

HUSTLER MAGAZINE v. FALWELL AND THE ROLE OF THE FIRST AMENDMENT

R. GEORGE WRIGHT*

I. INTRODUCTION

In *Hustler Magazine v. Falwell*,¹ the Supreme Court, through an opinion by Chief Justice Rehnquist, held with virtual unanimity² that

public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one . . . at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.³

The publication at issue was a parody of a Campari Liqueur advertisement, the gist of which portrayed Reverend Falwell as having engaged in "a drunken incestuous rendezvous with his mother in an outhouse,"⁴ and as being a habitual drunk.⁵ The ad parody was accompanied by a disclaimer indicating that it was "'not to be taken seriously,'"⁶ and the magazine's table of contents listed the parody as "'[f]iction.'"⁷ The plaintiff Reverend Jerry Falwell's attention was drawn to the ad parody by a reporter,⁸ and Falwell shortly thereafter filed suit alleging libel, invasion of pri-

* Associate Professor of Law, Cumberland School of Law, Samford University. A.B. 1972, University of Virginia; M.A. 1974, Ph.D. 1976, J.D. 1982, Indiana University.

¹ 108 S. Ct. 876 (1988).

² Justice White filed an opinion concurring in the judgment in which he appeared to broadly reject Chief Justice Rehnquist's approach to the case, while leaving to a more propitious moment the task of suggesting why the first amendment required Chief Justice Rehnquist's result. *Hustler*, 108 S. Ct. at 883 (White, J., concurring). Justice Kennedy had not joined the Court in time for argument and took no part in deciding the case.

³ *Id.* at 882.

⁴ *Id.* at 878.

⁵ *Id.*

⁶ *Id.*

⁷ The ad parody was republished by the defendant during the course of the litigation, which might have gone to the issue of the defendant's intent had the Court reached this issue. *See id.* at 878 n.1.

⁸ *Falwell v. Flynt*, 797 F.2d 1270, 1272 (4th Cir.), *reh'g denied*, 805 F.2d 484 (4th

vacy, and intentional infliction of emotional distress. The defendants, *Hustler Magazine* and publisher Larry Flynt, were granted a directed verdict on the invasion of privacy claim and were found not liable on the libel claim, but the jury found both defendants liable for \$100,000 compensatory damages and \$50,000 punitive damages on the claim of intentional infliction of emotional distress.⁹ The judgment entered on the jury's verdict on the emotional distress claim was affirmed by the Fourth Circuit,¹⁰ but was reversed by the Supreme Court.

The opinion for the Court drew, at least implicitly, a number of controversial conclusions. First, it is questionable whether Flynt's ad parody should be treated as speech within the meaning, intent, or purposes and values of the first amendment. That is, it is unclear whether Flynt's parody is actually speech in the constitutional sense.¹¹ Second, assuming that Flynt's parody is speech in the constitutional sense, it is unclear why the Court gave this speech the high level or degree of protection that it did. The Court, as will be discussed in Section III, has frequently sought to distinguish between "high-value" speech, or speech close to the core of the free speech clause, and "low-value" speech, or speech on the periphery of, if not entirely outside the purposes of, the free speech clause. This distinction is not unproblematic, but the Court has often suggested that low-value speech may be constitutionally subject to state regulation on any one of a variety of relatively undemanding, non-rigorous constitutional tests. It is unclear why the Court did not view Flynt's parody as being within one of the "low-value" speech categories or at least as being analogous to speech ordinarily within those categories.

The *Hustler* Court's controversial conclusions may be examined primarily by reference to the broad range of purposes or values that might be thought to underlie the free

Cir. 1986) (en banc), *rev'd sub nom.* *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988).

⁹ *Hustler*, 108 S. Ct. at 878. Note that the jury finding of no defamation and perhaps the ratio of punitive to compensatory damages hardly bespeak a jury overborne by passionate enthusiasm for the plaintiff or antipathy for the defendant.

¹⁰ *Falwell*, 797 F.2d at 1270.

¹¹ For the view that constitutional language is to be interpreted generally with reference to the scope of its purposes rather than merely through a dictionary based, ordinary language approach, see Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 269 & n.20 (1981).

speech clause. This focus raises a number of other controversial aspects of the *Hustler* opinion, including (1) the relevance and application of a free speech-based concern for the value of individual self-realization; (2) the relevance, for free speech purposes, of the falsity and unbelievability of Flynt's speech; and (3) the possible analogy between Flynt's speech and invidious racial epithets. This Essay, then, considers whether any legitimate free speech concerns raised by the tort of intentional infliction of emotional distress could be addressed by nonconstitutional restrictions on the tort or, at least, by constitutional restrictions less dramatic than those imposed in *Hustler*. If the tort of intentional infliction of emotional distress is to be "constitutionalized," then the most defensible approach is to immunize only those otherwise tortious speech-acts addressing a matter of public interest and concern, regardless of whether the plaintiff-victim is thought to be a public figure or not.

II. SPEECH AND NON-SPEECH FOR CONSTITUTIONAL PURPOSES

By implication, the Court in *Hustler* determined that Flynt's parody was, at least as alleged, more like a written defamation or libel than a psychological battery¹² and thus deserving of similar constitutional treatment. Intentional infliction of emotional distress, even to the extent that it is inflicted in some communicative manner, does not require that the defendants have made some false assertion of fact.¹³ The Court nonetheless saw fit to subsume the tort of intentional infliction of emotional distress within the constitutional restrictions on the tort of libel. Specifically, as quoted above, the Court required that public official or public figure plaintiffs claiming intentional infliction of emotional distress show not only the elements of that tort, but also that the defendant made a false statement of fact, and that the defendant did so with actual malice.¹⁴

¹² For an analogy of intentional infliction of emotional distress to battery, see *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

¹³ See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 (1977); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

¹⁴ *Hustler*, 108 S. Ct. at 882. Presumably, the defendant's actual malice must be shown by clear and convincing evidence, as required by the constitutional libel case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

The Court thus constitutionalized the tort of intentional infliction of emotional distress in a peculiarly inapposite way by grafting the extraneous modern defamation element of falsity incongruously onto the tort of intentional infliction of emotional distress, and anticlimactically required that the false statement be shown to have been made with reckless disregard for its falsity. However, there is no organic, necessary, or even recurring relationship between any communicative infliction of emotional distress and the truth or falsity of any statement of fact the defendant may happen to make. In other words, there is no particular reason, if one is inclined to inflict emotional distress, to do so in a way that requires or is attended by a false statement. The emotional distress of someone in Falwell's position is not assuaged by the understanding that most or all readers do not believe the literal truth of the factual assertions; the plaintiff's reputation or his distress over a decrease in his reputation is not the issue. Further, we may be sure that no one contemplating inflicting emotional distress on a public official or public figure who is aware of the Court's rule in *Hustler* will be so foolish as to expose himself to the only possibility of plaintiff's recovery by gratuitously including an arguably false assertion of fact. There will always be ways of inflicting severe emotional distress on public officials or public figures other than through false factual claims. For all practical purposes, the Court's holding in *Hustler* grants reasonably sophisticated perpetrators essentially complete and absolute constitutional protection.

