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THE CONSTITUTIONAL CONCEPT OF PUBLIC DISCOURSE: OUTRAGEOUS OPINION, DEMOCRATIC DELIBERATION, AND HUSTLER MAGAZINE V. FALWELL

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ARTICLE

THE CONSTITUTIONAL CONCEPT OF PUBLIC DISCOURSE: OUTRAGEOUS OPINION, DEMOCRATIC DELIBERATION, AND HUSTLER MAGAZINE V. FALWELL

Robert C. Post*

Hustler Magazine v. Falwell is the most recent in a long line of first amendment decisions in which the Supreme Court has extended constitutional protection to outrageous or offensive speech. In this article Professor Post analyzes the theory behind this protection. He argues that speech is defined as outrageous by reference to norms of community life. In the culturally heterogeneous environment of the United States, however, first amendment doctrine functions to facilitate communication among communities, so that a common democratic and public opinion may be formed. For this reason first amendment doctrine demarcates a distinct realm of public discourse that is neutral with respect to the norms of specific communities. Professor Post demonstrates how several important themes in the Falwell opinion follow from this separation of public discourse from community values. In particular he contends that the separation illuminates Falwell's rejection of "outrageousness" and "bad motive" as criteria for the regulation of public discourse, as well as its reliance upon the curious and muddy distinction between fact and opinion. Professor Post notes, however, that the constitutional concept of public discourse is inherently unstable, because speech that violates community norms of civility is perceived as irrational and coercive, and hence as incompatible with public deliberation. Thus first amendment doctrine suspends legal enforcement of the very norms that make rational deliberation possible. Professor Post labels this the "paradox of public discourse," and argues that the paradox accounts for the jagged and uneven course of first amendment doctrine. The article concludes with a discussion of the various methods by which the domain of public discourse may be defined.

THE recent "revival" of the view that politics should be understood as a "deliberative process"¹ raises significant questions for first amendment jurisprudence. It invites reconsideration of the function

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¹ Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

and extent of constitutional protection for public speech. Professor Frank Michelman, an astute participant in the revival, has for example convincingly argued that public deliberation cannot achieve its purposes if it is "considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom."²

Although the United States Supreme Court has increasingly fashioned first amendment doctrine around the concept of what it calls "public discourse,"³ it has developed the concept in ways that seem plainly incompatible with Michelman's point. Emblematic is the Court's 1988 opinion in *Hustler Magazine v. Falwell*, in which Chief Justice Rehnquist used the notion of "public discourse" constitutionally to immunize from legal regulation speech that was justifiably experienced as profoundly invasive and violative of identity.⁴ During the last two Terms the Court has explicitly and forcefully reiterated this approach: "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"⁵

The purpose of this Article is to assess the justification and structure of the concept of public discourse that underlies these strong conclusions. It uses the *Falwell* decision as a specific focus for analysis. Part I appraises torts like defamation and the intentional infliction of emotional distress, which form the basis of the *Falwell* case, and illustrates how they regulate communication in order authoritatively to enforce a particular kind of community life. The first amendment doctrines invoked by *Falwell* prohibit this enforcement within the realm of public discourse. Part II then explores the theory of public discourse that justifies this prohibition. That theory, in brief, turns on the demarcation of a distinct realm of speech within which legal application of the ordinary norms of community life is constitutionally suspended. This suspension ensures that in the culturally heterogeneous environment of the United States, public debate can proceed within an arena that is legally neutral with respect to the norms of particular communities. It also creates an arena within which new forms of community life can be exemplified and advocated. But the suspension is conceptually and socially unstable, because speech that contravenes community norms is experienced as coercive

² Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1527 (1988).

³ See, e.g., *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 881 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985).

⁴ See *Falwell*, 108 S. Ct. at 880-82.

⁵ *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (quoting *Falwell*, 108 S. Ct. at 882); see also *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989) (holding mere offensiveness insufficient to justify suppression of speech).

and violative of personal identity, and hence as incompatible with constructive public debate.

Part III demonstrates how the first amendment doctrines employed by the *Falwell* opinion follow from its conception of public discourse. The constitutional separation of public discourse from community life illuminates why *Falwell* rejects "outrageousness" and illicit motivation as grounds for the regulation of public speech.⁶ It also explains why *Falwell* turns on the curious and muddy distinction between fact and opinion,⁷ for the Article argues that statements of fact are those which claim to be true regardless of the standards that define community life, whereas statements of opinion are those which claim to be true on the basis of the standards of a particular community.

Finally, Part IV canvasses the various criteria used by the Court to distinguish public discourse from other speech. These criteria are generally conceded to be inadequate, and Part IV explores the reasons for this failure. It then offers a reconceptualization of these criteria that attempts more fully to uncover the values at issue in the classification of speech as public discourse.

I. *HUSTLER MAGAZINE V. FALWELL*

Hustler Magazine v. Falwell is a classic first amendment case.⁸ Its antagonists could have been selected by central casting to embody the fundamental constitutional tension between anarchic self-expression and strict civic virtue. The plaintiff was Jerry Falwell, a well-known religious fundamentalist and leader of the Moral Majority, a political organization that sought to inject traditional values into American public life. The defendants were *Hustler Magazine* and its publisher, Larry Flynt, both notorious for their dedication to a vivid and perverse pornography. The subject of the dispute was a vicious and puerile satire that purported to describe an incestuous encounter between Falwell and his mother in an outhouse, and that was intended, as Flynt testified, to "assassinate" Falwell's integrity.⁹

Michael Sandel once observed that "[l]iberals often take pride in defending what they oppose."¹⁰ If that is true, there was much to be proud of in the *Falwell* opinion. Even those who maintained that the

⁶ See *Falwell*, 108 S. Ct. at 880-82.

⁷ See *id.* at 880, 882.

⁸ The *Falwell* decision has been called "momentous," "a case of profound first amendment significance." Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 442 (1988). For the background of the case, see R. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988).

⁹ Deposition Testimony of Larry Flynt, reprinted in Joint Appendix at 91, 141, *Falwell* (No. 86-1278).

¹⁰ Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15.

Hustler parody was constitutionally protected confessed to the "profound repugnance" that it inspired.¹¹ In the face of that repugnance, however, the Supreme Court, impressively massing behind an opinion by Chief Justice Rehnquist, held in ringing first amendment tones that however "outrageous" the satire, however maliciously motivated or intensely painful its effects, a public figure like Falwell could not recover damages without demonstrating the existence of "a false statement of fact which was made with 'actual malice.'"¹² The *Falwell* opinion thus stands squarely in the tradition of *Cohen v. California*¹³ as an important articulation of the first amendment right to give offense.

A. The Background of the Case

The antagonism between Larry Flynt and Jerry Falwell could hardly be more natural. Flynt was to Falwell a "sleaze merchant,"¹⁴ a purveyor of precisely the kind of moral corruption that Falwell sought to destroy. Falwell was to Flynt a phony, "a big windbag" who, like the fallen evangelists Jimmy Swaggart and Jim Bakker, needed to be "exposed."¹⁵ For years Flynt had excoriated Falwell in the pages of *Hustler*, the raunchy flagship of Flynt's pornographic publications, as a "vicious hypocrite."¹⁶ The breaking point came in November 1983, when *Hustler* featured on its inside front cover a parody of an advertisement for Campari Liqueur. Campari ads had a well-known and recognizable format. They featured celebrities speaking about their "first time," meaning their first drink of Campari, but with a clear double entendre concerning their first sexual experience.

Hustler's version was entitled "Jerry Falwell talks about his first time."¹⁷ The spoof followed the usual Campari format; it featured a

¹¹ *Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing en banc).

¹² *Falwell*, 108 S. Ct. at 882.

¹³ 403 U.S. 15 (1971).

¹⁴ See Taylor, *Court, 8-0, Extends Right To Criticize Those in Public Eye*, N.Y. Times, Feb. 25, 1988, at A22, col. 2.

¹⁵ See Savage, *Justices Void Award Falwell Won from Flynt*, L.A. Times, Feb. 25, 1988, pt. 1, at 23, col. 1.

¹⁶ See Plaintiff's Trial Exhibit 11 (excerpting Feb. 1980 issue of *Hustler Magazine*), reprinted in Joint Appendix, *supra* note 9, at 209. In February 1980, *Hustler* had named Falwell its "Asshole of the Month." *Id.* See generally Plaintiff's Trial Exhibits 11-15 (excerpting Feb. 1980, Nov. 1981, Dec. 1981, Feb. 1982, and Mar. 1983 issues of *Hustler Magazine*) (characterizing Falwell as a fanatic, a charlatan and an egomaniac, and envisioning censorship and destruction of classic works of art under a Moral Majority regime), reprinted in Joint Appendix, *supra* note 9, at 208-24.

¹⁷ *Hustler*, Nov. 1983, reprinted in On Petition for a Writ of Certiorari to the United States

thoughtful photograph of Falwell, beneath which was set forth the following "interview":

FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda — that's called a Fire and Brimstone — at the time. And Mom looked better than a Baptist whore with a \$100 donation.

INTERVIEWER: Campari in the crapper with Mom . . . how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?¹⁸

At the bottom of the parody, in small letters, was the disclaimer "ad parody — not to be taken seriously."¹⁹

Court of Appeals for the Fourth Circuit at E1, *Falwell* (No. 86-1278) [hereinafter *Petition for Writ of Certiorari*].

¹⁸ *Id.*

¹⁹ *Id.* *Hustler's* table of contents listed the satire as "Fiction; Ad and Personality Parody." 108 S. Ct. at 878.

Falwell was not amused. In fact he was "incensed."²⁰ He first read the parody on an airplane; when his flight landed he called his lawyer and said, "Get him."²¹ Falwell wanted "'to protect myself and the memory of my mother,' and to end 'the kind of sleaze merchantry that Larry Flynt typifies.'"²² Almost immediately thereafter he filed suit in the United States District Court for the Western District of Virginia, alleging defamation, invasion of privacy, and intentional infliction of emotional distress.²³

Falwell's legal strategy reflected the growing trend of plaintiffs to combine in a single complaint two or more of the three so-called "dignitary torts or torts which focus on the protection of 'personality.'"²⁴ The strategy proved fortunate for Falwell. Because Virginia had no common law cause of action for invasion of privacy,²⁵ Falwell was forced to base his privacy claim on a Virginia statute prohibiting the use of a person's name or likeness for purposes of trade or advertising without his consent.²⁶ At the close of evidence, however, the district court ruled as a matter of law that Flynt's use of "Falwell's

²⁰ See Taylor, *Sharp Words in High Court on Hustler Parody of Falwell*, N.Y. Times, Dec. 3, 1987, at A30, col 1.

²¹ *Id.*

²² *Id.* (quoting Jerry Falwell).

²³ See 108 S. Ct. at 878. Jurisdiction was established on the basis of diversity. The suit named as defendants Larry Flynt, Hustler Magazine, Inc., and Flynt Distributing Co., Inc. See Complaint, reprinted in Joint Appendix, *supra* note 9, at 4-5.

On November 15, 1983, Falwell sent out two mailings to solicit contributions "to help . . . defend his mother's memory in court." *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1150 (9th Cir. 1986). The first mailing, which was sent to approximately 500,000 "rank-and-file members" of the Moral Majority, described the *Hustler* parody; the second, which was sent to about 26,900 "major donors," included a copy of the parody with eight words blackened out. See *id.* On November 18, Falwell solicited contributions from about 750,000 supporters of the Old Time Gospel Hour. In his mailing he included a copy of the parody and a letter "focused on the need to keep Falwell's religious television stations open in order to combat people like Larry Flynt." *Id.* These solicitations produced in excess of \$700,000 in contributions. See *id.* On December 4 and December 11, Falwell also displayed the parody during a sermon broadcast nationwide on the Old Time Gospel Hour. See *id.* Flynt retaliated by reprinting the parody in the March 1984 issue of *Hustler*, see *id.* at 1149, and by suing Falwell for copyright infringement because of Falwell's use of the parody to solicit contributions. See *id.* at 1150. The Ninth Circuit, however, held the mailings and the television displays permissible under the fair use doctrine. See *id.* at 1151-56.

²⁴ Mead, *Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24, 29, 43 (1983).

²⁵ See *Brown v. ABC*, 704 F.2d 1296, 1302-03 (4th Cir. 1983) (applying Virginia law).

²⁶ See Complaint, reprinted in Joint Appendix, *supra* note 9, at 16. Falwell's complaint relied on VA. CODE ANN. § 8.01-40 (1984), which provides, in part:

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 . . . may maintain a suit in equity . . . and may also sue and recover damages for any injuries sustained by reason of such use.

name and likeness . . . was not for purposes of trade within the meaning of the statute."²⁷ Falwell's libel claim was also eliminated when the jury returned a special verdict that the *Hustler* parody could not "reasonably be understood as describing actual facts about plaintiff or actual events in which plaintiff participated."²⁸ Since 1974 it has been assumed that dictum in *Gertz v. Robert Welch, Inc.*²⁹ establishes an absolute constitutional privilege in defamation actions for the publication of opinion, as opposed to false fact,³⁰ and the jury's verdict was taken to mean that the Campari parody was opinion.³¹

All that remained, therefore, was Falwell's claim for intentional infliction of emotional distress. Virginia law specifies that in order to succeed a plaintiff must establish four elements:

One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.³²

Falwell's evidence that Flynt had intended to cause him distress rested on Flynt's deposition testimony that he had intended to "upset" Falwell,³³ that he had wanted "[t]o settle a score" because Falwell had

²⁷ *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986). The Fourth Circuit, upholding the ruling, relied primarily on interpretations of § 51 of the New York Civil Rights Law, to which it found the Virginia statute "substantially similar." See *id.* at 1278; N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1989).

²⁸ Petition for Writ of Certiorari, *supra* note 17, at C1.

²⁹ 418 U.S. 323 (1974).

³⁰ See *id.* at 339-40. For a brief survey of the impact of the *Gertz* dictum, see Gleason, *The Fact/Opinion Distinction in Libel*, 10 HASTINGS COMM/ENT L.J. 763, 775-92 (1988).

³¹ See *Falwell*, 797 F.2d at 1275-76.

³² *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974), cited in *Falwell*, 797 F.2d at 1275 n.4.

³³ See Deposition Testimony of Larry Flynt, reprinted in Joint Appendix, *supra* note 9, at 136. Flynt was obviously irrational and deeply disturbed during his deposition. He began the deposition by identifying himself as "Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh." *Id.* at 91. He repeatedly directed uncontrolled and foul-mouthed remarks to the attorneys in the room, calling his own lawyer an "idiot," see *id.* at 99, and a "liar," see *id.* at 144, and telling him to "shut up," see *id.* at 119. He called Falwell's lawyer an "asshole." See *id.* at 93-95. Flynt claimed that his life was "in danger," see *id.* at 146, that he had a photograph of Falwell having coitus with a sheep, see *id.* at 124, that he had affidavits of persons who had seen Falwell committing incest with his mother, see *id.* at 105, and that the

labelled Flynt's personal life "abominable,"³⁴ and that he had desired to "assassinate" Falwell's integrity.³⁵ Falwell's evidence that the *Hustler* parody had caused severe emotional distress consisted primarily of his testimony that reading the satire had inflicted a "very deep wound of personal anguish and hurt and suffering, such as nothing in my adult life I ever recall before."³⁶ This evidence satisfied the jury, which, sharing Falwell's opinion that the parody was "outrageous and intolerable," awarded Falwell \$100,000 in compensatory damages, and held Flynt and *Hustler Magazine* each responsible for \$50,000 in punitive damages.³⁷

Flynt and *Hustler* appealed, offering two constitutional arguments.³⁸ First, they contended that because the *Hustler* parody was opinion and constitutionally privileged in a defamation action, it should also be privileged in a cause of action for intentional infliction of emotional distress.³⁹ Second, they contended that even if the parody were not absolutely privileged, Falwell's admitted status as a

Campari parody was "not intended to parody or exaggerate anything, but to convey the truth," *id.* at 140.

Flynt later moved to have the deposition suppressed on the grounds that he could not comprehend the obligation of his oath or give a correct account of events, in support of which he submitted the affidavits of two psychiatrists to the effect that during the deposition Flynt was in a psychotic, manic state. *See* Declarations in Support of Defendant's Motion to Exclude Deposition Testimony of Larry Flynt, *reprinted in* Joint Appendix, *supra* note 9, at 180-85. The trial court initially granted Flynt's motion, but later, on the first day of trial, reversed itself and admitted an edited version of the deposition into evidence. *See Falwell*, 797 F.2d at 1273.

³⁴ *See* Deposition Testimony of Larry Flynt, *reprinted in* Joint Appendix, *supra* note 9, at 113.

³⁵ *See id.* at 141.

³⁶ Testimony of Jerry Falwell, *reprinted in* Joint Appendix, *supra* note 9, at 38. Falwell testified:

I have never been to a psychiatrist or psychologist in my life for personal help. I am not sure but what I feel that as a Christian and a minister — I am not sure it would not be wrong for me to do it. . . . I did not cut my schedule back; I did not stop anything I was doing, but I can tell you it has created the most difficult year of performance, physically, mentally, emotionally, in all of my life. Those who work near me can tell you that my ability to concentrate and focus on the job at hand has been greatly, greatly damaged.

Id. at 42. An administrative subordinate of Falwell, Dr. Ron Godwin, testified at trial that Falwell had an extraordinarily busy schedule, that as a result of the *Hustler* parody Falwell neither cut back his schedule in any way nor lost his dynamism in speaking. *See* Testimony of Ronald Godwin, *reprinted in* Joint Appendix, *supra* note 9, at 52-53. Godwin stated that, shortly after reading the parody, Falwell seemed "more troubled, more serious, more concerned than I had ever seen him on any other issue, crisis or otherwise," *id.* at 53, and that thereafter it was "more difficult for me as an administrator to get Dr. Falwell's attention and to get him to be able to focus on the details of the organization we administer," *id.* at 54.

³⁷ *See* Petition for Writ of Certiorari, *supra* note 17, at C3-C4. The jury returned a verdict for Flynt Distributing Co., Inc. *See id.*

³⁸ *See* Falwell v. Flynt, 797 F.2d 1270, 1273-74 (4th Cir. 1986). Flynt and *Hustler* also argued that the trial court had misunderstood some points of state law and that it had issued a number of incorrect and prejudicial evidentiary rulings. *See id.* at 1277-78.

