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Indiana Law Journal

Volume 63 | Issue 4 Article 6

Fall 1988

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Boyd C. Farnham
Indiana University School of Law

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Recommended Citation

Farnham, Boyd C. (1988) "Free Speech and Freedom from Speech: Hustler Magazine v. Falwell, The New York Times Actual Malice Standard and Intentional Infliction of Emotional Distress," *Indiana Law Journal*: Vol. 63: Iss. 4, Article 6.
Available at: https://www.repository.law.indiana.edu/ilj/vol63/iss4/6

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Free Speech and Freedom from Speech: *Hustler Magazine v. Falwell,* The *New York Times* Actual Malice Standard and Intentional Infliction of Emotional Distress

> One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.[1]
>
> Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in?
> A. Yeah.
> Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?
> A. To assassinate it.[2]

INTRODUCTION

In a 1959 article examining the tort of injurious falsehood,[3] William Prosser concluded that innocent or negligent false statements "made in good faith are not a basis for liability for injurious falsehood."[4] Five years later in *New York Times Co. v. Sullivan,*[5] the United States Supreme Court explicitly adopted this conclusion by finding that the first amendment provides constitutional protection to innocent and negligent defamatory[6]

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1. Baumgartner v. United States, 322 U.S. 665, 673-74 (1943).
2. Flynt v. Falwell, 797 F.2d 1270, 1273 (4th Cir. 1986) (questions posed by attorney for Jerry Falwell, answered by co-defendant Larry Flynt), *rev'd sub nom.* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).
3. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).
4. *Id.* at 437.
5. 376 U.S. 254 (1964).
6. Defamation is defined by the Second Restatement of Torts in the following manner:
   > A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

RESTATEMENT (SECOND) OF TORTS § 559 (1976). The elements of a defamation cause of action are stated in section 558 as:

> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting at least to negligence on the part of the publisher; and,
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. § 558.

statements concerning public officials. This protection is in the form of an "actual malice" test, which requires a public official-plaintiff in a defamation action to prove that the defendant had knowledge that a statement was false or that the defendant recklessly disregarded the truth.[7] The actual malice standard, as the Court later explained, is essential to protecting the necessary "breathing space" for the "fruitful exercise" of first amendment rights from the inhibiting effects of defamation suits.[8]

Prosser also argued that if a defendant makes false statements "in the sense of spite or ill will or a desire to do harm to the plaintiff for its own sake" he should be liable "even where he honestly believes his statement to be true and would otherwise have a privilege to make it."[9] The level of first amendment protection afforded these "malevolent"[10] defendants was not discussed by the Court in *New York Times*. As a result, public figure-plaintiffs[11] are increasingly attempting to circumvent application of the actual malice standard—relying on this concept of a malevolent speaker—by using the tort of intentional infliction of emotional distress.[12] Such an approach focuses on the public figure's personal interest in freedom from extreme and outrageous speech which causes severe emotional distress.[13] The possi-

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7. *New York Times*, 376 U.S. at 279-80. *See infra* notes 17-32 and accompanying text.

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). The Court stated:

> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise.

Id.

9. Prosser, *supra* note 3, at 437.

10. "Malevolent" is the term used by Prosser to describe a person who makes false statements prompted by "ill will" or a "desire to do harm" to another individual. *Id.* For a further discussion of malevolent publishers, see *infra* notes 63-77 and accompanying text.

11. The protection of the actual malice standard was later extended to include public figures. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). The Supreme Court stated:

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id. See also infra note 18.

12. Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 28 n.20 (1983) (stating that from 1975 to 1981, intentional infliction of emotional distress pleadings have shown a modest but significant upward trend). *See also Falwell*, 797 F.2d at 1274 ("There has been, of late, a growing trend toward pleading libel, invasion of privacy and intentional infliction of emotional distress in lawsuits arising from a tortious publication.").

13. *See, e.g.*, Hess v. Treece, 286 Ark. 434, 441, 693 S.W.2d 792, 796 (1985) ("The fact that Mark Treece happened to be a city employee should not deprive him of protection from outrageous conduct . . . ."), *cert. denied*, 475 U.S. 1036 (1986).

bility of damage awards in these cases, though, poses a threat to the free speech values protected in *New York Times*.

The Supreme Court had its first opportunity to consider how the tort of intentional infliction of emotional distress applies in the context of first amendment rights to free speech in *Hustler Magazine v. Falwell*.[14] In a narrowly tailored opinion, the Court found that an award of damages for intentional infliction of emotional distress could not be based upon an ad parody which could not be understood as stating actual facts about a person.[15] But, the Court carefully avoided establishing a blanket prohibition against all such actions based on speech. The issue left unresolved by the *Hustler Magazine* case is whether a plaintiff may recover for intentional infliction of emotional distress when the speech involved is a factual statement. The purpose of this Note is to resolve this issue by establishing a framework which compromises neither personal interests nor important first amendment values.

Initially, this Note examines the pertinent elements of the *New York Times* actual malice standard—as applied in defamation cases—and the tort of intentional infliction of emotional distress,[16] along with the impact of the *Hustler Magazine* decision on both. Next, it distinguishes between a good faith speaker and one whose dominant motive for speaking is malevolent. This distinction is then applied to different speakers based upon their belief in a statement's truth or falsity and the statement's actual truth or falsity. Finally, this Note concludes that protecting true speech from the tort of intentional infliction of emotional distress, coupled with a jury instruction allowing a plaintiff to recover for false speech which a malevolent speaker reasonably or negligently believes to be true, best reconciles the competing interests.