The relevance in this context of false statements of fact by the defendant will be discussed further below, but it is worth speculating why the Court might have been led to essentially graft a portion of the tort of defamation onto the tort of intentional infliction of emotional distress. Perhaps the Court assumed that there was no harm in doing so since the torts of defamation and intentional infliction of emotional distress are often thought of as somehow mutually equivalent¹⁵ or at least as on a par with each other constitutionally.¹⁶ The problem is that the two kinds of tortious

¹⁵ See *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1420 (C.D. Cal. 1987) (citing case authority and concluding that the plaintiff "cannot maintain a separate cause of action for mental and emotional distress where the gravamen is defamation").

¹⁶ *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982) (same first

conduct might be entitled to the same degree of constitutional protection without the elements of the torts, such as a false statement, being transferable between the torts in any non-arbitrary way. The torts of defamation and of intentional infliction of emotional distress plainly serve different purposes; the falsity of an assertion of fact is generally relevant, in principle, only to defamation. As one commentator has rightly observed, “[t]he emotional distress tort . . . is designed to protect the victim’s emotional well-being, as distinct from the reputational interests historically protected in defamation law.”¹⁷ Intentional infliction of emotional distress is more in the nature of a kick or a punch and need not involve any true or false assertion of fact.

This analogy between intentional infliction of emotional distress and the tort of battery impeaches the constitutional logic of *Hustler* at its deepest level. Most of us would be reluctant to ever categorize any punch or kick as “speech” within the meaning of the first amendment, or to afford such action even a limited degree of constitutional protection. We are reluctant to classify a punch as “speech” even though some punches are provoked by the literal speech of one’s political opponent. Arguably, the punch may be a reaction or a “response” to a political speech with which one heatedly disagrees; accordingly, we appreciate that protected speech may take the form of action or symbolic conduct.¹⁸

But if a punch or, for that matter, a merely negligent elbowing, does not amount to speech in the constitutional sense, why must “written speech” be treated as speech within the meaning of the Constitution if the “written speech” is nothing more than a surrogate for the punch? If, in a particular instance, “written speech” is demonstrably

amendment considerations must be applied to an outrageous conduct claim as to defamation), *cert. denied*, 462 U.S. 1132 (1983). The Supreme Judicial Court of Massachusetts referred to and cited authority bearing upon this issue without deciding it in *Godbout v. Cousens*, 396 Mass. 254, 485 N.E.2d 940, 947 (1985) or in *Fleming v. Benzaquin*, 390 Mass. 175, 454 N.E.2d 95, 104 (1983).

¹⁷ Mead, *Suing Media For Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 27 (1983). The full implications of this point were missed not only by Chief Justice Rehnquist’s opinion in *Hustler*, but also in *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542, 551 (1986) (en banc), *cert. denied*, 108 S. Ct. 1107 (1988).

¹⁸ See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

intended to merely have the same functions and effect as a punch, shouldn't the law recur to substance rather than form?¹⁹

The free speech clause has been widely interpreted by commentators either as intended to serve a narrower²⁰ or a broader²¹ range of purposes. Interpreted broadly, the free speech clause is thought to operate to protect the workings of a representative process of government, to promote the detection and dissemination of truth in the political realm, and to accommodate and promote the important value of individual self-realization.²² As a first approximation, a court should be reluctant to classify "written speech" as constitutional speech, where the utterance, apart from its popularity or unpopularity, cannot plausibly be construed as implicating any of the recognized purposes or functions of the first amendment.

The Court in *Hustler* did not consider the relation between the ad parody and the purposes or functions of the first amendment presumably because it assumed that Flynt's parody, however distasteful and controversial, qualified as speech in the constitutional sense. Such an assumption seems warranted only if one focuses on the speaker and the addressee, both well-known, politically controversial public figures who are natural political adversaries, in a broad sense of the term "political." But if the focus is instead placed on the actual speech and its context, the Court's assumption seems more doubtful.

Regardless of whether one accepts the view that "*Hustler* is not a bona fide competitor in the 'marketplace of ideas,'"²³ it seems clear that the contents of the magazine,

¹⁹ For a sampling of the wide range of circumstances where the Court has explicitly refused to exalt form over substance, see *Bowen v. Gilliard*, 107 S. Ct. 3008, 3019 (1987); *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3259-60 (1986); *Papasan v. Allain*, 478 U.S. 265, 279 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

²⁰ See, e.g., A. MEIKLEJOHN, *POLITICAL FREEDOM* 26-27, 79-80 (1960); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300-01 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23-25 (1971).

²¹ See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983).

²² See, e.g., Emerson, *supra* note 21, at 878-79.

²³ *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part), *cert. denied*, 108 S. Ct. 1219 (1988). *But*

exclusive of any obscene material, cannot all be considered constitutional speech. In light of the recognized purposes of the free speech clause, one may wish to impose as a minimum requirement that for something to count as speech in the constitutional sense, it must itself embody or seek to convey some discernible social idea, where both "social" and "idea" are interpreted with reasonable breadth.²⁴ The Court has come close to endorsing this requirement in several cases such as the obscenity case of *Paris Adult Theatre I v. Slaton*,²⁵ in which the Court concluded that "[w]here communication of ideas, protected by the First Amendment, is not involved, . . . the mere fact that, as a consequence, some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests."²⁶

*Chaplinsky v. New Hampshire*²⁷ established the classic "fighting words"²⁸ category of "written speech" and at least arguably held such speech to be completely outside the meaning of the first amendment. The Court in *Chaplinsky* referred to fighting words as "no essential part of any exposition of ideas . . .,"²⁹ thereby at least suggesting a linkage between constitutional protection and the presence of an idea of some unspecified sort.

