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HUMOR, DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: THE POTENTIAL PREDICAMENT FOR PRIVATE FIGURE PLAINTIFFS

INTRODUCTION

Since President Reagan appointed Mark Fowler\(^1\) chairman of the Federal Communications Commission in 1981, the Commission has significantly reduced government regulation of the electronic media.\(^2\) One consequence of deregulation is the proliferation of so-called "shock jocks," radio personalities hired for their comedic skills who often cross traditional boundaries of media decorum in the contest for shares of the radio audience.\(^3\) For example, radio personality Howard Stern telephoned Air Florida after one of its planes crashed into the Potomac River to ask about the price of a one-way ticket from National Airport to the 14th Street Bridge.\(^4\)

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1. Commissioner Fowler resigned his position in 1987 to enter the private practice of communications law. Over the course of Fowler's tenure as chairman, the Federal Communications Commission (FCC) relaxed its rules governing the content of radio and television programming and ownership of media properties, and significantly reduced the amount of paperwork involved in the administration of the FCC and in managing radio and television stations. Mr. Fowler also supported the repeal of the Fairness Doctrine, a long-standing FCC rule requiring station owners to communicate opposing sides of significant public issues. *A Chairman Who Marched to His Own Drummer*, Broadcasting, Mar. 23, 1987, at 51.


4. Barol, *supra* note 3, at 80. Stern, who has been offending radio listeners and simultaneously earning high ratings for years, currently broadcasts a show from New York that is simulcast in Philadelphia. Stern’s previous employer fired him after a dispute in which Stern called his employers "scumbags" on the air. Stern’s current show features tasteless
In another example, a top-rated radio show in Tampa featured a pair of disc jockeys who played a song entitled “Electric Avenue” every time a condemned person died in the Florida electric chair.\(^5\) With the advent of this type of program, which encourages a combination of confrontation, harassment, humiliation and sensationalism,\(^6\) the number of lawsuits against radio stations for defamation and intentional infliction of emotional distress has increased markedly.\(^7\)

Individuals who have been the target of some of the more extreme examples of such jokes understandably want compensation. As Jerry Falwell learned recently, however, recovery against media defendants does not come easily.\(^8\) Media defendants routinely claim that the first amendment protects their actions.\(^9\) Courts have traditionally permitted media defendants substantial leeway in situations involving satire, parody and other forms of humor.\(^10\) The governing case law involves public figures, however, and the theo-

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5. Id. Shock jocks are popular across the country. In November 1986, three shock jocks were battling for the morning radio ratings in Dallas. Jacksonville and Tampa also have their own shock jocks. Id.

6. Importantly, most shock jocks apparently do not seek to further any sort of social agenda with their comments. Howard Stern is representative of most. Stern is an equal opportunity offender, whose penchant for offending everyone implies that the primary, and perhaps sole, purpose of his broadcasts is to make people laugh.

Even jokes based on social or political issues often do not easily fit within traditional constitutionally protected speech. For example, Washington D.C.’s Doug “the Greaseman” Tracht celebrated the first marking of Dr. Martin Luther King’s birthday as a national holiday by suggesting that if the assassination of a black leader led to a day off from work, then killing more blacks would result in more vacation time. Id.

When the first amendment protects this kind of material, it protects primarily the value of a laugh rather than one of the more traditional ends of the first amendment freedom of expression, such as searching for truth and aiding the ability of the people to govern themselves. See infra notes 114-19 and accompanying text.


retical framework recent Supreme Court decisions have constructed does not afford private figures adequate compensation.

Consider the following scenarios: A Louisiana woman received a telephone call one month prior to her wedding from a man who identified himself as the caterer of her reception. The caller referred to her fiance as a "dork" and told her that she had to change the wedding date because someone else had booked the reception hall. The caller was actually a disc jockey who taped the call and later broadcast it as a prank. As a result, the bride-to-be suffered hysterical seizures and required substantial psychiatric care. A Florida attorney wrote to a local radio station and complained of the offensive nature of a portion of the station's programming. One of the radio personalities at the station broadcast the attorney's address and phone number and encouraged the station's listeners to harass the attorney. Over a period of several months, the same radio host allegedly mentioned the attorney by name more than 40,000 times and in this manner was responsible for much of the abuse the attorney received from the station's listeners over the same period. These types of cases currently fall into an analytical black hole. No clear rules governing recovery for private figure plaintiffs against media defendants exist.

This Note explains traditional remedies that plaintiffs seek against media defendants. It also analyzes recent court decisions in an effort to predict a trend for resolving actions for defamation and intentional infliction of emotional distress that private figure plaintiffs bring against media defendants who have published material intended to be humorous. The Note concludes by proposing

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11. For a summary of the Supreme Court's defamation decisions, see Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 Geo. L.J. 1519, 1571-73 (1987). Professor Smolla has set out in tabular form the effects of various combinations of important variables, including identity of the plaintiff, identity of the defendant, status of the speech, level of fault, types of damages and voting behavior of the Supreme Court Justices.

12. Private figure plaintiffs do not voluntarily inject themselves into a public controversy, and often do not have access to the media to combat the harmful speech of the defendants. See infra notes 33-36 and accompanying text.


an analytical method by which courts can hold liable media defendants who, in the name of humor, egregiously harass, humiliate or falsely portray private figure plaintiffs.

TRADITIONAL REMEDIES

Federal Communications Commission Regulations

Because the Federal Communications Commission (FCC) regulates the broadcast media, it offers some, though very limited, redress for harmful humor. The restrictions placed on the broadcast media have traditionally been greater than those placed on other media. One justification for this is the idea that with the creation of the FCC, Congress "condemned" the airwaves. 15 "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." 16 The FCC must undertake certain duties "as public convenience, interest, or necessity requires." 17 Although the FCC may not censor broadcasts, 18 it can revoke or suspend a radio or television station's license for a variety of reasons, 19 including the broadcast of obscene language. 20 The FCC also enforces a prohibition against indecent language. 21 When the Commission receives a complaint that does not focus on either the obscenity or the indecency of a broadcast, however, its responsibilities and powers are considerably less clear.

17. 47 U.S.C. § 303 (1982 & Supp. V 1987); see M. Franklin, THE FIRST AMENDMENT AND THE FOURTH ESTATE 499 (1981). "The origin of the phrase, 'public interest, convenience and necessity,' . . . is unclear from legislative documents," Franklin noted. " 'The standard was almost drained of meaning under section 307 of the Communications Act, where the issue was almost never the need for broadcasting service but rather who should render it.'" Id. (quotingriendly, THE FEDERAL ADMINISTRATIVE AGENCIES 54-55 (1962)).
19. Id. § 303(m).
20. Id. § 303(m)(1)(D). (FCC can suspend operator's license upon transmission of "profane or obscene words, language, or meaning."); id. § 312(a)(6) (FCC can revoke operator's license for violation of 18 U.S.C. § 1464 (1982), which pertains to broadcasting obscene language.).
21. 2 F.C.C. Red. 2726 (1987). "'The Commission, by this public notice, puts all broadcast and amateur radio licensees on notice as to new standards that the Commission will apply in enforcing the prohibition against obscene and indecent transmissions.'" Id.
The FCC has been reluctant to sanction stations on speech grounds except when the speech is clearly outside the scope of first amendment protection.\textsuperscript{22} It has yet to attempt to revoke or fail to renew a station's license because it has received complaints of radio personalities amusing their listeners at the expense of private individuals. The FCC demonstrated its aversion to interfering with radio programming through deregulation, which, in effect, shifted regulation from the FCC to the marketplace.\textsuperscript{23} The relaxation of regulation helps explain the emergence of shock jocks. Because humor such as "shock radio" receives high ratings, thus making such programs popular with sponsors,\textsuperscript{24} stations have great incentive to keep such programs on the air. For these reasons, the FCC's regulations are of little use to a private figure plaintiff who has been the subject of "shock" humor.\textsuperscript{25}