I. THE *New York Times* ACTUAL MALICE STANDARD, THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND THE IMPACT OF *HUSTLER MAGAZINE*

Resolving the conflict between first amendment values and personal interests in freedom from extreme and outrageous speech requires an understanding of the individual elements of the actual malice standard, the emotional distress tort and the *Hustler Magazine* decision. This section

14. 108 S. Ct. 876 (1988).

15. *Id.* at 879.

16. This Note is limited in scope to situations involving statements made about plaintiffs who are public officials or public figures. Therefore, it is limited to those cases where the actual malice standard of *New York Times* would be applicable. In addition, it will focus upon situations involving intentional infliction of emotional distress, and not the very different tort of negligent infliction of emotional distress.

explores briefly the relevant elements and their respective significance.

A. New York Times *and the Actual Malice Standard*

In *New York Times Co. v. Sullivan*,[17] the Supreme Court announced a speech-protective doctrine that focuses on the culpability of a speaker. This decision extended first amendment protection to unintentionally false speech critical of public officials. The Court described this protection, which was later extended to all public figures,[18] as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[19]

Application of this test centers on whether the speaker knew or should have known that a particular statement was false.[20] Actual malice on the part of a defendant must be shown by clear and convincing evidence.[21] Factual error or defamatory content alone is insufficient to allow recovery for a false statement.[22] Even the combination of factual error and defamatory content, absent the speaker's requisite culpability, is insufficient to remove the speech from the protection of *New York Times*.[23]

The actual malice standard is premised on a number of factors. First, it furthers a national commitment to wide-open debate on public issues which may "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[24] The standard accomplishes this goal by raising the level of fault a plaintiff must prove to recover for defamation. Second, it recognizes that public officials and public figures have voluntarily placed themselves in positions which typically invite a high degree of personal

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17. 376 U.S. 254 (1964).

18. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). In extending the protection to public speakers, the Court stated:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Id.

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

20. *Id.* at 280.

21. Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1140 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986).

22. Time, Inc. v. Hill, 385 U.S. 374, 387 (1967).

23. *New York Times*, 376 U.S. at 273 ("If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.").

24. *Id.* at 270.

criticism.[25] By virtue of their positions, these individuals have greater access to channels of communication which provide a mechanism for counteracting false statements and unfair criticisms.[26] Finally, the actual malice standard recognizes that free and full exercise of first amendment rights requires the protection of some erroneous statements in order to shield good faith publishers from the speech-inhibiting effects of defamation awards.[27] Although "the knowingly false statement and the false statement made with reckless disregard for the truth, do not enjoy constitutional protection,"[28] preserving first amendment rights requires that public persons accept the risk that they will be subject to innocent or negligent mistakes made by good-faith speakers.[29]

The protection provided speech by the actual malice standard is generally not affected by the label placed on a cause of action. Courts dealing with first amendment cases have held that "[w]here the constitutional right to free speech is involved, . . . the *New York Times* standard would be

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25. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz, 418 U.S. at 345.

26. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

27. Saint Amant v. Thompson, 390 U.S. 727, 732 (1968). *See also Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *New York Times*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' ").

28. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

The Court explained the theory behind denying false statements in facts in *Gertz* when it stated:

> They [false statements of fact] belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Gertz, 418 U.S. at 340 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1947).

29. *Gertz*, 418 U.S. at 344-45. The Court stated:

> An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case . . . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.

Id.

applicable to . . . an intent inquiry."[30] For example, the actual malice standard has recently been applied to cases involving false light invasion of privacy torts.[31] As the tort of intentional infliction of emotional distress extends into areas concerning the constitutional right to free speech, application of the actual malice standard in this context becomes a critical issue.[32]

B. Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are typically defined by state court decisions or state legislatures.[33] The Restatement (Second) of Torts defines the cause of action as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[34]

Included in this definition are four distinct elements which a plaintiff must plead and prove: 1) intentional or reckless conduct by a defendant; 2) which is extreme and outrageous; 3) causing severe emotional distress; and, 4) of which defendant's conduct was the proximate cause.[35]

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30. Hutchinson v. Proxmire, 579 F.2d 1027, 1036 n.16 (7th Cir. 1978), *rev'd on other grounds,* 443 U.S. 111 (1979).

31. Logan v. District of Columbia, 447 F. Supp. 1328, 1333-34 (D.D.C. 1978). The district court stated:

> Finally, plaintiff's invasion of privacy claims as to the erroneous report that his urine test indicated drug usage must be considered. On this claim plaintiff appears to assert that the article invaded his privacy by placing him in a false light. To recover on such a theory, however, the plaintiff must demonstrate that the article was published with knowledge of its falsity or in reckless disregard of the truth—i.e. that it was published with actual malice.

Id.

32. At least one author has stated the same basic issue in different terms. *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct,* 82 COLUM. L. REV. 42 (1982). Givelber states:

> Defamation cases also present the question of whether the defendant has abused his or her privilege. In other words, given that the interests at stake justify the defendant's publication of defamatory matter, has the defendant done so under circumstances (e.g., knowledge that the material is false, ill will towards plaintiff, or publication to a wider group than necessary) that defeat the privilege? In a case of intentional infliction of distress, an abuse of privilege might occur when the defendant is not furthering a legitimate interest, or is employing excessive means to further that interest, or is acting out of hatred for the plaintiff.

