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Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism

I. INTRODUCTION

With increasing frequency over the last several years, plaintiffs suing media defendants for defamation have also asserted claims for intentional infliction of emotional distress.¹ In an effort to preserve the media's first amendment protection in defamation² suits, the Supreme Court enunciated the "actual malice" standard in its 1964 decision of *New York Times Co. v. Sullivan*.³ This standard precludes a public figure or public official from recovering against a media defendant for defamation unless he proves that the defendant made the statement with knowledge of its falsity or with reckless disregard for the truth.⁴

A problem arises when a public figure attempts to circumvent the rigorous "actual malice" standard by characterizing his claim as one for intentional infliction of emotional distress allegedly resulting from the same publication on which the defamation claim is based. In essence, such a plaintiff is attempting to recover for the same alleged

1. See generally Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 36-37 (1983). In addition to intentional infliction of emotional distress, other theories of liability have been pled in conjunction with defamation. In particular, invasion of privacy claims are often raised. For examples see *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982) (alleging libel, invasion of privacy, and intentional infliction of emotional distress), *cert. denied*, 462 U.S. 1132 (1983) and *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (alleging defamation, intentional infliction of emotional distress, and invasion of privacy).

2. The Restatement (Second) of Torts provides the following elements for defamation:

- (a) [A] false and defamatory statement concerning another (the plaintiff);
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS § 558 (1965).

3. 376 U.S. 254 (1964). See *infra* notes 11-13 and accompanying text.

4. *Id.* at 279-80. The Supreme Court has previously utilized the "actual malice" standard for causes of action other than defamation. In 1967, the Court held that a plaintiff who brings a "false light" invasion of privacy suit for the publication of a matter of public interest must establish "actual malice" as a condition precedent to recovery. *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967).

wrong, under a different theory, without having to negotiate the substantial first amendment hurdles that the Supreme Court has carefully put in place.⁵

In *Hustler Magazine, Inc. v. Falwell*,⁶ the Supreme Court addressed the question of whether the first amendment places any limits on the tort of intentional infliction of emotional distress. The trial court awarded damages to Reverend Jerry Falwell for intentional infliction of emotional distress against *Hustler Magazine* and Larry Flynt. The award was based solely on a finding that the defendants intended to cause Falwell emotional distress by publishing a distasteful ad parody about him.⁷ The Supreme Court unanimously reversed the decision and held that a public figure cannot recover for intentional infliction of emotional distress caused by the publication of a satirical work, without first proving "actual malice."⁸ The opinion of the Court, written by Chief Justice Rehnquist, demonstrated its commitment to the preservation of free speech and the continued utility of the *New York Times* standard to meet this end.⁹

This note begins by providing a historical overview of both defamation and intentional infliction of emotional distress. Next, the procedural and factual history of *Hustler Magazine, Inc. v. Falwell* will be traced from the trial court to the United States Supreme Court. Additionally, the majority and concurring opinions will be analyzed. Finally, this note will conclude with an examination of the impact that the *Falwell* holding will have on public figures, the media, and free speech.

II. BACKGROUND

A. Constitutional Development of the Law of Defamation

Prior to 1964, the common law tort of defamation had been unrestricted by the first amendment guarantee of freedom of speech.¹⁰

5. Such an "end run" could result in liability for speech protected by the first amendment and possibly promote the media self-censorship that the "actual malice" standard was intended to prevent. See generally *New York Times*, 376 U.S. at 270-72.

6. 108 S. Ct. 876 (1988).

7. See *infra* notes 42-56 and accompanying text.

8. *Falwell*, 108 S. Ct. at 882.

9. There was speculation that the Court had grown disenchanted with the *New York Times* standard after its decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (allowing punitive damages for defamation about actual malice viewed as not violating first amendment). See Note, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: Does the Actual Malice Standard of Gertz v. Robert Welch, Inc. Apply to Speech on Matters of Purely Private Concern?*, 14 PEPPERDINE L. REV. 337, 353-54 (1987). The *Falwell* decision indicates that the *New York Times* standard is still appropriate in disputes involving public figures and media defendants. See *Falwell*, 108 S. Ct. at 882.

10. R. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* 3-4 (1980). This fact is evidenced by the Supreme Court's reference to defamatory statements as falling within

However, in 1964 the United States Supreme Court began to define the constitutional parameters of defamation in the landmark decision of *New York Times Co. v. Sullivan*.¹¹ In *New York Times*, the Court held that the first amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”¹² Accordingly, the burden carried by public officials in maintaining a defamation action against a media defendant substantially increased.

The Supreme Court justified its creation of the actual malice requirement by asserting its “commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹³ Furthermore, the Court recognized the inevitability that erroneous statements would be made in such open debate and maintained that even these statements must receive protection in order to preserve a healthy climate of free expression for all speech.

The application of the actual malice standard exclusively to public

one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

11. 376 U.S. 254 (1964). In *New York Times*, the plaintiff, one of three elected Commissioners of the City of Montgomery, Alabama, brought suit against the New York Times Company, claiming that he had been defamed by statements made in a full-page advertisement which the company had printed. The advertisement was an appeal for funds for three purposes: support of the black student civil rights movement, the struggle for the right to vote, and the legal defense of Dr. Martin Luther King, Jr.

The ad stated that “[t]hey have bombed [Dr. King’s] home almost killing his wife and child. They have assaulted his person. They have arrested him seven times . . .” The plaintiff contended that the pronoun “they” in the phrase “they have arrested him seven times” would be read as referring to the police and thus to him because he was the municipal authority who supervised the police department. Further, the plaintiff claimed that the text implied that the police performed the other described acts. The plaintiff and six other witnesses testified that they had interpreted the advertisement as referring to the plaintiff in his official capacity. Also, it was ascertained that the ad contained several factual errors.