Requiring that constitutionally protected speech seek to convey some rudimentary social idea is consistent with most of the familiar rhetoric of the free speech case law. Protecting written speech that embodies the requisite social idea is perfectly consistent with protecting allegedly outrageous,

cf. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 394-95 (1975) (pornography characterized as antifemale propaganda).

²⁴ See Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 156 (P. Kurland, G. Casper & D. Hutchinson eds. 1986).

²⁵ 413 U.S. 49 (1973).

²⁶ *Paris Adult Theatre I*, 413 U.S. at 67. Discouraging the intentional infliction of severe emotional distress would presumably count as a legitimate state interest.

²⁷ 315 U.S. 568 (1942).

²⁸ See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988); Schauer, *supra* note 11, at 268. For a discussion of the current unsettled status of the "fighting words" doctrine, see 3 R. ROTUNDA, J. NOWAK & J. YOUNG, CONSTITUTIONAL LAW § 20.40, at 198-99 (3d ed. 1986). See also Harry Kalven, Jr.'s reference to *Chaplinsky* as "a case which bespeaks the gentility of a bygone era." H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 78 (J. Kalven ed. 1988).

²⁹ *Chaplinsky*, 315 U.S. at 572. Professor Kalven pointed out that the unanimous Court opinion in *Chaplinsky*, whatever its current authority, was joined by Justices Black and Douglas, whose sensitivity to free speech values seems clear. See H. Kalven, *supra* note 28, at 79.

unpopular, or offensive ideas,³⁰ or foolish and immoderate speech,³¹ or the conveyance of ideas dependent upon satire, imagination, exaggeration, or caricature,³² or speech that does not in fact persuade³³ or even attempt to persuade some or all of one's immediate audience.

It is not at all obvious, however, that Flynt's depiction of Jerry Falwell as engaging in drunken incest with his mother meets the "social idea" requirement. It is even suggested by an argument that is useful to Hustler in a libel context that Flynt's speech does not meet this requirement. The material is said to be non-defamatory because it is so patently absurd and nonsensical on its face that no reasonable reader could believe it to be true.³⁴ While the intended and appreciated inanity of a statement of a nominally factual sort may save it from being defamatory, it hardly suggests that the statement should be treated as a contribution to public discussion or debate.

To argue that Flynt's speech would be widely thought of as offensive, and particularly offensive to Reverend Falwell, by itself hardly suffices to supply the requisite social idea. While the Court majority may have seen fit to extend free speech protection to the arguably offensive terse anti-draft imprecation in *Cohen v. California*,³⁵ and while *Cohen* sought to extend protection to the emotive as well as the cognitive aspects of the speech,³⁶ *Cohen* seems easily distinguishable. The defendant in *Cohen* at least expressed, if without much pretension to articulateness, an opinion, or reaction, to some obviously significant political issue or debate, along

³⁰ *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

³¹ *Baumgartner v. United States*, 322 U.S. 665, 674 (1944); *In re Stevens*, 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48, 50 (1982) (Mosk, J., dissenting).

³² *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1415 (C.D. Cal. 1987).

³³ *See id.* at 1421 (quoting *Falwell v. Flynt*, 805 F.2d 484, 488 (4th Cir. 1986)).

³⁴ *Hustler Magazine v. Falwell*, 108 S. Ct. at 876, 879 (1988); *see also Dworkin*, 668 F. Supp. at 1413 (citing *Frank v. National Broadcasting Co.*, 119 A.D.2d 252, 506 N.Y.S.2d 869, 872-73 (1986)); *cf. Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (en banc) (recovery not permitted by a public figure where the false statement had at least some superficial plausibility).

³⁵ 403 U.S. 15 (1971). *See generally Cohen, A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595 (1987); Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283.

³⁶ *Cohen*, 403 U.S. at 26; Heins, *Banning Words: A Comment On "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 587 (1983).

with, if not by means of, his emotive meaning. *Cohen* is thus perhaps best read as protecting emotive meaning expression as long as there is some minimally sufficient grounding in cognitive meaning. But Flynt's speech in *Hustler* lacks the requisite cognitive meaning about some topic of potential public interest, even if, as seems questionable, it was intended to convey some recognizable emotive meaning.

Courts have occasionally been led to overlook this simple logic on the dubious assumption that "all statements that are not factual must be categorized as opinion."³⁷ Perhaps the most straightforward analysis of Flynt's speech would recognize that it did contain one assertion of fact, however ludicrously false. But even if we assume, as the Court did in *Hustler*, that no recklessly false assertion of fact is contained within Flynt's speech,³⁸ it is a fallacy to assume, as the Court does, that Flynt's speech therefore falls into the category of "robust political debate,"³⁹ or "debate about public affairs,"⁴⁰ or speech on "public issues."⁴¹ Why must speech that is neither true nor false necessarily qualify as some sort of opinion on a particular public issue? Presumably, an ordinary joke or riddle would fall into neither the fact nor opinion category.

Of course, Flynt's speech is "about" an incontestably public figure. This, however, does not mean necessarily that Flynt's speech sought to convey some social idea. Even speech by one public figure about another, antithetical public figure need not qualify as conveying a social idea. The Supreme Court has observed elsewhere that the mere background presence of political controversy or ideological debate, "lurking" in the broader cultural context of an instance of speech, does not itself necessarily change the speech's category.⁴²

If Flynt's speech were interpreted generously, it could be seen to indicate not merely distilled irresponsibility, or inar-

³⁷ *Dworkin*, 668 F. Supp. at 1415 (citing *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987)).

³⁸ *Hustler*, 108 S. Ct. at 882.

³⁹ *Id.* at 879.

⁴⁰ *Id.* at 880.

