F. Outrageous Expression

" '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. ..."

Hustler Magazine, Inc. v. Falwell

485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

Hustler Magazine published a "parody" of an advertisement for Campari Liqueur that contained the name and picture of nationally known television evangelist and political activist Jerry Falwell and was entitled "Jerry Falwell talks about his first time." The parody included an alleged "interview" in which Falwell stated that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. The parody also suggested that he was a hypocrite who preached only when drunk. In small print at the bottom of the page, the ad contained the disclaimer, "ad parody—not to be taken seriously." The magazine's table of contents also listed the ad as "Fiction; Ad and Personality Parody."

Rev. Falwell sued *Hustler* and its publisher, Larry Flynt, for invasion of privacy, libel, and intentional infliction of emotional distress. Falwell did not dispute that he was a "public figure" under New York Times v. Sullivan (1964; reprinted above, p. 634) and later cases. The district judge directed a verdict against Falwell on the privacy claim but submitted the other two claims to a jury. The jury found for *Hustler* and Flynt on the libel claim but for Falwell on his claim for intentional infliction of emotional distress and awarded compensatory damages of $100,000 and punitive damages of $50,000 each against *Hustler* and Flynt. The court of appeals affirmed, and the Supreme Court granted certiorari.

Chief Justice **REHNQUIST** delivered the opinion of the Court. ...

... Respondent would have us 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, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At 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. ... The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures 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." AP v. Walker, decided with Curtis Publishing Co. v. Butts (1967) (Warren, C. J., concurring in result). ... Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," *New York Times* [1964]. ...

Of course, this does not mean that *any* speech about a public figure is immune from sanction in the form of damages. Since *New York Times,* we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. See Gertz [v. Robert Welch, Inc. (1974)]. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," *id.,* and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. ...

Respondent argues, however, that a different standard should apply in this case because here the State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication. ... It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In Garrison v. Louisiana (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment. ... 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 awards without any showing that their work falsely defamed its subject. ... The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. ...

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. ... From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer

little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "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. See NAACP v. Claiborne Hardware Co. (1982) ("Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action.") And, as we stated in FCC v. Pacifica Foundation (1978):

> [T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in *Pacifica Foundation* that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." In *Chaplinsky* (1942), we held that a State could lawfully punish an individual for the use of insulting "fighting" words. ... These limitations are but recognition of the observation in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) that this Court has "long recognized that not all speech is of equal First Amendment importance." But the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.

We conclude 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," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

Reversed.

Justice **KENNEDY** took no part in the consideration or decision of this case.

Justice **WHITE**, concurring in the judgment. ...

Editors' Notes

(1) **Query:** Recall that Rehnquist had urged an approach to constitutional interpretation blending *textualism* and *originalism*. ("The Notion of a Living Constitution," reprinted above, p. 243.) Did he use either approach in this opinion? What approach(es) did he use? What conception of democracy or self-government does his opinion presuppose?

(2) **Query:** Would the opposite result in *Hustler* have given public figures an opportunity to outflank *New York Times* 's standard of "actual malice" to sue critics for libel? Does the actual result in *Hustler* give critics an easy way around *New York Times* 's standard of "actual malice" in that all they need do to lodge false charges is to label them a spoof, knowing that some tar will stick?

(3) **Query:** An approach including democratic theory in the Constitution or requiring interpreters to construe the First Amendment as being based on such a theory might seem to justify the results in *New York Times* and *Hustler* as well as in R.A.V. v. St. Paul (1992; reprinted above, p. 686). But do these results mean that democratic theory is ultimately self-destructive in requiring society to stand idly by if political discussion disintegrates into vulgar name calling? Is the version of democratic theory that would justify these sorts of decisions the only version available under the American constitutional system? What would another version look like? (Most European countries who think themselves constitutional democracies make it much easier than does the United States for public officials to obtain libel judgments.)

(4) For an account of this case, see Rodney A. Smolla, *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (New York: St. Martin's Press, 1988). See also Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," 103 *Harv.L.Rev.* 601 (1990).