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ABSTRACT

In 1984, a jury awarded $200,000 to the Rev. Jerry Falwell for emotional distress intentionally inflicted by a parody depicting Falwell as a drunkard who had incestuous relations with his mother in an outhouse. In 1988, in "Hustler v. Falwell," the U.S. Supreme Court struck down the verdict on First Amendment grounds. Although the "Hustler" decision has been widely hailed as a major victory for freedom of expression, this view needs qualification, and subsequent cases in the lower courts support such qualification. A critical examination of the Supreme Court's decision suggests that the decision confuses the concepts of falsity, believability, and opinion. Analysis reveals the Court's opinion to be far from clear. The Court addresses neither the question of how much protection the First Amendment grants to opinion, nor the question of what constitutes opinion, nor the more general problem of plaintiffs' use of alternate theories of liability to avoid First Amendment obstacles to claims for libel. One result is that "Hustler v. Falwell" may not effectively discourage attempts to use intentional infliction of emotional distress as an end-run around difficult constitutional defenses to libel and invasion of privacy. (Sixty-three notes are included.) (MS)

Some Second Thoughts About Hustler v. Falwell

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Some Second Thoughts About Hustler v. Falwell

In 1984, a jury awarded $200,000 to the Rev. Jerry Falwell for emotional distress intentionally inflicted by a parody depicting Falwell as a drunkard who had incestuous relations with his mother in an outhouse. In 1988, in Hustler v. Falwell,[1] the U.S. Supreme Court struck down the verdict on First Amendment grounds. The court held that public figures and public officials suing for intentional infliction of emotional distress must prove that their emotional distress was caused by a false statement of fact published with knowledge that it was false or with reckless disregard for the truth.[2]

The Hustler decision has been widely hailed as a major victory for freedom of expression because it appeared to reiterate the Court's support of First Amendment protection for even vicious statements of opinion and for the "actual malice" standard of New York Times v. Sullivan.[3] One observer has called the Court's opinion

> a triumphant celebration of freedom of speech. Far from signalling the disintegration of America's moral gyroscope, the opinion reaffirms the most powerful

> magnetic force in our constitutional compass: that essential optimism of the American spirit, an optimism unafraid of wild-eyed, pluralistic, free-wheeling debate.[4]

This paper suggests that such praise needs qualification, and that subsequent cases in the lower courts support such qualification. The paper begins with a brief legal history of the Hustler case. It then critically examines the Supreme Court's decision, and suggests that the decision confuses the concepts of falsity, believability and opinion. Analysis reveals the Court's opinion to be far less than clear. The Court forthrightly addresses neither the question of how much protection the First Amendment grants to opinion, nor the question of what constitutes opinion, nor the more general problem of plaintiffs' use of alternate theories of liability to avoid First Amendment obstacles to claims for libel. One result is that Hustler may not effectively discourage attempts to use intentional infliction of emotional distress as an end-run around difficult constitutional defenses to libel and invasion of privacy.

The Legal Background

As it has developed through common law, an action for intentional infliction of emotional distress requires a plaintiff to prove that the defendant 1) did something extreme and outrageous that 2) either intentionally or recklessly 3) caused the plaintiff severe emotional distress.[8] During the

past decade, it has become increasingly common for plaintiffs to assert such claims against the mass media, and to couple them with claims for libel and invasion of privacy.[6] Plaintiffs appear to have seized on intentional infliction of emotional distress as a theory of liability that might circumvent First Amendment and common law barriers to actions for libel and invasion of privacy. Falwell's action against Hustler provides a striking example.

The material in Hustler magazine that angered Falwell was a parody of a Campari liquor ad. It contained Falwell's name and photograph, and a phony interview in which the Falwell character described an incestuous encounter with his mother and portrayed both his mother and himself as drunkards. In small print at the bottom of the ad was a disclaimer: "Ad parody--not to be taken seriously." Falwell sued for libel, invasion of privacy (appropriation of his name and likeness for commercial purposes) and intentional infliction of emotional distress.

The trial court dismissed the privacy claim and the jury found against Falwell on the libel claim, concluding that no reasonable person would believe that the parody described actual facts about him.[7] But the jury did find Hustler responsible for intentional infliction of emotional distress, and awarded $100,000 in actual damages and $100,000 in punitive damages.[8]

Apparently, the jury found the very nature of the ad parody -- plus the fact that Hustler republished it after

Falwell sued -- to be sufficiently outrageous. As to the requisite intent, Hustler publisher Larry Flynt had testified in a deposition that he intended to cause Falwell emotional distress. And as to the requirement of "severe emotional distress," Falwell testified that he had never had a personal experience of equal intensity, and that he had become angry enough to retaliate physically. A colleague testified that Falwell's enthusiasm, optimism and ability to concentrate suffered visibly as a result of the parody. The court of appeals found all of this to be sufficient evidence to have justified the jury's verdict,[9] and affirmed.

The court of appeals also rejected Hustler's argument that the First Amendment barred liability. Hustler argued that to collect for either libel or intentional infliction of emotional distress, Falwell, as a public figure, should be required to prove "actual malice" -- knowledge of falsity or reckless disregard for the truth.[10] The court agreed, but with an important twist. The real intent of the "actual malice" rule was to require a high degree of legal fault, the court reasoned; since one requirement of a successful intentional infliction suit is fault at the level of intentional or reckless conduct, the constitutional fault requirement is satisfied. To make a plaintiff suing for intentional infliction of emotional distress prove knowing or reckless disregard for the truth, the court concluded, would be to change the very nature of the tort.[11] And that the court declined to do.

