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Emotional Distress and the First Amendment: An Analysis of *Hustler v. Falwell*

Rodney A. Smolla*

*Whether in florid impotence he speaks,
And, as the prompter breathes, the puppet squeaks;
Or at the ear of Eve, familiar Toad,
Half froth, half venom, spits himself abroad,
In puns, or politics, or tales, or lies,
Or spite, or smut, or rhymes, or blasphemies.
His wit all see-saw, between that and this,
Now high, now low. now master up, now miss,
And he himself one vile Antithesis.
Amphibious thing! that acting either part.
The trifling head or the corrupted heart,
Fop at the toilet, flatt'rer at the board,
Now trips a Lady, and now struts a Lord.
Eve's tempter thus the Rabbins have exprest,
A Cherub's face, a reptile all the rest;
Beauty that shocks you, parts that none will trust;
Wit that can creep, and pride that licks the dust.*

—Alexander Pope
Epistle to Dr. Arbuthnot¹

I. INTRODUCTION

The Supreme Court decided this term a case of profound first amendment significance.² Television evangelist Reverend Jerry Falwell was awarded \$100,000 in compensatory damages and \$100,000 in punitive

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1. A. Pope, *Epistle to Dr. Arbuthnot*, lines 317-333.

2. *Hustler v. Falwell*, ____ U.S. ____, 108 S. Ct. 876 (1988), reviewing *Falwell v. Flynt*,

damages against *Hustler Magazine* and its publisher, Larry Flynt,³ in a suit arising from a parody published by *Hustler*. This parody, in which Falwell is depicted as having had sex with his mother, was not defamatory, was not an invasion of privacy, and was not legally obscene. The Fourth Circuit held, however, that it satisfied all elements of the tort of "intentional infliction of emotional distress," and because the record clearly showed that Flynt intended to inflict distress on Falwell, the award of damages did not offend the first amendment.⁴ In effect, *Hustler Magazine* and Larry Flynt were fined \$200,000 for telling a bad, dirty joke.

Many lawyers, journalists, and members of the general public may initially react to this litigation with bemused disinterest. What does *Hustler's* coarse parody have to do with the first amendment anyway? If *Hustler* and Flynt lose, so what—they have it coming. We need to put these smut peddlers out of business,⁵ and if the law of obscenity won't do it,⁶ the tort system will.

Many Americans may be equally ambivalent toward Falwell's fortunes. They may, rightly or wrongly, perceive Falwell as a species of hustler in his own right, part of a constellation of religion-pushers from Oral Roberts to Jim and Tammy Bakker,⁷ who deserve a little gratuitous emotional distress once in a while to knock them off their hypocritical high horses. When presented with *Hustler's* protestations of the lawsuit's chilling effect on free speech and Falwell's claims of *Hustler's* chilling effect on all things decent and pure in American life, the reflexive reaction of many Americans may be to quote the recent quip of Chief Justice Rehnquist: "A chill on both your houses!"⁸

797 F.2d 1270 (4th Cir. 1986), *reh'g denied*, 805 F.2d 484 (4th Cir. 1986), *rev'd*, ____ U.S. ____ 108 S. Ct. 876 (1988).

3. The jury awarded \$100,000 in actual damages, and \$50,000 in punitive damages against Flynt, and \$50,000 in punitive damages against *Hustler*. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986), *reh'g denied*, 805 F.2d 484 (4th Cir. 1986), *rev'd*, ____ U.S. ____, 108 S. Ct. 876 (1988).

4. *Id.* at 1275-77.

5. See, e.g., A. DWORKIN, *INTERCOURSE* 48 (1987) (discussing "*Hustler's* meat-grinder cover, in which a woman is fed into a meat grinder and comes out as ground beef"); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985). See also REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (1986) (the "Meese Commission Report").

6. See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, ____ U.S. ____, 106 S. Ct. 1172 (1986).

7. See Smolla, *Book Review, The First Liberty: Religion and the American Republic, and Religion in American Public Life*, 4 CONST. COMM. 204, 205 n.4, 208 (1987) (citing Gordon, *Video Vicars: How They Tune Out the Press*, WASH. JOURNALISM REV., Apr. 1986, at 39-47).

8. Justice Rehnquist made the quip from the bench during oral argument in *Anderson v.*

One who resists this temptation to dismiss *Hustler v. Falwell* cavalierly, and grants the litigation the sober second thought it deserves, sees a first amendment conflict of enormous difficulty and significance. For however down and dirty *Hustler's* parody was, the essence of the satire was not that "Falwell had sex with his mother and therefore is bad," but rather that "Falwell is a hypocrite and we don't like him."⁹ Seen in those terms the emotive and cognitive message of the ad was a spirited and vicious premeditated attack against one of the most prominent American public figures of our time.¹⁰ The novel constitutional question posed by the case is whether the existence of intent to cause emotional distress through the use of speech concerning a public figure is sufficient to overcome first amendment protection of that speech when the *only* risk posed by the speech is its capacity to inflict severe emotional distress on that public figure.

The Supreme Court, in a striking display of unanimity, held that the ad parody at issue in the *Falwell* litigation must be deemed absolutely protected under the first amendment, and that no amount of fault on the part of *Hustler* or Flynt should permit that protection to be pierced. This article is a defense and an analysis of the *Hustler* decision. It is argued that the result in the case was required, at the very least, on the relatively narrow ground that the parody must be considered "opinion," and opinion is absolutely immune from liability regardless of how outrageous, indecorous, or mean-spirited, and regardless of what name is given to the legal cause of action under which it is prosecuted.¹¹ Most fundamentally, however, absolute protection for the parody was compelled by a far more sweeping proposition: when speech concerns public figures and public issues, the capacity of the speech to cause emotional disturbance is *never* enough, standing alone, to justify its abridgement.¹² The proposition goes to the heart of the first amendment—Justice Holmes's haunting admonition that "[e]very idea is an

Liberty Lobby, Inc., ____U.S. ____, 106 S. Ct. 2505 (1986). See 12 Med. L. Rev. (BNA) 1344 (News Notes, Dec. 10, 1985).

9. As subsequently discussed, no reasonable person could have misconstrued the ad parody as purporting to actually make the factual assertion that Falwell had sex with his mother. See *infra* text accompanying notes 25-26. The jury explicitly found that the ad could not be so interpreted. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir.), *reh'g denied*, 805 F.2d 484 (4th Cir. 1986), *rev'd*, ____U.S. ____, 108 S. Ct. 876 (1988).

10. On Reverend Falwell's extraordinary religious and political influence as a contemporary American public figure, see, e.g., A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 315-17 (1985); *God and Money*, NEWSWEEK, Apr. 6, 1987, at 16-22.

11. See *infra* notes 137-57 and accompanying text.

12. See *infra* notes 82-97 and accompanying text.

incitement."¹³ It is a proposition not garnered merely from the band of cases emanating from *New York Times Co. v. Sullivan*,¹⁴ but rather

13. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

14. 376 U.S. 254 (1964). In *New York Times*, the Court held that in a libel suit brought by a public official, the first amendment requires the plaintiff to demonstrate with clear and convincing evidence that the defendant published the statement with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80, 285-86. The literature on the *Times* case is rich. See, e.g., Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Bertelsman, *The First Amendment and Protection of Reputation and Privacy—New York Times Co. v. Sullivan and How it Grew*, 56 KY. L.J. 718 (1967); Bertelsman, *Libel and Public Men*, 52 A.B.A. J. 657 (1966); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Carter, *Right of Reply Versus the Sullivan Rule: Time for a Second Look*, 27 LOY. L. REV. 41 (1981); Green, *The New York Times Rule: Judicial Overkill*, 12 VILL. L. REV. 730 (1967); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; LeBel, *Reforming the Tort of Defamation: An Accommodation of Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249 (1987); Lewis, *New York Times v. Sullivan Reconsidered: Times to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969); Nelson, *Newsmen and the Times Doctrine*, 12 VIL. L. REV. 738 (1967); Ottley, Lewis & Ottley, *New York Times v. Sullivan: A Retrospective Examination*, 33 DEPAUL L. REV. 741 (1984); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORN. L.Q. 581 (1964); Pierce, *The Anatomy of an Historic Decision*, *New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965). See also R. SMOLLA, *SUING THE PRESS: LIBEL, THE MEDIA, AND POWER* 26-52 (1986).

Throughout this article the *Times* case and its progeny will be referred to frequently in passing. The Supreme Court first extended the actual malice standard beyond public officials, to include "public figures," in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Associated Press v. Walker*, 388 U.S. 130 (1967). In a plurality opinion, the Court briefly flirted with extending the actual malice standard to any defamatory statement involving an issue of public interest, without regard to the public or private status of the plaintiff. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court rejected the *Rosenbloom* approach, dividing the law of defamation between public and private plaintiffs. Public officials and public figures were required to meet the actual malice standard. States were free to establish their own standards for private figure plaintiffs, as long as they did not establish liability without fault. *Gertz* prohibited any award of punitive or presumed damages unless actual malice was established. In private figure cases tried under the negligence standard, *Gertz* further required that actual injury be demonstrated, though a broad range of injuries remained compensable and proof requirements were not rigorous. For commentary on *Gertz*, see, e.g., R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* §§ 1.2.5, V.3 (1980); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976); Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Christie, *Injuries to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979); LaRue, *Living with Gertz: A Practical Look at Constitutional Libel Standards*, 67 VA. L. REV. 287 (1981); Rosen, *Media Lament—The Rise and Fall of Involuntary Public Figures*, 54 ST. JOHN'S L. REV. 487 (1980); Robertson, *Defamation and the First Amendment: In Praise of Gertz v.*

from the wide expanse of first amendment cases encompassing incitement to violence, fighting words, commercial speech, symbolic speech, and obscenity.¹⁵ To justify penalizing speech on matters of public concern, the government must meet a heavy burden of demonstrating that the abridgement is required to prevent some palpable species of social harm; the emotional disturbance generated by the content of the speech will never by itself be sufficient to provide that justification.

Because Falwell's suit is simply a public figure striking back for intense distress suffered in the rough and tumble of the American ideological marketplace, it was, in the end, easy pickings for demolition under the first amendment.¹⁶ Suits for emotional distress in many other contexts, however, are not so easily dismissed.¹⁷ In announcing its holding in *Hustler*, the Court was quite careful to limit the decision to public officials and public figures.¹⁸ The intellectual challenge posed by Falwell's suit is not how to construct a convincing rationale for rejecting his claim, but rather how to articulate limits on that rationale that will permit suits for emotional distress inflicted through speech in other contexts to survive. This challenge must be faced and resolved, for one can easily conjure up examples of emotional distress inflicted solely because of the content of speech in which something less than absolute first amendment protection is clearly warranted. This matter cannot be resolved merely by superimposing the defamation fault rules of *New York Times* and *Gertz v. Robert Welch, Inc.*¹⁹ upon the cause of action for infliction of emotional distress. After discussing the powerful first amendment concerns implicated in any imposition of tort liability for speech that inflicts emotional distress, this article presents a solution involving multi-tiered levels of fault. These tiers range from absolute immunity, to actual malice, to negligence, and are geared to reflect the unique balance of interests at stake in the emotional distress context.²⁰

Robert Welch, Inc., 54 TEX. L. REV. 199 (1976); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983); Watkins & Schwartz, *Gertz and the Common Law of Defamation: Of Fault, NonMedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823 (1984).

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court held that the first amendment restrictions on presumed and punitive damages in *Gertz* did not apply in a private figure case in which the speech did not involve matters of public concern.

15. See *infra* notes 87-125 and accompanying text.

16. See *infra* text accompanying notes 178-90.

17. See *infra* notes 178-90, 212-19, and accompanying text.

18. See ____ U.S. at ____, 108 S. Ct. at 882.

19. See *supra* note 14.

20. See *infra* text accompanying notes 219-24.

II. THE FACTS OF FALWELL — AN AMERICAN CLASSIC

A. *The Parody*

Lest one cheat Reverend Jerry Falwell of the full passion of his lawsuit, and fight only the abstract strawmen of the conceptual elements of his cause of action, it is fairest to examine the facts of his case in unsanitized, graphic detail. An advertising campaign for Campari Liqueur several years ago featured celebrities such as Jill St. John talking about their "first time." The interviews in the ad ostensibly concerned the celebrities' first encounter with Campari, but the racy double entendre was sexual. The catch-line of the advertising campaign was: "Campari. You'll never forget your first time." *Hustler Magazine*, in its November 1983 issue, ran a full-page mock Campari Liqueur ad entitled "Jerry Falwell talks about his first time." The parody included a picture of Falwell, a picture of a bottle of Campari with a glass of Campari on the rocks, and a fictional interview with Falwell. The "interview" was, by any standard, rough business:

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a \$100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the

pulpit. You don't think I could lay down all that bullshit sober, do you?²¹

The ad was listed in the table of contents (yes, *Hustler* has a table of contents) as "Fiction; Ad and Personality Parody."²² At the bottom of the page on which the ad appears it stated: "Ad Parody—Not to be Taken Seriously."²³

Falwell took it seriously, however, and filed suit in federal court in Virginia. Not one to back away from a good fight, Larry Flynt promptly republished the parody in *Hustler's* issue of March 1984.²⁴

Falwell sued under three theories: defamation, appropriation of name or likeness, and intentional infliction of emotional distress. Falwell lost on his defamation claim, because the jury correctly concluded that no reasonable person would believe that *Hustler* intended the ad parody to describe actual facts about Falwell.²⁵ The parody was so outrageous that it could not possibly be mistaken for a real ad, or be understood to convey the factual message that Falwell had actually had sex with his mother in an outhouse. Falwell also lost on his appropriation claim, because to be prohibited under Virginia law, such an appropriation must be for purposes of trade or advertising.²⁶ Because the parody was a fake advertisement, the court ruled that the use of Falwell's name and photograph did not fall within the meaning of the statute.²⁷ Falwell prevailed, however, on his claim for intentional infliction of emotional distress, and that victory, in its first embarrassing blush, seemed unassailable.

