injuring the reputation of the plaintiff. \(^{106}\) According to the finding of the jury in the Falwell case, that is not what the defendants did in this case. The jury's finding, which was accepted by both the court of appeals and the Supreme Court, was that the published statements could not reasonably be understood to be statements of actual facts or events. \(^{107}\) If that is true, then the state-

\(^{101}\) Time, Inc. v. Hill, 385 U.S. at 390.

\(^{102}\) See supra notes 73, 100.

\(^{103}\) See supra note 57.

\(^{104}\) The latest false light decision of the Court was Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974). Because the liability of the defendant in that case was based on the plaintiff's presentation of evidence that was sufficient to satisfy the "actual malice" standard of culpability, Cantrell did not present the Supreme Court with an occasion for consideration of whether the first amendment prohibited a standard permitting recovery on a lesser showing of culpability to govern some false light claims.

\(^{105}\) The normative suggestion that follows from the drawing of the distinction between redundant and nonevasive alternatives calls for a reform of the current disparity between the constitutional restrictions attached to defamation claims and those attached to false light claims. Different constitutional rules for those redundant alternative claims need to be eliminated or independently justified. The false light experience provides an interesting example of how the Supreme Court could employ the analytical method offered here to reach a result—equivalent constitutional rules for two tort claims—that is proper in the false light context but improper in the emotional distress context presented in Falwell.

\(^{106}\) See supra note 53.

\(^{107}\) See supra note 3.
ments should not be characterized as capable of injuring the reputation of the plaintiff. Common sense suggests that a plaintiff's reputation would not be affected by statements that the jury found no reasonable person could take to be true statements about that plaintiff. Given the finding of the jury, therefore, the wrongful conduct of the defendants must have consisted of something other than the publication of false statements of fact capable of injuring the reputation of the plaintiff. Because a defamation claim was not available in this situation, it would be inappropriate to consider the emotional distress tort claim to be a redundant alternative to a defamation claim. If the claim is nonevasive rather than redundant, then under the rule proposed above the Court should consider what type of constitutional restrictions ought to be placed on this claim.

Earlier in this section of this article, two questions were identified as being presented by the Falwell case. First, should the "actual malice" rule apply to emotional distress actions? The court of appeals correctly said no, while the Supreme Court erroneously said yes. Second, does the fault element of the emotional distress tort provide adequate protection for valuable speech? The court of appeals incorrectly said yes, while the Supreme Court's affirmative response to the first question implied that it would reach the proper negative answer. The remaining task of this article is to demonstrate how each of those two questions could have been answered correctly by adopting a comprehensive explanation of why and how the first amendment affects recovery for the intentional infliction of emotional distress.

III. A PROPERLY CONSTITUTIONALIZED EMOTIONAL DISTRESS TORT

Before considering the manner in which the emotional distress tort ought to be constitutionalized, it is useful to pursue the question of whether there was any need to resort to constitutional decisionmaking in the Falwell case. The first amendment comes into play in this sort of situation only if free speech interests are threatened by liability imposed on a defendant as a matter of state tort law. One might easily argue that because the plaintiff's tort claim should have been held to be insufficient as a matter of tort law, the Falwell case need never have been presented to the United States Supreme Court. For that reason, Falwell is distinguishable from such landmark first amendment cases as New York Times Co. v. Sullivan. In Sullivan, the threat to first amendment interests was posed by the application of a body of state

108. See supra notes 77-78 and accompanying text.
tort law as it was understood and fairly routinely applied by the state courts. Because no error of state law was committed in the *Sullivan* case, the options for protecting the first amendment interests were limited to changing state law (a matter for the state legislature or judiciary) or to finding some federal constitutional restriction to impose on recovery under the state law. Given the reasons to suspect that the threat to first amendment interests was in line with and not just coincidental to the state policy of that time, the Supreme Court correctly stepped in to impose constitutional limitations on the tort law under which the plaintiff recovered.

