The Survival of "End-Run" Theories of Tort Liability After *Hustler v. Falwell*

By Robert E. Drechsel

The Supreme Court's decision striking down a verdict for the Rev. Jerry Falwell in an intentional infliction of emotional distress suit against *Hustler Magazine* was widely praised as a major victory for freedom of expression. Careful examination of the decision and subsequent cases in the lower courts, however, reveals that the *Hustler* decision is unclear and limited. It has not dealt decisively with plaintiffs' use of alternative theories of liability to avoid otherwise insurmountable First Amendment barriers to actions for libel or invasion of privacy. The lower courts have done a more effective job of resolving the issue without *Hustler*.

➤In 1988, the U.S. Supreme Court applied the First Amendment to strike down a $200,000 verdict, not for libel or invasion of privacy, but for emotional distress intentionally inflicted on the Rev. Jerry Falwell by a vicious parody in *Hustler Magazine*.[1] *Hustler v. Falwell* was widely hailed as a major victory for freedom of expression,[2] but this article suggests that such praise needs qualification, and that subsequent cases in the lower courts support such qualification. The article begins with a concise legal history of the *Hustler* case. It then critically examines the Supreme Court's decision, and concludes that the Court failed to make clear the real basis for its decision. Consequently, *Hustler* has not resolved the central problem presented by suits for intentional infliction of emotional distress — plaintiffs' use of such alternative theories of liability where their claims would otherwise be foreclosed by First Amendment limitations on suits for 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 to 2) either intentionally or recklessly 3) cause the plaintiff severe emotional distress.[3] During the past decade, it has become increasingly common for plaintiffs to assert such claims against the mass media, and to couple them

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with claims for libel and invasion of privacy.[4] Falwell's action against *Hustler* provides a striking example of how plaintiffs have seized on intentional infliction of emotional distress as a theory of liability that might circumvent the difficult legal barriers that would make recovery impossible if they sued only for libel or invasion of privacy.

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 the parody could not reasonably be understood as describing actual facts about Falwell or actual events in which he participated.[5] But the jury did find *Hustler* responsible for intentional infliction of emotional distress.[6]

Apparently, the jury found the very nature of the ad parody — plus the fact that *Hustler* republished it after Falwell sued[7] — 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, and affirmed.[8]

The court of appeals also rejected *Hustler*'s argument that the First Amendment barred liability. *Hustler* argued that to collect for intentional infliction of emotional distress, Falwell should be required to prove the same "actual malice" — knowledge of falsity or reckless disregard for the truth[9]— required of a public-figure libel plaintiff. 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 a successful intentional infliction suit requires fault at the level of intentional or reckless conduct, the constitutional fault requirement is satis-

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

2. See, e.g. "Court, 8-0, Extends Right to Criticize Those in Public Eye," New York *Times*, Feb. 25, 1988, p. 1 col. 4 (national ed.); "Double-Barrel Judgment," New York *Times*, Feb. 25, 1988, p. 15, col. 1 (national ed.); Arlen W. Langvardt, "Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects," *American Business Law Journal*, 26:665-708 (1988); James R. Lagunza, "*Hustler Magazine, Inc.* v. *Falwell*: Laugh or Cry, Public Figures Must Learn to Live with Satirical Criticism," *Pepperdine Law Review*, 16:97-116 (1988); and Rodney A. Smolla, *Jerry Falwell v. Larry Flynt* (New York: St. Martin's Press, 1988).

3. *Restatement (Second) of Torts* §46(1) (1965).

4. *See, e.g.*, Robert E. Drechsel, "Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media," *Dickinson Law Review*, 89:339-61 (1985); Terrance C. Mead, "Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution," *Washburn Law Journal*, 23:24-63 (1983); George E. Stevens, "The Tort of 'Outrage': A New Legal Problem for the Press," *Newspaper Research Journal*, Spring 1984, pp. 27-33.

5. *Hustler Magazine* v. *Falwell*, 108 S.Ct. at 878.