Hustler further argued that since the jury found the parody not literally believable, it must be considered a statement of opinion and, as such, protected by the First Amendment. Again, the appeals court disagreed, concluding that whether an offensive publication is an opinion is irrelevant to the question of whether a publication is outrageous. In other words, intentional infliction of emotional distress focuses on outrageous conduct; whether that conduct takes the form of a statement of opinion makes no difference.[12]

Hustler in the Supreme Court

The Supreme Court unanimously reversed the court of appeal. Chief Justice Rehnquist's opinion began by reiterating the importance of constitutional protection for ideas and opinions: "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[13] In so doing, Rehnquist drew directly from the Court's central precedents in libel law. The Court also emphasized that in libel cases a defendant's motive is irrelevant -- ill will or hatred of the plaintiff do not diminish the First Amendment's protection:

> Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area

> of public debate about public figures. Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages [sic] awards without any showing that their work falsely defamed its subject.[14]

The Court also objected to "outrageousness" as a criterion for determining when speech loses First Amendment protection:

> '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. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.[15]

Consequently, the Court concluded, public figures and public officials may not recover for intentional infliction of emotional distress

> without showing <u>in addition</u> that the publication contains a <u>false statement of fact</u> which was <u>made with 'actual malice,'</u>

> i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. [emphasis added][16]

The Court accepted the jury's conclusion that the parody was not literally believable, but did not elaborate on why or whether it found Falwell unable to satisfy the actual malice standard. The Court merely attributed its conclusion to "reasons heretofore stated."[17]

Difficulties with the Court's Reasoning

If the Supreme Court's decision makes anything clear, it is this: intentional infliction of emotional distress is no longer a viable theory of liability for public figures where the offensive material either amounts to opinion or is not provably, believably false. This conclusion, however, must be drawn as much from consideration of the facts in the Falwell case as from the Court's discussion of the law.

The jury disposed of Falwell's libel claim by finding that readers wouldn't take the parody as factual. This finding, however, can be interpreted in several ways. One interpretation is simply that this was a finding that the parody lacked the requisite defamatory meaning for a libel action.[18] Another is that the jury thereby found Falwell unable to prove that any false statement of fact had been published about him.[19] A third is that the jury's finding was tantamount to a conclusion that

the parody was a statement of opinion. Although the Supreme Court seems to have regarded the jury's finding as highly important to the intentional infliction of emotional distress claim as well as to the libel claim, Chief Justice Rehnquist's opinion remains unclear as to precisely why.[20]

Perhaps the Court is saying that the jury's conclusion that no one would believe the ad merely confirms that it is political parody and, as such, the type of material that cannot be restricted without threatening serious harm to fundamental First Amendment interests. The Court implies as much by treating at some length the importance of political parody and the threat presented to it by actions such as Falwell's.[21] The Court expresses this concern while discussing the First Amendment problem presented by the fact that intentional infliction of emotional distress actions allow a plaintiff to recover when the defendant intends to cause harm. That is, the Court worries that allowing actions such as Falwell's could render all parody vulnerable to suits for intentional infliction of emotional distress because parodists frequently intend to make life miserable for their subjects. But the Court never explicitly connects this analysis with its imposition of the actual malice standard.

An alternative explanation might be that the Court presumed that parody is inherently opinion and that, under the First Amendment, pure opinion cannot be punished under any theory of liability. Indeed, the Court expends several paragraphs

emphasizing the importance of protecting "ideas" and "opinions".[22] But if the Court were regarding the jury's verdict as an indicator that the parody was opinion, it is unclear why the Court found the actual malice standard to be relevant at all.

Precisely this question may have bothered Justice White, who noted in a two-sentence concurrence that he found New York Times v. Sullivan to have "little to do with this case, for here [in Hustler] the jury found that the ad contained no assertion of fact."[23] In other words, if the parody constitutes protected speech because it is opinion, it makes little sense to apply the actual malice standard. A publisher might even worry that application of the actual malice standard could be counterproductive: in a literal sense, Falwell certainly satisfied it -- Larry Flynt proudly conceded that what Hustler published was false and that he knew it.[24]

The Court found both the "intent" and "outrageousness" requirements of the intentional infliction tort to be constitutionally deficient. But it seems to stop short of rejecting them altogether, since it requires public figures to prove falsity and actual malice "in addition."[25] Consequently, it must be either the falsity or actual malice requirement or both that saved Hustler, because the Court never disputes Hustler's ill intent or the outrageousness of the parody. Since, literally speaking, Hustler knew it was publishing a falsehood, perhaps the Court is using the actual malice standard as a test of whether the ad was a statement of fact or opinion. Or, given that the jury found the parody not believable, the Court may have

found Falwell unable to prove actual malice because there was nothing to prove false.

Neither of these explanations is satisfying. In essence, the problem is that a jury quite logically could find material to be simultaneously "not believable" but also false and published with actual malice. Under the Supreme Court's approach, the defendant could then either be held liable, or a court would have to deal far more directly with the issue of constitutional protection for opinion.