The *Falwell* case presents a significantly different scenario. First, no state court had ever decided the tort law issues involved in Falwell's intentional infliction of emotional distress claim. The case was filed in a federal district court, with the appeal from the judgment in favor of Falwell proceeding naturally to the federal court of appeals. Thus there was no definitive statement comparable to the Alabama Supreme Court decision in *Sullivan* approving the application of state law to impose liability on the defendant. Second, the emotional distress tort claim Falwell asserted had only fairly recently been recognized by the state supreme court. As a result, there was relatively little authority from which the federal court could predict what the Virginia state courts would do with that sort of claim. Third, there is absolutely no basis from which to infer that hostility to first amendment interests was part of the public policy or the political climate prevailing within Virginia at the time of the *Falwell* litigation as it was in Alabama at the time of *Sullivan*. Finally, and most significantly, the decision by the federal district court to allow the plaintiff to recover on an emotional distress claim imposed as undemanding an application of the state tort law's elements of proof as one is likely to find.

The intentional infliction of emotional distress action recognized by the Supreme Court of Virginia requires the plaintiff to prove the defendant's conduct caused the plaintiff to suffer severe emotional dis-

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110. The trial court's judgment based on the verdict for the plaintiff in *Sullivan* was affirmed by the state supreme court. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962).


112. See *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974). This case was decided by the Supreme Court of Virginia in December 1974. Falwell's claim was filed in October 1983.
tress. This standard should be applied in a more demanding fashion than it was in Falwell. In the leading case in which the state supreme court recognized the tort claim, Womack v. Eldridge, an investigator working for a lawyer who was defending a client accused of child molesting tricked her way into the plaintiff's home and took a photograph of the plaintiff. That photograph was then shown to the victims of the molestation, who were asked whether the plaintiff was the man who had molested them. The victims testified that the plaintiff was not the person, but the authorities nevertheless pursued the issue of whether the plaintiff was involved in the offense. At the trial of his emotional distress claim, the plaintiff testified that he had "suffered great shock, distress, and nervousness," that he "suffered great anxiety as to what people would think of him," that he feared that he would be accused of child molesting as a result of the defendant's conduct, and that he "had been unable to sleep while the matter was being investigated." The state supreme court's opinion in that case also notes that the plaintiff became "emotional and incoherent" while he was testifying. In addition, the plaintiff's wife testified that the plaintiff "experienced great shock and mental depression" as a result of the incident.

The record in the Falwell case on the issue of the severity of the plaintiff's emotional distress is significantly less compelling than in Womack. The Fourth Circuit excerpt from the plaintiff's testimony at trial speaks of "anger" that turned into "a more rational and deep hurt." A colleague of the plaintiff testified that the plaintiff's "ability to concentrate on the myriad details of running his extensive ministry was diminished." Absent is any evidence that even comes close to being equivalent to evidence of emotional distress that the state courts had previously characterized as severe. Hence, the district court in Falwell could have granted a directed verdict in favor of the defendants or entered a judgment notwithstanding the verdict on the emotional distress claim. Failing that, the appellate courts could have

113. According to the Restatement, "[t]he law intervenes only where the [emotional] distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity." Restatement (Second) of Torts § 46 comment i (1965).
115. Id. at 339-40, 210 S.E.2d at 146-47.
116. Id. at 340, 210 S.E.2d at 147.
117. Id.
118. Id.
119. See 797 F.2d at 1276.
120. Id. at 1277. Rodney Smolla's recent book on the case doesn't disclose any more compelling evidence of the emotional distress suffered by Falwell. See generally R. Smolla, supra note 18.
set aside the judgment for the plaintiff on the basis of the insufficiency of the evidence to satisfy this element of the tort action. Furthermore, if the federal courts were unsure how the Virginia state courts would have characterized the evidence in this case, they had the option of using the state’s recently adopted certification procedure. Employing the certification option might have enabled the federal courts to avoid the constitutional issue altogether by giving the Supreme Court of Virginia the opportunity to rule that Falwell’s emotional distress claim asserted by Falwell failed as a matter of state tort law.

_Falwell_ is thus distinguishable from a case such as _Sullivan_, in that first amendment interests could have been adequately protected by an application of state tort law that was arguably both fairly easily obtainable and more demanding than the application that occurred in the trial and appellate stages of the litigation. Nevertheless, because it is conceivable that an emotional distress action might be employed in the manner in which the Alabama libel action was used in the _Sullivan_ litigation (i.e., to cast a deliberate chill on important speech), this article concludes by fixing the contours of a properly constitutionalized action for the intentional infliction of emotional distress.