³⁹ *See id.* at 1273-74.

public figure meant that "the actual malice standard of *New York Times Co. v. Sullivan* . . . must be met before Falwell can recover for emotional distress."⁴⁰

The Fourth Circuit, however, rejected both arguments and upheld the jury's verdict. It brushed aside the first contention on the ground that the defamation tort was essentially concerned with false statements of fact, whereas an "action for intentional infliction of emotional distress concerns itself with intentional or reckless conduct which is outrageous and proximately causes severe emotional distress, not with statements per se."⁴¹ At issue in the case, therefore, was whether the defendants' publication was outrageous, not whether the publication was fact or opinion. Defendants' argument was for this reason "irrelevant in the context of this tort."⁴²

The Court of Appeals rejected the second argument on similar grounds. It noted that although the tort of defamation was intrinsically concerned with false statements, the "actual malice" standard of *New York Times* "alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover."⁴³ Applying the actual malice standard to the tort of intentional infliction of emotional distress, on the other hand, "would add a new element" to the tort and fundamentally shift its focus from the outrageous character of a publication to its truth or falsity.⁴⁴ Interpreting the *New York Times* standard as focusing "on culpability,"⁴⁵ the Fourth Circuit held that Virginia's requirement that infliction of emotional distress be "intentional or reckless" evidenced an exactly parallel focus. "The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress."⁴⁶

⁴⁰ *Id.* at 1273 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The actual malice standard of *New York Times* requires a plaintiff to demonstrate that a defendant has published the communication at issue with "knowledge that it is false or with reckless disregard of whether it is false or not." *New York Times*, 376 U.S. at 280, quoted in 797 F.2d at 1274 n.2.

⁴¹ 797 F.2d at 1276.

⁴² *Id.*

⁴³ *Id.* at 1275.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ *Id.* The Fourth Circuit's opinion was instantly controversial, receiving widespread and largely negative notice. See, e.g., Entin, *Privacy, Emotional Distress, and the Limits of Libel Law Reform*, 38 MERCER L. REV. 835, 853-58 (1987); Note, Falwell v. Flynt: *First Amendment Protection of Satirical Speech*, 39 BAYLOR L. REV. 313, 322-32 (1987); Note, *Emotional Distress When Libel Has Failed: The Faulty Logic of Falwell v. Flynt*, 16 COLONIAL LAW. 115 (1987); Note, Falwell v. Flynt: *Intentional Infliction of Emotional Distress as a Threat to Free Speech*, 81 NW. U.L. REV. 993, 1004-08 (1987) [hereinafter Note, *Threat to Free Speech*]; Note, Falwell v. Flynt: *An Emerging Threat to Freedom of Speech*, 1987 UTAH L. REV. 703, 719-26. But see Note, *Constitutional Law — Satire, Defamation, and the Believability Rule as Bar to Recovery — Falwell v. Flynt*, 22 WAKE FOREST L. REV. 915, 922-29 (1987).

B. The Supreme Court Opinion

The Supreme Court reversed. Chief Justice Rehnquist wrote for the Court, and his opinion was joined by all Justices except for Justice Kennedy, who did not participate in the case, and Justice White, who wrote a short, one paragraph concurrence designed primarily to disassociate himself from Chief Justice Rehnquist's strong reaffirmation of the *New York Times* actual malice standard.⁴⁷ Chief Justice Rehnquist's opinion is rhetorically adept, touching all the "right" first amendment sentiments and eloquently evoking the nation's tradition of cutting political satire. But the argumentative structure of the opinion is obscure, making it difficult to discern a crisp course of reasoning.

In essence, however, the logical foundation of the *Falwell* opinion lies in its repudiation of the Fourth Circuit's interpretation of *New York Times*. The *Falwell* opinion makes clear that *New York Times* was not so much concerned with setting levels of "culpability," as with fulfilling a constitutional mandate to design rules calculated to facilitate "the free flow of ideas and opinions on matters of public interest and concern" that is "[a]t the heart of the First Amendment."⁴⁸ The damages assessed against Flynt and *Hustler*, the Court argued, must be evaluated against the requirements of that same constitutional mandate.⁴⁹ For this reason it is not sufficient simply to observe, as did the Fourth Circuit, that the torts of defamation and intentional infliction of emotional distress have different functions and elements. The decisive issue is rather how these elements affect "the world of debate about public affairs"⁵⁰ protected by the Constitution.

By a 6-5 vote, the Fourth Circuit denied a petition to rehear the case en banc, see 805 F.2d 484 (4th Cir. 1986), despite a brilliant and stinging dissent by Judge Wilkinson.

⁴⁷ Justice White had powerfully expressed his dissatisfaction with the *New York Times* actual malice standard in his concurring opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765-74 (1985) (White, J., concurring in the judgment). Because Chief Justice Rehnquist had himself previously supported calls for reconsideration of the *New York Times* actual malice standard, see *Coughlin v. Westinghouse Broadcasting & Cable*, 476 U.S. 1187, 1188 (1986) (Burger, C.J., joined by Rehnquist, J., dissenting from denial of certiorari), his opinion in *Falwell* marks a distinct shift toward the conservation of consensus principles of first amendment jurisprudence developed since *New York Times*. In assessing the extent of that shift it should also be noted that Chief Justice Rehnquist had previously questioned the sweeping constitutionalization of the fact/opinion distinction created by state and federal courts on the basis of the *Gertz* dictum. See, e.g., *Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting from denial of certiorari); *Miskovsky v. Oklahoma Pub. Co.*, 459 U.S. 923, 924-25 (1982) (Rehnquist, J., dissenting from denial of certiorari). A notable achievement of Chief Justice Rehnquist's *Falwell* opinion, of course, is its transformation of that dictum into solid constitutional doctrine.

⁴⁸ *Falwell*, 108 S. Ct. at 879.

⁴⁹ See *id.* at 879-80.

⁵⁰ *Id.* at 880.

The holding of *Falwell* ultimately rests on three distinct propositions concerning that world. First, the constitutional value of a communication to "public discourse"⁵¹ does not depend upon its motivation. The American tradition of political cartoonists and satirists, for example, represents a form of speech "often calculated to injure the feelings of the subject of the portrayal," and yet "[f]rom the viewpoint of history it is clear that our political discourse would have been considerably poorer without" it.⁵² Thus the regulation of improper intentions, although important for the civil law of torts, is constitutionally inappropriate "in the area of public debate about public figures."⁵³

Second, in the world of public debate safeguarded by the first amendment, "[f]alse statements of fact are particularly valueless" because "they interfere with the truthseeking function of the marketplace of ideas."⁵⁴ It is especially important, on the other hand, "to ensure that individual expressions of ideas remain free from governmentally imposed sanctions,"⁵⁵ particularly those opinions or ideas involved in the criticism of "public men and measures."⁵⁶ That freedom "is essential to the common quest for truth and the vitality of society as a whole."⁵⁷ The caricature at issue in *Falwell* should therefore receive particular constitutional solicitude, not only because it expresses an idea, but also because it involves the criticism of a public figure.

Third, nonfactual communications in public discourse cannot constitutionally be penalized because of their "outrageousness":

'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. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.⁵⁸

While frankly acknowledging that this "refusal" has had its exceptions — as for example with respect to "'fighting' words,"⁵⁹ or to "vulgar,"

⁵¹ See *id.* at 881.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 880.

⁵⁵ *Id.* at 879.

⁵⁶ *Id.* at 879–80.

⁵⁷ *Id.* at 879 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503–04 (1984)).

⁵⁸ *Id.* at 882.

⁵⁹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). For constitutional purposes, "fighting" words are defined as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*

'offensive,' and 'shocking'" speech broadcast over the electronic media⁶⁰ — the Court in *Falwell* simply shrugged off this apparent inconsistency. It casually observed that "the sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles"⁶¹ that "speech does not lose its protected character . . . simply because it may embarrass others"⁶² or because "society may find [it] offensive."⁶³

Each of these three propositions about "the world of debate about public affairs" is well rooted in traditional constitutional doctrine, and a good measure of the undeniable power of the *Falwell* opinion lies in its ability authentically to evoke such central themes of first amendment jurisprudence. Although the opinion does not even attempt to explore the logical status and interrelationship of these claims, the three propositions, when taken together, offer a strongly normative image of a realm of public discourse that is obviously incompatible with the jury verdict in *Falwell*, and that therefore requires the reversal of the Fourth Circuit's decision.

In the last two paragraphs of its opinion, the Court in *Falwell* shifted gears and announced a narrow prophylactic rule:

[P]ublic 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.⁶⁴

The Court did not claim that this carefully guarded rule was itself expressive of the normative characteristics of public discourse. Instead it proposed the rule as an explicitly instrumental device designed to ensure that the operation of the legal system not unduly curtail legitimate public discussion. The Court justified the rule with the familiar theory that constitutionally valueless expression must sometimes be protected so that speakers will not engage in self-censorship and hence diminish "speech relating to public figures that does have constitutional value."⁶⁵ The Court insisted that it had to apply the rule to the tort of intentional infliction of emotional distress in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."⁶⁶

⁶⁰ See *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978).

⁶¹ *Falwell*, 108 S. Ct. at 882.

⁶² *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982)).

⁶³ *Id.* (quoting *Pacifica*, 438 U.S. at 745).

⁶⁴ *Id.* at 882.

⁶⁵ *Id.* at 880.

⁶⁶ *Id.* at 882. It should be noted, however, that the Court's proposed rule is as a technical matter unacceptably casual in its formulation, for it fails to specify any relationship between

The *Falwell* opinion thus combines a specific and extraordinarily narrow holding with reasoning best described as delphic. By refusing to reconcile inconsistencies between *Falwell* and prior decisions on offensive or abusive speech, the opinion fails to address the tension between such speech and freedom of expression, a tension central to *Falwell* and to first amendment jurisprudence generally. The opinion tells us almost nothing about whether the Constitution protects outrageous communications that are privately disseminated rather than displayed in the pages of a nationally distributed magazine,⁶⁷ or whether it protects outrageous communications that are designed to hurt or embarrass private figures,⁶⁸ or whether it protects communications that, although injuring the same emotional tranquility as that safeguarded by the tort of intentional infliction of emotional distress, are also violative of similar torts like invasion of privacy.⁶⁹ If the only operative legal standard is the "general first amendment principle" that speech cannot be regulated because it causes offense or embarrassment, then these questions are all easily answered: each of these hypothetical situations is constitutionally indistinguishable from the one actually presented by the *Falwell* case.

But this conclusion rings false; it jumps far too easily beyond the particular circumstances of the *Falwell* decision. If the implications

the required false fact and the actionable infliction of emotional distress. It does not make clear whether the false fact must itself cause the consequent emotional distress, or whether the false fact must merely be "contained" in a publication that otherwise inflicts such distress. If the latter, the rule does not make clear whether the false fact must be of a certain kind, or whether any false fact, no matter how innocent, will render an entire publication constitutionally unprotected. It would seem, however, that the rule cannot perform its assigned function of protecting an area of "breathing space" unless strictly interpreted, that is, unless it were to require that the false fact stated with actual malice also be intended to and in fact cause intense emotional distress by reason of its outrageous character.

⁶⁷ Imagine, for example, that instead of printing the parody in a publication "such as the one here at issue," *id.*, Flynt had reached Falwell on the telephone and said (with utter malice) the very same words that he had printed in *Hustler*. Would Flynt receive the same constitutional protection?

⁶⁸ Imagine, for example, that instead of publishing the parody about a public official or a public figure, Flynt had picked a private person's name at random from the telephone directory and had published in *Hustler* the identical Campari parody about him. Would Flynt receive the same constitutional protection?

⁶⁹ The holding of *Falwell* explicitly applies only to actions "for the tort of intentional infliction of emotional distress." 108 S. Ct. at 882. But the purpose of the tort of invasion of privacy, like that of the tort of intentional infliction of emotional distress, is often said to be the provision of redress for "injury to [a] plaintiff's emotions and his mental suffering." *Froelich v. Adair*, 213 Kan. 357, 360, 516 P.2d 993, 996 (1973); see *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967). The Court has in fact been deeply troubled by the tension between first amendment rights and the protection of privacy. See, e.g., *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607-09 (1989). Indeed, only four months after *Falwell*, the Court resolved this tension in a manner arguably inconsistent with some of the more broadly stated principles contained in *Falwell*. See *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

of *Falwell* are not to reach so far, however, the decision must rest on some implicit constitutional theory considerably more complex than any announced by the Chief Justice.⁷⁰

*C. The Significance of the Falwell Opinion: Civility and
Intentional Infliction of Emotional Distress*

The full significance of the *Falwell* opinion becomes clear only when assessed from a historical and functional perspective. The tort of intentional infliction of emotional distress is one of a family of actions, which include defamation and invasion of privacy, that are designed to protect the respect to which the law believes persons are entitled. In serving this function, however, these torts also enforce those "generally accepted standards of decency and morality"⁷¹ that define for us the meaning of life in a "civilized community."⁷² Although our own experience of human dignity subsists in the performance of these standards, the *Falwell* opinion prohibits their enforcement in public discourse, at least in the absence of false statements of fact.

This prohibition represents a radical departure from the traditional perspective of the common law. For centuries the kind of ridicule represented by the *Hustler* parody was regulated by the common law tort of defamation. Communications were deemed defamatory if they exposed an individual "to hatred, contempt, or ridicule."⁷³ The object of the tort was the protection of reputation, which is to say the standing of a person in the eyes of others. But an important reason why the law protected reputation was, as Justice Stewart observed in an eloquent and influential formulation, to safeguard "the essential dignity and worth of every human being."⁷⁴

The relationship between dignity and reputation is complex, but the essential idea is that our sense of identity and "worth" depends to

⁷⁰ As Rodney Smolla has written, "The intellectual challenge posed by Falwell's suit is not how to construct a convincing rationale for rejecting his claim, but rather how to articulate limits on that rationale . . ." Smolla, *supra* note 8, at 427; see LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315 (1989).

⁷¹ *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

⁷² RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977). For a detailed discussion of this function in the context of the tort of defamation, see Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 710-19, 732-39 (1986) [hereinafter Post, *Foundations of Defamation Law*]. For a detailed discussion of this function in the context of the tort of invasion of privacy, see Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959-66 (1989) [hereinafter Post, *Foundations of Privacy*].

⁷³ *Parmiter v. Coupland*, 151 Eng. Rep. 340, 342 (Exch. of Pleas 1840).

⁷⁴ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

a significant degree upon what others think of us.⁷⁵ Because individual identity evolves from forms of social interaction, we incorporate into our personality, into our very sense of self-worth and dignity, the institutionalized values and norms to which we have been socialized.⁷⁶ This insight was most acutely formulated by George Herbert Mead, who observed that "[w]hat goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct."⁷⁷

More recently, the sociologist Erving Goffman has demonstrated how the very stability of human personality depends upon the continual reaffirmation of community values and attitudes through the enactment of forms of civility, which Goffman calls rules of "deference and demeanor."⁷⁸ In his most famous work, for example, Goffman documented how certain "total institutions," like mental hospitals, prisons, or the military, deliberately violate ordinary rules of deference and demeanor in an attempt to unhinge and alter the identity of new initiates.⁷⁹ This strategy works because a person's "self" can be "disconfirm[ed]" if a person is not permitted to participate in the forms of mutual respect which he has been socialized to expect.⁸⁰ The dignity and integrity of individual personality thus depend to no small degree upon the maintenance of this respect.

⁷⁵ The argument in the following three paragraphs is developed in considerably greater length in Post, *Foundations of Defamation Law*, cited above in note 72, at 707-19.

⁷⁶ See, e.g., A. HALLOWELL, *CULTURE AND EXPERIENCE* (1955); T. SHIBUTANI, *SOCIETY AND PERSONALITY* 239-47 (1961); Caughey, *Personal Identity and Social Organization*, 8 *ETHOS* 173 (1980).

⁷⁷ G. MEAD, *MIND, SELF AND SOCIETY* 162 (C. Morris ed. 1937).

⁷⁸ See E. GOFFMAN, *INTERACTION RITUAL* 47-91 (1967). Rules of deference define conduct by which a person conveys appreciation "to a recipient of this recipient, or of something of which this recipient is taken as a symbol, extension, or agent." *Id.* at 56 (emphasis in original). Rules of demeanor define conduct by which a person expresses "to those in his immediate presence that he is a person of certain desirable or undesirable qualities." *Id.* at 77. Goffman conceives of these rules as creating a chain of ceremony in which each "individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts." *Id.* at 84.

Each individual is responsible for the demeanor image of himself and the deference image of others, so that for a complete man to be expressed, individuals must hold hands in a chain of ceremony, each giving deferentially with proper demeanor to the one on the right what will be received deferentially from the one on the left. While it may be true that the individual has a unique self all his own, evidence of this possession is thoroughly a product of joint ceremonial labor, the part expressed through the individual's demeanor being no more significant than the part conveyed by others through their deferential behavior toward him.

Id. at 84-85.

⁷⁹ See E. GOFFMAN, *ASYLUMS* (1961).

⁸⁰ See E. GOFFMAN, *supra* note 78, at 51.

Defamatory communications may be defined as those whose content is not civil, because their meaning violates the respect which we have come to expect from each other. They thus threaten not only the self of the defamed person (causing, among other things, symptoms of "personal humiliation, and mental anguish and suffering"⁸¹), but also the continued validity of the rules of civility which have been violated. These rules represent the "special claims which members [of a community] have on each other, as distinct from others,"⁸² and hence they embody the very substance and boundaries of community life. The definition and enforcement of these boundaries create for each community "its distinctive shape, its unique identity."⁸³ The common law's regulation of defamation contains numerous features that attempt to preserve the integrity of these rules of civility, and thus to safeguard not only the dignity and personality of defamed persons, but also the identity and values of the community.⁸⁴

In this process of regulation, the concept of truth played a curious and ambiguous role. At traditional common law, a libel victim was given a choice of "two remedies, one by indictment and the other by action."⁸⁵ If the plaintiff elected to proceed by way of criminal prosecution, the truth or falsity of the libel was deemed immaterial,⁸⁶ and the defendant was "not allowed to alledge [sic] the truth of it by way of justification."⁸⁷ The crime of defamation was thus entirely oriented toward maintaining the integrity of civility rules. If a plaintiff elected to bring an action for civil damages, however, a defendant could plead the "justification" of truth as an affirmative defense. A plaintiff could not recover compensation if a defendant could prove that his own uncivil communication was true.

The traditional common law rule had a special twist, however: a "defamatory statement [was] presumed to be false,"⁸⁸ and a defendant

⁸¹ Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

⁸² J. GUSFIELD, COMMUNITY: A CRITICAL RESPONSE 29 (1975).

⁸³ K. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 10-13 (1966).

⁸⁴ See Post, *Foundations of Defamation Law*, *supra* note 72, at 711-15, 735-39. The common law's protection of privacy also attempts to safeguard civility rules, and thus to preserve both the personality of individuals and the identity of the community. See Post, *Foundations of Privacy*, *supra* note 72, at 959-66, 979-86.

