CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC FIGURES AND PUBLIC OFFICIALS MUST ESTABLISH STATEMENT WAS PUBLISHED WITH ACTUAL MALICE TO RECOVER FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988).

The first amendment guarantees that freedom of the press and of speech may not be abridged.[1] The United States Supreme Court initially took the view, however, that libel was not considered within the parameters of the first amendment, and therefore, libel was not entitled to first amendment protection.[2] As a result, newspapers and the press were fully subject to state defamation laws[3] because there were no consistent federal laws of libel to govern the debate and discussion of public affairs.[4] Until the advent of the Warren Court, the Supreme Court was reluctant to impose libel standards that would be applicable to all states.[5] In 1964, the Supreme Court mandated that first amend-

[1] *See* U.S. CONST. amend. I, which provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." The Supreme Court extended first amendment protections to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of the press and of speech are among the fundamental personal rights protected from interference by the states by the fourteenth amendment's due process clause). In addition, the Court applied the fourteenth amendment to incorporate the Bill of Rights against the state governments. *Id.* at 666.

[2] In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), Justice Murphy, writing the opinion for the Court, included libelous statements among the categories of speech that were not worthy of constitutional protection because they were not an "essential part of any exposition of ideas." *Id.* at 572. Other areas of speech that were not guaranteed constitutional protection included obscene, profane, and insulting or "fighting words which by their very utterance impose an immediate breach of the peace." *Id.* (citing Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941)).

[3] *See, e.g.*, ALA. CODE tit. 14, § 350 (1940) (prescribing that the prosecution of "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude"). In Alabama, the penalty upon conviction of criminal libel was a fine not exceeding $500 and a prison term not exceeding six months. *Id.*

[4] Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 587 (1964). *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) (a public official claiming defamation must show "actual malice" or forego a remedy). *See also infra* note 46 and accompanying text.

[5] Constitutional attacks on state defamation laws were presented before the Court's decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but those cases primarily dealt with the absolute privilege of high ranking government executives. *See, e.g.*, Barr v. Matteo, 360 U.S. 564 (1959); Spaulding v. Vilas, 161 U.S. 483 (1896). *See also* Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942)

ment protection of press and speech should place some limitations on state defamatory laws.[6] It was at this time that the Supreme Court included libel within the constitutional protection of the first amendment.[7]

Recently, in *Hustler Magazine v. Falwell*,[8] the United States Supreme Court addressed an unusual question involving first amendment limitations on the states' authority to protect its citizens from the intentional infliction of emotional distress.[9] The Court considered whether public figures may recover for emotional harm arising from the publication of an allegedly offensive ad parody.[10] The *Hustler* Court held that first amendment protection of speech and press prohibits public figures and public officials from recovering damages for the intentional infliction of emotional distress[11] without showing that the publication contained a false statement of fact made with actual malice.[12]

The November 1983 issue of Hustler Magazine included a parody[13] of an advertisement for Campari Liqueur.[14] The "ad parody" featured Jerry Falwell, a well known minister and commentator on political issues, and was entitled "Jerry Falwell talks

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(the Supreme Court was evenly divided on a question involving libel of a public official); Beauharnais v. Illinois, 343 U.S. 250 (1952) (extending the class of libelous statements to include those that defame groups as well as individuals); Near v. Minnesota, 283 U.S. 697 (1931) (providing an injunctive remedy to situations involving the defamation of public officials).

6 *New York Times*, 376 U.S. at 270. *See also infra* notes 53-60, 66-82 and accompanying text.

7 *See New York Times*, 376 U.S. at 270. *See infra* notes 38-52 and accompanying text. *See also* Note, *Privilege to Criticize Public Officials: A Constitutional Extension*, 38 S. CAL. L. REV. 349 (1965); Comment, *The New Constitutional Definition of Libel and Its Future*, 60 NW. U.L. REV. 95 (1965).

8 108 S. Ct. 876 (1988).

9 *Id.* at 879.

10 *Id.*

11 Outrageous conduct causing severe emotional distress is defined by the RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965) as: "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."

12 *Hustler*, 108 S. Ct. at 882. The Supreme Court applied the *New York Times* actual malice standard which limits recovery to statements made "with knowledge that it was false or with reckless disregard as to whether or not it was true." *Id.* (citing *New York Times*, 376 U.S. at 264; Time, Inc. v. Hill, 385 U.S. 374, 390 (1967)).

13 A parody is defined as a literary work that broadly mimics an author's style and holds it up to ridicule. THE AMERICAN HERITAGE DICTIONARY 904 (2d ed. 1982).