21. HUSTLER MAGAZINE, Nov. 1983, plaintiff's Exhibit 1, Joint Appendix p. 1500 (copy on file with *Arizona State Law Journal*).

22. Falwell v. Flynt, 797 F.2d 1270, 1272 (4th Cir. 1986), *reh'g denied*, 805 F.2d 484 (4th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S. Ct. 1601 (1987).

23. *Id.*

24. *Id.* at ____, 107 S. Ct. at 1273.

25. *Id.*

26. VA. CODE ANN. §§ 5.01-.40 (1985). The Fourth Circuit noted that the Virginia appropriation of name or likeness statute was patterned after the New York model. 797 F.2d at 1278. Under section 51 of the New York Civil Rights Law, N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976), the use of a celebrity's name or likeness in connection with a news story or editorial comment does not constitute appropriation for purposes of trade. *See, e.g.*, *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976); *Booth v. Curtis Publishing Co.*, 15 A.D.2d 343, 349, 223 N.Y.S.2d 737, 743, *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 208 N.Y.S.2d 468 (1962); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952); *Humiston v. Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1919); B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION § 11.5.1, at 473-74. *But see* *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) (advertising in connection with interview of Cher created false impression of endorsement and could be actionable as a commercial appropriation).

27. *See Falwell*, 797 F.2d at 1278. *See also supra* discussion in note 26.

B. The Seductive Logic of the Court of Appeals

The Fourth Circuit began its analysis in *Falwell* with what appeared to be enlightened sensitivity to first amendment values. The court flatly accepted the proposition that the defendants were "entitled to the same level of protection in an action for intentional infliction of emotional distress that they would receive in an action for libel."²⁸ The court realized that although defamation was once the primary vehicle by which those injured by speech obtained recompense, invasion of privacy torts and actions for infliction of emotional distress are now commonly pleaded as companions to defamation in lawsuits arising from tortious publication.²⁹ A plaintiff may not avoid the constitutional rules established in *New York Times Co. v. Sullivan*³⁰ and its progeny,³¹ the court reasoned, by artfully pleading alternate tort theories. "It is not the theory of liability advanced but the status of the plaintiff, as a public figure or official and the gravamen of a tortious publication which give rise to the first amendment protection prescribed by *New York Times*."³²

This solid start was followed by an equally solid insight—that to state that the defendants should receive the same quantum of protection required by *New York Times* does not mean that the court should apply the actual malice standard of the *Times* case—knowledge of falsity or reckless disregard for the truth—in the emotional distress context.³³ The *Times* standard focuses on knowing or reckless falsity. The emotional distress tort, by contrast, has nothing to do with truth or falsity.³⁴

To satisfy the elements of infliction of emotional distress in Virginia, the wrongdoer's conduct: (1) must be intentional or reckless; (2) must offend generally accepted standards of decency or morality; (3) must be causally connected with the plaintiff's emotional distress; and (4) must cause severe emotional distress.³⁵ *New York Times*, the court argued, did not change any of the elements of the tort of defamation, but rather raised the required level of fault to actual malice.³⁶ Thus,

28. *Falwell*, 797 F.2d at 1274.

29. *Id.* See generally R. SMOLLA, LAW OF DEFAMATION § 10.01 (1986); Entin, *Privacy, Emotional Distress, and the Limits of Libel Reform*, 38 MERCER L. REV. 835 (1987); Mead, *Suing the Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983).

30. 376 U.S. 254 (1964).

31. See *supra* note 14.

32. *Falwell*, 797 F.2d at 1274.

33. *Id.*

34. *Id.* at 1275-76.

35. *Id.* at 1275 n.4 (citing *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974)).

36. *Id.* at 1275.

the *Times* decision left the essential nature of the tort of defamation unchanged.³⁷

So too, the court reasoned, the first amendment should not alter the elements of the emotional distress tort, but rather should require a minimum threshold of fault equivalent to that required in the defamation context.³⁸ The cause of action for intentional infliction of emotional distress under Virginia law contains a requirement of intentional or reckless misconduct. Thus, the court reasoned, the cause of action has "built-in" a level of fault equivalent to that required in the defamation context by *New York Times*.³⁹ The court held that the record supported the conclusion that Flynt, in publishing the ad parody, acted intentionally or recklessly to inflict emotional distress upon Reverend Falwell.⁴⁰

The first time through, to spot any glaring flaw in this analysis is difficult. Certainly, the court's treatment of the facts was convincing. No one, of course, can plumb the surreal depths of Larry Flynt's mind with absolute confidence, but the record seems amply to support the finding of intentional conduct. Consider, for example, the following colloquy between Falwell's lawyer and Flynt:

Q. Did you want to upset Reverend Falwell?

A. Yes. . . .

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

A. He's a glutton.

Q. How about a liar?

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

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

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

A. Yes.

37. *Id.* The California Supreme Court recently challenged the Fourth Circuit on this point. See *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, —, 728 P.2d 1177, 1186, 232 Cal. Rptr. 542, 551 (1986) ("Indeed, in . . . [*New York Times Co. v. Sullivan*] the Court effectively held that the [f]irst [a]mendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The *Falwell* court misses this crucial point and as a result cannot be followed.").

38. *Falwell*, 797 F.2d at 1274.

39. *Id.*

40. *Id.* at 1276-77.

Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in?

A. Yeah.

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

A. To assassinate it.⁴¹

One can fairly infer from this dialogue that Larry Flynt hates Jerry Falwell's guts, and set out to do whatever he could to hurt him.⁴²

The record also supports Falwell's claim of severe distress. Testifying about his reaction to the ad, Falwell stated:

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

Q. How long did this sense of anger last?

A. To this present moment.

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

A. Never had. Since I have been a Christian, I don't think I have ever intentionally hurt anybody. I am sure I have hurt people but not with intent. I certainly have never physically attacked anyone in my life. I really think that at that moment if Larry Flynt had been nearby I might have physically reacted.⁴³

This testimony is intriguing. The intensity of Falwell's distress is convincing, but it does not appear to be caused so much by *what the ad said as such*, but rather by Falwell's dismay that so much evil could

41. Deposition testimony of Larry Flynt, admitted into evidence at trial, Joint Appendix at 901-02. See 797 F.2d at 1273.

42. Larry Flynt was in a state of severe psychological disturbance at the time the deposition was taken, and his lawyers argued vigorously, but ultimately without success, that the videotape of the deposition should not have been admitted at trial. *Id.* at 1277. When asked to identify himself for the deposition, for example, Flynt called himself "Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh." *Id.* at 1273. He testified that the ad parody was actually written by Yoko Ono and Billy Idol. *Id.* Whatever Flynt's mental state at the time of his deposition, however, the basic proposition that he cannot stand Falwell and that *Hustler* set out intentionally to cause him distress rings true from the record, if not from the text of the ad parody itself.

43. *Id.* at 1276.

exist in the world. Falwell met the devil face to face for the first time, and felt so badly about the encounter he sued him. Whatever one thinks of this testimony, however, it was certainly ample record evidence to affirm the jury award, if the legal analysis of the Fourth Circuit is sound.

III. THE SUPREME COURT'S ANALYSIS

The Supreme Court reversed the Fourth Circuit in an 8-0 ruling.⁴⁴ Chief Justice Rehnquist began his opinion for the Court by reviewing the history of the case, including the jury's verdict and the decision of the Fourth Circuit Court of Appeals affirming the \$200,000 jury award. He then summarized the issues facing the Supreme Court. "This case," wrote Rehnquist, "presents us with a novel question involving [f]irst [a]mendment limitations upon a States's authority to protect its citizens from the intentional infliction of emotional distress."⁴⁵ Rehnquist described the Campari ad parody as offensive to Jerry Falwell, and "doubtless gross and repugnant in the eyes of most."⁴⁶

Rehnquist began his analysis with an essay on the purposes of the first amendment. "At the heart of the [f]irst [a]mendment," he wrote, "is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."⁴⁷ He then recognized the two principal functions of free speech, the self-fulfillment of the individual speaker, and the broader social search for enlightenment. Quoting from the Court's 1984 decision, *Bose v. Consumers Union*,⁴⁸ he noted that "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."⁴⁹ The Court has been particularly vigilant, he observed, to ensure that ideas remain free from governmentally imposed sanctions, because the "[f]irst [a]mendment recognizes no such thing as a 'false' idea."⁵⁰ Rehnquist capped off his introductory remarks by invoking one of the most sacred passages in the first amendment tradition, the haunting appeal for tolerance by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States*: "[W]hen men have

44. *Hustler v. Falwell*, ____ U.S. ____, 108 S. Ct. 876 (1988).

45. *Id.* at ____, 108 S. Ct. at 879.

46. *Id.*

47. *Id.*

48. *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984).

49. ____ U.S. at ____, 108 S. Ct. at 879 (quoting *Bose*, 466 U.S. at 503-04).

50. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁵¹

Chief Justice Rehnquist had established his philosophical base. This opinion was decidedly not grounded in the thesis that society must regulate public discourse to elevate it.⁵² Rehnquist had instead begun with a ringing endorsement of the classic Holmes/Brandeis view of free speech.⁵³ Rehnquist was endorsing the marketplace of ideas metaphor, not grudgingly, but with positive enthusiasm.

If the marketplace of ideas was to be robust and wide-open, what did that bode for public figures? The next section of Rehnquist's analysis went to great lengths to establish that in America the prevailing ethos is not to encourage people to enter the public arena by guaranteeing them shelter from caustic and virulent attack; it is rather to require as a cost of entering the public arena a certain toughening of the hide. Good but sensitive people may be discouraged in America from stepping forward into public life, but that is part of the price of an open society and a spirited democracy. In this nation, a public figure must be able to take as well as give.

Public figures, observed Chief Justice Rehnquist, have a substantial capacity to shape events. Quoting Felix Frankfurter, he noted that one “of the prerogatives of American citizenship is the right to criticize public men and measures.”⁵⁴ And in this country, such criticism will not always be reasoned and moderate. Quoting from *Monitor Patriot Co. v. Roy*,⁵⁵ Rehnquist made a point that seemed aimed personally at Jerry Falwell: “[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul!’ when an opponent or an industrious reporter attempts to demonstrate the contrary.”⁵⁶ This quote was a diplomatic way of stating to Reverend Falwell that moralists must expect attacks on their morality.

This does not mean, cautioned Rehnquist, “that *any* speech about a public figure is immune from sanction in the form of damages.”⁵⁷

51. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

52. See A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

53. See generally H. KALVEN, *A WORTHY TRADITION* 125-78 (1988).

54. ____ U.S. at ____, 108 S. Ct. at 879-80 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

55. 401 U.S. 265 (1971).

56. ____ U.S. at ____, 108 S. Ct. at 880, (quoting *Monitor Patriot*, 401 U.S. at 274).

57. *Id.* (Emphasis in original).

Speech that is libelous in the conventional sense—speech that contains genuine misstatements of fact and that injures reputation—may be penalized in some circumstances. But even here, Rehnquist admonished, the Constitution requires that the rules of libel be fashioned to provide sufficient breathing space for free speech. In what was, to most observers, a remarkable paragraph, Chief Justice Rehnquist proceeded to wholeheartedly endorse *New York Times Co. v. Sullivan* and its progeny. For public figures and public officials, it was critical that they prove that the offending statement was *both* false and made with actual malice.⁵⁸ If the Chief Justice had any doubts about the wisdom of the *New York Times*⁵⁹ ruling, they were not apparent here; in both letter and spirit, he was reaffirming *New York Times* with relish.

The argument of the Fourth Circuit, however, was that the rules emanating from *New York Times* did not apply to the emotional distress tort, and that the state's interest in protecting its citizens from emotional distress far outweighed any interest the speaker may have in propagating vulgar and shocking speech. It should adequately protect first amendment interests, they argued, to require that the plaintiff prove intent to inflict the distress and to prove that the speech is offensive and outrageous.

But in the world of debate over public affairs, Rehnquist pointed out, many things are done with motives that are less than admirable, and they do not for that reason alone forfeit first amendment protection. That an utterance is spoken out of hatred does not mean it is false. Larry Flynt may hate Jerry Falwell as much as Jerry Falwell hates Satan, but it does not follow that the hate-filled speech of either man is not in its own way a contribution to the free interchange of ideas. Rehnquist thus wrote that "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the [f]irst [a]mendment prohibits such a result in the area of public debate about public figures."⁶⁰

This conclusion, the Chief Justice argued, was necessary to avoid censoring the work of political cartoonists and satirists. The art of caricature, he argued, is based on deliberate distortion or exaggeration

58. *Id.*

59. One of the most striking things about the *Hustler* decision is that Chief Justice Rehnquist repeatedly quoted and cited with approval many of the decisions emanating from *New York Times* in which he had previously been a dissenter. Prior to *Hustler*, this author and many others had voiced the suspicion that the Chief Justice and other members of the Court were tempted to roll-back the progeny of *New York Times*. See Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987).