\textit{Tort Remedies for Media Attacks}

Plaintiffs who suffer humiliating and harassing attacks at the hands of the media have, in most instances, suffered two distinct types of harm. One type of harm is the damage done to the plaintiff's reputation, and the other is the damage done to the plaintiff's physical and mental well-being. Although elements of the two injuries overlap, separate torts have evolved to compensate plaintiffs for each kind of injury. The common law of defamation protects a plaintiff's reputational interest,\textsuperscript{26} and the comparatively new tort

\textsuperscript{23.} In 1981, the FCC adopted proposals that reduced the regulations affecting commercial radio licensees. In re Deregulation of Radio, 84 F.C.C.2d 968, 968-69 (1981).
\textsuperscript{24.} Barol, supra note 3, at 80. "Both Stern and Tracht get away with what they do because of commercial clout. Stern took the WXRK morning show from a 1.2 share to a 6.2 in his first six months. Advertisers tend to put delicate questions of taste aside when confronted with numbers like these." Id. In Stern's case, the advertisers even put up with insults to themselves and their businesses. Id.
\textsuperscript{25.} For example, the Personal Attack Rule provides that when an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group during the presentation of views on a controversial issue, the person or group must be notified, sent a script or tape, and given a reasonable opportunity to respond over the licensee's facilities. However, this Rule is of little help to a private figure plaintiff who has been harmed because the element of a "controversial issue" is likely to be missing. 47 C.F.R. § 73.679 (1974).
\textsuperscript{26.} B. Sanford, supra note 9, § 4.3.
of intentional infliction of emotional distress protects the plaintiff from the statement's physical and emotional impact on the plaintiff.27

The Elements of Defamation

The common law tort of libel protects an individual's interest in his reputation. If a statement "injures the subject's reputation by lowering the esteem, respect, goodwill or confidence in which he is viewed,"28 that individual has suffered the requisite harm entitling him to bring a libel action against the statement's publisher.

According to section 558 of the Second Restatement of Torts, a plaintiff sets forth a prima facie case for libel when he shows (1) a false and defamatory statement of and concerning the plaintiff, (2) communicated to at least one other person, (3) with fault amounting to at least negligence on the part of the defendant, and (4) either actionability without any special harm or the existence of special harm.29 In addition to establishing these elements of defamation, plaintiffs must also maneuver past constitutional protections that the United States Supreme Court has provided for media defendants. In the landmark case New York Times Co. v. Sullivan,30 the Supreme Court held that the first amendment required plaintiffs who are public officials seeking damages show that the defendant published the allegedly defamatory material with "actual malice"—either knowledge that the material was false or

27. Id. § 11.3.4.
28. Id. § 4.22 (citing W. Prosser & W. Keeton, Handbook on the Law of Torts § 111, at 773 (5th ed. 1984); see Kimmerle v. New York Evening Journal, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) (citing Sydney v. Macfadden Newspaper Pub. Corp., 242 N.Y. 208, 211-12, 151 N.E. 209, 210 (1926)) (defining libel as publications that expose the plaintiff to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society").
with reckless disregard for the truth or falsity of the material. In subsequent cases, the Court expanded the scope of this first amendment protection to cover all public figure plaintiffs and, although later overruled, to all issues of public concern.

31. New York Times, 376 U.S. at 279-80. Two years later, in Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court issued the first in a series of decisions that, taken cumulatively, expanded the scope of the New York Times holding from “public officials” to “public figures.” In Rosenblatt, the county commissioner of Belknap, New Hampshire, appointed the plaintiff to supervise a public recreation center. The defendant, a newspaper columnist, sharply criticized the manner in which the center was operated. The plaintiff prevailed in state court, but the Supreme Court reversed the judgment and instructed the trial court to determine whether the plaintiff was a public official for first amendment purposes. Id. at 85-88. After noting that the central purpose of providing protection to speakers was to offer citizens the opportunity to criticize their government, the Court declared that “the ‘public’ official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” Id. at 85.

32. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967) (plurality opinion). In Butts, the defendant publisher suggested in a Saturday Evening Post story that the plaintiff, the football coach at the University of Georgia, attempted to fix a football game. In Walker, the Associated Press published a story that accused the plaintiff, a retired United States Army general, of leading an attack on federal marshals at the University of Mississippi while the marshals were supervising the enrollment of the university’s first black student. Both plaintiffs were successful in the lower courts, which had declined to apply the New York Times test. The Supreme Court applied the New York Times test in both cases, concluding that “public figures” as well as “public officials” came within the scope of that decision because the “differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each has no basis in law, logic or First Amendment policy.” Id. at 163 (Warren, J., concurring). Although the Court regarded both plaintiffs as “public figures,” it affirmed Butts by a 5-4 vote on the facts, and unanimously reversed Walker. See Kalven, The Reasonable Man and the First Amendment: Hill, Butts and Walker, 1967 Sup. Ct. Rev. 267.

33. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion). In Rosenbloom, defendant Metromedia accused Rosenbloom, a private figure, of selling obscene material. The Supreme Court used this case to slide further down the slippery slope of expanding first amendment protection by holding that the New York Times actual malice standard applied to all cases involving matters of public or general interest even if a private figure plaintiff was harmed. Id. at 44-45.

The Court’s extension of New York Times to suits involving private figure plaintiffs and matters of public concern in Rosenbloom was overruled in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974):

[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publica-
For private figures, the standard is less rigorous. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that private figure plaintiffs need only show negligence in order to recover in a defamation action. The Court's rationale for permitting a lesser showing by private figure plaintiffs was that public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."

Perhaps more importantly, the Supreme Court set forth in *Gertz* a constitutional privilege for speakers to express opinions without fear of liability. In reaching this conclusion, the Court noted that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Although the Court rendered the *Gertz* decision in a defamation context, the principle applies logically to any tort action that might subject a defendant to liability solely because the defendant has expressed an opinion.

Shortly after the Court's decision in *Gertz*, the *Second Restatement of Torts* was revised to include a section specifically addressing expressions of opinion: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Thus, a me-
dia defendant cannot be liable for publishing pure opinions, and any defendant who publishes even admittedly defamatory statements will incur no liability without at least some showing of fault.

The Elements of Intentional Infliction of Emotional Distress

Apart from an injury the media may inflict upon a plaintiff's reputation, a plaintiff can recover for severe harm to his psyche under the emerging tort of intentional infliction of emotional distress.\(^3\) Section 46 of the Second Restatement of Torts explains intentional infliction of emotional distress as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."\(^4\) Consequently, a successful plaintiff must show (1) intentional or reckless conduct, (2) that is extreme and outrageous, (3) that actually causes severe emotional distress, and (4) that the defendant proximately caused such distress. According to the Supreme Court, "[T]he law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'"\(^5\)

Actions for intentional infliction of emotional distress arise in a variety of factual contexts, and the tort can be an effective tool for controlling socially undesirable behavior.\(^6\) The plaintiff may include claims of intentional infliction of emotional distress in a

2. If the facts are stated and not defamatory, there is no liability for the opinion unless the opinion "reasonably indicate[s] an assertion of the existence of other defamatory facts that would justify the forming of the opinion."

3. There is no liability for the expression of an opinion based on unstated facts if the facts are assumed by the parties to the communication. Again, the implication that other defamatory facts exist defeats the immunity.

4. Liability arises for the expression of a derogatory opinion if the facts are not stated and if the opinion can reasonably be taken to imply the existence of defamatory facts.

B. Sanford, supra note 9, § 5.4.1.

39. Restatement (Second) of Torts § 46 (1965).

40. Id.


complaint when he or she seeks compensation for severe emotional distress suffered as a result of the defendant’s publication, especially in those instances in which constitutional law appears to foreclose a defamation action.

