

Case Comments

Hustler Magazine v. Falwell: The Application of the Actual Malice Standard to Intentional Infliction of Emotional Distress Claims

I. INTRODUCTION

“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.”¹ The constitutional protection provided by the first amendment, however, is not absolute² and does not protect certain categories of communications such as defamation,³ obscenity,⁴ or incitement.⁵ In *Hustler Magazine v. Falwell*,⁶ the Supreme Court held that a public figure who was the subject of an offensive parody could not recover damages for intentional infliction of emotional distress unless he or she established that the underlying publication contained a false statement of fact and that the defendant acted with “actual malice.”⁷ These two requirements guarantee the defendant the same level of first amendment protection whether the plaintiff pleads defamation or emotional distress.

This Comment focuses on the first amendment protection accorded media defendants who are sued for intentional infliction of emotional distress. It begins by examining the recent Supreme Court decision which applied the actual malice standard to an intentional infliction of emotional distress claim. Second, it considers the protection provided by the actual malice standard in defamation actions. Third, the expanding use of the intentional infliction of emotional distress tort against media defendants is evaluated. Fourth, intentional infliction of emotional distress and defamation claims are distinguished. Finally, this Comment concludes by evaluating the Supreme Court’s decision and its possible effect on first amendment jurisprudence.

II. *HUSTLER MAGAZINE V. FALWELL*

In the November 1983 issue of *Hustler* magazine, Larry Flynt first published an “ad parody” featuring the Reverend Jerry Falwell.⁸ The parody of a Campari Liqueur advertisement fictitiously portrayed Falwell as a drunken hypocrite who had an unnatural relationship with his mother.⁹ As a result, Falwell sued Flynt and

1. *Street v. New York*, 394 U.S. 576, 592 (1968) (Harlan, J.). See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action”); *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (even “the most repulsive speech enjoys [the] immunity” provided by the first amendment (citing *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966))).

2. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“not all speech is of equal First Amendment importance”).

3. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

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

5. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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

7. See *infra* notes 44-61 and accompanying text.

8. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). In March 1984, after Falwell had filed his lawsuit, Flynt republished the parody in *Hustler* magazine. *Id.* at 1273.

9. *Id.* at 1272. Falwell distributed edited copies of the parody to his religious supporters in order to raise money.

Hustler magazine for libel, invasion of privacy, and intentional infliction of emotional distress.¹⁰ The Virginia district court dismissed the invasion of privacy claim¹¹ and the jury found for the defendant on the libel claim, stating that no reasonable person would believe that the parody was true.¹² However, the jury awarded Falwell \$100,000 in actual damages and \$100,000 in punitive damages for his emotional distress claim.¹³

The Court of Appeals for the Fourth Circuit held that the actual malice standard applied to Falwell's claim because of his status as a public figure and because the gravamen of the claim was tortious publication.¹⁴ The court of appeals stated that the defendants were "entitled to the same level of first amendment protection in a claim for intentional infliction of emotional distress that they received in Falwell's claim for libel."¹⁵ However, the Fourth Circuit held that in emotional distress claims, "when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of."¹⁶ Thus, the appellate court upheld the jury's finding of intentional infliction of emotional distress and the award of damages.¹⁷

In a closely split decision, the Fourth Circuit rejected Flynt's request for a rehearing en banc.¹⁸ Dissenting from this denial, Judge Wilkinson concluded that since Falwell's libel claim had failed, his intentional infliction of emotional distress action must also fail, "for the constitutional principles of freedom of expression preclude attaching adverse consequences to utterances other than defamatory falsehoods."¹⁹ Stating that "distortion and discomforture" were the goals of satire, the dissent concluded that political satire should be immune from intentional infliction of emotional distress liability.²⁰ Judge Wilkinson denied that "those in political life should ever be able to recover damages for no other reason than hurt feelings" ²¹ Given the often unpleasant nature of political debate, political

The Ninth Circuit held this use of Flynt's copyrighted material constituted "fair use." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

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

11. *Id.* at 1278. Falwell cross-appealed on the privacy issue, claiming that the use of "his name and likeness" in an ad parody constituted "use for the purposes of trade." *Id.* The Fourth Circuit held that since the parody was "not reasonably believable and . . . contained a disclaimer," it did not constitute "use for the purposes of trade," and, therefore, did not violate Falwell's statutory right to privacy under Virginia law. *Id.*

12. *Id.* at 1273. Since the parody was not reasonably believable, it did not damage Falwell's reputation. Therefore, there was no libel. *Id.*

13. *Id.*

14. *Id.* at 1274. Throughout the appeal neither party disputed the conclusion that Falwell was a public figure. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 n.5 (1988). See *infra* note 22.

15. *Falwell v. Flynt*, 797 F.2d 1270, 1274 (4th Cir. 1986).

16. *Id.* at 1275. The United States Supreme Court summarized the court of appeals holding as "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict emotional distress, it is of no constitutional import whether the statement was a statement of fact or an opinion or whether it was true or false." *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988).

17. *Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986).

18. *Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986).

19. *Id.* at 485 (Wilkinson, J., dissenting) (citing *Garrison v. Louisiana*, 379 U.S. 65, 73 (1964), and *Greenbelt Co-op. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970)).

20. *Id.* at 487.

21. *Id.* at 484.

figures²² should not be able to maintain a cause of action for emotional distress which occurs in their chosen profession.²³ The dissent concluded that the proper remedy for Flynt's offensive attack on Falwell was not legal action, but rather free discussion in the marketplace of ideas.²⁴

The United States Supreme Court reversed the Fourth Circuit holding "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact, which was made with 'actual malice'"²⁵ Writing for a unanimous Court, Chief Justice Rehnquist declined to "find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury . . . when that speech could not reasonably have been interpreted as stating actual facts about the public figures involved."²⁶ The opinion focused on the societal importance of "the free flow of ideas and opinions on matters of public interest and concern."²⁷ Such robust political debate, even when it consists of "vehement, caustic, and sometimes unpleasantly sharp attacks" on public figures, is protected by the first amendment.²⁸ Rehnquist also discussed the unique role of political cartoons in the history of public and political debate. While admitting that Flynt's ad parody was "at best a distant cousin . . . and a rather poor relation at that" of even the most caustic political cartoons, the Chief Justice stated that there was no principled, objective test to separate the types of satire.²⁹ He concluded that the "outrageousness" standard used in intentional infliction of emotional distress claims was too subjective a standard to justify a distinction because it focused on the speech's emotional impact on its subject.³⁰ Although in some circumstances the impact of speech may provide grounds for its regulation,³¹ the protection provided by the first amendment does not disappear merely because the speech is offensive or upsetting.³² Thus, the Court did not hold that speech which intentionally inflicts emotional distress is per se unprotected speech.³³ The Supreme Court, however, did not foreclose the possibility of inten-

22. *Id.* at 485. Judge Wilkinson found Falwell to be more than a public figure because of the role Falwell had assumed in politics. Therefore, the judge decided that Falwell stood "on the same footing as a public official." *Id.*

23. *Id.* at 485-86.