Falsity and Believability

At the very least, the Court has confused the concepts of falsity and believability. And rather than clarify the degree of First Amendment protection for opinion, the Court has further muddled the very distinction between fact and opinion.

By its very language, the actual malice test focuses on truth in an absolute, literal sense; it concerns itself with the defendant's subjective awareness of an extant, provable truth. Failure to establish either falsity or actual malice doesn't inherently prove that something is a statement of opinion; it may merely reflect inability to prove falsity or a failure to establish the defendant's subjective culpability. In the Hustler case, by contrast, the focus is apparently not on falsity in any provable or absolute sense, but on "believability."

The Supreme Court seemingly finds the parody ad to be "not false" because it is not believable rather than because it is

false in any absolute sense. Is the parody then protected by the First Amendment because it isn't believable? Or because it is an opinion? Or is it an opinion because it isn't believable? The Court does not explain. One can easily see how believability may be relevant in libel law, since it gets to the heart of the question of what other people think of the plaintiff as a result of the alleged libel.[26] But why should believability be relevant to intentional infliction of emotional distress, where the victims' complaints focus on how they feel about themselves? Using "believability" as an indicator of opinion seems equally wrong-headed. Certainly people express opinions precisely because they want others to believe them. Yet, if the Court wants to protect the Hustler parody because it is an idea or opinion, the Court does a poor job of conceptually explaining why the parody should be regarded as such.

The most likely interpretation of the decision is that the Court's real concern does lie primarily with the issue of falsity, and only secondarily with the issue of actual malice. The Court has made clear that public-figure and private-figure libel plaintiffs must show falsity.[27] And in at least two libel cases, the Court has related falsity to believability.

In Greenbelt Cooperative Publishing Ass'n v. Bresler, a public-figure real estate developer sued over the use of the word "blackmail" to characterize his position in certain negotiations with a city.[28] The lower courts held for the developer. In reversing, the Supreme Court concluded that

> even the most careless reader must have

> perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.[29]

Yet, just as in Hustler, the Court failed to explain precisely why this conclusion was constitutionally relevant. It said only that "the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review."[30]

The Court may have considered the statement nondefamatory because it wasn't literally believable. Or the Court may have considered the statement to have been opinion, not fact, thus making proof of actual malice impossible. Or the Court may have implicitly reasoned that the plaintiff could not sustain the burden of proving falsity, since at the metaphorical level the statement was not believably false.

The Court shed some further light on the matter four years later in Old Dominion Br. No. 496, Nat. Ass'n of Letter Carriers. v. Austin.[31] At issue here was a labor union's characterization of plaintiffs as "scabs" along with a strongly pejorative definition of "scab" that included such terms as "traitor." The Court thus again confronted the question of how to deal with

metaphorical language (albeit technically as a matter of federal labor law, not First Amendment law). The Court first concluded that although "scab" might be construed as a representation of fact, plaintiffs literally were scabs so they could not allege that the word was used falsely.[32] Then the Court entered territory more relevant to Hustler.

It noted that before the actual malice test can be met, there must be a false statement of fact; in the context of the labor dispute at hand, even words like "traitor" could not be construed as representations of fact.[33] Then, however, the Court characterized the definition of a scab as an "expression of opinion."[34] And then it analogized the case to Greenbelt, concluding that here, too, it is impossible to believe that any reader would have taken the language literally.[35] The bottom line, nevertheless, appears to be that the Court found the plaintiff unable to prove the language to be false, except in the most literal sense.[36]

If the Court is engaging in similar reasoning in Hustler, it would be fair to assume that the key to understanding the case lies in the concept of falsity. Public figures, the Court may be saying, cannot sue successfully for intentional infliction of emotional distress unless they can prove that what is published is literally false and believable.[37] The Court's discussion of opinion and actual malice are, therefore, not necessarily central at all.[38] Whether one calls the Hustler parody an "opinion", an "idea" or rhetorical hyperbole, the point is that it does not

communicate a believable falsehood. And consequently, there is really no need to apply the actual malice test.

The Public Figure-Private Figure Problem

In the process of wedding the constitutional law of libel to the tort of intentional infliction of emotional distress, the Court maintained its focus on tort plaintiffs' public or private status. The Court specifically confined its holding to cases involving public figures, but even under the Court's libel cases, all plaintiffs must prove falsity when a libel involves a matter of public concern.[39] Since the Hustler decision seemingly hinged on falsity, there would seem to be little reason to have made the holding contingent in any way on Falwell's status as a public figure. Yet the Court's holding implies that a different standard might be applied in cases brought by private figures. By so doing, the Court has left open the possibility of intentional infliction suits by private figures. The public figure-private figure dichotomy is likely to be no less confusing in intentional infliction of emotional distress litigation than it has been in the context of libel, and is likely to encourage legal wrangling over whether a plaintiff is private or public. The Supreme Court itself has suggested that the definition of "public figure" ought to be fairly narrow,[40] so we might expect plaintiffs frequently to seek private-figure status.