THE CASES

Courts and commentators have pronounced modern defamation law to be a chaotic and confused body of concepts and cases. Recently, a substantial amount of scholarship has included the tort of intentional infliction of emotional distress in discussions of defamation law and policy. The recent landmark case *Hustler Magazine v. Falwell* helped settle some of the confusion involving the

43. See, e.g., Smolla, supra note 11, at 1519-24. Professor Smolla suggests that in the wake of the Supreme Court’s efforts to define the constitutional limits of defamation actions, it has become increasingly difficult to discern exactly what the states are free to do with the torts of slander and libel. The Court has deconstitutionalized and returned to the common law some aspects of defamation, and has constitutionalized and withdrawn from the common law other aspects. In each case, however, the Court has left unclear how much it has given and how much it has taken away. At a time in which the law of defamation is so deeply dissatisfying to plaintiffs and to defendants, and calls for reform are gaining increasing support, this doctrinal uncertainty is especially damaging, for it so clouds the picture that intelligent judgments about the future course of defamation become almost impossible to make. Id. at 1523 (footnotes omitted); see also Smolla & Gaertner, The Annenberg Libel Reform Proposal: The Case for Enactment, 31 WM. & MARY L. REV. 25, 25 (1989) (“For 200 years, the common law of libel operated under a complex and bizarre set of rules . . . .”); Wissler, Bezanson, Cranberg & Soloski, Why Current Libel Law Doesn’t Work, 27 JUDGES J. 28 (1988) (discussing problems with current libel law and the advantages of certain out-of-court alternatives for resolving libel suits).


interaction of the two torts. As the leading case in this area, the Hustler Magazine decision also illuminates several basic ideas involving constitutional protection for humorous material.

Hustler Magazine v. Falwell: The Collision of Constitutional Law and Intentional Infliction of Emotional Distress

In Hustler Magazine, the Reverend Jerry Falwell46 sued Hustler magazine and its publisher, Larry Flynt, for libel, invasion of privacy and intentional infliction of emotional distress. The action arose from Hustler's publication of a parody portraying Falwell as a habitual drunkard who had engaged in an incestuous relationship with his mother.47 The trial judge dismissed the claim for invasion of privacy.48 The jury found for the defendants on the libel claim, concluding that the parody was not defamatory.49 Falwell succeeded, however, on his claim for intentional infliction of emotional distress, receiving an award of $200,000.50

The Court of Appeals for the Fourth Circuit affirmed,51 noting that to succeed on his libel claim Falwell must meet the New York Times actual malice standard.52 The court upheld the intentional infliction of emotional distress award, stating that "when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's inten-

46. Jerry Falwell is a well known television evangelist and conservative political figure. See infra note 73.
47. See R. Smolla, Jerry Falwell v. Larry Flynt: The First Amendment on Trial (1988) for a complete account of the case. The publication at issue in Hustler Magazine was a one page “ad parody” satirizing both Falwell and the Campari Liqueur advertisements in which various celebrities spoke of their “first times.” Id. at 21-22. Hustler took advantage of the ad campaign’s double entendre and produced its own crude parody, which Chief Justice Rehnquist labeled “a distant cousin” of the American tradition of political cartoons, “and a rather poor relation at that.” Hustler Magazine, 485 U.S. at 55.
49. Id. The jury found that a reasonable person would not think that the Hustler parody suggested actual facts about Falwell. Id. at 49. The jury’s verdict is consistent with the “short, working definition of libel for today’s journalist [which] is ‘a false statement of fact printed or broadcast about a person which tends to injure that person’s reputation.’” B. Sanford, supra note 9, § 4.2 (footnote omitted).
50. Hustler Magazine, 485 U.S. at 49. Falwell’s award consisted of $100,000 in compensatory damages and $50,000 each from co-defendants Hustler magazine and Larry Flynt. Id.
52. Id. at 1274.
tional or reckless misconduct has proximately caused the injury complained of."

The Supreme Court reversed, also invoking the *New York Times* actual malice standard. The Court ruled that in this instance Falwell could not recover unless he could show that "the publication contain[ed] 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." Commentators have argued that the Court improperly applied the *New York Times* test in this context. Under their view, the *New York Times* test is relevant only in situations involving questions of fact. In *Hustler Magazine*, no such question presented itself. The ad parody was facially untrue in any literal sense, and the defendant did not allege its truthfulness, so further inquiry was unnecessary. Even if the Court correctly applied the *New York Times* test to these "facts," at least on a technical level, they satisfied the elements of *New York Times* actual malice because the defendant made the publication intentionally "with knowledge that the statement was false." If, on the other hand, the Court considered the parody to express the defendant's opinion, the *New York Times* test would not apply because no "false statement of fact" appeared.

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53. Id. at 1275. In so ruling, the court refused to apply the *New York Times* test literally. *New York Times* required the plaintiff to prove knowledge of falsity or reckless disregard of the truth. When applied to an action for intentional infliction of emotional distress, that requirement would add a new element. Instead, the court reasoned that "[p]roperly read, *New York Times* focuses on culpability," on whether the conduct was "'knowing . . . or reckless.'" Id. Ultimately, the *New York Times* standard is identical to the "intentional or reckless" element of Virginia's intentional infliction of emotional distress doctrine. Id.


55. Id. at 56.


57. *Hustler Magazine*, 485 U.S. at 56.

58. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). This distinction is of crucial importance. Had the Court analyzed the problem more efficiently, it need not have applied the *New York Times* test. According to the jury, the *Hustler* parody did not communicate any false statement of fact. See supra note 49 and accompanying text. Therefore, a separate analysis is appropriate. See infra text accompanying notes 68-72.
Clearly, the Court in *Hustler Magazine* reinforced constitutional protection for satire, parody and other forms of humor.\(^{59}\) The issue remains, however, as to when, if ever, a joke may be actionable. At trial, Falwell established each of the elements necessary to recover under the tort of intentional infliction of emotional distress. Nevertheless, the Court denied Falwell's recovery, citing *Hustler's* first amendment privilege.

The Court also gave substantial attention to the culpability of the defendant's conduct, an element necessary to maintain a successful action for intentional infliction of emotional distress.\(^{60}\) In order to recover, the plaintiff must show that the defendant acted "outrageously."\(^{61}\) At the district court level, the jury characterized the *Hustler* parody as outrageous and consequently found for Falwell.\(^{62}\) In its decision, the Supreme Court seemingly agreed with the Fourth Circuit that the amount of protection the first amendment affords a media defendant does not change when a plaintiff suits for intentional infliction of emotional distress rather than libel.\(^{63}\) From this proposition, the Court concluded properly that permitting recovery simply because a jury found a publication "outrageous" could not withstand constitutional scrutiny.\(^{64}\)

The Court's holding is clear: No public figure may recover for intentional infliction of emotional distress based on publication of offensive material without showing that the publication contained a false statement of fact made with *New York Times* actual malice.\(^{65}\) Determining precisely what entitled *Hustler* to raise the first

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60. *Hustler Magazine*, 485 U.S. at 52-56.
61. *Restatement (Second) of Torts* § 46 comment d (1977). The test for outrageousness is whether an average member of the community, after hearing of the alleged conduct of the defendant, would exclaim, "Outrageous!" *Id.*
63. *Hustler Magazine*, 485 U.S. at 49. The Fourth Circuit noted that "petitioners are entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in [the] claim for libel." *Id.* (quoting Falwell, 797 F.2d at 1274).
64. *Id.* at 55. This idea flows from the very roots of first amendment theory. Outrageous statements are considered outrageous in many instances because they conflict in a fundamental manner with the sentiments of the majority. Unconventional ideas of this sort are clear candidates for first amendment protection. *See infra* note 122.
65. *Id.* at 56.
amendment as a defense requires close analysis of the Court’s reasoning. First, the Court was plainly unconcerned with the speaker’s motives. At trial Flynt stated that his purpose in publishing the parody was to “assassinate” Falwell’s character. That Flynt’s malicious intent did not affect the Court’s opinion is clear from Chief Justice Rehnquist’s statement, “[A] bad motive may be deemed controlling for purposes of tort liability in other areas of the law, [but] we think the First Amendment prohibits such a result in the area of public debate about public figures.” The Court did not discuss whether a speaker’s intent may be relevant in cases involving private figure plaintiffs.