The judge instructed the jury that the statements were libel per se and not privileged. Therefore, if the jury determined that the newspaper published the advertisement and that the statements were about the plaintiff, then the newspaper would be held liable. *Id.* at 256-59, 262.

12. *Id.* at 279-80.

13. *Id.* at 270.

officials¹⁴ was short-lived, however, as the Supreme Court, in *Curtis Publication Co. v. Butts*,¹⁵ extended the requirement to defamation suits brought by public figures against media defendants. In his concurring opinion, Chief Justice Warren contended that the distinction between “public figures” and “public officials” had become blurred. He reasoned that requiring different standards of proof had “no basis in law, logic, or First Amendment policy.”¹⁶

In the plurality opinion of *Rosenbloom v. Metromedia, Inc.*,¹⁷ the Supreme Court specifically rejected the public figure/official requirement and held that actual malice must be proven where the speech involved “an event of public or general concern.”¹⁸ The Court asserted that the plaintiff’s status as a private person is irrelevant in determining whether the issue is one of public interest.¹⁹

The *Rosenbloom* holding did not enjoy much longevity, however, as three years later, in *Gertz v. Robert Welch, Inc.*,²⁰ the Supreme Court returned to the view that only public officials or public figures fell within the purview of the *New York Times* rule.²¹ In *Gertz*, the

14. Shortly after the *New York Times* decision, the Court ruled that the actual malice standard was to be applied in state criminal libel prosecutions resulting from statements critical of the official conduct of public officers. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). The Court maintained that the “larger public interest” in dissemination of the truth outweighed the public official’s interest in his private reputation. *Id.* at 72-73. Additionally, in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court held that the term “public official” includes not only individuals elected to office but also those government employees who were in positions of “substantial responsibility for or control over the conduct of government affairs.” *Id.* at 85.

15. 388 U.S. 130 (1967). In *Butts*, the plaintiff, who was a well-known college football coach, brought a libel action against the *Saturday Evening Post* for the publication of an article that accused him of conspiring to “fix” a football game. The football coach was held to be a public figure and thus had to prove that the article had been published with actual malice. *Id.* at 134-36, 155.

16. *Id.* at 163 (Warren, C.J., concurring). Chief Justice Warren asserted that the blurred distinction between “public figures” and “public officials” might be the result of:

a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector.

Id.

17. 403 U.S. 29 (1971) (suit against radio station for broadcasting news stories that described plaintiff as a “girlie-book peddler” and charged him with being involved in the “smut literature racket”).

18. *Id.* at 52.

19. *Id.* at 43-44.

20. 418 U.S. 323 (1974). Defendant, a magazine publisher, alleged that the plaintiff, a Chicago attorney, was part of a conspiracy to discredit the local police and that he was a “Communist-fronter.” *Id.* at 325-26.

21. *Id.* at 346-47.

Court articulated the interests involved: "[t]he need to avoid self-censorship by the news media"²² and "the compensation of individuals for the harm inflicted on them by defamatory falsehood."²³ Justice Powell stated that the public or general interest standard of *Rosenbloom* was insufficient to serve these competing interests.²⁴ Moreover, the Court viewed the state as having a greater interest in protecting private individuals from defamatory falsehoods than in protecting public persons.²⁵ This belief is premised upon the idea that public officials and public figures have voluntarily exposed themselves to a heightened risk of injury from defamatory statements concerning them.²⁶ Additionally, public figures and public officials generally have superior access to the media and thus are more able than private plaintiffs to rebut false statements made about them.²⁷

Finally, the *Gertz* Court held that statements of opinion were entitled to full first amendment protection.²⁸ This is true regardless of how damaging the opinion is to the plaintiff's reputation. The Court mandated that "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but upon the competition of other ideas."²⁹

B. Intentional Infliction of Emotional Distress

According to the Restatement (Second) of Torts, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes se-

22. *Id.* at 341.

23. *Id.*

24. *Id.* at 343, 346.

25. *Id.* at 345.

26. *Id.* at 344. For an interesting discussion of celebrities as public figures, see R. SACK, *supra* note 10, at 229-30.

27. *Gertz*, 418 U.S. at 344. In fact, Justice Powell stated that "[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Id.* In *Rosenbloom*, Justice Harlan also acknowledged that public figures and officials can obtain avenues of communication with less difficulty than private persons. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissenting).

28. See *Gertz*, 418 U.S. at 339-40. For a discussion of constitutional protection of opinion, see R. SACK, *supra* note 10, at 176-80. For an informative explanation of the distinction between statements of opinion and fact, see ROBERT H. PHELPS & E. DOUGLAS HAMILTON, *LIBEL: RIGHTS, RISKS, RESPONSIBILITIES* 203-06 (1966).

29. *Gertz*, 418 U.S. at 339-40. However, the Court observed that false statements of fact, whether made accidentally or intentionally, are of no value in public debate. *Id.* at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

vere emotional distress to another is subject to liability for such emotional distress."³⁰ The tort of intentional infliction of emotional distress is designed to protect one's interest in emotional tranquility.³¹ However, due to the difficulty in assessing injury and the likelihood of feigned claims, intentionally inflicted emotional distress has been recognized only recently as a separately maintainable action.³²

At present, most jurisdictions, including Virginia where *Falwell v. Flynt*³³ was tried, have adopted the formulation of the tort found in the Restatement (Second).³⁴ Under this view, intentional infliction of emotional distress is established by proving four elements:

- 1) The defendant's conduct was intentional³⁵ or reckless;³⁶
- 2) the conduct was extreme and outrageous;
- 3) the defendant's conduct caused emotional distress; and
- 4) the emotional distress was severe.³⁷

Certainly, the most crucial element is the extreme and outrageous conduct because proof of the other elements may be inferred from the outrageous conduct.³⁸ The comments to the Restatement (Sec-

30. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

31. See Givelbar, *The Right to Minimum Social Decency and the Limits of Even-handedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51 (1982); see also Mead, *supra* note 1, at 27.

32. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 at 49-50 (4th ed. 1971); see also RESTATEMENT (SECOND) OF TORTS § 46 (1965). Initially, recovery for emotional distress was allowed only as a by-product of an independent tort, such as battery or false imprisonment. See W. PROSSER, *supra*, § 12, at 49-50; see also Mead, *supra* note 1, at 28. However, it is suggested that where no bodily harm (i.e. shock or illness) results from severe emotional distress, the gravity of the act's outrageousness may serve to establish that the claim is valid or not trivial. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965).

33. 797 F.2d 1270, 1275 n.4 (4th Cir. 1986) (citing *Womack v. Eldridge*, 215 Va. 38, 210 S.E.2d 145, 148 (1974)), *rev'd sub nom. Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988).

34. See generally Annotation, *Modern Status of Intentional Infliction of Emotional Distress as Independent Tort: "outrage"*, 38 A.L.R. 4th 998 (1985).

35. Intent may be established by showing that the defendant desires to inflict severe emotional distress upon the plaintiff or knows with substantial certainty that his actions will cause such distress. See RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965).

36. To prove reckless disregard, one must show that the defendant had a subjective awareness of a high probability that severe emotional distress would be inflicted and yet proceeded in "conscious disregard" of that high probability. See, e.g., *Plocar v. Dunkin Donuts of America, Inc.*, 103 Ill. App. 3d 740, 746, 431 N.E.2d 1175, 1179-80 (1981). For example, intent through recklessness was found when the defendant chose to commit suicide by slashing his throat in the plaintiff's kitchen. Upon her return home, the plaintiff found his corpse with blood all over the premises. *Blakeley v. Shortal's Estate*, 236 Iowa 787, 792, 20 N.W.2d 28, 31 (1945).

37. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

38. See, e.g., *Sere v. Group Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C.) (indicating that one may infer the existence of the element of intent or recklessness from the outrageousness of defendant's conduct), *cert. denied*, 459 U.S. 912 (1982); *Poulsen v. Rusesel*, 300 N.W.2d 289, 297 (Iowa 1981) (plaintiff unable to establish the element of severe and extreme emotional distress); *Bennet v. City Nat'l Bank & Trust Co.*, 549 P.2d 393,

ond) indicate:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, "Outrageous!"

The liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There must still be freedom to express an unflattering opinion.³⁹

While the Restatement (Second) attempts to define the parameters of what is outrageous and what is not, inevitably the determination of outrageousness will be in large part a subjective one.⁴⁰ Consequently, where potential liability for expression exists, the tort of intentional infliction of emotional distress takes on constitutional dimensions.

As a result of the stringent standard set forth in *New York Times*, emotional distress claims against the media, either alone or in conjunction with defamation claims, have increased dramatically in recent years.⁴¹ However, until the decision in *Hustler Magazine, Inc. v. Falwell*, the first amendment implications on the tort of intentional infliction of emotional distress had never been addressed by the Supreme Court.

III. STATEMENT OF THE CASE

Jerry Falwell, a well-known minister and commentator on political and public issues, filed suit in federal district court against defendants Larry Flynt, Hustler Magazine, Inc. (Hustler) and Flynt Distributing Company for libel, invasion of privacy, and intentional infliction of emotional distress. The damage to Falwell allegedly re-

398 (Okla. Ct. App. 1975) (holding that expert medical testimony unnecessary to show causation between plaintiff's harm and defendant's act).

However, some courts have held that proof of extreme and outrageous conduct along with the plaintiff's testimony of mental suffering are not sufficient to establish severe emotional distress. See, e.g., *Venerias v. Johnson*, 127 Ariz. 496, 500, 622 P.2d 55, 59 (Ct. App. 1980) (dismissing complaint when plaintiff's sole evidence of his severe emotional distress was his own testimony); *Harris v. Jones*, 281 Md. 560, 570-71, 380 A.2d 611, 616-17 (1977) (decision regarding outrageous conduct unnecessary because plaintiff failed to establish that he suffered severe emotional distress).

39. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).

40. See *infra* notes 88-99 and accompanying text. One commentator has observed the following with respect to the vague nature of outrageousness: "The term 'outrageous' is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior. The concept thus fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct." Givelbar, *supra* note 31, at 51.

41. See Mead, *supra* note 1, at 28, 33-39.

sulted from the publication of an ad parody in *Hustler* magazine.⁴² The ad parody attempted to satirize an actual promotional campaign for Campari Liqueur in which celebrities discuss their "first time." Ostensibly, the celebrities are referring to their first experience with the liqueur; however, the sexual double entendre is evident throughout the advertisements.⁴³ The ad parody for which Falwell brought suit portrays Falwell as the celebrity subject who describes his "first time" as a drunken incestuous rendezvous with his mother in an out-house.⁴⁴ Falwell's mother is presented as a drunken and promiscuous woman, and Falwell is depicted as a hypocritical drunkard.⁴⁵

At trial, the district court granted a directed verdict against plaintiff Falwell for his invasion of privacy claim.⁴⁶ Moreover, the jury found against Falwell on the libel claim, reasoning that no reasonable person would believe that the parody was reporting actual facts about him.⁴⁷ However, the jury returned a verdict for Falwell on his emotional distress claim,⁴⁸ awarding him \$100,000 in actual damages and \$50,000 in punitive damages against both Flynt and *Hustler*.⁴⁹

42. *Falwell v. Flynt*, 797 F.2d 1270, 1272 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988). The ad parody was first published in the November 1983 issue of *Hustler* and then again in the March 1984 issue after Falwell had initiated his suit. *Id.*

43. *Id.*

44. *Id.* The parody is referred to in the table of contents as "Fiction: Ad and Personality Parody"; and at the bottom of the ad parody itself a disclaimer reads "ad parody—not to be taken seriously." *Id.*

45. The text of the ad parody as it appeared in *Hustler* is set out in Note, *Falwell v. Flynt, An Emerging Threat to Freedom of Speech*, 1987 UTAH L. REV. 703, 716 n.76 (1987).