24. *Id.* at 487-88.

25. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988). See *infra* notes 44-61 and accompanying text.

26. *Id.* at 879. Justice Kennedy did not participate in the decision as the case was argued before he joined the Court. *Id.* at 883. Justice White filed a two-sentence concurring opinion. *Id.*

27. *Id.* at 879.

28. *Id.* at 880 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "One of the prerogatives of American citizenship is the right to criticize public men" *Id.* at 880 (quoting *Baumgartner v. United States*, 332 U.S. 665, 673-74 (1944)).

29. *Id.* at 881.

30. *Id.* at 881-82 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)) "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." *Id.* at 882.

31. *Id.* at 882. *E.g.*, *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (limiting radio broadcast of offensive speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (allowing punishment for use of "fighting words").

32. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988).

33. In first amendment analysis, the most important (and perhaps only) balancing of interests occurs when the court determines whether the communication constitutes "speech" within the meaning of the first amendment and, thus, is

tional infliction of emotional distress liability based on an offensive publication. A public figure, such as Falwell, could recover damages for emotional distress if, in addition to establishing the elements of the emotional distress cause of action, that plaintiff also shows that the publication was a false statement of fact which was made with actual malice.³⁴ Since the jury found that the ad parody was not believable and therefore did not contain false statements of fact,³⁵ it was constitutionally immune from intentional infliction of emotional distress liability, as well as defamation liability.

Justice White filed a very brief concurrence. While agreeing that the "penalization [of] the publication of the parody cannot be squared with the First Amendment," he felt that the majority's discussion of the actual malice standard was unnecessary,³⁶ as the jury found that the parody was not factual. Thus, the Court unanimously overturned the district court's finding of liability and award of damages.

III. DEFAMATION, EMOTIONAL DISTRESS, AND ACTUAL MALICE

A. Defamation: A Brief Examination of a Constitutionalized Tort

Defamation is the publication of a false statement of fact that "so harms the reputation of another as to lower him [or her] in the estimation of the community or to deter third parties from associating with him [or her]." ³⁷ At common law, the only remedies for the publication³⁸ of false and defamatory matters were actions for libel or slander,³⁹ which were strict liability torts.⁴⁰ The statement was presumed to be false, which placed the burden on the defendant of proving that it was true and,

entitled to protection. This "definitional balancing" contrasts with the usual "ad hoc balancing" of the litigants' interests for the purpose of determining who should prevail at trial. See generally NIMMER ON FREEDOM OF SPEECH § 2.03 (1984 & Supp. 1988).

34. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988).

35. *Id.*

36. *Id.* at 883 (White, J., concurring).

37. RESTATEMENT (SECOND) OF TORTS § 559 (1976).

38. In defamation law, "publication" is a term of art and a necessary element of a defamation cause of action. *Id.* at § 577 (1976). Publication occurs when the defamatory matter is intentionally or negligently communicated to a person other than the one defamed. *Id.*

39. Part of the historical tangle of defamation law is the distinction between libel and slander. Libel is written defamation. It was both a crime and a tort developed by the early common law courts. Oral defamation is slander. It originated in the medieval ecclesiastical courts. Today, the distinction focuses on the permanence of the form of communication. Permanent forms of defamation are libel, while transitory defamation is slander. L. ELDRIDGE, *THE LAW OF DEFAMATION* § 12 (1978).

40. *Id.* at § 5.

For well over a thousand years Anglo-American law provided some measure of protection for one's good name. For example, the laws of Alfred, which were probably compiled in the late ninth century, provided that one found guilty of public slander be punished by "no lighter penalty than the cutting off of his tongue." . . . By the sixteenth century, when the common law courts began to express an interest in allowing monetary compensation for defamation, the procedure of these courts was rigidly well-defined by a complex system of pleading with strict technical rules. Defamation came into the common law in the form of an action on the case; this meant that the damage caused to the person defamed was the principle purpose of the action, rather than the injury which led to this damage. Because the law considered the damage and not the injury, special rules of pleading and proving damages were developed. . . . Thus, the law of defamation . . . is an unhappy tangle of illogical rules derived from its haphazard historical development.

Roemer v. Commissioner, 716 F.2d 693, 698 (9th Cir. 1983) (footnotes omitted).

therefore, not actionable.⁴¹ Furthermore, presumed damages were permitted because of the difficulty in proving actual harm to the plaintiff's reputation.⁴²

The common law system of protecting an individual's reputation directly conflicted with the first amendment's prohibition of laws which "abridg[e] the freedom of speech, or of the press . . ."⁴³ Inevitably the United States Supreme Court was forced to reconcile the opposing interests of individual reputation and free speech. In *New York Times Co. v. Sullivan*,⁴⁴ the Court held that the first amendment prohibited a public official from recovering any damages for defamation based on criticism of official conduct unless the official proved the statement was made with actual malice.⁴⁵ In order to meet the actual malice standard, the plaintiff was required to establish, with convincing clarity,⁴⁶ that the defendant published the defamatory material with knowledge of its falsity or acted with reckless disregard for the truth or falsity of the publication.⁴⁷ The development of the actual malice standard was an attempt "to strike a balance between 'vigorous debate on the political issues . . . while at the same time affording protection to the reputation of individuals.'"⁴⁸ The purpose of the actual malice requirement was to prevent any "chilling" of speech due to publishers' fears of defamation liability for inadvertant factual misstatements.⁴⁹ The *Sullivan* decision was the beginning of the constitutionalization of the tort of defamation.⁵⁰

41. RESTATEMENT OF TORTS § 613(2)(a) (1938).

42. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 394 (1974) (White, J., dissenting). In claims for libel per se and slander per se, the plaintiff could recover without alleging or proving any harm. A defamatory statement constitutes libel per se when the statement is clearly defamatory on its face and extrinsic evidence of its defamatory meaning is unnecessary. A slanderous statement is actionable per se when it imputes to the plaintiff any of the following: a criminal offense, a contagious disease, a lack of fitness for a chosen profession, trade, or calling, or unchastity (of a female plaintiff). See *ELDRIDGE*, *supra* note 39, §§ 16-19 (1978). With some minor variations, these standards have been codified in the *Restatement*. See RESTATEMENT (SECOND) OF TORTS §§ 569-74 (1976).