Id. at 61 (footnotes omitted). This Note argues that such an abuse occurs when a malevolent speaker uses extreme and outrageous speech, which is false, to inflict severe emotional distress.

33. For a list of cases recognizing the tort in various courts, see 7 SHEPARDS CAUSES OF ACTION 633, 671 (1983).

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

35. *Id.* Note also that the presence of any element necessary to establish another tort—such as assault or battery—is no longer required. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1965). This refers generally to the absence of any physical impact requirements which were previously necessary to establish a claim for emotional distress. *Id.* § 46 comment b.

Three of these elements are of particular importance to this Note.[36] First, a plaintiff must prove that a defendant intended to inflict emotional distress, or that a defendant recklessly disregarded the probability that emotional distress would result. This element applies without consideration of the specific acts which may have caused the distress,[37] as "the relevant culpability focuses [only] on the resulting harm."[38] Therefore, both the actual malice standard and the emotional distress tort include identical culpability requirements: intentional or reckless conduct by a defendant.

The second pertinent element is extreme and outrageous conduct. This element focuses on the specific act causing the emotional distress. A defendant's conduct satisfies this requirement only when it goes "beyond all possible bounds of decency," and is "regarded as atrocious, and utterly intolerable in a civilized community."[39] For purposes of this tort, "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[40] When applied to public figures, the definition of extreme and outrageous conduct may need to be narrowed, because such persons are expected to endure a greater amount of critical speech.[41] The actual malice standard, beyond its requirement of intentional or reckless false speech, encompasses no comparable provision qualifying the types of conduct subject to liability.

Finally, the tort requires that the emotional distress be severe. This element recognizes that "[c]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a

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36. Although the other element is not essential to the specifics of the Note, because it is not affected and does not affect application of first amendment protections, it is an important part of the context in which the controversy is set. The Note itself assumes that proof of intentional, or reckless, extreme and outrageous conduct alone will not satisfy the elements of the tort.

37. Drechsel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media,* 89 DICK. L. REV. 339, 351 (1985).

38. *Id.* The Second Restatement of Torts gives two examples to illustrate the requisite level of fault a plaintiff must prove in order to recover for emotional distress:

> 15. During *A*'s absence from her home, *B* attempts to commit suicide in *A*'s kitchen by cutting his throat. *B* knows that *A* is substantially certain to return and find his body, and to suffer emotional distress. *A* finds *B* lying in her kitchen in a pool of gore, and suffers severe emotional distress. *B* is subject to liability to *A*.
>
> 16. The same facts as in Illustration 15, except that *B* does not know that *A* is substantially certain to find him, but knows that there is a high degree of probability that she will do so. *B* is subject to liability to *A*.

RESTATEMENT (SECOND) OF TORTS § 46 comment i, illustrations 15 & 16 (1965).

39. *Id.* § 46 comment d ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.").

40. *Id.*

41. *See supra* notes 25-26.

part of the price of living among people."[42] As a general rule, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could expect to endure it."[43] In the case of public persons, as recognized in *New York Times*, they may be expected to endure more emotional distress simply by virtue of their position in society.[44] The actual malice standard itself, though, makes no similar provision regarding the extent of injury inflicted by defamatory falsehoods.

C. Hustler Magazine v. Falwell[45]

The action in *Huster Magazine* is based upon an advertisement parody published in Hustler magazine, featuring the Rev. Jerry Falwell.[46] Following publication of the parody, Falwell sued Hustler magazine, and its publisher Larry Flynt, for libel, invasion of privacy, and intentional infliction of emotional distress. The trial court dismissed the action for invasion of privacy and the jury found for the defendants on the libel claim; but, the jury awarded Falwell $200,000 on his claim for intentional infliction of emotional distress.[47] The Fourth Circuit Court of Appeals, finding that Falwell is a public figure and that the publication at issue "gives rise to the first amendment protection [of the actual malice standard] prescribed by *New York Times [v. Sullivan],*"[48] affirmed the decision. "To hold otherwise," the court noted, "would frustrate the intent of *New York Times* and encourage the type of self-censorship which it sought to abolish."[49] Nevertheless, the court found that Falwell's claim had satisfied this constitutional standard.[50]

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42. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).
43. *Id.*
44. *See supra* notes 25-26.
45. 108 S. Ct. 876 (1988).
46. In *Hustler Magazine*, the ad parody was described by the court of appeals as follows:
> The "ad parody" which gives rise to the instant litigation attempts to satirize an advertising campaign for Campari Liqueur. In the real Campari advertisement celebrities talk about their "first time." They mean, their first encounter with Campari Liqueur, but there is a double entendre with a sexual connotation. In the Huslter parody, Falwell is the celebrity in the advertisement. It contains his photograph and the text of the interview which is attributed to him. In this interview Falwell allegedly details an incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia. Falwell's mother is portrayed as a drunken and immoral woman and Falwell appears as a hypocrite and habitual drunkard.

Falwell v. Flynt, 797 F.2d 1270, 1272 (4th Cir. 1986), *rev'd sub nom.* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).
47. *Flynt*, 797 F.2d at 1273.
48. *Id.* at 1274.
49. *Id.*
50. *Id.* at 1275. The court stated:
> The first of the four elements of intentional infliction of emotional distress under Virginia law requires that the defendant's misconduct be intentional or reckless.