14 *Hustler*, 108 S. Ct. at 878. The ad parody appeared on the inside front cover of the magazine and contained Jerry Falwell's name along with his photograph. *Id.*

about his first time."[15] This advertisement was similar to actual Campari ads, in that both ads featured various celebrities discussing their first time.[16] Although the ads refer to celebrities' first encounter with Campari Liqueur, the advertisements play on the sexual connotation of first times.[17]

Hustler editors chose Falwell as their featured celebrity and drafted an alleged interview with him whereby Falwell detailed his first time as being in an outhouse with his mother.[18] Although the ad contained a disclaimer,[19] it portrayed Falwell and his mother as being drunk and immoral.[20]

Subsequent to publication, Falwell brought suit in the United States District Court for the Western District of Virginia against Hustler Magazine, Inc., Larry Flynt, and Flynt Distributing Company.[21] Falwell alleged that he was entitled to recovery for publication of the ad parody in Hustler based on libel, invasion of privacy,[22] and intentional infliction of emotional distress.[23] While the case was pending in the trial court, Hustler

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15 *Id.*

16 *Id.* In addition, the editors copied the form and layout from the Campari ads so that the actual Campari ads and this parody of Jerry Falwell were identical. *Id.*

17 *Id.*

18 *Id.*

19 *Id.* The disclaimer read "ad parody—not to be taken seriously." *Id.* The ad parody was also listed in the table of contents as "Fiction; Ad and Personality Parody." *Id.*

20 *Id.* The parody also suggested that Falwell was insincere and only preached when he was intoxicated. *Id.*

21 Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986). Flynt Distributing Company was named as a defendant in this action, but the jury found no liability on their part, and therefore, Flynt Distributing Company was not relevant to Hustler Magazines' appeal. *Id.* at 1273. For further discussion of the lower court's opinion see *Falwell v. Flynt: An Emerging Threat to Freedom of Speech*, 1987 UTAH L. REV. 703.

22 *Falwell*, 797 F.2d at 1272-73. Falwell based his invasion of privacy claim on the Virginia Code which prescribes that:

> Any person whose name, portrait, or picture is used without having first obtained the written consent of such person . . . for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages.

VA. CODE ANN. § 8.01-40 (1985).

23 *Falwell*, 797 F.2d at 1272-73. Under Virginia law, plaintiffs claiming intentional infliction of emotional distress are required to prove that the defendant's conduct is intentional or reckless, offends generally accepted standards of decency, is causally connected with the plaintiff's emotional distress, and caused emotional

republished the ad parody in its March 1983 issue.[24]

At the conclusion of the evidence at trial, the United States District Court for the Western District of Virginia granted a directed verdict in favor of defendants on the invasion of privacy claim.[25] The jury returned a verdict in favor of the defendants on the libel claim concluding that the ad parody could not reasonably describe "actual facts about [the respondent] or actual events in which [he] participated."[26] The jury, however, decided in favor of the plaintiff on the intentional infliction of emotional distress claim and awarded damages.[27]

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court.[28] The court of appeals held that the plaintiff was a public figure, and therefore, the defendants were "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in plaintiff's claim for libel."[29] The court reasoned, however, that the literal application of the actual malice standard was not appropriate in an action for intentional infliction of emotional distress.[30] The court of appeals determined that the *New York Times* standard was met and that the jury was correct in finding that defendant's intentional or reckless misconduct proximately caused the plaintiff's injury.[31]

The defendants petitioned for a rehearing en banc, which was denied.[32] Upon petition, the United States Supreme Court granted certiorari because of the important constitutional issues

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distress that was severe. *Id.* at 1275 n.4 (citing Womack v. Eldridge, 215 Va. 338, 343, 210 S.E.2d 145, 148 (1974)).

24 Hustler Magazine v. Falwell, 108 S. Ct. 876, 878 n.1 (1988).

25 *Falwell*, 797 F.2d at 1278.

26 *Id.* at 1273.

27 *Id.* The petitioners' motion for judgment notwithstanding the verdict was denied. *Id.* The jury awarded $100,000 to plaintiff in compensatory damages. Additionally, the jury awarded $50,000 to plaintiff in punitive damages from each defendant with the exception of Flynt Distributing Co., Inc., where the jury found no liability. *Id.*

28 *Id.* at 1278.

29 *Id.* at 1274.

30 *Id.* The court of appeals stated that the *New York Times* decision did not place emphasis on the falsity of the statement or the defendant's disregard for the truth, but on the defendant's culpability arising from knowing or reckless conduct. Hustler Magazine v. Falwell, 108 S. Ct. 876, 879 (1988).

31 *Falwell*, 797 F.2d at 1275. *See infra* notes 39-53 and accompanying text for a discussion of the *New York Times* standard.