The Court, then, leaves open at least two possibilities. One is that private figures suing for intentional infliction face

no constitutional barriers, or at least that the Court is saving that issue for another day. The other is that, maintaining the parallel with libel law, private figures might win upon showing falsity, believability and negligence[41] plus outrageousness, intent and severe harm.[42] The significance of a lesser constitutional barrier for private figures is underlined by the fact that nearly half of the intentional infliction claims brought against mass media have been brought by plaintiffs who are almost certainly private figures.[43]

A post-Hustler Illinois case, Van Duyn v. Smith,[44] provides a striking illustration of the opportunity the Supreme Court left for private figures. The executive director of an abortion clinic sued an anti-abortion protester for libel, invasion of privacy and intentional infliction of emotional distress. A central allegation was that the defendant had distributed a "Wanted" poster and a "Face the American Holocaust" poster to plaintiff's friends and neighbors.[45] The "Wanted" poster allegedly resembled an FBI poster, and referred to plaintiff as "Margaret the Malignant," said she was wanted "for prenatal killing in violation of the Hippocratic Oath and Geneva Code," and accused her of killing for profit and presiding over more than 50,000 killings.[46]

The poster also contained the disclaimer that "nothing in this poster should be interpreted as a suggestion of any activity that is presently considered unethical. Once abortion was crime but it is not now considered a crime."[47] The Holocaust poster

contained pictures of aborted fetuses between 22 and 29 weeks in gestational age, with the method of abortion listed under each picture.[48]

The trial court dismissed all the claims. The appeals court affirmed as to libel and invasion of privacy, but reversed dismissal of the intentional infliction claim. The court found that Hustler did not apply to intentional infliction of emotional distress suits brought by private figures, and it found that the plaintiff here was a private figure.[49] Regarding the libel claim, however, the court found the posters to be nonactionable statements of opinion.[50]

The "End-Run" Problem

The Van Duyn case also illustrates the central problem presented for publishers by actions for intentional infliction of emotional distress: their potential for circumvention of otherwise difficult First Amendment barriers. Had the Supreme Court forthrightly recognized this, its decision might have become more useful. Nor is there any lack of lower court reasoning on this issue from which the Supreme Court might have borrowed -- regardless of whether plaintiffs are public or private figures. Already a decade ago, in Hutchinson v. Proxmire, a federal appeals court upheld refusal to allow trial on a libel plaintiff's additional claim for intentional infliction of emotional distress:

> We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused.[81]

Particularly influential has been the California Supreme Court's decision in Reader's Digest Ass'n v. Superior Court, a libel, invasion of privacy and intentional infliction of emotional distress action brought by the Synanon Church and its founder.[82] The trial court had refused to grant summary judgment to the defendant; the state supreme court reversed, invoking New York Times v. Sullivan. The constitutional protection granted by Sullivan does not depend on the label given the stated cause of action, the court concluded. Liability "cannot be imposed on any theory for what has been determined to be a constitutionally protected publication."[83]

At least a dozen cases in addition to Hustler have involved claims for intentional infliction of emotional distress based on statements of opinion or on hyperbolic rhetoric. The Hutchinson/Reader's Digest line of reasoning has been important in resolving the majority of them. For example, in Celebrezze v. Dayton Newspapers, an Ohio Supreme Court justice sued for libel and intentional infliction of emotional distress because of an editorial cartoon. The Ohio courts sided with the newspaper, finding that since the cartoon was a constitutionally protected

statement of opinion, it could be the subject of neither a libel nor an intentional infliction suit.[64] Similarly, a California appeals court rejected an intentional infliction claim stemming from a Robin Williams comedy routine.[65] The plaintiff's claims of libel and intentional infliction of emotional distress both were based upon publication of a joke, the court noted; since the joke was nondefamatory because it was not literally believable, it constituted speech protected by the First Amendment from attack by any other theory of liability.[66]

Hustler magazine itself has been successful in the lower courts in at least one case strikingly similar to that brought by Falwell. This time, feminist Andrea Dworkin was the target of cartoons and photographs depicting sexual activity and bearing captions making disparaging remarks about Dworkin and her mother. She sued for libel, false light invasion of privacy, and intentional infliction of emotional distress.[67] In granting summary judgment to Hustler on all three claims, a federal district court concluded that

> [w]hatever the label, Dworkin cannot maintain a separate cause of action for mental and emotional distress where the gravamen is defamation. Without such a rule, virtually any defective defamation claim, such as the one in this case, could be revived by pleading it as one for intentional infliction of emotional distress; [sic] thus circumventing the

restrictions, including those imposed by the Constitution, on defamation claims.[88]

In all of these cases, the courts have focused on the nature of the expression and on the plaintiffs' seemingly obvious attempt to use intentional infliction of emotional distress to circumvent libel and privacy defenses. Whether the plaintiffs have been public or private figures has been at best a secondary consideration. The logic is compellingly straightforward and sensible: if the constitution (or even the common law) would protect the expression where the gravamen of the claim is libel or invasion of privacy, it would make no sense to let the expression be vulnerable under any other theory of liability.[89] Perhaps this is what the Supreme Court is trying to say in Hustler, but if so, it has said it far more opaquely than many lower courts.

The difficulty can be seen more clearly if one imagines a plaintiff suing exclusively for intentional infliction of emotional distress, perhaps to make it less obvious that the claim is really a libel claim in disguise. Under the approach commonly taken in the lower courts, a judge could still examine the nature of the speech and find, for example, that the statement is an opinion or hyperbole or at least not provably or believably false. Since such expression has been accorded First Amendment protection from actions for libel, the court could conclude that it must inherently be constitutionally protected from an action for intentional infliction of emotional distress

as well. A court applying Hustler might well be led to the same conclusion if the plaintiff is a public figure. But if the plaintiff is a private figure, as Van Duyn demonstrates, the holding in Hustler provides little guidance; the result would be more uncertain.