60. — U.S. at —, 108 S. Ct. at 881.

for satirical effect. The cartoonist's method is often not reasoned or evenhanded, but slashing and one-sided, full of black scorn and ridicule. Rehnquist then engaged in a moving tribute to the great American tradition of spirited satire and parody of public figures. He described the cartoons of Thomas Nast, who published in *Harper's Weekly* in the post-Civil War era. Nast engaged in a graphic vendetta against William M. "Boss" Tweed and his corrupt "Tweed Ring" in New York City. Nast was effective because he constantly went beyond the bounds of good manners and taste. Rehnquist recalled caricatures of George Washington, James G. Blaine, and Abraham Lincoln, and cartoonists' renditions of "Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder."⁶¹ From the viewpoint of history, he argued, "it is clear that our political discourse would have been considerably poorer without them."⁶²

But could not these famous caricatures in political cartoons be distinguished from the coarse *Hustler* parody? Rehnquist conceded that the *Hustler* parody was at best a distant cousin of the conventional political cartoon, "and a rather poor relation at that."⁶³ In what may have been the single most important analytic step in his opinion, however, Rehnquist argued that there was simply no way to draw a principled distinction between the *Hustler* parody and other satiric efforts. The statement "I know it when I see it"⁶⁴ is simply not good enough. "If it were possible," stated Rehnquist, "by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm."⁶⁵ But the Supreme Court was doubtful, Rehnquist explained, that any reasonably concrete standard could ever be articulated. One thing was certainly clear: the amorphous pejorative "outrageous" was too subjective to withstand first amendment requirements. To permit a jury to impose liability for mere "outrageousness" would invite jurors to base liability on the basis of their tastes and prejudices.⁶⁶

61. *Id.*

62. *Id.*

63. *Id.*

64. The statement is Justice Potter Stewart's, describing obscenity in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Stewart wrote that he could never succeed in intelligibly defining obscenity, "[b]ut I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197 (Stewart, J., concurring). This pithy statement became part of American legal folklore. Pith, however, is no substitute for analysis, and the Supreme Court in *Hustler* was unwilling to follow Justice Stewart's lead.

65. — U.S. at —, 108 S. Ct. at 881.

66. *Id.* at —, 108 S. Ct. at 882.

Chief Justice Rehnquist then made it clear that the mere capacity of speech to embarrass or offend did not strip it of its protected character. In citing the holdings in *FCC v. Pacifica Foundation*,⁶⁷ the George Carlin "seven-dirty-words" case, and *Chaplinsky v. New Hampshire*,⁶⁸ the "fighting words" case, Rehnquist emphasized that those holdings represented narrow exceptions to the general first amendment rule that the government must remain neutral in the marketplace of ideas. While the Court had recognized that all speech is not of equal first amendment importance, Rehnquist explained, the speech in this case simply did not fit into the precisely drawn categories in which lower levels of protection had been permitted.⁶⁹ "We conclude," wrote Rehnquist, "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether it was true."⁷⁰ Here, the jury had explicitly found that the statement was not factual. In the absence of a misstatement of fact, Falwell could not, Chief Justice Rehnquist explained, recover for the mere intentional infliction of emotional distress. Only Justice Byron White failed to join the Rehnquist opinion, instead filing a brief, two-sentence, separate concurring opinion. "As I see it, the decision in *New York Times v. Sullivan*, has little to do with this case, for here the jury found that the ad contained no assertion of fact,"⁷¹ wrote Justice White. "But I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the [f]irst [a]mendment."⁷²

IV. A FIRST AMENDMENT CRITIQUE

A. Relational Risks

The key sentence in *Hustler v. Falwell* comes in its penultimate paragraph, in which Chief Justice Rehnquist succinctly restates the

67. 438 U.S. 726 (1978).

68. 315 U.S. 568 (1941).

69. For a discussion of the implications of this passage, see *infra* notes 152-97 and accompanying text.

70. ____ U.S. at ____, 108 S. Ct. at 882.

71. *Id.* at ____, 108 S. Ct. at 883 (White, J., concurring) (citations omitted).

72. *Id.* Justice Anthony Kennedy took no part in the consideration on the decision of the case.

holdings of the Court: "We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true."⁷³ Given the abiding suspicion in many quarters that the Chief Justice simply could not have written a resounding press victory, this sentence will inevitably be subjected to microscopic examination, in a search for loopholes. Beyond the one reservation it explicitly articulates—that it is limited to public officials and public figures—I am convinced there are none.

From his concurring opinion, one gathers that Justice White construes this sentence as linking the emotional distress tort to the actual malice standard of *New York Times*.⁷⁴ This, however, is a mistaken construction. The critical phrase in the sentence is *not* the recapitulation of the actual malice test, but rather the words, "*in addition that the publication contains a false statement of fact.*"⁷⁵

Notwithstanding the momentum of tort law's increasing solicitude for protection of emotional tranquility,⁷⁶ the decision in *Hustler* must be construed to bar recovery *absolutely* when the plaintiff is a public figure and the essence of the tort is not a factual misstatement, but the mere infliction of distress. That this is the only permissible interpretation of the holding is clear against the backdrop of the Fourth Circuit decision. As the Fourth Circuit recognized, to simply lift the terms "intentional" or "reckless" out of the *New York Times* case and pluck them into the elements of the emotional distress tort, assuming the meaning remains the same in both contexts, is not enough.⁷⁷ The court, however, dissipated its good instincts on this point and lapsed into the very mechanical trap it sought to avoid. For the court failed to perceive that moving from one tort context to another changes not only the elements of the tort cause of action, but also the balance of first amendment interests.

Terms describing levels of fault are not meaningful in the abstract. The terms "intentional," "reckless," or "negligent" are always relational; they have meaning only when describing the relationship between

73. *Id.* at —, 108 S. Ct. at 882.

74. *Id.* at —, 108 S. Ct. at 883.

75. *Id.* at —, 108 S. Ct. at 882 (emphasis added).

76. See R. SMOLLA, *supra* note 14, at 3-25.

77. *Falwell*, 797 F.2d at 1270.

an actor's conduct and specific risks. Judge Cardozo, in his famous explication of the terms "negligence" and "proximate cause" in *Palsgraf v. Long Island Railroad Co.*,⁷⁸ emphasized that there is no such thing as "negligence in the air,"⁷⁹ and that one cannot even think of negligence except in relational terms.⁸⁰ The same is true for "intentional" or "reckless" conduct.

When the Supreme Court "constitutionalized" part of the law of defamation in *New York Times Co. v. Sullivan*,⁸¹ it established a relational connection between the publisher's conduct and a specific risk—the risk of publishing a defamatory false statement of fact. To simply lift the *New York Times* formulation out of the context of defamation and apply it literally to the tort of infliction of emotional distress is logically indefensible, because the relationship between the publisher's conduct and the risks encompassed by the emotional distress tort differs in kind from the relationship between the conduct and risk at stake in defamation. The term "actual malice," as used in *New York Times*, is nonsensical when applied mechanically to the emotional distress claim in *Falwell*. One cannot speak meaningfully about the publisher's subjective doubt as to truth or falsity when neither the initial decisionmaking process of the publisher nor the subsequent injury to the plaintiff has anything to do with the truth or falsity of the communication, or with its capacity to inflict reputational damage. This is the point Justice White was emphasizing in his concurrence. White's fears, however, were misplaced, for when viewed in its entire context, it is clear that Chief Justice Rehnquist's opinion does not disagree with White's.

The terms "intentional" and "reckless" are meaningful in the *Hustler* case only in relation to a very different risk—the risk that publishing the parody would proximately cause severe emotional distress. It is confusing to ask how the standard of *New York Times Co. v. Sullivan* should apply to this case. The *Times* standard was crafted for a different relationship between an actor's conduct and risks of social harm. The proper question to ask is: How should the first amendment be applied to restrict a state's decision to impose penalties for this sort of conduct in relation to this sort of risk? When conceived in those terms, the

78. 248 N.Y. 339, 162 N.E. 99 (1928).

79. *Id.* at —, 162 N.E. at 99 (quoting B. POLLACK, TORTS 455 (11 ed.)).

80. "Negligence," wrote Cardozo, "is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all." *Id.* at 345, 162 N.E. at 101 (citing *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694 (1887)).

81. 376 U.S. 254 (1964).

first amendment issue posed is both profound and stark: May a public figure recover compensatory and punitive damages in a tort suit when a publisher acts intentionally or recklessly only in relation to the risk that his publication will inflict severe emotional distress? Chief Justice Rehnquist's opinion answers emphatically: "No."

B. *The Palpable Harm Requirement*

Despite the fact that the *New York Times* standard cannot be mechanically plugged into the emotional distress tort, the *Times* holding is not irrelevant. Rather, *Times* remains useful as part of the broader universe of first amendment cases that provide guidance concerning the relative weights of the competing interests posed in the emotional distress context. *New York Times* and its progeny, as well as first amendment cases in many other contexts, reveal this cardinal principle: the power of speech to generate severe emotional disturbance on issues of public concern is never enough, standing alone, to justify abridging that speech, even when the infliction of emotional disturbance is intentional.⁸² The government may curtail speech only when it produces some other, more palpable, species of social harm that the government may prevent.⁸³

The very purpose of effective speech is to "disturb," often on both cognitive and emotional levels. In *Gitlow v. New York*,⁸⁴ Justice Holmes said that "whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."⁸⁵ The same is true of the "discourse" in *Falwell*. The ad parody simply had no capacity to cause any harm other than the infliction of emotional distress. As Chief Justice Rehnquist's opinion explained, permitting Jerry Falwell to recover would run "afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."⁸⁶

82. As the Supreme Court explained in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

83. See *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others. . . .").

84. 268 U.S. 652 (1925).

85. *Id.* at 673 (Holmes, J., dissenting).

86. *Hustler*, ____ U.S. at ____, 108 S. Ct. at 882.

The first amendment thus permits curtailing speech that infringes a protected common law property right in one's name or likeness,⁸⁷ or that interferes with protected copyright interests,⁸⁸ or that interferes with the orderly administration of the selective service system.⁸⁹ In each of these situations the content of the speech is not being regulated because of its *intellectual or emotional impact as such*, but because the speech interferes with a legitimate social interest *other than* disagreement with or disquiet from the content of the speech.⁹⁰

Similarly, defamation and false-light invasion of privacy actions concern more than the protection of emotional tranquility; they also serve the state interests in deterring the publication of damaging false information and protecting reputation.⁹¹ Because there is "no constitutional value in false statements of fact,"⁹² a state may provide remedies for injuries arising from such false statements.⁹³ When no false statements of fact are involved, however, the Supreme Court has struck a sharply different first amendment balance.⁹⁴ So too, states may legitimately ban obscene publications, after meeting the relatively rigorous definitional requirements of obscenity, because the Court has declared obscene material to be utterly devoid of first amendment value.⁹⁵ In the special first amendment context of broadcast regulation, with unique social interests at stake, the government possesses a narrow power to regulate vulgar speech that does not rise to the level of the legally obscene.⁹⁶ In none of these contexts, however, has the Supreme

87. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

88. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985).

89. *United States v. O'Brien*, 391 U.S. 367 (1968).

90. Even when claims of copyright or the right of publicity are involved, the first amendment requires that parody or satire be given wide compass. *See Groucho Marx Productions, Inc. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980).

91. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984).

92. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

93. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Because the Supreme Court permitted recovery in the *Firestone* case for emotional distress, without requiring proof of reputational injury, the case is obviously extremely important in analyzing Reverend Falwell's suit. The case is discussed later in this article with regard to limits on first amendment protections in situations not involving both public figures and public speech. *See infra* text accompanying notes 217-19.

94. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the father of a deceased rape victim was denied recovery for the emotional injuries allegedly caused by the publication of his daughter's name in violation of a Georgia statute prohibiting such disclosure. In addition to holding that the father's action was barred, the Court recognized that, at least where public figures or public officials are concerned, falsity is a constitutionally required predicate to recovery for injury to reputation or psyche. *Id.* at 489-90.

95. *See Miller v. California*, 413 U.S. 15 (1973).

96. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Court permitted speech to be abridged solely because of its emotional impact.⁹⁷ The *Hustler* decision is a momentous reaffirmation of that principle.

C. *Incitement, Fighting Words, and Symbolic Speech*

No one can deny the intense emotional distress that may be generated by the spectacle of members of the American Nazi Party marching in uniformed lock-step through a Jewish community, or by hooded members of the Ku Klux Klan burning crosses, and shouting vicious slurs against Blacks, Jews, and Catholics. Yet it is now axiomatic that such speech, however offensive to mainstream values solicitous of racial and religious tolerance, is nevertheless protected unless it poses a clear and present danger of lawless action, a test that requires that the impending violence be imminent and likely.⁹⁸

The closest Reverend Falwell could come to a Supreme Court case that strongly supported his claim was *Beauharnais v. Illinois*.⁹⁹ *Beauharnais* was a criminal libel case, involving an Illinois statute that criminalized any publication that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" which exposed them "to contempt, derision, or obloquy or which is productive of breach of the peace or riots."¹⁰⁰ A racist Chicago organization known as the White Circle League of America distributed leaflets calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."¹⁰¹ The leaflet called on "[o]ne million self respecting people to unite," and proclaimed that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."¹⁰²

The defendant *Beauharnais* was president of the White Circle League, and in his defense to the Illinois criminal prosecution he asked that the

97. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *Cohen v. California*, 403 U.S. 15, 18 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

98. See *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *Near v. Minnesota*, 283 U.S. 697 (1931).

99. 343 U.S. 250 (1952).

100. *Id.* at 251 (quoting section 224a of Illinois Criminal Code, ILL. REV. STAT. ch. 38, div. 1, § 471 (1949)).

101. 343 U.S. at 252.

102. *Id.*

jury be instructed that he could not be found guilty unless the leaflets were "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."¹⁰³ The court refused to use this instruction, and *Beauharnais* was convicted. The United States Supreme Court affirmed.