6. *Ibid.*

7. *Hustler* republished the parody after Falwell filed suit. *Ibid.*, p. 878 n.1. Meanwhile, Falwell, Moral Majority and Old Time Gospel Hour mailed thousands of copies of the parody to potential donors as part of a fund-raising appeal. *Hustler* sued for copyright infringement but the fund-raising campaign was held to be a fair use. *Hustler Magazine, Inc.* v. *Moral Majority, Inc.*, 606 F.Supp. 1526 (C.D. Cal. 1985), *aff'd*, 796 F.2d 1148 (9th Cir. 1986).

8. *Falwell* v. *Flynt*, 797 F.2d 1270, 1276-77 (4th Cir. 1986).

9. This standard was first enunciated by the Supreme Court in *New York Times* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

fied. 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.[10] 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 protected by the First Amendment from any theory of liability. 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.[11]

Hustler in the Supreme Court

The Supreme Court unanimously reversed the court of appeals. 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."[12] 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.[13]

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.[14]

Therefore, the Court concluded, public figures and public officials may not recover for intentional infliction of emotional distress "without showing *in addition* that the publication contains a *false statement of fact* which was *made with 'actual malice,' i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. [emphasis added]"[15] 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.[16]

10. 797 F.2d at 1274-75.
11. *Ibid.*, pp. 1275-76.
12. 108 S.Ct. at 879.
13. *Ibid.*, pp. 880-81.
14. *Ibid.*, p. 882.
15. *Ibid.*
16. The Court merely attributed its conclusion to "reasons heretofore stated." *Ibid.*, pp. 882-83.

If the Supreme Court's decision makes anything clear, it would appear to be that intentional infliction of emotional distress is no longer a viable theory of liability for public figures where the offensive material is not provably, believably false. This conclusion, however, is more implicit than explicit in the Court's opinion, because the Court failed to make clear the real basis for its decision.

One possibility is that the Court presumed parody to be opinion, and as such within a category of speech protected by the First Amendment from any theory of liability. Such reasoning would directly address the problem of using alternative theories of liability to avoid otherwise insurmountable barriers to actions for libel where opinion is involved. Indeed, the Court expends several paragraphs emphasizing the importance of protecting "ideas" and "opinions," treats at some length the importance of political parody, and seemingly 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.[17]

The Supreme Court's recent decision in *Milkovich v. Lorain Journal Co.*,[18] however, strongly suggests that no constitutional privilege for opinion underlay *Hustler*. *Milkovich* held that the First Amendment does not inherently immunize all statements of opinion from actions for libel. Rather, the Court concluded, First Amendment interests are adequately served by the requirement that plaintiffs prove defamatory statements to be false.[19] More to the point, the *Milkovich* decision placed *Hustler* in a line of cases providing constitutional protection for statements that cannot reasonably be interpreted as stating actual facts.[20]

In *Hustler* the Court also found both the "intent" and "outrageousness" requirements of the intentional infliction tort to be constitutionally deficient. But it stopped short of rejecting them altogether, since it requires public figures to prove falsity and actual malice "in addition." Either the falsity or actual malice requirement or both must have saved *Hustler*, because the Court never disputed *Hustler*'s ill intent or the outrageousness of the parody.

Thus, the most plausible interpretation of the decision is that the Court's concern lies primarily with the issue of falsity, and only secondarily with the issue of actual malice. 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.[21] Whether one considers the *Hustler* parody an opinion, an idea or rhetorical hyperbole, the point is that it does not communicate a *believable falsehood*. Hence, there was no need to reach the question of whether there was actual malice.

The "End-Run" Problem

Had the Court forthrightly held that opinion is protected from all tort liability by the First Amendment, its decision presumably would have

17. *Ibid.*, pp. 879-81.
18. 110 S.Ct. 2695 (1990).
19. *Ibid.*, p. 2706.
20. *Ibid.*
21. It is worth noting that the court's decision is confined to offensive *publications*. Presumably, it 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.

applied regardless of a plaintiff's public or private status. That the Court specifically confined its decision to public figures suggests that *Hustler* should not be read as significantly enlarging constitutional protection for opinion. But even if the decision is interpreted as enlarging First Amendment protection for speech that is not demonstrably false, the Court's reasoning is puzzling.