⁴¹ *Id.*

⁴² See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (gender-labeled help wanted ads as merely commercial speech, rather than political speech, even though the notion of the propriety of gender-stereotyped job categories is plainly implicated).

ticulate animosity, but a more particular message, perhaps along the lines of a hyperbolically formulated accusation of broad, unprincipled hypocrisy on the part of Reverend Falwell. If Flynt's language were reasonably susceptible of such a meaning, it would certainly meet the minimum requirements for speech in the constitutional sense. But Flynt's speech cannot genuinely sustain any such meaning. Initially, Flynt's speech appears to be speech in the constitutional sense, in that it expressly, or by reasonable inference, accuses or associates Falwell with drunken incest contrary to Falwell's pretensions. Flynt, however, wants to assert, for free speech purposes, that this sort of implication was not meant seriously⁴³ and could not be taken seriously by a reasonable audience,⁴⁴ which seems plausible if "reasonable" is defined restrictively. There is certainly no obvious reason why Flynt should be allowed inconsistent positions on this issue. However, if the "unprincipled hypocrisy" claim is not fairly attributable to Flynt's speech, no other cognizable social idea remains, except that which unusually creative persons, or Flynt's attorneys, may gratuitously bestow upon the speech after the fact.

Finally, one can easily envision deriving a great deal of personal gratification, if not individual self-fulfillment, from the speech in question, and individual self-fulfillment is often considered among the primary values underlying the free speech clause.⁴⁵ The problem with this view, even if we assume that Flynt's speech promoted his self-fulfillment as much as it might have impaired that of Falwell, is that not everything that promotes a value underlying the free speech clause is necessarily speech in the constitutional sense.⁴⁶ Even if Flynt's ad parody promoted Flynt's self-fulfillment in

⁴³ *Hustler*, 108 S. Ct. at 878. The true inanity of Flynt's language is recognized in Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 424 (1988) (Flynt's speech as "a bad, dirty joke"), but Professor Smolla then reinvests Flynt's speech with coherent cognitive meaning in *id.* at 425 (message of Falwell's alleged hypocrisy and Flynt's associated distaste for Falwell).

⁴⁴ See *id.* Presumably, the jury took into consideration the possibility that there may be a difference in sophistication between the readership of *Hustler* and, say, that of *The Review of Metaphysics*.

⁴⁵ See sources cited *supra* at note 21; see also Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). But cf. BeVier, *supra* note 20, at 322 (judgments as to what promotes self-realization perhaps best left to elected legislators rather than judges).

⁴⁶ But cf. Heins, *supra* note 36, at 590 (gutter racial invective "not wholly unrelated" to self-fulfillment value).

some relevant sense recognizable to Aristotle,⁴⁷ or Rousseau,⁴⁸ or John Stuart Mill,⁴⁹ which seems doubtful in the extreme, one might presumably derive comparable self-fulfillment from a vigorous session of chopping firewood or from leading a scout troop on a hike. These latter are hardly speech in the constitutional sense, and Flynt's ad parody is only a marginally closer case.

To put the point in perspective, one might note that Flynt's putative speech simply does not lend itself to classic free speech policy analysis. What would be the point, for example, of suggesting that Falwell's situation, or the welfare of the public generally, would be promoted by "counterspeech" or a rebuttal by Falwell of whatever assertions or opinions are thought to be conveyed by Flynt's speech?⁵⁰ Certainly, the public interest might be served by Falwell's reacting to Flynt's speech in a way that delegitimizes Flynt's approach, but this is hardly the same as "answering" Flynt's speech on its own terms. Similarly, it would be impertinent to suggest that to avoid or minimize the injury, Falwell should have avoided "further bombardment" by averting his gaze from the ad parody.⁵¹ Furthermore, it would be genuinely odd to ask, for example, such questions as whether Flynt had available, at reasonable cost, sufficient alternative channels or means of conveying his "message" in undistorted fashion beyond the means he ac-

⁴⁷ See generally Aristotle's ETHICS and POLITICS.

⁴⁸ See generally Rousseau's DISCOURSE ON THE ORIGINS OF INEQUALITY.

⁴⁹ See generally Mill's ON LIBERTY. Among contemporary writers, Professor David Richards interestingly suggests that the background right underlying freedom of speech is a fundamental "right to conscience," or a right to "interpretive independence of our twin moral powers of rationality and reasonableness." See D. RICHARDS, TOLERATION AND THE CONSTITUTION 166 (1986). Again, Flynt's parody only minimally, if at all, implicates this basic value even assuming that the speech did not tend as much to sabotage the moral independence of the target as exalt that of the speaker.

⁵⁰ For the importance in other contexts of counterspeech, see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); see also *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1421 (C.D. Cal. 1987).

⁵¹ Cf. Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1749-50 (1985) (noting the possibility of a defendant's making it impossible for a public figure to avert her attention). But cf. *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes") (establishing, in parallel with a few cases involving dangerous canines, a "one bite" rule).

tually chose.⁵² If Flynt had some cognizable social message to impart, he would, of course, have the resources and notoriety to convey his message in ways not involving the intentional infliction of emotional distress.⁵³ If, on the other hand, Flynt intended neither to convey a social idea, nor to arbitrarily joke about a controversial public figure he disliked, but rather intended to inflict emotional distress on a designated victim, obviously no alternative means less subject to governmental regulation were available to him.

III. LOW-VALUE SPEECH VERSUS HIGH-VALUE SPEECH FOR CONSTITUTIONAL PURPOSES

A cold-eyed analysis suggests that Flynt's ad parody probably does not bear classification as speech within the meaning of the first amendment. But even if Flynt's parody comes within the scope of the first amendment, if it can be classified, apart from its controversiality or unpopularity, as "low-value" and not "high-value" speech, it should be subject to state regulation on grounds less stringent than those adopted by the Court in *Hustler*.⁵⁴

The low- versus high-value speech distinction, perhaps traceable to *Chaplinsky*,⁵⁵ assumes that in light of first amendment values, different types or categories of speech deserve different degrees of protection.⁵⁶ Speech central to, or at the core of,⁵⁷ the first amendment merits stringent protection, while speech less central, or at the periphery of the first amendment, merits less protection.⁵⁸ The low- versus

⁵² For the relevance of the availability of "ample alternative channels of communication" in the context of time, place, and manner restrictions on the use of public forum, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing authority).

⁵³ *But cf. Cohen*, 403 U.S. at 25-26 (concluding that Cohen's "otherwise inexpressible emotions" could not be conveyed in a way that did not fall afoul of the criminal statute under which Cohen was charged). For a sense of the complexities of the "ample alternative channels" analysis, see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-45 (1975).

⁵⁴ See *Hustler*, 108 S. Ct. at 882.