46. *Flynt*, 797 F.2d at 1273. Falwell's invasion of privacy claim was brought under section 8.01-40 of the Code of Virginia which provides a cause of action for damages resulting from the unconsented use of an individual's name or likeness for the purposes of trade or advertising. While Falwell's name and likeness were used in the parody, the district court decided that the use was not for the purposes of trade as meant by the statute. *Id.*

47. Accordingly, the jury determined that Falwell had suffered no damage to his reputation. *Falwell v. Flynt*, 805 F.2d 484, 485 (4th Cir. 1986) (denial of rehearing) (Wilkinson, J., dissenting).

48. *Flynt*, 797 F.2d at 1273. The appellate court stated that intent could be satisfied by Flynt's testimony that he intended to cause Falwell emotional distress. It held that the element of "outrageousness" was "quite obvious from the language in the parody and in the fact that Flynt republished the parody after [the] lawsuit was filed." *Id.* at 1276. Finally, the court also maintained that Falwell's testimony was sufficient to establish that he suffered severe emotional distress and that the ad's publication proximately caused it. Falwell testified: "I think I have never been as angry as I was at that moment My anger became a more rational and deep hurt . . . I really felt like weeping . . . [I]f Larry Flynt had been nearby I might have physically reacted." *Id.* at 1276-77.

49. *Id.* at 1273. However, the jury did not return a verdict against Flynt Distributing Company. *Id.* In a related action, *Hustler* sued Falwell for copyright infringement. The alleged infringement occurred when the Moral Majority, Inc. and Old Time Gospel Hour reproduced and mailed hundreds of thousands of copies of the ad parody as part of a solicitation campaign. The district court's ruling that the reproductions con-

The Court of Appeals for the Fourth Circuit subsequently affirmed the lower court decision. The court agreed with the defendants' contention that as a result of Falwell's status as a public figure they were "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel."⁵⁰ Nevertheless, the court refused to literally apply the *New York Times* actual malice standard to the emotional distress claim.⁵¹

The court of appeals stated that the *New York Times* holding focused on the constitutional import of the greater level of fault inherent in the requirement of knowing and reckless conduct, and not on the knowledge of the statement's falsity or the reckless disregard for its truth.⁵² Therefore, it held that the *New York Times* standard was met by the jury's determination pursuant to Virginia state law⁵³ that Flynt and Hustler had acted intentionally and recklessly.⁵⁴ Further, the appellate court rejected the argument that since the jury had found the ad parody did not describe actual facts about Falwell, the statement constituted an opinion which is afforded first amendment protection.⁵⁵ Finding this irrelevant, the appellate court asserted that the issue was whether publication of the ad was an act "sufficiently outrageous to constitute intentional infliction of emotional distress."⁵⁶

Flynt and Hustler petitioned for a rehearing which the court denied.⁵⁷ The Supreme Court then granted certiorari to resolve the novel first amendment question of whether a public figure can recover for emotional distress caused by the publication of a satire

stituted "fair use" was upheld. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986).

50. *Flynt*, 797 F.2d at 1274.

51. *Id.* For a discussion of the actual malice standard set forth in *New York Times*, see *supra* notes 10-13 and accompanying text.

52. *Id.* at 1274-75.

53. To maintain a cause of action for intentional infliction of emotional distress in Virginia, the plaintiff must establish that the defendant's conduct (1) is intentional or reckless, (2) offends generally accepted standards of decency or morality, (3) is causally connected with the plaintiff's emotional distress, and (4) caused severe emotional distress. *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

54. *Flynt*, 797 F.2d at 1274-75.

55. *Id.* at 1275-76. See *infra* notes 98-109 and accompanying text for discussion of satire as opinion or rhetorical hyperbole.

56. *Flynt*, 797 F.2d at 1276.

57. *Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986). Despite the denial for rehearing, Judge Wilkinson wrote a very eloquent dissenting opinion in which he recognized the constitutional gravity of the case. *Id.* at 484-89 (Wilkinson, J., dissenting).

which many people would find offensive.⁵⁸

The Supreme Court overturned the ruling of the fourth circuit. It held that the first amendment prohibits public figures and public officials from recovering damages for intentional infliction of emotional distress, as the result of the publication of a caricature, without establishing that the publication contains a false statement of fact which was made with actual malice.⁵⁹

IV. ANALYSIS

A. *Majority Opinion*

At the outset of the opinion, Chief Justice Rehnquist⁶⁰ indicated the Court had found that a state's interest in protecting a public figure from emotional distress is insufficient to preclude "First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury . . ." ⁶¹ The majority determined that a public figure must prove actual malice, in addition to the elements for emotional distress, in order to recover damages for the publication of a caricature.⁶² Accordingly, the Court has now placed a first amendment limitation on the tort of intentional infliction of emotional distress and has reaffirmed its commitment to free speech and the *New York Times* standard.

Recognizing that free speech is essential not only to individual liberty but also to the "common quest for truth and the vitality of society as a whole,"⁶³ Chief Justice Rehnquist stated that the "free flow of ideas and opinions on matters of public interest and concern" is at the very core of the first amendment.⁶⁴ For this reason, he maintained, the Supreme Court has been especially watchful to ensure that individual expression remains unencumbered by government-imposed sanctions.⁶⁵

The Court observed that inevitably caustic speech about public figures will be generated as a result of the vigorous political debate

58. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 879 (1988).