Under the Court's libel cases, *all* plaintiffs must prove falsity when a libel involves a matter of public concern.[22] Since the *Hustler* decision apparently hinged on falsity, there would seem to be little reason to have made the holding contingent 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. Since the Supreme Court itself has suggested that the definition of "public figure" ought to be fairly narrow,[23] plaintiffs have a doubly strong incentive 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. The other is that, maintaining the parallel with libel law, private figures might win upon showing falsity, believability and *negligence*[24] plus outrageousness, intent and severe harm.[25] 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.[26]

Van Duyn v. Smith, a post-*Hustler* Illinois case which the Supreme Court of the United States has declined to review,[27] strikingly illustrates the opportunity left for private figures to use intentional infliction of emotional distress as an end-run around difficult First Amendment obstacles. 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.[28] 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.[29]

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

23. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976); *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979); *Wolston* v. *Reader's Digest*, 443 U.S. 157 (1979).

24. 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.

25. This possibility exists since negligence in the steps leading to publication of outrageous, false material might be conceptually distinguished from intent 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. The narrowness of the *Hustler* decision also leaves general negligence available as an alternative theory of liability. *See* Robert E. Drechsel, "Negligent Infliction of Emotional Distress: New Tort Problem for the Mass Media," *Pepperdine Law Review* 12:889-917 (1985).

26. A rough tally as of this writing indicates that of 85 plaintiffs who have alleged intentional infliction of emotional distress, at least 41 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.

27. 173 Ill.App.3d 523, 527 N.E.2d 1005 (App. Ct. 1988), *cert denied*, 57 U.S.L.W. 3841 (U.S. June 26, 1989) (No. 88-1761).

28. 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. *Ibid.*

29. *Ibid.*

In a manner reminiscent of *Hustler*, 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."[30] 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.[31]

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.[32] Regarding the libel claim, however, the court found the posters to be nonactionable statements of opinion.[33]

There is other, albeit indirect, evidence that lower courts are, at best, uncertain whether *Hustler* applies when private figures are involved. In at least six post-Hustler cases brought against media defendants by plaintiffs who are arguably private figures, *Hustler* has not been used at all. Rather, courts have relied on common law principles. Ironically, the common law "outrageousness" requirement, of which the Supreme Court was so critical, has been precisely what has saved all six defendants.[34]

In fact, several lower courts have much more directly and usefully addressed the end-run problem of alternative theories of liability than has the Supreme Court — 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. "If the alleged defamatory falsehoods themselves are privileged," the court concluded, "it would defeat the privilege to allow recovery for the specified damages which they caused."[35]

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.[36] 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

30. *Ibid.*
31. *Ibid.*
32. *Ibid.*, p. 1010.
33. *Ibid.*, p. 1015.
34. *Dempsey* v. *National Enquirer*, 702 FSupp. 927 (D.C. Me. 1988) (story about plaintiff who fell out of airplane and survived not sufficiently outrageous to support claim); *Doe* v. *American Broadcasting Companies*, 16 Media L. Rep (BNA) 1958 (N.Y. App. Div. 1989) (broadcasts identifying plaintiffs as rape victims despite journalists' promise not to identify them not sufficiently outrageous to support cause of action); *Grimsley* v. *Guccione*, 703 FSupp. 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.*, 546 A.2d 1168 (Super. Ct. Pa. 1988) (newspaper headline allegedly linking plaintiff to mob activity not sufficiently outrageous to justify claim); *Virelli* v. *Goodson-Todman Enterprises*, 142 A.D.2d 479, 536 N.Y.2d 571 (1989) (article on drug abuse which allegedly misrepresented plaintiffs not sufficiently outrageous to support claim). *See also*, *Seely* v. *Detroit News Inc.*, 16 Media L. Rep (BNA) 2266 (Ct. App. Mich. 1989).
35. 579 F.2d 1027, 1036 (7th Cir. 1978). The Supreme Court later reviewed the case, but not on this issue.
36. 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984), *cert. denied*, 478 U.S. 1009 (1986).