Second, the Court discussed the classification of the parody as fact or opinion in only an oblique fashion. The Court could have characterized Hustler’s parody as merely the speaker’s opinion. Because the Court had previously provided constitutional protection for statements of opinion in Gertz v. Robert Welch, Inc., and several subsequent decisions, the Court could have decided the case solely on this ground. The jury in Hustler Magazine found specifically that no reasonable person could have understood the parody to be a statement of fact. The Court could have accepted this finding and held that all nonfactual statements—statements

66. In this case, little doubt existed as to the intentional nature of the defendant’s actions, as evidenced by his deposition concerning the parody:
   Q: Did you want to upset Reverend Falwell?
   A: Yes . . .
   Q: And wasn’t one of your objectives to destroy [Falwell’s] integrity, or harm it, if you could?
   A: To assassinate it.
   Falwell, 797 F.2d at 1273.


68. The better analysis begins with identifying the allegedly defamatory publication as either fact or opinion.


70. See Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974)(protecting defendant’s use of the words “scab” and “traitor” in the course of a labor dispute); Greenbelt Coop. Publishing Ass’n v. Bresler, 398 U.S. 6 (1970) (protecting defendants’ use of the word “blackmail” in the course of a zoning debate because the term could not be reasonably understood to be a criminal accusation); see also Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers L. Rev. 81 (1981) (discussing the application of the fact/opinion distinction in defamation law and its relationship to the fair comment privilege).
not alleging a fact—are necessarily statements of opinion and, as such, are not actionable. Nevertheless, the Court missed an opportunity to simplify analysis of this type of problem by neglecting the distinction between fact and opinion.

Finally, the Court left open the question of what a private figure plaintiff must show in order to recover damages for emotional distress. The Court, as well as the parties to the case, considered it "clear" that Falwell was a public figure for first amendment purposes. The Court's specific notation that Falwell was a public figure suggests that the New York Times high standard of proof applicable to public figures in intentional infliction of emotional distress actions may not be appropriate for private figure plaintiffs. By inference, private figures will have to prove that the defendant negligently published a false statement of fact in order to recover.

Courts and commentators that have considered defamation suits have regarded each of these variables as relevant in formulating a theory of liability. In Hustler Magazine, perhaps unnecessarily,

71. Falwell, 797 F.2d at 1273.

72. At least one court has used the distinction between fact and opinion to deny recovery to a plaintiff without having to determine whether or not she was a "public figure [for] a limited range of issues." Deupree v. Iiiff, 860 F.2d 300, 304 (8th Cir. 1988) (quoting Gertz v. Robert Welch, 418 U.S. 323, 351 (1974)). In Deupree, the plaintiff, a sex education teacher, complained about a statement that she was "much more interested in the titillating sorts of information [and] ... actually denies a very secret sort of sexual gratification." Id. at 302. The Eighth Circuit found this statement to be pure opinion and therefore not actionable regardless of whether the plaintiff was a private or public figure. Id. at 304-05. This result suggests that courts can overcome the public/private figure distinction that can be read into Hustler Magazine by finding that the statement is "pure opinion" and thus protected.

73. 485 U.S. at 57 n.5. Falwell, a fundamentalist Baptist televangelist based in Lynchburg, Virginia, founded the Moral Majority, which now operates under the new name of the Liberty Federation. This group is composed largely of politically conservative individuals with close ties to Protestant churches and is dedicated to furthering the conservative political agenda. The Federation has been associated with the right-to-life movement and efforts to reintroduce prayer into public schools.

More than 350 television stations carry Falwell's weekly program, Old Time Gospel Hour, and he appears almost every day on the Liberty Broadcasting Network, a cable and broadcast television program channel. Falwell is also a frequent guest on network television news shows such as CNN's Crossfire, ABC's Nightline, and CBS's Face the Nation.

Finally, Falwell founded Liberty University, a religious college with an enrollment of more than 7,500 students. Ostling, TV's Unholy Row, TIME, Apr. 6, 1987, at 60.

the Court transplanted much of the modern theory of defamation to intentional infliction of emotional distress.\textsuperscript{75} For defendants, the same right is at stake when a plaintiff alleges defamation or intentional infliction of emotional distress: the right to freedom of expression. For plaintiffs, at least theoretically, the torts compensate for two separate harms. Plaintiffs who recover for defamation receive compensation for damage to their reputations,\textsuperscript{76} and plaintiffs who recover for intentional infliction of emotional distress receive compensation for a discernible psychological and, in most cases, physical harm.\textsuperscript{77}

Because separate policy considerations support each cause of action, at first glance separate tests seem essential to fairly adjudicate the claims. Since deciding \textit{New York Times} in 1964, the Supreme Court has struggled to set forth tests that properly safeguard the right to freedom of expression while still respecting an individual's interest in being free from unwarranted personal attacks. In formulating its scheme, the Court has declared that a central element in any defamation action is the identity of the plaintiff.\textsuperscript{78} If the plaintiff is a public figure, he is entitled to significantly less protection from the media than if he is a private figure.\textsuperscript{79} Although this sort of treatment provides little incentive for citizens to enter public life, a fair balance is struck between the robust discussion of public affairs, which the first amendment plainly anticipates, and the right of citizens to be free from unfair attacks by the media.\textsuperscript{80}

Perhaps in response to the constitutional barriers that the Supreme Court has constructed, barriers which often deny recovery

\textsuperscript{75} This kind of "transplant" analysis leads to analytical confusion as to precisely what issue a court is resolving. \textit{See supra} text accompanying notes 56-58.

\textsuperscript{76} \textit{Restatement (Second) of Torts} § 559 (1977); \textit{see supra} text accompanying note 29.

\textsuperscript{77} \textit{Restatement (Second) of Torts} § 46 (1977); \textit{see supra} text accompanying notes 39-40. Comment k of § 46 suggests that although a showing of physical harm is not necessary to maintain an action for intentional infliction of emotional distress, in those cases involving a tenuous assertion of severe emotional distress, evidence of physical harm will assist the plaintiff's efforts in proving the validity of his claim.

\textsuperscript{78} \textit{New York Times} Co. v. Sullivan, 376 U.S. 254, 288-92 (1964); \textit{see B. SANFORD, supra} note 9, § 7.1 (plaintiff's status as public or private person is important factor in defamation liability).

\textsuperscript{79} \textit{B. SANFORD, supra} note 9, § 7.2; \textit{see supra} notes 31-33; \textit{see also} Note, \textit{supra} note 43, at 1396-97.

\textsuperscript{80} \textit{See B. SANFORD, supra} note 9, § 7.2.
in defamation actions, plaintiffs are increasingly including allegations of intentional infliction of emotional distress in their complaints. As noted above, intentional infliction of emotional distress actions seemingly warrant a slightly different analysis. Instead of alleging the defendant proximately caused damage to their reputations, plaintiffs must prove the defendant intentionally caused severe emotional distress by acting in an outrageous fashion. In *Hustler Magazine*, the Court weighed the competing interests—constitutional concerns and individual rights—and devised implicitly what one might call the "outrageous opinion" defense. Such a conception of the boundaries of first amendment protection seems particularly relevant to analysis of humorous expression because of its generally "outrageous" character. Several pre-*Hustler Magazine* cases specifically considered the level of first amendment protection to which humorous expression is entitled. These cases reveal the difficulty courts have encountered in their attempts to establish general principles to guide their decisions.

**Polygram Records v. Superior Court: When is a Joke Actionable?**

*Polygram Records v. Superior Court* involved a nightclub performance by comedian Robin Williams, who included the following material in his routine: "There are White wines, there are Red wines, but why are there no Black wines like: REGE, a

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82. See B. SANFORD, supra note 9, § 11.3.4.
83. See infra notes 84-111, 123-32 and accompanying text; see also Dworkin v. Hustler Magazine, 867 F.2d 1188 (9th Cir.), cert. denied, 110 S. Ct. 59 (1989) (denying recovery under both a defamation and a false light theory to an anti-pornography activist whom Hustler depicted in a cartoon because a reasonable person could not interpret the cartoon as conveying a statement of fact); Catalfo v. Jensen, 657 F. Supp. 463, 465 (D.N.H. 1987) (denying tort recovery to a plaintiff whom a magazine article described as a "fat version of Dustin Hoffman’s ‘Ratso’ in Midnight Cowboy" because the statement was an expression of opinion); Raye v. Letterman, 14 Media L. Rep. (BNA) 2047 (1987) (comedian David Letterman’s statement that "I saw the most terrifying commercial on television last night, featuring Martha Raye, actress, condom user" could not have reasonably communicated facts concerning the plaintiff, who was commonly known as principle spokesperson for a manufacturer of dentures in which she is referred to as "Martha Raye, actress, denture wearer"); Franklin v. Friedman, 12 Media L. Rep. (BNA) 1146 (1985) (denying libel recovery to plaintiff talk show host whom a comic strip portrayed as shrinking physically because the cartoon could not reasonably have conveyed a statement of fact).
MOTHERFUCKER. It goes with fish, meat, any damn thing it wants to. I like my wine like I like my women, ready to pass out.”