32 *Hustler*, 108 S. Ct. at 879. The rehearing en banc was denied by a divided court. *Id.*

involved.[33] After reversing the judgment of the court of appeals,[34] Chief Justice Rehnquist, writing for the majority,[35] concluded that public individuals may not recover damages for intentional infliction of emotional distress without showing that a false statement of fact was published with actual malice.[36]

At common law, one who intentionally printed defamatory materials was held to a standard of strict liability, unless the publisher could prove that the publication was either true or subject to a conditional privilege.[37] Because individuals possess a significant interest in protecting their reputations, the Supreme Court took the view that defamatory publications were not entitled to first amendment protection.[38]

In 1964, however, the Supreme Court determined that first amendment protections of press and of speech should place some limitations on state defamation laws.[39] In *New York Times Co. v. Sullivan*,[40] the Court concluded that first amendment protections should be extended to publications regarding public officials.[41]

In *New York Times*, respondent was a public official who was

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33 Hustler Magazine v. Falwell, 480 U.S. 945 (1987).

34 *Hustler*, 108 S. Ct. at 879.

35 Chief Justice Rehnquist delivered the majority opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, Stevens, O'Connor, and Scalia. *Id.* at 877. Justice White filed a concurring opinion and Justice Kennedy took no part in the consideration or decision of the case. *Id.* at 877, 883.

36 *Id.* at 882.

37 *Falwell*, 797 F.2d at 1274-75. *See also* Owens v. Scott Publishing, 46 Wash. 2d 666, 284 P.2d 296 (1955), *cert. denied*, 350 U.S. 968 (1956)("a written publication which tends to expose a living person to hatred, contempt, ridicule, or obloquy or to deprive him of the benefit of public confidence or social intercourse, is libelous per se"); Peck v. Tribune Co., 214 U.S. 185 (1909) (for a statement to be libelous it need not be that the person libelled has done something that people in the community may regard as discreditable, as it is sufficient if the statement hurts the party alluded to).

38 *See supra* note 2 and accompanying text; *e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (state was permitted to define libel laws without possibility of constitutional objection).

39 *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (seminal case which prohibited strict liability libel laws and required proof of actual malice for a public official to recover for publication of a defamatory statement). For other discussions on the impact of *New York Times* see Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429 (1965); Note, *Privilege to Criticize Public Officials: A Constitutional Extension*, 38 S. CAL. L. REV. 349 (1965); Comment, *The New Constitutional Definition of Libel and Its Future*, 60 NW. U.L. REV. 95 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191 (1964).

40 376 U.S. 254 (1964).

41 *Id.* at 264.

responsible for supervising the Montgomery, Alabama Police Department.[42] Sullivan filed this libel action in his capacity as police supervisor alleging that he had been defamed by statements that appeared in the New York Times.[43] The article stated that Sullivan had terrorized Martin Luther King and his followers.[44] Although neither of these statements mentioned Sullivan by name, he contended that inferences could be made that Sullivan was the subject of the article.[45]

In deciding *New York Times*, the Court noted that there were no prior decisions which placed constitutional limitations upon the power of a state to award damages to a public official for libel.[46] The Supreme Court, however, relied on rules adopted by a number of state courts regarding the publication of defamatory statements concerning public officials.[47] The Court also weighed

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[42] *Id.* at 256.

[43] *Id.* at 257. The article appeared in the *New York Times* on March 29, 1960. *Id.*

[44] *Id.* Respondent's claim was based on the following which appeared in the third and sixth paragraphs of the article, respectively:

> In Montgomery, Alabama, after students sang 'My Country 'Tis of Thee' on the State Capital steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering,' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*.

Id. at 257-58 (emphasis in original).

[45] *Id.* at 258. Respondent contended that the word "police" referred to him as Montgomery Police Commissioner. *Id.* Additionally, he alleged that arrests are usually made by police, and therefore, an inference could be made that the advertisement was directed at him. *Id.* Furthermore, the respondent concluded that the public would interpret the advertisement as accusing the Montgomery police and himself of answering Dr. King's protests with intimidation and violence. *Id.*

[46] *Id.* at 269. The Court previously considered this question in Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1941), where the Court was equally divided on a question concerning defamation of a public official, and therefore, never decided the constitutional implications.

[47] *New York Times*, 376 U.S. at 280 (footnote omitted) (citing Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)). In *Coleman*, the Supreme Court of Kansas held that a public official claiming defamation must show actual malice to recover damages. *Coleman*, 78 Kan. 711, 98 P. 281. *See also* Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955) (statement was not libelous per se and would not support an action for libel without proof of special damages); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922) (where statement is charged as libelous per se, any one who claimed privilege by publication of such charge must prove the facts that bring him within the protection of the privilege); Stice v. Bea-

the policy that public debate should be free from interference and that unpleasant sharp attacks will occasionally be made against public officials.[48]

In reaching its decision, the *New York Times* Court concluded that constitutional guarantees of freedom of speech and of the press were required in limiting a state's power to award damages for libel in civil actions brought by public officials.[49] Justice Brennan, writing the majority opinion, noted that the Alabama law was constitutionally defective in that it "fail[ed] to provide the safeguards . . . required by the First and Fourteenth Amendments."[50] The Court further held that a public official was prohibited from recovering damages for a libelous statement regarding his official conduct unless he could prove that the statement was made with actual malice.[51] Finding that no showing of actual malice was made by Sullivan,[52] the Alabama Supreme Court's decision was reversed.[53]

Later that year, in *Garrison v. Louisiana*,[54] the Court extended

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con Newspaper Corp., 185 Kan. 61, 340 P.2d 396 (1959) (newspaper stories based upon information given by persons in the police department regarding police department's investigation were qualifiedly privileged and one is not civilly liable for such publication regardless of whether the publication was "libelous per se or libelous per quod"); Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1 (1921) (qualified privilege protecting communications concerning the acts of a public officer are not lost because the statements made were false).