43. The complete text of the first amendment reads "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

44. 376 U.S. 254 (1964). The Police Commissioner of Montgomery, Alabama, alleged that a civil rights advertisement in the *New York Times* had libeled him by implying that he was responsible for a wave of police terror against civil rights activists. *Id.* at 256-57.

45. *Id.* at 279-80. "'Actual malice' is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a state may constitutionally permit a public official to recover for libel actions brought against publishers." *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251 (1974). As the term actual malice is used throughout this Comment, it does *not* mean ill-will against the defamed.

46. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964). The plaintiff must demonstrate actual malice with convincing clarity at each stage of the proceeding, including the summary judgment stage. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

47. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). This placed the burden of proving falsity on the plaintiff and was contrary to the common law. See *supra* notes 37-42 and accompanying text.

48. *Falwell v. Flynt*, 805 F.2d 484, 485 (4th Cir. 1986) (Wilkinson, J., dissenting) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 133-34 (1979)). Justice Brennan stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964):

Thus we consider this case against a backdrop of a profound national 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 . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space that they need . . . to survive."

Id. at 270-72 (footnote omitted).

49. *Id.* The factual misstatements in the *New York Times* advertisement were minimal. *Id.* at 258-59.

50. Previously, defamation law was solely an issue of state tort law. The *Sullivan* decision was entirely unexpected. The attorney representing the Montgomery Police Commissioner later stated, "I had confidently predicted that the only

Originally, only public officials were required to prove actual malice in order to recover damages for defamatory publications concerning their official conduct.⁵¹ Later, the Supreme Court expanded the *Sullivan* holding and required public figures also to prove actual malice.⁵² Persons who are “intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large,” are considered to be public figures.⁵³ Due to the wide access to the media which public plaintiffs enjoy and the importance of open debate on public issues,⁵⁴ both public officials and public figures now are required to prove actual malice in defamation actions.⁵⁵

Because the state’s interest in protecting the reputations of private individuals outweighs the first amendment interest in avoiding the “chilling” effect on free speech, private plaintiffs must meet a significantly lower burden than that of actual malice.⁵⁶ Any person who does not fall within the definition of public official or public figure need not establish actual malice in order to recover damages for defamation.⁵⁷ The standard of liability for private plaintiffs in defamation actions is an issue of state law.⁵⁸ Each state has wide latitude in adopting its own standard of proof in defamation actions brought by private persons.⁵⁹ At least in publications concerning matters of

way the Court could decide against me was to change 100 years or more of libel law. That is precisely what the Court did.” Address by M. Roland Nachman, Jr., *New York Times v. Sullivan* Libel Litigation Symposium, in *New York City* (Mar. 9, 1984), reprinted in *NEW YORK TIMES v. SULLIVAN: THE NEXT TWENTY YEARS* 117 (R. Winfield ed. 1984).

51. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

52. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

53. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 337 (1974). Plaintiffs found to be public figures include a nationally known college football coach, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); a retired general and political activist, *Associated Press v. Walker*, *decided with Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); and a nationally known fundamentalist minister and political commentator, *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988). Plaintiffs not found to be public figures include a prominent attorney, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); a socialite involved in a divorce, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); and a researcher who received a federal grant, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). For an in-depth analysis of public figure status see B. SANFORD, *LIBEL & PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION* §§ 7.3–72 (1985).

54. The imposition of the actual malice burden on public plaintiffs was justified by two rationales. First, public plaintiffs enjoy greater access to the media, which provides them with the opportunity to contradict the defamatory statement. Second, since many public plaintiffs attain their status voluntarily, they are thought to assume the risk of media exposure. R. SMOLLA, *THE LAW OF DEFAMATION* §§ 2.05–.06 (1986). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

55. *E.g.*, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986); *Wolston v. Readers’ Digest Ass’n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Monitor Patriot v. Roy*, 401 U.S. 265 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

56. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974).

57. *Id.*

58. *Id.* at 347; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). The majority of states use a negligence standard, while a small minority of states require private plaintiffs to prove actual malice. For a comprehensive list see SMOLLA, *supra* note 54, §§ 3.10–.11 (1986).

59. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974).

public interest,⁶⁰ liability cannot be established without some finding of fault or negligence on the part of the defendant.⁶¹

While false statements of fact are not protected by the first amendment,⁶² "there is no such thing as a false idea."⁶³ Rather than permit judicial punishment of "pernicious" opinions, all opinions are protected in order to encourage free discussion of opinions.⁶⁴ In evaluating ideas and opinions, "the best test of truth is the power of the thought to get itself accepted in the market[place of ideas] . . ."⁶⁵ The test for determining which statements are facts and which are opinions has not been definitively established.⁶⁶ However, once a statement is labeled an opinion, it is entitled to absolute protection under the first amendment and cannot be the basis of defamation liability.⁶⁷

Once defamation liability has been established, the defendant is responsible for the actual injury to the plaintiff's reputation.⁶⁸ Actual injury in a defamation cause of action is not limited to harm to reputation and community standing, but includes "personal humiliation, and mental anguish and suffering."⁶⁹ In *Time, Inc. v.*

60. In *Dun & Bradstreet, Inc. v. Greenmoss, Inc.*, 472 U.S. 749 (1985), a plurality of the Court rejected a standard based on the media/nonmedia status of the defendant and partially returned to the public interest/private interest dichotomy originally established in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), *overruled by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). However, this dichotomy has been applied only to suits by private plaintiffs. An example of a private person/public issue case was the defamation suit brought by an attorney (private person) who was representing the family of a man killed by a police officer (public issue). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (where newspaper publishes statement on matter of public concern, private plaintiff cannot recover damages without showing statement was false). In such a case, liability could not be established without fault. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). An example of a private person/private issue case was the defamation suit brought by a construction company (private "person") for a highly inaccurate credit report (private issue). See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). The Court did not decide whether a private plaintiff in a private issue defamation case was required to prove even negligence. See *id.* at 770 (White, J., concurring) (White believed that the plurality opinion did not require a showing of negligence.). See also *id.* at 775-76, 780-81 (Brennan, J., dissenting) (Brennan felt that the plurality opinion required the plaintiff to show negligence on the part of the defendant.).

61. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). The Court reasoned that strict liability would have been too rigorous a standard in light of the first amendment. *Id.* at 347-48. Plaintiff also has the burden of establishing actual injury. *Id.* See *infra* notes 68-71 and accompanying text.

