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DID FALWELL HUSTLE *HUSTLER*? ALLOWING PUBLIC FIGURES TO RECOVER EMOTIONAL DISTRESS DAMAGES FOR NONLIBELOUS SATIRE

Traditionally, authors of critical commentary have utilized satire[1] as an influential technique by which to express opinions on political issues and societal standards.[2] By making humorous yet often stinging attacks against government, private organizations, and even well-respected individuals, satirists noticeably have influenced many political and societal trends.[3] Courts,

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1. *See* Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U.L. REV. 923, 923-24 & nn.1 & 3 (1985)(defining "satire"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2017 (1981) (same). By publicly scoffing at cherished virtues and values, satirists attempt to cause readers to reevaluate accepted customs. Dorsen, *supra*, at 923 nn.1 & 3. Generally, satire embodies three characteristic features. *Id.* at 924. First, satire usually vividly describes either a painful or absurd situation or a foolish or evil person. *Id.*; G. HIGHET, THE ANATOMY OF SATIRE 18 (1962). Second, satire uses sharply critical and often crude language to disturb the reader. Dorsen, *supra*, at 924. Finally, most satire attempts to evoke both laughter and contempt from the reader. *Id.*; G. HIGHET, *supra*, at 18-21. In attempting to affect societal attitudes, satire often creates embarrassment and hurt feelings. Dorsen, *supra*, at 925.

2. *See* Falwell v. Flynt, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, C.J., dissenting) (describing historical tradition of political satire), *cert. granted sub nom.* Hustler Magazine, Inc. v. Falwell, 107 S. Ct. 1601 (1987); Dorsen, *supra* note 1, at 923-25 (discussing importance of satirical commentary); *see also* Rich & Brilliant, *Defamation-in-Fiction: The Limited Viability of Alternative Causes of Action*, 52 BROOKLYN L. REV. 1, 3-5 (1986) (discussing importance of free expression in fiction). Satire began as a distinct form of literature as early as the second century B.C. in Rome. *See* G. HIGHET, *supra* note 1, at 24-44 (discussing satire in early Rome and Greece). Satirists, attempting to cause readers to reevaluate habits and customs, often try to make readers uncomfortable by publicly ridiculing accepted values and institutions. Dorsen, *supra* note 1, at 923 n. 1; *see supra* note 1 (defining "satire"). Often, the failure of a satire to cause readers to experience distress signifies the failure of a satirist to achieve his purported goal. *Falwell*, 805 F.2d at 487. Satirists use satire to destroy facades and unmask hypocrisy. *Id.* Often, satires have had a more significant effect on societal attitudes than factual reports. *See* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 868, 603 P.2d 454, 459, 160 Cal. Rptr. 352, 357 (1979) (Bird, C.J., concurring) (Dickens and Dostoevski may have had more impact on societal attitudes than factual recitations); Dorsen, *supra* note 1, at 923 n. 4 (satire often has more bite than factual recitations). *See generally* M. HODGART, SATIRE 10-32 (1969) (discussing origins and principles that underlie satire).

3. *See* S. TOWER, CARTOONS AND LAMPOONS: THE ART OF POLITICAL SATIRE 13-14 (1982) (describing influence of political satire). Famous satirists such as Horace, Voltaire, Shakespeare, Woody Allen, and Garry Trudeau have influenced societal attitudes by humorously attacking accepted ideas and notable leaders, often in unflattering ways. *See* Dorsen, *supra* note 1, at 923 (listing famous satirists). An example of an attack on a well-respected leader involves a famous colonial cartoon about George Washington. *See* W. MURRELL, A HISTORY OF AMERICAN GRAPHIC HUMOR 34 (1933) (describing cartoon satire about Washington). In the cartoon, as Washington's aide David Humphreys guides the donkey on which Washington sits, the caption reads, "The glorious time has come to pass/When David shall conduct an ass." *See id.* Other

attempting to encourage the press to publicize new ideas and opinions,[4]

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leaders often have been the focus of biting satirical attacks. *See, e.g.*, S. HESS & M. KAPLAN, THE UNGENTLEMANLY ART: A HISTORY OF AMERICAN POLITICAL CARTOONS 106 & 108 (1968) (describing satires about James A. Garfield as unwed mother and Grover Cleveland as father of illegitimate children); W. MURRELL, *supra*, at 49 (describing satirical attack against Thomas Jefferson); S. TOWER, *supra*, at 99-115 (describing satirical attacks against Lincoln). *See generally* E. JOHNSON, A TREASURY OF SATIRE (1945) (providing examples of satires from ancient Greek period to twentieth century).

4. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 268-70 (1964) (recognizing that free exchange of ideas promotes beneficial social change). Commentators have suggested numerous theories in analyzing the reasons for and bases of the first amendment freedom of the press. *See* M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 11-52 (3d ed. 1987) (describing various theories that commentators have advanced about first amendment protection). The United States Supreme Court generally has defined three basic functions of the first amendment. First, the first amendment, by fostering individual self-expression, allows individuals the freedom to seek self-fulfillment. *See* City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (first amendment functions to foster individual self-expression and self-fulfillment). Second, the first amendment, by allowing individuals to discuss openly thoughts and grievances, serves as a "safety valve" that stabilizes government by creating an open, nonrepressive society. *See* Whitney v. California, 274 U.S. 354, 375 (1927) (first amendment functions as "safety valve"). The third and most widely accepted view is that the first amendment serves an enlightenment function, allowing the discovery of truth through the free dissemination of information. *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 139-40 (1969) (first amendment functions to allow press to enlighten public by disseminating information); Whitney v. California, 274 U.S. 354, 375 (1927) (Brandeis, J., concurring) (first amendment allows press to enlighten public); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[A], at 1-7 (1984) (enlightenment function is foundation of first amendment). The enlightenment function embodies the "marketplace of ideas" theory, which suggests that when a government allows individuals to express freely both true and false ideas, the competition of those ideas in the "marketplace of ideas" will allow true ideas to triumph over false ideas. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (advancing idea that competition among ideas provides best test of truth); *see also* M. NIMMER, *supra*, § 1.02[A], at 1-9 (discussing marketplace of ideas theory). *But see* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 967-81 (1978) (rejecting classic marketplace of ideas theory). In recognizing the beneficial value of free exchanges of ideas, the United States Supreme Court has determined that the United States Constitution protects an individual's freedom to express his views on public issues. Roth v. United States, 354 U.S. 476, 484 (1956); *see* U.S. CONST. amend. I (granting freedoms of speech and press). The Court has determined that the first amendment requires that individuals have opportunities to discuss political matters and policies. Stromberg v. California, 283 U.S. 359, 369 (1931); *see* U.S. CONST. amend. I (granting freedom of speech). The Court recognized that when the opportunity for free political discussion exists, individuals legally may effect political changes by verbally influencing others as to the correctness of new ideas. *Id.* Although not all individuals will use this privilege of free expression to speak on matters of good taste, the first amendment does not differentiate between offensive and inoffensive expression, but unilaterally guarantees the right to express new ideas. Bridges v. California, 314 U.S. 252, 270 (1941); *see* U.S. CONST. amend. I (granting freedoms of speech and press).

Although the first amendment guarantees the right to express new ideas, this right is not absolute. *See infra* note 5 and accompanying text (discussing nonabsolute interpretation of first amendment freedoms). In determining whether the first amendment allows a court to punish an individual for expressing a particular idea or opinion, the Court most often has adopted a balancing approach that weighs the government's need to protect a particular interest against an individual's right to express an idea. *See* M. FRANKLIN, *supra*, at 45 (describing

generally have afforded satirists substantial legal protection from the victims of satirical comment by recognizing that the freedom of the press clause enumerated in the first amendment of the United States Constitution[5]

Supreme Court's use of balancing approach). In balancing first amendment freedoms against governmental concerns, the Court has not distinguished formally between the protections granted by the freedom of speech and by the freedom of the press. *See, e.g.,* Houchins v. KQED, Inc., 438 U.S. 1, 8-9 (1978) (denying press access to prison to which ordinary individual does not have access); Zurcher v. Stanford Daily, 436 U.S. 547, 563-67 (1978) (denying press exemption from police search); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (applying freedom of speech language to action against press); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (interchangeably using terms "freedom of speech" and "freedom of press"); Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 456 (1983) (describing Supreme Court's failure to distinguish between freedoms of speech and press). One commentator has suggested that, although Supreme Court decisions have not afforded the press any substantial protections under the first amendment "press" clause that individuals do not receive under the first amendment "speech" clause, the Court has not rejected the possibility that the press clause could grant the press greater rights than the speech clause grants nonmedia individuals. *See* Anderson, *supra*, at 459 (Supreme Court has not rejected idea that press clause could have independent significance). Commentators disagree on whether the freedom of the press should receive additional protection independently from the freedom of speech. *Compare* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 658 (1975) (first amendment press and speech clauses should receive separate consideration) *and* Stewart, *"Or Of the Press,"* 26 HASTINGS L.J. 631, 634 (1975) (press clause confers special status that other private business does not receive) *with* Lange, *The Speech & Press Clauses*, 23 U.C.L.A. L. REV. 77, 107-18 (1975) (describing possible dangers in separating freedom of press from freedom of speech) *and* Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J.761, 768-80 (1977) (press clause should receive no more weight than speech clause).

5. U.S. CONST. amend. I. The first amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of sppech, or of the press . . ." *Id.* Although the first amendment creates these freedoms, the Bill of Rights fails to define adequately the term "freedom." Brown & Chamberlain, *Introduction* to THE FIRST AMENDMENT RELISTED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS at 1 (1982). Because congressional records that pertain to Congress' passage of the Bill of Rights are virtually nonexistent, Congress' intent in enacting the first amendment provides no basis by which to define the term "freedom." Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to* Gitlow, in THE FIRST AMENDMENT RELISTED: NEW PERSPECTIVESON THE MEANING OF FREEDOM OF SPEECH AND PRESS 14, 45 n.14 (1982); *see* Anderson, *supra* note 4, at 485 (describing difficulties in determining reasons of Congress and various state legislatures for adopting first amendment). Commentators disagree over Congress' reasons for including the freedom of the press in the Bill of Rights. *See* N. DORSEN, P. BENDER & B. NEUBORNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 20-24 (4th ed. 1976) (contrasting different views of first amendment framers' intentions). *Compare* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 20 (1941) (first amendment drafters wanted liberty of press to provide right of unrestricted discussion of public affairs) *with* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY vii-viii (1960) (first amendment drafters did not believe in broad scope for freedom of press in political discussion).

Although doubt continues to exist over the framers' intended interpretation of the freedom of the press, twentieth-century court decisions have attempted to answer many questions

protects the press' publication of satirical and fictional works.[6] The use of satirical comment, however, does not constitute an unrestricted privilege.[7]

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regarding modern interpretations of the freedom of the press. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (first amendment protects press from liability for false statements made without knowing disregard of truth); Near v. Minnesota, 283 U.S. 697, 713 (1931) (first amendment protects press from prior restraints on publication); Ollman v. Evans, 750 F.2d 970, 975-76 (D.C. Cir. 1984) (en banc) (first amendment protects expression of opinion), *cert. denied*, 471 U.S. 1127 (1985). The meaning of the first amendment freedom of the press, however, has not remained constant. Brown & Chamberlin, *supra*, at 1. For example, although in the early nineteenth century Congress enacted a law that imposed criminal liability for publishing or writing seditious libel, a false, malicious, and scandalous statement against the government, the United States Supreme Court in the twentieth century has recognized that punishing individuals who publish seditious libel violates the first amendment. *See New York Times*, 376 U.S. at 276 (attacking constitutional validity of early sedition laws); *see also* Anderson, *supra* note 4, at 515-23 (discussing inconsistency of 1798 Sedition Act with first amendment freedom of press clause).

In addition to recognizing that punishing sedition is inconsistent with the first amendment freedom of the press, the Supreme Court generally has interpreted the first amendment as affording the press substantial first amendment protection in numerous areas. *See, e.g., New York Times*, 376 U.S. at 279-80 (first amendment prohibits holding press liable for publishing false statements when press published false statements without knowingly disregarding truth); Lovell v. Griffin, 303 U.S. 444, 450-51 (1938) (first amendment protects freedom to distribute political pamphlets, leaflets, newspapers, and books); Grosjean v. American Press Co., 297 U.S. 233, 244-45, 250 (1936) (first amendment prohibits states from imposing taxes to punish press for publishing information); *Near*, 283 U.S. at 713 (first amendment prohibits prior restraints on publication); Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment freedom of press applies to state action through fourteenth amendment). The Supreme Court, however, has not provided the press with an absolute privilege to publish without accountability any material that the press chooses. *See, e.g.,* New York v. Ferber, 458 U.S. 747, 756 (1982) (first amendment does not prohibit state from restricting publication of child pornography that visually depicts sexual conduct by children); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) (first amendment does not prohibit entertainer from recovering damages for violation of right of publicity when press broadcasts entertainer's act without permission); Miller v. California, 413 U.S. 15, 23 (1973) (first amendment does not protect press' publication of obscene material); *New York Times*, 376 U.S. at 279-80 (first amendment does not protect false material published with knowing or reckless disregard of truth); *see also* Roth v. United States, 354 U.S. 476, 484-85 (1957) (publication of obscene material receives no constitutional protection under freedoms of speech or press); *Near*, 283 U.S. at 716 (recognizing that first amendment may allow prior restraint in exceptional circumstances).

6. *See, e.g.,* Spence v. Washington, 418 U.S. 405, 409-11 (1974) (applying first amendment protection to political symbolism); Papish v. Board of Curators, 410 U.S. 667, 670-71 (1973) (per curiam) (applying first amendment protection to offensive cartoon depicting policeman raping Statue of Liberty); Pring v. Penthouse Int'l, 695 F.2d 438, 440, 442 (10th Cir. 1982) (applying first amendment protection to fiction), *cert. denied*, 462 U.S. 1132 (1983); Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 486 (D. Mass. 1980) (applying first amendment protection to political cartoon); United States *ex rel.* Radich v. Criminal Court of New York, 385 F. Supp. 165, 174 (S.D.N.Y. 1974) (applying first amendment protection to political satire involving flag desecration); Yorty v. Chandler, 13 Cal. App. 3d 467, 476-77, 91 Cal. Rptr. 709, 715 (1970) (applying first amendment protection to satirical cartoon); Myers v. Boston Magazine Co., 380 Mass 336, ____, 403 N.E.2d 376, 377-80 (1980) (applying first amendment protection to satirical statement).

7. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974) (first amendment freedoms are not absolute); Cohen v. California, 403 U.S. 15, 19 (1971) (same); Konisberg v.

Courts increasingly have recognized that, although the first amendment protects satirical commentary, a person who is the subject of a satirical work can recover damages from satirists in some situations.[8] For example, courts have determined that, under the first amendment, a plaintiff can recover damages for defamation[9] if the believability of false facts underlying

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California, 366 U.S. 36, 49-50 (1961) (same); Dorsen, *supra* note 1, at 926 (court analysis of cases involving satirical comment should employ same first amendment balancing test that courts use in other cases). Several commentators and judges have suggested that protection of first amendment freedoms should be absolute. *See, e.g.*, Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (first amendment provides absolute protection for freedoms of speech and press); Cahn, *Justice Black and First Amendment "Absolutes:" A Public Interview*, 37 N.Y.U. L. REV. 549, 552-54 (1962) (discussing Justice Black's absolutist interpretation of first amendment); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262-63 (first amendment freedoms should receive absolute protection); *see also* Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (supporting absolutist interpretation of first amendment); M. NIMMER, *supra* note 4, § 2.01, at 2-3 n.5 (explaining differing views held by Supreme Court justices on absolutist interpretation of first amendment). Supporters of the absolutist interpretation argue that the terms of the first amendment are literal and absolute. *See* M. NIMMER, *supra* note 4, § 2.01, at 2-2 (describing absolutist argument). The Supreme Court, however, never has accepted an absolutist interpretation of the first amendment. *See, e.g.*, Nebraska Press Ass'n v. Stewart, 427 U.S. 539, 704 (1976) (rejecting absolutist interpretation of first amendment); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (same); Saia v. New York, 334 U.S. 558, 562 (1948) (same); *supra* note 5 (discussing absolutist approach). In freedom of speech cases, the Supreme Court most often balances first amendment freedoms against other governmental and individual concerns. *See supra* note 4 (discussing balancing approach that Court uses in first amendment cases).

8. *See* Dorsen, *supra* note 1, at 928-63 (discussing judicial remedies for harm resulting from satire). In attempting to recover damages from satirists for the harm resulting from a satire's publication, plaintiffs have claimed that a particular satire has defamed a plaintiff, that a satire has infringed a plaintiff's ownership of a trademark, and that a satire has infringed a plaintiff's ownership of a copyright. *Id.* at 925. Courts have allowed plaintiffs to recover for trademark infringement when a business' satirical appropriation of a plaintiff's trademark tends to cause consumers to confuse the products produced by the plaintiff with those produced by the business that satirically appropriated the plaintiff's trademark. *See* Playboy Enters. v. Chuckleberry Publishing Co., 687 F.2d 563, 569 (2d Cir. 1982) (defendant infringed "Playboy" trademark by using name "Playmen" on sexually explicit magazine); Gucci Shops, Inc. v. R. H. Macy & Co., 446 F. Supp. 838, 839-40 (S.D.N.Y. 1977) (infringement of "Gucci" trademark found when defendant sold diaper bags called "Gucchi Goo"). Additionally, many courts have allowed plaintiffs to recover for copyright infringement when a satirist has "borrowed" a copyrighted work to publish a satirized version of that copyrighted work. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1980) (defendant's parody of plaintiff's copyrighted song infringed copyright); Walt Disney Publications, Inc. v. Air Pirates, 581 F.2d 751, 756-57 (9th Cir. 1978) (finding copyright infringement when defendant published drawings of Disney characters in sexual situations), *cert. denied*, 439 U.S. 1132 (1979). One commentator has argued that courts often misapply the trademark and copyright laws in satirical comment cases. *See* Dorsen, *supra* note 1, at 939-63 (discussing courts' misapplication of trademark and copyright law in satire cases).

9. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining "defamation"); W. KEETON, PROSSER AND KEETON ON TORTS § 111, at 773-78 (5th ed. 1984) (same); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 45-48 (1980) (same); BLACK'S LAW DICTIONARY 375-76 (5th ed. 1979) (same). Defamation involves an expression, verbal or nonverbal, that tends to injure an individual's reputation by exciting derogatory or contemptuous feelings against

a satire injures the plaintiff's reputation.[10] Courts, however, generally recognize that, under first amendment defamation standards,[11] satires that

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that individual. R. SACK, *supra*, at 45; BLACK'S LAW DICTIONARY 375 (5th ed. 1979). Defamation includes both libel, a written or visual defamation, and slander, a spoken or aural defamation. R. SACK, *supra*, at 43.

10. *See* Martin v. Municipal Publications, 510 F. Supp. 255, 258 (E.D. Pa. 1981) (comical statement is defamatory if reasonable person would believe that comical statement expresses true facts); Buller v. Pulitzer Publishing Co., 684 S.W.2d 473, 478-79 (Mo. Ct. App. 1984) (holding satirist liable for believable false statement of fact in satirical cartoon); *see also* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 76-78, 155 Cal. Rptr. 29, 38-39 (fictionalized novel defamed plaintiff by including false statements of fact), *cert. denied*, 444 U.S. 984 (1979); Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 127-29, 233 N.E.2d 840, 843, 286 N.Y.S.2d 832, 834-36 (1967) (defendant defamed plaintiff in biography by attributing fictionalized statements to plaintiff), *cert. dismissed*, 393 U.S. 1046 (1969); U.S. CONST. amend. I (establishing freedom of press). By allowing a subject of a satirical work to recover defamation damages, courts have recognized that believable, false statements of fact in a satire can damage a person's reputation. *See Martin*, 510 F. Supp. at 258 (plaintiff may recover defamation damages for false statements of fact that defendant stated in comical context); Embrey v. Holly, 48 Md. App. 571, 581-82, 429 A.2d 251, 259 (1981) (humorous statement can damage person's reputation if readers believe statement expresses true facts), *rev'd in part*, 293 Md. App. 128, 442 A.2d 966 (1982); Silsdorf v. Levine, 59 N.Y.2d 8, 15-16, 449 N.E.2d 716, 720 (plaintiffs can recover damages for humorous false statement if plaintiffs demonstrate that falsities would affect conclusions of average reader), *cert. denied*, 464 U.S. 831 (1983); Salomone v. MacMillan Publishing Co., 97 Misc. 2d 346, 350-51, 411 N.Y.S.2d 105, 109 (N.Y. Sup. Ct. 1978) (same), *rev'd on other grounds*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980). Although a satirist may not have intended for readers to believe literally the statements asserted in a satire, a subject of a satirical work may be able to recover damages from a satirist who fails clearly to assert to the reader that the statement is satirical and not serious. *See Embrey*, 48 Md. App. at 581-82, 429 A.2d at 259 (jury question exists when reader could interpret humorous statement as stating either true fact or opinion); *Salomone*, 97 Misc. 2d at 351, 411 N.Y.S.2d at 109 (same). The subject of a satirical work cannot recover defamation damages, however, solely because a satirist's false assertions about a person are believable and injure that person's reputation. *See* LaRocca v. New York News, Inc., 156 N.J. Super. 59, 62, 383 A.2d 451, 453 (1978) (court must find defendant's fault before allowing plaintiff to recover damages for harm to reputation resulting from satirical cartoon's publication); Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, 595 (Okla.) (denying recovery for defamation when defendant did not exhibit malicious intent), *cert. denied*, 459 U.S. 923 (1982); *infra* notes 37-38 and accompanying text (discussing reputational injury and falsity requirements in defamation cases). The United States Supreme Court has determined that, for a plaintiff to recover for defamation, the plaintiff must prove that the defendant acted with some measure of fault. *See* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1565 (plaintiff in defamation action must prove that media defendant acted with fault), *cert. denied*, 106 S. Ct. 1784 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public officials must prove defendant published statement with knowing disregard of truth); *infra* notes 11 & 39 (discussing fault requirements in defamation cases).

11. *See* 1 A. HANSON, LIBEL AND RELATED TORTS ¶ 141 (Supp. III 1976) (discussing proof requirements that Supreme Court has developed for defamation actions); *see also* B. DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 10-32 (1986) (discussing development of constitutional proof standards in defamation law); C. MORRIS, MODERN DEFAMATION LAW 6-28 (ALI 1978) (same); Note, *Private Lives and Public Concerns: The Decade Since* Gertz v. Robert Welch, Inc., 51 BROOKLYN L. REV. 425, 429-30 (1985) (summarizing development of constitutional first amendment defamation standards); Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 576-77 (1980) (same).

convey unbelievable assertions should not constitute defamatory statements.[12]

In 1964, the United States Supreme Court, in *New York Times Co. v. Sullivan*, first imposed constitutional limitations on state defamation laws. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (recognizing that first amendment limits public official plaintiff's ability to recover against press for defamation). The Supreme Court in *New York Times* determined that, under the first amendment, a public official cannot compel the press to pay damages for publishing a defamatory falsehood relating to the public official's official conduct unless the public official proves with convincing clarity that the press acted with "actual malice." *Id.* at 279-80; *see infra* note 13 (defining "public official"). The Supreme Court in *New York Times* defined "actual malice" as the publication of a statement "with knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not." *Id.* at 280; *see* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (defining "reckless" conduct as publishing defamatory falsehood with "serious doubt" as to statement's truth). In *Curtis Publishing Co. v. Butts*, the Supreme Court extended the "actual malice" fault standard to public figures' actions against the press. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring); *see infra* note 13 (defining "public figure").

Although the actual malice fault standard applies in defamation actions brought by public officials and public figures, the Supreme Court has not extended the actual malice requirement to defamation actions brought by private figures. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (allowing private figures to recover defamation damages after proving press' negligence); *infra* note 14 (defining "private figure"). Although the Supreme Court, in *Rosenbloom v. Metromedia, Inc.*, found that all plaintiffs, both public and private, must prove actual malice when a defamatory statement is of public concern, the Supreme Court in *Gertz* terminated the *Rosenbloom* standard. *See Gertz*, 418 U.S. at 346-47 (repudiating *Rosenbloom* standard); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (plurality opinion) (all plaintiffs must prove actual malice when statement is of public concern), *overruled by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Supreme Court in *Gertz* determined that, in private figure defamation actions, states can establish the defamation standard of liability for a private figure's actual damages as long as the state does not impose liability without fault. *Gertz*, 418 U.S. at 347. Although the Supreme Court in *Gertz* allows private figures in defamation actions to recover actual damages upon showing the press' negligence, the Supreme Court requires that a private figure must show actual malice before recovering punitive damages. *Gertz*, 418 U.S. at 349.

Since *Gertz*, the Supreme Court has continued to refine constitutional defamation law. *See, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 (private figure has burden of showing falsity of defamatory statement), *cert. denied*, 106 S. Ct. 1784 (1986); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984) (discussing standards for summary judgment in defamation actions); Wolston v. Readers Digest Ass'n, 443 U.S. 157, 166-67 (1979) (refining definition of "public figure"). Generally, a plaintiff in a defamation action must prove the defendant's fault, the statement's falsity, and injury to the plaintiff's reputation. *See Philadelphia Newspapers*, 106 S. Ct. at 1562-65 (plaintiff in defamation actions must show fault and falsity); *infra* notes 37-39 and accompanying text (discussing proof requirements of reputational injury, falsity, and fault in defamation actions).

12. *See, e.g.*, Keller v. Miami Herald Publishing Co., 778 F.2d 711, 715-17 (11th Cir. 1985) (first amendment requires that cartoon depicting unbelievable events is not defamatory); Pring v. Penthouse Int'l, 695 F.2d 438, 440, 442-43 (10th Cir. 1982) (unbelievable story is not defamatory), *cert. denied*, 462 U.S. 1132 (1983); Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976) (statements of opinion are not defamatory), *cert. denied*, 429 U.S. 1062 (1977); Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 486 (D. Mass. 1980) (statement that newspaper was "worst newspaper in America" is nonactionable opinion); Palm Beach Newspapers v. Early, 334 So. 2d 50, 53 (Fla. Dist. Ct. App. 1976) (per curiam) (cartoon attacking public official is not defamatory when cartoon fails to express believable false facts), *cert. denied*, 439 U.S. 910 (1978); Myers v. Boston Magazine Co., 380 Mass. 336, 342, 403 N.E.2d 376, 379 (1980)

Although unbelievable satirical comments do not constitute defamatory statements under the first amendment, recent court decisions have permitted

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(humorous nonfactual statement is not defamatory); *see also* Comment, *Fictionalized Publications: When Should Defamation and Privacy Be A Bar?*, 1984 UTAH L. REV. 411, 415 (to be defamatory, reader reasonably must understand that fictional statement is defamatory). In determining that the first amendment prohibits individuals from recovering defamation damages for the press' assertion of unbelievable statements, courts have recognized that defamation requires a false statement of fact. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (dictum) (requiring false statement of fact in defamation actions); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (same); *Pring*, 695 F.2d at 440 (same); *see also* Comment, *supra*, at 413-14 (describing false statement of fact requirement). Unless a press' statement constitutes a false statement of fact, a plaintiff in a defamation action cannot establish the defamation proof requirement that the press knowingly or recklessly published a falsehood. *Letter Carriers*, 418 U.S. at 284; *see supra* note 10 (discussing requirement of knowing disregard of truth in defamation actions).

In determining whether a statement is defamatory, courts have distinguished between statements of facts and statements of opinion. *See, e.g., Letter Carriers*, 418 U.S. at 284 (distinguishing between statements of fact and statements of opinion); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (en banc) (same), *cert. denied*, 471 U.S. 1127 (1985); Lewis v. Time, Inc., 710 F.2d 549, 552-53 (9th Cir. 1983) (same); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983) (same). Courts have relied on the Supreme Court's dicta in *Gertz v. Robert Welch, Inc.* to find that a statement of pure opinion should receive absolute protection under the first amendment in defamation actions. *See, e.g.*, Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 223 (2d Cir. 1985) (pure opinion receives absolute first amendment protection); *Ollman*, 750 F.2d at 975 (same); *Lewis*, 710 F.2d at 553 (same); *see also Gertz*, 418 U.S. at 339-40 (dictum) (statement of opinion should receive absolute first amendment protection); RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977) (pure opinion receives absolute protection). The Supreme Court in *Gertz* recognized that false opinions or ideas do not exist. *Gertz*, 418 U.S. at 339-40; *see Lewis*, 710 F.2d at 553 (citing *Gertz* for proposition that false ideas do not exist); *Rinsley*, 700 F.2d at 1307 (same). Courts have determined that even rhetorical hyperbole, a nonfactual statement that can serve to attack viciously particular individuals or groups, should have absolute first amendment protection when the stated rhetoric does not express believable, false facts. *See* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (rhetorical hyperbole that does not express believable situation does not constitute defamation); Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966) (phrase "those bastards" did not defame plaintiffs because no reasonable person would view phrase as expression of fact); *see also* B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION OF DEFENSE AND LITIGATION § 5.4.2.2, at 125-29 (1985) (describing types of rhetorical statements that receive absolute first amendment protection).

