AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Advocacy

---

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)

Hustler *magazine in November 1983 published a fake advertisement featuring Jerry Falwell, a prominent leader of the Moral Majority, talking about his "first time." Campari Liqueur, at the time, had an advertising campaign in which celebrities talked about their first sip of that product. In the* Hustler *satire, Falwell discussed getting drunk and having sexual relations with his mother. Falwell sued Hustler for libel, invasion of privacy, and intentional inflicting of emotional damages. A trial jury accepted the last claim and awarded him $150,000 in damages. When that judgment was affirmed by the Court of Appeals for the Fourth Circuit,* Hustler *appealed to the Supreme Court of the United States. Numerous press associations filed amicus briefs asking the Court to overturn the trial verdict. The brief for the Association of American Editorial Cartoonists contained examples of political cartoons, and concluded with the following satirical musical parody by Mark Russell about Ronald Reagan's attorney general, Edwin Meese (sung to the tune of "Santa Claus is Coming to Town").*

> *Oh you'd better be nice, not cranky and rude,*
> *And don't ask for things like shelter and food*
> *Mr. Meese is coming to town.*
> *He's making a list of the food that he brings*
> *To all of the hungry who live in Palm Springs*
> *Mr. Meese is coming to town.*

The Rehnquist Court unanimously reversed the lower federal courts. Chief Justice Rehnquist's opinion held that the First Amendment prohibits public figures from recovering damages for infliction of emotional distress in the absence of a false statement of fact. Why did Rehnquist reach that conclusion? How does the Hustler *advertisement contribute to public discourse? Might you make a distinction between the* Hustler *advertisement and the Mark Russell parody noted above? Or was Justice Rehnquist right that no meaningful lines can be drawn consistent with the First Amendment?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

. . .

This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the

common quest for truth and the vitality of society as a whole." . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. . . .

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." . . . Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks."

Of course, this does not mean that any speech about a public figure is immune from sanction in the form of damages. Since *New York Times Co. v. Sullivan* (1964), we have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." . . . False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. . . . But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate" . . . and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. . . .

. . .

Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana* (1964), we held that even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. . . . The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. . . .

Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as "The Royal Feast of Belshazzar," and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous 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.

Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. . . .

. . .

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

Here it is clear that respondent Falwell is a "public figure" for purposes of First Amendment law. . . . Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here. . . .

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

JUSTICE WHITE, concurring in the judgment.