A black winemaker, David Rege (pronounced “Reggie”) sued Williams after the routine appeared on a comedy album and in a Home Box Office comedy program. Rege’s defamation suit claimed that Williams had damaged his reputation and adversely affected the sale of his wine. All of the parties involved agreed that “the central question in this case is whether Williams’ joke is as a matter of law actionable as defamation.”

The defendant maintained that “comedy is a form of expression that is categorically protected by the First Amendment.” Williams asserted two competing theories to support this proposition. The first was that all forms of humor are also forms of social commentary and, in that sense, are “comparable in certain respects to political speech and religious expression.” The second theory, which the California Court of Appeals ultimately rejected, was that “comedy is, virtually by definition, not taken seriously or literally.”

The court pointed out that Williams’ two propositions were inherently contradictory. It reasoned that comedy constitutes a

85. Id. at 546-47, 216 Cal. Rptr. at 253.
86. Id. at 546, 216 Cal. Rptr. at 253.
87. Id. at 546-47, 216 Cal. Rptr. at 253-54. The California Court of Appeal dismissed the trade libel claim, holding that even if Williams’ statements suggested that Rege’s goods were of inferior quality, they were not defamatory because it did not accuse Rege of “dishonesty, lack of integrity or incompetence nor even imply any reprehensible personal characteristic.”
88. Id. at 550, 216 Cal. Rptr. at 256. The court noted that Rege’s defamation claim rested in part on the contention that Williams’ monologue associated Rege’s wines with blacks, which Rege claims are “a socio-economic group of persons commonly considered to be the antithesis of wine connoisseurs.”
89. Id. at 557, 216 Cal. Rptr. at 261. The court said that even if Williams did convey these meanings, Rege could not recover on a claim that his wine had been “disparaged by association with a particular racial or ethnic group.”
90. Id. The court found this contention “repugnant to values embedded in our Constitution.”
91. Id., 216 Cal. Rptr. at 257-58.
92. Id. at 552-53, 216 Cal. Rptr. at 258. “[T]he suggestion that humor cannot serve serious aims or, as one court put it, ‘sharpen the cutting edge of truth’ is not easy to reconcile with petitioners’ concomitant assertion, which we find easier to accept, that humor is an important form of social commentary.”
The court also believed that the idea that comedy is entitled to absolute first amendment protection was problematic because comedy is difficult, if not impossible, to define.\textsuperscript{94} Drawing a lesson from the Supreme Court's less than successful efforts to define obscenity,\textsuperscript{95} the court concluded that "judicial efforts to define a concept similarly resistant to explication . . . have confused rather than clarified the jurisprudence of the First Amendment."\textsuperscript{96} A proper inquiry in cases of this type, the court decided, was not whether a court should categorize the statement as humor, but whether one could understand the statement in a defamatory sense.\textsuperscript{97} The court concluded that the joke was not defamatory as a matter of law because the routine was clearly the product of "a comic imagination impossible for any sensible person to take seriously."\textsuperscript{98} Despite Polygram's argument that the monologue was not defamatory because it was an obvious joke that Williams did not intend for his audience to take seriously, the court held that the threshold inquiry was whether those who heard the statements could reasonably understand them in a defamatory sense.\textsuperscript{99}

\textsuperscript{93} Id. at 553, 216 Cal. Rptr. at 258.
\textsuperscript{94} Id., 216 Cal. Rptr. at 258. For two attempts to define comedy, see A. Cook, The Dark Voyage and the Golden Mean: A Philosophy of Comedy (1948) and D. Grote, The End of Comedy: The Sit-Com and the Comedic Tradition (1983).
\textsuperscript{95} Polygram, 170 Cal. App. 3d at 553, 216 Cal. Rptr. at 258. The court offered Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), as a case in which the Supreme Court struggled fruitlessly for an adequate definition of obscenity. Id. at 704 (Harlan, J., concurring and dissenting); see Roth v. United States, 354 U.S. 476 (1957) (defining obscenity as material that, taken as a whole, appeals to the prurient interest); Miller v. California, 413 U.S. 15, 24 (1973) (clarifying the key issues in identifying obscene material to be "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value") (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). For a complete discussion of the difficulties involved in formulating a proper definition of obscenity, see Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 Geo. L.J. 899 (1979).
\textsuperscript{96} Polygram, 170 Cal. App. 3d at 553, 216 Cal. Rptr. at 258.
\textsuperscript{97} Id. at 554, 216 Cal. Rptr. at 259.
\textsuperscript{98} Id. at 556-57, 216 Cal. Rptr. at 261 (footnote omitted).
\textsuperscript{99} See supra note 97.
The court in *Polygram* refused, however, to suggest that material is constitutionally protected simply because it is a form of humor. The court noted that "caricature, satire or other forms of humor which ridicule may in certain circumstances convey a defamatory meaning and be actionable even if the words used could not be understood in their literal sense or believed to be true." Nevertheless, by denying recovery for statements that are "impossible for any sensible person to take seriously," the court afforded protection for statements it regarded as outlandish. *Polygram* raises, but does not answer, the critical question of whether inherently unbelievable statements can harm a plaintiff's reputation.

**Pring v. Penthouse International: Greater Protection for Outlandish Remarks**

In *Pring v. Penthouse International*, the United States Court of Appeals for the Tenth Circuit answered that question in the negative. In *Pring*, Penthouse magazine published a humorous article about the sexual prowess of Miss Wyoming. The article described Miss Wyoming's unique contribution to the pageant's talent competition—her ability to levitate a man by engaging in oral sex with him. The reigning Miss Wyoming, Kimerli Pring,

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100. *Polygram*, 170 Cal. App. 3d at 553, 216 Cal. Rptr. at 258.
101. *Id.* The court's reference to situations in which a court may impose liability is puzzling. The language the court used is susceptible to two very different interpretations, and each has radically different consequences for defamation law. If the court is suggesting that a nonfactual reference to a plaintiff can be defamatory, it is apparently recognizing a right to compensation for reputational injury caused by admittedly unbelievable statements. Exactly what the court had in mind when it referred to "certain circumstances" in which liability is appropriate is difficult to determine. One possible explanation is liability for "pure humor," or statements made for no other purpose than their comedic value. See infra text accompanying note 149.

A second and perhaps more sound interpretation of the court's language is that courts should impose liability in cases involving implied facts. When a statement communicates no facts explicitly, it may nevertheless imply a factual meaning. See B. Sanford, *supra* note 9, § 5.1-.5.

103. 695 F.2d 438 (10th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).
104. *Id.* at 443.
105. *Id.* at 440-41.
106. *Id.* This case illustrates the enormous difficulties involved in separating types of expression. The story communicates several messages, but broadly speaking, the story is a
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successfully sued Penthouse for defamation. On appeal, the Tenth Circuit had to determine "whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff.” Just as the Fourth Circuit had concluded in Hustler Magazine, the court in Pring noted that the nature of the alleged tort could not affect the level of protection that the first amendment afforded the defendant. The court declared that "[i]t would serve no useful purpose to treat separately the 'false light' cause of action nor the 'outrageous conduct' doctrine sought to be injected into the trial, as the same First Amendment considerations must be applied.”