59. *Id.* at 882.

60. The Supreme Court was unanimous in its decision in this case. Chief Justice Rehnquist's majority opinion was joined by Justices Brennan, Marshall, Blackmun, Stevens, O'Connor and Scalia. Justice White authored a concurring opinion. The newly-appointed Justice Kennedy had no role in the consideration of the case. *Id.* at 876.

61. *Id.* at 879.

62. *Id.* at 882.

63. *Id.* at 878 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984)). "[T]he 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." *Id.*

64. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 879 (1988).

65. *Id.*

that the first amendment encourages;⁶⁶ such expression, however, is a necessary component of the free marketplace of ideas.⁶⁷ Nevertheless, Chief Justice Rehnquist pointed out that all speech about public figures is not insulated from liability. The Court has repeatedly held since *New York Times* that a public figure may recover for a defamatory falsehood that was made with knowledge of its falsity or with reckless disregard for its truth.⁶⁸ This actual malice standard is said to provide adequate "breathing space" for free expression by avoiding the chilling effect on speech that would result if strict liability were imposed for the assertion of false facts. At the same time, public figures could still recover upon a showing that the falsehoods were knowingly and recklessly made.⁶⁹

The Court acknowledged that in prior cases it had ruled that expression motivated by malevolence and ill-will was provided with first amendment protection.⁷⁰ It further noted that while these motives are often dispositive in assessing liability in other tort areas, "the First Amendment prohibits such a result in the area of public debate about public figures."⁷¹ Moreover, the Court surmised that if it held otherwise, "there [could] be little doubt that political cartoonists and satirists would be subjected to damage awards without any showing that their work falsely defamed its subject."⁷²

The opinion then noted that, by their nature, satire and caricature⁷³ are acerbic and "often calculated to injure the feelings of the subject of the portrayal."⁷⁴ Nonetheless, caricatures and satirical

66. *Id.* (citing *Curtis Publishing v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)); see *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944) (recognizing a public right to criticize); see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (political candidate open to comment).

67. *Falwell*, 108 S. Ct. at 879 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

68. *Id.* at 880 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

69. *Id.*

70. *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964)).

71. *Id.* at 881. See *infra* note 102 and accompanying text.

72. *Id.* Such a result is repugnant to the first amendment. See *infra* note 95 and accompanying text.

73. Caricature is defined as "the deliberately distorted picturing or imitating of a person, literary style, etc., by exaggeration of features or mannerisms . . ." *Falwell*, 108 S. Ct. at 881 (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)). Chief Justice Rehnquist made the following observations about such satire: "The art of the [political] cartoonist is often not reasoned or evenhanded, but slashing and one-sided." *Id.* at 881.

74. *Id.* In fact, Judge Wilkinson opined that:

cartoons have been important components of both public and political discourse and their existence has enriched such debate.⁷⁵

Admitting that the ad parody about Falwell bears only a minimal affiliation with typical political cartoons,⁷⁶ the majority steadfastly refused to impose an “outrageousness” standard in the realm of public and political discussion.⁷⁷ They believed such a standard would have an “inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”⁷⁸ Citing *FCC v. Pacifica Foundation*⁷⁹ and *Street v. New York*,⁸⁰ the Court reaffirmed its position that the offensiveness of some expression does not justify stripping such speech of its constitutional protection;⁸¹ thus, the *Hustler* ad parody was entitled to full first amendment protection.⁸²

In conclusion, the majority reiterated its holding that public figures and public officials cannot recover for intentional infliction of emotional distress allegedly suffered from the publication of a caricature or a satirical work without also establishing that “the publication contains a false statement of fact that was made . . . with knowledge that the statement was false or with reckless disregard as to whether or not it was true.”⁸³ This standard, according to the Court, is essential to provide ample “breathing space” for the liberties prescribed by the first amendment.⁸⁴

B. Concurring Opinion

Justice White, in his very brief concurrence, stated that the majority’s reliance on *New York Times v. Sullivan*⁸⁵ was misplaced because the jury determined that no assertion of fact was made in the

The best political humor may be in bad taste. The cartoonist’s nightmare may be that the intended victim of all his insult and ridicule indeed *fails* to suffer emotional distress, but instead finds the whole thing merely funny and calls up the cartoonist, not to complain, but to ask for the original.

Falwell v. Flynt, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting) (citing Barnes, *Lovebombing*, The New Republic, Oct. 13, 1986, at 12).

75. *Falwell*, 108 S. Ct. at 881.

76. *Id.* See *infra* note 97 and accompanying text. It has been noted that “*Hustler* magazine . . . is a singularly unappealing beneficiary of First Amendment values and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate.” *Flynt*, 805 F.2d at 484.

77. *Falwell*, 108 S. Ct. at 881-82.

78. *Id.* (citing *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 910 (1982)). See *infra* notes 88-97 and accompanying text.

79. 438 U.S. 726, 745-46 (1978).

80. 394 U.S. 576, 590-92 (1969).

81. *Falwell*, 108 S. Ct. at 882.

82. See *infra* note 98.

83. *Falwell*, 108 S. Ct. at 882.

84. *Id.*

85. 376 U.S. 254 (1964).

ad parody.⁸⁶ However, Justice White agreed with the majority's ruling that the first amendment precludes liability for publication of the ad parody under an intentional infliction of emotional distress theory.⁸⁷

V. IMPACT

The holding of the Supreme Court reaffirmed its commitment to the *New York Times* standard and, for the first time, placed first amendment limitations upon the tort of intentional infliction of emotional distress. The Court sent a clear message to public figures and officials that they will be unable to circumvent the substantial first amendment protection given to media defendants in defamation suits by merely recharacterizing their claims as one for intentional infliction of emotional distress. By requiring a public figure plaintiff to establish actual malice as part of his emotional distress claim, the Court recognized that when first amendment freedoms are involved an objective standard is essential for determining liability based upon speech. This significant decision gives rise to a number of concerns involving the practical effects of the ruling, the likelihood of recovery by public figures under an emotional distress theory, and the essentially carte blanche authority of the media to say or write almost anything about public figures.