48 *New York Times*, 376 U.S. at 270. *See also* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (speech which "stirs the audience to anger" or "invites dispute" with regard to a public official is protected under the first amendment).

49 *New York Times*, 376 U.S. at 279.

50 *Id.* at 264. The Alabama law determined that a publication was libelous per se where the statements "tend to injure a person . . . in his reputation" or "bring [him] into public contempt." *Id.* at 263. The trial court reasoned "that the standard was met [when] the words are such as to 'injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust.' " *Id.* at 267.

51 *New York Times*, 376 U.S. at 267. The *New York Times* Court defined actual malice as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* Actual malice under the *New York Times* standard is different from common law malice which is defined as the intentional doing of a wrongful act without just cause, with an intent to inflict an injury. Falwell v. Flynt, 797 F.2d 1270, 1275 n.3 (1986). *See also* St. Amant v. Thompson, 390 U.S. 727 (1968) (under *New York Times*, there must be sufficient evidence to prove that the defendant had serious doubts about the publication of the public official and acted in reckless disregard of the defamatory statements made regarding the public official).

52 *New York Times*, 376 U.S. at 288. The evidence presented against petitioner supported a finding of negligence on the part of the *New York Times* in not discovering the misstatements but was insufficient to show actual malice. *Id.*

53 *Id.* at 284.

54 379 U.S. 64 (1964).

the *New York Times* rule to criminal cases.[55] In *Garrison*, the Court held that the *New York Times* rule was applicable in limiting a state's power to impose criminal sanctions for false statements regarding the official conduct of public officials.[56] Garrison was a district attorney in Louisiana who issued a statement ridiculing eight judges of the criminal district court.[57] Garrison was tried without a jury and convicted of criminal defamation.[58]

The Supreme Court reversed the conviction reasoning that the constitutional guarantees of freedom of speech and of the press apply equally in criminal and civil cases.[59] The Court further observed that where the criticism is of the official conduct of a public official, the public interest outweighs the interest of the public official's private reputation.[60] The Supreme Court ruled that the Constitution does not protect criticism of the official conduct of public officials by knowingly false statements or statements made with reckless disregard of the truth.[61]

The Supreme Court extended *New York Times* protections of speech in 1966, holding that a government employee having substantial control over government affairs is a public official, and therefore, is subject to the *New York Times* rule for defamation.[62] In *Rosenblatt v. Baer*,[63] a former recreational supervisor brought suit alleging that defamatory falsehoods were published regard-

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55 *Id.* at 67.

56 *Id.*

57 *Id.* at 65.

58 *Id.* The appellant was convicted under LA. REV. STAT. ANN. §§ 14:47-50 (West 1950) which read in relevant part:

> Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:
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> (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or
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> (2) To expose the memory of one deceased to hatred, contempt, or ridicule; or
>
> (3) To injure any person, corporation, or association of persons in his or their business or occupation.
>
> Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

LA. REV. STAT. ANN. § 14:47.

Garrison's conviction was affirmed by the Louisiana Supreme Court. *Garrison*, 379 U.S. at 67.

59 *Id.* at 74.

60 *Id.* at 73.

61 *Id.* at 75.

62 Rosenblatt v. Baer, 383 U.S. 75 (1966).

63 *Id.*

ing his performance at the recreational area.[64] In reaching its decision, the Supreme Court determined that classification as a public official included government employees who had substantial responsibility over government concerns.[65] Therefore, the *Rosenblatt* Court determined that Baer could not recover damages for defamatory falsehoods about his official conduct unless he could prove actual malice.[66]

One year later, the Supreme Court decided *Curtis Publishing Co. v. Butts*[67] and expanded the *New York Times* rule to include public figures.[68] Butts was employed as athletic director of the University of Georgia.[69] An article was written in the *Saturday Evening Post* which accused Butts of conspiring to fix a football game between the University of Alabama and the University of Georgia.[70] Butts brought suit against the publisher in federal court.[71] The jury returned a verdict in Butts' favor and the Court of Appeals for the Fifth Circuit affirmed the lower court's decision.[72]

Butts was decided with *Associated Press v. Walker*,[73] a case involving a news dispatch which gave an eyewitness account of rioting at the University of Mississippi campus.[74] Respondent Walker, a politically prominent figure[75] who was present on the campus, reportedly took an active part in the violent activities.[76] Respondent filed suit in a Texas state court and a jury verdict was

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64 *Id.* at 78-79. The article written by petitioner questioned where monies had gone in previous years when respondent was employed as recreational supervisor, although no reference was made to respondent directly. *Id.*

65 *Id.* at 85.