Reversing the jury verdict for Falwell, the Supreme Court's opinion focuses on the narrow question of whether:

> a state's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, *even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved.*[51]

The Court's holding is similarly restricted, providing that public figure-plaintiffs "may not recover for the tort of intentional infliction of emotional distress *by reason of publications such as the one here at issue* without showing that the publication contains a false statement of fact which was made with actual malice. . . ."[52]

The opinion in *Hustler Magazine* is based on two factors. First, the Court stresses the jury's finding that "the ad parody could not 'reasonably be understood as describing actual facts about [Respondent] or actual events in which he participated.' "[53] This emphasis is consistent with earlier Supreme Court cases that limit damage awards to cases involving representations of facts.[54] Second, the Court focuses on the "prominent role" that "satirical cartoons have played . . . in public and political debate."[55]

> This is precisely the level of fault that *New York Times* requires in an action for defamation. . . . We, therefore, hold that when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of.

Id.

51. *Hustler Magazine*, 108 S. Ct. at 879 (emphasis added).

52. *Id.* at 882.

53. *Id.* at 878 (citing Application to Petition for Cert. at C1). *See also Falwell*, 797 F.2d at 1274, 1278.

54. *See* Greenbelt Pub. Ass'n. v. Bresler, 398 U.S. 6 (1970), where the Court explained:

> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Id. at 14 (footnotes omitted). *See also* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). In *Old Dominion*, the Court stated:

> It is similarly impossible to believe that any reader of the Carrier's Corner [union newsletter] would have understood the newsletter to be charging the appellees with committing the criminal offense of treason. . . . Jack London's "definition of a scab" is merely rhetorical hyperbole, a lusty and imaginative expression of contempt felt by union members towards those who refuse to join.

Id. at 285-86 (footnote omitted).

55. *Hustler Magazine*, 108 S. Ct. at 881. The Court described the special position of political cartoons as follows:

> Despite their sometimes caustic nature, from the early cartoon portraying George

According to the Court, an award of damages is not consistent with the first amendment "when the conduct in question is the publication of a caricature such as the ad parody involved here."[56]

Despite this limited holding, the Court's opinion indicates that false statements of fact may be treated differently because of their inherent lack of value.[57] This same distinction is reflected in earlier Court decisions involving speech which is not "reasonably believable."[58] According to the *Hustler Magazine* Court, if there were any principled way to distinguish Flynt's patently offensive speech—intended to inflict emotional injury—from traditional cartoons, then "public discourse would probably suffer little or no harm."[59] Therefore, the *Hustler Magazine* case leaves unresolved the level of first amendment protection from the tort of intentional infliction of emotional distress that is applicable to factual statements.

II. *New York Times* Actual Malice Standard and Intentional Infliction of Emotional Distress: Resolving the Conflict for Each Type of Speech

Determining how the actual malice standard should interact with the tort of intentional infliction of emotional distress requires categorizing the possible types of speakers and types of speech contemplated in *New York Times Co. v. Sullivan*.[60] Speakers can be divided between innocent and malevolent.[61] The types of speech can be divided into three basic catego-

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> Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. . . . Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.

Id.

56. *Id.* at 883.

57. *Id.* at 880 ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas; and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective").

58. *See, e.g., Greenbelt*, 398 U.S. at 13 ("If the reports had been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meetings, this would be a different case."). *See also Old Dominion*, 418 U.S. at 286. In that case, the Court stated:

> This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if its words were taken out of context and used in such a way as to convey a false representation of fact.

Id.

59. *Hustler Magazine*, 108 S. Ct. at 881.

60. 376 U.S. 254 (1964).

61. *See infra* notes 63-77 and accompanying text.

ries: speech which the speaker either knows to be false or is reckless with regard to its truth or falsity; speech which is true;[62] and speech which a speaker reasonably or negligently believes to be true, but which is actually false. These categories facilitate the analysis by evaluating each type of speaker, and type of speech, on an individual basis.

A. Speakers: Innocent or Malevolent?

In *New York Times*, the Supreme Court found that speakers who falsely criticize public officials are protected from defamation actions if they make innocent or negligent errors.[63] Because innocent speakers may make honest mistakes, strict liability for honest mistakes would inhibit publication of valuable true speech. Although intentionally false speech has no value,[64] the actual malice standard attempts to avoid the possible "chilling effect" on speech caused by requiring good-faith speakers to prove the truth of each of their statements.[65] Because public persons voluntarily accept positions which are open to a higher degree of criticism, they must also accept the risk that good-faith speakers may make an innocent, false statement concerning them.[66]

Although the Supreme Court found that the first amendment protects good-faith speakers, language in the majority opinion of *New York Times* indicates that a malevolent speaker may be treated quite differently. For example, the Court's explicit concern was that "a *good-faith* critic of government will be penalized for his criticism . . . ."[67] The Court also cited

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62. Included in this category is speech which a speaker believes to be false, but is actually true, and true speech which a speaker believes is true. The two are combined for the purposes of this Note because the defense of truth will be available to protect the speaker in both instances. As a result, different levels of culpability do not lead to different conclusions.

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

64. A footnote in the majority opinion of *New York Times*, quoting John Stuart Mill, indicated that false speech may have some value:

> Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error."

Id. at 279 n.19 (citing J. MILL, ON LIBERTY 15 (Oxford ed. 1947)).

In Garrison v. Louisiana, 379 U.S. 64 (1964), though, the Court concluded that intentionally false speech has no value:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.

Id. at 75.

65. *See supra* note 27.

66. *See supra* notes 25-26.