A useful preliminary step may be the identification of the basis for allowing recovery on the underlying tort theory. As described earlier, the independent action for the infliction of emotional distress is a relatively recent product of tort law. A consideration of why the emotional distress tort action is justified at all might make the development of the first amendment restrictions on that action easier to accomplish.

One of the best scholarly treatments of the intentional infliction of emotional distress action is found in an article by Professor Daniel Givelber, in which he asserts the “major mission and justification”

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121. Independent appellate review of some constitutional issues in defamation cases has been explicitly approved by the Supreme Court. See _Bose Corp. v. Consumers Union of United States_, 466 U.S. 485 (1984). Under the _Bose_ standard, the appellate court might have taken a very demanding look at the evidence that supported a liability judgment with first amendment implications.

122. VA. CONST. art. VI, § 1; VA. SUP. CT. R. 5:42. This procedure allows federal courts to certify to the state supreme court questions of state law that might dispose of the federal case without requiring a consideration of federal constitutional issues that might otherwise be presented. The practice and the philosophical underpinnings of certification are described in LeBel, _Legal Positivism and Federalism: The Certification Experience_, 19 GA. L. REV. 999 (1985).

123. See supra notes 22-23 and accompanying text.

for the tort is "to provide the basis for achieving situational justice" when a party in a disadvantageous position in a preexisting relationship fails to adhere to "a basic level of fair procedure and decency." Discerning in the cases a use of the tort as the basis for providing something on the order of a "'private due process' in dealings between unequals," Professor Givelber finds the "results more unpredictable, and doctrine virtually nonexistent" when the parties do not have a contractual relationship.

At the heart of the Givelber conception of the emotional distress tort is the sense that the tortious conduct consists of the abusive exercise of power that the defendant holds over the plaintiff. Even in the noncontractual sphere, however, that conception of the tort could have considerable explanatory power. In order to arrive at the moral foundation of this tort claim, one simply needs to ask what it is that is abusive about that exercise of power. An answer that places this tort claim in a broader category of moral reasoning is that the wrong consists of treating the plaintiff as a means to an end of the defendant, rather than as an individual who is for that reason alone entitled to respect and dignity. In the emotional distress context, the abuse consists of the defendant's use of the plaintiff's emotional well-being as a means to further some private end of the defendant.

A plaintiff-as-means understanding of the basis for condemnation of the defendant's conduct is likely to prove much too sweeping as a basis for liability. Suggesting that a defendant faces tort liability any time that the defendant acts in a way that treats the plaintiff as a means to the defendant's end would bring tort law into play in what would undoubtedly prove to be too numerous instances of a variety of common situations. Such an understanding can, however, serve as the cornerstone from which to evaluate and construct a constitutionalization scheme for the elements of the tort of intentional infliction of emotional distress. Considering the tort claim in the light of why the defendant's conduct is wrong might provide a core of coherence around which a workable body of law can be built.

To constitutionalize the emotional distress tort action in the same manner as the defamation and privacy torts have been constitutional-

125. Id. at 75.
126. Id. at 63.
127. Id. at 43.
128. Id. at 63.
129. Lee Bollinger's work on first amendment theory notes the tendency of free speech proponents to undervalue the harm that speech can cause. See, e.g., L. BOLLINGER, supra note 82, at 57 passim. One of the purposes of the suggestion in the text is to take seriously the claims of individuals to be free from emotional distress caused by the speech of other people.
ized in the last quarter-century, one would examine the existing elements of the tort, looking for hooks on which to hang first amendment protection. That search would attempt to identify those elements of the tort claim that correct abuses in the application of the tort action and defend the constitutional values that underlie the first amendment. The falsity elements of defamation and false light privacy claims have served that function in the context of promoting the publication of true statements of fact, but as explained earlier, the intentional infliction of emotional distress claim has no such falsity element. However, there are two elements of the emotional distress claim that can serve as the basis for the incorporation of constitutional restrictions on liability—the elements of damages and conduct.