62. See *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

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

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

65. *Id.* "[L]et [those who subscribe to contrary views] stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 n.8 (1974) (quoting Thomas Jefferson's first Inaugural Address).

66. For an in-depth exposition of the different fact/opinion tests, see the series of opinions in *Ollman v. Evans & Novack*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). Judge Starr, writing for the majority, used a totality of the circumstances test to determine whether a statement was fact or opinion. *Id.* at 979. The test considered four factors: (1) the common usage and meaning of specific language; (2) the verifiability of the statement; (3) the context in which the statement was made; and (4) the broader social context of the statement. *Id.* at 979-84.

67. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). The private person/public person dichotomy does not apply to opinions since they are absolutely protected.

68. RESTATEMENT (SECOND) OF TORTS § 621 (1976). Damages for reputational injuries include nominal damages, general damages for harm to the plaintiff's reputation and community standing, and special damages for mental suffering and resulting bodily harm. *Id.* at §§ 620-23. General damages include presumed damages. See *supra* note 42 and accompanying text. Actual injury is part of the plaintiff's burden of proof and the basis of compensatory damages. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

69. *Id.* at 350. Despite the actual injury requirement of *Gertz*, presumed damages arguably are still awardable. *Id.* See, e.g., *Brown v. Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988).

Firestone,⁷⁰ a private plaintiff who alleged no harm to her reputation established actual injury by her claims of humiliation and emotional suffering.⁷¹ Thus, the recoverable damages in a defamation claim include parasitic damages for the emotional distress caused by the defamatory publication,⁷² as well as traditional awards for reputational injury.⁷³

The constitutionalization of the tort of defamation also affected the awardability of punitive damages. Despite their potential chilling effect, the Supreme Court never has held that the award of punitive damages, even for public officials and public figures, is unconstitutional.⁷⁴ Public plaintiffs are required to show actual malice in order to have *any* recovery, including punitive damage awards.⁷⁵ A private plaintiff seeking recovery for a defamatory publication concerning a public issue⁷⁶ may not recover punitive damages or presumed damages⁷⁷ without a showing of actual malice.⁷⁸ However, actual malice is not required for a private plaintiff suing for "private issue" defamation to receive punitive damages.⁷⁹

B. *Intentional Infliction of Emotional Distress*

Recently, plaintiffs in defamation actions have included claims for intentional infliction of emotional distress⁸⁰ and negligent infliction of emotional distress.⁸¹ The increasing number of emotional distress claims against media defendants suggests that the plaintiffs, who essentially are suing for defamation, are using emotional distress claims for access to a media defendant otherwise protected by the actual malice requirement.⁸² A person is liable for the severe emotional distress caused by

70. 424 U.S. 448 (1976).

71. *Id.* at 459-61.

72. SANFORD, *supra* note 53, § 9.6.3 (1985). In contrast, some states require proof of reputational harm in order to recover damages for emotional distress. See *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983); *Grimes v. Carter*, 241 Cal. App. 2d 694, 50 Cal. Rptr. 808 (1966); *Urban v. Hartford Gas Co.*, 139 Conn. 301, 93 A.2d 292 (1952); *Greenlee v. Coffman*, 185 Iowa 1092, 171 N.W. 580 (1919); *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982); *France v. St. Clare's Hosp.*, 83 A.D.2d 1, 441 N.Y.S.2d 79, (1981); *Waite v. Stockgrowers' Credit Corp.*, 63 N.D. 763, 249 N.W. 910 (1933). For a general discussion of emotional damage awards in defamation actions see ELDRIDGE, *supra* note 39, § 95 (1978).

73. See *supra* note 68. See also RESTATEMENT (SECOND) OF TORTS §§ 620-23 (1976).

74. Cf. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 84 (1971) (Marshall, J., dissenting) (punitive damages in defamations are per se unconstitutional).

75. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). See *supra* notes 44-55 and accompanying text.

76. See *supra* note 60.

77. See *supra* note 42 and accompanying text.

78. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

79. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). See *supra* note 60.

80. Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 347-50 (1974) [hereinafter Drechsel]. Drechsel discussed 35 cases which used intentional infliction of emotional distress claims against media defendants. Most of the time, the plaintiff alleged a defamation cause of action, as well as intentional infliction of emotional distress. Although the plaintiffs tended to be successful at the trial level, only two of the emotional distress claims were upheld on appeal. *Id.* at 346-47. See also Mead, *Suing the Mass Media for Emotional Distress: A Multi Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983). Mead performed a statistical analysis of suits against the mass media. The results indicated that the number of suits alleging multiple causes of action was increasing, while the number of claims alleging only defamation was steadily declining. *Id.* at 33-34. The increase in the number of intentional infliction of emotional distress claims was seen as "significant." *Id.* at 43.

81. Drechsel, *Negligent Infliction of Emotional Distress: New Tort Problems for the Mass Media*, 12 PEPPERDINE L. REV. 889 (1985).

82. Libel expert Bruce Sanford described intentional infliction of emotional distress claims against the media as

his or her intentional or reckless conduct which is extreme or outrageous.⁸³ In order for liability to be established, the defendant's conduct must be "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 society."⁸⁴ Currently, the majority of states recognize intentional infliction of emotional distress as an independent tort.⁸⁵

Intentional infliction of emotional distress claims have been instituted against media defendants for a variety of conduct.⁸⁶ For example, the Second Circuit held that a photographer's constant harrassment of Jacqueline Onassis and her children was sufficiently "extreme and outrageous" to support a claim for intentional infliction of emotional distress.⁸⁷ The court reasoned that since the photographer's conduct was sufficient to establish criminal liability for harrassment, it was sufficiently "extreme and outrageous" to support a civil action.⁸⁸ In another successful intentional infliction of emotional distress suit against a media defendant, the publication of a nude photograph falsely identified as the plaintiff was found to constitute "conduct which exceed[ed] the bounds tolerated by a civilized society."⁸⁹ A New York court found that the defendant's *knowing* misidentification of the photograph was sufficient to establish liability for intentional infliction of emotional distress.⁹⁰

In contrast, a radio broadcast detailing alleged improprieties in a bankruptcy court did not constitute "extreme and outrageous" conduct and failed to support an intentional infliction of emotional distress cause of action by the bankruptcy trustee.⁹¹ The District Court for the Eastern District of Michigan found that the report concerned matters of legitimate public interest and was published without actual malice.⁹² Therefore, the report "cannot be said to have been so extreme and

"lawsuits that try to make an end-run around the libel laws." Wall St. J., Feb. 25, 1988, at 2, col. 2. See *supra* notes 80-81 and accompanying text. See also SMOLLA, *supra* note 54, § 11.01(1).