⁸⁵ 3 W. BLACKSTONE, COMMENTARIES *125.

⁸⁶ See *De Libellis Famosis*, 77 Eng. Rep. 250, 251 (K.B. 1605).

⁸⁷ 3 W. BLACKSTONE, *supra* note 85, at *126. See 2 J. KENT, COMMENTARIES ON AMERICAN LAW 18-24 (2d ed. 1832). In the eyes of the early common law, "the greater the truth, the greater the libel." Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 735 (1942) (quoting Lord Mansfield). On the subsequent history of the defense of truth in indictments for criminal defamation, see L. ELDREDGE, THE LAW OF DEFAMATION § 64, at 324-27 (1978); Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790-805 (1964); and Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 43-49 (1931).

⁸⁸ L. ELDREDGE, *supra* note 87, § 63, at 323.

had to overcome this presumption to avoid liability. Hence in cases like the *Hustler* parody, where truth was either difficult or impossible to establish because the defamatory communication did not contain factual statements, the defendant would be held liable. Thus private plaintiffs, and even public officials, could recover damages for the publication of satire containing defamatory ridicule.⁸⁹

This tradition of focusing the tort primarily on the regulation of uncivil communications was most famously summarized by Learned Hand in an opinion upholding a libel judgment based upon a photograph that asserted nothing whatever about a plaintiff, either true or false, but that nevertheless exposed him "to more than trivial ridicule."⁹⁰ Hand stated that "it is a non sequitur to argue that whenever truth is not a defense, there can be no libel; that would invert the proper approach to the whole subject."⁹¹ The function of the tort was to provide redress for uncivil communications, which subject persons to "ridicule, scandal, reproach, scorn, and indignity,"⁹² and "[t]he only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation."⁹³

About the turn of the century, the traditional common law approach to truth began to change. Instead of a defendant's burden of proving truth, courts began to speak of a plaintiff's burden of proving falsity. To shift the burden of proof in this manner is essentially to narrow the focus of the tort from communications whose content is uncivil, to communications whose content is uncivil by reason of false statements of fact. The tort's altered focus is reflected in the elements of the cause of action for defamation contained in the first *Restatement of Torts*, which stated that "[t]o create liability for defamation there must be an unprivileged publication of false and defamatory matter."⁹⁴ The *Restatement* did not completely abandon the focus of the traditional common law, however, for it also expressly retained a provision providing that an actionable communication "may consist of a statement of opinion."⁹⁵ Although conceding that the legal characterization

⁸⁹ See, e.g., *Doherty v. Kansas City Star Co.*, 144 Kan. 206, 59 P.2d 30 (1936); *Brown v. Harrington*, 208 Mass. 600, 95 N.E. 655 (1911); *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132 (1834); D. THOMAS, *A LONG TIME BURNING: THE HISTORY OF LITERARY CENSORSHIP IN ENGLAND* 56-61 (1969). Two caveats to the point in text are necessary. First, liability depended on the application of the common law privilege of "fair comment," discussed at pp. 627-29 below. Second, the common law ordinarily refused to predicate liability upon mere "name-calling" or vile "epithets." See R. SMOLLA, *LAW OF DEFAMATION* § 4.03 (3d ed. 1989).

⁹⁰ *Burton v. Crowell Publishing Co.*, 82 F.2d 154, 156 (2d Cir. 1936).

⁹¹ *Id.*

⁹² *Id.* at 154 (quoting Complaint, *Burton* (No. 258)).

⁹³ *Id.* at 156.

⁹⁴ *RESTATEMENT OF TORTS* § 558 (1938).

⁹⁵ *Id.* § 566. The accompanying comment noted that if a communication "expresses a

of opinion may depend on "propriety" rather than "truth or falsity," the *Restatement* nevertheless insisted that "a defamatory communication may be made by derogatory adjectives or epithets as well as by statements of fact."⁹⁶ It even illustrated the point with an example containing political criticism:

A, while making a political speech, accurately relates certain specific conduct of his opponent in blocking reform measures advocated by A. In the course of his argument, A declares that any person who would so conduct himself is no better than a murderer. A has defamed his opponent⁹⁷

The first *Restatement* thus contained within it two distinct visions of the tort of defamation,⁹⁸ one retaining the traditional focus on the regulation of uncivil communications, the other reflecting the newer focus on the regulation of communications that were uncivil by reason of false statements of fact. This dual focus was also evident in the tentative drafts of the second *Restatement*. They retained both the requirement that defamatory statements be "false,"⁹⁹ and the provision enabling actionable defamation to consist solely of expressions of opinion.¹⁰⁰ Indeed, as recently as May 23, 1974, the American Law Institute approved the insertion into the second *Restatement* of a new section entitled "Ridicule," which provided that "[a] defamatory communication may consist of words or other matter which ridicule another."¹⁰¹ The comment to the section stated that:

sufficiently derogatory opinion as to the conduct in question, it is defamatory and, unless it is privileged as fair comment, is actionable." *Id.* § 566 comment a (citation omitted).

⁹⁶ *Id.* § 566 comment a.

⁹⁷ *Id.* § 566 comment a illustration. The *Restatement* also noted, however, that A's criticism might be privileged as "fair comment." See *id.* For a discussion of the privilege of fair comment, see pp. 627-29 below.

⁹⁸ The inconsistency has been well explored by George Christie. See Christie, *Defamatory Opinions and the Restatement* (Second) of Torts, 75 MICH. L. REV. 1621, 1625-28 (1977).

⁹⁹ See RESTATEMENT (SECOND) OF TORTS § 558 (Tent. Draft No. 20, 1974). The drafters strengthened the requirement on April 5, 1975. See RESTATEMENT (SECOND) OF TORTS § 558(a) (Tent. Draft No. 21, 1975). The final version of § 558 provides: "To create liability for defamation there must be: (a) a false and defamatory statement concerning another" *Id.*

¹⁰⁰ See RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 20, 1974). The Tentative Draft did, however, insert the following comment: "Even though an expression of a derogatory opinion is defamatory, the Constitution may restrict the maintaining of an action for defamation if it deals with a matter of public or general interest." *Id.* § 566 comment a.

¹⁰¹ *Id.* § 567A (Tent. Draft No. 20, 1974); see also 51 ALI PROCEEDINGS 302-39 (1974) (reporting the discussion on the eventual abandonment of § 567A); Christie, *supra* note 98, at 1628-30 (describing the proposal and initial endorsement of § 567A). Dean Prosser, as Reporter, first introduced this section in 1965; he stated that "[r]idicule appears nowhere in the Restatement, and since it is a common form of defamation it seemed obvious that it should go somewhere." 42 ALI PROCEEDINGS 404 (1965).

One common form of defamation is ridicule, which in effect is the expression of an opinion that the plaintiff is ridiculous, and so exposes him to contempt or derision, or other derogatory feelings. Humorous writings, verses, cartoons or caricatures which carry a sting and cause adverse rather than sympathetic or neutral merriment, may be defamatory.¹⁰²

One month later, on June 25, 1974, the Supreme Court in *Gertz v. Robert Welch, Inc.*¹⁰³ issued its famous dictum on the constitutional protection of opinion:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of facts.¹⁰⁴

The *Gertz* dictum definitively preempted the traditional common law understanding of truth, and decisively shifted the focus of the tort to communications that are uncivil by reason of false statements of fact.¹⁰⁵ Common law regulation of other kinds of uncivil communications, as for example those that offend against decency by reason of true statements of fact or by reason of ridicule, was for this reason displaced to torts like invasion of privacy¹⁰⁶ or the intentional infliction of emotional distress.

This is of course exactly what happened to Jerry Falwell in his suit against Flynt. Because the *Gertz* dicta had immunized plainly defamatory ridicule such as the *Hustler* parody, Falwell was forced to offer a theory of his case that predicated liability on the basis of the comparatively more recent tort of intentional infliction of emotional distress. Although the latter tort has quite different elements from those of defamation, it nevertheless has a closely analogous sociological structure.

Until well into the twentieth century, the "long-recognized common-law rule" did not permit claims "for mental suffering only."¹⁰⁷ By 1939, however, at about the same time that the tort of defamation

¹⁰² RESTATEMENT (SECOND) OF TORTS § 567A comment a (Tent. Draft No. 20, 1974).

¹⁰³ 418 U.S. 323 (1974).

¹⁰⁴ *Id.* at 339-40 (footnote omitted).

¹⁰⁵ See Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 540-41 (1988).

¹⁰⁶ See RESTATEMENT (SECOND) OF TORTS § 652D (1977). The early privacy cases perceived a definite connection between the theory of truth in criminal libel ("the greater the truth, the greater the libel") and the rationale of the privacy tort. See, e.g., *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 555-56, 64 N.E. 442, 447 (1902); see also L. ELDRIDGE, *supra* note 87, § 66, at 330-31 & n.41; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1061 (1936) ("[The] 'right of privacy,' is a flank attack upon the doctrine that truth is an absolute defense in libel and slander.").

¹⁰⁷ *Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916).

was shifting its focus to false statements of fact, Dean Prosser could write that "[i]t is time to recognize that the courts have created a new tort" regulating "the intentional, outrageous infliction of mental suffering in an extreme form."¹⁰⁸ The new tort was recognized by the drafters of the second *Restatement* in 1948,¹⁰⁹ and is now widely accepted.¹¹⁰ Although the four elements of the tort set forth in Virginia law are entirely typical,¹¹¹ "the tort, despite its apparent abundance of elements, in practice tends to reduce to a single element — the outrageousness of the defendant's conduct."¹¹²

This reduction occurs because of the strong tendency to assume that "the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed,"¹¹³ so that the element of "severe" emotional distress is generally satisfied by a plaintiff's simple recitation that he has been upset. The tendency is illustrated by the *Falwell* case itself, where the independent evidence of Falwell's mental anguish was minimal, to say the least.¹¹⁴ The implicit assumption that outrageous conduct necessarily produces emotional distress also satisfies the requirement that there be "a causal connection between the wrongdoer's conduct and the emotional distress."¹¹⁵ Consequently the element of causality is most often met, as in the *Falwell* case, by the simple testimony of a plaintiff. Finally, the element of intent or recklessness is usually satisfied by the notion that a defendant "should have known" that outrageous conduct would produce emotional distress. The question thus becomes whether the defendant's conduct was itself intentional.

The "collapse"¹¹⁶ of the tort's four elements into the single question of the outrageousness of the defendant's behavior is sociologically

¹⁰⁸ Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939). See generally Magruder, *supra* note 106 (describing the emergence of a broad tort principle affording relief for emotional distress in the more outrageous cases).

¹⁰⁹ See Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPPERDINE L. REV. 1, 2-5 (1985).

¹¹⁰ For a state by state survey of the tort of intentional infliction of emotional distress, see LIBEL DEFENSE RESOURCE CENTER, 50-STATE SURVEY 1988: CURRENT DEVELOPMENTS IN MEDIA LIBEL AND INVASION OF PRIVACY LAW 926-67 (H. Kaufman ed. 1988).

¹¹¹ See *supra* note 32. Section 46 of the Second Restatement now provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" RESTATEMENT (SECOND) OF TORTS § 46 (1977).

¹¹² 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, 42-49 (1982); see Note, *Threat to Free Speech*, *supra* note 46, at 1004-08.

¹¹³ RESTATEMENT (SECOND) OF TORTS § 46 comment j (1977).

¹¹⁴ See *supra* notes 23 & 36. The intrinsic and reciprocal relationship between the outrageousness of the *Hustler* parody and the existence of Falwell's distress is perceptively noted by Rodney Smolla, who asks, "How could such an ad *not* inflict distress . . . ?" R. SMOLLA, *supra* note 8, at 158 (emphasis in original).

¹¹⁵ *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

¹¹⁶ See Givelber, *supra* note 112, at 49. For a rare example of a court consciously resisting

significant. Outrageous behavior is precisely conduct which "offends against the generally accepted standards of decency and morality,"¹¹⁷ and which is therefore, in the influential words of the second *Restatement*, "utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"¹¹⁸ Because well-socialized members of a "civilized community" have incorporated into their very identities the "generally accepted standards of decency and morality" policed by the tort, they experience behavior which violates those standards as profoundly demeaning, disrespectful, and painful. The expectation of a spontaneous and negative emotional reaction to such behavior is so powerful that the *Restatement* (and most courts) use it to define the behavior to be regulated. It is no wonder that juries have been willing to do the same.

The reciprocal dependence of personality and civility thus undermines the formal structure of the tort and leads to the "collapse" of its distinct elements. Even though the tort as a doctrinal matter follows the pattern of a negligence action, in which a defendant is held liable if and only if his unacceptable conduct actually causes demonstrable injury, the practical structure of the tort instead resembles actions for defamation or invasion of privacy, which have no independent requirement that a plaintiff allege or prove actual injury.¹¹⁹ From a sociological point of view, the tort functions, as do

this "collapse," see *Kazatsky v. King David Memorial Park, Inc.*, 515 Pa. 183, 197-98, 527 A.2d 988, 995 (1987).

¹¹⁷ *Womack*, 215 Va. at 342, 210 S.E.2d at 148.

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977). For a sampling of the immense influence of this comment, see *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 n.13 (Alaska 1988); *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980); *Haldeman v. Total Petroleum, Inc.*, 376 N.W.2d 98, 104-05 (Iowa 1985); *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 602-05, 374 N.W.2d 905, 908-10 (1985); *Dominguez v. Stone*, 97 N.M. 211, 214, 638 P.2d 423, 426 (1981); *Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376 (Okla. 1978); and *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 739-40, 565 P.2d 1173, 1176 (1977).

¹¹⁹ At common law, of course, the publication of a defamatory statement carried with it an irrebuttable presumption of injury. See Post, *Foundations of Defamation Law*, *supra* note 72, at 697-99. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held this irrebuttable presumption of injury unconstitutional, and required instead some showing of "actual injury," which could include proof of "personal humiliation, and mental anguish and suffering." *Id.* at 349-50. Eleven years later the Court held that the common law presumption was constitutional where the plaintiff is a private figure and the communication at issue does not involve "matter[s] of public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion).

Invasions of privacy have also been regarded as intrinsically harmful, so that a plaintiff need make no independent demonstration of injury. See Post, *Foundations of Privacy*, *supra* note 72, at 964-66. The first *Restatement of Torts*, for example, stated that damages in a privacy action "can be awarded in the same way in which general damages are given for defamation." RESTATEMENT OF TORTS § 867 comment d (1939). The second *Restatement*, despite the holding

these latter actions, to penalize those defendants who breach civility rules, regardless of the contingent consequences of that behavior.

For this reason the tort of intentional infliction of emotional distress, like common law actions for defamation and invasion of privacy, in practice serves at least two distinct purposes. It not only provides relief for those whose personalities have been threatened by uncivil behavior, but it also serves to safeguard those "generally accepted standards of decency and morality"¹²⁰ that define for us the meaning of life in a "civilized community."¹²¹

Many of these standards, of course, inhere in norms of communication, norms that define the terms of civil discussion. As the Court recently stressed in *Bethel School District No. 403 v. Fraser*,¹²² these norms are particularly important for the maintenance of "public discourse," because "the habits and manners of civility" are "indispensable to the practice of self-government in the community and the nation."¹²³ Professor Michelman makes essentially the same point when he argues that public discussion cannot be "jurisgenerative" unless it "is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom."¹²⁴ Yet the *Falkwell* opinion prohibits the tort of intentional infliction of emotional distress from enforcing, in the absence of a knowingly false assertion of fact, precisely those norms which define civility and hence which would restrain speech likely to be experienced as coercive and violative of identity.

As this discussion illustrates, moreover, the opinion's precise justification for this prohibition is patently inadequate. The Court stated that "in the area of political and social discourse" the distinction between outrageous and non-outrageous opinion is not "principled" and hence constitutionally inappropriate, because it "has an inherent subjectiveness about it" that would permit liability to be imposed

in *Gertz*, permits the recovery of damages for the "interest in privacy" harmed by the alleged tortious conduct, whether or not a plaintiff has suffered actual injury such as mental distress or special damages. See RESTATEMENT (SECOND) OF TORTS § 652H (1977); see also *Socialist Workers Party v. Attorney General of the United States*, 642 F. Supp. 1357, 1421 (S.D.N.Y. 1986); cf. *Manville v. Borg-Warner Corp.*, 418 F.2d 434, 437 (10th Cir. 1969) (holding that a plaintiff can recover a nominal award in a privacy suit without showing special or general damages); *Cason v. Baskin*, 159 Fla. 31, 40-41, 30 So. 2d 635, 640 (1947) (stating that nominal damages are appropriate for invasion of privacy without any other harm).

¹²⁰ *Womack*, 215 Va. at 342, 210 S.E.2d at 148.

¹²¹ See RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977).

¹²² 478 U.S. 675 (1986).

¹²³ *Id.* at 681-82 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). The Court noted that "the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others." *Id.* at 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

¹²⁴ Michelman, *supra* note 2, at 1527.

merely on the basis of "tastes" or preferences.¹²⁵ Although this reasoning accurately captures a central theme of first amendment jurisprudence,¹²⁶ the reasoning seems deeply misplaced in the context of a tort that appeals to *intersubjective*, rather than to private, standards of judgment. Outrageous behavior is that which violates *community* values, rather than merely personal or idiosyncratic preferences.¹²⁷ The Court's reference to "tastes" fails to recognize that taste constitutes an appeal to social and common standards of evaluation, and thus that "taste, in its essential nature, is not private, but a social phenomenon."¹²⁸ Immanuel Kant's classic modern formulation of this point contrasts taste, which "*demands*" the agreement of others, with the sense of the agreeable or pleasant, concerning which "every one is content that his judgement, which he bases upon private feeling, and by which he says of an object that it pleases him, should be limited merely to his own person."¹²⁹

To claim that speech is outrageous is to assert much more than that it is personally unpleasant or disagreeable; it is to claim that the speech is undesirable because it is inconsistent with common canons of decency. Such a claim may be controversial, but it need be neither arbitrary nor subjective. This is recognized even within the narrow confines of first amendment doctrine, which draws the line between constitutionally protected and unprotected speech on the basis of such structurally similar claims as that speech is "prurient" (when measured by "'contemporary community standards'"¹³⁰) and hence obscene, or that speech is of a kind whose "very utterance inflict[s] injury" and hence constitutes "fighting words,"¹³¹ or that speech is "vulgar," 'offensive,' and 'shocking,' and hence not fit for broadcast over the radio during daytime hours.¹³²

It is evident, then, that what is driving the *Falwell* opinion is not that the distinction between outrageous and non-outrageous speech is

¹²⁵ See 108 S. Ct. at 881-82. The Court reiterated this reasoning one month later in *Boos v. Barry*, 108 S. Ct. 1157 (1988), when it rejected a statute that regulated speech offensive to the "dignity" of foreign diplomats, stating that such "[a] 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*," would be "inherently subjective." *Id.* at 1164.