publication."[37]

At least a dozen cases in addition to *Hustler* have involved claims for intentional infliction of emotional distress based on statements of opinion or hyperbole. 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.[38] Similarly, a California appeals court rejected an intentional infliction claim stemming from a Robin Williams comedy routine.[39] 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.[40]

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.[41] 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.[42]

The appeals court affirmed the district court's decision after the Supreme Court decided *Hustler*. Instead of concluding that the gist of Dworkin's complaint was in fact defamation, the appeals court concluded that the publication in question was a privileged statement of opinion.[43] In an expansive reading of the Supreme Court's decision, 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."[44]

37. 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). *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 (Cal. Ct. App. 1987); *Smith* v. *Dameron*, 14 Media L. Rep. (BNA) 1879, 1881 (Va. Cir. Ct., 1987); *Basilius* v. *Honolulu Pub Co.*, 711 F Supp. 548 (D.C. Hawaii 1989).

38. *Celebrezze* v. *Dayton Newspapers*, 13 Media L. Rep. (BNA) 1911, 1912 (Ohio C.P. 1986), *aff'd*, 41 Ohio App.3d 343, 535 N.E.2d 755 (1986). *See also Thomas* v. *News World Communications*, 681 F.Supp. 55 (D.C.D.C. 1988).

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

40. 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).

41. *Dworkin* v. *Hustler*, 668 F.Supp. 1408 (C.D. Cal. 1987), *aff'd* 867 F.2d 1188 (9th Cir. 1989); *cert. denied*, 58 U.S.L.W. 3213 (U.S. Oct. 2, 1989) (No. 88-1900).

42. 668 F.Supp. at 1420.

43. 867 F.2d at 1193.

44. *Ibid.*, p. 1196 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*, 109 S.Ct. 65 (1988).

Hustler has also defended itself successfully against libel and intentional infliction of emotional distress suits brought by two other anti-pornography activists. The magazine called one a "tightassed housewife" and "deluded busybody" in need of "professional help,"[45] and referred to the other as a "pus bloated walking sphincter."[46] A federal appeals court found all of the statements to be opinion and, as such, not actionable for either libel or intentional infliction of emotional distress regardless of whether the plaintiff was a public or private person. But, perhaps tellingly, the court used *Hustler* as authority only for the "public person" portion of this conclusion.[47]

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 heart of the claim is reputational harm or invasion of privacy, it would make no sense to let the expression be vulnerable under any other theory of liability. 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.

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.[48] 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 *Hustler's* ad parody, the column

45. *Ault* v. *Hustler Magazine*, 860 F.2d 877, 879 (9th Cir. 1988), *cert denied*, 109 S.Ct. 1532 (1989).

46. *Leidholdt* v. *L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1532 (1989).

47. *Ault* v. *Hustler Magazine*, 860 F.2d at 880; *Leidholdt* v. L.F.P. Inc., 860 F.2d at 893. See also Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988). Other lower courts have held that since opinions expressed on matters of public concern are protected by the First Amendment, they cannot be considered outrageous. *See Brooks* v. *Paige*, 12 Media L. Rep. (BNA) 2353 (Colo. Dist. Ct. 1986), *aff'd* 15 Media L. Rep. (BNA) 2353 (Colo. Ct. App. 1988) and *Koch* v. *Goldway*, 817 F.2d 507 (9th Cir. 1987).

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

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.

Conclusion

In *Hustler v. Falwell*, the Supreme Court largely forfeited an opportunity to deal directly and decisively with the problem of plaintiffs' creative relabeling of their claims to avoid constitutional barriers to actions for libel and invasion of privacy. The decision has 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 has it entirely closed 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 Rodney 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."[49] 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. But "technical ramifications" are not so easily dismissed. A great deal of important lawmaking is interstitial. In *Hustler* the Supreme Court left considerable room for interstitial maneuvering. Fortunately for the media, lower courts have thus far dealt with the end-run issue more directly and effectively than the Supreme Court.

49. Smolla, *op. cit.*, pp. 301-2.