A. Significance of an Objective Standard

The actual malice standard is a relatively objective criterion as compared to the determination of "outrageousness."⁸⁸ Since a public figure would have to show actual malice to recover for emotional distress, both public figures and the media can operate with more certainty as to the actionability of a particular publication.⁸⁹ If outrageousness were the key requirement in establishing liability,

86. *Falwell*, 108 S. Ct. at 883.

87. *Id.*

88. The actual malice test is, to a degree, a subjective evaluation. It focuses on the defendant's knowledge regarding the truth of the statement; such a "statement must be judged entirely on the basis of what the publisher intended it to mean." R. SACK, *supra* note 10, at 212-13. However, it may be argued that an inquiry into the defendant's attitude toward the truth of his statement is less likely to be as subjective as the inquiry into "outrageousness"—which draws on the fact-finder's religious and moral background, taste, etc. See generally Note, *supra* note 45, at 721-22.

89. A publisher is in a better position to know if he has knowledge of falsity or reckless disregard for the truth than to know if a particular portrayal is likely to be deemed outrageous. See *supra* note 88 and accompanying text.

the probable outcome of a potential claim would be shrouded in substantial ambiguity, a condition that would probably precipitate self-censorship.⁹⁰ This uncertainty would result because of the great degree of subjectivity that would inevitably arise when a jury attempts to decide if a publication is outrageous.⁹¹ The Court specifically found that such subjectivity in the first amendment arena is unacceptable.⁹² Indeed, this statement is in full accord with prior holdings which have held that speech is no less protected because it is offensive or has an "adverse emotional impact on [its] audience."⁹³

In light of the base and distasteful nature of the *Hustler* ad parody, the Court is clearly upholding the principle that offensive speech is still constitutionally protected. If the Court had held otherwise, it would have placed certain cherished first amendment protections in substantial jeopardy, as well as overturning its decisions that have consistently afforded protection to offensive speech.⁹⁴ Perhaps even more unsettling is the fact that an outrageousness standard could give rise to a sustainable cause of action against speech that is completely truthful. Thus, potential liability for offensive but truthful speech would have a tremendous "chilling effect" on free speech and

90. One commentator suggests that an outrageousness standard would promote a climate in which unpopular ideas could be punished:

Both public officials and public figures are likely to be identified with a particular viewpoint. Frequently the defendant will be on the other side of the issue. Extreme and outrageous language is often associated with unpopular ideas and positions. Accordingly, it will be very difficult for an appellate court to determine whether it is the language or rather the accompanying message that is the real object of the trier of fact's disapproval.

Note, *supra* note 45, at 721.

91. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988). "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* See *supra* note 88 and accompanying text.

92. *Falwell*, 108 S. Ct. at 882.

93. *Id.* See *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 909-12 (1982) (holding that speech by boycotters used to induce individuals not to patronize certain establishments protected by the first amendment); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (fact that father was offended by speech on radio not sufficient reason for suppressing it); *Cohen v. California*, 403 U.S. 15, 23-26 (1971) (first amendment protected exclamation of "Fuck the Draft"); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 469 U.S. 916 (1978). In *Collin*, the Nazi party was allowed to march in the predominately Jewish community of Skokie, Illinois. Although many of the citizens would likely suffer severe emotional distress, the court held that first amendment protection could not be made dependent on what a community finds offensive. 578 F.2d at 1205-06.

94. See *Spence v. Washington*, 418 U.S. 405 (1974) (improperly displaying United States flag with taped-on peace symbol held protected speech); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (distribution of publication containing "indecent speech" protected by the first amendment); *Bachellar v. Maryland*, 397 U.S. 564 (1970) (advocacy of unpopular idea protected); *Street v. New York*, 394 U.S. 576 (1969) (disrespect for the flag by burning not an actionable offense); see also *supra* note 93 and accompanying text.

constitute an intolerable violation of the first amendment.⁹⁵

The Court acknowledged that the ad parody is a distant cousin to political cartoons which provide necessary stimulation to healthy public and political discourse.⁹⁶ The determination that the ad parody constituted satire or caricature was dispositive of the protection given to the work and its publisher. The Court refused to condition first amendment protection upon the perceived quality of the work or the respectability of the publication involved.⁹⁷ Therefore, it is the categorization of a work as caricature and the status of the plaintiff that determine whether the actual malice standard will be applied to intentional infliction of emotional distress claims.

B. Practical Impact

As a practical result of the *Falwell* holding, if work can be roughly defined as satire or caricature and it does not fall within one of the unprotected categories,⁹⁸ there is almost no way that a public figure will be able to show actual malice. Caricature, by definition, involves exaggeration and distortion. Reasonable people simply do not seek factual information from satirical works.⁹⁹ Therefore, it is anoma-

95. See *supra* notes 93, 94 and accompanying text; see also *infra* note 98. Unless the speech is unprotected it is of value to public commentary and should be part of the marketplace of ideas. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Creating fear of liability for protected speech would hinder open debate and fly in the face of the first amendment objective of promoting such debate.

Judge Wilkinson recognized the value of satire to intellectual discourse. "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy." *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting).

96. *Falwell*, 108 S. Ct. at 882. For examples of satiric comment, see generally *Flynt*, 805 F.2d at 487.

97. *Id.* To have done so, the Court would have been undercutting the objectivity which is crucial in analyzing first amendment protection. Conditioning protection on the quality of the satire or the reputation of the publication in which it appears would involve unnecessary and inappropriate subjectivity, as would an "outrageousness" standard.