The court reversed the jury verdict, applying logic similar to the court's in Polygram. Because the story "could not be taken literally," no reasonable person could have taken it to convey a defamatory meaning. Therefore, Pring supports the proposition that the more outrageous or outlandish a statement is, the lower the probability that the plaintiff will recover.

parody of beauty pageants. See id. The author might have expressed his contempt for pageants in several other ways, including a philosophical essay, a presentation of sociological data about the contestants of beauty pageants, or a simple declaration that beauty pageants are silly exhibitions. Each of these methods would have expressed the author's central point more or less effectively. Instead, the author elected to write a story. Protection of this choice, not only of what to say but how to say it, finds support in Cohen v. California, 403 U.S. 15 (1971), in which the defendant was convicted of disturbing the peace for wearing in public a jacket that read “Fuck the Draft.” The Court reversed the defendant's conviction on first amendment grounds, concluding that the "emotive" content of speech deserved constitutional protection equal to the cognitive message. Id. at 26. See generally Haiman, Speech v. Privacy: Is There a Right Not to be Spoken To?, 67 Nw. U.L. Rev. 153 (1972) (arguing that some protection of "freedom from speech" already exists under corollary first amendment rights, but that creating distinct rules for "unwanted speech" is different and perhaps unwise).

The facts of Pring also set out the different categories of expression that courts select in analyzing humor—statements of facts, expressions of opinion and "nonsense" or "fantasy." See infra notes 133-40 and accompanying text. A reader of the Pring article who understood that the publication was "of and concerning" the plaintiff might have several reactions that affect the plaintiff's reputation. Although any reasonable person would not likely believe that Miss Wyoming was capable of levitating another, an inference of some allegation regarding her sexual capabilities is reasonable upon reading the story.

107. Pring, 695 F.2d at 439.
108. Id.
109. Id. at 442.
110. Id.
111. Id. at 439.
FIRST AMENDMENT GOALS

Any regulation affecting broadcasts requires consideration of the first amendment’s rule that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”112 The policies behind decisions to extend, withhold or limit first amendment protection to some types of speech can help define the level of first amendment protection that courts should afford media defendants for publishing humorous statements about private individuals.113 Once that level of protection is determined, the viability of the tort of intentional infliction of emotional distress as a limit on such speech can be better evaluated.

The Supreme Court has offered many reasons for the prohibitions against interfering with speech. In Whitney v. California,114 Justice Brandeis said in his concurrence,

[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . [I]t is hazardous to discourage thought, hope and imagination . . . . Recognizing the occasional tyrannies of governing majorities . . . [the framers] amended the Constitution so that free speech and assembly should be guaranteed.115

Other premises include that freedom of expression leads to self-fulfillment, that it is an essential tool for advancing knowledge and discovering truth, and that it allows for individual involvement in the democratic process.116

Hustler Magazine v. Falwell117 supports the idea that free speech is necessary to encourage political discourse. This particular premise of the first amendment, however, does not support the freedom to engage in speech that ridicules private individuals purely for the entertainment value of the speech. Although Hustler Magazine denies recovery by public figures in order to protect po-

112. U.S. CONST. amend. I.
113. For a discussion of the different levels of protection afforded various types of speech in the past, see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985).
114. 274 U.S. 357 (1927).
115. Id. at 375-76 (Brandeis, J., concurring).
litical discourse, it arguably has no bearing on cases involving private individuals.

The Value of Humor

Undeniably, humor makes important contributions to intellectual, cultural and literary life.\textsuperscript{118} It is an effective tool of the social commentator and the bread and butter of the stand-up comedian. In his opinion in \textit{Hustler Magazine}, Chief Justice Rehnquist recounted a brief history of the dramatic effects that editorial cartoonists have had upon American political discourse.\textsuperscript{119} Rehnquist noted that “[d]espite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate.”\textsuperscript{120}

In addition to this social commentary function, humor is an immensely popular form of entertainment.\textsuperscript{121} Unlike the general area of social and political discourse, however, the Court in \textit{Hustler Magazine} did not protect humor specifically for its entertainment value. Although the decision may implicitly protect satire and parody for their value as entertainment, it emphasized a traditional rationale for free expression: the search for truth through the ventilation of competing ideas.\textsuperscript{122}

\textsuperscript{119} \textit{Hustler Magazine}, 485 U.S. at 54-55.
\textsuperscript{120} Id.
\textsuperscript{121} See generally, M. Charney, \textit{Comedy High and Low: An Introduction to the Experience of Comedy} (1987). A quick check of the most popular programs in the electronic media reveals the deep attraction Americans have for comedy. The demand for motion picture comedies, situation comedies on broadcast television, and shock jock formats in radio all attest to the popularity of humorous programming.
\textsuperscript{122} \textit{Hustler Magazine}, 485 U.S. at 51. Protecting speech for its value in discovering truth has been an important part of first amendment philosophy since the early years of the twentieth century. In 1919, Justice Holmes argued that

the ultimate good desired is better reached by 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, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see J. Mill, \textit{On Liberty} 21 (C. Shields rev. ed. 1956) (1859) (arguing that silencing an opinion “rob[s] the human race” because the opinion may be correct, or even if the opinion is false, it will reveal truth more clearly by plainly conflicting with the truth).
Nonetheless, first amendment rights are not absolute. At stake in the long line of cases stretching from New York Times to Hustler Magazine are the rights of individuals to preserve their reputational interest and to be free from intentionally inflicted emotional distress. At least one court has suggested that injurious humorous publications should be actionable. In Triggs v. Sun Printing & Publishing Association,¹²³ the Court of Appeals of New York held that "'a person shall not be allowed to murder another's reputation in jest.'"¹²⁴

John Stuart Mill's ideas help in understanding the rationale behind free expression. His suggestion that opinions may be objectively classified as true or false, except for those opinions that are partially true was rejected, however, by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea."). Nevertheless, Mill's essay points out the difficulty in classifying expression as either fact or opinion. Because no speaker is truly objective, all expression results from the speaker's subjective perceptions of the world around him. Thus, all expression may be the mere opinion of the speaker.

Numerous cases reveal the substantial confusion that persists in fact/opinion distinctions. See, e.g., Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (protecting the defendant's use of the word "blackmail" because "[i]t 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 [the plaintiff's] public and wholly legal negotiating proposals that were being criticized."); Hoover v. Peerless Publications, 461 F. Supp. 1206, 1209-10 (E.D. Pa. 1978) (allowing recovery for defendant's statement that the plaintiff "had some mental problems" even though a reasonable interpretation was that the defendant had simply expressed his opinion, because an equally reasonable interpretation was that the plaintiff had a mental disease); Stripling v. Literary Guild of America, 5 Media L. Rep. (BNA) 1958 (1979), aff'd without opinion, 636 F.2d 312 (5th Cir. 1981) (concluding that if expression is considered opinion, the plaintiff cannot possibly meet his burden of proving the statement false); see also Note, The Fact-Opinion Determination in Defamation, 88 COLUM. L. REV. 809 (1988).

¹²³. 179 N.Y. 144, 71 N.E. 739 (1904).
¹²⁴. Id. at 155, 71 N.E. at 743 (quoting Donoghue v. Hayes, [1831] Hayes, Irish Exchequer 265, 266). The court grounded its theory of liability in public policy:

The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life, or pry into his domestic concerns. It never attacks the individual, but only his work. A true critic never indulges in personalities, but confines himself to the merits of the subject-matter, and never takes advantage of the occasion to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste.

Id.
Similarly, in the recent case of Frank v. National Broadcasting Co., the Appellate Division of the New York Supreme Court recognized that "the danger implicit in affording blanket protection to humor or comedy should be obvious, for surely one's reputation can be as effectively and thoroughly destroyed with ridicule as by any false statement of fact." In Frank, financial planner Maurice Frank sued the producers of Saturday Night Live, a television comedy program that had broadcast a sketch involving a tax adviser called "Fast Frank." The plaintiff objected to the sketch because "Fast Frank," who resembled the plaintiff, humorously advised clients to take several unusual and improper deductions in preparing their tax returns. Although the court suggested that a plaintiff might receive compensation when a defendant's ridicule destroys his reputation, the court dismissed the complaint because the material was "so extremely nonsensical and silly" that no one could have taken it seriously.