67. *New York Times*, 376 U.S. at 292 (emphasis added). Again citing John Stuart Mill, the Court stated in another footnote:

> [T]o argue sophistically, to supress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most

approvingly to the following trial court jury instruction which also makes this distinction:

> [W]here an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, *and the whole thing is done in good faith and without malice,* the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff . . . .[68]

Implicitly, the Court recognized that the motives of the speaker might be relevant to the type of protection given the speech. The Court's explicit concern is for the good-faith critic, not critics in general.

In the context of defamation, the Court made this distinction clearer by permitting damage awards only against speakers who intentionally or recklessly make false statements.[69] While a public person accepts the risk of being subject to an unintentional falsity, it is not clear that they accept the risk of being subject to malevolent speech.[70] These factors support a strong inference that the Court's concern is with good-faith speakers; those speakers whose speech helps "to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."[71] It remains unclear whether the Court intended to protect malevolent speakers who seek to use speech as a weapon for intentionally inflicting personal injury.[72]

Applying this distinction requires a standard effectively separating the two types of speakers. In the case of defamation, the Supreme Court typically requires a finding of malice by clear and convincing evidence.[73] Although helpful in the context of the emotional distress tort, this standard alone is insufficient because it fails to account for cases involving a speaker

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> aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.

Id. at 272 n.13 (citing J. MILL, ON LIBERTY 47 (Oxford ed. 1947)).

68. *New York Times,* 376 U.S. at 280-81 (emphasis added) (citing Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908)).

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

70. *See supra* note 13.

71. *New York Times,* 376 U.S. at 292 (quoting Roth v. United States, 354 U.S. 476 (1956)). The Court in Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988), cited *Garrison* for the proposition that "even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment. . . ." *Id.* at 880. But, *Garrison* did not establish that ill-will is irrelevant to a determination of the level of protection given speech. *Garrison* only held that ill-will *alone* is not sufficient to deny speech its constitutional protection. *Garrison,* 379 U.S. at 78.

72. *See supra* notes 67-68 and accompanying text.

73. *See supra* note 21.

possessing mixed motives. One way to resolve this problem is to require that a speaker's dominant motive be malevolent—that is, a speaker's dominant motive must be to inflict injury using speech.[74] A speaker would be found to be malevolent if it were shown, by clear and convincing evidence, that his dominant motive was the intent to inflict injury.

Hustler Magazine v. Falwell[75] is the paradigm malevolent speaker case. During his deposition, co-defendant Flynt revealed the real purpose of the parody. Flynt stated that he realized publishing the parody would portray Falwell as a "glutton," a "liar," and a "hypocrite."[76] Flynt also claimed that his "objective" in approving publication of the ad parody was "to assassinate" the integrity which Falwell relied upon for his livelihood and career.[77] Based upon this deposition testimony, *Hustler Magazine* offers an

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74. The dominant motivation test is proposed here as a way to separate speakers. The premise of the test, as indicated throughout the Note, is that there may be situations when speech is protected by the actual malice standard but should not be immune from suits claiming intentional infliction of emotional distress. The dominant motivation test suggests that this situation occurs when a malevolent speaker makes a statement which he believes to be true, but which is actually false. *See infra* notes 96-108 and accompanying text.

For examples of how a dominant motive test functions in other contexts, see NLRB v. Wright Line, 105 L.R.R.M. (BNA) 1169 (1980) (motivation tests in the context of labor relations); Commissioner v. Duberstein, 363 U.S. 278 (1960) (dominant motivation applied in the context of income tax); and, Lewis & Fisher, Wright Line—*An End to the Kaleidoscope in Dual Motive Cases?*, 48 TENN. L. REV. 879 (1981) (a review of several motivation tests, including a dominant motivation test, in the labor context).

75. 108 S. Ct. 876 (1988).

76. *Id.* at 1273. In his deposition, the following exchange occurred between Larry Flynt and Falwell's attorney:

> Q. Did you want to upset Reverend Falwell?
> A. Yes . . . .
> Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?
> A. He's a glutton.
> Q. How about a liar?
> A. Yeah. He's a liar, too.
> Q. How about a hypocrite?
> A. Yeah.
> Q. That's what you wanted to convey?
> A. Yeah.
> Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?
> A. Yes.

Id.

77. *Id.* The deposition continued with Flynt answering the attorney's questions:

> Q. Did you appreciate, at the time that you wrote "okay" or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?
> A. Yeah.
> Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?
> A. To assassinate it.

Id.

excellent example of clear and convincing evidence that a speaker's dominant motive was malevolent. It is necessary to determine when a malevolent speaker such as Flynt may be held liable for intentional infliction of emotional distress for a misstatement of fact.