Although many courts extend absolute first amendment protection to opinion and rhetoric, a few courts have distinguished between pure opinion, an opinion based on stated or known facts, and mixed opinion, an opinion that implies defamatory, unstated facts. *See* Hoover v. Peerless Publications, Inc., 461 F. Supp. 1206, 1210 (E.D. Pa. 1978) (jury must decide whether statement constitutes actionable mixed opinion or nonactionable pure opinion); Pritsker v. Brudnoy, 389 Mass. 776, ____, 452 N.E.2d 227, 228 (1983) (same); Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 448-49, 211 S.E.2d 674, 690 (false headline injured plaintiff's reputation), *cert. denied*, 423 U.S. 882 (1975); *see also* RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977) (defining "pure opinion" and "mixed opinion"); B. SANFORD, *supra*, § 5.4.2.4, at 132 n.83 (listing courts that found mixed opinion actionable). While courts have afforded the writers of pure opinion virtually absolute protection under the first amendment in defamation actions, a writer who defames a plaintiff in a mixed opinion often is accountable to that plaintiff for defamation. *See* B. SANFORD, *supra*, § 5.4, at 113-38 (comparing pure and mixed opinion); *supra* note 9 and accompanying text (discussing how believable statements

both public figures[13] and private figures[14] to recover damages for the harm that the publication of satirical comments causes under tort theories other than defamation.[15] Recently, plaintiffs have attempted to recover damages

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printed in humorous context can defame individuals).

Although the Supreme Court has not established a method by which to distinguish fact from opinion, recent lower court decisions have developed standards by which to determine whether a statement constitutes fact or opinion. *See* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302-03 (10th Cir. 1985) (describing four-prong test for evaluating whether statement constitutes opinion), *cert. denied*, 107 S. Ct. 272 (1986); *Ollman*, 750 F.2d at 979 (same); *infra* notes 147-51 and accompanying text (discussing four-prong test). Generally, the determination of whether a statement expresses opinion or false facts depends on whether a reader of the controversial statement could understand the statement to describe actual facts. *Pring*, 695 F.2d at 440.

13. *See* R. SACK, *supra* note 9, at 196-207 (defining "public figure"); B. SANFORD, *supra* note 12, § 7.3.1, at 229-30 (same). The importance in distinguishing between public and private figures results from the Supreme Court's application of different proof requirements for public figures and private figures in defamation actions. *See supra* note 11 and accompanying text (discussing requirement that while public figure and public official in defamation action must prove actual malice, private figure may have to prove only negligence). The Supreme Court in *Gertz* impliedly recognized three types of public figures. *See Gertz*, 418 U.S. at 345-51 (discussing types of public figures); B. SANFORD, *supra* note 12, § 7.3.1, at 230 (listing three types of public figures that courts have recognized). The first category of public figures, the "pervasive" or "all-purpose" public figure, includes individuals who have access to the media and, by the individuals' conduct or achievement, have invited attention and commentary. *See* B. SANFORD, *supra* note 12, § 7.4.2, at 252 (defining "pervasive" public figures); *see also* R. SACK, *supra* note 9, at 200-01 (listing examples of "pervasive" public figures). The second type of public figure, the "limited purpose" or "vortex" public figure, is a person who has placed himself before the public to influence a particular public controversy. *See* R. SACK, *supra* note 9, at 197-98 (defining "vortex" public figures); *see also* B. SANFORD, *supra* note 12, § 7.4.2.2, at 257-69 (illustrating test for determining whether individual is "vortex" public figure). A third and rare category of public figure is a "nonvoluntary" public figure who, through notoriety, involuntarily enter a particular public controversy. *See* B. SANFORD, *supra* note 12, § 7.4.2.3, at 269-73 (defining "nonvoluntary" public figure). The Supreme Court in *Gertz* did not delineate the three categories of public figures to establish definitive prototypes, but described the three categories merely to illustrate examples of individuals who should constitute public figures. *See Gertz*, 418 U.S. at 343-44 (categories of public figures are merely generalities); B. SANFORD, *supra* note 12, § 7.4.2.1, at 249 (same).

Like public figure plaintiffs, public officials who sue the press for defamation must prove that the press acted with actual malice. *See supra* note 11 (discussing actual malice requirement in defamation actions). A public official is an elected or appointed government employee who has or appears to have substantial control over or responsibility for government affairs. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966); *see* R. SACK, *supra* note 9, at 189-90 (defining "public official").

14. *See* R. SACK, *supra* note 9, at 193-94 & 205-07 (providing examples of private figure plaintiffs); *see also* M. FRANKLIN, *supra* note 4, at 201-26 (discussing distinctions between public and private figures); *supra* note 13 (discussing importance of distinction between public and private figures).

15. *See* Falwell v. Flynt, 797 F.2d 1270, 1277 (4th Cir. 1986) (allowing public figure to recover damages under intentional infliction of emotional distress tort theory), *cert. granted sub nom.* Hustler Magazine, Inc. v. Falwell, 107 S. Ct. 1601 (1987); Garner v. Triangle Publications, 97 F. Supp. 546, 547 (S.D.N.Y. 1954) (denying summary judgment for invasion of privacy claim after defendant published fictionalized stories about plaintiff's criminal

under the intentional infliction of emotional distress tort[16] for nonlibelous satirical statements that neither convey believable facts nor create reputa-

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misconduct); Clifford v. Hollander, 6 MEDIA L. REP. (BNA) 2201, 2202 (N.Y. Civ. Ct. 1980) (allowing private figure plaintiff to recover damages under intentional infliction of emotional distress tort theory for distress that publication of humor caused); *see also* Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976) (allowing private figure plaintiff to recover damages under false light invasion of privacy theory); Cher v. Forum Int'l, Ltd., 692 F.2d 634, 640 (9th Cir. 1982) (allowing public figure to recover for exploitation of name for commercial purposes), *cert. denied*, 462 U.S. 1120 (1983). To recover damages for the harm that the publication of satirical comments creates, plaintiffs have alleged that the publication of nondefamatory statements invaded their privacy. *See Garner*, 97 F. Supp. at 550 (plaintiff alleged invasion of privacy in publication of nondefamatory material); *Clifford*, 6 MEDIA L. REP. (BNA) at 2202 (plaintiff recovered damages for emotional distress when no defamation existed). The idea of a "right to privacy" first emerged in a law review article by Samuel D. Warren and Louis D. Brandeis. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (introducing idea of "right to privacy"). The right to privacy embodies the "right to be let alone." *Id.* at 205. Most states currently recognize a tort claim for invasion of privacy, either by statute or case law. *See* R. SACK, *supra* note 9, at 390 (listing states that recognize invasion of privacy actions). Invasion of privacy theories include public disclosure of private facts, placing another in a "false light," and appropriation of name or likeness. *See infra* notes 46-49 and accompanying text (discussing invasion of privacy theories); *see also* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1253-77 (1976) (discussing invasion of privacy theories that plaintiffs use against press); Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (discussing categories of invasion of privacy causes of action).

16. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (defining "intentional infliction of emotional distress" tort); *see also* Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339, 344-45 (1985) (same); Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 26-27 (1983) (discussing history and development of intentional infliction of emotional distress tort); Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1750-51 (1985) (defining "intentional infliction of emotional distress"). The "intentional infliction of emotional distress" tort, the "outrage" tort, and the "*prima facie*" tort have very similar proof requirements and generally refer to the same tort action. *See* Kovner, *Recent Developments in Intrusion, Private Facts, False Light, and Commercialization Claims*, in 1 COMMUNICATIONS LAW 1985, at 465, 503 (PLI Patents, Copyrights, Trademarks, and Literary Property Handbook Series No. 210) (courts use different terms to refer to same tort action). The Restatement (Second) of Torts defines the intentional infliction of emotional distress as "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46 (1965). In an intentional infliction of emotional distress tort action, a plaintiff must establish four elements. *See* Note, *supra*, at 1750-51. An intentional infliction of emotional distress plaintiff must prove that the defendant's conduct was extreme and outrageous, that the defendant intentionally or recklessly caused emotional distress, that the suffered emotional distress was severe, and that the defendant's conduct caused the emotional distress. *See id.* (discussing elements in intentional infliction of emotional distress action). Although a plaintiff in an intentional infliction of emotional distress action theoretically must prove all four elements, the proof requirement of outrageous conduct usually is the determinative factor in most intentional infliction of emotional distress actions. *See* Drechsel, *supra*, at 345 (outrageous conduct is most important element in emotional distress action); Note, *supra*, at 1751 (outrageous conduct is central, if not only, element of emotional distress action). A court often will infer that the remaining elements exist upon a showing of highly outrageous conduct. *See* Note, *supra*, at 1751 (discussing courts that, after finding outrageous conduct in intentional infliction of emotional distress action, inferred existence of remaining elements).

tional injury.[17] Courts that allow plaintiffs to recover damages for emotional distress resulting from nondefamatory satire often have not applied first amendment defamation protections to claims of intentional infliction of emotional distress.[18] Although plaintiffs who plead the intentional infliction of emotional distress tort generally must prove injury[19] and intent,[20] the

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17. *See, e.g.*, Falwell v. Flynt, 797 F.2d 1270, 1272 (4th Cir. 1986) (plaintiff alleged that intentional infliction of emotional distress arose from nondefamatory satire), *cert. granted sub nom.* Hustler Magazine, Inc. v. Falwell, 107 S. Ct. 1601 (1987); Pring v. Penthouse Int'l, Inc., 695 F.2d 438, 442 (10th Cir. 1982) (discussing plaintiff's allegation that defendant intentionally caused emotional distress by publishing satirical story), *cert. denied*, 462 U.S. 1132 (1983); Martin v. Municipal Publications, 510 F. Supp. 255, 260 (E.D. Pa. 1981) (plaintiff alleged that defendant intentionally caused emotional distress by publishing satirical caption below plaintiff's picture); *see also* Ross v. Burns, 612 F.2d 271, 272 (6th Cir. 1980) (defendant counterclaimed that plaintiff intentionally inflicted emotional distress by publishing nude photographs of defendant); Koch v. Goldway, 607 F. Supp. 223, 224 (C.D. Cal. 1984) (plaintiff alleged that defendant intentionally inflicted emotional distress by printing editorial about plaintiff); Pierson v. News Group Publications, 549 F. Supp. 635, 642-43 (S.D. Ga. 1982) (plaintiff alleged that defendant intentionally inflicted emotional distress by printing embarrassing pictures of plaintiff). Although plaintiffs in both intentional infliction of emotional distress tort actions and defamation actions must prove the defendant's fault, the elements of a traditional intentional infliction of emotional distress tort action differ from the elements of a defamation action. *See* Drechsel, *supra* note 16, at 350 (emotional distress tort differs substantially from defamation tort); Mead, *supra* note 16, at 27 (same); *supra* note 16 (defining tort of intentional infliction of emotional distress). The intentional infliction of emotional distress tort has fewer elements than a defamation action, protects a victim's emotional rather than reputational interests, and focuses more clearly on the defendant's actual conduct. Mead, *supra* note 16, at 27; *see* Drechsel, *supra* note 16, at 350-52 (discussing differences between defamation and intentional infliction of emotional distress); *supra* note 16 (defining tort of intentional infliction of emotional distress).

18. *See* Martin v. Municipal Publications, 510 F. Supp. 255, 260 (E.D. Pa. 1981) (publishing satirical caption could be outrageous and extreme conduct, even absent defamation); *see also* Nally v. Grace Community Church of the Valley, 204 Cal. Rptr. 303, 308 (Cal. Ct. App. 1984) (first amendment does not protect intentional infliction of emotional distress); Note, *supra* note 16, at 1753 (first amendment rarely considered in intentional infliction of emotional distress actions). One commentator has noted that, although some courts considering intentional infliction of emotional distress claims address first amendment issues, the majority of courts rule for the defendant on common law principles and, therefore, do not expressly apply the first amendment to the intentional infliction of emotional distress tort. *See* Drechsel, *supra* note 16, at 348-50 (discussing courts' application of first amendment principles to intentional infliction of emotional distress tort actions).

19. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) (discussing injury requirement in intentional infliction of emotional distress actions); *see also supra* note 16 (discussing proof requirements in intentional infliction of emotional distress actions). In proving injury in an intentional infliction of emotional distress tort action, a plaintiff must show that the plaintiff actually suffered severe emotional distress as a result of the defendant's actions. *See* Note, *supra* note 16, at 1750 (discussing injury requirement of intentional infliction of emotional distress tort). Liability results only when the suffered emotional distress is so extreme that no reasonable man could endure the distress. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965); *see* Drechsel, *supra* note 16, at 346 (discussing severe injury requirement in intentional infliction of emotional distress actions). Although resulting bodily harm, such as shock or illness, is not a prerequisite to recovery for the intentional infliction of emotional distress tort, a defendant whose intentional actions cause bodily harm will be liable for both

United States Supreme Court never expressly has attached first amendment protections to the intentional infliction of emotional distress tort.[21] Because the Supreme Court has not applied first amendment protections to intentional infliction of emotional distress actions, courts often do not require that a plaintiff pleading intentional infliction of emotional distress meet the

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the emotional distress and the resulting bodily harm. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965). To recover for intentional infliction of emotional distress, a plaintiff must prove that severe distress occurred. *Id.* Although embarrassment, anger, worry, or disappointment may be severe, mental distress that causes only minor discomfort is not a basis for liability. Drechsel, *supra* note 16, at 345-46. A plaintiff in an intentional infliction of emotional distress action, however, can use the extreme and outrageous nature of the defendant's conduct to infer the existence of severe emotional distress. *Id.* at 346; *see* RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965) (outrageousness is evidence of injury).