Beauharnais has never been explicitly overruled; if it remains good law it is powerful support for Falwell's claim. The only social harms caused by the speech in *Beauharnais* were the distress the leaflets surely inflicted on black citizens in Chicago, and the racial intolerance the leaflets may have whipped up in the hearts and minds of some Chicago whites. Despite the label "criminal libel," the speech was not libelous in the accepted sense of that term, because it contained no reputation-injuring false statements of fact. The leaflets were pure hysterical diatribe—expressions of racist opinion calculated to create hate. No clear and present danger to any more palpable social interest was established—the Supreme Court deemed the repugnance of the message alone as sufficient to support the conviction. Reverend Falwell's case, indeed, is even stronger than *Beauharnais*. In his suit the emotional distress is focused on a single individual and supported by actual evidence; in *Beauharnais* the diffused distress was suffered, one must assume, by the entire black population of Chicago. Conventional libel doctrine has always disqualified such generalized racial or religious group references as too large to support liability.¹⁰⁴ Furthermore, the elements of emotional distress that Falwell established actually protected the defendant more than did the Illinois criminal statute.¹⁰⁵

Beauharnais, however, must be regarded as a dead case. The Supreme Court in *Garrison v. Louisiana*¹⁰⁶ struck down a Louisiana criminal libel law for failing to satisfy the actual malice standard of *New York Times Co. v. Sullivan*.¹⁰⁷ One might argue, of course, that *Beauharnais*

103. *Id.* at 253.

104. See, e.g., Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186 (N.D. Cal. 1980) (no action could be maintained for reference to 600 million Muslims); Puerto Rican Legal Defense Fund, Inc. v. Grace, 9 Media L. Rep. (BNA) 1514 (N.Y. Sup. Ct. 1983) (no action could be maintained for reference to 900,000 Puerto Ricans). See also Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8 (Ky. 1978); Granger v. Time, Inc., 174 Mont. 42, 568 P.2d 535 (1977); Macaulay v. Bryan, 75 Nev. 278, 339 P.2d 377 (1959); McCollough v. Cities Service Co., 676 P.2d 833 (Okla. 1984).

105. See *supra* text accompanying note 35.

106. 379 U.S. 64 (1964).

107. 376 U.S. 254 (1964). See also Tollet v. United States, 485 F.2d 1087, 1094-99 (8th Cir. 1983) (striking down as unconstitutional federal act prohibiting mailing of "libelous, scurrilous, defamatory, or threatening" material); Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

with a *New York Times* standard superimposed upon it could still stand, and that Falwell's claim would fit this remodeled version of *Beauharnais* because it was supported by intentional or reckless conduct.¹⁰⁸ This argument, however, is flawed for the same reason that the Fourth Circuit's analysis in *Falwell* was flawed—it assumes the first amendment should treat intent to publish a false defamatory fact as equivalent to intent to inflict severe distress through inflammatory opinion.¹⁰⁹ To inflame is not the same as to defame, however, and modern first amendment jurisprudence has passed *Beauharnais* by.

Something more than inflammatory, racist rhetoric is now required to support abridgement of free speech. *Beauharnais* cannot survive side by side with cases such as *Brandenburg v. Ohio*¹¹⁰ and *Hess v. Indiana*.¹¹¹ *Brandenburg* involved a Ku Klux Klan rally with racist speech more incendiary than the leaflets in *Beauharnais*—statements such as “the nigger should be returned to Africa, the Jew to Israel,”¹¹² and “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken.”¹¹³ Rejuvenating the Holmes/Brandeis clear and present danger test,¹¹⁴ the Supreme Court held this speech was fully protected by the first amendment.¹¹⁵

Chief Justice Rehnquist's opinion in *Hustler* makes it abundantly clear that it is the *Brandenburg* strain of the first amendment tradition, and not the *Beauharnais* strain, which is to dominate the first amendment jurisprudence of the Rehnquist Court. Nothing more powerfully

108. This would track the analysis of the Fourth Circuit in *Falwell*, with the added support of refitted *Beauharnais*. See *supra* text accompanying notes 35-40.

109. See *infra* text accompanying notes 136-56.

110. 395 U.S. 444 (1969) (per curiam).

111. 414 U.S. 105 (1973) (per curiam).

112. 395 U.S. at 447.

113. *Id.* at 446.

114. See *Whitney v. California*, 274 U.S. 357, 374-79 (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). For an excellent review of the evolution of the Holmes/Brandeis clear and present danger test through *Brandenburg*, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 16.13-16.15, at 854-65 (3d ed. 1986) [hereinafter J. NOWAK]. See also D. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 23-31, 92-93 (1986).

115. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). See also *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam); *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam) (First amendment protected statement that: “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.”); *Bond v. Floyd*, 385 U.S. 116 (1966) (first amendment protected Julian Bond's support of Student Non-violent Coordinating Committee (SNCC) statement criticizing war in Vietnam and draft laws).

illustrates this theme of *Hustler* than the exceptionally short shrift Chief Justice Rehnquist gave to *Chaplinsky v. New Hampshire*.¹¹⁶

In *Chaplinsky*, the Supreme Court upheld a criminal conviction against a Jehovah's Witness for uttering "fighting words" to a city marshall in the course of an incident arising from a hostile crowd reaction to the appellant's proselytizing on the street. The Court stated that certain "well-defined and limited" classes of speech "have never been thought to raise any constitutional problem," including "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹¹⁷ In the years since *Chaplinsky*, the Court has limited the "fighting words" concept to face-to-face confrontations that threaten to provoke *immediate* violence.¹¹⁸ Indeed, the Court in *Chaplinsky* stated that "[t]he test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."¹¹⁹

Most significantly for the purposes of Reverend Falwell's claim, the Supreme Court has rejected the view that vulgarities may be penalized merely because they offend the recipient's sensibilities. In *Cohen v. California*,¹²⁰ in which the defendant wore the words "fuck the draft" on his jacket, the Court emphasized that the state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to a hostile reaction."¹²¹ Rather, the state was attempting to penalize *only* the fact of communication.¹²² This, the Court held, the state could not do:

How is one to distinguish this from any other offensive word? Surely the state has no legal right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.¹²³

116. 315 U.S. 568 (1942).

117. *Id.* at 571-72.

118. See, e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971). ("No individual *actually or likely to be present* could reasonably have regarded the words . . . as a direct personal insult.") (emphasis added).

119. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

120. 403 U.S. 15 (1970).

121. *Id.* at 20.

122. *Id.* at 18.

123. *Id.* at 25.

Similarly, in *Street v. New York*,¹²⁴ a flag desecration case, the Court wrote:

[A]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.¹²⁵

The ad parody in *Falwell* was neither gentle nor genteel; its shock effect was purposeful, and to most, offensive. The parody could not be penalized for that offensive shock effect alone, however, without turning back the clock on decades of first amendment doctrine. And that the Supreme Court refused to do.

According to the *Restatement (Second) of Torts*, the principal touchstone for intentional infliction of emotional distress is whether the conduct is such that "an average member of the community . . . [would] exclaim, 'Outrageous!'"¹²⁶ When dealing with non-speech conduct, the epithet "Outrageous!" may be a useful description of the type of conduct the tort seeks to proscribe. But nothing could be more antithetical to settled first amendment doctrine than the notion that speech may be penalized merely for being "outrageous." The clear and present danger test is meaningless if merely outrageous speech may be penalized; Nazis and Ku Kluxers might as well be summarily rounded up. The current law of obscenity would be obsolete under the *Restatement* test, for a large part of what is currently classified colloquially as "pornographic" but not obscene would suddenly lose its first amendment protection if the test were whether the average member of the community found it "outrageous." The Critical Legal Studies and Law and Economics movements are both at times "outrageous," and not above inflicting a little emotional distress in the process. Lenny Bruce was "outrageous." *Saturday Night Live*, *Monty Python*, and *Doonesbury* are often "outrageous." It is because they are outrageous that they are funny. It is because they are outrageous that they are effective. In comedy and in social critique, it works when it hurts.

D. The Vagueness of the "Outrageous," "Immoral," and "Indecent" Standards

In stating that public discourse would suffer little or no harm if speech such as the *Hustler* ad parody were excluded from the market,¹²⁷

124. 394 U.S. 576 (1969).

125. *Id.* at 592. See also *Kingsley Int'l. Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959).

126. RESTATEMENT (SECOND) OF TORTS § 46 comment d.

127. *Hustler*, ____ U.S. at ____, 108 S. Ct. at 881.

Chief Justice Rehnquist revealed what was probably the most important influence on his own analysis. What concerned the Chief Justice most was "separation." The Court could find, he argued, no principled basis for separating protected from unprotected speech in this context. Whether or not such a separating standard exists, the Court was "quite sure that the pejorative description 'outrageous' does not supply one."¹²⁸

The chill on the exercise of free expression posed by the Fourth Circuit's use of the emotional distress cause of action was compounded by the speaker's inability to predict what a jury will determine to be "out of bounds" in terms of "decency" or "morality." The critical operative standard for this tort, when applied in the speech context, is thus impermissibly vague. To be actionable, the speech must offend "generally accepted standards of decency and morality."¹²⁹ The damages award in *Falwell* was punishment for having run afoul of that standard. Under the related doctrines of overbreadth and vagueness, speech may not be penalized when the controlling standard is capable of sweeping and improper application,¹³⁰ or if its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."¹³¹ An amorphous and fluid standard such as the phrase "generally accepted standards of decency and morality" invites a jury to impose liability because of its distaste for the publisher, rather than for any concrete harm caused by what is published.¹³² Any attempt to prosecute *Hustler* magazine for obscenity under a legal standard penalizing the publication of material offending "generally accepted standards of decency and morality" would violate the Supreme Court's requirements of specific definition.¹³³ The Supreme Court first noted in *New York Times Co. v. Sullivan* that the financial penalties of a libel judgment may be exponentially more punishing than the corresponding maximum fine for criminal libel;¹³⁴ so too, the damages awarded in a private suit for infliction of emotional distress may be far more punitive than the fine exacted in an obscenity conviction. If a state may not

128. *Id.* at —, 108 S. Ct. at 881-82.

129. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). This standard essentially tracks the *Restatement*, which speaks of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, to be regarded as atrocious, and utterly intolerable in a civilized community." *RESTATEMENT (SECOND) OF TORTS* § 46 comment d.

130. See J. NOWAK, *supra* note 114, §§ 16.8, 16.9, at 840-47.

131. *Zwickler v. Koota*, 389 U.S. 241, 249 (1967).

132. See *Kunz v. New York*, 340 U.S. 290, 295 (1951); Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 52 (1982).

133. See *Miller v. California*, 413 U.S. 15 (1973).

134. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

criminally penalize as obscene speech falling within the vague rubric of "indecent" or "immoral," it certainly should not be permitted to accomplish that same end through its tort system.¹³⁵

E. Emotional Distress and Outrageous Opinion

The jury's specific finding that no reasonable person could interpret the ad parody as a literal misstatement of fact¹³⁶ renders the *Hustler* case indistinguishable from *Greenbelt Cooperative Publishing Ass'n v. Bresler*.¹³⁷ In *Bresler*, the Supreme Court held that, as a matter of law, the word "blackmail" in the particular circumstances of the case was not actionable:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that . . . their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.¹³⁸

One must remember that the Court necessarily decided *Bresler* as a matter of federal constitutional law. The Supreme Court's ruling that the language was "rhetorical hyperbole," and therefore not actionable, was not an exercise in interpreting common law tort doctrine; instead, it was a holding that the first amendment forbids exacting tort penalties that no reasonable reader could interpret as misstatements of fact. Surely, Bresler, the plaintiff, suffered severe emotional distress from being the object of a "vigorous epithet" in a heated community controversy. To believe that if Bresler had been clever enough to include in his lawsuit a supplementary cause of action for emotional distress, the Supreme Court would have reached a different result on that claim, however, is impossible.¹³⁹

135. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting) (emphasizing "largely uncontrolled" freedom of juries to levy punitive damages awards "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

136. 797 F.2d at 1273.

137. 398 U.S. 6 (1970).

138. *Id.* at 14.

139. See *Blatty v. New York Times Co.*, 421 Cal. 3d 1033, 728 P.2d 1177, 1184, 232 Cal. Rptr. 542, 549 (1986):

In *Old Dominion Branch No. 96, National Ass'n of Letter Carriers v. Austin*,¹⁴⁰ the Supreme Court addressed language every bit as emotionally incendiary as the ad parody at issue here. In the midst of a heated labor dispute, a union newsletter printed a "List of Scabs" and included Jack London's definition of a scab.¹⁴¹ That definition, the Court stated, was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join."¹⁴²

The Court in *Letter Carriers* obviously believed that this "lusty and imaginative expression of contempt" was designed to inflict distress—to express disgust and contempt—and yet it was nonetheless not actionable, because one could not reasonably understand it to be a literal misstatement of fact. *Letter Carriers* is an enormously important guide to the correct resolution of the *Falwell* case. *Letter Carriers* instructs that in the rough and tumble controversies of American life, vicious insults designed to cause severe distress will be hurled about. But unless that emotionally-laden speech carries with it some harm other than its

Not only does logic compel the conclusion that [f]irst [a]mendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than "defamation" to their injurious-falsehood claims . . . and thereby avoid the operation of the limitations and frustrate their underlying purpose.

140. 418 U.S. 264 (1974).

141. The offending newsletter read:

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

Id. at 268 (emphasis in original).

142. *Id.* at 285-86 (emphasis added).

capacity to outrage, such as factual misstatements, it is not actionable.