⁵⁵ *Chaplinsky*, 315 U.S. at 572 (referring to certain categories of speech as being of only "slight social value as a step to truth").

⁵⁶ For a recent academic exposition, see Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 & nn.2 & 4 (1987).

⁵⁷ For a recent reference to the concept of the "core" of the first amendment, see *Boos v. Barry*, 108 S. Ct. 1157, 1162 (1988) (the category of classic "political speech" as at the core).

⁵⁸ For a recent example, see *Curtis v. Thompson*, 840 F.2d 1291, 1297-98 (7th

high-value determination does not reflect some essentially controversial judicial assessment of the merits of the idea being expressed, but rather "the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment."⁵⁹ At least some degree of judicial consensus has developed around this inquiry.⁶⁰

Cir. 1988) (regulation of the category of "commercial speech" based on its content as "less problematic" than regulation of political speech based on its content).

⁵⁹ Stone, *supra* note 21, at 194.

⁶⁰ See *id.* at 194-95. Professor Stone indicates that among the low-value free speech categories are "express incitement, false statements of fact, obscenity, commercial speech, fighting words, and child pornography." *Id.* In this context, "obscenity" presumably refers generally to sexually explicit or pornographic materials; "obscenity" is often used to refer to the legal characterization of materials as failing to meet the relevant constitutional test, and therefore not at all protected. See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973) ("[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment") (citing authority). Characterizing express incitement as low-value speech also does not seem inevitable. At least some speech expressly inciting illegal acts would seem most logically classified as core political speech, crisply articulating an important approach to important public affairs, and therefore high-value speech. It is just that at least some such speech may fail the appropriate constitutional test, one that is very demanding on the government, as befits high-value speech. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (clear and present danger formulation articulated); see also *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985) (pornography cannot be considered low-value speech if it is sought to be suppressed because of its alleged influence on political and social attitudes), *aff'd per curiam*, 475 U.S. 1001 (1986). But see *Dennis v. United States*, 341 U.S. 494, 544-45 (1951) (Frankfurter, J., concurring) (express incitement of overthrow of the government as low-value speech).

Whether one chooses to call the language of express incitement high- or low-value speech depends upon whether one focuses on its crucial political content and viewpoint, or upon its counseling of seriously harmful illegal acts. This choice itself is presumably not crucial, as long as the burden on the government to justify suppressing the speech is a heavy one, as with incontestably core speech. One reason, though, for not classifying both obscene materials and express incitement to rebellion as low-value speech is that it makes the low-value speech classification nearly useless as an independent predictor of the degree of protection against government suppression that the speech is entitled to. On such an analysis, we know from the low-value speech classification only that the speech is entitled to either no, or virtually no, free speech protection (obscene materials), or the most stringent sort of protection, no less protective than any kind of high-value speech (express incitement), or else requires protection of an intermediate degree (e.g., commercial speech). The low- versus high-value distinction thus loses much of its meaning. The same point might be made, incidentally, with respect to the distinction between content-based and content-neutral restrictions on speech, in which knowing that a government restriction on speech is content-based tells us very little, if anything, about the stringency or laxity of the government's constitutional burden in suppressing the speech. See, e.g., *Curtis*, 840 F.2d at 1298 (content-based regulation of commercial speech "less problematic" than regulation of public affairs speech); Schauer, *supra* note 11, at 279 ("[l]aws against price fixing, extortion, perjury and solicitation to . . . nonpolitical crimes are all 'aimed at communicative impact,' yet these . . . laws are intuitively and correctly held to be outside the coverage of the first amendment"). For general

Perhaps the most useful analysis of what makes particular kinds of speech low-value speech for constitutional purposes is that of Professor Sunstein,⁶¹ who suggests the relevance of four factors. These four factors are as follows: first, that the speech be remote from the central first amendment focus on popular control of public affairs or the governmental process;⁶² second, that the speech be largely noncognitive rather than cognitive, or knowledge-imparting, in nature;⁶³ third, that the speaker not be intending to convey a message;⁶⁴ and finally, that the speech fall into a class where it is relatively unlikely that the government's motive in seeking to regulate the speech is constitutionally impermissible.⁶⁵

While these four factors are not susceptible of invariably uncontroversial application, they do collectively suggest, in as unequivocal a way as can reasonably be hoped for, that Flynt's speech in the *Hustler* case qualifies at best as low-value speech. First, although Falwell and Flynt are both public figures who frequently publish ideas about public affairs and public policy, Flynt's speech in the *Hustler* case does not reasonably seek to convey any of these governmental process-related ideas. Second, Flynt's speech is either wildly false or utterly devoid of cognitive or knowledge-imparting content. Third, any coherent message is "brought to" Flynt's speech by the creative reader, rather than reasonably drawn from it. Finally, the theory that an illegitimate government motive played any significant role in regulating the defendant's speech is implausible. The regulation was, after all, initiated by a private party plaintiff in a civil suit whose claims must often filter their way through the jury process. Equally as important, the government's own role in regulating the kind of speech at issue in *Hustler* simply reflects the widespread view that there should be at least some minimal form of civil tort redress for the intentional infliction of severe emotional distress.⁶⁶

discussions of the content-based versus content-neutral speech restriction distinction, see the authorities cited *supra* at notes 56 & 59 and Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

⁶¹ See Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-06.

⁶² *Id.* at 603.

⁶³ *Id.* at 606, 603 n.87.

⁶⁴ *Id.* at 603-04.

⁶⁵ *Id.* at 604.

⁶⁶ Consider the evolution of the tort of intentional infliction of emotional distress

Consideration of Professor Sunstein's four factors thus suggests that Flynt's speech should at best be classified as low-value speech and should not be given the practically absolute⁶⁷ constitutional protection conferred on it by the Court. Flynt's parody is certainly entitled to no greater protection than arguably offensive speech that constitutes an independent common law tort. In the past, the Court has permitted state regulation of non-obscene but arguably offensive sexually oriented speech, based on its content, without imposing a demanding constitutional test. State regulation is allowed on the assumption that such speech is low-value speech⁶⁸ on the periphery of first amendment concerns.⁶⁹ In sexually oriented speech cases, the Court has recognized that it would be idle pedantry to suggest that regulating profanity in appropriate contexts imposes some appreciable burden or disadvantage on speakers who wish to convey a particular viewpoint,⁷⁰ or even on those who wish to convey a particular speech "content."⁷¹ As Justice Stevens has observed, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."⁷²

Some conceptions of what constitutes "core" or high-value speech are more expansive. One commentator has suggested, for example, that "[e]xpressions of dislike or disrespect for another are precisely the type of ideological communications that are within the very core of the protection accorded by the first amendment."⁷³ Doubtless some

from such a landmark case as *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926), as traced in Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Mead, *supra* note 17; Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

⁶⁷ See *supra* text accompanying notes 13-14.