¹²⁶ See, e.g., *Cohen v. California*, 403 U.S. 15, 21, 25 (1971).

¹²⁷ For a recent and lucid discussion of this distinction, see Sagoff, *Values and Preferences*, 96 ETHICS 301 (1986).

¹²⁸ H. GADAMER, *TRUTH AND METHOD* 34 (G. Barden & J. Cumming trans. 2d ed. 1975).

¹²⁹ I. KANT, *CRITIQUE OF JUDGMENT* 46 (J. Bernard trans. 1968). Kant continues: "Thus he is quite contented that if he says, 'Canary wine is pleasant,' another man may correct his expression and remind him that he ought to say, 'It is pleasant to me.'" *Id.* at 57 (emphasis in original).

¹³⁰ *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957))).

¹³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹³² See *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978).

subjective or arbitrary, but rather that it is constitutionally inappropriate as a standard for the legal regulation of public discourse. The question, of course, is exactly why the distinction is inappropriate, and on this question the *Falwell* opinion is not forthcoming.

The opinion is clear, however, about its concern constitutionally to protect a special kind of "world of debate about public affairs,"¹³³ and it is with this concern that the construction of an adequate explanatory theory must begin.

II. THE FIRST AMENDMENT AND PUBLIC DISCOURSE

There has traditionally been a strong affinity between first amendment jurisprudence and the concept of the public. The "Court has emphasized that the First Amendment 'embraces at the least the liberty to discuss publicly . . . all matters of public concern.'"¹³⁴ It has stated more than once "that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values,'"¹³⁵ and that speech on matters "of public concern" is "entitled to special protection."¹³⁶ The same is true for speech about "public persons," a class consisting of "those who hold governmental office," and 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."¹³⁷

The concept of the public has a number of different meanings for first amendment doctrine. One important meaning is the designation of speech that will be deemed constitutionally independent of the managerial authority of state institutions. This is the meaning that the concept of the public holds in contemporary "public forum" doctrine.¹³⁸ But in the context of a case like *Falwell* the concept expresses quite a different meaning. It refers instead to the protection of speech from the control of community norms like those enforced by the tort of intentional infliction of emotional distress. This section explores some of the justifications and consequences of that protection.

¹³³ *Falwell*, 108 S. Ct. at 880.

¹³⁴ *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)).

¹³⁵ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

¹³⁶ *Connick v. Myers*, 461 U.S. 138, 145 (1983); see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

¹³⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

¹³⁸ See generally Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784-800 (1987).

A. Public Discourse and Community

The concept of "public discourse" at issue in a decision like *Falwell* is in many respects unique and counter-intuitive. These qualities can perhaps best be made visible by comparing the first amendment concept of public discourse to a competing notion that developed in the early nineteenth century in the common law privilege of "fair comment." The privilege, with many local and chronological variations, roughly functioned to immunize the publication of honestly held but defamatory opinions about matters of public concern that were fair and communicated without malice.¹³⁹

The origins of the privilege have been traced back to an 1808 decision involving the harsh criticism of three travel books.¹⁴⁰ Although the criticism was otherwise defamatory, the judge charged the jury that:

Every man who publishes a book commits himself to the judgment of the public, and anyone may comment upon his performance. . . . [W]hatever their merits, others have a right to pass their judgment upon them — to censure them if they be censurable, and to turn them into ridicule if they be ridiculous.¹⁴¹

Any other conclusion, the judge stated, would permit the author of a book to "maintain a monopoly of sentiment and opinion respecting it."¹⁴²

As the privilege achieved recognition and expanded to embrace purely political discussion, the elements of the privilege also came more sharply into focus. Although articulated differently by various judges at various times, these elements included a variety of requirements, including that the privileged comment represent the honest belief of the speaker;¹⁴³ that the comment state opinion rather than fact;¹⁴⁴ and that the comment concern matters "of public interest,"

¹³⁹ See, e.g., RESTATEMENT OF TORTS §§ 606-607 (1938); 1 W. ODGERS, THE LAW OF LIBEL AND SLANDER 34-68 (1887); Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280 (1954); Townsend, *The English Law Governing the Right of Criticism and Fair Comment*, 30 AM. L. REG. 517 (1891).

¹⁴⁰ Carr v. Hood, 170 Eng. Rep. 983 n.*, 1 Camp. 355 n.* (K.B. 1808); see Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 43-44 (1929).

¹⁴¹ Carr, 170 Eng. Rep. at 985 n.*, 1 Camp. at 358 n.*; see also Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 414 (1910) (describing literary criticism as the first discourse to receive the privilege of fair comment).

¹⁴² Carr, 170 Eng. Rep. at 985 n.*, 1 Camp. at 357 n.*.

¹⁴³ See Veeder, *supra* note 141, at 425-26.

¹⁴⁴ See Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 878-80 (1949); Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1203-05 (1962). A minority of American jurisdictions held that the privilege should extend also to false statements of fact, provided that the other conditions of the privilege were also met. See Noel, *supra*, at 891; Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. (Review Essay) 539, 552-53.

rather than, for example, the merely "private character" of public persons like authors or politicians.¹⁴⁵ Successful invocation of the privilege also required that the comment be without malice,¹⁴⁶ meaning that the comment be made for "a well-defined public purpose" rather than "for some ulterior and improper purpose,"¹⁴⁷ and that the comment not be framed in too intemperate a fashion.¹⁴⁸

At first blush, the privilege of fair comment resembles the constitutional privilege that emerges from *Falwell*: both privileges attempt to define an arena of specifically "public" discourse, and both rely for their rationale on the distinction between opinion and fact. But this resemblance is merely superficial, for in fact the two privileges presuppose radically different concepts of public discourse.

The privilege of fair comment defines a "world of debate about public affairs" that is pervasively normative, in that it focuses upon whether a public communication has been made "upon a proper occasion, from a proper motive, in a proper manner and . . . based upon reasonable or probable cause."¹⁴⁹ The privilege of fair comment thus envisions public debate as infused with and controlled by precisely "the habits and manners of civility" praised by the Court in *Bethel School District No. 403 v. Fraser*.¹⁵⁰ Although courts applying the privilege used various doctrinal tests, like the distinction between fact and opinion, the nature of malice, or the scope of the legitimate interests of the public, in the end these tests were merely tools by which courts could analyze such normative questions as whether it is civil and appropriate in public discourse to attribute base motivations to public persons,¹⁵¹ to scrutinize the private character or personal life of such persons,¹⁵² or to express one's evaluations of such persons with "contemptuous allusions, and sarcastic phrases, well calculated to humiliate, and . . . devoid of all cast of fair comment."¹⁵³

¹⁴⁵ See Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1207-11 (1949).

¹⁴⁶ See Carman, *Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1, 11 (1980); Thayer, *Fair Comment as a Defense*, 1950 WIS. L. REV. 288, 306-07.

¹⁴⁷ Veeder, *supra* note 141, at 425.

¹⁴⁸ See Note, *supra* note 145, at 1216.

¹⁴⁹ *Bausewine v. Norristown Herald*, 351 Pa. 634, 645, 41 A.2d 736, 742, *cert. denied* 326 U.S. 724 (1945); see *Preveden v. Croation Fraternal Union of America*, 98 F. Supp. 784, 786 (W.D. Pa. 1951).

¹⁵⁰ 478 U.S. 675, 681 (1986).

¹⁵¹ See Boyer, *supra* note 139, at 290-92; Hallen, *supra* note 140, at 74-81; Noel, *supra* note 144, at 881-87; Note, *supra* note 145, at 1209-10.

¹⁵² See Boyer, *supra* note 139, at 290-92; Hallen, *supra* note 140, at 81-86; Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1289-90 (1942); Note, *supra* note 145, at 1210-11.

¹⁵³ *Williams v. Hicks Printing Co.*, 159 Wis. 90, 102, 150 N.W. 183, 188 (1914); see also *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922).

The privilege of fair comment, in other words, functioned to interpret and uphold norms of civility, in the same manner as did the underlying tort of defamation. Although the existence of the privilege indicated that public discourse had for the common law its own somewhat distinct rules of civility, which permitted a freer play of opinion than in private life, the common law nevertheless subordinated that discourse to community notions of propriety and decency. In line with this subordination, the common law allocated to the jury, as the representative of the community, the determination as to the applicability of the privilege of fair comment.¹⁵⁴ By this means the common law firmly embedded the sphere of public discourse within a community defined by rules of civility and respect.

Exactly the opposite is true, however, of the sphere of public discourse defined by first amendment doctrine. Since the 1930's, the Supreme Court has regularly expressed a specifically constitutional vision of a "world of debate about public affairs" that transcends the bounds and perspectives of any particular community. An early and classic articulation of this vision appears in *Cantwell v. Connecticut*,¹⁵⁵ in which a Jehovah's Witness had been convicted of the common law crime of inciting breach of the peace because of speech that was concededly highly offensive to his Catholic audience. The Court held that the speech was constitutionally protected:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.¹⁵⁶

The passage is extraordinarily rich and allusive, and it merits close attention. It sketches a sphere of constitutional immunity that extends

¹⁵⁴ See P. LEWIS, GATLEY ON LIBEL AND SLANDER ¶¶ 748-750 (8th ed. 1981); RESTATEMENT OF TORTS §§ 618-619 (1938). The court, however, retained the authority to determine whether the "defamatory criticism" involved "a matter of public concern." *Id.* § 618(1).

¹⁵⁵ 310 U.S. 296 (1940).

¹⁵⁶ *Id.* at 310. The holding of *Cantwell* also rested in part upon the free exercise clause of the first amendment.

to speech about public subjects, like "religious faith" or "political belief" or "prominent" persons, even though such speech violates the most elementary civility rules against "exaggeration" or "vilification" or "excesses and abuses." The justification for this immunity is that America contains "many" diverse communities which are often in sharp conflict. If the state were to enforce the civility rules of one community, say those of Catholics, as against those of another, say Jehovah's Witnesses, the state would in effect be using its power and authority to support some communities and repress others. But the first amendment forbids the state from doing this, in order that "many types of life, character, opinion and belief can develop unmolested and unobstructed."¹⁵⁷

Cantwell thus refused to enforce civility rules within a constitutionally defined sphere of public discourse because it perceived communities as labile and evolving. If the common law privilege of fair comment reflected and enforced the civility rules of a fixed and established community that contained within itself a distinct sphere of public discourse, first amendment doctrine since *Cantwell* has instead maintained a sphere of public discourse in which communities themselves develop through competition for the allegiance of individual adherents.¹⁵⁸ The constitutional "shield" established by *Cantwell* ensures that this competition occurs on a level playing field, in which no particular community can obtain an unfair advantage and use the power of the state to prejudge the outcome of this competition by enforcing its own special norms or civility rules. This special neutrality is reflected in the fact that the Constitution shifts the primary locus of decisionmaking away from the jury, which represents community standards, to the judge, who represents instead an impartial and overarching public order, and who exercises "independent review" to determine matters of "constitutional fact."¹⁵⁹

Although *Cantwell* concluded with what has by now become a familiar image of constitutional neutrality, close attention to its logic reveals that this image actually rests on the assumption that community life is constituted by the voluntary choices of its members. It is for this reason that *Cantwell* viewed the function of the first amendment to be safeguarding the potential for new and more satisfactory choices.¹⁶⁰ This vision differs fundamentally from that expressed by

¹⁵⁷ *Id.*

¹⁵⁸ See Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 319-20 (1988).

¹⁵⁹ See *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2694-95 (1989); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984).

¹⁶⁰ The importance of this potential to American sensibilities can hardly be overestimated. It underlies, for example, John Dewey's assertion, which seems almost blandly trite, that "[d]emocracy is a way of life controlled by a working faith in the possibilities of human nature."

the common law torts of defamation and intentional infliction of emotional distress, which conceive the self as instead constituted by community norms. These torts penalize speech that violates civility rules because they understand such speech to damage the very identity of community members; first amendment doctrine, on the other hand, rests on the possibility of using speech to create new identities.

Ultimately, then, the logic of *Cantwell* places the Constitution firmly on the side of those individuals who would attempt to use speech to alter the terms of community life. This is an important source of the strong "intellectual individualism" that characterizes first amendment doctrine.¹⁶¹ The most eloquent expression of that individualism is perhaps in *Cohen v. California*, in which the Court rejected the authority of the state to punish "unseemly" speech so as to maintain "a suitable level of discourse within the body politic":

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.¹⁶²

The concept of a neutral sphere of public discourse, which derives from this commitment to individualism, has powerful implications for the civility rules enforced by the common law tort of intentional infliction of emotional distress. The specific "outrageousness" standard at issue in *Falwell*, for example, can have meaning only within the

Dewey, *Creative Democracy — The Task Before Us*, in CLASSIC AMERICAN PHILOSOPHERS 389, 391 (M. Fisch ed. 1951).

¹⁶¹ West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). For a discussion of the effects of that individualism, see Post, cited above in note 158, at 319-24.

¹⁶² 403 U.S. 15, 23-24 (1971) (citing Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring)). The individualism of first amendment doctrine is linked to the innermost logic of democracy. To the extent that personality and social structure are interdependent, and to the extent that democracy is a social structure in which persons must continually *choose* their values and commitments, democracy must at root presuppose citizens autonomous enough to create, rather than be created by, their communities. Hence Whitman's famous celebration of American government as founded upon "the theory of development and perfection by voluntary standards, and self-reliance," and as premised upon the "idea of perfect individualism." W. WHITMAN, *Democratic Vistas*, in LEAVES OF GRASS, AND SELECTED PROSE 460, 471 (J. Kouwenhoven ed. 1950). The concept of democracy thus itself contains quite radical implications that point toward a very different image of the self than that which justifies the regulation of defamation or intentional infliction of emotional distress. The tentative development of these implications, in a context quite distinct from that of first amendment doctrine, appears in Justice Blackmun's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). See Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-99 (1989).

commonly accepted norms of a particular community. But the constitutional concept of public discourse forbids the state from enforcing such a standard within the "world of debate about public affairs,"¹⁶³ because to do so would privilege a specific community and prejudice the ability of individuals to persuade others of the need to change it. Outrageous speech calls community identity into question, practically as well as cognitively, and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life.

Of course, on this account, an "outrageousness" standard is unacceptable not because it "has an inherent subjectiveness about it,"¹⁶⁴ but rather because it would enable a single community to use the authority of the state to confine speech within its own notions of propriety.¹⁶⁵ *Falwell* itself gestures toward this latter explanation by defending its holding on the ground of the "oft-repeated" premise that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."¹⁶⁶ The difficulty with this gesture, however, is that, like most modern commentary, it conceives of neutrality only at the level of ideas, rather than at the more general level of the structures that establish communal life. We might correct this difficulty by saying that the concept of public discourse requires the state to remain neutral in the "marketplace of communities."

It is important to note, however, that this neutrality does not and cannot extend to public life generally, where it is natural and commonplace for law to regulate behavior in ways that implement one or another specific image of communal identity. We outlaw drug abuse or racial discrimination because we believe that such conduct is inconsistent with whom we want to be. But the central thrust of modern first amendment doctrine is to prohibit speech from being regulated in this way. The consequence of this prohibition is to ensure that the various forms of identity enacted by public law remain subject

¹⁶³ *Falwell*, 108 S. Ct. at 880.

¹⁶⁴ *Id.* at 882.

¹⁶⁵ The same point could be made about the Court's refusal to implement a "dignity" standard in *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988). See *supra* note 125. Although not inherently subjective, a "dignity" standard is intrinsically connected to the particular norms of a specific community. As Richard Rorty has observed,

"[I]ntrinsic human dignity" is the comparative dignity of a group with which a person identifies herself. Nations or churches or movements are, on this view, shining historical examples not because they reflect rays emanating from a higher source, but because of contrast-effects — comparisons with other, worse communities. Persons have dignity not as an interior luminescence, but because they share in such contrast-effects.

Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583, 586–87 (1983). State regulation of speech on the basis of a "dignity" standard, therefore, would impose the "example" of a particular community.

¹⁶⁶ 108 S. Ct. at 882 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978)).

to the perennial evaluation of speech, and so to that limited extent vulnerable and provisional.¹⁶⁷ Thus the ambition of constitutional law to create a distinct realm of public discourse independent of the norms of any particular community has forced first amendment doctrine sharply to separate communication from behavior. The common law privilege of fair comment, however, by subjecting public discourse to community norms like any other form of conduct, effaces this distinction between speech and action.

Constitutional law and common law, then, embody fundamentally different concepts of public discourse.¹⁶⁸

B. The Structure of Public Discourse

The very notion that discourse can proceed independently of the norms of ordinary community life should pose something of a puzzle. *Cohen* tells us that "the arena of public discussion" constituted by the first amendment is designed to produce "a more perfect polity."¹⁶⁹ But how can this be true if those who participate in that arena speak to each other across the deep chasms that divide American communities from each other? We may well ask how such persons can find common ground to support a discussion that will be to their mutual advantage.

Curiously, at about the time the Supreme Court was fashioning its special concept of public discourse, American sociologists were developing a strikingly analogous notion of the "public," which they viewed as a form of social organization transcending particular communities and existing only in the presence of diverse and conflicting forms of communal life. In his 1933 article on *The Concept of the Public*, for example, Carroll Clark noted that "[b]efore a group can become a public there must be a confrontation of divergent attitudes involving the tacit or expressed rules that set the pattern of behavior and fix judgment of consequences."¹⁷⁰ Thus "publics come into existence" only when "social organization is widened and complicated by economic and cultural differentiation that entail incompatible schemes of group behavior."¹⁷¹ As a sociologist, however, Clark was forced to confront explicitly the question of what holds a public together as a

¹⁶⁷ As Harold Lasswell wrote in 1941, at a time when public debates were closing down all over the world, a society "is acting as a public when it makes debatable demands for collective action," but it is acting as a crowd "[w]henver a topic is beyond debate." H. LASSWELL, *DEMOCRACY THROUGH PUBLIC OPINION* 20 (1941). Gabriel de Tarde first introduced the distinction between the public and the crowd in *L'OPINION ET LA FOULE* (1910).

¹⁶⁸ To avoid terminological confusion, the remainder of this Article refers to "public discourse" only as the kind of public dialogue defined by constitutional doctrine.

¹⁶⁹ *Cohen v. California*, 403 U.S. 15, 24 (1971).

¹⁷⁰ Clark, *The Concept of the Public*, 13 SW. SOC. SCI. Q. 311, 314 (1933).