As suggested earlier, the damages element of the emotional distress tort is the most promising basis on which to dispose of the claim in the *Falwell* case. If the evidence in a particular case is determined to be sufficient to satisfy the state tort law requirement that a plaintiff suffer severe emotional distress, as it was held to do by the trial and intermediate appellate courts in *Falwell*, then making this element a matter of constitutional significance offers a way to place first amendment restrictions on the tort recovery. Furthermore, this technique would not be a radical departure from the way in which the first amendment has been held to limit recovery in other tort contexts. Constitutionalizing the damages element of a speech tort is a tactic adopted by the Court in the *Gertz* case. There the Court held that presumed damages and punitive damages for defamatory publications could only be recovered on a showing of "actual malice." 

Treating the damages element of the emotional distress tort as a matter of constitutional significance has a number of advantages. First, the Court could establish a constitutional threshold level of harm that plaintiff must cross before the tort claim can succeed. In this way, trivial interferences with emotional tranquility can be screened out before claims are allowed to get to juries. Second, the

130. Those elements are:
   1) intent or recklessness;
   2) extreme and outrageous conduct;
   3) proximate causation; and
   4) severe emotional distress.

See supra notes 25-28 and accompanying text.

131. See supra notes 113-22 and accompanying text.

132. See 797 F.2d at 1276-77.


134. The Court subsequently held that the *Gertz* restriction on recovery of presumed and punitive damages applies only in cases in which the defamatory communication involves a matter of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).
damages element might be subjected to the same heightened scrutiny of appellate review as the "actual malice" requirement in defamation cases. 135 Such a standard of review would encourage trial courts to be sure that a plaintiff has adequate evidence of the element in question, and would allow appellate courts to step in as a further safeguard should the trial courts let the application of the constitutionalized damages element slip below the requisite level of proof. Third, the constitutionalized damages element might be subjected to a heightened standard of proof, again following the model of the "actual malice" requirement of the defamation tort action. 136 Insistence on proof of the severity of the plaintiff's emotional distress by clear and convincing evidence would not only act as a further screening device for less than compelling cases but would also give the trial court an opportunity to dispose of the claim relatively early in the litigation process. 137

The multiple facets of this first step of constitutionalizing the emotional distress tort action could serve as a basis for a preliminary judicial evaluation of recovery for severe emotional distress in the speech-about cases which pose the greatest threat to first amendment values. Recovery in such cases should be limited to instances in which the plaintiff has introduced clear and convincing evidence that the distress caused 138 by the defendant's conduct was, in some meaningful sense, disabling. Absent such evidence, the emotional distress claim should be dismissed as a matter of law.

Expert testimony from a health care professional could be introduced to establish that the emotional distress has reached the required level, but medical testimony should not be made a necessary element of proof. A plaintiff should simply be required to demonstrate in some credible fashion that the defendant's conduct so disrupted and interfered with the plaintiff's ability to function in normal ways that the emotional distress was, as a practical matter, virtually indistinguishable from a physical injury which forces a change in the plaintiff's activity. Indeed, a sociologist who has worked closely with lawyers in

137. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (courts are to apply the clear and convincing evidence standard of proof when evaluating sufficiency of evidence to survive a motion for summary judgment).
138. The Virginia law of negligent infliction of emotional distress in cases in which there is no physical impact with the body of the plaintiff requires that the causal connection between the defendant's conduct and the emotional distress must be established by clear and convincing evidence. See Hughes v. Moore, 211 Va. 27, 197 S.E.2d 214 (1973). A court concerned about the ease with which emotional distress might be proved to be "severe" might use the causation element as another hook on which to hang both the heightened standard of proof and the independent appellate review protective devices employed in the defamation context.
trying to understand the nature of the traumatic response to a disaster refers to the possibility of "a kind of psychological concussion." 139 This disabling distress standard could be applied in a manner that is substantially more demanding than whatever standard the lower courts thought they were applying in the Falwell case. Under this standard, the testimony of anger and temporary distraction offered by Falwell and his associate would fall short of establishing the disabling level of distress required for recovery.