B. Speech Which Is Knowingly False or Made with Reckless Disregard for the Truth

Where speech is knowingly false, or made with reckless disregard for its truth, using the tort of intentional infliction of emotional distress presents no major first amendment conflicts. Under the actual malice standard, this type of speech receives no constitutional protection.[78] If a public-figure plaintiff can show this falsity, along with the requisite intent or recklessness, he can recover for defamation. If a plaintiff attempts to recover for intentional infliction of emotional distress, he does not recover by proving the speaker's knowledge of the falsity alone; rather, he must also prove that the speech constituted extreme and outrageous conduct.[79] The emotional distress tort is more speech protective than the actual malice standard in this category of speech, because it places additional burdens on a plaintiff which must be fulfilled before recovery. While a defamation plaintiff can clearly recover for this type of speech under *New York Times,* an emotional distress plaintiff has only the possibility of an award based on such a showing. The distinction between an innocent speaker and a malevolent speaker need not be applied to this category of speech because intentionally false speech is not protected regardless of the speaker's motive.[80]

This scenario is identical to the fact pattern of the *Hustler Magazine* case assuming that Flynt had published a factual statement about Falwell rather than an ad parody. Suppose a speaker should realize that a statement is false, but decides to make it anyway. Because the speaker should know the statement to be false, there is no protection from either defamation or intentional infliction of emotional distress. As the court of appeals in *Hustler Magazine* concluded, "The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such conduct which results in severe emotional distress."[81] Therefore, there is no conflict between first amendment values and the use of the emotional distress tort. Also, because these facts satisfy the actual malice

78. "Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy consitutional protection." *Garrison,* 379 U.S. at 75.

79. *See supra* notes 39-41 and accompanying text.

80. Note, however, satisfaction of the actual malice standard may have some relevance to a determination of intentional conduct for the purpose of satisfying the requirements of the emotional distress tort.

81. Flynt v. Falwell, 797 F.2d 1270, 1275 (4th Cir. 1986), *rev'd sub nom.* Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).

standard itself, the result is not altered by the *Hustler Magazine* decision.

C. Speech Which Is True

One consistent principle reflected in nearly all Supreme Court decisions is that truth is a defense to libel and defamation actions. As the Court explained, "Truth may not be the subject of either civil or criminal sanctions when discussion of public affairs is concerned."[82] This defense has been deemed "constitutionally required" if the subject of the speech is a public official or public figure, without regard to the motives of the speaker.[83] In *Garrison v. Louisiana*, the Supreme Court used this principle to invalidate a state law which "permitt[ed] a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood . . . ."[84] This was a direct application of the *New York Times* principle which explicitly requires a falsity in addition to malice.[85]

When the tort of intentional infliction of emotional distress is applied to truthful speech, the protection afforded by the truth defense is circumvented. The elements of the emotional distress tort fail to take into account the truth or falsity of a statement. Thus, even though truth is constitutionally required as a defense, a jury could still find that a true statement is nevertheless extreme and outrageous conduct. One real danger is that a jury will find that a true statement is extreme and outrageous simply as a way to punish a defendant for his point of view, or to reward a plaintiff for his point of view.[86] Therefore, the tort may directly infringe upon the constitutional protection given true speech.[87]

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82. *Garrison*, 379 U.S. at 74.

83. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court stated:

> It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of *New York Times v. Sullivan*, . . . and like cases is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure.

Id. at 489 (citations omitted).

84. *Garrison*, 379 U.S. at 74.

85. The true speech referred to in this section is speech that is objectively true, rather than speech which the speaker subjectively believes is true. In *Hustler Magazine*, Larry Flynt may have believed that Falwell was a glutton or a liar. While such statements are difficult to prove or disprove, they are most likely not the kinds of speech that would be considered extreme and outrageous. Speech that would more readily fit into the category of extreme and outrageous, such as that portraying Falwell as incestuous, would also be easier to prove objectively. But, under the framework proposed in this Note, the actual burden is upon the plaintiff to disprove the statement's truth before recovering for emotional distress.

86. Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1780 (1985).

87. This infringement occurs because application of the tort would have a chilling effect on other true speech. *See New York Times*, 376 U.S. at 277 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Truth is a defense because true speech lies at the very heart of the first amendment.[88] After *New York Times,* erroneous speech made while criticizing a public official is protected in order to promote the "fruitful" exercise of true speech.[89] Deliberate lies, though, have no value in the marketplace of ideas. They do not further the exercise of free speech, and therefore they do not deserve protection under the first amendment.[90] The remaining undecided issue is the level of protection to be granted a speaker who uses true speech only as a weapon to inflict damage upon a public person.

One solution might be to allow a plaintiff to recover against a malevolent speaker, based on the idea that a malevolent speaker's true speech has little or no value in comparison to other forms of true speech. Such a solution was implicitly suggested in *Hess v. Treece,*[91] where the Supreme Court of Arkansas upheld an award of damages for intentional infliction of emotional distress even though true speech was involved. The plaintiff in that case was a police officer who was the subject of numerous complaints initiated by the defendant, as well as an official investigation arising as a result of these complaints. Although the plaintiff failed to establish that any of these complaints were false, the court sustained a jury verdict for the plaintiff because the facts established that the defendant's conduct was extreme and outrageous.[92]

This approach creates a number of problems. First, allowing jury verdicts against the speaker directly infringes upon a speaker's right to make true statements.[93] Second, as the dissent in *Hess* indicates, citizens may be afraid to complain about misconduct on the part of public persons.[94] Allowing a plaintiff to recover in this situation creates the chilling effect discussed in *New York Times;* speakers are afraid to make true statements because they may be sued for outrageous conduct. Finally, attempting to separate true

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88. *Supra* note 82.

89. *Supra* note 27.

90. Saint Amant v. Thompson, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation."). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

91. 286 Ark. 434, 441, 693 S.W.2d 792, 796 (1985), *cert. denied,* 106 S. Ct. 1245 (1986).

92. *Hess,* 286 Ark. at 441, 693 S.W.2d at 796.

93. *See supra* note 27.