¹⁷¹ *Id.* at 315.

viable social formation across the rifts of such cultural differentiation. His answer, by no means idiosyncratic, is quite striking from the perspective of first amendment scholarship: "A public is, in fact, organized on the basis of a universe of discourse"¹⁷²

A public, in other words, is constituted precisely by the ability of persons to speak to one another across the boundaries of divergent cultures. From this perspective, of course, the social function of first amendment doctrine, as reformulated during the 1930's and 1940's, becomes plain enough: it is to establish a protected space within which this communication can occur. Sociologically viewed, however, the continued existence of this space depends upon at least five preconditions. First, a society must include a plurality of cultures and traditions. A society characterized by the norms of only one community will lack the impetus to liberate its public discourse from the regulation of those norms. At least in America, the recognition of "rich cultural diversities"¹⁷³ has spurred the disengagement of public discourse from the values of any single community. Since *Cantwell* the acknowledgement of these competing traditions has been a continual theme of first amendment jurisprudence.

Second, even a culturally heterogeneous society cannot sustain public discourse unless the society values and wishes to preserve that heterogeneity. Just as Jerry Falwell sought to impose his notion of the "outrageous" onto Larry Flynt's satire, so too will powerful communities seek to use the authority of the state to impose their own norms on speech generally.¹⁷⁴ The common law torts of defamation and invasion of privacy represent just such efforts to use law to subject communication to "universal" cultural standards.¹⁷⁵ In the absence of a commitment to diversity, therefore, the fact of heterogeneity may well be submerged within a legal tendency toward uniformity. First amendment jurisprudence is committed to diversity because of its methodological individualism, which, I have argued, ultimately derives from its voluntaristic conception of community life.¹⁷⁶ The first amendment requires state neutrality in the marketplace of communities precisely because it views membership in such communities as

¹⁷² *Id.* at 313 (quoting R. PARK & E. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 254 (1924)); see C. DAWSON & W. GETTYS, AN INTRODUCTION TO SOCIOLOGY 621-22 (3d ed. 1948). For an example of the influence of defining the "public" in terms of a "universe of discourse," see K. BOULDING, THE IMAGE 132-47 (1956).

¹⁷³ See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁷⁴ See *Post*, *supra* note 158, at 306-14.

¹⁷⁵ See *Post*, *Foundations of Defamation Law*, *supra* note 72, at 714-15; *Post*, *Foundations of Privacy*, *supra* note 72, at 976-78.

¹⁷⁶ See *supra* pp. 630-31. On "individualism" as one of "the values of the American Creed," see S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 14 (1981).

flowing from individual choice. The individual thus becomes the privileged unit of social action.¹⁷⁷

Third, those participating in public discourse can communicate with each other only if they have something in common to talk about. Thus persons cannot constitute "a 'public'" unless "they are exposed to similar social stimuli."¹⁷⁸ A primary and continuing source of these stimuli within public discourse is the news. News, as Walter Lippmann noted long ago, "comes from a distance,"¹⁷⁹ from beyond the "self-contained community"¹⁸⁰ in which we happen to live. The news functions as a medium of common information that brings together persons of widely disparate traditions and cultures. Thus "news is a public (and a public-generating) social phenomenon."¹⁸¹ "The emergence of the mass media and of the 'public' are mutually constructive developments."¹⁸² For this reason the first amendment protects not merely the expression of ideas, but also "the free communication of information."¹⁸³

Fourth, persons must have a reason to enter into the realm of public discourse to communicate with those beyond their own communities.¹⁸⁴ Clark offers as exemplary the desire for profit in the marketplace. Individuals from widely disparate cultural backgrounds participate together in a market, in which decisions are not made upon "mores" or "tradition," but rather upon commonly available "fact and news."¹⁸⁵ It is important to recognize, however, that the continued existence of the public space established by the market depends upon the common motivation of profit. With respect to "the arena of public discussion" established by the first amendment, the common motivation must be understood as that of democratic self-governance and a shared political destiny. Because our government responds to the desires of "the whole People, who are the publick,"¹⁸⁶ individuals from diverse traditions and communities must attempt to communicate

¹⁷⁷ This individualism differs, for example, from the more corporatist values that inform the regulation of speech in England. See Post, *supra* note 158, at 310-14. Recent efforts to regulate pornography have forcefully challenged this individualism. See *id.* at 329-35.

¹⁷⁸ J. BENNETT & M. TUMIN, *SOCIAL LIFE: STRUCTURE AND FUNCTION* 140 (1948).

¹⁷⁹ W. LIPPMANN, *LIBERTY AND THE NEWS* 38 (1920).

¹⁸⁰ W. LIPPMANN, *PUBLIC OPINION* 263-75 (1922).

¹⁸¹ A. GOULDNER, *THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY: THE ORIGINS, GRAMMAR, AND FUTURE OF IDEOLOGY* 106 (1976).

¹⁸² *Id.* at 95.

¹⁸³ *Schneider v. California*, 308 U.S. 147, 163 (1939).

¹⁸⁴ See J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 27-28 (1927).

¹⁸⁵ See Clark, *supra* note 170, at 316.

¹⁸⁶ *Cato's Letters*, No. 32, (as reprinted in the *New-York Weekly Journal*, Feb. 25 and Mar. 4, 1734), reprinted in *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* 15 (L. Levy ed. 1966).

with each other if they wish to participate in that dialogue which will ultimately direct the actions of the entire nation.

Fifth, communication requires not merely common information, but also commonly accepted standards of meaning and evaluation, so that the significance of that information can be assessed. The necessity for these standards suggests that the emergence of public discourse rests upon a delicate balance: if persons in public discourse share too much, if they are simply members of the same community, the diversity requisite for the emergence of public discourse will not be present. But if, on the other hand, such persons share too little, if they have absolutely no common standards for the evaluation and assessment of meaning, public discourse cannot be sustained.¹⁸⁷

The conduct of public discourse, in other words, requires persons to share standards, but not the kind of standards that fuse them into a community. But what can persons in public discourse share in the "absence of interaction in terms of the conventional and traditional definitions"¹⁸⁸ of specific communities? The answer given by sociologists was that persons can share the ability to engage in "intellectual processes," and they thus defined a "public" as "any group . . . that achieves corporate unity through critical interaction."¹⁸⁹ "In the public," it was said, "interaction takes the form of discussion. Individuals act upon one another critically Opinions clash and thus modify and moderate one another."¹⁹⁰ In the words of a more contemporary theorist, Alvin Gouldner, the very existence of public discourse implies "a cleared and safe space"¹⁹¹ in which the interpretation of shared

¹⁸⁷ Robert Park, for example, noted that:

Whenever in any political society the diversity of interests and points of view from which the news is interpreted becomes so great that discussion is no longer possible, then there is no longer any public opinion In that case nothing but force, in some form or other, is capable of maintaining sufficient order to permit, if not the normal, at least the necessary, social processes to go on. Under such circumstances it is vain to speak of freedom of speech or of the role of public opinion.

Park, *News and the Power of the Press*, 47 AM. J. SOC. 1, 6 (1941); see A. LOWELL, PUBLIC OPINION AND POPULAR GOVERNMENT 34-36 (1913). See generally Davison, *The Public Opinion Process*, 22 PUB. OPINION Q. 91, 102 (1958) (arguing that the definition of a public does not "include those who . . . feel no community of interest with it").

¹⁸⁸ E. REUTER & C. HART, INTRODUCTION TO SOCIOLOGY 502 (1933).

¹⁸⁹ *Id.* at 501-02.

¹⁹⁰ R. PARK & E. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 869 (1921). Park and Burgess argue that because "public opinion is determined by conflict and discussion, . . . both sides of an issue get considered," and "contentions are rejected because they will not stand up to criticism." *Id.* at 794-95. Thus, "the public . . . is always more or less rational. It is this fact of conflict, in the form of discussion, that introduces into the control exercised by public opinion the elements of rationality and fact." *Id.* at 795; see also C. DAWSON & W. GETTYS, *supra* note 172, at 621-22 ("Divergent opinions, through inter-communication in a public, tend to inhibit and modify each other until the matter is thought out more or less dispassionately and a common definition is reached. This shared opinion is termed *public opinion*." (emphasis in original)).

¹⁹¹ A. GOULDNER, *supra* note 181, at 98.

stimuli, like news, can occur in a "critical" manner, "meaning that what has been said may be questioned, negated and contradicted."¹⁹²

The identification of public discourse with forms of "critical interaction" rests upon a very abstract logic. If membership in a community is "a constituent of . . . identity,"¹⁹³ the effort to communicate through public discourse with those who do not share that identity must entail a constant effort to distance oneself from the assumptions and certitudes that define oneself and one's community.¹⁹⁴ By being "critical" and "intellectual," public discourse can strive to generalize its appeal so as to reach persons from disparate cultures and traditions.

The problem, however, is that this conception of public discourse is highly schematic, and its value as an empirical description may be questioned. Even the most casual survey of American public deliberation would lead to the conclusion that it is "intellectual" and "critical" only in fits and starts, and that there are unending attempts by various cultures and traditions to seize control of public discussion and to subject it to particular community values and standards.¹⁹⁵ But the conception does have considerable power as a description of how meaningful public discussion can occur in the face of fundamental and concededly valid cultural divergence. In such circumstances, it may be said, persons ought to strive to engage in a mutual process of critical interaction, because if they do not, no uncoerced common understanding can possibly be attained.¹⁹⁶

First amendment doctrine attempts to protect an arena for just such a process of critical interaction. Resting upon a deep respect for the "sharp differences" characteristic of American life, it is committed to the maintenance of "the right to differ as to things that touch the heart of the existing order."¹⁹⁷ It thus creates "a cleared and safe space" within which can occur precisely that "uninhibited, robust, and wide-open"¹⁹⁸ debate on public issues that one would expect to emerge when dominant cultural traditions are denied access to the force of

¹⁹² *Id.* (emphasis omitted).

¹⁹³ M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982).

¹⁹⁴ See generally Clark, *supra* note 170, at 314-15 (discussing the distinction between public discourse in "primary societies" with a shared identity and secondary societies with economic and cultural diversity).

¹⁹⁵ For an informative catalogue, see *Times Film Corp. v. Chicago*, 365 U.S. 43, 69-73 (1961) (Warren, C.J., dissenting).

¹⁹⁶ Michelman makes this same point by noting that public deliberation requires that "participation in the process result[] in some shift or adjustment in relevant understandings on the parts of some (or all) participants." Michelman, *supra* note 2, at 1526; see also S. BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* 312-13 (1986).

¹⁹⁷ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁹⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

law to silence the clash of divergent perspectives. Contemporary constitutional doctrine looks to this debate to constitute that "universe of discourse" within which public opinion, and hence democratic policy, may be formed.

To more fully understand that doctrine, however, the notion of "critical interaction" upon which it depends must be analyzed somewhat more precisely.

C. The Nature of Critical Interaction Within Public Discourse

The general idea of critical interaction is simple enough. Public discussion must facilitate communication among persons from widely varying traditions and cultures. Within public discourse, therefore, "the tenets of one man may seem the rankest error to his neighbor";¹⁹⁹ "one man's vulgarity is another's lyric";²⁰⁰ and "one man's amusement, teaches another's doctrine."²⁰¹ In such circumstances participants in public debate must be tolerant; they cannot silence speech because of pre-existing assumptions about what is reasonable or appropriate, for any such assumptions would prejudice the outcome and conduct of the debate.

At root, therefore, the concept of critical interaction depends upon the continuous possibility of transcending what is taken for granted. If, as the torts of defamation and intentional infliction of emotional distress suggest, speech within a community is ordinarily bounded by normative standards whose validity is assumed and enforced, critical interaction may be defined as that in which such standards have ceased to provide boundaries because they have themselves become potentially questionable. The first amendment embodies this conception of critical discourse by performing the wholly negative function of shielding speakers from the enforcement of community standards.

When the standards to be suspended are civility rules, however, constitutional intervention can be quite problematic, for the observance of civility rules sustains and defines the very personalities of those within a community. For this reason, words that are deeply uncivil "by their very utterance inflict injury,"²⁰² and, as Alexander Bickel once remarked, such communication "amounts to almost physical aggression."²⁰³ We might say, therefore, that civility rules that distinguish appropriate from inappropriate ways of speaking also tend

¹⁹⁹ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); see *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946).

²⁰⁰ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁰¹ *Winters v. New York*, 333 U.S. 507, 510 (1948); see *Miller v. California* 413 U.S. 15, 40-41 (1973) (Douglas, J., dissenting).

²⁰² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁰³ A. BICKEL, *THE MORALITY OF CONSENT* 72 (1975); see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 496 (1970).

to define a point (although certainly not the only point) at which speech shades into conduct, at which a community subordinates speech to the regulatory schemes that it imposes upon action generally.²⁰⁴ This is explicitly true with respect to the tort of intentional infliction of emotional distress, which enforces a standard that makes no distinction at all between speech and conduct; but it is also characteristically true of the other dignitary torts, which carry the strong sense of a defendant having used "words as instruments of aggression and personal assault."²⁰⁵ For this reason the prohibition of the enforcement of civility rules is experienced less like the opening to debate of heretofore unquestionable topics, and more like the licensing of heretofore unacceptable patterns of behavior.

This fact has important consequences for the constitutional concept of public discourse, for the ultimate purpose of that discourse is to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society. The most complete contemporary investigation of this purpose appears in the work of Jürgen Habermas, who views the public as a "sphere" that grounds the legitimacy of modern states by providing a space for the creation of "a common will, communicatively shaped and discursively clarified."²⁰⁶ The objective is the attainment of "a consensus arrived at communicatively in the public sphere."²⁰⁷ But such a consensus will carry legitimacy only if the state imposes upon public discussion the regulative structure of an "ideal speech situation," in which speech is "immunized against repression" and "all force" is excluded, "except the force of the better argument."²⁰⁸ Within an ideal speech situation, discourse is seen as functioning as pure communication, as "removed from contexts of experience and action" and as consisting entirely of "bracketed validity claims of assertions, recommendations, or warnings."²⁰⁹

The radical implication of this perspective is that within the public sphere the state must regard speech as independent from the general

²⁰⁴ I am building here on J.L. Austin's insight that the difference between speech and action is "usually, at least in part, a matter of convention." J. AUSTIN, *PHILOSOPHICAL PAPERS* 237 (3d ed. 1979); see *id.* at 245-47, 251.

²⁰⁵ *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting). A striking example of a related phenomenon appears in the current pornography controversy, where some commentators have claimed that "[p]ornography is not expression depicting the subordination of women, but is the practice of subordination itself." Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 659 (1987) (emphasis omitted).

²⁰⁶ 2 J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 81-82 (T. McCarthy trans. 1987).

²⁰⁷ *Id.* at 82.

²⁰⁸ 1 *Id.* at 25-26 (T. McCarthy trans. 1984). See generally S. BENHABIB, *supra* note 196, at 282-83 (discussing Habermas' theory of communicative ethics).

²⁰⁹ J. HABERMAS, *LEGITIMATION CRISIS* 107 (T. McCarthy trans. 1975).

context in which social action is routinely assessed. This means that many of the criteria for the evaluation of speech which ultimately derive from that context must be "bracketed" out. As Alvin Gouldner notes, the "rationality of 'public' discourse . . . depends on the prior possibility of separating speakers from their normal powers and privileges in the larger society, especially in the class system, and on successfully defining these powers and privileges as irrelevant to the quality of their discourse."²¹⁰

All speech, of course, is simultaneously communication and social action,²¹¹ and in everyday life it is quite difficult and unusual to separate these two aspects of speech. In most circumstances we attend as carefully to the social status of a speaker, and to the social context of her words, as we do to the bare content of her communication.²¹² We thus cannot understand Habermas and Gouldner's characterization of discussion within the public sphere as descriptive. It must be understood rather as articulating a regulative ideal for the legal structure of public discourse. This ideal is reflected, for example, in the first amendment right to engage in public discourse anonymously, so that speakers can divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience.²¹³

At first glance, therefore, the aspiration of public discourse towards a condition of "deliberation and reflection and a critical spirit"²¹⁴ appears to complement the structure of critical interaction, which also

²¹⁰ A. GOULDNER, *supra* note 181, at 98.

²¹¹ "Words," as Wittgenstein reminds us, "are deeds." L. WITTGENSTEIN, *CULTURE AND VALUE* 46e (P. Winch trans. 1980).

²¹² See Riesman, *supra* note 152, at 1306-07.

²¹³ See *Talley v. California*, 362 U.S. 60 (1960). *Talley* concerned a Los Angeles ordinance requiring those who distributed hand-bills to identify both themselves and the hand-bills' authors. The holding is sometimes read as narrowly resting on the need to avoid "the deterrent effect on free speech" that a general requirement of identification would create. See *id.* at 67 (Harlan, J., concurring). But the ordinance at issue in *Talley* was struck down on its face, and, as Justice Clark pointed out in dissent:

The record is barren of any claim, much less proof, that [Talley] will suffer any injury whatever by identifying the handbill with his name. . . . [T]here is neither allegation nor proof that Talley or any group sponsoring him would suffer "economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility."

Id. at 69 (Clark, J., dissenting) (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

The breadth of *Talley's* holding is therefore better justified by the principle discussed in the text — the same principle that causes prestigious scientific journals to circulate proposed articles anonymously for peer review. The hope is that by withholding the identity of the manuscript's author, journals will obtain an impartial evaluation of the contents of the article, rather than a reflection of the status of its author.

²¹⁴ E. DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 89 (C. Brookfield trans. 1957). For Durkheim, the more democratic the government, the "greater [the] number of things . . . submitted to collective debate," a debate which must be "dominated by reflection" and lead to a "shedding [of] custom and tradition." *Id.* at 87-88.

regulates speech as pure communication that is severed from its social context. But on closer inspection this compatibility dissolves, for our conception of rational reflection and deliberation itself depends upon the observance of civility rules. Speech inconsistent with these rules is easily seen as irrational or valueless,²¹⁵ as the condescending disgust aroused in some readers by *Hustler's* Campari parody illustrates.²¹⁶ More importantly, speech inconsistent with civility rules is likely to be experienced as violent and coercive.²¹⁷ John Dewey made this point in the very terms in which he expressed his

democratic faith . . . in the possibility of conducting disputes, controversies, and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself, instead of having one party conquer by forceful suppression of the other — a suppression which is not the less one of violence when it takes place by psychological means of ridicule, abuse, intimidation, instead of by overt imprisonment or in concentration camps.²¹⁸

²¹⁵ This tendency is evident in the otherwise inexplicable arguments of Frederick Schauer and others that obscenity "is more accurately treated as a physical rather than a mental experience" because it contains "neither propositional, emotive, nor artistic content." F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 182-83 (1982); see E. BARENDT, *FREEDOM OF SPEECH* 248 (1985); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603. For examples in the judicial literature, see *Texas v. Johnson*, 109 S. Ct. 2533, 2553 (1989) (Rehnquist, C.J., dissenting); and *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

²¹⁶ For an illustrative reaction, see Fein, *Hustler Magazine v. Falwell: A Mislitigated and Misreasoned Case* (Book Review), 30 WM. & MARY L. REV. 905, 910 (1989) (arguing that the parody lacks "any plausible nexus to cerebral activity").