As part of the constitutionalization of the damages element of the emotional distress tort, it ought to be made clear that the "bootstrap" technique approved in the Restatement (Second) of Torts should not be employed. According to the Restatement comments to § 46, the fact that the distress is severe "must be proved; but in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed." 140 The inference of one tort element from the existence of another is not unique to the emotional distress action. 141 However, in a case in which significant constitutional interests might be placed in jeopardy, courts ought to make it clear that the plaintiff must present convincing evidence of each of the tort elements—particularly those that are being treated as matters of constitutional significance.

The damages element of the emotional distress action is the proper place to begin an inquiry into the manner in which a protection of constitutional interests can be introduced into the tort claim. Once the plaintiff has established that he or she has suffered disabling harm and that the defendant intended to cause such harm, then the plaintiff should be entitled to compensation unless the harm was justified or privileged. This claim of entitlement to compensation, while not carrying with it an imposition of a formal burden of proof on the defendant, 142 reflects the moral claim that the plaintiff should not have to be the uncompensated victim of an intentional infliction of harm without a good reason for imposing the burden of that injury on the plaintiff.


140. Restatement (Second) of Torts § 46 comment j (1965).

141. An example of this bootstrapping of elements is found in the malicious prosecution action. Among the elements of the tort claim are the initiation of criminal proceedings without probable cause and primarily for a purpose other than bringing an offender to justice (malice). See Restatement (Second) of Torts § 653 (1977). The Restatement allows the lack of probable cause to serve as evidence of an improper purpose, id. § 669, but an improper purpose is not evidence of the lack of probable cause, id. § 669A.

142. See, e.g., Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986) ("a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages [for defamation] from a media defendant").
A claim by a person who has actually suffered severe emotional distress, at the hands of a defendant who intended that result, deserves to be taken seriously by the courts.

The second of the emotional distress tort's elements that ought to be made a matter of constitutional significance is requiring the plaintiff to prove that the defendant's conduct can be characterized as "extreme and outrageous." Chief Justice Rehnquist concluded that this element could not serve as the basis for distinguishing constitutionally acceptable liability from impermissible infringements on first amendment values. As the element was applied in the Falwell case, the Chief Justice may have been correct. Simply stating that conduct must be extreme and outrageous before attaching liability to the conduct would not be an adequate measure to extend first amendment protection to constitutionally valuable speech. To the extent that the lower court opinions in the Falwell case support that view, they were properly rejected by the Supreme Court. However, in examining the relationship between the first amendment and this tort action, the task for the Court here is the same as it was in connection with the other speech torts that have been constitutionalized. What the Court needs to do is consider whether the element can be applied in a manner that serves its protective purpose while still retaining an ability to accomplish the tort law aims associated with the action.

One way in which this element could be modified in order to still distinguish permissible from impermissible liability situations would be to pour some content into the nebulous terms "extreme" and "outrageous." In this instance, the Restatement (Second) of Torts provides almost no help to a court trying to establish guidelines for litigation of emotional distress claims that impinge on constitutional interests. The Restatement's treatment of this element depends more on the factfinder's having an intuitive reaction of a particular kind than on the factfinder reaching an intellectual conclusion. According to the Restatement, this element is satisfied when "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Proof that the defendant's conduct sinks to this level is described in the Restatement in a way that lends itself to a characterization as a trial by exclamatory outburst, stating that "[g]enerally, the case is one in which the recitation of the facts to an average member of the community

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143. 108 S. Ct. at 881-82.
144. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).
145. Id.
would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'”

Given the Restatement's inadequate approach to the extreme and outrageous conduct element, that element requires careful supplementation if the emotional distress tort claim is to be applied in a way that does not too greatly infringe on first amendment interests. “Resentment of the actor” and “exclaiming, 'Outrageous!'” are reactions that "an average member of the community" might have to a good deal of constitutionally valuable and legitimately protected speech. Allowing liability to turn on such a reaction, without any further check on liability, would create just the sort of difficulties that the Chief Justice recognized in his Falwell opinion. The task for the Court, therefore, is to fashion this element of the tort into a standard that adequately protects first amendment interests and yet leaves some room for the imposition of liability in situations in which constitutional protection is undeserved and unwarranted. It is the attainment of that latter goal that is missing entirely in the Court's decision in Falwell. The remainder of this article will show that the goal can be reached.