83. RESTATEMENT (SECOND) OF TORTS § 46 (1966).

84. *Id.* at comment d.

85. At least 37 states recognize intentional infliction of emotional distress tort claims. For a listing, see Note, *Minnesota's "New Tort": Intentional Infliction of Emotional Distress*, 10 WM. MITCHELL L. REV. 349, 351-52 n.21 (1984).

86. *E.g.*, *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897 (W.D. Mich. 1983) (newspaper article falsely connecting plaintiff's funeral home to a prostitution ring constituted "extreme and outrageous" conduct); *Parnell v. Booth Newspapers, Inc.*, 572 F. Supp. 909 (W.D. Mich. 1983) (newspaper photograph falsely implying that plaintiff was a prostitute constituted "extreme and outrageous" conduct). Actual malice was not discussed in either case since both plaintiffs were considered private figures. *Cf. Ross v. Burns*, 612 F.2d 271 (6th Cir. 1980) (newspaper photograph of undercover narcotics officer with the caption "Know Your Enemies" did not constitute "extreme and outrageous" conduct).

87. *Galella v. Onassis*, 487 F.2d 986, 994 (2d Cir. 1973).

88. *Id.* at 994 n.11.

89. *Clifford v. Hollander*, 6 Media L. Rep. (BNA) 2201, 2202 (N.Y. Civ. Ct. 1980). *Cf. Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (no liability for publication of nude photograph misidentified as public plaintiff because defendant's negligent investigation as to identity did not constitute actual malice).

90. *Clifford v. Hollander*, 6 Media L. Rep. (BNA) 2201, 2202 (N.Y. Civ. Ct. 1980). The defendant's testimony that "he did not write the copy for the . . . photograph and that [the plaintiff's] name, place of residence and occupation only appeared by coincidence" was found to be not credible. *Id.* The court also found that he intentionally misidentified the photograph in retaliation for an article written by the plaintiff which characterized him as a "gap-tooth, porno-film maker." *Id.*

91. *Dougherty v. Capital Cities Communications, Inc.*, 631 F. Supp. 1566 (E.D. Mich. 1986).

92. *Id.* at 1572-73.

outrageous as to shock the public conscience, as is required for intentional infliction of emotional distress.”⁹³ However, the court did not say that, in the absence of a finding of actual malice, a report *never* could be extreme and outrageous.

C. *The Relationship Between Emotional Distress and Defamation*

Since both severe emotional distress and reputational injury may arise from the same publication, some commentators suggest that a defamed plaintiff could use the intentional infliction of emotional distress cause of action to circumvent the traditional protections of the press provided by defamation law.⁹⁴ In a defamation claim, liability is based upon a finding of falsity and, if the plaintiff is a public figure or a public official, a finding of the defendant’s knowledge or reckless disregard of falsity. Whereas, intentional infliction of emotional distress merely requires a finding that the defendant’s extreme and outrageous behavior caused the plaintiff’s emotional distress. Beyond basic differences of intent and falsity, there are less obvious distinctions between the two claims: damages awardable, the length of the statutes of limitation, and the applicability of common law defamation privileges. Because of these differences, courts should not permit plaintiffs to substitute intentional infliction of emotional distress claims where defamation claims would fail.

1. *Intent*

In a defamation cause of action brought by a public plaintiff, he or she must prove that the defendant acted with the requisite subjective intent of actual malice.⁹⁵ That is, the defendant must have acted with knowledge of the falsity or reckless disregard of the falsity of the publication.⁹⁶ Actual malice is not a “reasonable person” standard or a “should have known” standard.⁹⁷ If the publication is true, there is no defamation liability, regardless of the plaintiff’s status or the defendant’s knowledge.⁹⁸ The defendant’s feelings about the plaintiff and motives for publishing the allegedly defamatory statement are irrelevant in establishing constitutional defamation liability⁹⁹ since liability is not grounded in ill-will, hatred, spite, or intent to cause harm.¹⁰⁰ Thus, the key issue in constitutional defamation is the defendant’s *knowledge*.

In an intentional infliction of emotional distress claim, the defendant is liable for

93. *Id.* at 1576.

94. See Drechsel, *supra* note 80, at 359–60. See also Note, *First Amendment Limits on Torts Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1778–85 (1985).

95. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *supra* notes 44–49 and accompanying text.

96. *Id.*

97. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

98. RESTATEMENT (SECOND) OF TORTS § 581A (1976) (“One who published a defamatory statement of fact is not subject to liability for defamation if the statement is true.”). Also, if the publication is an opinion, there is no defamation liability ever. See *supra* notes 62–67 and accompanying text.

99. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). See, e.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1973); *Greenbelt Publishing Ass’n v. Bresler*, 398 U.S. 6, (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 78–79 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

100. See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (“even if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free exchange of ideas . . .”).

intentional or reckless conduct which reaches the "extreme and outrageous" level and which results in severe emotional distress to the plaintiff.¹⁰¹ The intent requirement here focuses on the defendant's state of mind or motive for acting in an extreme and outrageous manner.¹⁰² The key issues in establishing intentional infliction of emotional distress liability are (1) whether the defendant intended to cause or recklessly acted to cause severe emotional distress and (2) whether severe emotional distress was proximately caused by the defendant's conduct.¹⁰³ *Intent to cause injury* is the gravamen of the emotional distress tort.¹⁰⁴ Thus, the focus must be whether the defendant intended to cause emotional injury.

2. Punitive Damages

One possible reason for the popularity of emotional distress causes of action is the availability of punitive damages without proof of actual malice. In *Gertz v. Robert Welch, Inc.*,¹⁰⁵ the Supreme Court held that punitive damages could not be awarded without proof of actual malice even in defamation actions brought by private plaintiffs.¹⁰⁶ Only a private plaintiff suing for "private issue" defamation may be awarded punitive damages absent a showing of actual malice.¹⁰⁷ However, in actions for intentional infliction of emotional distress, like other "non-constitutionalized" torts, punitive damages are permitted if the defendant acted with common law malice, hatred, or ill-will.¹⁰⁸ Often punitive damages constitute a major portion of the damage award.¹⁰⁹

"[I]n cases raising first amendment issues, [the Supreme Court] repeatedly [has] held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion into the field of free expression.'"¹¹⁰ Thus, jury awards in

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

102. *Id.*

103. *Id.*

104. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 880 (1988).