Indeed, even where public figures are involved such uncertainty is not inconceivable. In September 1988, a jury ruled against former Massachusetts Gov. Edward King in a libel suit focusing on a newspaper column alleging that he had once called a judge and demanded that he change his decision in a rape case. The jury found the allegation to be false; but the jury never reached the question of actual malice, because it also found that King had not been "discredited...in the minds of any considerable and reputable class" of the community.[60] This appears to be a finding that the material was not defamatory. What if King's suit had been brought under a theory of intentional infliction of emotional distress?

Unlike the Hustler ad parody, the column material may well have been both provably false and believable. Conceivably, a jury may have found actual malice, outrageousness and even intent. The Supreme Court's approach leaves room for such a scenario because it allows a public figure to sue even if the material is found not to have harmed the public figure's reputation. Precisely because the Court did not directly address the use of alternative theories of liability to circumvent barriers to libel, this possibility remains -- even when the

speech clearly involves a matter of public significance and even when a public figure or official is the target.

Another approach used in the lower courts -- particularly in the context of "opinion" cases -- has put a constitutional spin on the "outrageousness" requirement. Such courts have reasoned that since opinions expressed on matters of public concern are protected by the First Amendment, statements of opinion cannot be considered outrageous. In Brooks v. Paige, for example, a professional soccer player brought an intentional infliction of emotional distress suit against a sports commentator who, during a television program, drew a mustache and beard on the player's portrait, spat on it and jumped on it. The trial judge directed a verdict for the defendant; his actions were not outrageous, the court concluded, because they "were no more than comments...or conduct expressing ideas with respect to that public figure and those matters of public concern."[21]

Conclusion

In Hustler, the Supreme Court had an opportunity to deal directly and decisively with the questions of 1) what constitutes a statement of opinion; and 2) how much constitutional protection such statements have. Such a decision would have been a useful addition to the law of libel as well as to the law of intentional infliction of emotional distress. The Court instead left both questions without clear answers. Nor did it directly address the problem of plaintiffs' creative relabeling of their claims to

avoid constitutional barriers to actions for libel and invasion of privacy. Consequently, the decision does not shut the door on actions for intentional infliction of emotional distress by private figures who are upset by statements of fact or opinion. Nor does it entirely close the door on intentional infliction of emotional distress actions by public figures and officials when false statements are involved.

In his book on the Hustler case, Professor Smolla argues that to "decipher the meaning of the case only in terms of its technical ramifications is to sap the decision of its true resonance and power, like treating Moby Dick as a simple whaling adventure."[82] The point has merit. Certainly it is important that the Supreme Court reiterated its adherence to New York Times v. Sullivan and to First Amendment protection for even vicious verbal attacks on public figures.[83] But "technical ramifications" are not so easily dismissed. A great deal of important law-making is interstitial. In Hustler the Supreme Court has left considerable room for interstitial maneuvering.

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FOOTNOTES

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

2. Id. at 882.

3. See, e.g. Court, 8-0, Extends Right to Criticize Those in Public Eye, N.Y. Times, Feb. 25, 1988, p. 1 col. 4 (national ed.); Double-Barrel Judgment, N.Y. Times, Feb. 25, 1988, p. 15, col. 1 (national ed.); Langvardt, Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects, 26 Am. Bus. L. J. 665 (1988); Note, Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism, 16 Pepperdine L. Rev. 97 (1988); and R. SMOLLA, JERRY FALWELL V. LARRY FLYNT (1988). New York Times v. Sullivan held that public officials could not sue successfully for libel unless they proved that the libel was published with knowledge of its falsity or with reckless disregard for the truth. 376 U.S. 254, 279-80 (1964).

4. SMOLLA, supra note 3, at 303.

5. Restatement (Second) of Torts §46(1) (1965).

6. See, e.g., Drechsel, Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media, 89 Dick. L. Rev. 339 (1985); Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution, 23 Washburn L.J. 24 (1983); Stevens, The Tort of 'Outrage': A New Legal Problem for the Press, Newspaper Research J., Spring 1984, at 27.

7. Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986).

8. Id.

9. Id. at 1276-77.

10. New York Times v. Sullivan, 376 U.S. 254, 279-80.

11. 797 F.2d at 1274-75.

12. 797 F.2d at 1275-76.

13. 108 S.Ct. at 879.

14. Id. at 880-81.

15. Id. at 882.

16. Id.

17. Id. at 882-83.

18. "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement (Second) of Torts §563.

19. The plausibility of this interpretation is supported by Smolla's discussion of the trial judge's charge to the jury. SMOLLA, supra note 3, at 156.

20. One analyst has suggested that the actual malice requirement is necessary to avoid undercutti defamation law where a defendant's statement actually constituted parody but would not be perceived as such by the reasonable reader -- that is, where the

reasonable reader perceived something as a statement of fact although precisely the opposite perception was intended by the defendant. Langvardt, supra note 3, at 702.

21. 108 S.Ct. at 881.