Fortunately for one attempting to determine the nature of constitutionally acceptable definition of extreme and outrageous conduct, there are two sources of guidance to construct a useful standard. One is a matter of constitutional purpose and the other a matter of constitutional precedent. First, determining what the element is supposed to accomplish is essential. The first amendment is designed to promote the fullest possible expression of "speech that matters." In order to accomplish that end, protection sometimes must be extended to speech that does not matter, at least in constitutional terms.

When deciding whether constitutional protection ought to be extended to a particular situation, then, a court needs to ask two questions. An affirmative answer to either of those questions leads to a recognition of limitations on liability. The first question is whether the communication is speech that matters. If so, then the constitution requires some protection of that speech. First amendment precedent provides a way to answer the question, as will be demonstrated shortly. But even if that question is answered in the negative, an affirmative answer to a second question, about speech that does not matter, also leads to the recognition of constitutional protection. The second question that needs to be asked about this category of speech is

146. Id.
148. See id. ("The First Amendment requires that we protect some falsehood in order to protect speech that matters") (emphasis added).
whether the distinction between the speech at issue and speech that matters is so difficult to draw that the risk of error in drawing the distinction ought not to be placed on the speaker. It was a negative answer to this second question on the issue of the truth of defamatory statements that led the Court to adopt the "actual malice" requirement in New York Times Co. v. Sullivan.\footnote{149}

If the difficulty of drawing the line dividing constitutionally valuable speech from speech that lacks such value is not very pronounced, then the case for constitutional protection of the valueless speech is considerably less compelling. It is when that distinction is thought to rest exclusively on the difference between truth and falsity that the chilling effect concerns of the Sullivan line of cases are at their highest. If another sort of distinction can be identified, one that is more carefully tailored to the emotional distress tort than is the truth/falsity distinction, then the extension of constitutional protection to valueless speech ought to be less necessary.

The abstract considerations derived from the purpose of constitutionalizing the extreme and outrageous conduct element of the tort provide some assistance in determining how to set up an acceptable standard for that element. The law of obscenity offers an analogous situation in which courts have had to work out a first amendment test for identifying material that is of no constitutional value. One of the elements of that test asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."\footnote{150} As a recent decision makes clear,\footnote{151} this factor is not to determined by reference to local community standards. Instead, "[t]he proper inquiry is ... whether a reasonable person would find such value in the material, taken as a whole."\footnote{152}

Drawing on the rationale for constitutional protection of speech, the nature of the tort claim being asserted, and the precedent in the obscenity context setting up a blend of local and national standards, a test for determining whether conduct is sufficiently extreme and outrageous to permit liability to be imposed could be incorporated into the emotional distress tort. This would separate the constitutionally permissible instances of liability from those situations in which liability would interfere too greatly with first amendment interests.

The least complicated method of creating such a test simply would be to supplement the current "extreme and outrageous" com-
ponent of the *Restatement* with a lack-of-social-value element. Under this approach to the issue, the only publication that would satisfy the test for liability would be a publication which was extreme and outrageous *and* which lacked serious social value. The introduction of the social value component as a check on the extreme and outrageous component serves to distinguish constitutionally valuable "speech that matters"\(^{153}\) from speech that has no such constitutional value. Phrasing the social value component in the negative, as this test does, carries with it an obligation for the plaintiff to prove the lack of value, and thus avoids the imposition of a formal burden of proof on the defendant to justify the publication.

The method of constitutionalization of the emotional distress claim offered here requires a plaintiff to prove that:

1) the defendant acted with the intent to cause the plaintiff to suffer severe emotional distress or with recklessness regarding such harm; and
2) the defendant actually caused severe emotional distress, which rises to the level of a disabling interference with the plaintiff's normal functioning, and which has been proven by clear and convincing evidence; and
3) the defendant acted in a way that:
   a) can be characterized as extreme and outrageous, and
   b) either
      i) is predominantly speech that is directed to the plaintiff rather than speech about the plaintiff that is directed to a wider audience,
      or
      ii) is speech that lacks serious social value

Using this enriched emotional distress claim, courts can adequately protect constitutionally valuable speech while still leaving open the possibility that victims of intentionally inflicted emotional distress are not precluded from recovery as a result of the introduction of a false statement of fact element that has no necessary relevance to the tort action. The revised test for liability offered here suggests that an alternative to the linear depictions of constitutional protection associated with the *Sullivan* line of cases (figure 1) and the Fourth Circuit's *Falwell* decision (figure 2) can now be drawn. Instead of viewing the constitution as encouraging all the speech up to a particular dividing line by extending protection beyond that line, the new test can be portrayed (see figure 3) as involving two circles, one that includes conduct that is extreme and outrageous, and another that includes speech that

\(^{153}\) See supra note 147.
has serious social value. In those instances covered by the overlap of those two circles, the first amendment would be held to prohibit liability, even though all the elements of the emotional distress tort claim may have been satisfied.