In defining the "outrageous" element of an intentional infliction of emotional distress action, the Restatement (Second) of Torts states that outrageous conduct exists when an average member of a community, after hearing about a defendant's conduct, would exclaim, "Outrageous!" RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965); *see* Drechsel, *supra* note 16, at 345 (listing examples of outrageous conduct). Additionally, nonoutrageous conduct may become outrageous if the defendant knew of the plaintiff's special sensitivity to the defendant's injurious conduct. Dreschel, *supra* note 16, at 345.

20. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965) (plaintiff can recover for intentional infliction of emotional distress when actor intended to inflict severe emotional distress); *see also supra* note 16 (discussing elements of intentional infliction of emotional distress tort). A plaintiff can recover for the intentional infliction of emotional distress after proving that the defendant intended to cause severe emotional distress, or deliberately disregarded a substantial probability that the plaintiff's severe emotional distress would result. RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965). Because the defendant's intent to injure the plaintiff is an element of the intentional infliction of emotional distress tort, a plaintiff in an intentional infliction of emotional distress tort action must prove the defendant's fault in publishing a statement. *See* Drechsel, *supra* note 16, at 345 (emotional distress tort requires fault). The fault standard in intentional infliction of emotional distress actions, however, differs from the fault standards in defamation actions. *See supra* note 11 (discussing first amendment fault standards in defamation actions). For example, while a public figure plaintiff in a defamation action must prove that the press knowingly or recklessly published a false statement, an emotional distress plaintiff must prove that the press intended to harm emotionally the plaintiff by publishing either a false or true statement. *See* Mead, *supra* note 16, at 52-53 (comparing fault requirements in defamation and emotional distress actions). *Compare supra* note 11 (discussing defamation fault standards) *with* RESTATEMENT (SECOND) OF TORTS § 46 comment i (1965) (discussing intentional infliction of emotional distress fault standard).

21. *See* Rich & Brilliant, *supra* note 2, at 18-19 (Supreme Court has not resolved question of whether first amendment protections apply to all privacy actions); *see also* Drechsel, *supra* note 16, at 351-52 (courts do not universally apply first amendment to intentional infliction of emotional distress tort); Note, *supra* note 16, at 1753 (few courts considering intentional infliction of emotional distress claims have applied first amendment considerations to tort). *But see* Pring v. Penthouse Int'l, 695 F.2d 438, 442 (10th Cir. 1982) (applying first amendment considerations to intentional infliction of emotional distress tort), *cert. denied*, 462 U.S. 1132 (1983); Ault v. Hustler Magazine, 13 MEDIA L. REP. (BNA) 1657, 1662-63 (D. Or. 1986) (same); Doe v. Sarasota-Bradenton Television Corp., 436 So. 2d 328, 330 (Fla. Dist. Ct. App. 1983) (same); Boyles v. Mid-Florida Television Corp., 431 So. 2d 627, 636 (Fla. Dist. Ct. App. 1983) (same), *aff'd*, 467 So. 2d 282 (Fla. 1985).

first amendment defamation fault standard[22] or prove the injurious statement's falsity,[23] proof standards that the Supreme Court requires in defamation tort actions.[24] The availability of the intentional infliction of emotional distress tort claim in situations that do not involve libelous[25] satire circumvents the media protections that the Supreme Court has established in defamation actions, particularly when courts allow public figures to recover damages for emotional distress.[26] By imposing economic accountability on satirists for the emotional distress that a public figure endures from the publication of nondefamatory satire, courts will discourage satirists from expressing any opinion that might cause a public figure to experience any distress.[27]

Although the Supreme Court never expressly has attached first amendment protections to the intentional infliction of emotional distress tort, the Supreme Court, to encourage the free expression of ideas, has established strong first amendment protections for the press' statements in defamation actions.[28] Recognizing in 1964 that common-law defamation proof standards provided inadequate protection for the press,[29] the Supreme Court, in *New*

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22. *See supra* note 11 (discussing first amendment fault standard in defamation actions); *infra* notes 39 & 42 and accompanying text (discussing first amendment actual malice standard in defamation actions).

23. *See infra* note 38 and accompanying text (discussing requirement that defamatory statement must be false).

24. *See supra* note 11 (discussing first amendment fault requirement in defamation actions); *infra* notes 36-44 and accompanying text (discussing constitutional proof requirements in defamation actions).

25. *See* BLACK'S LAW DICTIONARY 825 (5th ed. 1979) (defining "libelous" as "defamatory"); *see also* R. SACK, *supra* note 9, at 43 (defining "libel"); *supra* note 9 (defining "libel").

26. *See* B. SANFORD, *supra* note 12, § 11.3.4, at 455 (proof requirements in intentional infliction of emotional distress actions ignore first amendment protections); Note, *supra* note 16, at 1778-83 (allowing public figure to recover for intentional infliction of emotional distress circumvents first amendment defamation law); *infra* notes 154-56, 166-72 and accompanying text (same); *see also infra* notes 36-39 and accompanying text (discussing first amendment protections that apply in defamation actions).

27. *See* Note, *supra* note 16, at 1758-61, 1785 (courts that allow plaintiffs to recover for intentional infliction of emotional distress create danger of censorship of unpopular ideas); *supra* notes 4-5 and accompanying text (discussing Supreme Court's attempts to encourage free expression of ideas).

28. *See* New York Times Co. v. Sullivan, 376 U.S. 259, 279-80 (1964) (requiring courts to apply first amendment protection to press' publications in defamation actions); *supra* note 11 (discussing first amendment standards that courts must apply in defamation actions); *infra* notes 36-44 and accompanying text (same).

29. *See* C. MORRIS, *supra* note 11, at 5 (under common law, plaintiffs in defamation actions could recover substantial damages without proof of fault or loss); B. SANFORD, *supra* note 12, § 6.2.1, at 162 (under common law, falsity of defamatory statement was not genuine prerequisite to liability); Note, *supra* note 12, at 429-30 (common-law defamation afforded media defendants little protection). Under the common law, the Supreme Court did not require that courts attach first amendment considerations to defamation actions. Comment, Hepps v. Philadelphia Newspapers, Inc.*: The Validity of the Common Law Presumption of Falsity in Light of* New York Times *and its Progeny*, 61 NOTRE DAME LAW. 125, 130 (1986). Under the

York Times v. Sullivan,[30] determined that, because the public can benefit from an uninhibited press, the first amendment freedom of the press must apply to defamation actions, at least if the plaintiff is a public official.[31] The first amendment provides that Congress shall not enact a law that will curtail freedom of the press.[32] The first amendment, however, does not

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common law, a plaintiff in a defamation action had to plead at least four elements. *See* Comment, *supra*, at 128 (describing common-law proof requirements in defamation actions). First, a plaintiff had to plead that the defendant had communicated a statement of fact to a third party. *Id.*; *see* N. ROSENBERG, PROTECTING THE BEST MEN 5 (1986) (under common law, defamatory statement was nonactionable unless third party heard statement); *supra* note 12 (distinguishing statements of fact and opinion). Second, a defamation plaintiff had to plead that the communicated item was defamatory. *See* Comment, *supra*, at 128 & n.17 (describing defamatory statement requirement); *supra* note 9 (defining "defamation"). Third, a plaintiff in a defamation action had to show that the communicated item was "of and concerning" the plaintiff. *See* Comment, *supra*, at 128 & n.18 (describing defamation requirement that communicated statement concerned plaintiff). Last, the plaintiff had to plead that the communicated item was false. *See id.* at 128-29 (describing falsity requirement).

Although the plaintiff in a common law defamation action had to plead that a defamatory statement was false, the defamed plaintiff did not necessarily have to prove the statement's falsity. Comment, *supra*, at 129. Under the common law, courts presumed that a communicated defamatory statement was false. *See* RESTATEMENT (SECOND) OF TORTS § 581A comment b, at 235-36 (1977) (explaining common-law presumption of falsity); Comment, *supra*, at 129 & n. 21 (same). Although truth was an absolute defense in common-law defamation actions, courts placed the burden of proving a defamatory statement's truth on the defendant. *See* Sack, *Common Law Libel and the Press—A Primer*, in 1 COMMUNICATIONS LAW 1985, at 1, 29 (PLI Patents, Copyrights, Trademarks, and Literary Property Handbook Series No. 210) (under common law, defendant in defamation action had to prove truth of defamatory statement); Comment, *supra*, at 129 (at common law, burden of proving truth was on press). *But see* Krutech v. Schimmel, 27 A.D.2d 837, 837, 278 N.Y.S.2d 25, 26 (1966) (plaintiff in common-law defamation action must prove statement's falsity when defendant has qualified privilege); Comment, *supra*, at 129 & nn.23-24 (under common law, defendant could escape liability for untrue defamatory statement by proving existence of privilege). Because the press sometimes had difficulty in overcoming the common law presumption of a defamatory statement's falsity, a speaker of a true statement conceivably could be liable for defamation. *See* B. SANFORD, *supra* note 12, § 6.2.1, at 162 (under common-law defamation, falsity of defamatory statement was not always prerequisite to liability).

In addition to creating the possibility that plaintiffs in common-law defamation actions might recover defamation damages for true statements, courts under the common law allowed plaintiffs to succeed in defamation actions against defendants who had not exhibited any fault. *See* C. MORRIS, *supra* note 11, at 5 (under common law, person who innocently made defamatory statement could be liable for defamation). In the majority of courts, fault was not an element of common-law defamation. *See* C. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL 129 (1971) (describing common-law majority view of fault); C. MORRIS, *supra*, at 5-6 (same). If the press published a statement that the press honestly believed was true, a court still could impose liability on the press for defamation if later investigation proved that the statement was false. *See* Post Publishing Co. v. Hallam, 59 F. 530, 540-41 (6th Cir. 1893) (press is liable for false statement even though press, after making careful investigation, thought that statement was true). *But see* C. LAWHORNE, *supra*, at 152 (describing minority court view that honest belief in statement's truth defeated common law defamation claim).

30. 376 U.S. 254 (1964).

31. *Id.* at 279.

32. U.S. CONST. amend. I.

provide the press with an absolute protection against defamation actions.[33] Although some commentators have argued that the Constitution grants the first amendment freedom of the press without qualification,[34] the Supreme Court, recognizing that the freedom of the press is not absolute, requires courts considering defamation actions to balance the press' freedom to publish against an individual's reputational interests.[35]

To provide a balance between the freedom of the press and an individual's reputational interests, the Supreme Court has devised constitutional standards for courts to apply in defamation actions.[36] The Court requires that, for a plaintiff to recover for defamation, the plaintiff must establish that the published statement injured the plaintiff's reputation,[37] that the published statement was false,[38] and that the publisher acted with some

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33. *See supra* note 5 (first amendment protections are not absolute); *supra* note 11 (discussing proof requirements in defamation actions); *infra* notes 36-44 and accompanying text (same).

34. *See supra* note 7 and accompanying text (discussing commentators' argument that Constitution grants absolute first amendment rights).

35. *See supra* note 5 and accompanying text (discussing Supreme Court's interest balancing in first amendment cases); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (granting press first amendment protection in public official defamation actions except when public official proves actual malice).

36. *See supra* note 11 (describing constitutional first amendment standards for defamation actions); *see, e.g.*, Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2514 (1986) (requiring plaintiffs in defamation actions to show actual malice with "clear and convincing evidence" at summary judgment stage of trial); Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563-64 (private figure plaintiff has burden of showing defamatory statement's falsity), *cert. denied*, 106 S. Ct. 1784 (1986); Time, Inc. v. Firestone, 424 U.S. 448, 454-54 (1976) (restricting definition of public figure); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (states may develop fault standards for private figure defamation actions); Curtis Publishing Co. v. Butts, 388 U.S. 130, 264-65 (1967) (Warren, C.J., concurring) (to recover for defamation, public figures must prove that press published defamatory statement with actual malice); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (public official in defamation action must prove falsity of defamatory statements); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (to recover for defamation, public officials must prove that press published defamatory statements with actual malice).

37. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (requiring defamatory statement in defamation action); B. SANFORD, *supra* note 12, § 4.2, at 76 (1985) (discussing reputational injury requirement in defamation actions).

38. *See* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1564 (requiring private figure plaintiffs in defamation actions to prove defamatory statements' falsity), *cert. denied*, 106 S. Ct. 1784 (1986); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (requiring public figure plaintiffs in defamation actions to prove defamatory statements' falsity). Under common-law defamation, courts often required a defendant in a defamation action to prove that the defendant's allegedly defamatory statement was true. *See* Trahan v. Ritterman, 368 So. 2d 181, 184 (La. Ct. App. 1979) (requiring defendant to prove truth of defamatory statement); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) (discussing common-law assumption that defamatory statement was untrue). Plaintiffs in common-law defamation actions did not have to show that allegedly defamatory statements were false and, therefore, conceivably could recover damages for the publication of true statements if defendants could not prove the truth of the statements. B. SANFORD, *supra* note 12, at 161-62. In *Garrison v. Louisiana*, however, the United States Supreme Court held that, if a published statement concerned a

degree of fault.[39] In determining the degree of fault that a defendant must exhibit before a plaintiff can succeed in a defamation action, courts first distinguish between "public figure" plaintiffs and "private figure" plaintiffs.[40] The Supreme Court has distinguished between public and private figures by recognizing that a public figure voluntarily has "thrusted" himself before the public to influence the outcome of particular public issues, but that a private figure has not.[41] While states can allow private figures to recover damages after showing that the press negligently published a defamatory statement, the Court requires that if a plaintiff is a public figure, the plaintiff must establish that the press published the allegedly defamatory statement with "actual malice," a knowing or reckless disregard of the truth.[42] Although the actual malice standard does not provide the press with an absolute privilege to print any falsehood about a public figure, public figures have difficulty in overcoming the strict actual malice proof standard, as well as the reputational injury and falsity proof requirements.[43] The first amendment protections that the Court has adopted in defamation actions substantially have protected the press by reducing the likelihood that public

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public figure plaintiff, the public figure must show that the published statement was false. *Garrison*, 379 U.S. at 74. Additionally, in *Philadelphia Newspapers, Inc. v. Hepps*, the Supreme Court determined that a private figure plaintiff must prove an allegedly defamatory statement's falsity if the statement involves a matter of public concern. *Hepps*, 106 S. Ct. at 1564; *see* B. SANFORD, *supra* note 12, at 170 n.71 (listing courts that required plaintiff to prove falsity prior to *Hepps*). Although the Court in *Hepps* requires private figure plaintiffs to prove defamatory statements' falsity if the statements involve a matter of public concern, the Court did not expressly extend the burden of proving falsity to all private figure plaintiffs. *See Hepps*, 106 S. Ct. at 1563 (limiting decision to statements that involve matters of public concern). Courts, therefore, still may be able to require defendants in defamation actions affirmatively to prove the truth of defamatory statements if those statements involve private figures and do not involve matters of public concern. *See id. But see In re* IBP Confidential Business Documents Litig., 797 F.2d 632, 647-48 (8th Cir. 1986) (implying that, under *Hepps*, all private figure plaintiffs must prove falsity of defamatory statements).

39. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (states can establish fault standards for private figure plaintiffs in defamation actions); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (public figure plaintiffs in defamation actions must show that media defendants acted with knowing or reckless disregard of truth); *supra* note 11 (discussing constitutional fault standards for defamation actions).

40. *See Gertz*, 418 U.S. at 348 (permitting different proof standards for public and private figure plaintiffs in defamation actions); *supra* notes 13-14 and accompanying text (differentiating between public and private figures); *supra* note 11 (describing different fault standards for private and public figures).

41. *Gertz*, 418 U.S. at 344-45; *see supra* note 13 (describing types of public figures).

42. *See Gertz*, 418 U.S. at 347-48 (allowing states to develop different fault standards for private figures and public figures); Curtis Publishing Co. v. Butts, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring) (requiring public figures to meet actual malice fault standard); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring public officials to meet actual malice fault standard); *supra* note 11 (defining "actual malice").

43. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing actual malice standard as proof requirement in public official defamation actions); B. SANFORD, *supra* note 12, § 8.1, at 285 (recognizing difficulty that public figures have in meeting actual malice standard); *supra* note 13 (defining "public figure").

figure plaintiffs can succeed in defamation suits against the press.[44]

Although the Supreme Court has established strict proof requirements in public figure defamation actions, numerous courts recently have allowed both private and public figure plaintiffs to recover damages on causes of action other than defamation.[45] When a statement allegedly injures a plaintiff's reputation, many plaintiffs in defamation actions plead not only defamation in violation of the first amendment, but also one or more invasion of privacy tort claims,[46] including public disclosure of private facts,[47] appropriation of name or likeness,[48] and "false light" invasion of privacy.[49] Plaintiffs often have attempted to bypass the strict proof requirements of traditional first amendment defamation actions by pleading one or more of these alternative causes of action.[50] For example, in *Time, Inc.*

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44. *See* B. SANFORD, *supra* note 12, § 8.1, at 285 (public figures have difficulty in winning defamation suits); *Appeals Court Libel Ruling Hailed As Investigative Journalism Victory*, Washington Post, March 14, 1987, § A, at 9, col. 1 (same).

45. *See* Rich & Brilliant, *supra* note 2, at 15 (plaintiffs increasingly plead alternative causes of action); *supra* note 15 (discussing alternative causes of action).

46. *See, e.g.*, Pring v. Penthouse Int'l, 695 F.2d 438, 442 (10th Cir. 1982) (discussing plaintiff's claims for libel, "false light" invasion of privacy, and "outrageous conduct"), *cert. denied*, 462 U.S. 1132 (1983); Ross v. Burns, 612 F.2d 271, 272 (6th Cir. 1980) (defendant counterclaimed for invasion of privacy and emotional distress); Geisler v. Petrocelli, 616 F.2d 636, 637 (2d Cir. 1980) (plaintiff alleged libel and various privacy invasions); Ault v. Hustler, Inc., 13 MEDIA L. REP. (BNA) 1657, 1658 (D. Or. 1986) (same); Koch v. Goldway, 607 F. Supp. 223 (C.D. Cal. 1984) (plaintiff alleged libel and emotional distress); Cibenko v. Worth Publishers, Inc., 510 F. supp. 761, 764 (D.N.J. 1981) (plaintiff alleged libel and "false light" invasion of privacy); *see supra* note 15 and accompanying text (discussing and defining invasion of privacy tort theory).

47. *See* Sidis v. F-R Publishing Corp., 113 F.2d 806, 808 (2d Cir.) (plaintiff alleged public disclosure of private facts), *cert. denied*, 311 U.S. 711 (1940); Branson v. Fawcett Publications, Inc., 124 F. Supp. 429, 430 (E.D. Ill. 1954) (same); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining "public disclosure of private facts" tort); R. SACK, *supra* note 9, at 402 (same).

48. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) (allowing plaintiff to recover for press' broadcast of plaintiff's entertainment act); Friedan v. Friedan, 414 F. Supp. 77, 78 (S.D.N.Y. 1977) (plaintiff alleged appropriation of plaintiff's picture); *see also* RESTATEMENT (SECOND) OF TORTS § 652C (1977) (defining "appropriation of name or likeness" tort); R. SACK, *supra* note 9, at 439-40 (same).

49. *See, e.g.*, Pring v. Penthouse Int'l, 695 F.2d 438, 442 (10th Cir. 1982) (discussing plaintiff's claims for libel, "false light" invasion of privacy, and "outrageous conduct"), *cert. denied*, 462 U.S. 1132 (1983); Geisler v. Petrocelli, 616 F.2d 636, 637 (2d Cir. 1980) (plaintiff alleged libel and various privacy invasions); Ault v. Hustler, Inc., 13 MEDIA L. REP. (BNA) 1657, 1658 (D. Or. 1986) (same); Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 764 (D.N.J. 1981) (plaintiff alleged libel and "false light" invasion of privacy); Martin v. Municipal Publications, 510 F. Supp. 255, 259 (E.D. Pa. 1981) (same); *see also* R. SACK, *supra* note 9, at 393-94 (defining "false light" invasion of privacy). The "false light" invasion of privacy action protects an individual's interest in emotional stability. R. SACK, *supra* note 9, at 393. The "false light" cause of action differs from defamation in that, while plaintiffs in "false light" actions recover for injured feelings, defamation plaintiffs recover for injured reputation. *Id.* To recover for "false light" invasion of privacy, a plaintiff must show that the defendant made a public statement about the plaintiff that was substantially and materially false. *Id.*

50. *See* Mead, *supra* note 16, at 31 (discussing cases in which plaintiffs attempted to avoid defamation proof requirements).

v. Hill,[51] the Supreme Court considered whether the first amendment permits a plaintiff to recover for invasion of privacy when a press statement places the plaintiff in a "false light" but does not defame the plaintiff.[52] In *Hill*, the New York Court of Appeals affirmed a jury's finding of liability against the defendant under the "false light" invasion of privacy theory after the defendant published an untrue story which stated that a new play depicted the plaintiff's escape from convict captors.[53] The Supreme Court in *Hill* defined "false light" invasion of privacy as the use of a person's name or picture as the subject of a fictitious report or article.[54] The Supreme Court in *Hill* recognized that a state, through statutory law, could create and enforce a "false light" invasion of privacy tort action to provide plaintiffs with an alternative to the defamation cause of action in suits concerning the press' publication of inaccurate statements.[55] The Supreme Court in *Hill*, however, determined that a state statute violates the first amendment if the statute allows a plaintiff to recover for invasion of privacy without requiring the plaintiff to prove that the media defendant acted with actual malice, the knowing or reckless publication of a falsehood.[56] The Supreme Court in *Hill*, therefore, found that the same first amendment considerations that require a plaintiff to prove actual malice in defamation actions also require a plaintiff to prove actual malice in invasion of privacy actions against the press.[57]

Although the Supreme Court in *Hill* recognized that plaintiffs in invasion of privacy actions must prove the press' fault in publishing a defamatory statement, the Supreme Court has not expressly required that a plaintiff in

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51. 385 U.S. 374 (1966).

52. *Id.* at 387-88.

53. *Id.* at 379-80. In *Time, Inc. v. Hill*, the plaintiffs complained that *Life*, a magazine published by defendant Time, Inc. (Time), falsely reported that a fictionalized play reenacted the plaintiff's family's struggle to escape from the family's captors. *Id.* at 377. The plaintiff stated that, while escaped convicts detained the plaintiff and his family, the escaped convicts had treated the plaintiff courteously and had released the plaintiff and his family without harm. *Id.* at 378. The play that *Life* described, however, portrayed a family that captors had treated violently. *Id.*

The plaintiff in *Hill* brought an action against Time for portraying the plaintiff's experience in a "false light." *Id.* at 376-77. A New York statute allowed plaintiffs to recover for invasion of privacy if a person, firm, or corporation used the plaintiff's name for advertising or trade purposes. *Id.* at 376 n.1; *see* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) (establishing limited cause of action for invasion of privacy). The Supreme Court, however, determined that New York courts had construed the statute broadly to allow recovery for numerous privacy invasions. *Id.* at 381-82.

54. *Hill*, 385 U.S. at 384. In defining "false light" invasion of privacy, the Supreme Court in *Hill* accepted the definition of "false light" in the New York privacy statute upon which the plaintiff had based his suit. *Id.*; *see* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976) (establishing limited cause of action for invasion of privacy). The Court recognized that truth was a complete defense to the New York statute's "false light" invasion of privacy action. *Hill*, 376 U.S. at 382-83.

55. *Hill*, 385 U.S. at 384-85 n. 9.

56. *Id.* at 387-88.

57. *Id.*

an invasion of privacy action always must prove that the injurious statement was false before recovering damages.[58] The Supreme Court, however, increasingly has expanded application of the defamation falsity requirement to invasion of privacy actions that deal with harm inflicted by published statements.[59] For example, in *Cox Broadcasting Co. v. Cohn*,[60] the Supreme Court considered whether plaintiffs can recover for invasion of privacy when the media discloses true statements.[61] In *Cox Broadcasting*, the father of a deceased rape victim sued a media defendant on an invasion of privacy claim for publicly announcing the rape victim's name.[62] The Court in *Cox Broadcasting*, recognizing that the public relies on the press to inform society about facts and events,[63] held that the courts could not punish the press for publishing truthful information obtained from public court records.[64] Although the Court in *Cox Broadcasting* limited its decision to the publication of truthful information about private figures, the Court, in dictum, recognized a more substantial right for the press against public figures in invasion of privacy actions.[65] The Court in *Cox Broadcasting* recognized that a statement's truth is an absolute defense against public figures in privacy invasion actions when the published information is a matter of public interest.[66] Because courts generally recognize that infor-

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58. *See* Rich & Brilliant, *supra* note 2, at 18-19 (recognizing that Supreme Court has not determined whether first amendment standards apply to all invasion of privacy actions); *see also* Drechsel, *supra* note 16, at 351-52 (courts inconsistently apply first amendment standards to privacy actions).

59. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (barring state from punishing newspaper for publishing truthful information legally obtained); Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 490 (1975) (prohibiting punishment for publishing true information obtained from public records); *Hill*, 385 U.S. at 382-83 (stressing importance of complete defense of truth in "false light" privacy action); *see also supra* note 38 and accompanying text (discussing falsity requirement in defamation actions).

60. 420 U.S. 469 (1975).

61. *See id.* at 490-96 (considering whether plaintiff can recover for defendant's publication of true information that press defendant received from open public records).

62. *Id.* at 471, 474. In *Cox Broadcasting Co. v. Cohn*, a reporter covered a rape trial in which the rape victim had died. *Id.* at 472. The reporter discovered the name of the rape victim, the plaintiff's daughter, by examining public records. *Id.* The television station for which the reporter had covered the story publicly named the plaintiff's daughter as the rape victim. *Id.* at 473-74. The rape victim's father sued the television station for invasion of the plaintiff's right to privacy. *Id.*

63. *Id.* at 491-92.

64. *Id.* at 490. In *Cox Broadcasting*, the United States Supreme Court stated that the first amendment requires that truth must act as an absolute defense against privacy actions brought by public officials and public figures, at least when the published information concerns a matter of public interest. *Id.* In considering private figure plaintiffs, however, the Supreme Court limited its decision to deciding that private figures could not recover damages in a privacy action for the publication of nondefamatory, truthful information contained in official court records. *Id.* at 496.

65. *See id.* at 489-90 (dictum) (recognizing that public figure cannot recover privacy damages for publication of truthful information that concerns matter of public interest).

66. *Id.* at 490.

mation about a public figure's life is a matter of public interest,[67] the Court, through dictum in *Cox Broadcasting*, appears to give the press a stringent defense against invasion of privacy actions brought by public figures for the publication of truthful information.[68]

Although Supreme Court decisions suggest that public figure plaintiffs must establish falsity and actual malice to recover for invasion of privacy, some courts recently have allowed plaintiffs to circumvent first amendment defamation proof requirements by permitting plaintiffs to plead the intentional infliction of emotional distress tort.[69] When courts first recognized the viability of the intentional infliction of emotional distress tort, courts permitted plaintiffs to recover damages for the intentional infliction of emotional distress only after a court had found the defendant liable under a traditional tort claim, such as assault or battery.[70] Gradually, courts began to allow plaintiffs to claim emotional distress as an independent tort when the harm that the plaintiffs suffered failed to fall into any traditional tort claim.[71] Increasingly, plaintiffs alleging that emotional distress resulted from a press publication have pleaded the intentional infliction of emotional distress tort as an independent cause of action in defamation and privacy tort actions.[72] If a court, using first amendment proof standards, finds that the printed material is defamatory, the court traditionally allows a defamed plaintiff to recover damages not only for reputational injury, but also for the emotional distress that results from a defamatory statement.[73] If a court

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67. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974) (public information about "all-purpose public figure" extends to all contexts of public figure's life); Monitor Patriot Co. v. Roy, 401 U.S. 265, 274, 277 (1971) (information of public interest reaches far beyond customary meaning of "official conduct"); Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (recognizing that any information affecting public official's fitness for office is matter of public interest, notwithstanding that information might intrude on public official's private life); B. SANFORD, *supra* note 12, § 7.2.4, at 225-26 (courts apply liberal standard in determining whether information about public official is of public interest); *supra* note 13 (defining public figure).

68. *See Cox Broadcasting*, 420 U.S. at 490 (recognizing press privilege to publish truthful information about public figure).

69. *See* Parnell v. Booth Newspapers, Inc., 572 F. Supp. 909, 920-21 (W.D. Mich. 1983) (refusing to apply first amendment defamation privilege to intentional infliction of emotional distress action); Apostle v. Booth Newspapers, Inc., 572 F. Supp. 897, 908-09 (W.D. Mich. 1983) (same); Mead, *supra* note 16, at 31 (discussing cases in which courts allowed plaintiffs to recover emotional distress damages when defendant had not made defamatory statements); *supra* note 16 (discussing elements of intentional infliction of emotional distress tort).