94. *Hess,* 286 Ark. at 448, 693 S.W.2d at 800 (Purtle, J., dissenting). As the dissent argued:

> Citizens may now be afraid to complain of conduct on the part of public officials or employees. Apparently they will now be obliged to keep their mouths shut about what they perceive as misconduct on the part of public employees or officials or face being sued for outrageous conduct.

Id.

speech into different levels of value, each of which may be accorded varying degrees of protection, creates a difficult line-drawing problem.[95]

A preferable solution to the conflict between truth as a defense and intentional infliction of emotional distress is to establish a constitutional requirement that true speech can never be considered extreme and outrageous. Such a standard assures that true speech receives its proper level of constitutional protection, while providing consistency between the results according to the actual malice standard and the tort. This standard also avoids the dangers of directly and indirectly infringing upon first amendment rights, and eliminates the difficulties associated with drawing lines between relative values of true speech.

Applying this proposed standard to the *Hustler Magazine* case, and assuming that the ad parody had been a factual statement which was true, the result would be dramatically different than that reached by the court of appeals. Under the proposed standard, Falwell would not recover. First, assuming Flynt reasonably or negligently believed the speech to be true, the statement would be protected by the actual malice standard if Flynt could prove the truth of the statement. Second, the statement itself would be protected from intentional infliction of emotional distress because the jury would be instructed that true statements could not be found to be extreme and outrageous conduct. The results under both defamation law and intentional infliction of emotional distress would be the same, because truth would be a defense to both actions. Although this is a clear case of a malevolent speaker making a statement with the express intent to harm a public figure, the result is consistent with the Supreme Court observation that "many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."[96] Therefore, this standard provides consistent protection for true statements in the context of both defamation and intentional infliction of emotional distress.

D. Speech Which a Speaker Reasonably or Negligently Believes To Be True, But Which Is Actually False

According to the Court in *New York Times,* false speech which a good-faith speaker reasonably or negligently believes to be true is protected by

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95. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). In that case, four justices joining in a plurality opinion agreed that "society's interest in protecting [erotic expression] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Id.* at 70. But, five justices concluded that "the social value ascribed speech is not relevant to the level of first amendment protection it is granted." *Id.* at 73 n.1 (Powell, J., concurring). *See also* KEV, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir. 1986).

96. *Gertz,* 418 U.S. at 342.

the first amendment. Despite *New York Times,* this type of speech is vulnerable to a cause of action for intentional infliction of emotional distress. Regardless of the speaker's actual knowledge of the truth or falsity of a statement, a jury could find that the use of false speech constitutes extreme and outrageous conduct. The issue present in this category of speech is whether the actual malice standard also constitutionally precludes an action for intentional infliction of emotional distress when a speaker reasonably or negligently believes false speech to be true.

A good-faith speaker who reasonably believes in the truth of a statement will escape liability—in both libel and emotional distress actions—even if the speech is false and causes personal or professional injury. The primary reason for protecting this false speech is to further the full and free exercise of other valuable speech. Forcing an innocent speaker to prove the truth of every statement might lead to "self-censorship," thereby inhibiting other valuable true speech.[97] The actual malice standard strikes a balance in favor of protecting the false speech of an innocent speaker. Public persons, by virtue of their positions in society, must bear the risk of being harmed by such speech.

In the case of a malevolent speaker, the balance should be struck in favor of the plaintiff. When a speaker's dominant motive is to inflict injury, that speaker must accept the risk of his unintentionally false speech. As Prosser explained, "One who speaks for such a malevolent purpose takes the risk that what he says will prove to be false."[98] Coupled with the Court's implicit premise that it was protecting good-faith publishers in *New York Times,*[99] and the fact that public persons do not accept the burden of extreme and outrageous conduct by virtue of their positions, this risk-bearing shift is appropriate. In this instance, the malevolent speaker is the best person to accept the risk of false speech.

A potential problem with this approach is the possibility of a chilling effect similar to that experienced by good-faith speakers. This possibility, though, does not necessarily immunize all such statements from liability.[100] Instead, such a finding may simply "suggest that a court should adopt a stricter standard of proof, or certain additional elements should be required."[101] The tort of intentional infliction of emotional distress, when

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97. *New York Times,* 376 U.S. at 279. The Court stated:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

Id. See also supra note 27.

98. Prosser, *supra* note 3, at 437.

99. *Supra* notes 63-77.

100. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1262 (9th Cir. 1982), *cert. denied,* 459 U.S. 1227 (1983).

101. *Id.*

coupled with the standards proposed in this Note, may actually be more speech protective than the actual malice standard. While a plaintiff in a defamation action need only show a defendant's knowing or reckless use of false speech to shift the burden of production to the defendant, the emotional distress tort requires a plaintiff to prove much more before such a shift occurs.[102] This is true for several reasons.

First, intentional infliction of emotional distress involves a strict intent inquiry. A plaintiff must initially establish that a defendant intended to inflict emotional distress.[103] To satisfy the terms of the proposed jury instruction, the plaintiff must show that the defendant's dominant motive was to inflict such distress. Only when a plaintiff satisfies this burden is a speaker classified as malevolent, and thereby liable for intentional infliction of emotional distress. Under this standard, a speaker who negligently inflicts emotional distress will not be liable.

Second, a plaintiff must show that the defendant's conduct was extreme and outrageous.[104] This element involves a two-part inquiry. Initially, a defendant's conduct must go "beyond all possible bounds of decency," and be "intolerable in a civilized community."[105] In addition, because true speech is immune from a finding of extreme and outrageous conduct, a plaintiff must also establish that the defendant's speech was false.[106] Therefore, a plaintiff must prove that a defendant used extreme and outrageous false speech. Effective application of this element also requires a court to continually exercise its power to determine, as a matter of law, whether conduct is extreme and outrageous.[107] This is especially true in the case of public figures who are expected to be subject to more critical speech.