66 *Id.* at 87.

67 388 U.S. 130 (1967). *Butts* was consolidated with Associated Press v. Walker, 388 U.S. 130 (1967).

68 *Id.*

69 *Id.* at 135. Although the University is a state facility, Butts was hired by the Georgia Athletic Association which is a private corporation. *Id.*

70 *Id.* The story allegedly developed when a third party accidentally overheard a telephone conversation between Butts and the coach of the University of Alabama. *Id.* at 136.

71 *Id.* at 137.

72 *Id. See also* Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1964).

73 388 U.S. 130, 140 (1967).

74 *Id.* The events that were featured in the news article occurred on September 30, 1962. *Id.* The author of the news dispatch was present during the events described and he reported them immediately to the Associated Press office. *Id.* at 141.

75 *Id.* at 140. Respondent Walker pursued a career in the United States Army before he resigned to engage in political activities. *Id.*

76 *Id.* Walker admitted his presence on the campus and admitted speaking to students. *Id.* at 141. He claimed that he had counseled peaceful protests, but in no way did he exercise control over groups that rejected his plea. *Id.*

returned in his favor.[77]

Because of the constitutional issues involved, the United States Supreme Court granted certiorari in both cases.[78] Justice Harlan, writing for the Court, noted that there was a public interest in the circulation of the materials involved in *Butts* and *Walker*.[79] The Court further observed that both Butts and Walker commanded a substantial amount of public interest, and therefore, they would be characterized as public figures.[80] The Court held that a public figure who was not a public official could recover for the publication of defamatory statements.[81] The public figure, however, would be required to prove that the false statements caused injury to his reputation and that the publisher demonstrated unreasonable conduct which deviated from the ordinary standards of investigation and reporting.[82] Applying this standard to the facts presented, the Court concluded that Butts was entitled to recovery, but Walker was not.[83]

The Supreme Court next considered the issue of actual malice in 1971 when it further expanded the standard in *Rosenbloom v. Metromedia, Inc.*[84] In *Rosenbloom*, the Supreme Court extended the *New York Times* rule to a suit brought by a private individual for defamatory statements made about the individual's involvement in a public event.[85] The *Rosenbloom* Court stated that the focus was not on whether the plaintiff was a public official, public figure, or private individual, but rather on whether the defamatory information derived from a matter of public concern.[86]

Rosenbloom was arrested for distribution of obscene

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77 *Id.* The jury awarded $500,000 in compensatory damages and $300,000 in punitive damages. *Id.* The trial judge refused to enter the punitive award because there was "no evidence to support the jury's answers that there was actual malice." *Id.*

78 Curtis Publishing Co. v. Butts, 385 U.S. 811 (1966); Associated Press v. Walker, 385 U.S. 812 (1966).

79 *Butts*, 388 U.S. at 154.

80 *Id.* The Court reasoned that under ordinary tort rules, both Butts and Walker would have been considered "public figures." *Id.*

81 *Id.* at 155.

82 *Id.*

83 *Id.* at 157-58. The Court held that the investigatory standard employed in *Butts*, was an actual departure from the ordinary standards of investigation used by responsible publishers, and therefore, Mr. Butts was entitled to recovery. *Id.* In *Walker*, the Court found the publishers were only negligent, and therefore, the deviation from ordinary standards of investigation and reporting were not present. *Id.* at 158.

84 403 U.S. 29 (1971).

85 *Id.* at 43-44.

86 *Id.*

magazines.[87] The police informed the respondent's radio station and other news media of the petitioner's arrest and of the raid on his home.[88] After the story was broadcast, Rosenbloom was acquitted on the criminal obscenity charges and filed suit against respondent seeking damages for libel.[89] The Supreme Court held that a public or general interest story does not lose its constitutional protection just because it involves a private individual.[90] Hence, private individuals would have to prove that defamatory statements concerning their involvement in an event of public or general interest was published with actual malice.[91]

In *Gertz v. Robert Welch, Inc.*,[92] the Supreme Court retreated from its position in *Rosenbloom* holding that defamation suits brought by private individuals were not subject to the *New York Times* standard.[93] Gertz was a respected attorney, who represented the family of a youth who had been killed by a policeman.[94] Respondent published a magazine that expressed the views of the John Birch Society.[95] An article was featured in the magazine that falsely portrayed Gertz as a communist and a

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87 *Id.* at 32. Petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area and was arrested when he arrived at a newsstand to make a delivery. *Id.*

88 *Id.* Respondent's broadcast after the second arrest of petitioner was as follows:

> The Special Investigations Squad raided the home of George Rosenbloom in the 180 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.