At one time, the common law protection for "opinion" or "fair comment" in defamation actions extended only to "fair" or "reasonable" opinions.¹⁴³ The "fairness" or "reasonableness" of the comment was usually left to the jury's relatively unguided judgment.¹⁴⁴ This practice permitted juries to judge the "worth" of the speaker's viewpoint, and thus carried the potential for persecution of unpopular opinion. The common law of defamation thus often permitted the prosecution of "outrageous" opinion.¹⁴⁵

When the Supreme Court stated in *Gertz v. Robert Welch, Inc.*,¹⁴⁶ that "[u]nder the [f]irst [a]mendment there is no such thing as a false idea,"¹⁴⁷ it emancipated the outrageous opinion from legal censure. "However pernicious an opinion may seem," the Court stated, "we depend for its correction *not on the conscience of judges and juries but on the competition of other ideas.*"¹⁴⁸

An outrageous opinion directed against a public figure will virtually by definition be intentionally or recklessly designed to generate severe emotional distress. Opinions are always "intentional"; they are designed to have an effect.¹⁴⁹

The ad parody in *Hustler* was neither true nor false. Opinions are not true or false, but only bad or good. The jury clearly thought the parody was bad—bad to the point of being outrageous. The use of the Virginia cause of action for emotional distress to punish Flynt and *Hustler* for speech that the *jury found* could not be understood as factual thus resuscitated the discredited cause of action for outrageous opinion. The second element of the cause of action, the requirement that the conduct "offends generally accepted standards of decency or morality,"¹⁵⁰ requires that the judge and jury do what *Gertz* forbids: examine their consciences to determine if Flynt's opinion was "indecent" or "immoral."

Significantly, Virginia's own courts had interpreted the protection for opinions quite expansively. In *Crawford v. United Steelworkers, AFC-CIO*,¹⁵¹ the Virginia Supreme Court engaged in an analysis of the

143. R. SMOLLA, *supra* note 29, § 6.02[3].

144. See R. SACK, *supra* note 14, § IV.3.6; R. SMOLLA, *supra* note 28, § 6.02[3].

145. See Hill, *Defamation and Invasion of Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1233 (1984).

146. 418 U.S. 323 (1974).

147. *Id.* at 339.

148. *Id.* at 339-40 (emphasis added).

149. See *Gitlow v. New York*, 268 U.S. 652, 673 (1923) (Holmes, J., dissenting).

150. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974).

151. 230 Va. 217, 335 S.E.2d 828 (1985).

Supreme Court's decision in *Bresler* that seemed to precurse the Supreme Court's ultimate analysis in *Hustler*.

By the same token, the words upon which the trial court fashioned liability here will not support recovery. The words are disgusting, abusive, repulsive, and are in no way condoned by this Court. Nevertheless, they cannot reasonably be understood, under the circumstances of this labor dispute, to convey a false representation of fact. To call a person a "cocksucker" does not, under the circumstances of this labor dispute, convey the false representation that the individual engaged in sodomy. *Nor does calling a person a "motherfucker," under the circumstances of this case, convey the false representation that the person engaged in incest.* Because this was a labor dispute and considering the way in which the words were used, these repulsive words will not support liability.¹⁵²

The Fourth Circuit had mistakenly reasoned that absolute protection for opinion is irrelevant when the purpose of the cause of action is not to vindicate the victim's reputation, but to compensate the victim for the opinion's capacity to emotionally disturb.¹⁵³ But the modern protection for opinion comes not from the elements of the tort of defamation, but from the first amendment.¹⁵⁴ That the fact/opinion

152. *Id.* at 234-35, 335 S.E.2d at 838-39 (emphasis added). If, under the analysis in *Crawford*, the free speech values surrounding a labor dispute protect the statement "you are a motherfucker," one would expect the first amendment to also protect an ad parody with incest as its central theme, when in the parody it is clear that the point is made not for its factual value but as an attack on perceived hypocrisy.

153. 797 F.2d at 1276.

154. See generally R. SMOLLA, *supra* note 29, at § 6.02[4], 6.03. See also *Ollman v. Evans*, 750 F.2d 970, 975 n.8 (D.C. Cir. 1984) (citation omitted) (en banc), *cert. denied*, 471 U.S. 1127 (1985) ("Although [the] claim arises under the District of Columbia common law of libel, . . . the issue whether the allegedly libelous statements are protected opinion is to be decided as a matter of federal constitutional law.") (citing *Lewis v. Time, Inc.*, 710 F.2d 549, 552-53 (9th Cir. 1983)); *Yerkie v. Post-Newsweek Stations, Michigan, Inc.*, 470 F. Supp. 91, 94 (D. Md. 1979); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 603 (D.D.C. 1977), *aff'd without opinion*, 578 F.2d 442 (D.C. Cir. 1978); *Bucher v. Roberts*, 595 P.2d 239 (Colo. 1979); *Naked City, Inc. v. Chicago Sun-Times*, 77 Ill. App. 3d 188, 395 N.E.2d 1042 (1979); *Mashburn v. Collin*, 355 So. 2d 879, 891 (La. 1977).

The most important Supreme Court statement treating opinion as absolutely protected under the first amendment is, of course, the famous line in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that "there is no such thing as a false idea." *Id.* at 339. Although the quoted statement from *Gertz* was unabashed dictum, it has been accepted by subsequent decisions as controlling law. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 504 (1984) (quoting the *Gertz* dicta with approval); *Ollman v. Evans*, 750 F.2d at 974-75 n.6; *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460, 1464 & n.7 (D.C. Cir. 1983); *Lewis v. Time, Inc.*, 710 F.2d at 552-53; *Hammerhead Enterprises v. Brezenoff*, 707 F.2d 33, 40 (2d Cir.), *cert. denied*, 464 U.S. 892 (1983); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Avins v. White*, 627 F.2d

distinction may be irrelevant to the state definition of infliction of emotional distress¹⁵⁵ does *not*, therefore, decide the matter. The question is whether it is irrelevant under the first amendment. The answer provided by *Hustler v. Falwell* is that the distinction is *always* relevant. Opinion is always protected under the first amendment; in fact, its absolute protection is one of the most pervasive themes of modern first amendment jurisprudence.¹⁵⁶ This protection does not dissolve when the name of the tort changes. And an opinion is no less an opinion because it is disturbing. Under our first amendment the indecent, immoral, or outrageous opinion must simply be tolerated by the legal system; our society has other correctives.¹⁵⁷

F. The Special Problems of Satire and Parody

Chief Justice Rehnquist is economical in his writing. The slip opinion in *Hustler* consumes only eleven printed pages. Given that economy of style, it is telling that nearly two pages of the Court's opinion would

637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

Two members of the Court—Justice White and Chief Justice Rehnquist—have noted, however, that “the problem of defamatory opinion was not remotely an issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem.” *Miskovsky v. Oklahoma Publishing Co.*, 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923 (1982) (Rehnquist, J., dissenting) (quoting Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L.REV. 1205, 1239 (1976)).

155. Although the formal elements of infliction of emotional distress do not include the fact/opinion distinction, one might nevertheless argue that this is only because the tort often encompasses conduct that has nothing to do with speech. When speech is the predicate for emotional distress liability, however, a persuasive argument can be made that only speech reasonably understood as factual may support liability, because only factual speech carries the potential for severe distress in a reasonable person. As discussed subsequently, the common law position is already quite close to this proposition, for traditionally the law of torts has disqualified mere verbal abuse, insults, and epithets as grounds for liability under *any* tort theory. See *infra* text accompanying notes 183-84.

156. It is worth noting, for example, that even Judge Robert Bork, who came under severe fire in his Supreme Court nomination hearings for harboring an overly restrictive view of the first amendment, authored a stirring and persuasive first amendment analysis of the fact/opinion distinction in which the first amendment protections for opinion were treated quite expansively. See *Ollman v. Evans*, 750 F.2d at 993 (Bork, J., concurring).

157. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). For a sampling of the rich judicial effort to devise effective protection for opinion, compare *Ollman*, 750 F.2d 970 (applying four factor test) with *Shiver v. Apalachee Publishing Co.*, 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983) (distinction “a judgment call”) and *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom.*, *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977) (emphasizing “verifiability”) and *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980); *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1360 (Colo. 1983) (applying three factor test); *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 309, 435 N.E.2d 1021, 1025, *cert. denied*, 459 U.S. 1037 (1982).

be taken up by what can only be described as homage to the great American tradition of parody and satire.¹⁵⁸

The fact that speech is satiric should not, standing alone, either enhance or diminish the protection to which the speech is otherwise entitled under the first amendment. Labeling speech "satire" or "parody" does not talismanically immunize that speech from all legal restraint. If the satirist goes beyond the scope of the fair use doctrine in taking from a copyrighted work, for example, he may be legitimately subjected to the penalties of the copyright act.¹⁵⁹ If the satirist crosses the line into the legally obscene, or the commercially fraudulent, the speech may be regulated.¹⁶⁰

At the same time, satiric speech is in no sense a second-class first amendment citizen. Whatever level of first amendment protection the speech would otherwise enjoy is not diminished by the fact that it is spiced with humor. More importantly, the satirist's first amendment protection is not lessened because the speech is cruel, crude, mean-spirited, unfair, or viciously biting. In the defamation context, it has long been axiomatic that common law malice—hatred, spite, or ill-will—is not enough to satisfy the "knowing or reckless" actual malice test of *New York Times*.¹⁶¹ The hatred with which speech is expressed does not affect its value in the marketplace of ideas. American life is replete with examples of speech lying at the core of first amendment protections, dripping with venom.¹⁶²

158. See ____ U.S. at ____, 108 S. Ct. at 881.

159. See *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).

160. See *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972).

161. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 754 (1985); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 n.3 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977); *Postill v. Booth Newspapers, Inc.*, 118 Mich. App. 608, 626, 325 N.W.2d 511, 516 (1982); *Novi Ambulance, Inc. v. Farmington Observer*, 11 Media L. Rep. (BNA) 1644, 1646 (Mich. Cir. Ct. 1985); *Nevada Broadcasting v. Allen*, 669 P.2d 337, 344 (Nev. 1983).

Although it is error to confuse common law "ill will" malice with constitutional "actual malice," it is perfectly proper to permit the existence or nonexistence of common law ill will malice to be established as evidence probative of the existence or nonexistence of actual malice. Courts permit evidence of ill will, hatred, or spite to be introduced for whatever weight it deserves on the actual malice question, with the caveat that ill will, hatred, or spite *standing alone* can never establish knowing or reckless disregard for the truth. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd on other grounds*, 466 U.S. 485 (1984); *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1220 (Ind. App. 1978); *DiLorenzo v. New York News, Inc.*, 81 A.D.2d 844, 432 N.Y.S.2d 483, 487 (1981); *Hellman v. McCarthy*, 10 Med. L. Rep. (BNA) 1789, 1794 (N.Y. Sup. Ct. 1984).

162. See generally, Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and*

Satire is often effective precisely because it is shocking to mainstream cultural sensibilities. The satirist's very purpose is often to be "outrageous" and "indecent," to incite anger, revulsion, and controversy.¹⁶³ The "bite" of satire is often its potency:

Thus, satire is a potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical, and often harsh language—tempered by humor. Highet describes the "typical weapons of satire—irony, paradox, antithesis, parody, colloquialism, anticlimax, topicality, obscenity, violence, vividness, [and] exaggeration." He identifies three attributes of satiric writing: 1) it describes "a painful or absurd situation or a foolish or wicked person or group as vividly as possible;" 2) it uses sharply critical language including callous, crude, obscene or taboo words in order to shock and disturb the reader; and 3) it attempts to evoke an emotion in the reader which blends amusement and contempt, hatred and laughter.¹⁶⁴

As Judge J. Harve Wilkinson pointed out in his dissent from the Fourth Circuit's denial of rehearing en banc, "[s]atire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air."¹⁶⁵

Copyright: Remedies Without Wrong, 65 B. U.L. REV. 923, 924-26 (1985). See also *infra* text accompanying notes 165-75.

163. See *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987); Dorsen, *supra* note 125, at 924-26.

164. Dorsen, *supra* note 162, at 924 (quoting G. HIGHET, *THE ANATOMY OF SATIRE* 16-18 (1962)).

165. *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing). Judge Wilkinson went on to write:

While *Hustler's* base parody is unworthy of this or any tradition, the precedent created by the cause of action against this defendant may one day come to stifle the finer forms of this genre.

The natural urge to bring down self-appointed moralists led Moliere to satirize the French lay clergy in *Tartuffe*, and motivated Mencken to chastise novelists for failing to look beneath the surface of American evangelists. Sinclair Lewis acted on Mencken's suggestions by writing *Elmer Gantry*, a scathing satiric attack on the Protestant clergy and the public's willingness to boost demagogues to positions of influence. E. Martin, *H.L. Mencken, and the Debunkers* 123 (1984).

Public moralists have not been the only victims of the satirist's wit. Despite his enormous popularity in 1789, George Washington was once depicted on a donkey led by his aide David Humphreys over the caption, "The glorious time has come to pass/When David shall conduct an ass." S. HESS & M. KAPLAN, *THE UNGENTLEMANLY ART: A HISTORY OF AMERICAN POLITICAL CARTOONS* 61 (1968). Thomas Jefferson was forced to endure vicious rumors spread by general gossip as well as by his

Satire about public persons and public issues lies at the core of first amendment protection because the emotive aspect of the speech is inextricably intertwined with its cognitive content. As the Supreme Court stated in *Cohen v. California*:¹⁶⁶

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.¹⁶⁷

One unavoidable consequence of satire's emotive power is its greater capacity to inflict pain than that of other genres of speech. It is a fact of American life that an attack on a public figure in a context such as *Doonesbury* may have more impact than scores of detached analytic essays by commentators on op-ed pages. It has never been part of our first amendment jurisprudence, however, to penalize speech because it is effective.

The satire that *Hustler* published in this case was admittedly crude. Judge Wilkinson described it as a "base parody" that is "unworthy" of the grand American tradition of public satire.¹⁶⁸ If it is "unworthy," however, it is only unworthy of praise as particularly humorous, clever,

political enemies. For example, he was drawn as a lecherous beast who waited in his shirttails outside his wife's bedroom and as the keeper of a slave harem who actioned his mulatto offspring into slavery. See V. DABNUEY, *THE JEFFERSON SCANDALS: A REBUTTAL* 9-15 (1981). Similarly, political cartoonists have portrayed Grover Cleveland as the father of an illegitimate child, pictured James Garfield as an unwed mother in a dress, and lambasted Ulysses S. Grant as an incompetent drunk. See generally, S. HESS & M. KAPLAN, *supra*; W. MURRELL, *A HISTORY OF AMERICAN GRAPHIC HUMOR* (1967).