²¹⁷ This experience has already led at least one commentator strongly to criticize the conclusions of the *Falwell* opinion:

This analogy between intentional infliction of emotional distress and the tort of battery impeaches the constitutional logic of *Hustler* at its deepest level. Most of us would be reluctant to ever categorize any punch or kick as "speech" within the meaning of the first amendment. . . . [E]ven though . . . the punch may be a reaction or a "response" to a political speech with which one heatedly disagrees. . . .

But if a punch . . . does not amount to speech in the constitutional sense, why must "written speech" be treated as speech within the meaning of the Constitution if the "written speech" is nothing more than a surrogate for the punch?

Wright, *Hustler Magazine v. Falwell and the Role of the First Amendment*, 19 CUMB. L. REV. 19, 23 (1988). Speech that is experienced as "nothing more than a surrogate for [a] punch" by virtue of its violation of civility rules cannot be, in Michelman's terms, truly "jurisgenerative." See Michelman, *supra* note 2, at 1502.

²¹⁸ Dewey, *supra* note 160, at 393. Dewey's belief in the necessity of civility reflects an unresolved tension in his thought. Dewey habitually contrasted "the democratic method of forming opinions in political matters," by which he meant "persuasion through public discussion," with what he called "the methods in common use in forming beliefs in other subjects," by which he meant dependence "upon a person or group possessed of 'authority.'" J. DEWEY, *FREEDOM AND CULTURE* 128-29 (1939). Dewey believed that "the usual procedure" of settling "issues, intellectual and moral, by appeal to the 'authority' of parent, teacher, or textbook" was deeply "inconsistent with the democratic method." *Id.* at 129. Yet he never questioned how, in the absence of some form of social "authority," participants in democratic processes could define,

The dependence of rational deliberation upon rules of civility suggests that we must understand rational reflection as itself a form of social action that depends for its fulfillment upon a specific normative structure.²¹⁹ Public discourse consequently entails two distinct and incompatible requirements. There is, first, the requirement of negativity, of freedom from the boundaries of community expectations and norms. This requirement initiates the very possibility of public discourse by distinguishing it as pure communication able to reach out beyond the confines of any single community. This is the requirement of *critical interaction*. But there must also be a second requirement, one of *rational deliberation*, which entails consideration and evaluation of the various positions made possible by the space of critical interaction. The constitutional purpose of public discourse requires that rational deliberation be civil and noncoercive, which is to say that it must be consistent with the very norms that are negated by critical interaction.

The two requirements of public discourse thus stand in contradiction. The aspiration to be free from the constraints of existing community norms (and to attain a consequent condition of pure communication) is in tension with the aspiration to the social project of reasoned and noncoercive deliberation. The first aspiration is sustained by the values of neutrality, diversity, and individualism; the second by the deliberative enterprise of democratic self-governance. Although the success of public discourse depends upon both requirements, the primary commitment of modern first amendment jurisprudence has unquestionably been to the radical negativity that characterizes critical interaction, which defines the initial, distinguishing moment of public discourse.²²⁰ As a consequence the constitutional structure that regulates the domain of public discourse denies enforcement to the very norms upon which the success of the political enterprise of public discourse depends.

This contradiction is deeply disturbing. As Sabina Lovibond has recently reminded us, "the norms implicit in a community's . . . social practices are 'upheld,' in quite a material sense, by the sanctions which the community can bring to bear upon deviant individuals."²²¹ The

inculcate, and sustain the rules of civility that distinguish legitimate persuasion from coercive "ridicule" and "abuse."

²¹⁹ See S. BENHABIB, *supra* note 196, at 316. On the common law's efforts to implement this insight, see Post, cited above in note 158, at 307-09, 328-29.

²²⁰ Thus first amendment doctrine has never embraced the ideal of a civil "town meeting" that Alexander Meiklejohn took to exemplify public deliberation. See A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24-26 (1948); see also Post, *supra* note 144, at 555-56 (observing that the Supreme Court has rejected Meiklejohn's emphasis on rules of order and civility in public deliberation).

²²¹ S. LOVIBOND, *REALISM AND IMAGINATION IN ETHICS* 61 (1983).

sanctions that the law can bring to bear to support civility rules are unique, not so much because of their monopoly of physical force, but because they alone purport to define social norms in accents that are universal. These norms can, of course, continue to be enforced by means of private and social pressure. But in the heterogeneity of contemporary culture only the law can authoritatively speak for norms that define a *common* ideal of rational deliberation. Only the law can rise above the particularity of specific social groups and definitively articulate those irreducible, minimum constraints of decency whose violation would be "utterly intolerable in a civilized community."²²² To the extent that a constitutional commitment to critical interaction prevents the law from articulating and sustaining a common respect for the civility rules that make possible the ideal of rational deliberation, public discourse corrodes the basis of its own existence.

This might be called the "paradox of public discourse."²²³ In general we have become so accustomed to the paradox that we scarcely notice it. But it is impossible to avoid in a decision like *Falwell*, where the first amendment, in the name of freedom of critical interaction, blunts rules of civility that define the essence of reason and dignity within community life. Surely, we tell ourselves, Larry Flynt's parody cannot be the stuff of rational deliberation; yet the constitutional protection afforded the parody undercuts our assurance. In the absence of legal support, our condemnation of the parody, and the values underlying that condemnation, become somehow relativized and drained of authority.²²⁴ We are left with a conflict between Flynt's concept of discourse and our own, with no umpire to decide between us. In this sense a decision like *Falwell* endangers our hold on the very concept of rational deliberation.

The intrinsic unease engendered by *Falwell* is thus explained in no small degree by the complex dependence of public discourse upon the very community norms that it negates, and by our queasy apprehension that those norms cannot entirely be maintained without the impersonal authority of law. The Court could have upheld *Falwell*'s judgment only at the price of denying the premises of critical interaction, by subjecting that interaction to "repression" and "force"

²²² RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977).

²²³ The paradox of public discourse, one might say, illustrates the profound truth in Justice Brandeis' observation that democracy "is a serious undertaking. It substitutes self-restraint for external restraint. It is more difficult to maintain than to achieve. It demands . . . exigent obedience to the moral law . . ." Letter from Justice Louis Brandeis to Henry Bruere (Feb. 25, 1922), *quoted in* P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 192 (1984).

²²⁴ See Fein, *supra* note 216, at 910 ("[T]he refusal of the Supreme Court to demarcate a first amendment line between the *Falwell* parody and political cartoons suggests a decay in society's moral convictions.").

grounded in community values. It could set aside his judgment only at the price of severing one more thread in the rope that binds community existence, and hence that may ultimately sustain the very possibility of rational deliberation.²²⁵ Public discourse requires both rational deliberation and critical interaction, and the jagged and uneven course of the Court's precedents involving the regulation of offensive speech is merely the legal reflection of this deeply disturbing paradox.

D. The First Amendment, Community, and Public Discourse

First amendment jurisprudence, as has often been noted, contains many diverse themes.²²⁶ To claim, as I have done, that one important theme is the separation of public discourse from the regulation of community norms, is to invite two objections. First, it may be argued that because the Constitution has been interpreted since the 1930's to require norms of toleration and individualism, norms which are themselves constitutive of a particular kind of community,²²⁷ there can be no coherent distinction between public discourse and community life. Second, it may be argued (with perhaps some inconsistency) that because the concept of community is altogether too elusive to be of analytic value, it is impossible to specify the kinds of norms whose enforcement within public discourse is prohibited by the first amendment.

Although the premise of the first objection seems to me quite accurate, its conclusion does not. It is true that we interpret the first amendment to create a distinct domain of public discourse because we believe in such values as neutrality, individualism, and diversity. Our understanding and implementation of these values define the boundaries of that domain, and for that reason, as I discuss in greater detail in Part IV, the location of these boundaries must ultimately depend, at least in part, upon such community values. But *within* the boundaries established for public discourse, the first amendment aspires to suspend legal enforcement of these as well as all other community values. Thus within the domain of public discourse even

²²⁵ This same point is made by those "communitarians," who, like Michael Sandel, argue that "intolerance flourishes most where forms of life are dislocated, roots unsettled, traditions undone. In our day, the totalitarian impulse has sprung less from the convictions of confidently situated selves than from the confusions of atomized, dislocated, frustrated selves, at sea in a world where common meanings have lost their force." Sandel, *supra* note 10, at 17.

²²⁶ See, e.g., Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983).

²²⁷ See L. BOLLINGER, *THE TOLERANT SOCIETY* (1986); C. TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 205-09 (1985).

the national flag, the very symbol of the values of individualism and diversity, may be burned and desecrated.²²⁸ The *Falwell* decision itself displays this radical negativity by immunizing speech contrary to norms of rationality, respect, and toleration — the very norms that justify the creation of our constitutional form of public discourse.

The second objection also begins with a sound premise. Although the concept of community is “[t]he most fundamental and far-reaching of sociology’s unit-ideas,”²²⁹ it is also exceedingly “difficult to define.”²³⁰ In this Article, I define a community as a social formation that inculcates norms into the very identities of its members.²³¹ But this understanding is vulnerable to the criticism that the inculcation of shared norms is a matter of degree, that some persons can share some norms but not others, that even within a community the meaning and application of shared norms can give rise to debate and disagreement, and so forth. And of course this criticism is perfectly reasonable and accurate. Taken to its logical extreme, it would seem to dissolve the notion of community altogether, because we can have no principled way abstractly to decide at just what point enough norms are sufficiently specific, inculcated and shared so as to constitute a community. But the criticism need not be pushed so far, for differences of degree often become differences of kind. The more damaging thrust of the criticism, therefore, is that in practice it can be extremely difficult to distinguish exactly when particular norms are part of a community life.

This point is well taken. Fortunately, though, it is not fatal to the dialectic between community and public discourse that animates first amendment doctrine. In the kind of cases we are considering, the first amendment functions primarily as a shield to block the imposition of those norms that a state has already determined legally to enforce. The decision to define these norms and to recognize them as important and widely shared is thus made in the first instance by the state itself. The precise question for constitutional adjudication in such circumstances is whether the legal enforcement of the norms is incompatible with the requirements of public discourse.

This incompatibility can arise for a number of different reasons. In the kind of cases we are considering, the issue for decision is most likely to be whether the norms which a state seeks to enforce are inconsistent with the neutrality essential to public discourse. The

²²⁸ See *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

²²⁹ R. NISBET, *THE SOCIOLOGICAL TRADITION* 47 (1966).

²³⁰ T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 5 (1978).

²³¹ See M. SANDEL, *supra* note 193, at 150; cf. Royce, *The Nature of Community*, in *CLASSIC AMERICAN PHILOSOPHERS*, *supra* note 160, at 201, 208–10 (arguing that a community consists of members whose identities have incorporated shared events of cooperation).

analysis of such questions does not depend upon whether the norms at issue in a particular case are in fact sufficiently inculcated or sufficiently shared so as to constitute an actual community.

The analysis does depend, however, upon whether the norms are of a kind that, if they were actually socialized into the identities of persons, would establish a community with a "distinctive shape, [a] unique identity."²³² An important challenge for first amendment jurisprudence, therefore, is to distinguish between two kinds of social standards: those that have the potential to constitute a specific form of community life, and those that do not. Enforcement of the former, in contrast to the latter, conflicts with the neutrality of public discourse. The distinction between the two, as I shall attempt to demonstrate in the following Part, underlies some of the most important and otherwise puzzling aspects of the *Falwell* decision.

III. PUBLIC DISCOURSE AND THE *FALWELL* OPINION

The *Falwell* opinion uses three propositions to define "the world of debate about public affairs" protected by the first amendment. The first of these propositions is that "an 'outrageousness' standard" cannot constitutionally be used to penalize speech because it "would allow a jury to impose liability on the basis of the jurors' tastes or views."²³³ The second is that "the First Amendment prohibits" using "bad motive" as a test for imposing "tort liability . . . in the area of public debate about public figures."²³⁴ The third is that in public discourse "[f]alse statements of fact are particularly valueless,"²³⁵ while the "First Amendment recognizes no such thing as a 'false' idea."²³⁶ In this Part I argue that each of these propositions can be best understood in the context of a constitutional prohibition on the enforcement of those standards that carry the potential to define a particular community identity.

A. The "Outrageousness" Standard

The "outrageousness" standard rejected by *Falwell* is a paradigmatic attempt to use the law to maintain the "boundaries" of a particular concept of community "identity,"²³⁷ for it is designed to penalize speech that has gone "beyond all possible bounds of decency" and that is "to be regarded as . . . utterly intolerable in a civilized community."²³⁸ Legal enforcement of an outrageousness standard would thus

²³² K. ERIKSON, *supra* note 83, at 11.

²³³ *Falwell*, 108 S. Ct. at 882.

²³⁴ *Id.* at 881.

²³⁵ *Id.* at 880.

²³⁶ *Id.* at 879 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

²³⁷ *See id.*

²³⁸ RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977).
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confine public discourse within the "bounds" of the particular "civilized community" defined by the standard. It would deprive public discourse of a position of neutrality as among differing definitions of community identity.

The *Falwell* opinion justifies its rejection of an "outrageousness" standard on the grounds of "our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."²³⁹ The three dignitary torts are the primary means by which the law awards damages to protect the "personality" of individuals from emotional harm caused by speech. These torts penalize speech that violates civility rules on the theory that the observance of such rules is necessary for the emotional well-being of properly socialized individuals.²⁴⁰ But these same civility rules concomitantly establish the identity of a community as "civilized," in exactly the same manner as does the outrageousness standard at issue in *Falwell*. The "longstanding refusal" to which the Court specifically refers thus functions as a continuing effort to exempt public discourse from the enforcement of those kinds of norms commonly used to create community identity.

Falwell illustrates the depth of the Court's commitment to preserving the neutrality of public discourse from the imposition of these kinds of norms. Although the Court assumed that the *Hustler* parody would "doubtless [be] gross and repugnant in the eyes of most,"²⁴¹ it nevertheless refused to permit the parody to be penalized. This result comports with the reasoning of *Cantwell*: if public discourse is constitutionally protected because it is the medium for the formation of future communities, its structural independence from all civility rules must be guaranteed, even if such rules in fact are accepted by every contemporary community. The "marketplace of communities" must thus be understood as extending in time, as well as in space. The individualist methodology of first amendment doctrine ultimately means that individuals must be free within public discourse from the enforcement of all civility rules, so as to be able to advocate and to exemplify the creation of new forms of communal life in their speech.

B. The Distinction Between Speech and Its Motivation

Falwell's rejection of the reasoning of the Fourth Circuit rests squarely on the premise that in public discourse the worth of speech cannot be measured by the integrity of its motivation. The opinion reaches the strong conclusion that, while "bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we

²³⁹ *Falwell*, 108 S. Ct. at 882.

²⁴⁰ See *supra* pp. 616-24.

²⁴¹ 108 S. Ct. at 879.

think the First Amendment prohibits such a result in the area of public debate about public figures."²⁴²

The reasoning of the *Falwell* opinion seems at first glance consistent with traditional first amendment doctrine. Since *New York Times*, the Court has repeatedly insisted upon this separation of speech from intent, holding that even false defamatory speech uttered "from personal spite, ill will or a desire to injure"²⁴³ does not lose its constitutional protection. This separation is remarkable, for in ordinary life our assessment of the meaning and value of speech often depends upon our understanding of the purposes or intentions of a speaker.²⁴⁴

The justification for this separation in the context of the *Falwell* decision should by now be plain enough. The intent element of the tort of intentional infliction of emotional distress effectuates a civility rule concerning how persons should relate to each other. To use speech for the primary purpose of emotionally injuring another is to act in an uncivil way and hence to bring one's conduct within the regulation of a dignitary tort. Because it enforces a civility rule, the intent element at issue in *Falwell* maintains a particular vision of community life, and so is inconsistent with the neutrality necessary for public discourse.

This reasoning does not imply, however, that intent can never constitutionally be used to regulate public discourse, and any such implication in *Falwell* is plainly false. The actual malice standard of *New York Times*, for example, which *Falwell* itself applies, permits false defamatory speech to be punished if there is "sufficient evidence

²⁴² *Id.* at 881.

²⁴³ *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam) (quoting from trial court's jury instructions); see also *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 (1989); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

²⁴⁴ See, e.g., K. BURKE, *A GRAMMAR OF MOTIVES* (1945).

Aristotle noted long ago that the ability of speech to persuade depends to a significant degree upon our perception of "the personal character of the speaker," II *THE COMPLETE WORKS OF ARISTOTLE* 2155 (J. Barnes ed. 1984), which in turn depends in large measure upon our conviction that he entertains "the right feelings towards his hearers." *Id.* at 2194. "Persuasion is achieved," said Aristotle, "by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided." *Id.* at 2155. A speaker's presentation of character "may almost be called the most effective means of persuasion he possesses." *Id.*

Motive has such obvious importance for the evaluation of speech that in most areas of the law we would not dream of severing speech from the context of its purposes or intentions. See, e.g., *United States v. American Livestock Comm'n Co.*, 279 U.S. 435, 437-38 (1929) (Holmes, J.) ("[M]otive may not be very material when it is sought to justify what until justified is a wrong."). Think, for example, of areas like fraud or perjury, where the legal assessment of speech depends directly upon its intent.

to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."²⁴⁵ The standard thus ultimately turns on the "state of mind of the defendant."²⁴⁶ It cannot be true, therefore, that the "First Amendment prohibits"²⁴⁷ bad motive from "controlling" the legal characterization of speech within public discourse.

The reason the use of an intent requirement is constitutionally impermissible in the tort of intentional infliction of emotional distress, but constitutionally acceptable in the actual malice standard, is that the latter does not use the criterion of intent to enforce a civility rule. In explicating the actual malice standard the Court has consistently stressed that the criterion of intent is not to be confused with morally charged notions like "personal spite, ill will or a desire to injure."²⁴⁸ Indeed, the fundamental mistake of the Fourth Circuit in *Falwell* was to conflate the actual malice standard with the ethical concept of "culpability."²⁴⁹ The purpose of the actual malice standard is not to demarcate any such "boundary between morally acceptable and unacceptable modes of political discussion";²⁵⁰ it is rather to forge "an instrument of policy, to attain the specific end of minimizing the chill on legitimate speech."²⁵¹ The element of intent in the actual malice standard accomplishes this objective by placing a defendant, to the maximum extent possible, in control of the legality of his own speech. In the actual malice standard, therefore, the element of intent does not function to impose the norms of an ideal community, but instead to achieve a desired policy outcome. Thus the permissibility of regulating public discourse on the basis of the criterion of intent depends upon the precise use of the criterion in relation to community norms.