⁶⁸ See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

⁶⁹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (opinion of Stevens, J.). The Court more recently took a similar approach in analyzing a school district's regulation of offensive or vulgar speech by a public high school student in *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159, 3166 (1986).

⁷⁰ See *Stone*, *supra* note 21, at 243-44.

⁷¹ See *id.* at 243; *Pacifica Found.*, 438 U.S. at 743 & n.18.

⁷² *Pacifica Found.*, 438 U.S. at 743 n.18. *But cf.* *Cohen v. California*, 403 U.S. 15, 26 (1971) ("words are often chosen as much for their emotive as their cognitive force"). Of course, no one supposes that form and content are utterly separate and unrelated.

⁷³ Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 569 (1980); see also

expressions of dislike or disrespect may qualify as high-value speech, depending, among other considerations, on the content of the speech. But some instances of speech conveying disrespect, as we may assume Flynt's does of Falwell, are so "open" and undifferentiated—essentially all that Flynt "says" of Falwell is immediately "retracted" by Flynt's disclaimer⁷⁴—that the values underlying the free speech clause are at best not strongly implicated. This conclusion is independent of one's sympathy, or lack thereof, for Flynt or Falwell or the ideas ordinarily associated with either. Regardless of the identity or popularity of the speaker or the target, "few of us would march our sons and daughters off to war to preserve the citizen's right"⁷⁵ to commit the common law tort of intentional infliction of emotional distress by means of words or drawings that are, by admission, as devoid of any seriously intended meaning or public issue content as Flynt's were.⁷⁶ From the standpoint of the public interest, it seems appropriate to require, in exchange for granting immunity from liability for the tort of intentional infliction of emotional distress on a public figure or public official, that the speaker at least take the trouble to attempt to reasonably convey some particular public interest-related idea.

The Court thus had ample reason to classify Flynt's speech as low-value speech, at best, and accord it less than the practically absolute protection that it did. In addition, despite the important difference between the two torts, many of the individual and social costs of false and defamatory speech about public figures and public officials that have been identified in the libel context⁷⁷ are also relevant in the context of the *Hustler* case. If the risk of defamation, or unprovable defamation, constitutes a disincentive to public service,⁷⁸ so does the risk of speech like Flynt's that is

Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1149 (1983) (impossibility of separating "moral sensibilities" from "political sensibilities").

⁷⁴ *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 879 (1988).

⁷⁵ *Cf. Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) (referring to the right to see sexually explicit non-obscene materials at a convenient local theater).

⁷⁶ *Hustler*, 108 S. Ct. at 878.

⁷⁷ *See, e.g., Epstein, Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 797-801 (1986).

⁷⁸ *See id.*

now essentially immunized by the Supreme Court.

The arguments presented above do not rely in the slightest on any putative social interest in maintaining or elevating the level of public discourse or in promoting public civility. While such an interest has been given central importance by such champions of liberty as John Stuart Mill,⁷⁹ there seems to be little current enthusiasm for such an apparently anachronistic approach.⁸⁰ This state of affairs may eventually change if the judiciary begins to conclude that the quality of public debate, particularly at the lower ranges, is tending to systematically deteriorate over time.⁸¹

It has been said that “[o]nly small men are afraid of small writings.”⁸² Writers of the stature of Warren and Brandeis,⁸³ however, have expressed reasonable fear of material less inane virulent than Flynt’s. Referring to personal gossip in general, Warren and Brandeis classically warned that

Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. . . . Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things.⁸⁴

If there is a public interest in diminishing the scope and pervasiveness of mere idle gossip, there is an even more substantial public interest in providing only limited constitutional protection for intentional infliction of severe emotional distress.

Finally, it is possible to argue for relatively great constitutional protection for otherwise tortious intentional infliction

⁷⁹ See the discussion of Mill’s view in Wright, *supra* note 24, at 158-61.

⁸⁰ One commentator has stated flatly that “[t]he societal interest in purifying or raising the level of discourse is not a sufficient justification for regulating speech. The abstract interest in civility is too weak to justify such explicit content regulation.” Note, *supra* note 51, at 1762 n.71 (citing *Cohen v. California*, 403 U.S. 15, 25 (1971)).

⁸¹ See generally Wright, *Judicial Responses to Long-Term Societal Decline*, 30 ARIZ. L. REV. 271 (1988).

⁸² *Faloon v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1360 n.58 (N.D. Tex. 1985) (quoting Pierre de Beaumarchais), *aff’d*, 799 F.2d 1000 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987).

⁸³ See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸⁴ *Id.* at 196; see also A. BICKEL, *THE MORALITY OF CONSENT* 61-75 (1975).

of emotional distress on the grounds that such conduct amounts merely to "blowing off steam," thereby avoiding the risk of more serious harm by the defendant.⁸⁵ Even if we assume, however, that this essentially Aristotelian theory of catharsis is psychologically sound and that the harms of such speech are slight, this argument should give us pause. If the courts provide more than quite modest constitutional protection in accordance with this theory, the courts are essentially paying off to an implicit threat by defendants, many of whom, including Flynt, are acting with deliberation rather than impulse, to wreak even more serious havoc on their targets, or on others, if their otherwise tortious conduct is not strongly immunized. Adopting the "blowing off steam" rationale is, therefore, even more objectionable than according a "heckler's veto" to those who point to their own potentially violent reaction in order to justify suppressing disfavored speech.⁸⁶ Ultimately, the only sensible judicial response to those who feel some irresistible impulse to blow off steam is to insist that they do so by means of relatively high-value speech, of which defendants such as Flynt are presumably readily capable, or else accept a more modest level of free speech protection.⁸⁷

One controversial area of the law in which the claim of intentional infliction of emotional distress is sought to be countered in part by a "blowing off steam" rationale is that of abusive, racially charged epithets or invective.⁸⁸ Any attempt to sort out instances of personally directed racial invective deserving greater and lesser degrees of protection is apt to be difficult.⁸⁹ At least as to public official or public figure plaintiffs, the logic of the Court in *Hustler* will be clear: the defendant's speech will be immunized as long as the defendant is not so unwary as to gratuitously include a false, but plausible, statement of fact about the plaintiff.