98. In addition to defamatory communications, "fighting words" (words likely to incite listeners to violence) and obscenity are types of speech that are unprotected under the first amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Unprotected categories of speech are those kinds of "utterances [that] are no essential part of an exposition of ideas, and are of . . . slight social value as a step to truth." *Id.* at 572.

99. While one who views a satirical skit, on *Saturday Night Live* for example, may reasonably infer that there was a recent news event involving the individual being lampooned, he would be unjustified in thinking that the skit was relaying actual facts about the incident or the individual.

lous to allow recovery to public figures upon proof of the defendant's knowledge of falsity or reckless disregard for truth when no actual facts are being asserted.¹⁰⁰

In *Gertz*, the Court stated that under the first amendment false ideas do not exist;¹⁰¹ only facts are subject to accusations of falsity. However, satire is not intended to be taken literally, but rather, the purpose of such work is to express ideas and to generate discussion among its audience.¹⁰² Almost invariably, satire is an expression of opinion¹⁰³ or rhetorical hyperbole,¹⁰⁴ both of which are protected forms of speech. Thus, Justice White's contention that the application of *New York Times* to the *Hustler* ad parody was misplaced appears to be valid.¹⁰⁵

Even when a court does not consider the putative satirical work to be opinion, it will not likely characterize the statements as factual as-

100. There must exist a false statement of fact before one can even attempt an "actual malice" showing. The Supreme Court has maintained that if a statement is not one of fact, it could not contain a falsehood. Accordingly, the maker of a non-factual statement could not possibly have knowledge of its falsity. See *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974).

101. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). "However 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." *Id.* at 339-40.

102. While one purpose of satire and parody is to cause distress in the object of the lampoon, this does not necessarily detract from the author's intention to express an idea. "Humor is the idiom of the dissident and the critic because it appeals to the mind as well as the emotions. Humor can expose human folly, establish perspective and offer insight into human behavior." Note, *supra* note 45, at 724.

103. Expression protected by the first amendment includes even those "opinions that we loathe and believe to be fraught with death." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) (publications concerning candidates for office accorded same protection under first amendment as those in office) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

104. The Supreme Court has consistently held that rhetorical hyperbole, statements which cannot reasonably be interpreted as expressing facts, are accorded first amendment protection and cannot provide the basis for a civil suit. *Austin*, 418 U.S. at 286-87 (1974). In *Austin*, the defendant labor union referred to a nonunion employee as a "scab traitor," and as one "having 'rotten principles' and lacking in character." *Id.* at 267, 283. The Court held this to be "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refused to join." *Id.* at 286. See also *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970) (newspaper's description of public figure's bargaining position as "blackmail" held to be rhetorical hyperbole); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 440-43 (10th Cir. 1982) (publication in which plaintiff was identifiable as subject of a fictional sexual account could not be reasonably understood as describing actual facts or actual events), *cert. denied*, 462 U.S. 1132 (1983). The jury's finding in *Falwell* that the ad parody could not reasonably be believed as presenting actual facts about Jerry Falwell indicates that the ad parody was rhetorical hyperbole and thus protected.

105. *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 883 (1988) (White, J., concurring). The author suggests that while in the *Falwell* case the jury found no assertion of fact, the Court invoked *New York Times* to establish its definitive stance on this issue. Invoking the actual malice standard here will operate as a guide for future cases when public figures seek damages for intentional infliction of emotional distress from publications other than caricature or parody.

sertions about the plaintiff. This is precisely what occurred in the *Falwell* case. In such instances, where the speech is rhetorical hyperbole, proof of actual malice will be practically impossible as well.¹⁰⁶ Interestingly, the more outrageous the statements, the less likely they will be found to assert actual facts. This further demonstrates the contradictory results an "outrageousness" standard would bring about, when compared to an "actual malice" standard. It also underscores the threat an "outrageousness" standard would pose in the area of the first amendment.¹⁰⁷

Regardless of whether one believes that satire constitutes opinion or rhetorical hyperbole, the reality is that the Court's holding will operate as an almost insurmountable obstacle for public figures attempting to recover for intentional infliction of emotional distress allegedly caused by the publication of a piece of satirical criticism. This result is necessary in order that public commentary may thrive unfettered by fears of liability, particularly for true statements.¹⁰⁸ Recognizing that criticism of public figures contributes to the advocacy of ideas, the protection of which is central to the first amendment,¹⁰⁹ the Court has ensured that satirists need not engage in unnecessary self-censorship when making humorous attacks against public figures.

C. *The Carte Blanche Authority of the Media*

Given the substantial difficulty a public figure plaintiff will have in recovering for defamation or intentional infliction of emotional distress *when satire is involved*, one must question whether the media can say or write almost anything about a public figure without fear of legal reprisal. For the most part the media has such freedom, at least when the satirical speech does not fall into one of the unprotected categories.¹¹⁰

However, it may be argued that recovery under defamation or intentional infliction of emotional distress is inappropriate or unnecessary when the expression involved is satire or caricature. While the paramount concern in the area of defamation is protecting an individ-

106. See *supra* note 104 and accompanying text.

107. See *supra* notes 88-97 and accompanying text.

108. *Falwell*, 108 S. Ct. at 879; see *supra* notes 93-95 and accompanying text.

109. *Falwell*, 108 S. Ct. at 879-80; see *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71, 273-76 (1964).

110. See *supra* note 98 and accompanying text.

ual's reputational interest,¹¹¹ it is unlikely that a public figure's reputation will be measurably damaged by the publication of satire which is rhetorical hyperbole and which could not reasonably be interpreted as presenting actual facts about the public figure. This is the gravamen of the jury's finding in *Falwell* with respect to the defamation claim.¹¹² On the other hand, when the satire is determined to be the opinion of the publisher, it is entirely possible that the public figure's reputation could be injured to some degree.¹¹³ However, to promote open public debate of issues, the public figure's reputational interest must necessarily be subordinated to the interest of injecting the opinion into the marketplace of ideas.