C. The Distinction Between Fact and Opinion

The *Falwell* decision draws a sharp distinction between the communication of facts within public discourse, which can be subject to legal supervision for truth or falsity, and the communication of opinions or ideas within public discourse, which is constitutionally immunized from such supervision. Although this distinction may be commonplace, it is also deeply obscure, and it has proved resistant to

²⁴⁵ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

²⁴⁶ *Herbert v. Lando*, 441 U.S. 153, 160 (1979).

²⁴⁷ *Falwell*, 108 S. Ct. at 881.

²⁴⁸ See *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam).

²⁴⁹ See *supra* p. 611; *Falwell v. Flynt*, 797 F.2d 1270, 1275 (4th Cir. 1986).

²⁵⁰ Post, *supra* note 144, at 553.

²⁵¹ *Id.*; see *LeBel*, *supra* note 70, at 331-32. The *Falwell* opinion makes this point explicitly when it states that the use of the *New York Times* standard "reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Falwell*, 108 S. Ct. at 882.

most analytic attempts at clarification. This section argues that the thrust of the distinction can most convincingly be explained by reference to a constitutionally enforced separation of community norms and public discourse.

1. *Some Contemporary Understandings of the Distinction Between Fact and Opinion.* — For many years, the distinction between fact and opinion formed the backbone of the fair comment privilege,²⁵² yet neither courts nor commentators were able to give a principled or convincing explanation of its theoretical foundations. The words “fact” and “opinion,” as one writer observed, were “treated as if they possessed some ‘magic quality’ of self-elucidation,” so that they were used “primarily” as “vague familiar terms into which one can pour whatever meaning is desired in order to reach a particular conclusion.”²⁵³ The confusion intensified after the Court’s announcement in *Gertz* that defamatory opinion was constitutionally privileged.²⁵⁴ Although courts recognize that it is “often quite difficult to determine whether a publication constitutes a statement of fact or statement of opinion,”²⁵⁵ the absence of any satisfactory theory has left courts saddled with circular and unhelpful doctrinal tests, like those that urge judges to “consider all the words used” or “all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.”²⁵⁶ Such tests fail to specify in any theoretically useful manner exactly what a court should look for in the “words” or “medium” employed.

(a) *Rhetorical Hyperbole.* — Part of the difficulty that courts face is that in defamation law the notion of opinion has been confused with the concept of “rhetorical hyperbole,” which, strictly speaking, has nothing to do with the distinction between fact and opinion. Modern case law on the subject takes as its point of origin the Supreme Court’s decision in *Greenbelt Cooperative Publishing Association v. Bresler*,²⁵⁷ in which a newspaper had reported on negotiations

²⁵² See *supra* p. 627.

²⁵³ Titus, *supra* note 144, at 1205–06.

²⁵⁴ For a sampling of modern commentary, see Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1227–44 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); Comment, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 CALIF. L. REV. 1001 (1986); Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988); Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817 (1984); and Comment, *The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law*, 70 MARQ. L. REV. 673 (1987).

²⁵⁵ *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980).

²⁵⁶ *Id.* at 784.

²⁵⁷ 398 U.S. 6 (1970).

between a city and Bresler, a real estate developer, and had characterized Bresler's negotiating tactics as "blackmail." Bresler sued for defamation and was awarded damages by the trial court, apparently on the theory that the articles had "imputed to him the crime of blackmail."²⁵⁸ The Court rejected this interpretation of the meaning of the newspaper's language:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. 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.²⁵⁹

In *Bresler*, therefore, the Court vigorously seized control over the interpretation of the meaning of a communication, and definitively determined that an accusation of "blackmail" did not refer to the crime of blackmail, but rather to extremely unreasonable behavior. The Court used the term "rhetorical hyperbole" to signify this gap between the "literal" meaning of a defendant's words and the Court's interpretation of their "real" meaning. But having legally determined the "real" meaning of a communication, a court must still decide whether that meaning constitutes an assertion of fact or of opinion. Thus the concept of rhetorical hyperbole, which merely signifies a legally determinable separation between literal and actual meaning, concerns an inquiry that logically precedes the question whether any specific meaning is fact or opinion. Having legally determined the "real" meaning of a communication, a court must still decide whether that meaning constitutes an assertion of fact or of opinion.

Unfortunately, however, the Court, in a decision issued on the same day as *Gertz*, appeared to link the notion of rhetorical hyperbole to the kind of "opinion" that *Gertz* deemed constitutionally privileged. In *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*,²⁶⁰ the Court reviewed a libel judgment against a labor union that had identified three plaintiffs as "scabs," and that had cited Jack London's famous definition of a scab as "a traitor to his God, his country, his family and his class."²⁶¹ Although the case technically turned on the application of federal labor law to local labor

²⁵⁸ *Id.* at 8.

²⁵⁹ *Id.* at 14 (footnote omitted).

²⁶⁰ 418 U.S. 264 (1974).

²⁶¹ *Id.* at 268 (emphasis omitted).

disputes, the Court went out of its way to cite *Gertz* and *Bresler* and to conclude that the union's publication "cannot be construed as representations of fact" because it was "merely rhetorical hyperbole."²⁶² Ever since *Austin* there has been an unfortunate tendency to equate constitutionally protected opinion with rhetorical hyperbole,²⁶³ instead of inquiring into whether the actual meaning made visible by the concept of rhetorical hyperbole is fact or opinion.

The confusion of opinion and rhetorical hyperbole is reflected even in the structure of the *Falwell* case itself. The jury in the case had returned a judgment that the Campari parody could not "reasonably be understood as describing actual facts about [plaintiff] or actual events in which [plaintiff] participated."²⁶⁴ Everyone involved with the case, including the Court, assumed from this judgment that the parody involved an assertion of opinion, rather than fact. But this conclusion does not follow.²⁶⁵ The concept of rhetorical hyperbole requires us to recognize that even if traditions of satiric exaggeration do not permit us to read the assertions of the *Hustler* parody literally to say that Falwell actually had intercourse with his mother in an outhouse, these assertions can nevertheless be understood to convey a different message. In his Reply Brief to the Court, Flynt explicitly stated what he had intended the parody to mean: "that Falwell's message is 'b.s.' . . . that this formidable public figure's teachings are nonsense."²⁶⁶ If a reasonable reader were to agree with Flynt that the parody conveys this meaning, the precise question would then be whether *this* message is opinion or fact.

(b) *The Distinction Between Judgments and Preference Expressions.* — Any attempt to analyze the constitutional privilege for opinion must distinguish between two very different kinds of statements. Following the Kantian distinction that we have already discussed, statements that merely express or describe the "private feelings" of a

²⁶² *Id.* at 284–86.

²⁶³ See, e.g., *Palm Beach Newspapers v. Early*, 334 So. 2d 50, 53 (Fla. Dist. Ct. App. 1976), cert. denied, 354 So. 2d 351 (1977), cert. denied, 439 U.S. 910 (1978); Epter, *The Clash of Outrage and the First Amendment: The Protection of Non-Mainstream Opinion*, 27 DUQ. L. REV. 437, 438 n.6 (1989); Note, *Hustler Magazine, Inc. v. Falwell: Laugh or Cry, Public Figures Must Learn To Live with Satirical Criticism*, 16 PEPPERDINE L. REV. 97, 112–13 (1988); Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981); cf. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U.L. REV. 923, 929–37 (1985) (discussing rhetorical hyperbole analysis in libel cases as analogous to the general fact/opinion determination).

²⁶⁴ *Falwell*, 108 S. Ct. at 878 (quoting Appendix to Petition for Certiorari at C1).

²⁶⁵ The point can be illustrated by the following example. Suppose Flynt had written of Falwell that he "drinks like a fish." A jury could very well conclude that the statement does not describe an "actual" fact about Falwell, meaning that Falwell could not really be said to drink as a fish would drink. This conclusion would not imply, however, that the figurative meaning of Flynt's statement, that Falwell is an alcoholic, is not a statement of fact.

²⁶⁶ Reply Brief of Petitioner at 20, *Falwell* (No. 86-1278).

speaker must be distinguished from statements which make judgments about aspects of the world independent of a speaker.²⁶⁷ The first kind of statements, which I shall call "preference expressions," are a kind of report on the inner condition of a speaker, and the only possible claim to truth they might contain lies in the factual accuracy of that report. The sentence "I don't like Jerry Falwell" is an example of a preference expression. Although the sentence does claim to be true, this claim is at most limited to the validity of its factual characterization of the subject of the pronoun "I."²⁶⁸ The second kind of statements, which I shall call "judgments," do not simply make known the private feelings or attitudes of a speaker, but rather make claims about aspects of the world that are independent of the speaker and that do not appear to be merely factual in nature. The sentence "Jerry Falwell is a hypocrite" is an example of a judgment. The claim of the sentence to be true does not turn on the attributes of its speaker, and we intuitively understand the claim to involve evaluation rather than merely factual description.

At common law, preference expressions rarely formed the basis for defamation actions. "Terms of abuse and opprobrium" that "had no real meaning except to indicate that the individual who used them was under a strong emotional feeling of dislike toward those about whom he used them," were traditionally viewed as "not of themselves actionable as libelous."²⁶⁹ For this reason the vast majority of defamation cases that privilege communications as opinion concern judgments. The Campari parody in *Falwell*, for example, conveys just such a negative judgment on Falwell's "teachings."

The distinction between preference expressions and judgments forces us to understand the opinion privilege invoked by the *Falwell* decision in a deeper way. The decision distinguishes "[f]alse statements of fact," which are "particularly valueless," from statements of opinion.²⁷⁰ The latter are privileged to protect "the truth-seeking function of the marketplace of ideas":²⁷¹ because "the best test of

²⁶⁷ See *supra* p. 625. I am grateful to Bernard Williams for his efforts to help me clarify this distinction.

²⁶⁸ Some preference expressions, like crude racial insults, may merely evince or express, rather than describe, private feelings. Strictly speaking, such preference expressions have no propositional content at all, and thus cannot be said to be either true or false. The existence of this category of preference expressions, however, in no way affects the argument of this section.

²⁶⁹ *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966); see RESTATEMENT (SECOND) OF TORTS § 566 comment e (1977). Some courts, however, have labeled as opinion assertions that merely reflect a person's "subjective assessment of [a] situation." *Fleming v. Benzaquin*, 390 Mass. 175, 185, 454 N.E.2d 95, 102 (1983); see also *Johnson v. Delta Democrat Publishing Co.*, 531 So. 2d 811 (Miss. 1988).

²⁷⁰ *Falwell*, 108 S. Ct. at 880.

²⁷¹ *Id.*

truth is the power of the thought to get itself accepted in the competition of the market," the "First Amendment recognizes no such thing as a 'false' idea."²⁷²

This rationale justifies privileging judgments, which make nonfactual truth claims about the world that can be the subject of discussion and criticism. But it cannot justify privileging preference expressions, which make only factual truth claims that can in no way constitute a marketplace of ideas. If preference expressions are to be constitutionally privileged, therefore, it must be on the basis of a very different theory than that proposed in *Falwell*.

Such a theory could no doubt be developed from conceptions of individual autonomy and conscience.²⁷³ My only point here, however, is that the consequences of such a theory would be quite different from one that turns on the specific properties of public discussion. The implications of an autonomy theory might be tested by evaluating the first amendment protection that ought to be extended to defendants who are sued for intentional infliction of emotional distress because of preference expressions consisting of crude and offensive racial insults.²⁷⁴ But because preference expressions represent a special and marginal case, I discuss in the remainder of this Article the constitutional privilege for judgments, and I use the terms "opinions" and "ideas" to refer exclusively to judgments.²⁷⁵

(c) *Subjectivity*. — It is clear that the justification for the constitutional privilege accorded to judgments cannot be, as is sometimes asserted in the literature, that opinions are idiosyncratic and subjective²⁷⁶ and hence incapable of being "characterized as true or false."²⁷⁷ If judgments could not be said to be either true or false,

²⁷² *Id.* at 879 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting)).

²⁷³ Pertinent here would be those theories of freedom of expression that emphasize the importance of speech for self-realization and self-fulfillment. For a recent discussion of these theories, see Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54, 79–81 (1989).

²⁷⁴ For a collection of such cases, see Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982). At least one court has upheld such an action brought by a public official. *See Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (1981).

²⁷⁵ In so doing, I ignore yet a third kind of statement that courts sometimes classify under the rubric of opinion. John Searle calls them "fictional statements," and notes that they are "made possible by the existence of a set of conventions which suspend the normal operation of the rules relating illocutionary acts and the world." J. SEARLE, *EXPRESSION AND MEANING* 67 (1979). Fictional statements do not refer (in the ordinary sense) to the world at all, and are therefore not "about" anyone or anything. As a legal matter, the claim that statements are fictional and hence not actionable in defamation should depend upon whether the statements are "of and concerning" the plaintiff. Some courts, however, have incorrectly conceptualized the problem of fictional statements as an issue of opinion. *See, e.g., Pring v. Penthouse Int'l*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

²⁷⁶ *See Lewis v. Time, Inc.*, 710 F.2d 549, 554–56 (9th Cir. 1983).

²⁷⁷ Franklin & Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25

the marketplace of ideas could not serve a "truth-seeking function," and the Court's whole constitutional rationale for protecting opinion would collapse.

The distinction between judgments and preference expressions suggests, moreover, that in ordinary experience judgments do not at all seem to involve merely personal or subjective assertions. In everyday life we make the most momentous decisions on the basis of our evaluation of the truth or falsity of judgments, whether such judgments occur in a doctor's medical diagnosis or in the grades of a school transcript or in a memorandum of legal advice. In many areas of the law, like legal and medical malpractice, the state freely predicates civil sanctions on the basis of its evaluation of the truth or falsity of opinions.²⁷⁸ It could not do so if judgments were intrinsically subjective and incapable of being characterized as true or false.

(d) *Verifiability*. — The theory that has most influenced courts concerning the distinction between fact and opinion is the notion that an opinion is an assertion that "does not lend itself to verification and cannot, therefore, be regarded as one of fact."²⁷⁹ Opinions are thus those statements that cannot be "proved true or false."²⁸⁰ Simply stated in this fashion, however, the theory is subject to two fatal objections. First, the definition of opinion as unverifiable statements renders meaningless the constitutional rationale for protecting opinion. "The competition of the market" could not in any sense determine the validity of intrinsically unprovable statements, and hence, a marketplace in such statements could not serve a valuable "truth-seeking function."

Second, there are statements which, although unverifiable, would commonly be recognized as statements of facts. For example, if I were to claim that the temperature at a certain spot in Antarctica were minus 100 degrees at 2:00 pm on October 17, 1497, the claim might be unverifiable because of the absence of data or evidence, yet it would be apparent to all that I was making a factual assertion.²⁸¹

WM. & MARY L. REV. 825, 868-80 (1984); see Smolla, *supra* note 8, at 450. For an example of a decision alluding to this approach, see *Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 227-29 (2d Cir. 1985).

²⁷⁸ See, e.g., W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 185-89 (5th ed. 1984).

²⁷⁹ *Immuno, A.G. v. Moor-Jankowski*, 145 A.D.2d 114, 143, 537 N.Y.S.2d 129, 147 (1989).

²⁸⁰ *Mr. Chow*, 759 F.2d at 229; see, e.g., *Janklow v. Newsweek*, 788 F.2d 1300, 1302-03 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 718 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

²⁸¹ The existence of such unproveable factual statements was the premise of the Court's discussion in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), in which the Court pondered whether plaintiffs or defendants should bear the burden of proving the falsity of defamatory statements of fact when the speech at issue involved matters of public concern. All

There is, however, a more sophisticated formulation of the verifiability test that asks not whether statements are verifiable, but whether they are "objectively"²⁸² verifiable, whether they are "subject to empirical proof."²⁸³ This formulation of the test offers two significant advantages. First, it shifts the focus of analysis away from the issue of *whether* a particular statement can be proved, and to the question of *how* it can be proved. The latter question requires us to understand the particular kind of claim contained in a statement. Second, it offers a rough typology of two potential modes of "verification": the truth of some statements can be "empirically" or "objectively" established, but the validity of others can only be determined by the unimpeded discussion characteristic of the "marketplace of ideas."

Of course this version of the test cannot work unless we can establish some intelligible meanings for words like "empirically" or "objectively." These words are not self-defining, and in proposing definitions we need to keep in mind the purpose of the enterprise. "False statements of fact" are constitutionally valueless, the Court in *Falwell* tells us, because "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."²⁸⁴ The Court's point may perhaps be fairly generalized in the following manner: for constitutional purposes the truth of certain kinds of statements — opinions — can only be determined by the free play of speech and counterspeech characteristic of the marketplace of ideas. But the functioning of the marketplace depends upon the accuracy of other kinds of statements — factual assertions — whose truth must be determined independently of any mere process of discussion.

The difficulty with this interpretation of the Court's analysis is that it appears to conceive of factual truth as independent of social processes of discussion and communication. This conception conjures up images of a long-discredited logical empiricism, in which the "verification" of facts was said to rest on "'brute data' . . . whose validity cannot be questioned by offering another interpretation or reading,"

members of the Court agreed that the case posed the question of who should bear the risk that certain statements of fact might be "unknowably true or false." *Id.* at 776 (emphasis added); see also *id.* at 785 (Stevens, J., dissenting). Although the Court held that plaintiffs would in such circumstances be constitutionally required to prove falsity, it fully conceded that its holding would "insulate from liability some speech that is false, but unprovably so," and hence defeat suits that were, "in some abstract sense, . . . meritorious." See 475 U.S. at 776. This reasoning would make no sense whatever if speech were constitutionally privileged as opinion merely because it was unprovable.

²⁸² See *Mr. Chow*, 759 F.2d at 229; *Ollman*, 750 F.2d at 981; *Hollander v. Clayton*, 16 Media L. Rptr. (BNA) 1447, 1448 (N.Y. App. Div. 1989).

²⁸³ *Keller*, 778 F.2d at 718 (emphasis added).