22. Id. at 879-80.

23. Id. at 883.

24. As attorney Bruce Sanford has noted, "[i]f metaphors and hyperbole were taken literally, their meaning would usually be false, and whoever used the word [sic] would know that, literally, they were false. Thus, use of hyperbole would constitute knowing falsity and 'constitutional malice' under New York Times v. Sullivan....Common sense and the First Amendment reject such a result." SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 128 n.63 (1985).

25. 108 S.Ct. at 882. The importance of retaining the intent and outrageousness requirements is readily demonstrable. Consider Time, Inc. v. Hill, in which the plaintiff sued for false light invasion of privacy, complaining that Life Magazine had distorted and fictionalized an incident in which he and his family were held hostage by escaped convicts. The Life report suggested that the convicts had mistreated the family and that members of the family had taken several heroic actions in the face of this mistreatment. In fact, these incidents had not occurred. And after the real incident occurred, the family had moved to another state and discouraged all further publicity. 385 U.S. 374 (1967). The

Supreme Court held that plaintiffs in such "false light" cases would have to prove actual malice. Id. at 387-88. Since the trial court had not thus instructed the jury, the court remanded the case. Id. at 398.

Imagine for a moment that the Hill case is brought today under a theory of intentional infliction of emotional distress. The material involved is false but, unlike Hustler's ad parody, quite believable. It is not defamatory, thus not libelous. But it resurrects and distorts an incident for a plaintiff who has been assiduously avoiding further publicity. The resurrection of this incident -- particularly in its fictionalized form -- might well cause severe emotional distress. In such a case, the falsity and actual malice barriers may be surmountable, but Hill would still have to prove that the material was outrageous and that Time, Inc. had intentionally or recklessly caused severe emotional harm.

26. When hyperbole is at issue, "the literal meaning of a word must be ruled out as a reasonable possibility before the remaining meaning can be recognized -- and protected -- as an expression of opinion." SANFORD, supra note 24, at 127.

27. Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

28. 398 U.S. 6 (1970).

29. Id. at 14.

30. Id. at 13.

31. 418 U.S. 264 (1974).

32. Id. at 283.

33. Id. at 284.

34. Id.

35. Id. at 285-86.

36. Id. at 286. In dissent, justices Powell, Rehnquist and Burger also read the majority decision this way. Id. at 296.

37. It is worth noting that the court's decision -- both in terms of the facts and the law -- is confined to offensive publications. Presumably, the opinion places no constitutional limits on suits where a public figure is complaining about the actual conduct of the media -- for example, journalists' or photographers' behavior in gathering information.

38. Another reason for caution in estimating Hustler's impact on First Amendment protection for opinion is that Chief Justice Rehnquist, the author of the opinion, himself has expressed discomfort with the notion that the First Amendment provides absolute protection for statements of opinion. Joined by Justice White, Rehnquist in 1982 dissented when the Court denied certiorari in Miskovsky v. Oklahoma Publishing, a libel case that might have squarely raised the question of the scope of the First Amendment's protection for opinion. "I am confident," he wrote, "that this Court did not intend to wipe out this 'rich and complex history' [of the common law's handling of defamatory opinion] with the two sentences of dicta in Gertz...." 459 U.S. 923, 925 (1982). Rehnquist was referring to the statement in Gertz that "[u]nder 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 on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). The Oklahoma Supreme Court had reversed a million-dollar libel award to a senatorial candidate who had been the subject of critical comment in news stories, an editorial and an editorial cartoon; Rehnquist believed the state court might have read Gertz as clothing opinion with virtually absolute First Amendment protection.

Consequently, it appears unlikely that he intended to clothe opinion with absolute constitutional protection. A strategic middle ground in a case like Hustler would be to refrain from much specificity on the matter of opinion.

The aberrational nature of Hustler -- aberrational in the sense that it represented a victory in the lower courts for a public figure in an intentional infliction case involving publication -- may also have played a role. Other lower courts hearing such cases have sided consistently with defendants. See text accompanying notes 51-61 infra. The Fourth Circuit stood alone in accepting the type of legal argument Falwell offered. The Supreme Court may have felt a need to do little more than send a message that it disfavored the Fourth Circuit's reasoning.

39. Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

40. Gertz v. Robert Welch, Inc., 418 U.S. 323 (prominent lawyer representing family in highly newsworthy lawsuit is not public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (prominent

socialite who held news conferences during highly publicized divorce action not public figure for purposes of libel suit involving coverage of divorce); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (state-employed scientist conducting research funded by federal grant not public figure for purposes of libel suit involving criticism of his research); Wolston v. Reader's Digest, 443 U.S. 157 (1979) (man held in contempt by grand jury investigating Soviet espionage not public figure for purposes of libel action involving allegations that he was himself Soviet agent).

41. The negligence requirement would be in keeping with Gertz v. Robert Welch, Inc.: "So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347.

42. This entire possibility exists since negligence in the steps leading to publication of outrageous, false material might be conceptually distinguished from intent in the sense of desire to cause severe emotional distress. For example, one might desire to cause such harm but not have been negligent in putting together the offensive material that turns out to be false.

43. A rough tally as of this writing indicates that of 84 plaintiffs who have alleged intentional infliction of emotional distress, at least 40 appear likely to be held private figures under the Supreme Court's definition of the term. The number would undoubtedly be higher if even some of the borderline types were

categorized as private. A list of the cases may be obtained from the author.