70. *See* Mead, *supra* note 16, at 38 n.20 (listing cases in which courts attached parasitically emotional distress damages to defamation damages).

71. *Id.*

72. *See, e.g.*, Ross v. Burns, 612 F.2d 271, 272 (6th Cir. 1980) (plaintiff alleged privacy invasion and intentional infliction of emotional distress); Ault v. Hustler Magazine, Inc., 13 MEDIA L. REP. (BNA) 1657, 1658 (D. Or. 1986) (plaintiff claimed libel, intentional infliction of emotional distress, and numerous privacy invasions); Koch v. Goldway, 607 F. Supp. 223, 224 (C.D. Cal. 1984) (plaintiff claimed defamation and intentional infliction of emotional distress).

73. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (in defamation action,

determines that a statement is not defamatory, a court that allows a plaintiff to recover for the intentional infliction of emotional distress without requiring that the plaintiff prove actual malice and falsity ignores the first amendment protections of the freedom of the press that the Supreme Court established in *New York Times*.[74] In a defamation action, the Supreme Court, under the *New York Times* first amendment standards, requires that a plaintiff prove a defamatory statement's falsity before recovering for defamation.[75] The traditional definition of the intentional infliction of emotional distress tort, however, does not require explicitly that the published statements be false before a plaintiff can recover.[76]

In addition to some courts' failure to require falsity in emotional distress actions, courts apply varying fault standards in emotional distress cases.[77] Some courts, attaching first amendment fault standards to emotional distress actions, require plaintiffs to prove that the press published a statement with actual malice.[78] The traditional proof requirements for intentional infliction of emotional distress actions, however, rely on common-law principles, and do not embody the first amendment protections that defamation law requires.[79] Most definitions of the intentional infliction of emotional distress tort require only that a plaintiff prove that a defendant intentionally or

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plaintiff receives damages for reputational injury, personal humiliation, and mental distress); Schrottman v. Boston Globe, 7 MEDIA L. REP. (BNA) 1487, 1488 (Mass. 1981) (awarding plaintiff in defamation action damages for reputational injury and mental anguish); Hill, *supra* note 15, at 1252 (describing damages that defamed plaintiffs receive in defamation actions).

74. *See* Mead, *supra* note 16, at 28 (describing erratic application of first amendment standards in intentional infliction of emotional distress cases).

75. *See supra* note 38 (plaintiffs in defamation actions generally must prove falsity of defamatory statements).

76. Drechsel, *supra* note 16, at 349; *see* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (describing requirements in intentional infliction of emotional distress actions); *supra* note 16 (same). *But see* Lerette v. Dean Witter Org., Inc., 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592, 595-96 (1976) (if defamation claim fails, intentional infliction of emotional distress claim based on same nondefamatory statement also must fail); Williams v. New York Times, 10 MEDIA L. REP. (BNA) 1494, 1495 (Fla. Cir. Ct. 1984) (prohibiting liability for publishing true statements).

77. *See* Mead, *supra* note 16, at 28 (courts apply varying fault standards in intentional infliction of emotional distress actions). *Compare* Martin v. Municipal Publications, 510 F. Supp. 255, 260 (E.D. Pa. 1981) (applying common law standards to intentional infliction of emotional distress case) *with* Weingarten v. Block, 102 Cal. App. 3d 129, 151, 169 Cal. Rptr. 701, 716 (1980) (applying first amendment standards to intentional infliction of emotional distress case).

78. Weingarten v. Block, 102 Cal. App. 3d 129, 147, 151, 162 Cal. Rptr. 701, 714, 716 (1980) (requiring plaintiff to prove actual malice to recover for intentional infliction of emotional distress); *see* Williams v. New York Times, 10 MEDIA L. REP. (BNA) 1494, 1495 (Fla. Cir. Ct. 1984) (attaching first amendment protection to intentional infliction of emotional distress action); Drechsel, *supra* note 16, at 349 n.67 (discussing court that applied actual malice standard to intentional infliction of emotional distress tort).

79. Drechsel, *supra* note 16, at 351-52; *see supra* notes 17-18 and accompanying text (discussing different proof requirements in defamation actions and intentional infliction of emotional distress actions).

recklessly caused severe emotional distress through outrageous conduct.[80] This definition of the intentional infliction of emotional distress creates particular problems for satirical writers and cartoonists.[81] The "intentional" standard that the emotional distress tort requires strongly resembles the common-law "ill will" fault standard that the Supreme Court in *New York Times* specifically rejected.[82] Additionally, because one purpose of satire is to make readers uncomfortable about accepted political and social trends, satirists may be liable under the "outrageous" standard when the satire succeeds in meeting the satirist's intended goal of invoking discomfort.[83]

Although most cases in which courts have found a media defendant liable under the common-law definition of intentional infliction of emotional distress have involved private figure plaintiffs, the United States Court of Appeals for the Fourth Circuit, in *Falwell v. Flynt*,[84] recently allowed a public figure plaintiff to recover damages for the intentional infliction of emotional distress after the public figure failed to succeed on a libel claim.[85] In *Falwell*, Hustler Magazine, Inc. (Hustler) published a satirical "ad parody" involving Jerry Falwell, a nationally known fundamentalist minister, in two separate issues of *Hustler* magazine.[86] The parody imitated a nationally circulated advertisement that used double entendres to intimate a relationship between a celebrity's first sexual experience and first exposure to the advertiser's product.[87] The *Hustler* parody described Falwell's first sexual encounter as an incestuous relationship with his mother.[88] The magazine, however, printed a disclaimer with the parody which stated that

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80. *See* Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974) (describing proof requirements in intentional infliction of emotional distress cases); RESTATEMENT (SECOND) OF TORTS § 46 (1965) (same); *see also* Martin v. Municipal Publications, 510 F. Supp. 255, 260 (E.D. Pa. 1981) (citing section 46 of RESTATEMENT).

81. *See* Dorsen, *supra* note 1, at 926-28 (describing problems for satirists when little protection exists for controversial statements).

82. *See* Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964) (proof that defendant acted with "ill will" against plaintiff does not constitute actual malice); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official plaintiff in defamation action must prove that press knowingly or recklessly published falsehood); Drechsel, *supra* note 16, at 351 (describing differences in defamation and intentional infliction of emotional distress fault standards); *supra* note 11 (defining "actual malice").

83. *See* Dorsen, *supra* note 1, at 927 (good satire often causes hurt feelings); Mead, *supra* note 16, at 28 (courts inconsistently apply proof standards in emotional distress actions); Note, *supra* note 16, at 1777-78 (discussing probability that courts will impose liability under intentional infliction of emotional distress tort for offensive humorous ideas).

84. 797 F.2d 1270 (4th Cir. 1986), *cert. granted sub nom.* Hustler Magazine, Inc. v. Falwell, 107 S. Ct. 1601 (1987).

85. *Id.* at 1277.

86. *See id.* at 1272 (discussing parody published in *Hustler* magazine).

87. *See id.* (describing *Hustler*'s ad parody).

88. *See id.* In *Falwell v. Flynt*, the ad parody that was the basis of Falwell's defamation and emotional distress claims depicted Falwell's first sexual encounter as an incestuous relationship with his mother in an outhouse in Lynchburg, Virginia. *See id.* The ad parody also portrayed Falwell as a drunkard. *Id.*

readers should not consider seriously the advertisement's content.[89]

On October 31, 1983, Falwell filed an action for defamation, invasion of privacy, and intentional infliction of emotional distress in the United States District Court for the Western District of Virginia against Hustler, *Hustler*'s publisher Larry Flynt (Flynt), and Flynt Distributing Company (FDC).[90] The district court in *Falwell* dismissed Falwell's invasion of privacy claim, ruling that Virginia law provides a right of action for invasion of privacy only if a person uses another person's name or likeness for purposes of trade or advertising.[91] The district court in *Falwell* determined that Hustler did not use Falwell's name for purposes of trade or advertising.[92] The district court in *Falwell* sent the questions of defamation and intentional infliction of emotional distress to the jury.[93] The jury found for Hustler on the defamation claim, determining that no reasonable man could believe that Hustler had described actual facts about Falwell in its ad parody.[94] The jury found for Falwell, however, on the intentional infliction of emotional distress claim and awarded Falwell $200,000 in damages.[95]

On the defendants' appeal of the emotional distress award, the Fourth Circuit in *Falwell* considered whether a public figure plaintiff can recover from the press for emotional distress that results from nonlibelous satirical statements[96] and whether, absent defamation, the first amendment "actual

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89. *See id.* The disclaimer to the ad parody in *Falwell* appeared in small print at the bottom of the page containing the ad parody. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1150 (9th Cir. 1986). The disclaimer stated "Ad Parody—Not to Be Taken Seriously." *Id.* Additionally, the table of contents of the November 1983 issue of *Hustler* listed the parody as "Fiction; Ad and Personality Parody." *Falwell*, 797 F.2d at 1272.

90. *See Falwell*, 797 F.2d at 1272-73 (discussing district court adjudication of Falwell's suit against Hustler).

91. *See id.* at 1273 (discussing district court's dismissal of Falwell's invasion of privacy claim). In *Falwell v. Flynt*, the United States District Court for the Western District of Virginia recognized that Section 8.01-40 of the Virginia Code creates a cause of action for damages that result from using a person's name or likeness for purposes of trade or advertising without that person's consent. *See id.* (discussing district court decision); *see* VA. CODE ANN. § 8.01-40 (1984) (creating limited cause of action for invasion of privacy). The district court in *Falwell*, however, determined that Falwell's invasion of privacy claim did not meet the requirements of the Virginia Code definition because the Virginia statute would allow recovery for privacy invasion only if Hustler had used Falwell's name for advertising purposes. *See Falwell*, 797 F.2d at 1273 (discussing district court decision); *see also* VA. CODE ANN. § 8.01-40 (1984) (creating limited cause of action for invasion of privacy); *infra* note 92 and accompanying text (discussing reason that Falwell's invasion of privacy claim failed).

92. *See Falwell*, 797 F.2d at 1273 (discussing district court decision in *Falwell*).

93. *See id.*

94. *See id.*

95. *See id.* (discussing *Falwell* district court decision). In *Falwell*, the jury at the district court level found against Hustler and Flynt on the emotional distress claim, but found Flynt Distributing Co. innocent of the emotional distress claim. *See id.* The jury determined that Falwell had suffered $100,000 in actual damages and, in addition, assessed $50,000 in punitive damages against Flynt and $50,000 in punitive damages against Hustler. *See id.*

96. *Id.* at 1276-77. In *Falwell*, in addition to Hustler's appeal of the jury's award of damages for the intentional infliction of emotional distress, Falwell filed a counterappeal of

malice'' standard of *New York Times* should apply to emotional distress actions against the press.[97] In questioning whether a public figure plaintiff can base intentional infliction of emotional distress claims on nonlibelous satirical statements, the Fourth Circuit in *Falwell* considered the defendants' claim that a plaintiff could not succeed on an emotional distress action after failing to recover for defamation.[98] The Fourth Circuit in *Falwell* determined that the elements of a defamation tort and an emotional distress tort constitute separate principles.[99] The *Falwell* court determined that, while a plaintiff initiates a defamation action to remedy injury to the plaintiff's reputation, a plaintiff initiates an emotional distress claim to seek compensation for the plaintiff's psychic harm.[100] The Fourth Circuit in *Falwell*, therefore, found that a plaintiff's failure to prevail in a defamation action should not preclude the plaintiff from basing a claim of intentional infliction of emotional distress on the same facts as the failed defamation claim.[101]

After determining that an emotional distress claim can continue independently from a defamation claim, the Fourth Circuit in *Falwell* considered whether the first amendment requires that a plaintiff in an emotional distress action against the press must meet the same actual malice standard of proof as a plaintiff in a defamation action.[102] The Fourth Circuit in *Falwell* determined that an action for defamation is not the only basis on which individuals can recover for defamatory remarks published in a news medium.[103] The Fourth Circuit in *Falwell* recognized that a growing number of courts allow a plaintiff to plead separately defamation, invasion of privacy, and intentional infliction of emotional distress when all three causes of action arise from a single tortious publication.[104] The Fourth Circuit in

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the district court's decision to dismiss Falwell's invasion of privacy claim. *Id.* at 1278. Falwell claimed that Hustler should be liable for invasion of privacy. *Id.* at 1278. The United States Court of Appeals for the Fourth Circuit, however, agreed with the district court's determination that Hustler's parody did not violate the Virginia Code's invasion of privacy statute. *Id.*; *see* VA. CODE ANN. § 8.01-40 (1984) (allowing action for invasion of privacy when person uses another person's name or likeness for trade or advertising purposes).

97. *Falwell*, 797 F.2d at 1273-76; *see* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing actual malice standard for defamation actions).

98. *Falwell*, 797 F.2d at 1276. The defendants in *Falwell* suggested that a cause of action based upon the emotional distress tort can succeed only if no other possible tort remedies exist for a plaintiff. *Id.* The *Falwell* defendants argued that emotional distress tort remedies do not exist if the allegedly tortious conduct resembles a traditionally recognized tort, such as libel. *Id.*; *see supra* note 70 and accompanying text (discussing traditional parasitic application of intentional infliction of emotional distress claims).

99. *Falwell*, 797 F.2d at 1276.

100. *Id.*

101. *Id.* The Fourth Circuit in *Falwell* also considered several evidentiary issues relating to the admission of videotaped testimony and of prior derogatory statements that Hustler had published. *Id.* at 1276-77. The *Falwell* court upheld the admission of both types of evidence. *Id.*

102. *Id.* at 1274.