⁸⁵ See PROSSER AND KEETON, *supra* note 13, § 12, at 59; Magruder, *supra* note 66, at 1053; Prosser, *supra* note 66, at 887 ("[S]ome safety valve must be left through which irascible tempers may blow off relatively harmless steam.").

⁸⁶ See, e.g., *Terminiello v. Chicago*, 337 U.S. 1 (1948).

⁸⁷ It is worth noting that while the Restatement subjects the tort of intentional infliction of emotional distress to constitutional limitations—as all torts, presumably, should be—it does not begin to address the question of the level or degree of free speech protection that is appropriate. See RESTATEMENT (SECOND) OF TORTS § 566 comment f (1977).

⁸⁸ See Heins, *supra* note 36, at 590.

⁸⁹ See Note, *supra* note 51, at 1775.

This rule, however, is less than fully satisfactory, especially when it is recognized that the category of "public officials" is often defined expansively, so to include, for example, ordinary police officers.⁹⁰ One can certainly imagine that continually repeated vicious racial invective directed at a black police officer by a superior officer in the police hierarchy could be sufficient to establish the common law elements of intentional infliction of emotional distress.⁹¹ Rather than simply regretting the large social cost of such speech, borne disproportionately by ethnic minorities, one might consider whether a reduced level of constitutional protection could ever be appropriate in such cases.

In accordance with the basic distinction drawn in this Essay, courts should assume the quite manageable task of considering whether the speech at issue is "pure" racial invective, articulating either no particular social idea or no social idea not reasonably conveyable without resort to racial epithets, or is instead speech that does convey such an idea. Not all racial invective is constitutionally alike. Our free speech traditions will often require protection, for example, for the misguided eugenics policy advocate. They do not require substantial protection for the speaker whose "point" or message involves no more than simply announcing that the particular listener-victim is indeed quite uncontroversially a member of some racial or ethnic group to which the speaker attaches, for utterly unspecified reasons, a pejorative appellation. That a person *A*, who is a member of group *B*, is referred to by the speaker as a (member of group) *B*₁, without more, where *B*₁ is merely a rude name for *B*, is not itself a sufficient *social* idea, however much it may "resonate" or fit in with a broader cultural element of an actually articulated racial ideology.

This distinction would often protect speech that, for example, attempts to give a reason for the view that members of group *B* are somehow objectionable or even speech that

⁹⁰ See *Fleming v. Benzaquin*, 390 Mass. 175, 454 N.E.2d 95, 104-05 (1983) (concluding in dicta, that the weight of authority so holds) (citing Note, *Police Defamation Suits Against Citizens Complaining of Police Misconduct*, 22 St. Louis U.L.J. 676, 684-85 (1978)).

⁹¹ See the private employee case of *Bailey v. Binyon*, 583 F. Supp. 923, 932-34 (N.D. Ill. 1984) (distinction between actionable emotional distress and the unpleasantness of mere insults, annoyances, or indignities) (discussing no free speech issues).

asserts that some or all *Bs* possess some objectionable quality. Under this distinction, such speech would be protected even if the speech is addressed only to one of the members of *B* whom the speaker has no realistic hope of persuading.⁹² One might object that this approach protects the articulate or the reason-giving racist. The objection is correct, but it is a result that seems consistent with free speech values and purposes. And at least for the moment, the alternative accepted by the majority of the Court, in the case of public officials and public figures, is more solicitous of even the most painful, inane racial invective as long as the speaker does not inadvertently make a false, but plausible, factual claim.⁹³

IV. LIMITING THE SCOPE OF THE TORT BY NON-CONSTITUTIONAL MEANS

It would be perfectly sensible to have misgivings about reducing, if not eliminating, constitutional protection for Flynt's speech if the courts would, as a result, be left with insufficient means of controlling potential jury excesses in cases not involving the expression of any social idea. But this is not the case. The courts have at their disposal a number of nonconstitutional means of reducing the potential for abuse of the tort of intentional infliction of emotional distress.

The essential legitimacy of the tort of intentional infliction of emotional distress is well established,⁹⁴ and Professor Prosser suggested in his seminal article in 1939 that up until that time, the tort had been well policed and generally not used as an instrument of abuse.⁹⁵ Recently, though, the fear has arisen that plaintiffs might use the tort of inten-

⁹² *But see* Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 177 (1982). Otherwise protected speech directed only to implacably opposed listeners, or that is not even intended to convince that particular audience, should not for that reason alone lose its protected character. The value of free speech is not solely dependent upon the prospect of changing minds; one might seek instead to preserve one's integrity by taking a definitive stand on some controversial public issue, even to an unalterably hostile audience, perhaps partly out of a desire to avoid hypocrisy or patronizing one's audience.

⁹³ *See* *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882-83 (1988). For a brief discussion of some of these issues, see L. TRIBE, *supra* note 28, § 12-8, at 838 n.17.

⁹⁴ *See* *Yeager v. Local Union 20, Int'l Bhd. of Teamsters*, 6 Ohio St. 3d 369, 453 N.E.2d 666, 670 (1983) (unanimity of adoption among the states).

⁹⁵ Prosser, *supra* note 66, at 888-89.

tional infliction of emotional distress to avoid short statutes of limitation, circumvent restrictions on punitive damage awards, unduly expand privacy concepts, or generally appeal to juror prejudice, among other potential abuses.⁹⁶

Each of these potential problems, however, can readily be controlled by insistence on appropriate common law restrictions. One commentator has observed, for example, that "the strict requirements of the outrageousness standard"⁹⁷ may account for the paucity of successful emotional distress suits against media defendants.⁹⁸ The common law requirement that the plaintiff show severe emotional harm⁹⁹ and that the defendant's conduct was extreme and outrageous, over and above showing the defendant's intent, functions as an effective nonconstitutional limitation on the range of the tort.¹⁰⁰

Accordingly, a showing of defendant's intent does not substitute for a showing of outrageousness, and a showing of outrageousness does not substitute for showing the requisite intent.¹⁰¹ Similarly, neither intent nor outrageousness substitutes for a showing, perhaps even on a standard of "convincing" evidence,¹⁰² of the seriousness or gravity of the emotional harm inflicted.¹⁰³ If, despite the possibility of

⁹⁶ See Mead, *supra* note 17, at 25.