44. 173 Ill.App.3d 523, 527 N.E.2d 1005 (App. Ct. 1988).

45. 527 N.E.2d at 1007. The plaintiff also complained that during a two-year period the defendant had on several occasions followed her in his car, confronted her at an airport, interfered with her entrance and exit from an airport, confronted her at home and at work, and illegally picketed her home. Id.

46. Id.

47. Id. This is reminiscent of Hustler's disclaimer: "Ad Parody: Not to Be Taken Seriously."

48. 527 N.E.2d at 1007.

49. Id. The court also noted that even if the posters were constitutionally protected, plaintiff has alleged other conduct that might be found outrageous. Id. at 1010.

50. Id. at 1015. There is other, albeit indirect, evidence that lower courts are, at best, uncertain whether Hustler applies when private figures are involved. In at least five post-Hustler cases brought by plaintiffs who are arguably private figures, Hustler has not been used at all. Rather, courts have relied on common law principles. In fact, the "outrageousness" requirement of which the Supreme Court was so critical has been precisely what has been used to save all five defendants. See Dempsey v. National Enquirer, 16 Media L. Rep. (BNA) 1396 (D.C. Maine 1988) (story about plaintiff

who fell out of airplane and survived not sufficiently outrageous to support claim); Grimsley v. Guccione, 703 F.Supp. 903 (M.D. Ala. 1988)(story reporting that plaintiff gave birth without knowing she was pregnant not sufficiently outrageous nor emotional distress sufficiently severe to support cause of action); Kelson v. Spin Publications, 16 Media L. Rep. (BNA) 1130 (D.C. Md. 1988)(use of plaintiff's picture with article on increasing murder rates and drug problems not sufficiently outrageous to support claim); Salerno v. Philadelphia Newspapers, Inc., 15 Media L. Rep. (BNA) 2416 (Super. Ct. Pa. 1988)(newspaper headline allegedly linking plaintiff to mob activity not sufficiently outrageous to justify claim); Virelli v. Goodson-Todman Enterprises, 15 Media L. Rep. (BNA) 2447 (App. Div. N.Y. 1989)(article on drug abuse which allegedly misrepresented plaintiffs not sufficiently outrageous to support claim).

51. 579 F.2d 1027, 1036 (7th Cir. 1978). The Supreme Court later reviewed the case, but not on this issue.

52. 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984), cert. denied, 478 U.S. 1009 (1986).

53. 37 Cal.3d at 266, 208 Cal.Rptr. at 151, 690 P.2d at 624. Accord, Flynn v. Higham, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (Ct. App. 1984). "[T]o allow an independent cause of action for the intentional infliction of emotional distress based on the same acts which would not support a defamation action, would allow plaintiffs to do indirectly that which they could not do directly. It would also render meaningless any defense of truth or privilege." 149

Cal.App.3d at 682, 197 Cal.Rptr. at 148. See also, Miller v. Nestande, 192 Cal.App.3d 191, 237 Cal.Rptr. 359 (1987); Stephens v. Thieriot, 13 Media L. Rep. (BNA) 2143 (Cal. Ct. App. 1987); Webber v. Telegram-Tribune, 239 Cal.Rptr. 489, 14 Media L. Rep. (BNA) 1972 (Cal. Ct. App. 1987); Smith v. Dameron, 14 Media L. Rep. (BNA) 1879, 1881 (Va. Cir. Ct., 1987); Basilius v. Honolulu Pub. Co., 16 Media L. Rep. (BNA) 1759 (D.C. Hawaii 1989).

54. Celebrezze v. Dayton Newspapers, 13 Media L. Rep. (BNA) 1911, 1912 (Ohio C.P 1986), aff'd, 15 Media L. Rep. (BNA) 1589 (Ohio Ct. App. 1988). The Ohio Court of Appeals found the case strikingly similar to Hustler: "Both Falwell and Celebrezze are public figures. Both Hustler Magazine and Dayton Newspapers published cartoons, which if taken literally were defamatory, but as caricatures could not be reasonably construed as a statement of believable fact. *** Construing the evidence most strongly in appellant's favor, there is no showing of malice. Appellees admit that the purpose of the cartoon was to politically embarrass Celebrezze and prevent him from being re-elected, but such a motive does not constitute legal malice." 15 Media L. Rep. (BNA) at 1591. See also Thomas v. News World Communications, 681 F.Supp. 55 (D.C.D.C. 1988), in which anti-nuclear activists sued the Washington Times for libel and intentional infliction of emotional distress because of articles and cartoons criticizing them. In granting a motion to dismiss, the court noted that "the First Amendment precludes plaintiffs' action...for any alleged injury arising out of statements of opinion published in that newspaper." Id. at 73. The Massachusetts Supreme Court has held for a radio

talk show host who referred to a police officer as an "absolute barbarian," a "lunkhead", a "meathead" and a "little monkey". The talk show host had also stated on the air that he wanted to harm the officer with such statements because "I'm sore at him." Fleming v. Benzaquin, 454 N.E.2d 95, 99 nn7&8 (1983). These were all statements of opinion, the court held, and as such immune to a libel action. The court then pointed out that since the plaintiff never argued that his intentional infliction of emotional distress claim should survive an adverse ruling on the libel claim, it need not decide that question. Nevertheless, the court cited the appeals court decision in Hutchinson, precedent that clearly suggests that the answer is "no". Id. at 104.