In determining whether the humorous remarks were defamatory, the court focused on whether the statements were intended to injure as well as to amuse, and whether they gave the impression of being true. In Frank, the New York Supreme Court found the intent of the speaker to be relevant, whereas in Polygram the California Court of Appeals did not.

Balancing Free Expression Against the Plaintiff's Interests

In all of these decisions, the courts balanced the defendant's first amendment rights of free expression and the chilling effect that damage awards might have on humorists against the plaintiff's interests in his reputation and in being free from intentionally inflicted emotional distress. Although courts have tilted the scales in favor of protecting expression, they have encountered substantial difficulty in stating the principles upon which they base their deci-

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126. Id. at 257, 506 N.Y.S.2d at 872.
127. Id. at 254-55, 506 N.Y.S.2d at 870-71.
128. Id.
129. Id. at 261-62, 506 N.Y.S.2d at 875.
130. Id. at 261, 506 N.Y.S.2d at 875.
131. Id. at 257, 506 N.Y.S.2d at 873.
132. See supra note 99 and accompanying text.
This much, however, seems clear. Courts will analyze humorous material in terms of three types of expression:

1. False statement of fact (e.g., Jerry Falwell is an alcoholic who had his first sexual encounter with his mother in an outhouse.)
2. Opinion (e.g., It is my view that Falwell is an overrated hypocrite. To communicate this, I will publish a parody of Falwell and attribute to him the very sort of immorality that he so vehemently condemns.)
3. Nonsense/fantasy (e.g., Simply to amuse readers, I will publish a cartoon attributing immoral acts to Falwell.)

In recent decisions, the Supreme Court has set forth various levels of first amendment protection for each of these categories of expression. The Constitution protects false statements of fact from liability unless the speaker acts with some measure of fault. The level of fault required for liability depends on the identity of the plaintiff. Public figure plaintiffs must establish that the defendant acted with New York Times actual malice. Private figure plaintiffs may recover compensatory damages on a showing of negligence. The doctrine announced in Gertz v. Robert Welch, Inc., protects publications of pure opinion. Likewise, expressions like those in Pring and Frank that courts classify as "nonsense" or "fantasy" are protected from defamation suits because, by definition, no one will believe them to be literally true.

Two important questions follow from this analysis. The first is whether the third type of expression, mere "fantasy" or "non-
sense," is worthy of first amendment protection. If a plaintiff can show that this sort of material has harmed his reputation, or can establish the elements of intentional infliction of emotional distress following publication, the question arises whether the first amendment should shield the speaker from liability in the name of free expression. A second, related question is whether the two categories of "opinion" and "fantasy" are distinguishable.

First Amendment Protection for "Fantastic" Speech

Frequently, statements that fall into the category of "fantasy" or "nonsense" will be those intended to be humorous. Commentators and courts have argued that because no reasonable person will believe what the court has deemed simple "nonsense," such expression cannot be defamatory. The traditional definition of libel, however, includes any publication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." A third person may not believe a statement, but still think less of the target of the joke after hearing it. In this way, a statement that is unbelievable may effectively injure a plaintiff's reputation.

Nevertheless, the rules governing defamation actions require that a plaintiff bringing a libel action assert that the defendant made a false statement of fact. If a jury or a judge finds that an allegedly defamatory publication is inherently unbelievable, the libel action cannot go forward. The speaker's intention is not important in this regard. The relevant analysis involves only what an objective, reasonable person might believe after encountering the


143. Id. § 558.

144. In Hustler Magazine, if Larry Flynt had produced a similar parody attacking a private figure, the jury no longer has any preconceived perception of the plaintiff and may find that the parody asserts defamatory facts. However, labeling the parody as "humor" places the material in a context not lending itself to the communication of facts, and the incredible nature of the story may lead the jury to the same result of no liability.
allegedly libelous material. The ramifications of this analysis strike individual humorists differently. Practitioners of “low comedy”—those who depend on visual humor and gross exaggeration—are less likely to lose a defamation suit than comedians who employ dry wit.  

Applying this reasoning to intentional infliction of emotional distress actions obtains similar results. Because the Supreme Court required public figures to assert that a false statement of fact was made in order to maintain an action for emotional distress in Hustler Magazine, it has effectively shielded all nonfactual communication from either defamation or intentional infliction of emotional distress actions, at least in cases involving public figure plaintiffs.

If courts protect all nonfactual statements from defamation and intentional infliction of emotional distress liability, some societal value should accrue as a result. If we assume that all nonfactual communication is by definition opinion, the value is fairly clear. Opinions may help citizens discover “truth” and may aid in the process of self-government. In addition, some believe free ex-

145. See B. Sanford, supra note 9, at 155. Sanford discusses Myers v. Boston Magazine, 380 Mass. 336, 403 N.E.2d 376 (1980), a case in which the defendant described a local sportscaster as the “only newscaster in town who is enrolled in a course for remedial speaking.” Id. at 338, 403 N.E.2d at 377. On its face, one might reasonably interpret the statement as communicating a fact. Because the statement appeared in an article entitled “Best & Worst: Sports,” however, the court concluded that the context of the remark suggested instead that it was merely the opinion of the speaker. Id. at 341, 403 N.E.2d at 379.


147. For a discussion of “the search for truth” rationale for free expression, see supra note 116 and accompanying text. The self-government rationale suggests that citizens of a democratic society can best perform their role in the governmental process when the flow of debate is unrestricted. See A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require, that on every occasion, every citizen shall take part in the public debate. . . . [T]he vital point, stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another.

Id. at 25-26.
pression of individual thoughts and ideas leads to greater self-fulfillment.¹⁴⁸

We need not think of language, however, in such dichotomous terms. Instead of dividing expression sharply between fact and opinion, courts could place various sorts of expression along a continuum. At one end of the continuum is technically precise expression, that expression oriented toward objective description. At the other end is utterly random expression. Most communication involves expression edging toward the “objective expression” end of the continuum, primarily because it is most useful in day-to-day transactions. Perhaps “opinion,” or the subjective, nonfactual expression used to discover truth and aid in self-government, is located in the middle of the continuum. Beyond this class of expression, and edging toward randomness, is “pure humor,” or humor for its own sake.¹⁴⁹ The solitary goal of expression in this category is sheer entertainment.

¹⁴⁸ The self-fulfillment rationale suggests that the value derived from free expression is the simple autonomy to which it attaches. According to one commentator, free speech is vital because it offers the

self-respect that comes from a mature person’s full and untrammelled exercise of capacities central to human rationality.

The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.

Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974) (footnotes omitted). But see Bork, Neutral Principles and some First Amendment Problems, 47 Ind. L.J. 1, 25 (1971) (arguing that the self-fulfillment rationale is inadequate because individuals derive satisfaction from a multitude of other pleasurable activities that are indistinguishable from the functions or benefits of speech).

¹⁴⁹ The distinction between humor for its own sake and humor employed as social commentary is important. Although the job of dividing a statement into elements of pure humor and pure commentary is difficult, it is conceptually possible. For example, the parody at issue in Hustler Magazine ridiculed Jerry Falwell by attributing to him some unlikely characteristics—that he was an alcoholic and sexually immoral. The effect was to offend some and amuse others. The parody clearly communicated the message that Larry Flynt thought Falwell was a hypocrite. For that reason, it made some contribution to public debate, and courts should protect it under the “search for truth” rationale. Compare this to the facts of Raye v. Letterman, 14 Media L. Rptr. 2047 (BNA) (1987), in which David Letterman in a broadcast of his Late Night television program, told his audience, “I saw the most terrifying commercial on television last night, featuring Martha Raye, actress, condom user.” Martha Raye is perhaps best known for her commercials in which she is introduced as “Martha Raye, actress, denture wearer.” The social commentary contained in this joke, if any exists,
By drawing the line between protected and nonprotected speech at a point along the continuum, and not by strict classifications of fact or opinion, a court can avoid the unnecessary and unfortunate result of protecting all nonfactual expression from liability for intentional infliction of emotional distress. Under current standards, courts in cases involving humorous material are protecting absolutely nonfactual speech that is literally false, that the jury has found "outrageous," and that offers no objectively discernible opinion. Courts must recognize that not all nonfactual speech is of equal value.