105. 418 U.S. 323 (1974).

106. *Id.* See *supra* notes 76-78 and accompanying text. For an extensive examination of the problems of punitive damages in defamation litigation, see Winfield & Jollymore, *Prospects, Remedies and Alternatives*, in *NEW YORK TIMES v. SULLIVAN: THE NEXT TWENTY YEARS* 439-47 (R. Winfield ed. 1984).

107. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). See *supra* note 79 and accompanying text.

108. "[W]here the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives," punitive damages are allowable "not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future." *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 471, 244 N.Y.S.2d 259, 265-66 (N.Y. App. Div. 1964) (citations omitted).

Prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defamation was a matter of state tort law and punitive damages were awardable pursuant to state law.

109. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev'd sub nom.* *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (jury awarded \$100,000 in compensatory damages and \$100,000 in punitive damages); *Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986) (jury awarded \$260,000 in compensatory damages and \$1,000,000 in punitive damages); *Murr v. Stinson*, 752 F.2d 233 (6th Cir. 1985) (jury awarded \$20,000 in compensatory damages and \$125,000 in punitive damages); *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (N.Y. App. Div. 1964) (trial jury awarded \$1,000,000 in compensatory damages and \$2,500,000 in punitive damages; on appeal both awards were determined excessive and a new trial was ordered unless plaintiff agreed to accept \$400,000 compensatory damages and punitive damages of \$50,000 and \$100,000 from defendant corporation and defendant author of publication respectively).

110. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

defamation suits are subject to review for reasonableness¹¹¹ and, frequently, are reduced on review.¹¹² This reduction of awards on review protects media defendants from large awards motivated by the jury's sympathy for the plaintiff or the unpopularity of the defendant.¹¹³ Because large damage awards would lead to media self-censorship, the practice of reducing awards on review prevents such awards from having a chilling effect on the press.¹¹⁴

Since fundamental first amendment concerns generally are not expected to appear in intentional infliction of emotional distress cases, there is not the same predilection to review damage awards in emotional distress cases. Punitive damages are regarded as "private fines" imposed by juries "to punish reprehensive conduct and deter its future occurrence."¹¹⁵ Juries are given wide discretion in setting these awards,¹¹⁶ which are only disturbed on review if they are blatantly "excessive."¹¹⁷ Therefore, intentional infliction of emotional distress claims may provide a defamed plaintiff with a larger award of punitive damages, which is less likely to be disturbed on review, without requiring the plaintiff to meet the constitutional standard of actual malice.

3. Statutes of Limitation

Another possible reason for the increased use of intentional infliction of emotional distress claims by defamation plaintiffs is an attempt to extend the statutes of limitation provided by state defamation law. While the statutes of limitation for defamation claims generally are very short—usually one to two years,¹¹⁸ many states

111. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

112. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert.denied*, *CBS, Inc. v. Brown & Williamson Tobacco Corp.*, 108 S. Ct. 1302 (1988) (jury award of \$3,000,000 compensatory damages reduced by judge to \$1 raised to \$1,000,000 on appeal).

113. "[Juries] remain free to use their discretion selectively to punish expressions of unpopular views Jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

114. *Id.*

115. *Id.*

116. Punitive damages must bear some relationship to the defendant's culpability. *See Faulk v. Aware, Inc.*, 19 A.D.2d 464, 244 N.Y.S.2d 259, 266 (N.Y. App. Div. 1964).

117. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

118. *See* ALA. CODE § 6-2-8(k) (Supp. 1987) (2 years); ALASKA STAT. § 09.10.070(1) (1982) (2 years); ARIZ. REV. STAT. ANN. § 12-541(1) (1982) (1 year); ARK. CODE ANN. § 16-56-104 (Michie 1987) (slander 1 year, § 16-56-105 (1987) (libel 3 years); CAL. CIV. PROC. CODE § 340(3) (West Supp. 1988) (1 year); COLO. REV. STAT. § 13-80-103 (1987) (1 year); CONN. GEN. STAT. ANN. § 52-597 (West 1960) (2 years); DEL. CODE ANN. tit. 10, § 8119 (1974) (2 years); D.C. CODE ANN. § 12-301(4) (1981) (1 year); GA. CODE ANN. § 9-3-33 (1982) (1 year); HAW. REV. STAT. § 657-4 (1985) (2 years); IDAHO CODE § 5-219(5) (1979) (2 years); ILL. ANN. STAT. ch. 110, § 13-201 (Smith-Hurd 1984) (1 year); IND. CODE ANN. § 34-1-2-2(1) (Burns Supp. 1986) (2 years); IOWA CODE ANN. § 614.1(2) (West Supp. 1988) (2 years); KAN. STAT. ANN. § 60-514(1) (1988) (1 year); KY. REV. STAT. § 413.140(d) (Supp. 1983) (1 year); LA. CIV. CODE ANN. art. 3492 (West Supp. 1988) (1 year); ME. REV. STAT. ANN. tit. 14, § 753 (Supp. 1988) (2 years); MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1984) (1 year); MICH. COMP. LAWS ANN. § 600.5805(7) (West Supp. 1986) (1 year); MINN. STAT. ANN. § 541.07(1) (West Supp. 1988) (2 years); MO. ANN. STAT. § 516.140 (Vernon Supp. 1988) (2 years); MONT. CODE ANN. § 27-2-204(3) (1987) (2 years); NEB. REV. STAT. § 25-208 (1943, reissued 1985) (1 year); NEV. REV. STAT. § 11.190(4)(c) (Supp. 1987) (2 years); N.J. STAT. ANN. § 2A:14-3 (West 1987) (1 year); N.Y. CIV. PRAC. L. & R. § 215(3) (McKinney 1978) (1 year); N.C. GEN. STAT. § 1-54(3) (1987) (1 year); N.D. CENT. CODE § 28-01-18(1) (Supp. 1987) (2 years); OHIO REV. CODE ANN. § 2305.11(A) (Anderson Supp. 1987) (1 year); OKLA. STAT. ANN. tit. 12, § 95(4) (West Supp. 1988) (1 year); OR. REV. STAT. ANN. § 12.120(2) (Butterworth 1988) (1 year); PA. STAT. ANN. tit. 42, § 5523(1) (Purdon Supp. 1987) (1 year); S.C. CODE ANN. § 15-3-550(1) (Law. Co-op. 1976) (2 years); S.D. CODIFIED LAWS ANN. § 15-2-15(1) (Supp. 1984) (2 years); TENN. CODE ANN. § 28-3-103 (1980) (slander 6 months), § 28-3-104(a) (1980) (libel 1 year); TEX.

provide the same statute of limitation for defamation claims as they have for intentional infliction of emotional distress claims.¹¹⁹ When the time limits have differed, some courts have applied the shorter defamation statute of limitation to claims for emotional distress arising from tortious publication. Although New Jersey had a six-year statute of limitation for intentional infliction of emotional distress claims, the District Court for New Jersey applied the one-year defamation statute of limitation to an emotional distress claim which arose from tortious publication in *MacDonald v. Time*.¹²⁰ The New Jersey court reasoned that since the emotional distress claim arose directly from libel and was based on identical facts, the gravamen of the complaint was defamation.¹²¹ The court held that the shorter statute of limitation for defamation should apply.¹²² Therefore, the inclusion of an intentional infliction of emotional distress cause of action did not preserve or resurrect an expired defamation claim.