⁹⁷ *Id.* at 53.

⁹⁸ *Id.*

⁹⁹ See Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1021 (1st Cir. 1988).

¹⁰⁰ See, e.g., Ross v. Burns, 612 F.2d 271, 273 (6th Cir. 1980) (absence of "extreme and outrageous" conduct found as a matter of law); Cape Publications v. Bridges, 423 So. 2d 426, 428 (Fla. Dist. Ct. App. 1982) (same), *cert. denied*, 464 U.S. 893 (1983). *But see* Boos v. Barry, 108 S. Ct. 1157, 1164 (1988), in which the Court reiterated its view, adopted in *Hustler*, that an outrageousness standard would be too "inherently subjective." It might be noted, however, that the Court continues to criminalize speech alleged to be obscene based on the no less inherently subjective standard of lack of "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973); *Pope v. Illinois*, 107 S. Ct. 1918, 1921 (1987) (citing *Miller*, 413 U.S. at 24).

¹⁰¹ See, e.g., Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1275 (3d Cir. 1979) (en banc); *Godbout v. Cousens*, 396 Mass. 254, 485 N.E.2d 940, 946 (1985) (not requiring a showing that the defendant's intention was to cause particularly severe emotional distress).

¹⁰² See Prosser, *supra* note 66, at 888.

¹⁰³ See *id.*; see also Mead, *supra* note 17, at 48 ("[t]hough peace of mind is protected by the principles underlying both invasion of privacy and infliction of emotional distress torts, it appears the disturbance to such mental tranquility must be far greater to support the latter action."). *But cf.* *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814, 816 (1926) (no explicit requirement that the level of emotional distress actually suffered be severe).

judicial supervision of the elements, further restrictions on the tort are necessary, the courts could simply limit or bar the availability of punitive damages. This limitation could perhaps be based on the theory that the legal distinction between merely being liable for this tort, and appropriately being subject to punitive damages, is essentially arbitrary.¹⁰⁴ As has been suggested in the libel area, the states might simply impose a reasonable statutory maximum on the amount of total damages recoverable for intentional infliction of emotional distress.¹⁰⁵ Finally, the tort can have a short statute of limitations no longer than the period applicable to the most closely related torts.¹⁰⁶

V. CONCLUSION

The threat to the broadest plausible range of free speech values posed by the potential for tort liability of speech akin to Flynt's is quite minimal, especially if the courts and legislators adopt the available nonconstitutional means of restricting potential excesses. The Court in *Hustler*, of course, chose instead to protect almost absolutely, in a practical sense, language intended merely to inflict severe emotional distress on public figures and public officials.

One reason for this approach, beyond our cultural enthusiasm for any extension at all of the first amendment, may be the Court's prediction that such a course would help avoid subjecting the Court to superintending yet another stream of free speech cases. The problem is that it is probably not much easier to judicially identify public officials and public figures for such purposes than it is to tell whether particular language seeks to convey a cognizable social idea. For example, suppose a television reporter emotionally abused Jessica McClure, the toddler famous for falling into a well. Would the case really hinge on the presence or absence of a plausible false statement of fact, or would the court instead find a way to deny her public figure status?¹⁰⁷ This example suggests that public figure versus private figure status is

¹⁰⁴ See the discussion in *Chuy*, 595 F.2d at 1277.

¹⁰⁵ See, e.g., Epstein, *supra* note 77, at 815.

¹⁰⁶ Cf. *Yeager v. Local Union 20, Int'l Bhd. of Teamsters*, 6 Ohio St. 3d 369, 453 N.E.2d 666, 672 (1983) (intentional infliction of emotional distress as falling into the residual category of a four year limitations period in Ohio).

¹⁰⁷ For one possible approach to judicially resolving the most difficult borderline cases of the related issue of what counts as speech that is on a matter of public inter-

only loosely associated with the essential concerns underlying the free speech clause, which are captured more accurately by a concern for the presence of the requisite social idea.

It is initially surprising, though, in view of Chief Justice Rehnquist's heavy reliance on libel precedents,¹⁰⁸ that no member of the Court chose to pursue the possibility of imposing different constitutional standards based upon whether the speech at issue was on a matter of public interest and concern or on a matter of private or personal interest and concern. This approach is suggested by recent cases in libel¹⁰⁹ and other¹¹⁰ areas. On reflection, though, the Court's disinclination to pursue this avenue may be explained on the basis of the poor fit between these categories and the actual speech in *Hustler*. It is probably safe to say that Flynt's speech itself was not on some matter of public interest or concern. But it also fits uneasily within the category of merely private or personal interest speech. It is not as though Flynt had stopped to inform Falwell that he had dropped his car keys or was merely expressing annoyance over Falwell's reassigning him to a less prestigious job. Finding it difficult to categorize Flynt's speech as either public or private, the Court might have seen no point in applying the distinction.¹¹¹

The problem with this logic, however, is that the Court has implicitly adopted the wrong "default" setting. Even if the Court could not classify Flynt's speech as either public or non-public interest speech, it should not have effectively classified it as public interest speech by strongly constitutionalizing it. The Court should constitutionalize only such speech for which it has a clear affirmative reason, in light of basic free speech values, to protect. Speech that is not public interest speech, all else equal, should not be strongly

est, see Wright, *Speech on Matters of Public Interest and Concern*, 37 DE PAUL L. REV. 27 (1988).

¹⁰⁸ *Hustler*, 108 S. Ct. at 878-82.

¹⁰⁹ See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) (plurality opinion).

¹¹⁰ See, e.g., *Rankin v. McPherson*, 107 S. Ct. 2891, 2896-97 (1987) (public employee dismissal case allegedly based on the employee's speech); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (same).

¹¹¹ At least one commentator has found the distinction between speech on matters of public concern and speech not on such matters to be unsatisfactory, for reasons addressed in Section II above. See Note, *supra* note 51, at 1773-74.

constitutionalized because the “default” position, for unclassifiable speech, should be for the federal courts to respect the interest balancing inherent in state common law adjudication of tort claims.