In the area of emotional distress, where the plaintiff's emotional well-being is of central importance,¹¹⁴ it is the plaintiff's status as a public figure that makes him a target for satire and requires that he be able to emotionally withstand such communications. In the world of politics, "a certain toughening of the mental hide is a better protection than the law could ever be."¹¹⁵ Presumably, a prospective public figure is aware of the inherent dangers which accompany public life. Accordingly, he must be prepared for the possibility that unflattering statements concerning him will be published. Just as the Court in *New York Times Co. v. Sullivan* stated that a public official's reputational interest must take a backseat to first amendment speech,¹¹⁶ so too must his interest in emotional tranquility.

This is not to suggest that a public figure is powerless to act when he feels wronged by unfavorable words published about him. For example, if the parody or satire is determined to be obscene, the publisher clearly can be prosecuted pursuant to the laws regulating obscenity.¹¹⁷ Since such an action would be in the criminal arena, however, the public figure would be unable to recover damages in a subsequent civil suit absent a showing that the publication was done with "actual malice." Accordingly, if the public figure can establish that the statements were made with "actual malice," he may proceed and attempt to prove either defamation or intentional infliction of

111. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971).

112. *Falwell*, 108 S. Ct. at 878.

113. Depending on the status of the opinion-maker, his credibility, and the size of his audience, the public figure about whom he gives his opinion may suffer various levels of reputational injury. For instance, if a highly regarded film critic gives an actor a scathing review, there may be some very real damage to the actor's professional reputation.

114. See *supra* note 31 and accompanying text.

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

116. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964).

117. *New York v. Ferber*, 458 U.S. 747 (1982) (statute regulating obscene depiction of sexual conduct constitutional); *Miller v. California*, 413 U.S. 15 (1973) (obscene material not protected by first amendment).

emotional distress. However, the reality is that this will prove extremely difficult when the speech can be colored as satire constituting either opinion or rhetorical hyperbole.

D. Importance of the Decision in the Future

As the actual malice standard is technically inapposite to works of derisive humor, the relevance of the *Falwell* holding is more likely to be seen in suits involving supposed news reporting.¹¹⁸ It is highly possible that public figures may attempt to claim emotional distress or defamation in suits against tabloids or so-called "scandal sheets" which have published allegedly false facts about that person. Since public figures have recovered for libel against defendants such as the *National Enquirer*¹¹⁹ by proving actual malice, an emotional distress claim in such cases may be viable even under the new requirement. Obviously, a crucial inquiry in proving actual malice would be whether one could reasonably believe that a story in one of these publications described actual facts about anyone or anything.¹²⁰ At the very least, public figures have a better chance of recovering for intentional infliction of emotional distress against publications that are supposedly reporting factual information. Therefore, emotional distress suits brought by public figures against a more highly regarded news media may also be feasible in the future. After *Falwell*, such actions may be successfully maintained if the public figure can establish that publication was made with knowledge of falsity or reckless disregard for the truth and can satisfy the remaining elements of intentional infliction of emotional distress.¹²¹

118. By their nature, news reports are intended to contain assertions of fact; therefore, they allow a plaintiff the opportunity to try to prove actual malice. However, editorials are likely to be categorized as opinion, and editorial or political cartoons will usually constitute opinion or rhetorical hyperbole. See generally *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717-18 (11th Cir. 1985).

119. See *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984). Actress Carol Burnett recovered for a libelous story in the *National Enquirer* that reported her as being loud, violent, and drunk in a Washington, D.C. restaurant. For a discussion of lawsuits against the *National Enquirer*, see R. SMOLLA, *SUING THE PRESS* 100-17, 134-35 (1986).

120. Conceivably, some triers of fact would deem much of the contents in the *National Enquirer* and similar publications to be rhetorical hyperbole—statements that could not reasonably be construed as expressing actual facts about an individual. On the other hand, *Burnett*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) demonstrates that some stories in these publications will be interpreted as containing assertions of fact. See *supra* note 117.

121. While the actual malice standard is a heavy enough burden to satisfy, the outrageousness requirement also encumbers the plaintiff with another weighty burden of

VI. CONCLUSION

The unanimous decision in *Falwell* reaffirms the Court's allegiance to first amendment expression and acknowledges the importance of unrestrained public discourse. Its message was clear: public figures cannot circumvent the Constitution by recharacterizing a defamation claim as one for intentional infliction of emotional distress. By requiring a public figure to show "actual malice" before he can prove a claim for emotional distress allegedly caused by a satirical work, the Court has acknowledged the value of satire in public debate and has further reasserted its confidence in the "actual malice" standard as being an effective instrument which serves to maintain free expression. Additionally, the *Falwell* holding has ameliorated any possibility that liability could result from truthful speech.

In reality, due to the characteristics of satire, it is doubtful that a public figure will be able to prove "actual malice" in the publication of such work. However, the import of this new requirement is likely to be seen in future suits involving statements about public figures that are factual assertions. Whether the Supreme Court will extend the *Falwell* holding to forms of expression other than satire and caricature remains to be seen. Nevertheless, since the Court believes that the "actual malice" standard provides "sufficient breathing space" to first amendment speech, such an extension can be safely made without compromising the freedom of expression that the first amendment was designed to protect.

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proof. Even before the *Falwell* decision, defamation was the preferred theory to be pled in suits against the media. See Mead, *supra* note 1, at 33-45 (1983). However, even though the public figure may not be able to prove defamation (i.e., no reputational damage), he may still have an alternative opportunity for recovery if he can prove actual malice and establish the other elements of intentional infliction of emotional distress.