William Charles, America's first widely acclaimed political cartoonist, found it expedient to leave Scotland in 1806 after he published an irreverent cartoon. The cartoon, "A Fallen Pillar of the Kirk," showed a clergyman bouncing a bare-bosomed young woman on his knee while exclaiming, "Oh Lord, what good things dost thou provide for us men!" W. MURRELL, at 80. More recently, Garry Trudeau's *Doonesbury* has satirized the sanctuary movement of the liberation theologians and the Rev. Pat Robertson's direct line to divine inspiration.

Id. at 487.

166. 403 U.S. 15 (1971).

167. *Id.* at 25-26.

168. 805 F.2d at 487.

or tasteful. It is certainly not "unworthy" of first amendment protection.¹⁶⁹ The Court's famous statement in *New York Times Co. v. Sullivan*,¹⁷⁰ describing a profound national commitment to the principle that debate on public issues should be "uninhibited, robust, and wide-open"¹⁷¹ was not a mere slogan. The words "uninhibited" and "wide-open" gather their force when they are extended to protect speech at the fringes, speech that is indecorous and irreverent. No first amendment would be necessary if all American speech were polite, genteel, and restrained.¹⁷² But, as the Court in *New York Times* emphasized, our national character is more robust; our marketplace of speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks."¹⁷³

The satiric attack on Reverend Falwell was also couched in a form outside of conventional mores. That, however, cannot be enough to diminish its first amendment protection. For if the attack is not otherwise punishable—if it is not legally obscene, if it does not contain defamatory lies, if it does not pose a clear and present danger of violence—it may not be proscribed merely because it is unconventional or unorthodox. As the Court put it in *West Virginia State Board of Education v. Barnett*,¹⁷⁴ "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."¹⁷⁵

169. As James Madison explained:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding proper fruits.

Stephens v. Thieriot, 13 Media L. Rep. (BNA) 2143, 2147-48 (Cal. Ct. App. 1987) (quoting *Fellows v. National Enquirer, Inc.*, 42 Cal. 3d 234, 252, 721 P.2d 97, 109, 228 Cal. Rptr. 215, 227-28 (1986)); see also F. MOTT, *JEFFERSON AND THE PRESS* 38-43 (1943).

170. 376 U.S. 254 (1964).

171. *Id.* at 270.

172. The threat is by no means limited to commentary, but may also extend to more traditional forms of reporting. In the political arena, for example, it is common for the press to report on competing candidates who make vituperous comments about their opponents. Historically, the courts have been loathe to permit such political controversies to serve as the basis for defamation actions on the theory that: "Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to [politicians]. . . . Whatever is added to the field of libel is taken from the field of free debate." *Sweeny v. Patteson*, 128 F.2d 457, 458 (D.C. Cir. 1942). See generally R. SACK, *supra* note 14, at §§ IV.2.4, IV.2.5., at 160-61. If a politician is no longer required to prove publication of a known reckless defamatory falsehood, and instead may recover simply on a showing of intent to cause him emotional distress, the values protected by *New York Times* and its progeny will be severely undermined.

173. 376 U.S. at 270.

174. 319 U.S. 624 (1943).

175. *Id.* at 642.

Chief Justice Rehnquist's tribute to this cultural and legal tradition was quite eloquent—even moving. “Despite their sometimes caustic nature, . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate.”¹⁷⁶ “From the viewpoint of history,” the Chief Justice observed “it is clear that our political discourse would have been considerably poorer without them.”¹⁷⁷

Recognizing absolute protection for speech inflicting emotional distress on public figures does not leave the public figure remediless; the natural remedies of the market are available. The two central rationales supporting the Supreme Court's current defamation rules apply well to emotional distress suits predicated on satiric attacks upon public figures.

The first is the assumption of risk rationale. In *Gertz*, the Court reasoned that one who enters the public arena must accept an increased risk of defamation as part of the price of fame and influence.¹⁷⁸ This aspect of *Gertz* largely reflects the common sense dicta that he who enters the kitchen must accept the heat of the fire. If first amendment principles require that public figures assume some enhanced risk that others will lie about them, then surely they also accept an increased risk of being subjected to emotional distress.

In a pluralistic culture—a culture diverse enough to count both Jerry Falwell and Larry Flynt within its constellation of influential public figures—it is inevitable that prominent individuals will be occasionally subjected to unwanted and severe emotional distress. In candor, both Larry Flynt and Reverend Falwell occupy positions in the spectrum of American life that are likely to evoke deep feelings of loyalty and affection from some quarters, and disgust and revulsion from others. To be attacked with intensity is never pleasant. The first amendment, however, requires Reverend Falwell to assume the risk as part of the price of his political and religious ministry. As Professor Magruder noted long ago, “[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in community life, a certain toughening of the mental hide is a better protection than the law could ever be . . . upon the contrary, it would be unfortunate if the law closed all safety valves through which irascible tempers might legally blow off steam.”¹⁷⁹ Although Professor Magruder was writing about sound management of the tort system, fifty years later his words

176. ____ U.S. at ____, 108 S. Ct. at 881.

177. *Id.*

178. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

179. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

have taken on a constitutional dimension. *Gertz* teaches that there is an assumption of risk component to the first amendment. This assumption of risk is an essential element to a pluralistic, robust, and open culture. In the words of Judge Cardozo, "[t]he timorous may stay at home."¹⁸⁰

This author has expressed the lament in the context of libel that we are witnessing the collective thinning of the American skin.¹⁸¹ The view may well be every bit as apt for the tort of infliction of emotional distress:

What the libel explosion does to the free expression interests of the media, however, may in the end be less significant than what it does to the free expression interests of ordinary private citizens. For if we take the libel suit too seriously, we are in danger of raising our collective cultural sensitivity to reputation to unhealthy levels. We are in danger of surrendering a wonderful part of our national identity—our strapping, scrambling, free-wheeling individualism, in danger of becoming less American, less robust, wild-eyed, pluralistic and free, and more decorous, image-conscious, and narcissistic. The media is itself partly to blame for this direction, and it would be dangerous to release it totally from the important check and balance that the libel laws provide. But in the United States, the balance that must be struck between reputation and expression should never be tilted too far against expression, for the right to defiantly, robustly, and irreverently speak one's mind just because it is one's mind is quintessentially what it means to be an American.¹⁸²

The second rationale articulated in *Gertz* was the counterspeech principle. Public officials and public figures, the Court reasoned, are more likely to have effective opportunities for self-help when they are defamed; their very prominence ensures some degree of access to the media, permitting them to address the lie with counterspeech.¹⁸³ If access to the media as a means of self-help justifies substantial first amendment protection for defamatory speech, it justifies constitutional protection of speech that has merely inflicted emotional injury even

180. *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929). Cardozo continued: "The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation." *Id.* Neither, one may surmise, was Reverend Falwell.

181. R. SMOLLA, *supra* note 14, at 3-25.

182. *Id.* at 257.

183. *Gertz*, 418 U.S. at 344.

more. Regardless of the technical name given to a cause of action, the common law has always been extraordinarily wary of permitting recovery for name-calling, insults, epithets, and verbal abuse. This wariness stems not only from the assumption of risk principle, but from the secondary rationale that such language reflects as negatively on the speaker as on the victim.¹⁸⁴ The modern first amendment counterpart to this wisdom is that a public figure subjected to an outrageous satiric attack may be very well able to turn the tables on his attacker by using the media to display his outrage.

The *Hustler* case vividly illustrates the power of such counterspeech. Exercising his own first amendment prerogative, Reverend Falwell launched an impressive counterattack against Flynt and *Hustler* magazine. Reverend Falwell's Moral Majority, Inc., sent out three mailings in response. The first, a mailing to 500,000 "rank-and-file" members, described the *Hustler* parody and asked for contributions to help Falwell "defend his mother's memory."¹⁸⁵ A second mailing to 26,900 "major donors" included a copy of the parody itself, with eight of the most offensive words blacked out.¹⁸⁶ A third mailing signed by Falwell, under the auspices of his television show *The Old Time Gospel Hour*, was sent to 750,000 persons.¹⁸⁷ Reverend Falwell also used his television program to discuss the parody and counterattack Flynt, displaying the ad on nation-wide television.¹⁸⁸ Within thirty days of the mailings, the Moral Majority received \$45,000, and *The Old Time Gospel Hour* received \$672,000.¹⁸⁹ Falwell used the media to attack Flynt with specific reference to the parody, as well as to attack pornography more generally. These attacks did not mince words. Falwell wrote, for example:

184. See *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966). No matter how mean or vulgar, for example, mere insults, epithets, and name-calling are not deemed defamatory. See, e.g., *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); *Held v. Pokorny*, 583 F. Supp. 1038 (S.D.N.Y. 1984); *Lamelza v. Bally's Park Place, Inc.*, 580 F. Supp. 445 (E.D. Pa. 1984); *Crozman v. Callahan*, 136 F. Supp. 466 (W.D. Okla. 1955); *Morairty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (1972); *Rice v. Simmons*, 2 Del. 417 (1838); *Stanley v. Taylor*, 4 Ill. App. 3d 98, 278 N.E.2d 824 (1972); *Durr v. Smith*, 90 So. 2d 137 (La. Ct. App. 1956); *Bartow v. Smith*, 149 Ohio St. 301, 305, 78 N.E.2d 735, 737 (1948); *Blouin v. Anton*, 139 Vt. 618, 431 A.2d 489 (1981).

185. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986). *Hustler*, never lacking for temerity, sued Falwell for violating *Hustler's* copyright in the ad parody. The Ninth Circuit held that Falwell's use of the ad parody to counterattack *Hustler* was a fair use under the copyright law. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

Now pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy plague. . . . And there, in my opinion, is clear proof that the billion dollar sex industry, of which Larry Flynt is a self-declared leader, is preying on innocent, impressionable children to feed the lusts of depraved adults. For those porno peddlers, it appears that lust and greed have replaced decency and morality.¹⁹⁰

This counterattack by Falwell is precisely the sort of self-help remedy the Supreme Court contemplated in *Gertz*. Rather than use the media to "counter the lie," of course, Falwell used it to "counter the distress," by bluntly and colorfully attacking Flynt. That attack was financially lucrative for Falwell, and it combined his own emotive and cognitive use of language to further his own ideological positions. This is exactly the sort of response that the first amendment is intended to encourage. The salvos between Flynt and Falwell give true meaning to the ideal of wide-open and robust speech. Nothing could be more antithetical to first amendment values, however, than to give to either side the option of invoking the heavy machinery of the state tort system to exact compensation and punitive damages for the hurt feelings that inevitably accompany these rough exchanges.

V. PLACING LIMITS ON FIRST AMENDMENT PROTECTIONS

A. *Will the First Amendment Swallow Emotional Distress?*

If first amendment doctrines are potent enough to destroy Falwell's claim, are they *too* potent?¹⁹¹ Does disqualifying Reverend Falwell from recovery necessarily interfere with the tort of infliction of emotional distress in all situations in which speech is a component of the distress-inflicting conduct? When the speech is an element of some other oppressive, coercive, or harrassing activity, might it not, in combination with that other activity, create a cause of action that would raise less serious first amendment objections? Infliction of emotional distress by an oppressive bill collector, or through sexual harrassment on the job, may be effectuated by "speech." But the gravamen of the tortious activity in such cases is arguably the proscription of underlying non-

190. *Id.* at 1153 n.7.

191. The *Hustler* case was not the first in which an emotional distress claim was upheld despite the failure of a defamation claim. See, e.g., *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc); *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176 (1983). See generally Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

speech conduct, such as an oppressive commercial tactic, or anti-social behavior in the workplace. The penalty exacted on speech in such cases appears incidental to the governmental purpose of regulating more palpable harms, rather than regulating the purely expressive component of the conduct.¹⁹²

There has been much discussion about the potential capacity of the emotional distress tort to "swallow up" the torts of defamation and invasion of privacy.¹⁹³ The interrelationships between the torts of libel, slander, false light invasion of privacy, intrusion, publication of embarrassing facts, appropriation of likeness, and infliction of emotional distress are complex, volatile, and largely uncharted.¹⁹⁴ In a strict sense, however, these issues pose no federal constitutional questions, but are rather problems for the sound administration of state tort systems. As far as the Constitution is concerned, a state should be free to combine or separate these torts as it pleases, with as much or as little overlap in elements or functions as it deems wise. Nothing in the first amendment, for example, necessarily dictates a rule that when a defamation claim fails, an emotional distress claim arising from the same facts also fails.¹⁹⁵

Fear that the tort of emotional distress could destroy core first amendment values must thus be balanced against a countervailing fear that will certainly drive many to attack the Supreme Court's ruling in *Hustler*—the fear that a first amendment ruling in favor of Flynt would effectively swallow up all claims for emotional distress. For if the first amendment does bar Reverend Falwell's recovery against *Hustler* and Flynt, what is left of tort recovery for emotional distress? Assuming that Falwell's distress was indeed "severe,"¹⁹⁶ that Flynt's inducement of that distress was "intentional,"¹⁹⁷ and that the means used offended "generally accepted standards of decency or morality,"¹⁹⁸ is there any type of infliction of emotional distress that survives the Supreme Court's decision? If what *Hustler* published failed to pierce the shield of the first amendment, what would?