Finally, a defendant's conduct must cause severe emotional distress. Under *New York Times*, there is no explicit requirement that the defamation cause any degree of harm. This is an additional burden which the emotional distress tort itself imposes upon a plaintiff. As an additional requirement, it provides an added degree of protection to speakers who are willing to

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102. *See supra* notes 34-35 and accompanying text.

103. *See supra* note 36.

104. For an extended discussion of this element, and its relation to the other elements of the tort, see Givelber, *supra* note 32.

105. *See supra* note 39.

106. *See supra* note 82.

107. *See* RESTATEMENT (SECOND) OF TORTS § 46 comment h (1965). The Restatement states:

> It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Id. See also Chuy v. Philadelphia Eagles, 4 Media L. Rep. (BNA) 2537, 2541-42 (3d Cir. 1979) ("The court must determine, as a matter of law, whether there is sufficient evidence for reasonable persons to find extreme and outrageous conduct.").

risk emotional distress judgments by making extreme and outrageous statements with the intent to inflict injury.

Taken together, these elements present a more difficult obstacle to plaintiffs than the actual malice standard. Only after a plaintiff has established a prima facie case of intentional infliction of emotional distress will the burden of production shift to a defendant. Even then, the speaker is not faced with the prospect of proving the truth of the statement or facing inhibitive damage awards, the situation which the Court in *New York Times* feared. Instead, a defendant could disprove any one of the elements of the tort to escape liability. The only possible chilling effect would be on speakers who realize that their dominant motive is to inflict injury, and fear that their speech may be false and that their conduct might be classified as extreme and outrageous. Because the first amendment will not shield intentional or reckless misconduct resulting in severe emotional distress,[108] the malevolent speaker must accept the risk that his speech may turn out to be false.[109]

A jury instruction is the most effective way to resolve this conflict. If a jury finds by clear and convincing evidence that a speaker's dominant motive was to inflict injury, and that the speaker reasonably or negligently believed the speech to be true despite its ultimate falsity, then a court should instruct the jury that the plaintiff can only recover for intentional infliction of emotional distress. If the jury finds that the speaker's dominant motive was not to inflict injury through false speech, and that the speaker reasonably believed the speech to be true, then the plaintiff cannot recover for intentional infliction of emotional distress. Therefore, while not affecting the protection provided by *New York Times* regarding reputational interests, this instruction allows a plaintiff to recover for intentional infliction of

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108. *See supra* note 81.

109. The case of a malevolent speaker is very different than that of an innocent speaker in terms of a chilling effect. This difference only occurs, though, when a malevolent speaker makes a statement which is true and cannot be proven; or, when that same speaker fails to make a statement which is true because of not being able to guarantee its truthfulness. While an innocent speaker is thus protected from defamation and intentional infliction of emotional distress in order to avoid a chilling effect, the result should be different for a malevolent speaker.

Because a malevolent speaker is implicitly not entitled to the same amount of protection as a good-faith speaker, and because a speaker who has other good reasons for making a statement may still be afforded first amendment protection, the balance in this case should be struck in favor of individuals. In essence, the malevolent speaker—one with a dominant intent to inflict injury—will be assuming the risk of liability for the intentional and successful infliction of emotional distress. Therefore, once a plaintiff has established *prima facie* evidence that a speaker is malevolent, it will be that speaker's burden to either establish alternative motives for the statement, or prove the truth of the statement, in order to avoid liability for intentional infliction of emotional distress. Given the difference between speakers, such a burden is reasonable.

emotional distress caused by speech which is unprotected by the first amendment.

Applying such a jury instruction to the modified *Hustler Magazine* facts, and assuming that Larry Flynt reasonably or negligently believed the statement to be true, Falwell would only be able to recover for intentional infliction of emotional distress. Falwell would not recover for damage to his reputation because he could not meet the requirements of the actual malice standard; that is, the actual malice standard would protect Flynt's speech because of his reasonable belief in the truth of the statements. If there is any chilling effect in such a case, it is one which inhibits Flynt from publishing malevolent statements which he cannot prove are true. Because of the shifts in considerations occurring when an action is for emotional distress rather than defamation, this result is the most appropriate compromise between *New York Times* and intentional infliction of emotional distress.

CONCLUSION

In light of *Hustler Magazine v. Falwell*, it is necessary to examine the relationship between the first amendment and the tort of intentional infliction of emotional distress. Categorizing speakers and speech according to principles found in *New York Times* exposes a conflict in only two categories. In the category of true speech, the balance of interests is struck in favor of the strong constitutional value of protecting true speech. A speaker is protected from the emotional distress tort by a constitutionally required jury instruction which prevents true speech from being extreme and outrageous conduct. In the category of false speech which a speaker reasonably or negligently believes to be true, additional jury instructions protect a good-faith critic while leaving a malevolent speaker liable. The balance in this category of speech is struck in favor of public persons who do not accept being subject to intentionally inflicted severe emotional distress, and against malevolent speakers who must accept the risk that their speech may be found to be false. This balance best preserves vital first amendment interests while protecting the individual's concurrent interest in freedom from extreme and outrageous conduct which causes severe emotional distress.

BOYD C. FARNAM