Id. at 33. The same report was rebroadcast with respondent making a correction in the third sentence to read "reportedly obscene." *Id.* at 34.

89 *Id.* at 36.

90 *Id.* at 43. The Court further observed that the "First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." *Id.* at 44 (citing T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 531-32, 540 (1970)).

91 *Id.* at 52. *See supra* notes 38-52 and accompanying text.

92 418 U.S. 323 (1974). For an analysis of the *Gertz* decision see Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

93 *Gertz*, 418 U.S at 347.

94 *Id.* at 325.

95 *Id.*

leader in a scheme to frame the police.[96]

Alleging that the statements in the article were defamatory, Gertz filed suit against the publisher, Robert Welch, Inc.[97] Justice Powell, writing for the majority, distinguished between public figures, public officials, and private individuals.[98] Justice Powell recognized that public individuals have greater access to the media than private individuals, and therefore, public figures "have a more realistic opportunity to counteract false statements."[99]

Accordingly, Justice Powell reasoned in *Gertz* that private individuals are more vulnerable to injury resulting from a defamatory statement than public individuals, and therefore, are more deserving of greater state protection.[100] The Court held, however, that the state's interest in protecting private individuals extends no further than compensation for actual injury.[101] Therefore, Justice Powell reasoned that the first amendment prohibited states from allowing recovery of presumed and punitive damages for defamatory statements unless the plaintiff proved that the publisher had knowledge of falsity or reckless disregard for the truth.[102]

The *Gertz* Court determined that public individuals voluntarily exposed themselves to the mass media and increased their risk of defamatory falsehoods whereas private individuals did not.[103] After narrowly defining public figures, the Court held that Gertz was not rendered a public figure by his participation in professional and community affairs.[104]

The Court limited a private individual's recovery to compen-

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96 *Id.* at 326. The article also stated that Gertz had a police file that took "a big, Irish cop to lift." *Id.* The article mentioned that petitioner was "an official of the Marxist League for Industrial Democracy," which had advocated the seizure of our government. *Id.*

97 *Id.* at 327. The article contained many inaccuracies which Gertz claimed injured his reputation as both a lawyer and a private citizen. *Id.*

98 *Id.* at 344.

99 *Id.*

100 *Id.*

101 *Id.* at 349.

102 *Id.*

103 *Id.* at 345. The Court defined the various classes of public figures as follows: (1) those who occupy persuasive and influential positions, (2) those who have voluntarily injected themselves into a public controversy to influence the issue involved, and (3) those who are involuntary public figures. *Id.* The Court remarked, however, that it is rare to find a truly involuntary public figure. *Id.*

104 *Id.* at 352. *See also* Hutchinson v. Proxmire, 443 U.S. 111 (1979) (recipient of federal grant was not a public figure and was not required to establish actual malice).

satory damages.[105] Justice Powell additionally held that states may not impose strict liability in suits brought by private individuals because strict liability would award recovery without regard to whether the plaintiff established that the statement was published with knowledge of its falsity or with reckless disregard of the truth.[106]

After *Gertz*, the Court was reluctant to extend the public figure classification.[107] In *Time, Inc. v. Firestone*,[108] the Court held that respondent was not a public figure, even though she was a notable social figure involved in a divorced proceeding which was considered a public controversy.[109]

In *Time*, petitioner published a weekly news magazine that reported respondent's divorce as being granted "on the grounds of extreme cruelty and adultery."[110] Respondent, Mary Alice Firestone, demanded a retraction of the false article, but petitioner refused to comply with her request.[111] Justice Rehnquist, writing for the majority, held that Firestone was not a public figure.[112] The Court reasoned that "[r]espondent did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[113] Justice Rehnquist further stated that respondent was required to go to the state court in order to obtain a legal release to dissolve her marriage.[114] Accordingly, the Court concluded that respondent did not voluntarily inject herself into a public controversy, and therefore, she could not be considered a

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105 *Gertz*, 418 U.S. at 350.

106 *Id.* at 349. *See also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (private individual suing a media defendant must not only bear the burden of proving fault, but also must prove the falsity of the defendant's statement).

107 *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (notable socialite not a public figure by involvement in a divorce proceeding).

108 424 U.S. 448 (1976).

109 *Id.* at 455.

110 *Id.* at 452. The divorce was granted on the grounds that neither party had shown domestication. *Id.* at 451.

111 *Id.*

112 *Id.* at 455.

113 *Id.* at 453.