The simple answer is that tort law may continue to permit recovery for infliction of emotional distress, without running afoul of the first

192. See *United States v. O'Brien*, 391 U.S. 367 (1968).

193. See R. SMOLLA, *supra* note 29, at § 11.01[2][b].

194. See *id.* at §§ 10.01, 11.01.

195. See *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc); *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176 (1983). See *infra* notes 219-24 and accompanying text.

196. See *supra* text accompanying note 43.

197. See *supra* text accompanying note 42.

198. See *Wommack v. Eldridge*, 215 Va. 338 —, 210 S.E.2d 145, 148 (1974).

amendment when the tortious activity does not involve speech. This answer, however, is easily discredited, because it is surely underinclusive. There are too many examples of activity involving communication, verbal or symbolic, that strike one intuitively as beyond first amendment protection. The challenge, therefore, is to articulate some first amendment principle to guide that intuition.

B. *Non-Speech Masquerading as Speech*

In certain cases, one may avoid first amendment concerns by unmasking that which purports to be communicative activity to reveal non-speech masquerading as speech. In *Johnson v. Woman's Hospital*,¹⁹⁹ for example, the court allowed an action for infliction of emotional distress when the defendant displayed a dead newborn child in a formaldehyde jar to the plaintiff. The mere one-sentence restatement of the facts in *Johnson* is nauseating; little imagination is required to conjure the overwhelming emotional shock that must have consumed the plaintiff upon actually seeing the dead baby in a jar of formaldehyde. The distress, however, comes from what was seen. If recovery was legitimate in *Johnson*, it must be distinguished from the distress that results from seeing, on a magazine page, one's depiction as having had sexual intercourse with one's mother in an outhouse.

Emotional distress cases involving visceral shock at simply observing activity are now well established in the tort tradition. Courts have permitted recovery for the mutilation of a spouse's dead body,²⁰⁰ for witnessing a scene in which one's child is violently killed,²⁰¹ and even against an estate, for the decedent's act of committing suicide in the plaintiff's kitchen.²⁰² The medium through which harm is transmitted in these cases is "communicative" in the literal sense that the emotional injury is caused by what one absorbs by the senses in sight and sound. The famous line of cases emanating from *Dillon v. Legg*,²⁰³ indeed, require direct sensory observance as an element of the cause of action.²⁰⁴

One might argue, however, that these emotional distress cases do not truly involve "speech," because they are all examples of the antithesis

199. 527 S.W.2d 133 (Tenn. Ct. App. 1975).

200. *Alderman v. Ford*, 146 Kan. 698, 72 P.2d 981 (1981).

201. *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

202. *Blakeley v. Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945).

203. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

204. See *Ochoa v. Superior Court of Santa Clara County*, 39 Cal.3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985); *Justus v. Atchison*, 19 Cal.3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Campbell v. Animal Quarantine Station*, 63 Haw. 557 632 P.2d 1066 (1981).

of Marshall McLuhan's statement that the "medium is the message." In these cases there is medium but there is no message. It is not the idea of a dead baby in a formaldehyde jar, a mutilated corpse, or a suicide discovered in one's kitchen that is communicated; rather it is the reality of those events and actions that is observed. If it is speech at all, it is speech without a speaker. When one cannot plausibly argue that either the free trade of ideas or the self-fulfillment of a speaker is implicated, no first amendment concerns exist.

C. Emotional Distress for the Content of Speech

The psuedo-speech cases, however, do not cover the entire spectrum of situations in which emotional distress is inflicted through apparently communicative conduct. Tort law has become increasingly hospitable to causes of action in which "real speech" is the primary vehicle through which the defendant induces distress—cases in which a speaker and a message clearly exist, and the distress is caused by the content of the message. Although this species of recovery has gained accelerated momentum in recent years, it has an old and venerable pedigree. In *Wilkinson v. Downton*,²⁰⁵ the losing defendant was a practical joker who told a woman that her husband had been severely injured in an accident. The defendant could not interpose the comeback "can't you take a joke?" as a defense in *Wilkinson*; the court ruled that statements about the death or personal injury of loved ones were simply not joking matters in civilized life. Later, in fact, an entire class of cases developed in which courts imposed liability for erroneous messages announcing a relative's death.²⁰⁶

An intriguing modern manifestation of this issue is posed by *Molien v. Kaiser Foundation Hospital*,²⁰⁷ in which a doctor erroneously told a patient that she had a venereal disease, and the patient repeated the information to her husband. The marital friction caused by the false diagnosis led to a divorce. The California Supreme Court permitted the husband to recover for the emotional distress caused by the false medical information given to his ex-wife.²⁰⁸

Recovery for emotional distress is indeed routinely predicated upon expressive activity in which the distress is undeniably linked to the content of the message. Debt-collection cases, for example, are among

205. 2 Q.B. 57 (1897).

206. See, e.g., *Kaufman v. Western Union Tel. Co.*, 224 F.2d 723 (5th Cir.), cert. denied, 350 U.S. 947 (1955); *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

207. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

208. *Id.* at 931, 616 P.2d at 821, 167 Cal. Rptr. at 839.

the most common fact patterns for emotional distress recovery.²⁰⁹ Courts have held defendants liable for the distress created in attempting to recover debts even when the speech of the debt-collector is directed only to the debtor, and not communicated to third persons.²¹⁰ The emotional distress tort is also a recurring vehicle for recovery when persons are falsely accused of shoplifting,²¹¹ or of stealing from the employer's cash-drawer.²¹² Courts have also ruled that repeated sexual advances are sufficient grounds for recovery based on infliction of emotional distress.²¹³

In other contexts, courts permit recovery for the outrage of *what is said* under the rubric of some recognized tort other than infliction of emotional distress, even though the only compensable injury is emotional disturbance. In *Fisher v. Carrousel Motor Hotel, Inc.*,²¹⁴ for example, the plaintiff was a black customer attending a luncheon at a restaurant club. As he picked up his plate to go through the line, an employee of the cafeteria grabbed the plate from him and said that blacks could not be served in the club.²¹⁵ A recovery of compensatory and punitive damages for battery was upheld. Although the case has been used as an example of the sort of common law rule we ritually require first year law students to memorize—that a battery may be consummated by an offensive touching of not only the person of the plaintiff, but of an “appurtenance,” such as an umbrella or plate²¹⁶—the case is really a powerful example of recovery for emotional distress for the offensiveness of that which was communicated. The case had no relationship to the law of battery other than its demonstration of the quicksilver ingenuity with which a clever plaintiff's lawyer may press an old tort to do new tricks. The damages awarded under the Texas tort system expressed the community's outrage at the offensiveness of the race-hate and insult to human dignity embodied in a vicious slur such as “we don't serve niggers here.” There is, indeed, a certain stirring sense of judicial triumph and pride in reading the case—here is a Texas jury and Texas appellate court courageously renouncing

209. See, e.g., *Delta Finance Co. v. Ganakas*, 93 Ga. App. 297, 91 S.E.2d 383 (1956).

210. See, e.g., *Bundren v. Superior Court of California*, 145 Cal. App. 3d 784, 193 Cal. Rptr. 671 (1983).

211. See, e.g., *Hall v. May Dept. Stores Co.*, 292 Or. 131, 637 P.2d 126 (1981).

212. See, e.g., *M.B.M. Corp., Inc. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

213. See, e.g., *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961).

214. 424 S.W.2d 627 (Tex. 1967).

215. *Id.* at 628-29.

216. See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 30-32 (6th ed. 1976).

racism through the common sensibilities of tort law in the South in 1967.

Courts have permitted a parallel form of recovery in battery or assault cases involving sexual harrassment, in which the physical touching is fleeting or non-existent, and but for its verbal accompaniment, innocuous. In *Western Union Telegraph Co. v. Hill*,²¹⁷ for example, the defendant's employee leaned across the counter to touch a woman's hand, although he never made contact. He said to her, "If you will come back here and let me love you and pet you, I will fix your clock."²¹⁸ Although the court analyzed the matter in terms of whether the counter was sufficiently narrow to allow the man's arm to reach the plaintiff, it was not the attempted touching but the sexual advance that really formed the heart of the case, and it was what the defendant said that "consummated" the sexual advance.

After *Hustler*, do the rulings in these cases violate the first amendment? How will a court distinguish the insult to human dignity wrapped up in the epithet "nigger" or in the uninvited sexual come-on from the insult of being portrayed as one who has sex with one's mother?

To strike the iron where it is even hotter in first amendment terms, consider that the Supreme Court has upheld recovery under the law of defamation when the only injury for which the plaintiff seeks compensation is the emotional distress induced by the defamatory statement. In *Time, Inc. v. Firestone*,²¹⁹ Mary Alice Firestone, ex-wife of Russell Firestone, a scion of the wealthy Firestone family, sued for defamation arising from a brief "milestones" blurb in *Time* magazine announcing her divorce judgment. *Time* had summarized the grounds for the divorce in terms that made Firestone appear to have a wide-open, robust, and uninhibited sex life with men other than her husband. Although her suit was for defamation, she dropped all claims for reputational injury and predicated her entire recovery on the emotional anguish caused by *Time's* characterization.²²⁰ The Supreme Court upheld Firestone's jury verdict of \$100,000, holding that the first amendment's requirement of "actual injury" for private defamation cases could be satisfied by proving subjective emotional harm—no external injury to reputation

217. 25 Ala. App. 540, 150 So. 709 (1933).

218. *Id.* at 542, 150 So. at 710.

219. 424 U.S. 448 (1976).

220. Florida was among those states that had decided, as a matter of state law, that proof of reputational damage is not prerequisite to recovery for defamation—internal emotional distress will suffice standing alone, even when not "parasitic" to damage to reputation. See R. SMOLLA, *supra* note 29, at § 9.06[5].

was constitutionally mandated.²²¹ If the first amendment permits recovery for emotional distress in a defamation case in which no reputational damage is claimed, why should it not also permit recovery when the pretense of the defamation action is dropped, and a spade is called a spade? Would Mary Alice Firestone have lost in the Supreme Court (assuming she could surmount any obstacles posed by Florida law), if she had chosen to style her claim one for infliction of emotional distress?

D. A Multi-Tiered Solution

These questions concerning the implications of the Supreme Court's decision in *Hustler* must be addressed in light of the two most important "clues" dropped in Chief Justice Rehnquist's opinion. The first clue is the explicit limitation of the holding to public officials and public figures.²²² The second clue is the insistence in the opinion that "'not all speech is of equal [f]irst [a]mendment importance.'"²²³ Against the backdrop of these two themes in the opinion, a multi-tiered solution to the questions left unanswered by the *Hustler* decision may be constructed.

1. The Scale

The universe of tort recovery for emotional distress may be schematically arranged according to five variables: (1) whether the underlying tortious conduct is expressive or non-expressive; (2) whether, if the conduct is expressive, the plaintiff is a public figure or public official, or a private figure; (3) whether, if the conduct is expressive, the communication involves matters of public interest; (4) whether the victim's emotional distress is coupled with injury other than emotional distress; and (5) whether the actor's conduct may be fairly characterized as satisfying all of the elements of some tort other than emotional distress, or instead must be challenged exclusively under the rubric of emotional distress.

All non-expressive tortious conduct is outside of first amendment concern. Whether to permit recovery for expressive conduct causing emotional distress, however, involves an intricate balance of the remaining variables. A proper accommodation of first amendment values

221. 424 U.S. at 460.

222. ____ U.S. at ____, 108 S. Ct. at 882.

223. *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

and the plaintiff's interests in emotional distress cases would apply the five variables listed above according to the following rules:

(1) When the conduct is non-expressive, the plaintiff may recover if the state law elements of the tort are satisfied, because no first amendment interests are at stake.

(2) When the conduct is expressive, the plaintiff is absolutely barred from recovery when: (a) the plaintiff is a public official or public figure; (b) the speech involves a matter of public concern; (c) no injury other than emotional distress exists; and (d) no tort other than infliction of emotional distress has been committed. (Reverend Falwell's case falls into this category and thus, as the Supreme Court held, is absolutely barred.)²²⁴

(3) When the conduct is expressive, and there is either injury suffered other than emotional distress, or a tort committed other than intentional infliction of emotional distress, the plaintiff may recover subject to these restrictions:

(a) When the plaintiff is a public figure or official, and the speech concerns matters of public interest, one may recover for emotional distress only when: (i) the challenged conduct is reckless or intentional with regard to the risk of the *non-emotional distress* component of the injury; or (ii) when the defendant commits a tort other than intentional infliction of emotional distress and the conduct is intentional or reckless with regard to the legal interest protected by that tort. In addition to these requirements, all other currently existing first amendment restraints upon recovery for that tort, including absolute protection for opinion, must be satisfied.

(b) When the plaintiff is a public figure or official, but the speech does not involve matters of public concern, the same rules apply as in (a) above, but the minimum constitutional fault threshold is dropped to negligence.

(c) When the plaintiff is a private figure, but the speech involves issues of public concern, the same rules apply as in (a) above, but the minimum constitutional fault threshold is dropped to negligence.

(d) When the plaintiff is a private figure and the speech does not involve any issue of public concern, the case is treated for first amendment purposes as if it were non-expressive conduct, and no first amendment restrictions will apply, relegating the defendant's protection solely to that available under applicable common law rules.

224. It is not the literal speech in the ad parody—sex in an outhouse with one's mother—that qualifies as speech on issues of public concern, but rather the underlying opinion that Falwell is a hypocrite.