4. Defamation Privileges

Along with its constitutional restrictions, defamation liability is limited by several privileges relating to publication.¹²³ While those privileges concerning judicial and legislative proceedings are absolute defenses to a defamation cause of action,¹²⁴ most other privileges, such as the privilege of "neutral reportage," constitute conditional defenses.¹²⁵ These privileges are defenses to defamation causes

STAT. ANN. art. 5524(1) (Vernon 1958) (1 year); UTAH CODE ANN. § 78-12-29(4) (1987) (1 year); VA. CODE § 8.01-248 (1984) (1 year); WASH. REV. CODE ANN. § 4.16.100(1) (1962) (2 years); W. VA. CODE § 55-2-12(b) (1981) (1 year); WIS. STAT. ANN. § 893.57 (West 1983) (2 years); WYO. STAT. § 1-3-105(a)(v)(A) (1977) (1 year).

But cf. FLA. STAT. ANN. § 95-11(3)(o) (West 1988) (4 years); MASS. ANN. LAWS ch. 260, § 4 (Law. Co-op. Supp. 1988) (3 years); N.H. REV. STAT. ANN. § 508:4(II) (1987) (3 years); R.I. GEN. LAWS § 9-1-14 (1956, reenacted 1985) (slander 1 year, libel 3 years); VT. STAT. ANN. tit. 12, § 512(3) (1986) (3 years).

119. Of those states which recognize intentional infliction of emotional distress as a separate cause of action, those which have the same statute of limitation for emotional distress as for defamation claims include: ALA. CODE § 6-2-38k (1975) (2 years); ARK. CODE ANN. § 37-2113 (1987) (1 year—same as slander, 2 years shorter than libel); CAL. CIV. PROC. CODE § 340(3) (West Supp. 1988) (1 year); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1988) (2 years); IOWA CODE ANN. § 614.1(3) (West Supp. 1988) (2 years); KAN. STAT. ANN. § 60-514(2) (1983) (1 year); MASS. ANN. LAWS ch. 260, § 4 (Law. Co-op. 1988) (3 years); MISS. CODE ANN. § 15-1-35 (Supp. 1987) (1 year); N.M. STAT. ANN. § 37-1-8 (1978) (3 years); N.Y. CIV. PRAC. L. & R. § 215(3) (McKinney Supp. 1988) (1 year); N.C. GEN. STAT. § 1-54(3) (Supp. 1987) (1 year); OHIO REV. CODE ANN. § 2305.11 (Anderson Supp. 1983) (1 year); TENN. CODE ANN. § 28-3-104(a) (1980) (1 year—same as libel; but see § 28-3-103 (slander 6 months)); UTAH CODE ANN. § 78-12-29(4) (Supp. 1987) (1 year); WASH. REV. CODE ANN. § 4.16.100(1) (Supp. 1987) (2 years); WIS. STAT. ANN. § 893.57 (West. 1983) (2 years).

States having longer statutes of limitation for intentional infliction of emotional distress than for defamation include: ARIZ. REV. STAT. ANN. § 12-542(1) (1987) (2 years—1 year longer); D.C. CODE ANN. § 12-301(8) (1981) (3 years—2 years longer); GA. CODE ANN. § 9-3-33 (1982) (2 years—1 year longer); KY. REV. STAT. § 413.120 (Supp. 1988) (5 years—4 years longer); MICH. COMP. LAWS ANN. § 600.5805(8) (West Supp. 1986) (3 years—2 years longer); N.J. STAT. ANN. § 2A:14-2 (West 1987) (2 years—1 year longer); OKLA. STAT. ANN. tit. 12, § 95-3 (Supp. 1988) (2 years—1 year longer); OR. REV. STAT. ANN. § 12.110(1) (Butterworth 1988) (2 years—1 year longer); S.C. CODE ANN. § 15-3-530(5) (Law. Co-op. Supp. 1987) (6 years—4 years longer); VA. CODE § 8.01-243-A (1984) (2 years—1 year longer); W. VA. CODE § 55-2-12(b) (1981) (2 years—1 year longer).

But cf., ARK. CODE ANN. § 16-56-104 (1987) (1 year—2 years shorter than libel statute of limitation but the same as the slander statute of limitation).

120. 7 Media L. Rep. (BNA) 1981 (D.N.J. 1981).

121. *Id.* at 1983-84.

122. *Id.* at 1984.

123. See RESTATEMENT (SECOND) OF TORTS §§ 582-612 (1976) (defenses to actions for defamation).

124. See generally *id.* at §§ 585-592A (absolute privileges).

125. *Id.* at § 611. The privilege of neutral reportage denies defamation recovery for the publication of defamatory matters in a report of an official proceeding. However, such a report is privileged only if it is an "accurate and complete

of action but are not necessarily applicable to claims for intentional infliction of emotional distress.¹²⁶ In *Katchig v. Boothe*,¹²⁷ an intentional infliction of emotional distress claim did not prevent the use of the privilege which protects a witness who published defamatory matters within the scope of a trial.¹²⁸ In *Lerette v. Dean Witter Organization, Inc.*,¹²⁹ a California appellate court went further, holding that a cause of action for intentional infliction of emotional distress could not be based on defamatory communications made prior to trial but logically connected with the lawsuit, since such communications were privileged under California law.¹³⁰ The court refused to permit a "judicially derived cause of action" to defeat the "clear legislative intention" of the privilege because it would operate to deter otherwise protected communications.¹³¹

The function of defamation privileges is to protect individuals who publish defamatory materials in situations where the need for a free flow of information outweighs the interest in protecting individual reputations. Those courts which have applied the privileges to emotional distress causes of action have relied on the fact that the source of the emotional distress was the publication of defamatory matters.¹³² Since the essence of such claims was tortious publication, the use of the defamation privileges provided the defendants with the same protection available in a traditional defamation action. Therefore, selective pleading of an intentional infliction of emotional distress claim does not result in the imposition of liability for the publication of traditionally privileged material.