FIGURE 3.
The Relationship Between the First Amendment and the Intentional Infliction of Emotional Distress

Depicted in this way, the test demonstrates that the relationship between the first amendment and the emotional distress claim is coincidental rather than essential. In other words, the Constitution has no interest whatsoever in the emotionally distressing quality of speech. What is of concern is the social value attributed to that speech. Viewing the tort claim and the social value of speech as separate spheres that sometimes overlap depicts the two subjects of the title of this article in their proper relationship. The category of “this kind of speech” that was before the Court is now properly understood as constituting “speech with serious social value.” For that reason, the speech is entitled to first amendment protection from liability for the infliction of emotional distress.154

Application of the conduct element, as constitutionalized in this way, to the facts of the *Falwell* case demonstrates that the Supreme Court reached the correct result in refusing to allow the plaintiff to recover. One could conclude that the conduct of the defendants, in publishing the remarks that went well beyond commentary on the

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154 The unsatisfactory nature of the Court’s explanations for its construction of categories of speech is discussed in M. Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 301-10 (1988). The proposal outlined in the text of this article attempts to bring the publication involved in the *Falwell* case into a broad category of socially valuable speech, and resists the notion that further subcategorization of “this kind of speech” is likely either to reflect a principled distinction or to produce a manageable test.
plaintiff’s public and professional life and included allegations of incest and drunkenness, were so far beyond what is tolerable in a civilized community as to qualify for the extreme and outrageous characterization. Nevertheless, one could also conclude that the publication has serious social value on at least two levels. First, the ad parody does contain political or social commentary on Falwell’s public role as a highly visible proponent of a particular brand of fundamentalist morality. Along with the more highly publicized statements about Falwell’s sexual initiation with his mother, the publication contained statements purporting to claim that the only way Falwell could preach the message he put forth was if he was drunk. The message that Falwell’s preaching is so ridiculous that he could not do it sober is a commentary on public affairs that ought to be protected by the first amendment. Second, the ad parody falls into the category of humor. While it is certainly not to everyone’s taste, and goes well beyond the standard of behavior acceptable in most communities, the ad parody serves as a vehicle for provoking amusement by deflating the pomposity associated with the plaintiff. For these reasons, even if the plaintiff were held to have suffered severe emotional distress, the Hustler ad parody could be located within the overlap of the two circles in Figure 3, and thus protected from liability.

Applying the proposed test to the editorial cartoonist paradigm case that the Court found so troubling further demonstrates that the test has substantial merit as a means of protecting first amendment value. In most instances, a political cartoon would lie well within the social value circle and be located wholly outside of the emotional distress circle. However much a particular cartoon might deviate from a community’s standard of decency, as long as the publication had social value, the plaintiff would be unable to satisfy the burden of proof on this element. An allegation that a cartoon lacks social value could be countered by evidence that focuses on such matters as the content of the cartoon, the overall content and mission of the publication in which the cartoon appears, and the general pattern of behavior of both the cartoonist and the publication printing it. That distinction between the creator (e.g., the cartoonist) and the republisher (e.g., the newspaper) is also important in those instances in which a decision to sue one but not the other comes into play. Because the newspaper is likely to have a greater ability to satisfy a judgment, it is a more likely target of litigation. Under the application of the social value component of the test proposed here, because of its general social value, a

155. See supra note 7 and accompanying text. The cartoonist paradigm reflects the Court’s concern that Falwell’s recovery would open the door to liability for caustic political speech.
news or entertainment organization would not face a significant risk of liability for the publication of a cartoon that otherwise was characterizable as extreme and outrageous in its treatment of the plaintiff.