2. The Logic of the Scale

This matrix of rules tracks, in its analytic structure, the multi-tiered constitutional fault structure in defamation created by combining *New York Times Co. v. Sullivan*,²²⁵ *Gertz v. Robert Welch, Inc.*,²²⁶ and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*²²⁷ It does not, however, simply restate the current rules for defamation,²²⁸ substituting for "defamation" the term "emotional distress"; such an approach would fall into the trap set by the Fourth Circuit's enticing but flawed analysis.²²⁹ Instead, the appropriate analysis readjusts the first amendment matrix governing defamation to reflect the different balance of social interests posed by emotional distress cases. That balance requires absolute immunity at the "high end" of the scale, when public plaintiffs sue to recover for injuries caused by expressive conduct involving issues of public concern, and the only actual injury or legal interest implicated is emotional distress. When public plaintiffs sue to recover for injuries caused by public speech, the capacity of the speech to cause emotional disturbance is simply never enough, standing alone, to justify its abridgement.²³⁰

No absolute immunity is mandated, however, when the case implicates some interest of the plaintiff other than the disturbing quality of the speech; in such cases, the regulation of speech is incidental to the protection of some palpable social interest distinct from the capacity of the speech to disturb. The test for whether speech is being restricted because of a state interest other than the disturbance quality of the speech is whether one can identify, either factually or legally, some non-emotional injury to the plaintiff. Thus, the fact that the plaintiff can prove non-emotional injury, or that the plaintiff can point to some independently cognizable non-emotional distress tort, such as assault, battery, defamation, or invasion of privacy, is evidence that such a palpable state interest exists.²³¹ Even in such cases, however, the sacrifice of first amendment freedom must be meticulously balanced against the strength of the state interest, according to the sliding scale in the rules above. When the plaintiff and the speech are both public, the first

225. 376 U.S. 254 (1964).

226. 418 U.S. 323 (1974).

227. 472 U.S. 749 (1985).

228. These rules are summarized in note 14, *supra*.

229. See *infra* text accompanying notes 28-39.

230. See *supra* text accompanying notes 82-97.

231. It is only on this basis that the *Firestone* decision is justified: the defendant was at fault in relation to the risk of a false defamatory fact, implicating an interest other than emotional distress alone.

amendment interest is at its highest level. Abridgement of that interest through tort liability is thus permitted only when there is intentional or reckless conduct with regard to a risk other than the distress-inducing potential of the speech. It is critical that the intentional or reckless conduct be in relation to the other palpable interest being protected, and not simply to the risk of causing distress; if the risk is only related to distress, the case must fall within category (2) above, in which the expressive conduct is absolutely protected.

This rationale remains applicable as one moves down the scale to speech that involves public figures but no public issues, or public issues but no public figures. Because first amendment concerns for penalizing speech for its disturbance potential alone still exist in these cases, it remains essential that the fault standard applied be in relation to risks other than the emotional distress evoked by the speech. On the other hand, because *Gertz* informs us that private figures are in greater need and more deserving of tort remedies for injurious speech than public figures,²³² and because speech concerning private matters and public figures is of less first amendment significance than speech linked to a plaintiff's public figure status,²³³ the balance in these suits swings towards negligence rather than reckless or intentional conduct. The defendant must thus show both the public status of the plaintiff and the public status of the speech to receive the benefit of the "knowing or reckless" test. Showing only one of the two drops the minimum first amendment standard to negligence. In all of these cases, however, the first amendment requires that the risk be in relation to something other than the emotional content of the speech.

3. Applying the Scale

One should have no illusions, of course, that the process of separating these interests will always be easy. That does not mean, however, that such separation is impossible.

One of the most difficult cases that illustrates the problem of separating the emotive quality of speech from the invasion of other, more palpable interests is *Vietnamese Fisherman's Association v. Knights of Ku Klux Klan*.²³⁴ In that case, hooded and robed Ku Klux Klansmen rode past boats containing Vietnamese fisherman. The Klansmen carried guns, and were in a boat that contained a cannon and a figure hung

232. See *supra* text accompanying notes 178-90.

233. See *supra* note 14.

234. 518 F. Supp. 993 (S.D. Tex. 1981).

in effigy. The Klansmen fired a cannon towards the Vietnamese fishermen's boat.

The court held that in such circumstances Texas law might support an action against the Klan members for intentional infliction of emotional distress.²³⁵ Apparently, no first amendment defense was raised. But if a first amendment defense had been vigorously pressed, what would the correct result have been? Under the analysis here, the case turns on the guns and the firing of the cannon. As the district court recognized, brandishing the weaponry may have been sufficiently threatening to constitute assault.²³⁶ Although the outrage one feels at the actions of the Klan is fed primarily by the repugnance of the race-hate displayed against the Vietnamese fisherman, in a free society the abominable speech of racists must be tolerated unless it threatens to ripen into more palpable harm. Had the Klansmen merely boated past the Vietnamese fisherman with sheets and shotguns and figures hung in effigy, shouting "gooks go home" the first amendment should bar recovery. In such circumstances, the repugnance of the conduct would be in the message conveyed, a message driven home by the combination of the racial slur, and the symbols of the sheets, guns and hanging effigy. But the harm would still be *only* in the disturbing quality of this message.

Once this speech escalates to threats of violence, however, an interest other than the emotional disturbance caused by the content of the speech is implicated. The brandishing of firearms and shooting of the cannon combine to satisfy the common law definition of assault, by creating a reasonable apprehension of bodily harm. No reasonable person in the position of the Vietnamese fishermen could fail to be fearful of an hysterical physical attack in such circumstances. The Klansmen were at least negligent with regard to the threat of physical harm—indeed, they were almost certainly intentionally seeking to intimidate through physical threats; therefore, imposing liability for infliction of emotional distress does not offend the first amendment.

Similarly, in *Chuy v. Philadelphia Eagles Football Club*,²³⁷ the Philadelphia Eagles' staff physician erroneously informed a newspaper that Chuy, one of the Eagles' players, had a fatal illness. Arguably, only

235. *Id.* at 1013.

236. *Id.* at 1012. The court was not satisfied that the plaintiffs had developed sufficient facts to support liability for infliction of emotional distress or assault, but did find a likelihood of success on the merits of several statutory civil rights claims and on the common law tort of interference with contractual relationships. *Id.* at 1016.

237. 595 F.2d 1265 (3d Cir. 1979) (en banc).

the emotional impact of the speech predicated liability. On closer examination, however, *Chuy* is more subtle, and actually involves the intentional invasion of a more concrete interest of the plaintiff. *Chuy* involved an intentional lie—the doctor deliberately spread a false statement of fact about Chuy’s physical condition. The only reason the statement was not libelous was that under Pennsylvania law the imputation of serious disease is deemed defamatory only if it is a stigmatizing illness, such as venereal disease.²³⁸ But as *Firestone* instructs, spreading a false statement of fact is a palpable harm which a state may use as the basis for tort liability even when no reputational damage ensues. The false statement in *Chuy* was verbal assault in a *literal* sense. The power of the statement was indistinguishable from the power of a bullet zipping past one’s ear—Chuy thought he was going to die. The fact that the speech failed to meet all the technical requirements for defamation did not alter the fact that the harmful quality of the speech was not solely its emotional offensiveness, but its factual error—a factual error deliberately made by a doctor in a doctor/patient relationship and calculated to mislead the patient about his own health.

4. The Lax Standard for Private Figure/Private Speech Cases

When the plaintiff is a private figure, and the speech at issue does not address any issue of public concern, first amendment restrictions on emotional distress recovery will be completely eliminated under this proposed scale. Under the logic of *Dun & Bradstreet*,²³⁹ the first amendment value of this species of speech is so low that the unvarnished rules of the common law are sufficient to protect it, and no independent first amendment rules will apply.²⁴⁰ The oppressive bill-collector’s speech, for example, involves a private figure plaintiff, and speech that falls squarely within the type of commercial speech stripped of special first amendment protection in *Dun & Bradstreet*. Just as common law defamation rules operated without first amendment interference in the commercial defamation context, they should operate untrammelled in the context of commercial emotional distress. An act of sexual harrassment in the workplace presents exactly the same first amendment

238. *Id.* at 1281.

239. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

240. For a discussion of the implications of *Dun & Bradstreet*, see R. SMOLLA, *supra* note 29, at §§ 3.02-.05. Perhaps it is reading too much into nuance, but in defense of the scale proposed here it may be worth noting that in making his point that all speech is not created equal, the Chief Justice quoted from *Dun & Bradstreet*. See *Hustler*, ____ U.S. at ____, 108 S. Ct. at 882.

balance; the plaintiff is a private figure and the speech concerns private matters.

In both examples, our confidence that no special first amendment rules should be imposed comes largely from the intuition that the speech is inextricably wrapped up in the invasion of interests of the plaintiff other than the content of the speech itself. The speech is part of some other nonspeech business, such as a proposal to engage in a commercial or a sexual transaction. The decision to treat the conduct as tortious is really aimed at the transaction itself.

This analysis will accommodate equitably the vast run of cases. Like any scheme of legal rules, however, it will inevitably have some rough edges. One might ask, for example, whether cases falling into the private figure/private speech category are genuinely different in kind from cases in which the plaintiff is public but the speech is private. Does it make sense to treat a public figure victimized by an oppressive bill-collector, or by verbal sexual aggression, differently from a private figure so victimized? Even if the first amendment interferes with Jerry Falwell's right to recover from Larry Flynt for emotional distress, should it also interfere with his right to sue the abusive collection agency, or a superior at work who attempted to condition continuing employment on Falwell submitting to sodomy? One might pose the same problem in reverse: if the decision is made that fault in relation to a risk other than distress is required when the speech or the plaintiff is public, why shouldn't fault in relation to some non-emotional distress interest also be required in the private figure/private speech situation? After all, the rationale for excusing this latter category from first amendment protection is that cases in this category usually involve some palpable non-speech interest. Some private figure/private speech verbal inflictions of emotional distress will not involve any other non-speech "transactions." Suppose a capricious, malicious defendant walks up to a stranger on the street and screams "You are an ugly mother-fucker, I hope you die today!" Does the first amendment permit whatever recovery the common law provides, even though this speech does not fit comfortably into the supposition that some other "transaction" is involved? In short, why not treat all of these cases alike, and either require first amendment protection for all of them or none of them?

And if one must choose between all or none, surely the choice must be all. When the private figure, viciously assaulted with a torrent of gratuitous vulgarity on the street, sues for emotional distress, should not the first amendment impose the same sort of restrictions that have evolved in the criminal context in the "fighting words" cases—a show-

ing of risk of imminent harm other than the smarting of the words themselves?²⁴¹ Why shouldn't the plaintiff bear the burden in *every* case to demonstrate the defendant's fault in relation to some risk other than the capacity of the speech to cause emotional disturbance?

The answer to these objections involves three observations. First, the descending scale proposed here is, like the analogous scale in the first amendment rules for defamation, based on the large run of cases, and the paradigms one expects to find in each category. The notion in *Gertz* that public figures assume greater risks and have greater access to channels of counter-speech will not be true in all cases; the soundness of the rule turns on how well the probabilities for most cases have been assessed. Second, downside risks to a uniform rule exist regardless of the direction in which the rule is bent. A single standard applied across the board will either provide too much or too little first amendment protection. A graduated scale helps prevent fewer improperly balanced cases from escaping. Third, there is a federalism benefit to keeping the intrusion of constitutional rules upon the law of torts confined to bright-line factors. If a first amendment calculus were made an explicit requirement in every emotional distress case, the state law of emotional distress would indeed be swallowed up by the federal Constitution.

Tort law must be trusted to do some of its own work. Whatever fears we may have that occasionally in a private figure/private speech case there will be no social interest at stake other than the capacity of the speech to disturb should be alleviated by trust in the internal gyroscope of the law of torts. Tort law will, in its own wisdom, tend to screen out most emotional distress claims in which no interest or harm other than the emotive quality of the speech is implicated. It has long been hard legal doctrine that mere verbal abuse, standing alone, is not actionable.²⁴² Under standard defamation, privacy, and emotional distress rules, plaintiffs are told that the door of tort recovery is not open for the routine slings and arrows of outrageous fortune.

If tort law may be trusted in cases involving private figures and private speech, the flip side is that we cannot trust it to be sufficiently sensitive to first amendment values in public figure or public speech cases. Preoccupation with common law elements of infliction of emotional distress will distract attention from the possibility that a plaintiff is seeking recovery only because of the emotional content of the speech

241. See *Cohen v. California*, 403 U.S. 15, 20 (1970); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). See *supra* text accompanying notes 117-120.

242. See *supra* note 184.

at issue. Because the probabilities of improperly penalizing protected speech in public figure or public speech cases run higher than in private figure/private speech cases, the first amendment now requires that the plaintiff actually perform the task of separating the interests involved. Unless the plaintiff can articulate some interest other than emotional disturbance, and demonstrate at least negligence in relation to that interest, the first amendment should bar recovery. When both public figures and public speech are involved, the fear that tort liability is being imposed solely because of the disturbing quality of the speech is now at its highest, and the probability that that speech is within the core of the first amendment is at its highest as well. The threat of self-censorship is now so intense that only intentional or reckless misconduct in relation to some risk independent of emotional distress will justify liability. In these cases, the plaintiff is being forced to demonstrate the separation of emotional distress interests from more palpable interests that we were willing to simply assume existed in the private figure/private speech cases. When the *only* harm caused by such public speech about public figures is emotional distress, however, the first amendment compels absolute protection.

VI. CONCLUSION

The Supreme Court's opinion in *Hustler* was a triumphant celebration of freedom of speech. The most powerful challenges to the free speech tradition have always come not from bad people but from good people—people who would sanitize public discourse in order to elevate it, people who would have our speech be less violent, less caustic, less racist, less sexist, less sexual. But that, as Holmes instructed is not the theory of the Constitution. Principle distinctions may be made when speech is used to inflict palpable social harm. But in *Hustler*, the Supreme Court reaffirmed the principle that no such distinctions are possible when the only quarrel with the speech is its emotionally disturbing quality. For that is what uninhibited robust and wide-open speech is all about.