IV. THE FIRST AMENDMENT AND INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS CLAIMS AFTER *HUSTLER MAGAZINE V. FALWELL*

In many ways *Hustler Magazine v. Falwell*¹³³ was the proverbial "easy case." Given the consistency of the precedents establishing and expanding the actual malice standard,¹³⁴ it was extremely unlikely that the Court would have upheld any recovery by a public figure such as Falwell absent a finding of actual malice.¹³⁵ What is

. . . [report] or a fair abridgement" of the proceeding. *Id.* See *Time, Inc. v. Firestone*, 424 U.S. 488 (1976) (selection of one possible interpretation of an ambiguous court order did not constitute a fair abridgement); *Schiavone Constr. Co. v. Time, Inc.*, 735 F.2d 94 (3d Cir. 1984) (a report is a fair abridgement if the report and the original document have "equal sting"). This privilege protects fair and accurate reports which are both newsworthy and the subject of raging controversy. See *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977) (requiring newsworthiness in order for privilege to be applied); *Lasky v. American Broadcast Companies, Inc.*, 631 F. Supp. 962 (S.D.N.Y. 1986) (requiring raging controversy).

126. See RESTATEMENT (SECOND) OF TORTS ch. 25, scope note at 239 (1976) (the scope of these privileges is limited to defamation actions).

127. 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (Cal. Ct. App. 1971).

128. *Id.* at 640-41, Cal. Rptr. at 402-03.

129. 60 Cal. App. 3d 575, 131 Cal. Rptr. 592 (Cal. Ct. App. 1976).

130. *Id.* at 577, 131 Cal. Rptr. at 595 (California follows the *Restatement of Torts* § 586 comment A which extends the privilege to "communications preliminary to a proposed judicial proceeding." *Id.*).

131. *Id.* at 579, 131 Cal. Rptr. at 595-96.

132. See *supra* notes 127-31.

133. 108 S. Ct. 876 (1988).

134. See *supra* notes 44-55 and accompanying text.

135. See *supra* note 14. The actual malice issue could have been avoided entirely if it had been possible to label Falwell a private person. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (The plaintiff, a Palm Beach socialite

somewhat surprising is the scope of Chief Justice Rehnquist's majority opinion and its sweeping support of the actual malice standard. Since the jury found that the ad parody could not "reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated,"¹³⁶ and therefore was not a statement of fact,¹³⁷ the Court was not obligated to reach the actual malice issue.¹³⁸ Yet, Rehnquist's opinion makes the actual malice standard applicable to claims for intentional infliction of emotional distress.¹³⁹

While the Court did not take the next step advocated by Judge Wilkinson¹⁴⁰ and deny public plaintiffs any recovery for "hurt feelings,"¹⁴¹ the Court clearly diminished the possibility of successful emotional distress claims by public figures. By requiring the public plaintiff to prove that the statement was both "factual" and made with actual malice, the Court limited one potential "end-run" around the first amendment.¹⁴² At least for public plaintiffs, the Court's decision reduces the likelihood of recovery for intentional infliction of emotional distress where a cause of action for defamation would not lie. Since defamation awards may be based on emotional injury alone,¹⁴³ it is difficult to think of many situations where a public plaintiff could establish intentional infliction of emotional distress but not defamation. Perhaps the only remaining use for emotional distress claims based on offensive publication brought by public figures is those situations where the plaintiff, who established actual malice and the factual nature of the statement, cannot establish the common law elements of defamation: publication of a defamatory statement concerning the plaintiff which caused actual injury to his or her reputation.¹⁴⁴ It is possible that a public plaintiff could establish emotional distress liability without establishing "publication,"¹⁴⁵ such as where the defendant made the offensive statement directly to the plaintiff alone.¹⁴⁶

The Court had no opportunity to discuss whether the *Falwell* decision should be read to require a showing of actual malice in order for a private plaintiff to recover punitive damages for emotional distress due to an offensive "public issue" publication.¹⁴⁷ However, since the state interest in protecting the reputations of private citizens does not outweigh the first amendment interest in preventing

who was involved in a hotly contested divorce and had held several news conferences during the divorce, was found to be a private person.).

136. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988) (quoting Appendix C1 to the Petition for Certiorari).

137. See *supra* notes 62-67 and accompanying text.

138. *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988) (White, J., concurring).

139. *Id.*

140. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *reh'g denied*, 805 F.2d 484, 484-89 (4th Cir. 1986) (Wilkinson, J., dissenting). See *supra* notes 18-24 and accompanying text.

141. *Falwell v. Flynt*, 805 F.2d 484, 484 (4th Cir. 1986) (Wilkinson, J., dissenting).

142. See *supra* note 82.

143. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See also *supra* notes 69-73 and accompanying text.

144. RESTATEMENT (SECOND) OF TORTS § 558 (1976).

145. See *supra* note 38.

146. Publication to a third party is required to establish a defamation cause of action. RESTATEMENT (SECOND) OF TORTS § 577(1) comment b (1976). See *Ostrowe v. Lee*, 256 N.Y. 36 (1931) (Cardozo, C.J.) (no publication if defamatory writing read by no one but the defamed).

147. See *supra* note 134 and accompanying text. See also *supra* notes 76-79 and 105-07 and accompanying text.

self-censorship due to fears of high punitive damage awards in defamation claims,¹⁴⁸ it is unlikely that this balance would be different merely because the claim was for intentional infliction of emotional distress. Thus, in the near future “public issue” private plaintiffs may be unable to recover punitive damages for intentional infliction of emotional distress without showing both actual malice and the factual nature of the statement.

V. CONCLUSION

The constitutionalization of the tort of defamation which began twenty-four years ago with the *New York Times Co. v. Sullivan*¹⁴⁹ decision now has spread to the tort of intentional infliction of emotional distress. The imposition of the actual malice requirement on public plaintiffs in emotional distress claims is an attempt to properly balance the first amendment interest in an uninhibited press with the state’s legitimate interest in protecting its citizens from emotional injury. Whether this requirement will adequately protect political satire remains to be seen. However, the Supreme Court’s reaffirmation of the protection provided by the actual malice standard clearly shows that this constitutionalization is a permanent fixture in modern tort law.

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148. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See *supra* notes 76–79 and 105–07 and accompanying text.
149. 376 U.S. 254 (1964).