55. Polygram Records v. Superior Court, 170 Cal.App.3d 543, 216 Cal.Rptr. 252 (1985).

56. 170 Cal.App.3d at 558, 216 Cal.Rptr. at 262. See also, Raye v. Letterman, 14 Media L. Rep. (BNA) 2047 (Cal. Super. Ct. 1987) (comedienne/actress cannot maintain action for intentional infliction of emotional distress against David Letterman where his jokes about her were non-believable humor and as such not defamatory).

57. Dworkin v. Hustler, 668 F.Supp. 1408 (C.D. Cal. 1987), aff'd 16 Media L. Rep. (BNA) 1113 (9th Cir. 1989). For example, two women were depicted engaging in sexual activity, with one saying to the other: "You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world." 668 F.Supp. at 1410. Hustler has won two other libel and intentional infliction of emotional distress cases

involving vicious statements held to be opinio Ault v. Hustler Magazine, 15 Media L. Rep. (BNA) 2205 (9th Cir. 1988); Leidholdt v. L.F.P. Inc., 15 Media L. Rep. (BNA) 2201 (9th Cir. 1988). Ault involved Hustler's characterization of an anti-pornography activist as a "tightassed housewife" and a "deluded busybody" in need of "professional help." 15 Media. L. Rep. at 2206. Leidholdt involved Hustler's characterization of the founder of Women Against Pornography as a "pus bloated walking sphincter." 15 Media L. Rep. at 2203. The appeals court held that statements of opinion were not actionable for either libel or intentional infliction of emotional distress regardless of whether the plaintiff was a public or private person, but used Hustler as authority only for the "public person" portion of this conclusion. Ault v. Hustler Magazine, 15 Media L. Rep. at 2207. See also Deupree v. Iliff, 15 Media L. Rep. (BNA) 2225 (8th Cir. 1988) (court concludes that statements of opinion are protected by first amendment whether subject is public or private figure).

58. Id. at 1420. The appeals court affirmed the district court's decision after the Supreme Court decided Hustler; because of Hustler, the appeals court seemed reluctant to deal as directly with the end-run issue as did the district court. Instead of concluding that the gravamen of Dworkin's complaint was in fact defamation, the appeals court concluded that the publication in question was a privileged statement of opinion. 16 Media L. Rep. at 1116. This, however, may be an even more generous approach than that used by the district court, since the appeals court noted that after Hustler it "seems likely that the requirement that the speech

contain a false statement of fact applies not just to defamation claims, but to all claims seeking to impose civil liability for speech not otherwise outside the protection of the first amendment." Id. at 1118 n.5. See also, Fudge v. Penthouse International, 14 Media L. Rep. (BNA) 1238 (D.C.R.I. 1987), aff'd 840 F.2d 1012 (1st Cir. 1988), cert. denied 57 U.S.L.W. 3230 (Oct. 3, 1988) (headline over plaintiffs' photograph in Penthouse magazine is constitutionally protected from all theories of liability as statement of opinion, and use of plaintiffs' photograph in magazine is not inherently outrageous merely because of general nature of magazine).

59. For an argument that no plaintiff should be allowed to win a suit for intentional infliction of emotional distress when speech involves a matter of public concern, see Kirkpatrick, Falwell v. Flynt: Intentional Infliction of Emotional Distress as a Threat to Free Speech, 81 Nw. Univ. L. Rev. 993 (1987).

60. See Jury Rejects Libel Claims in King Suit Against Globe, 15 Media L. Rep. (BNA), Oct. 18, 1988, News Notes Section.

61. 12 Media L. Rep. (BNA) 2353 (Colo. Dist. Ct. 1986), aff'd 15 Media L. Rep. (BNA) 2353 (Colo. Ct. App. 1988) The Colorado Court of Appeals seemed to take an even more expansive view of constitutional protection: "a public figure may not maintain a claim for outrageous conduct when the conduct complained of is expressive behavior directed at his 'public persona'." 15 Media L. Rep. at 2356. See also Koch v. Goldway, in which a mayor had allegedly commented that her political opponent had the same name

as a missing Nazi war criminal, and asked, "Is this the same Ilse Koch? Who knows?" An appeals court affirmed summary judgment for the defendant, finding the comment to be opinion and, as such, actionable as neither libel nor intentional infliction of emotional distress. Essentially, the court found the statement of opinion not to be outrageous, although it is unclear whether the court meant to imply that all statements of opinion would be thus regarded. 817 F.2d 507, 508-509 (9th Cir. 1987).

62. SMOLLA, supra note 3, at 301-2.

63. The Rev. Falwell has already availed himself of the type of freedom of expression safeguarded by the very litigation he lost. Just before the 1988 Republican National Convention, he urged his followers to distribute 10 million copies of a comic book attacking Democratic presidential nominee Michael Dukakis. The comic portrayed Dukakis as a supporter of witchcraft and bestiality, and portrayed him wearing a dress, wig and pearls. "I want to shoot the guy's legs out from under him," Falwell was quoted as saying. "I want to expose him." Falwell Attacks Dukakis: Promotes Comic Book Showing Duke in Drag, Capital Times (Madison, Wis.), Aug. 13, 1988, p. 1 col. 1.

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