A final word needs to be said about the absence from the proposed approach of a distinct element dealing explicitly with the public or private status of the plaintiff. Language in the *Falwell* opinion suggests that it was the public figure status of the plaintiff combined with the absence of false statements of fact which produced a privilege to publish the ad parody. Implicit in such an approach is a belief that public persons are forced to accept, under all conceivable circumstances, any injury inflicted by any nondefamatory speech. Rather than recognize a blanket protection for all nondefamatory speech about public plaintiffs, the position offered in this article suggests that it would be preferable to incorporate a consideration of the public or private status of the plaintiff into the determination of whether the communication about the plaintiff has serious social value. The proposed test for serious social value also tracks the emerging strain in the Court's defamation precedent that makes constitutional protection contingent not just on the status of the plaintiff but also on the nature of the communication. In most instances, the public status of a plaintiff will weigh heavily toward indicating that the communication has social value and thus is constitutionally protected. However, by incorporating the status factor into the social value determination in this way, the possibility is left open that there could be a case in which there is intentionally harmful speech about a public person that does not fall into the category of “speech that matters” or “speech that involves a matter of public concern.” Rather than dismiss that case out of hand by a *per se* rule of nonliability to public figure or public official plaintiffs, the revision of the emotional distress action proposed here is structured in such a way as to leave open the opportunity to deal with that contingency.

**Conclusion**

This article has put forward a modification of the tort of intentional infliction of emotional distress that, in the end, produces the same result that was reached by the Supreme Court in the *Falwell* case. The question that probably needs to be answered is—why

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156. The Court's conclusion is stated as a limitation on recovery by “public figures and public officials.” 108 S. Ct. at 882.
157. See supra note 57.
158. See supra note 147.
159. See supra note 57.
bother? The justification for the approach offered in this article lies in a belief in the teaching role of the Supreme Court and in a sense that that role was poorly carried out in *Falwell*.

Given the decision in *Falwell*, which rejected liability in the circumstances of that case but provided relatively little guidance for the resolution of future disputes, there appear to be two paths that could plausibly be taken. Proceeding along one path, courts could take a very expansive approach toward the holding of *Falwell* and virtually eliminate the intentional infliction of emotional distress action as an independent claim for relief. The steps along this path would include a broad characterization of an emotional distress claim as an illegitimate alternative to a defamation claim, coupled with a widening scope for the *Falwell* decision so that the result is an absolute privilege from all liability for any speech that does not communicate false statements of fact about a plaintiff.

The other path, the borders of which are sketched out in this article, would begin with a more careful delineation of precisely why the speech in the *Falwell* case is deserving of constitutional protection. That protection would then be layered on top of the existing elements of the tort claim for intentional infliction of emotional distress, following the model employed in other speech-tort contexts in the quarter-century since the *Sullivan* decision. In this way, the emotional distress claim retains its viability to redress injuries that are inflicted on plaintiffs who ought not to suffer such harm without compensation.

To recap the enriched emotional distress claim that emerges from the considerations developed in this article, a plaintiff who brings a claim for the intentional infliction of emotional distress for conduct that involves speech should face a more demanding set of elements than have previously been recognized. For a claim of that sort, the plaintiff must prove that the defendant acted with the intent to cause the plaintiff to suffer severe emotional distress or with recklessness regarding such harm; that the defendant actually caused severe emotional distress, which rises to the level of a disabling interference with the plaintiff's normal functioning, and which has been proven by clear and convincing evidence; and that the defendant acted in a way that can be characterized as extreme and outrageous, and either is predominantly speech that is directed to the plaintiff rather than speech about the plaintiff that is directed to a wider audience, or is speech that lacks serious social value.

Adopting this enriched approach to the constitutionalization of the intentional infliction of emotional distress strikes a better balance between the tort claim and the first amendment than is suggested by
the Court's treatment of the issue in the *Falwell* case. Under this approach, all of the elements of the tort claim remain as prerequisites to liability. Additional showings are required of a plaintiff in order to prevent the tort claim from having too great a negative effect on first amendment interests, but those additional elements are tied directly to the purpose of that constitutional protection rather than grafted from the defamation context onto the emotional distress claim where they prove to be inappropriate.