103. *Id.*

104. *Id.*

Falwell, however, determined that to maintain the validity of first amendment protection and to avert self-censorship, a defendant publisher must receive the same degree of first amendment protection in an action for intentional infliction of emotional distress that a publisher receives in a first amendment defamation action.[105]

In considering the degree of first amendment protection that should apply in emotional distress actions against the press, the Fourth Circuit in *Falwell* determined that the first amendment actual malice standard of *New York Times* must apply in intentional infliction of emotional distress tort actions brought by public figures.[106] In applying the actual malice standard to intentional infliction of emotional distress tort actions, however, the Fourth Circuit in *Falwell* stated that the *New York Times* actual malice standard focuses on the culpability or intent of a defendant publisher.[107] The Fourth Circuit in *Falwell* further determined that the actual malice standard does not emphasize a publisher's knowing or reckless publication of a false work, but emphasizes only the publisher's intent in publishing a work.[108] The Fourth Circuit in *Falwell* found that the truth or falsity of a published work is unimportant in an emotional distress action because the truth or falsity of a publication is not an element of the emotional distress tort.[109] The Fourth Circuit in *Falwell* determined that the first amendment does not protect the press if a plaintiff shows that a defendant publisher's intentional or reckless misconduct has caused severe emotional distress.[110]

Although the *Falwell* court recognized that the first amendment protects the press when a nonlibelous statement causes a public figure to suffer emotional distress, the *Falwell* court's actual malice definition appears to differ from the Supreme Court's definition of actual malice, a knowing or

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* The Fourth Circuit in *Falwell* cited *Womack v. Eldridge* in discussing the elements that a plaintiff traditionally must prove in an intentional infliction of emotional distress action in Virginia. *Id.* at 1275 n.4; *see* Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). The *Falwell* court noted that, according to the Virginia Supreme Court in *Womack*, a plaintiff in an intentional infliction of emotional distress action must prove intentional or reckless conduct by a defendant publisher, conduct by a defendant publisher that offends accepted standards of decency, conduct by a defendant publisher that caused the plaintiff's emotional distress, and severe emotional distress. *Falwell*, 797 F.2d at 1275 n.4; *see Womack*, 215 Va. at 342, 210 S.E.2d at 148; *supra* note 16 (defining intentional infliction of emotional distress tort). The *Falwell* court found that the truth or falsity of an injurious statement is irrelevant in an intentional infliction of emotional distress tort action. *Falwell*, 797 F.2d at 1275-76.

110. *Falwell*, 797 F.2d at 1275. The *Falwell* court determined that the possibility that Hustler's parody constituted opinion was inconsequential in an action for emotional distress. *Id.* at 1276. The Fourth Circuit found that, because falsity was not an element of the emotional distress tort, the only issue before the court was whether Hustler's parody was sufficiently outrageous to meet the outrageousness proof requirement of the intentional infliction of emotional distress tort. *Id.*

reckless disregard of the truth.[111] The Fourth Circuit in *Falwell*, in focusing on intent to harm, appears to circumvent the protection that the actual malice fault standard of *New York Times* provides the press.[112] The *Falwell* court established that, in emotional distress actions against the press, a plaintiff who shows that a defendant publisher intended to cause emotional distress satisfies the actual malice standard, despite the Supreme Court's holding in *New York Times* that recognized the insufficiency of intent to harm or "ill will" to establish actual malice or the press' liability.[113] The *New York Times* standard places liability on the press for knowingly or recklessly publishing a falsehood.[114] By reverting to common-law "ill will" fault standards, courts substantially reduce the burdens on public figure plaintiffs who seek to recover damages from media defendants.[115] Many commentators argue that ill will is too easy for a plaintiff to establish because a reporter often develops some ill feelings against the subject of a story in the course of news investigations, particularly when the subject of a story has committed serious crimes or created bad feelings in the community.[116] The Supreme Court has provided plaintiffs with substantial

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111. *See* Rosenblatt v. Baer, 383 U.S. 75, 84 (1966) (to prove actual malice, plaintiff must show defendant's intent to inflict harm through falsehood, not simply intent to inflict harm); Henry v. Collins, 380 U.S. 356, 357 (1965) (same); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (intent to harm is insufficient to prove actual malice); Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977) (same); Adams v. Frontier Broadcasting Co., 555 P.2d 556, 563 (Wyo. 1976) (same); R. SACK, *supra* note 16, at 218 (same). *Compare Falwell*, 797 F.2d at 1274 (allowing recovery for public figure on proof that defendant intentionally published material with ill will) *with New York Times*, 397 U.S. at 279-80 (denying recovery unless public official proves that defendant knowingly or recklessly published false material).

112. *See supra* note 111 and accompanying text (listing courts finding that intent to harm is insufficient to prove actual malice).

113. *See New York Times*, 376 U.S. at 279-80 (allowing liability for defamation only if plaintiff proves actual malice); *see also* Henry v. Collins, 380 U.S. 356, 357 (1965) (intent to inflict harm does not establish actual malice); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (same); Sheer & Zardkoohi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U.L. REV. 364, 371 n.18 (1985) (neither hostility nor ill will proves actual malice); Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of* Bose Corp. v. Consumers Union of United States, Inc., 71 CORNELL L. REV. 477, 495 n.113 (1986) (authored by Gary A. Paranzino) (motive of vindictiveness does not prove actual malice); *supra* note 16 (defining actual malice).

114. *New York Times*, 376 U.S. at 279-80.

115. *See* R. SACK, *supra* note 9, at 211-12 & 214 n.168 (defendant's ill will towards plaintiff is, at most, possible indication of actual malice, but is not sufficient to prove actual malice); B. SANFORD, *supra* note 12, § 8.4.3.2, at 314 (hostility or ill will is not sufficient to establish actual malice); Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 260-61 (1985) (different proof requirements apply to common-law ill will standard and constitutional actual malice standard); LeBel, *The Infliction of Harm Through the Publication of Fiction: Fashioning a Theory of Liability*, 51 BROOKLYN L. REV. 281, 334-35 (1985) (when press publishes fiction, common-law intent to harm is often easy to establish).

116. *See* Bloom, *supra* note 115, at 261-64 (reporter sometimes develops hostility toward subject of story during his investigation); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 n.90 (1949) (ill will against plaintiff sometimes may be impossible to refute); *see also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (same).

discovery rights in defamation cases against the press, which further serve to decrease a plaintiff's burden in proving a reporter's ill feelings towards the plaintiff.[117]

Because of the ease with which plaintiffs can prove ill will against media defendants, numerous courts disagree with the fault standard that the *Falwell* court developed.[118] These courts have held that a plaintiff cannot recover separately for the intentional infliction of emotional distress if the plaintiff's defamation claim, based on the same facts as the emotional distress claim, fails.[119] For example, in *Hutchison v. Proxmire*,[120] the United States Court of Appeals for the Tenth Circuit, after rejecting a plaintiff's defamation claim, considered whether the plaintiff could retain a cause of action for the intentional infliction of emotional distress when the plaintiff based the emotional distress claim on the same facts as the failed defamation claim.[121] In *Hutchison*, the defendant, Senator Proxmire, during a speech on the Senate floor, described plaintiff Hutchison's scientific research on the causes of animal and human aggression as a study into why "rats, monkeys, and humans bite and clench their jaws" and acknowledged Hutchison's research as an example of wasteful government spending.[122] Although Hutchison claimed defamation in his suit against Proxmire, the Tenth Circuit dismissed the plaintiff's defamation suit because the plaintiff did not satisfy the burden of proving that the defendant had made his

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117. Herbert v. Lando, 441 U.S. 153, 177 (1979) (first amendment does not protect journalist's internal thought processes and internal editorial discussions from discovery). In *Herbert v. Lando*, the United States Supreme Court considered whether a plaintiff who wanted to prove actual malice could use discovery procedures to procure information regarding the press' thought processes in developing a story. *Id.* at 169-77; *see supra* note 11 (defining actual malice). In *Lando*, the plaintiff, the subject of a documentary broadcasted on the CBS television program "60 Minutes," sued the producer of the "60 Minutes" program, alleging that the show's commentator had made defamatory comments about the plaintiff's Vietnam military service record. *Id.* at 156. The Supreme Court in *Lando* recognized that the plaintiff could not prove that the defendant had acted with actual malice, a critical element of the defamation claim, by looking into the opinions and thoughts of the defendant because ill will does not suffice to establish actual malice. *Id.* at 175-76; *see supra* note 11 (defining actual malice). The Court determined that, because of the difficulty in proving actual malice, the plaintiff should be able to delve into the thought processes and internal editorial decisions that the press made in developing the story. *Id.* at 174-75.

118. *See, e.g.*, Hutchison v. Proxmire, 579 F.2d 1027, 1036 (7th Cir. 1978) (finding that emotional distress is merely result of defamatory statements), *rev'd on other grounds*, 443 U.S. 111 (1979); Ault v. Hustler Magazine, Inc., 13 MED. L. REP. (BNA) 1657, 1662 (D. Or. 1986) (no separate action for intentional infliction of emotional distress exists when same facts give rise to libel action); Fisher v. Maloney, 43 N.Y.2d 553, 557-58, 373 N.E.2d 1215, 1217, 402 N.Y.S.2d 991, 993 (1978) (questioning whether plaintiff should be able to base emotional distress action on facts that fall within traditional tort claim).

119. *See supra* note 118 (listing court decisions holding that no action for intentional infliction of emotional distress exists when emotional distress claim rests on same facts as failed libel claim).

120. 579 F.2d 1027 (10th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979).

121. *Id.* at 1036.

122. *Id.* at 1030.

statements with "actual malice."[123] After finding that the plaintiff's defamation claim failed, the *Hutchison* court considered the plaintiff's claim that he should recover for the emotional distress that the defendant intentionally had inflicted on the plaintiff.[124] The Tenth Circuit in *Hutchison* implied that the purpose of the *New York Times* actual malice standard in defamation cases is to provide a safeguard for each individual's constitutional right to free speech.[125] The *Hutchison* court determined that, if the plaintiff could recover for emotional distress when the statements did not constitute defamatory statements, the plaintiff's recovery would defeat the purposes of the actual malice requirement in defamation actions and of the first amendment free speech guaranty.[126] The Tenth Circuit in *Hutchison* reasoned that the allegation of intentional infliction of emotional distress resulted from the defendant's nondefamatory statements.[127] The *Hutchison* court concluded that allowing the plaintiff to recover for emotional distress after the plaintiff had failed to establish defamation would defeat the purpose of the *New York Times* actual malice standard.[128] The *Hutchinson* court, therefore, found that the plaintiff could not recover for intentional infliction of emotional distress because the defendant's statements regarding the plaintiff did not meet the actual malice standard and were not defamatory under the first amendment.[129]

In addition to the Tenth Circuit's determination in *Hutchison* that a plaintiff bringing an intentional infliction of emotional distress claim must prove that the press acted with actual malice, the Tenth Circuit has determined that a public figure's action for the intentional infliction of emotional distress must fail if the press' statement is not a believable false statement of fact.[130] In *Pring v. Penthouse International, Inc.*,[131] the Tenth Circuit

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123. *Id.* at 1036; *see supra* note 11 (defining actual malice). Following the decision of the United States Court of Appeals for the Tenth Circuit in *Hutchinson v. Proxmire,* the United States Supreme Court later reversed the *Hutchison* court's decision that the plaintiff did not prove actual malice. *See* Hutchison v. Proxmire, 443 U.S. 111, 136 (1979) (reversing Tenth Circuit decision on defamation issue).

124. *Hutchison,* 579 F.2d at 1036.

125. *See id.* at 1036 n. 16 (constitutional right to free speech requires protection of actual malice standard); *see also* U.S. CONST. amend. I (establishing right to freedom of speech).

126. *Hutchison,* 579 F.2d at 1036 & n.16.

127. *Id.* at 1036.

128. *Id.* at 1036 & n.16.

129. *Id.* at 1036.

130. *See* Pring v. Penthouse Int'l, 695 F.2d 438, 442 (10th Cir. 1982) (applying first amendment protections to intentional infliction of emotional distress action), *cert. denied,* 462 U.S. 1132 (1983); *see also* Palm Beach Newspapers v. Early, 334 So. 2d 50, 53 (Fla. Dist. Ct. App. 1976) (cartoons attacking public official are not defamatory when cartoons fail to express believable false facts); Springer v. Viking Press, 90 A.D.2d 315, 317-18, 457 N.Y.S.2d 246, 248 (N.Y. App. Div. 1982) (requiring private figure plaintiff to prove defamatory falsehood before recovery in intentional infliction of emotional distress action); Note, *supra* note 16, at 1778-83 (discussing argument that public figures should not recover for intentional infliction of emotional distress tort).

131. 695 F.2d 438 (10th Cir. 1982), *cert. denied,* 462 U.S. 1132 (1983).

considered whether a fictional story had defamed a public figure.[132] In *Pring*, the public figure plaintiff, the former winner of a state beauty contest, claimed that a fictional story which comically detailed a beauty queen's sexual talent had injured her reputation.[133] The Tenth Circuit in *Pring* determined that, because a reasonable man could not believe that the fictional story portrayed true events, no defamation occurred.[134] Recognizing that unbelievable stories could not constitute the false representation of fact that courts require in defamation actions, the *Pring* court determined that the first amendment precludes imposing liability on the press for unbelievable statements.[135] After finding that the published story had not defamed the plaintiff, the Tenth Circuit briefly examined the applicability of the first amendment defamation principles to an "outrageous conduct," or intentional infliction of emotional distress, claim.[136] The *Pring* court recognized that detaching the emotional distress claim from the defamation claim served no useful purpose because the same first amendment considerations applied to both claims.[137] The Tenth Circuit's decision in *Pring*, therefore, implies that the falsity and believability elements of a first amendment defamation cause of action must attach to a public figure's intentional infliction of emotional distress action against the press.[138]

Although the Tenth Circuit implies that, to recover for intentional infliction of emotional distress, public figure plaintiffs must prove that the press' statement is believable, one commentator has argued that, if the statement discussing the public figure is in pure satirical form, the press should have an absolute privilege against defamation and emotional distress claims.[139] The commentator has argued that satire is an expression of opinion

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132. *Id.* at 439.

133. *Id.* at 440-41. In *Pring v. Penthouse International, Ltd., Penthouse*, the magazine that the defendant published, printed a fictional story that described an event at a Miss America contest. *Id.* at 440. The story described Charlene, the Miss Wyoming participant in the Miss America contest, who performed astounding sexual acts onstage with a baton during the contest. *Id.* at 441. The plaintiff, the Miss Wyoming entrant in the actual Miss America contest, also was a baton twirler who had won a national baton twirling championship. *See* R. SMOLLA, SUING THE PRESS 163 (discussing facts of *Pring*). The plaintiff claimed that the story that *Penthouse* had printed defamed her by creating the impression that the plaintiff actually had performed these sexual acts during the contest. *Id.*

134. *Pring*, 695 F.2d at 442-43. In *Pring*, the United States Court of Appeals for the Tenth Circuit overturned a jury verdict for the plaintiff of $1.5 million in actual damages and $25 million in punitive damages. *See* R. SMOLLA, *supra* note 133, at 163-64 (discussing lower court's decision in *Pring*).

135. *Pring*, 695 F.2d at 443.