114 *Id.* at 454. Additionally, the *Time* Court restated that in such an instance,"[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."*Id.* (citing Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971)). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (individual held in contempt of grand jury inquiry was not a public figure twenty years after the event).

public figure.[115]

Recently, in *Dun & Bradstreet v. Greenmoss Builders, Inc.*,[116] the Supreme Court held that punitive and/or presumed damages may be awarded, absent a showing of actual malice, when the false statements made do not concern a matter of public interest or a public figure.[117] In *Dun & Bradstreet*, petitioner was a credit reporting agency that falsely reported to several subscribers that respondent, a construction contractor, was insolvent.[118] The respondent requested a retraction because the statements were false and grossly misrepresentative.[119] Respondent was dissatisfied with the correction statement and filed a libel suit in Vermont.[120] The United States Supreme Court affirmed the Vermont Supreme Court's decision, concluding that constitutional protection was more limited in regulating state libel law when the elements of the *New York Times* and *Gertz* decisions were not present.[121] Justice Powell further observed that the states have a substantially greater interest in awarding punitive damages to a private figure defamed by a publication of no public concern, even when a showing of actual malice is lacking.[122]

It was against this historical application of the *New York Times* actual malice standard that the case of *Hustler Magazine v. Falwell*[123] was decided. In *Hustler*, the United States Supreme Court was called upon to decide whether a public individual must establish actual malice to recover damages for the tort of intentional infliction of emotional distress.[124] The Court reasoned that, in order to recover damages, public officials and public figures must prove that the publication contained a false statement of fact which was made with actual malice.[125]

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115 *Time*, 424 U.S. at 454.

116 472 U.S. 749 (1985).

117 *Id.* at 763.

118 *Id.* at 751. Under the terms of the subscription contract, the subscribers were not allowed to reveal the confidential information to anyone else. *Id.*

119 *Id.* Respondent had notified the agency of its error and requested the names of the firms to whom the information was sent in addition to a retraction. *Id.* After determining that its report was false, the agency issued a retraction. *Id.* at 751-52.

120 *Id.* at 752. The correction statement clarified that a former employee filed for bankruptcy, not the respondent. *Id.* Respondent filed suit requesting both compensatory and punitive damages. *Id.*

121 *Id.* at 759.

122 *Id.* at 761.

123 108 S. Ct. 876 (1988).

124 *Id.* at 879. The RESTATEMENT (SECOND) OF TORTS § 46 (1965) defines the intentional infliction of emotional distress as "extreme and outrageous conduct [which] intentionally or recklessly causes severe emotional distress to another."

125 *Hustler*, 108 S. Ct. at 882.

Chief Justice Rehnquist, writing for the majority in *Hustler*, began his analysis by noting that the free flow of opinions and ideas was at the core of the first amendment.[126] The Chief Justice pointed out that the Court has been meticulous in safeguarding individual expressions of ideas from governmental sanctions.[127] Additionally, the Chief Justice stated that the first amendment encouraged critical speech of those who held public office or those public figures who were intimately involved in a public controversy.[128] The Court explained that criticism would not always be moderate, and therefore, public individuals would sometimes be subject to "unpleasantly sharp attacks."[129]

Chief Justice Rehnquist, however, observed that first amendment protection did not extend to all speech regarding public figures.[130] Accordingly, the Chief Justice noted that since *New York Times*, the Court has consistently held that a publication regarding a public individual which contained a defamatory statement "made 'with knowledge that it was false or with reckless disregard of whether it was false or not,' " was not within the parameters of the first amendment.[131] The Court reasoned that false statements of fact interfered with the free marketplace of ideas and caused irreversible damage to the public figure's reputation.[132]

Chief Justice Rehnquist further stated that imposing strict liability on a publisher for defamatory statements would undoubtedly have a strong impact on speech which was of constitutional value.[133] The Court recognized that the "[f]reedoms of expression require 'breathing space' " and that such breathing space was provided for in a constitutional rule that only permits recovery where the public figure can establish actual malice.[134]

Chief Justice Rehnquist rejected the respondent's argument

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126 *Id.* at 879.

127 *Id.*

128 *Id.* (citing Associated Press v. Walker, *decided with* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

129 *Id.* at 880 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

130 *Id.*

131 *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

132 *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 344 n.9 (1974)). The Court determined that false statements would cause irrevocable damage to the public individual, regardless of how persuasive the counter-arguments would be. *Id.* (citing *Gertz*, 418 U.S. at 340, 344 n.9).

133 *Id.*

134 *Id.* (quoting Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986)). The Court noted that actual malice requires a showing "that the statement

that a different standard should be applied in the instant matter because the parody caused severe emotional distress, rather than reputational harm.[135] The Chief Justice noted that, in the world of public debate, statements are protected by the first amendment, even with motives such as hatred or ill-will.[136]

The Chief Justice stated that the actual malice requirement is necessary to protect political cartoonists.[137] Chief Justice Rehnquist further recognized that political cartoons and political satires have influenced our public and political debates.[138] Considering that graphic depictions and political cartoons have played an important role in our history, the Court opined that the parody of Falwell and his mother was a "distant cousin" from more historical and noteworthy political cartoons.[139]

Chief Justice Rehnquist rejected the argument that the parody was so outrageous that it was distinguishable from the traditional political cartoons.[140] The Chief Justice reasoned that outrageousness in the political arena is a subjective question, and therefore, juries could impose liability based on their likes and dislikes of a particular expression.[141]

Furthermore, the Chief Justice noted that first amendment principles were subject to limitations.[142] Chief Justice Rehnquist recognized that speech which was vulgar, offensive, and shocking was not within the parameters of the first amendment, and therefore, not guaranteed constitutional protection.[143] The Chief Justice stated that the expression involved in this case was not governed by an exception and was within the protection of free-

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was false and that the statement was made with the requisite level of culpability." *Id.*

135 *Id.*

136 *Id.* The Court additionally noted that in Garrison v. Louisiana, 379 U.S. 64 (1964), publications motivated by hatred are protected by the first amendment.