The Distinction Between Opinion and Fantasy

Despite its potential advantages, the attempt to split nonfactual speech into separate, readily identifiable groups presents enormous difficulties. First, although pure humor is conceptually distinguishable from pure opinion, real-world communication rarely operates quite so neatly. The Hustler Magazine case presents a typical example. By publishing the parody in his magazine, Larry Flynt accomplished two things. He probably made a few readers laugh, and he probably caused a few to reflect, however briefly, on their impressions of Jerry Falwell and Falwell’s standing in society. One could argue that similar accomplishments exist for the facts of Pring and Polygram. An obvious explanation for these dual effects is that readers of the Hustler parody laugh because Falwell is the target of the attack; as a result, the parody communicates some objectively discernible opinion about Falwell’s character. Humorists can, however, easily entertain their audiences without conveying any intelligible “opinion” in the course of their remarks. In perhaps has something to do with the amount of sexual activity expected of older women. The difference between the two cases is one of degree. The Hustler parody is perhaps mean-spirited, but it does comment on the status of a figure of political importance. The Letterman joke is more of a bizarre juxtaposition than a social comment. See P. Grawe, supra note 120, at 15 (distinguishing “‘frothy’ comedy with little to recommend it beyond the light, inconsequential entertainment it offers” and “serious comedy, which engages the intelligence and artistic discrimination of the most sensitive audiences as well as the talents of the greatest geniuses of theatre in almost every age”).

150. As Paul Grawe says, “[T]he same genre can contain within itself not only extremely light, entertaining, ‘frothy’ stuff but also intensely serious works with ultimate religious significance.” P. Grawe, supra note 118, at 12. The difference, in broad terms, is between The Three Stooges and a Noel Coward play. The argument that, over time, the humor of The
the instance when a humorist expresses no opinion and an individual incurs harm because of the publication, to permit recovery seems fitting. Courts could restrict recovery to cases in which the injurious publication’s sole purpose was entertainment; that is, after applying an objective test, the finder of fact could ascertain no meaningful opinion that the speaker communicated.

Two responses to this argument are immediately apparent. First, freedom of expression encompasses humor, and the value of a joke is something worthy of protection. Although this has some appeal, a stronger argument for denying recovery even in those situations in which the plaintiff has suffered a cognizable harm because of a speaker’s humorous remarks is that, speaking practically, pure opinion cannot be separated easily from pure fantasy. Just as someone can always find a bit of redeeming social value in a pornographic film, one can find “opinion” or serious social comment in most jokes if one looks hard enough. A second response is that the first amendment requires some “breathing space” in order to function fully and effectively.

Attempts to impose liability on comedians for the jokes they tell may chill desirable social commentary. Three Stooges conveys some meaning of deep philosophical significance is conceptually unsatisfactory. Assuming a plaintiff has suffered emotional or reputational harm as a result of the defendant’s remarks, the relevant scope of the inquiry should be restricted to an examination of the injurious publication.

151. This is the argument of those endorsing the self-fulfillment rationale for free expression. See supra note 150. The equities of isolated cases, however, do not support protecting the speech. Assume a plaintiff suffers severe emotional or reputational harm as a result of defendant’s purely humorous speech. Permitting the plaintiff to go uncompensated because the defendant desires to tell a funny story is grossly unfair.

A better reason to deny compensation to the target of the joke is that once liability is imposed and judgments are awarded valuable expression may be chilled to some degree. See generally L. Forer, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT (1987). A solution to the chilling effect problem is to reform tort law. Several recent proposals have been made in this regard. See Anderson, Reputation, Compensation, and Proof, 25 Wm. & Mary L. Rev. 747 (1984); Smolla & Gaertner, supra note 43; Wissler, Bezanson, Cranberg & Soloski, supra note 43.

152. Justice Brennan introduced the notion of “breathing space” for the first amendment in his opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964). The concept was an important part of Chief Justice Rehnquist’s reasoning in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), as he wrote, “‘Freeoms of expression require breathing space.’ This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability.” Id. at 52 (quoting Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986)) (citations omitted). The troubling as-
Furthermore, because of their status, public figures enjoy certain protections that tend to counteract or mitigate any damage caused by humorous speech. For example, an individual encountering the Falwell parody will probably conclude, after a moment’s deliberation, that the parody does not alter meaningfully the reader’s perception of Falwell for several reasons. First, Falwell has been a public figure for some time, and most people have formed an opinion of him as a result of his participation in public life. Second, the context of the publication instructs the reader not to take it seriously. For example, the parody was labeled “ad parody—not to be taken seriously.” Third, the content of the parody diverges significantly from commonly held perceptions of Falwell. Finally, Falwell can effectively combat the Hustler parody because of his special access to media channels. On balance, when courts apply the law to public figure plaintiffs, the strong public interest in robust debate justifies the rule requiring the public figure to prove a false statement of fact regardless of the type of injury alleged.

Special Problems for Private Figure Plaintiffs

Private figure plaintiffs do not have access to this same sort of protection. By definition, private figures do not have commonly perceived reputations. Neither do they have ready access to the media to contest the attacks of others. Nevertheless, a logical corollary emanating from the Court’s opinion in Hustler Magazine would limit recovery for intentional infliction of emotional distress arising in a media-related context to those private figure plaintiffs who can show that the defendant negligently made a false statement of fact. This corollary merely separates the protection the Court has already provided for media defendants in earlier defamation cases and applies it in the intentional infliction of emotional distress setting. Under this view, a private figure attacked in a manner similar to the parody in Hustler Magazine would not be able to recover for emotional distress once the jury decided that the defendant made no statement of fact. For the reasons dis-

pect of the breathing space logic is that it implies that protection for expression pushes past its territorial boundaries and extends to speech that may not require such protection.

153. See supra note 73.
cussed above, however, the jury would have been less likely to arrive at that conclusion if the plaintiff in *Hustler Magazine* had been a private figure.\textsuperscript{155}

Therefore, in cases of intentional infliction of emotional distress brought by private figures, the logic of *Hustler Magazine* inadequately protects the plaintiff's interest in being free of outrageously inflicted forms of emotional and physical harm. In order to compensate private figure plaintiffs in these actions, courts must undertake the dangerous business of classifying expression as either opinion or nonsense. Such a decision is perhaps not as daunting as it may initially appear. Juries are, as a matter of course, regularly called upon to make difficult decisions. In actions for intentional infliction of emotional distress, for example, the jury must make the wholly unquantifiable judgment as to whether particular behavior is "outrageous." Properly instructed as to what constitutes an opinion, a jury is equally capable of sorting out expression that communicates an idea from one that communicates only hatred, cruelty, or humiliation.

**CONCLUSION**

Beginning with its decision in *New York Times Co. v. Sullivan*,\textsuperscript{156} and continuing through *Hustler Magazine v. Falwell*,\textsuperscript{157} the Supreme Court has crafted elaborate protections for citizens who exercise their first amendment right of free expression. Pure opinions are completely protected, and speakers may even make false statements of fact as long as those statements are not made with the requisite fault. Because of this bent toward protecting expression, judicial protection of humor may have disturbed the balance between free expression and an individual's interest in freedom from personal attacks that damage his reputation or intentionally inflict severe emotional distress. Under the current analysis, a speaker may attack another without fear of judicial sanction if the speaker strategically employs the vehicle of humor. By failing to distinguish between speech that is simply "fantasy" or "nonsense" from expressions of opinion, the Court has carved out first amend-

\textsuperscript{155} See infra text accompanying notes 153-55.

\textsuperscript{156} 376 U.S. 254 (1964).

\textsuperscript{157} 485 U.S. 46 (1988).
ment protection for speech that is factually false, outlandish, by
definition not opinion in the sense that it is not useful as social
commentary, and that causes a harm that is traditionally compens-
sable. Because a private figure plaintiff has a greater interest in
being free from the kind of psychological and reputational harm
that such fantastic speech can inflict, the practical difficulties in
separating opinion from fantasy must be overcome to permit
recovery.

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