136. *Id.* at 442; *see supra* note 16 (discussing intentional infliction of emotional distress tort).

137. *Pring*, 695 F.2d at 442.

138. *See id.* (requiring that same first amendment standards apply to defamation actions and to intentional infliction of emotional distress actions).

139. Dorsen, *supra* note 1, at 939; *see* Comment, *Defamation in Fiction: The Case for Absolute First Amendment Protection*, 29 AM. U.L. REV. 571, 582, 593 (1980) (fiction is opinion that should receive absolute first amendment protection); *supra* note 7 (discussing absolutist interpretation to first amendment).

and, as opinion, should receive absolute protection.[140] Although courts do not appear to extend absolute privileges to satire, many courts have implied that satire should receive absolute protection if the satire constitutes opinion and not fact.[141] For example, in *Janklow v. Newsweek, Inc.*,[142] the United States Court of Appeals for the Eighth Circuit considered the distinctions between fact and opinion.[143] In *Janklow*, the public figure plaintiff claimed that the defendant, the publisher of the *Newsweek* magazine, had defamed him by publishing an article which impliedly stated that the plaintiff had raped a teenage Indian girl.[144] The *Janklow* court recognized that the first amendment provides absolute protection for opinion because no opinion can be false.[145] In distinguishing between fact and opinion, the Eighth Circuit in *Janklow* weighed four factors to determine whether the implicit allegation should receive absolute protection as an opinion.[146] The *Janklow* court concluded that, by looking at the precision and specificity,[147] verifiability,[148] literary context,[149] and "public context"[150] of an allegedly injurious statement, courts adequately could determine whether a statement constituted fact or opinion.[151]

In applying the *Janklow* court's four factors that distinguish fact from opinion to satirical comments, commentators argue that the general context and unverifiability of satire normally will require findings that satire constitutes opinion.[152] The purpose of satire is to provide social or political criticism in an exaggerated manner.[153] Often, a satirist, through a satire, intends to create change through criticism.[154] By making readers uncom-

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140. Dorsen, *supra* note 1, at 939; *see* Comment, *supra* note 139, at 582, 593 (fiction should receive absolute first amendment protection).

141. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (stating that opinion should receive absolute first amendment protection); *infra* notes 142-52 and accompanying text (discussing cases that provide absolute constitutional protection to opinion).

142. 788 F.2d 1300 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986).

143. *Id.* at 1302-03.

144. *Id.* at 1301.

145. *Id.* at 1302; *see supra* note 12 (discussing courts' recognition that opinion cannot constitute defamatory statement).

146. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); *see* Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (en banc) (recognizing four factors to use in determining if statement is fact or opinion), *cert. denied*, 471 U.S. 1127 (1985).

147. *Janklow*, 788 F.2d at 1302.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1302-03.

152. *See* Dorsen, *supra* note 1, at 929-30 (courts should view satire as nonactionable opinion); Comment, *supra* note 139, at 582, 593 (fiction is opinion that should receive absolute first amendment protection); *see also* R. SMOLLA, *supra* note 133, at 181 (questioning whether public figures should recover for emotional distress); Note, *supra* note 16, at 1777-78 (humor should not provide basis for recovery under intentional infliction of emotional distress tort).

153. *See* Dorsen, *supra* note 1, at 923-24 (discussing purpose of satire).

154. *Id.*

fortable, a satirist often hopes to cause readers to reevaluate accepted standards.[155] The *Falwell* court's decision to allow public figures to recover emotional distress damages for nonlibelous satirical opinion, however, circumvents the first amendment's absolute protection of opinion.[156] In *New York Times*, the Supreme Court stated that the purpose of the first amendment freedom of the press is to encourage free political discussion and the exchange of ideas.[157] The Supreme Court, by developing first amendment defamation proof standards, has attempted to set guidelines that allow the press to express opinion without fear of liability.[158] Despite the Supreme Court's first amendment proof standards, however, the press increasingly has had to defend its actions and publications in court.[159] Most defamation actions that reach a jury result in substantial damage awards for the plaintiff.[160] Juries apparently tend to base damage awards partly on the popularity of the media defendant, and not solely on the plaintiff's suffered harm.[161] Although the Supreme Court has determined that courts should not attempt to base awards on the popularity of an expressed view, controversial publications such as *Hustler* have had to defend against numerous lawsuits, and juries often have awarded substantial damages to plaintiffs.[162] Although the majority of high damage awards are reversed or reduced on appeal,[163] litigation costs for the press steadily increase.[164] Publishers, hoping

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155. *Id.* at 924.

156. *See Falwell*, 797 F.2d at 1277 (allowing public figure plaintiff to recover emotional distress damages for nonlibelous satire); *supra* note 12 and accompanying text (discussing argument that opinion receives absolute first amendment protection).

157. *New York Times*, 376 U.S. at 270-72.

158. *See supra* notes 28-44 and accompanying text (discussing constitutional standards that Supreme Court has devised to encourage free expression of ideas).

159. *See* R. SMOLLA, *supra* note 133, at 4-7 (discussing explosion of libel litigation against press); Nagel, *How to Stop Libel Suits and Still Protect Individual Reputation*, 17 WASH. MONTHLY 12, 13 (Nov. 1985) (noting increasing number of libel suits against which press must defend).

160. *See* R. SMOLLA, *supra* note 133, at 6 (listing cases in which juries awarded defamed plaintiff substantial damages); Nagel, *supra* note 159, at 13 (discussing enormous jury awards in libel suits). As of November 1985, juries in over 20 libel suits had awarded the plaintiff over $1 million in damages. *See* Nagel, *supra* note 159, at 13 (discussing study of jury awards in libel actions).

161. *See* R. SMOLLA, *supra* note 133, at 176 (juries often find unpopular media defendants liable because jury dislikes defendant rather than because defendant published injurious statement).

162. *See id.* at 162 (in last few years, plaintiffs have initiated numerous defamation and privacy suits against publications such as *Penthouse* and *Hustler*).

163. *See* R. SMOLLA, *supra* note 133, at 77 (appeal courts reverse two-thirds of jury verdicts against press); Note, *Defamation and the Public Official: The Big Chill*, 6 COMPUTER/LAW J. 725, 733 (1986) (appeal courts overturn or reduce 75% of jury verdicts in libel actions); *Appeals Court Rules Post Did Not Libel Tavoulareas*, Washington Post, March 14, 1987, § A, at 1, col. 4 (discussing appeals court's dismissal of jury's $2.05 million verdict against press in libel action).

164. *See* Massing, *Libel Insurance: Scrambling for Coverage*, 24 COLUM. JOURNALISM REV. 35, 35 (Jan./Feb. 1986) (discussing increasing costs of libel insurance); Note, *supra* note 163,

to reduce litigation costs, have argued for stricter standards of liability in legal actions against the press.[165]

Although publishers hope for stricter and more exact liability standards in actions involving the press, the Fourth Circuit's decision in *Falwell* merely increases the possibility that a public figure will litigate and recover against the press for satirical comment.[166] The Fourth Circuit's decision in *Falwell* chills the press' initiative to print any controversial satire because, under *Falwell*, the media cannot rely on the protection of the *New York Times* first amendment standards in legal actions brought by public figures, even if the published satire is completely unbelievable.[167] Neither reporters nor editors can make informed publication decisions regarding controversial topics because the media cannot know with certainty the issues and articles that will create reader discomfort.[168] The press' liability will depend on the sensibilities of a jury in determining what a reasonable man would find outrageous.[169] This standard of outrageousness affords no guidelines to the

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at 725 (discussing rising litigation costs for press because of increasing number of suits). Although the increasing costs of libel litigation pose a problem for all major news media, the greatest dangers from skyrocketing libel insurance rates exist for small news organizations, whose profits often are too little to pay large libel insurance premiums. Note, *supra* note 163, at 743.

165. *See* Nagel, *supra* note 159, at 13 (discussing publishers' arguments that courts should provide press with greater protection against libel and privacy actions). According to the American Civil Liberties Union, many publishers would like courts to adopt proof requirements that would virtually guarantee absolute protection against libel and privacy actions. *See id.* (discussing report of American Civil Liberties Union). These publishers would like courts to adopt standards that do not investigate a reporter's "state of mind" and that do not impose liability for knowingly or recklessly publishing a defamatory falsehood about a public figure. *Id.*

166. *See Falwell*, 797 F.2d at 1275 (allowing public figures to recover damages for intentional infliction of emotional distress upon showing defendant's intent to harm plaintiff); R. SMOLLA, *supra* note 133, at 169 (noting that *Falwell* decision allows subjects of parodies to circumvent press protections developed in libel laws).

167. *See Falwell*, 797 F.2d at 1277 (allowing public figure plaintiff to recover emotional distress damages for unbelievable satire); *supra* note 166 and accompanying text (discussing *Falwell* court's circumvention of libel laws); *see also* Dorsen, *supra* note 1, at 939 (arguing that unbelievable satire should receive absolute protection as opinion).

168. *See* Dorsen, *supra* note 1, at 927 (satirists who want to predict satirical statements that will create liability act without clear guidelines); Note, *supra* note 16, at 1778 (discussing inability of political satires to be both insightful and inoffensive); *see also* R. SMOLLA, *supra* note 133, at 175-76 (juries often find unpopular and unsympathetic media defendants liable because of identity of defendants rather than actions of defendants).

169. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965) (discussing outrageousness element of intentional infliction of emotional distress tort); R. SMOLLA, *supra* note 133, at 181 (juries punish "bad taste" and unpopular ideas in intentional infliction of emotional distress actions); *supra* notes 16 & 19 (discussing outrageousness element of intentional infliction of emotional distress tort); *see also* Nagel, *supra* note 159, at 13 (in libel suits, 90% of jury verdicts favor plaintiffs). Increased liability for the press will only dissuade the press from publishing any controversial ideas. Note, *supra* note 163, at 743. Although allowing juries to punish arguably unpopular defendants such as *Hustler* and *Penthouse* for intentional infliction of emotional distress does not appear initially to affect more respected newspapers and publishers,

press in making publication decisions.[170] Public figures should not be able to assert their views publicly, and then, without proving that a satirist violated the *New York Times* first amendment standards, sue a satirist who comments unfavorably on the public figure.[171] By creating the possibility of liability for nondefamatory statements, the *Falwell* decision creates an impediment to the press' incentive to provide a forum for a completely free exchange of ideas.[172]

The *Falwell* decision allowing public figures to recover from the press for the publication of nonlibelous satirical commentary reduces the press' incentive to report new opinions to the public.[173] Because the *Falwell* decision chills the press' incentive to report controversial matters, the Fourth Circuit circumvents the constitutional defamation standards that the Supreme Court has established to encourage open discussion.[174] Unless the Supreme Court alters its defamation standards,[175] courts should not allow public figure plaintiffs to bypass the first amendment and recover on emotional distress claims without proving actual malice or falsity.[176] By requiring a public figure plaintiff to show both malice and falsity before allowing the plaintiff to recover for emotional distress, courts would encourage the media to express

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one commentator has argued that the "spillover" effect of precedential judgments against unpopular media defendants for nondefamatory publications quickly will lead to attacks on respected publications. R. SMOLLA, *supra* note 133, at 181.

170. *See supra* notes 168-69 and accompanying text (discussing press' difficulties resulting from court decisions that allow public figures to recover for intentional infliction of emotional distress); *see also* Note, *supra* note 163, at 743 (increasing litigation costs dissuade press from publishing any controversial ideas).

171. *See* B. SANFORD, *supra* note 12, § 11.3.4, at 455 (intentional infliction of emotional distress should not apply to media because of courts' failure to attach first amendment considerations to tort).

172. *See supra* notes 166-70 and accompanying text (discussing problems that result from allowing public figures to recover for emotional distress caused by nondefamatory satire).

173. *See supra* notes 96-110 and accompanying text (discussing Fourth Circuit's decision in *Falwell*); *supra* notes 112-117 and accompanying text (discussing ways in which *Falwell* decision circumvents Supreme Court defamation standards); *supra* notes 166-70 & 172 and accompanying text (discussing ways in which *Falwell* decision reduces press' incentive to publish satire).

174. *See supra* notes 155-56 and accompanying text (discussing *Falwell* court's circumvention of first amendment); *supra* notes 166-70 and accompanying text (discussing chilling effect that *Falwell* court may have on press' incentive to publish new ideas and opinions).

175. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2950-53 (1985) (White, J., concurring) (suggesting that Supreme Court should abandon actual malice standard in defamation law). In his concurrence in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Justice White proposed that the Court, in developing standards for defamation law, should abandon the actual malice standard. *Id.* at 2950. Justice White suggests returning to a common-law malice standard but limiting the amount of recoverable damages. *Id.* at 2950, 2952.

176. *See supra* notes 171-72 and accompanying text (discussing view that public figures should not recover damages in violation of *New York Times* first amendment standards); *see also supra* note 13 (defining public figure); *supra* notes 36-44 and accompanying text (discussing *New York Times* first amendment standards).

opinions about public and political figures without fear of liability.[177] The Fourth Circuit's decision in *Falwell*, however, fails to provide the press with adequate first amendment protection.[178] By allowing public figures to circumvent defamation law with the intentional infliction of emotional distress tort, the *Falwell* court not only restricts the press' first amendment rights, but inhibits public discussion controversial ideas.[179]

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ADDENDUM

On February 24, 1988, the United States Supreme Court, in *Hustler Magazine, Inc. v. Falwell*, 56 U.S.L.W. 4180 (U.S. Feb. 23, 1988)(No. 86-1278), reversed the Fourth Circuit's decision to award Mr. Falwell damages for the intentional infliction of emotional distress. The Supreme Court determined that a public figure cannot recover damages for the emotional distress that results from the publication of satire without showing that the satire contains a believable but false statement of fact and that the writer published that satire with actual malice.

177. *See supra* notes 11 & 36-44 and accompanying text (discussing *New York Times* first amendment standards of actual malice and falsity); *supra* note 12 (discussing differences between fact and opinion); *supra* notes 28-35 & 157-58 and accompanying text (discussing Supreme Court's emphasis on free expression of ideas).

178. *See supra* notes 111-17 and accompanying text (discussing ease with which plaintiffs can meet *Falwell* fault standard); *supra* notes 165-70 and accompanying text (discussing disincentive that *Falwell* court provides press to publicize unpopular or controversial ideas).

179. *See supra* notes 166-72 and accompanying text (discussing issues that courts create by allowing public figures to recover emotional distress damages for nondefamatory satire).