137 *Hustler*, 108 S. Ct. at 881. The Court noted that political cartoonists explore the unfavorable traits of their subject. *Id.* Therefore, if the Court permitted recovery for emotional distress without establishing actual malice, the political cartoonists would be consistently liable to their subject. *Id.*

138 *Id.* The Court noted that the political cartoonists have been around since the Civil War and Thomas Nast, most noted for his "graphic vendetta against William M. 'Boss' Tweed and his corrupt associates in New York City's 'Tweed Ring,' " has not only influenced our public debate but our history as well. *Id.*

139 *Id.*

140 *Id.* at 881-82.

141 *Id.* at 882.

142 *Id.* (citing F.C.C. v. Pacifica Found., 438 U.S. 726, (1978)). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting words" were outside the parameters of first amendment protection). *See also infra* note 2 and accompanying text.

143 *Hustler*, 108 S. Ct. at 882.

dom of speech and of press.[144] In conclusion, Chief Justice Rehnquist stated that respondent was a public figure[145] and may not recover for the intentional infliction of emotional distress by reason of the parody without showing that the publication contained a defamatory statement of fact that was made with actual malice.[146]

In a separate concurring opinion, Justice White disagreed with the application of the *New York Times* standard of review.[147] Justice White, however, agreed with the majority's conclusion that the publication of the parody could not be penalized.[148]

In light of the Supreme Court's prior decisions, the *Hustler* Court's judgment was well supported. The Court's traditional and extended application of the *New York Times* standard has repeatedly required the existence of actual malice for a public individual to recover damages.[149] Therefore, based on the preceding analysis and the historical application of the *New York Times* requirements, it was only proper for the Supreme Court to conclude that a public individual must also prove actual malice to recover for the intentional infliction of emotional distress.[150]

While the Court had defined public figures in many ways, the person who occupies that status is likely to know that they are in the public eye and publications concerning their position are constitutionally protected by the first amendment.[151] The first amendment, in its broadest terms, protects against "all laws abridging the freedom of speech."[152] At the heart of the first amendment is the recognition of the necessity of the free flow of ideas and public opinions.[153] "Breathing space" is needed to

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144 *Id.*

145 Neither party disputes this conclusion, considering that respondent is the host of a nationally syndicated television show and also founder of a political organization. *Id.* at 882 n. 5.

146 *Id.* at 882.

147 *Id.* at 883 (White, J., concurring).

148 *Id.*

149 *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extension of the actual malice standard to public figures who were not public officials); Rosenblatt v. Baer, 383 U.S. 75 (1966) (extension of the public official category to include government employees who have substantial responsibility over government concerns); Garrison v. Louisiana, 376 U.S. 64 (1964) (extension of the actual malice standard to criminal cases); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (where the court established the actual malice requirement).

150 *See Hustler*, 108 S. Ct. at 882.

151 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

152 *See supra* note 1 (text of first amendment).

153 *See id.*

protect the freedom of expression and the vitality of our constitutional system.[154] Therefore, public figures are not entitled to or worthy of greater state protection.[155]

The *Hustler* case may be viewed as an expression of the Supreme Court's interpretation of the constitutional protection guaranteed by the first amendment.[156] In considering this judgment along with previous decisions, the *Hustler* case extended the actual malice requirement to publications pertaining to public individuals to assure that proper first amendment protections would be accorded to public individuals seeking to recover damages resulting from the intentional infliction of emotional distress.[157] Therefore, the Court, it seems, will continue to protect the constitutional guarantees of freedom of speech and of press.[158]

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154 *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (the Court determined that "breathing space" was necessary to insure first amendment protection).

155 *See Gertz*, 418 U.S. at 345-46 (1974). In determining the limitations of the first amendment, the Supreme Court has held that private individuals were not required to prove actual malice to recover damages in a libel suit. *Id.* The Court has determined that the states have a substantially greater interest in protecting private individuals from defamatory statements. *Id.* Considering this rationale, one can conclude that the Court would affirm its holding in *Gertz*, if the issue were presented with regard to a claim brought by a private individual for the intentional infliction of emotional distress resulting from defamatory statements.

156 *See supra* note 1 (text of first amendment).

157 *See Hustler*, 108 S. Ct. at 879.

158 *See supra* note 1 (text of first amendment).