²⁸⁴ *Falwell*, 108 S. Ct. at 880.

and "whose credibility cannot be founded or undetermined by further reasoning."²⁸⁵ It is no doubt to these images that judicial use of the words "empirically" and "objectively" is meant to refer. But the vulnerability of such crude empiricism is now more or less taken for granted, because even if there were such things as "brute data," the meaning of those data would necessarily depend upon processes of inference that themselves are susceptible to further interpretation or reasoning.²⁸⁶ All knowledge, therefore, ultimately depends, to one degree or another, upon social processes of discussion.²⁸⁷

2. *Toward a Reformulation of the Distinction Between Fact and Opinion.* — It is possible, however, to make sense of the Court's analysis if it is reformulated to take account of "the accepted contrast between" statements "which are expected to be highly diverse, and which are not expected and which are not required, to converge on the one hand," and statements "where there is a well established expectation of convergence" on the other.²⁸⁸ In the area of "scientific enquiry," for example, "there should ideally be convergence on an answer, where the best explanation of that convergence involves the idea that the answer represents how things are, whereas in the area of the ethical . . . there is no such coherent hope."²⁸⁹

We expect scientific hypotheses ultimately to converge on a single answer because such hypotheses, in the words of Gilbert Harman, are "tested against the world,"²⁹⁰ and the world exists independently of our perceptions of it. This abstract appeal to a "world" affects only the kind of claims we understand scientific statements to make; it does not affect the substance of those claims by naïve reliance upon "brute data." Thus we recognize a claim as scientific if it purports to describe something independent of scientific investigators in such a way that, given enough time and effort, we would expect the claim to be confirmed or disconfirmed by a consensus of investigators. The origins of this way of thinking go back to the work of Charles Peirce, who defined scientific truth as the "opinion which is fated to be

²⁸⁵ C. TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES* 19 (1985).

²⁸⁶ "Observations are always 'theory laden.'" G. HARMAN, *THE NATURE OF MORALITY* 4 (1977).

²⁸⁷ This dependence was the basis of Wigmore's dissatisfaction with the fact-opinion distinction in evidence law. See 7 J. WIGMORE, *EVIDENCE* § 1919, at 14-16 (J. Chadbourn rev. ed. 1978); see also *Beech Aircraft Corp. v. Rainey*, 109 S. Ct. 439, 449 (1988); Slovenko, *The Opinion Rule and Wittgenstein's Tractatus*, 14 U. MIAMI L. REV. 1 (1959). This same dependence also underlay some of Frederick Schauer's justly famous critique of the division between fact and opinion in defamation law. See Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978).

²⁸⁸ Hampshire, *Morality and Convention*, in *UTILITARIANISM AND BEYOND* 145, 146 (A. Sen & B. Williams eds. 1982).

²⁸⁹ Williams, *The Scientific and the Ethical*, in *OBJECTIVITY AND CULTURAL DIVERGENCE* 209, 212 (S. Brown ed. 1984).

²⁹⁰ G. HARMAN, *supra* note 286, at 6.

ultimately agreed to by all who investigate," and who defined reality as "the object represented in this opinion."²⁹¹ For Peirce, reality was thus "independent, not necessarily of thought in general, but only of what you or I or any finite number of men may think about it."²⁹²

If the notion of a "world" allows us to anticipate that scientific thought will converge on a single description of nature, matters are very different with regard to ethical thought, which is ultimately "a matter of belonging to a certain culture,"²⁹³ a matter of "the conventions of groups."²⁹⁴ So long as there are divergent groups or cultures, we have no special grounds to expect a consensus to emerge about any particular ethical claim. If I were to argue, for example, that eating pork or marrying the widow of one's brother were morally wrong, I would ultimately have to appeal to norms already accepted within my culture or community. To the extent you did not share those norms, I would have no particular reason to expect that you would agree with me. (You *may* be convinced, of course, but that is another matter.)²⁹⁵ The lack of any "coherent hope" of convergence in ethical matters, then, is ultimately founded upon the diversity of groups and cultures.

We can thus distinguish between statements that make claims whose validity purports to be independent of the standards or perspectives of any finite group of persons, and statements that instead make claims founded upon the "complex of obligations binding us, as members of a community, to sustain the institutions which provide structure for our collective life."²⁹⁶ Judgments are intrinsically statements of the latter sort. That is because "there must be underlying grounds of judgment which human beings, qua members of a judging community, share, and which serve to unite in communication even those who disagree (*and who may disagree radically*) Judgment implies a community that supplies common grounds or criteria by which one attempts to decide."²⁹⁷ Hence "we require a definition of community in order to know how the judgment shall proceed."²⁹⁸

²⁹¹ C. PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE* 38 (1955).

²⁹² *Id.* at 39.

²⁹³ Williams, *supra* note 289, at 220.

²⁹⁴ G. HARMAN, *supra* note 286, at 113.

²⁹⁵ As Williams stresses, the distinction between convergent and nonconvergent assertions does not predict whether convergence "will actually occur," but instead

The point of the contrast is that even if [convergence on ethical matters] happens, it will not be correct to think that it has come about because convergence has been guided by how things actually are, whereas convergence in the sciences might be explained in that way if it does happen. This means, among other things, that we understand differently in the two cases the existence of convergence or, alternatively, its failure to come about.

Williams, *supra* note 289, at 212.

²⁹⁶ S. LOVIBOND, *supra* note 221, at 65.

²⁹⁷ R. BEINER, *POLITICAL JUDGMENT* 142-43 (1983) (emphasis in original).

²⁹⁸ *Id.* at 143.

Thus there is an important relationship between convergent and nonconvergent claims, and the first amendment distinction between public discourse and community. Because the truth or falsity of judgments is determinable only by reference to the standards of a particular community, any government effort to penalize false judgments in public discourse would in effect use the force of the state to impose the standards of a specific community. This would of course violate the constitutional principle that the arena of public discussion be neutral as to community standards. It might well be said, therefore, that from a constitutional point of view the evaluation of such statements must be left to the free play of speech and counterspeech through which communities compete within public discourse for the allegiance of individuals.

But because the truth or falsity of statements of fact is in theory determinable by reference to standards that, as Peirce notes, transcend all possible communities, government efforts to penalize false statements of fact are in theory consistent with a position of neutrality vis-à-vis the standards of any particular community. "[T]he independence of the fact-finder, the witness, and the reporter," as Hannah Arendt has movingly demonstrated, places them "outside the community to which we belong and the company of our peers."²⁹⁹ It is true that the punishment of false statements of fact appears, at first blush, to be inconsistent with the requirement of an ideal speech situation that all force be excluded "except the force of the better argument."³⁰⁰ But statements of fact are not arguments, and the very ability to argue presupposes accurate facts. "Freedom of opinion," as Arendt notes, "is a farce unless factual information is guaranteed and the facts themselves are not in dispute. In other words, factual truth informs political thought"³⁰¹ Thus the integrity of public discourse itself depends upon factual accuracy, a point to which *Falwell* itself appealed.³⁰²

If Peirce is correct, however, the validity of any factual characterization of the world ultimately depends upon the convergence of an infinite number of perspectives. This is because any given perspective can be biased and reflect only the particular standards of a specific community. Whenever the state attempts definitively to determine the truth or falsity of a specific factual statement, it truncates a potentially infinite process of investigation and therefore runs a significant risk of inaccuracy.³⁰³ Thus although legal fact-finding may in theory be

²⁹⁹ H. ARENDT, *BETWEEN PAST AND FUTURE* 259-60 (1968).

³⁰⁰ J. HABERMAS, *supra* note 208, at 25.

³⁰¹ H. ARENDT, *supra* note 299, at 238.

³⁰² See *Falwell*, 108 S. Ct. at 880; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring).

³⁰³ Thus, for example, we would certainly rather trust the verdict of indefinite generations

neutral, in practice we can expect it to be often inaccurate and inappropriately influenced by particular community sentiment and prejudice. Any respectable first amendment theory should allow for this phenomenon, and it is no doubt part of the underlying explanation of why the Court in *Falwell* did not permit liability to be imposed for false statements of fact *simpliciter*, but instead imposed the additional requirement of "actual malice," so as "to give adequate 'breathing space' to the freedoms protected by the First Amendment."³⁰⁴

We can thus advance a rough justification for the position adopted in *Falwell* that false statements of fact have no constitutional value within public discourse, but that false opinions can only be regulated by the marketplace of ideas. The justification depends upon reformulating the constitutional distinction between fact and opinion in the following manner: statements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we therefore have a right to expect ultimate convergence or consensus. Statements of opinion, on the other hand, make claims about an independent world the validity of which depends upon the standards or conventions of a particular community, and about which we therefore cannot expect convergence under conditions of cultural heterogeneity.³⁰⁵ If this reformulation is correct, it implies that *Falwell's* distinction between fact and opinion stems from the same central first amendment concern as that which guided *Falwell's* other characterizations of public discourse: the preservation of the neutrality of public discourse from the domination of community mores.

of historians than the verdict of any given jury on such questions as whether General William Westmoreland gave orders to his intelligence officers to underestimate enemy troop strength during the Vietnam War, or whether Ariel Sharon actually discussed with the Gemayel family the need to take revenge against Palestinians. See *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

³⁰⁴ *Falwell*, 108 S. Ct. at 882. See *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) ("Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."). The actual malice standard thus offers a double margin of protection to defendants. The standard not only provides a safeguard against the potential distortion and error of the state as a fact finder, but it also reduces the potential chilling effect on defendants' speech by ceding to them the maximum possible control over the legality of their own speech.

³⁰⁵ Of course, this distinction can only make sense within a society that has come to see itself anthropologically, as a distinct culture that could possibly be otherwise. For example, a culture that viewed ethics as having a "foothold or anchorage in Being, apart from the existence of actually living minds," would also view ethical claims as convergent and, in that respect, no different from factual statements. See W. JAMES, *The Moral Philosopher and the Moral Life*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY AND HUMAN IMMORTALITY* 184, 197 (1956). The legal interpretation of the fact/opinion distinction will thus ultimately reflect our understanding of our own culture's separation from nature. Cf. Post, *A Theory of Genre: Romance, Realism, and Moral Reality*, 33 AM. Q. 367 (1981) (tracing the decline of ontologically grounded ethics in America).

This reformulation enables courts constitutionally to distinguish fact from opinion by determining the kinds of validity claims made by particular statements. If a literary critic writes, for example, that a certain novelist did not deserve the Nobel Prize, the statement makes sense only by reference to the specific canons of aesthetic judgment invoked by the critic. Because these canons define a particular group, the statement should be characterized as opinion. But if the critic writes that the novelist paid \$50,000 to certain Swedish officials, she makes a claim that any person, regardless of her specific community, should in theory ultimately come to accept if confronted with the relevant evidence. For this reason the statement should be regarded as one of fact.

Sometimes the very same statement can be regarded as either fact or opinion, depending upon the claim that it is interpreted as making. For example, if a restaurant reviewer states that the egg rolls at a Chinese restaurant were "frozen," the statement should be deemed one of fact if the reviewer is taken to mean that the egg rolls were below the freezing temperature of water, a reference that in principle should be confirmable by anyone at all. But if, as is more likely, the reviewer is taken to mean that anyone who has a proper understanding of the appropriate temperature for the correct presentation of egg rolls would consider them unacceptably cool, her statement depends for its validity upon the standards of proper Chinese cooking, and should be understood as opinion.

The kind of validity claim made by a statement frequently depends upon the genre of expression within which it is embedded. The example of the restaurant reviewer demonstrates how in many circumstances the internal dynamics of a particular genre will virtually compel a specific interpretation of the validity claim of a statement.³⁰⁶ This is why courts attempting to apply the fact/opinion distinction have so often focused their analysis on the "medium" and context of a communication.

3. *The Dimensions of the Constitutional Privilege for Opinion.* — The constitutional logic we have been exploring turns on the specific characteristics of the "arena of public discussion" established by the first amendment, and for this reason offers little assistance in determining whether opinion expressed outside that arena should be constitutionally privileged. Although *Gertz* was originally interpreted quite narrowly constitutionally to immunize only opinion on matters "of public concern,"³⁰⁷ the prevailing contemporary interpretation is

³⁰⁶ For a particularly clear example of this process, see *Myers v. Boston Magazine Co.*, 380 Mass. 336, 403 N.E.2d 376 (1980).

³⁰⁷ Thus Tentative Draft No. 21, issued in April, 1975, modified § 566 of the first *Restatement of Torts* to provide:

A defamatory communication may consist of a statement in the form of an opinion. A statement of this nature, *at least if it is on a matter of public concern*, is actionable,

that *Gertz* privileges statements of opinion regardless of whether or not they occur in public discourse.³⁰⁸ Thus it is said that "[o]pinion is always protected under the first amendment; in fact, its absolute protection is one of the most pervasive themes of modern first amendment jurisprudence."³⁰⁹ But if this position is correct, it must be justified by very different constitutional concerns from those we have already canvassed.

Falwell is drafted quite narrowly and holds only that nonfactual ridicule is constitutionally privileged from the tort of intentional infliction of emotional distress if the plaintiff is a public figure or public official, and if the ridicule occurs in "publications such as the one here at issue."³¹⁰ These qualifications leave undecided the case where the ridicule does not occur in public discourse. But if one were to imagine such a case, as for example if Flynt were to call up Falwell's mother and ridicule her in the words of the *Hustler* parody, it seems to me unimaginable that the ridicule would be constitutionally privileged.³¹¹ It cannot be that *Falwell* absolutely protects all verbal means of intentionally inflicting emotional distress, all forms of racial, sexual, and religious insults, so long as the offending communications do not contain false factual statements.³¹²

But if *Falwell* is not to be read so broadly, it cannot be true that *Gertz* absolutely privileges the expression of opinion in both public

however, only if it also expresses, or implies the assertion of, a false and defamatory fact, which is not known or assumed by both parties to the communication.

RESTATEMENT (SECOND) OF TORTS § 566, at 6 (Tent. Draft No. 21, 1975) (emphasis added). The commentary to the new provision struggled with the *Gertz* dictum:

Supreme Court indications that an expression of opinion cannot be the basis for a defamation action have involved public communications on matters of public concern. While it is thus possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion

Id. at 8 comment c; see Christie, *supra* note 98, at 1628-32.

³⁰⁸ Thus in May 1975, the American Law Institute voted to strike the phrase "at least if it is on a matter of public concern" from § 566, on the ground that the principle of *Gertz* "applies straight through" regardless of whether speech is public or private. See 52 ALI PROCEEDINGS 152-55 (1975) (remarks of Dean Wade). For court opinions to this effect, see, for example, Ollman v. Evans, 750 F.2d 970, 975-76 (D.C. Cir. 1984); Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983). But see Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 499 n.9 (Mo. Ct. App. 1980) ("The Restatement interprets *Gertz* as affording a privilege to allegedly libelous opinions expressed as to private individuals in private communications. We reject this interpretation.").

³⁰⁹ Smolla, *supra* note 8, at 452 (footnote omitted); see Epter, *supra* note 263, at 442-43.

³¹⁰ *Falwell*, 108 S. Ct. at 882.

³¹¹ Cf. Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (refusing to dismiss a tort cause of action for an offensive letter); Mitran v. Williamson, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (1960) (recognizing a tort claim where the defendant sent the plaintiff an obscene photograph).

³¹² See Smolla, *supra* note 8, at 471-74.

and private discourse.³¹³ This suggests that analysis of the constitutional privilege for opinion must proceed in at least two dimensions. First, it must ask whether the expression of opinion occurs within public or private discourse. Second, it must explore the reason or justification for the regulation of the opinion. *Gertz* holds, most precisely, that the state cannot restrict the expression of opinion on the ground that the opinion is false. One could plausibly maintain that the state cannot, under any circumstances, penalize opinion because it is false, but that the constitutionality of regulating opinion for other reasons, as for example those involved in *Falwell*, depends (in part) upon whether the expression occurs within public or private discourse. This hypothesis, however, requires us to ask why the Constitution would place a blanket prohibition on the state from finding opinions true or false, but permit the state to regulate the expression of outrageous opinions when they do not occur in public discourse.³¹⁴

³¹³ The Court's decisions in the area of commercial speech confirm this conclusion. The Court has accepted a "common-sense" distinction between commercial speech and public discourse, and has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); see *Meyer v. Grant*, 108 S. Ct. 1886, 1891 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Consequently, "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *In re R.M.J.*, 455 U.S. 191, 203 (1982). This scheme of regulation, which is designed to "provide the legislative and executive branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation,'" *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3035 (1989) (quoting *Ohralik*, 436 U.S. at 455-56), would be rendered meaningless if commercial speech could achieve constitutional immunity from state restriction merely through formulation as opinion.

³¹⁴ One possible line of reasoning is that the truth or falsity of an opinion turns on its content, and the first amendment is deeply hostile to content-based regulation. The regulation of opinion because of its outrageousness, on the other hand, refers to style rather than to substance and is to that extent content-neutral. Chief Justice Rehnquist relied on this reasoning in his recent dissent in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), where he argued that the desecration of the flag conveys "nothing that could not have been conveyed . . . just as forcefully in a dozen different ways." *Id.* at 2549 (Rehnquist, C.J., dissenting); see also *id.* at 2557 (Stevens, J., dissenting).

This reasoning, however, is ultimately unsatisfactory. The Constitution is not hostile to the regulation of false assertions of fact, although such regulation is manifestly content-based. We must explain, therefore, why in non-public discourse content regulation is permissible with regard to facts, but not opinions. Moreover the distinction between style and substance is tenuous and unconvincing: often *how* something is said determines *what* is said. See Jones, *Blasphemy, Offensiveness and Law*, 10 BRIT. J. POL. SCI. 129, 142-43 (1980). The difficulties that translators routinely face in rendering essays, satires, short stories, or poems from one language into another exemplify this phenomenon. What Shelley famously called "the vanity of translation" illustrates the extent to which communication resists abstraction as "content" and instead inheres in the physical form of its presentation. See Shelley, *A Defence of Poetry*, in *ENGLISH ROMANTIC WRITERS* 1072, 1074 (D. Perkins ed. 1967); cf. Brooks, *The Heresy of Paraphrase*, in *THE WELL WROUGHT URN* 176 (1947). Conversely, our evaluation of the style of a communication is often deeply influenced by its substance. The point can plainly be seen

To pursue this inquiry, we must focus on the precise way in which opinions claim to be true or false. Statements of opinion seem to be inherently debatable and uncertain in a way that statements of fact do not. No doubt this characteristic of opinion has misled some courts and commentators into thinking that opinions do not even claim to be true. But on close inspection the characteristic stems instead from the fact that the very cultural standards that determine the truth of opinions are not themselves fixed and determinate, but rather are subject to debate. If facts appeal for validation to those standards that would theoretically prevail only after a potentially infinite process of investigation and discussion, and hence that would obtain only after all debate is settled, opinions appeal for validation to standards that are instead local and particular, and hence that remain fully subject to reinterpretation. The meaning of these latter standards, moreover, inheres in no small degree in their application to particular situations. There is no theory, no reproducible method, no "reconstructible rules"³¹⁵ by which we can definitively determine whether any given application, any given opinion, is correct or incorrect, because every such application will carry within it a contestable understanding of the underlying standard to be applied. Opinions might thus be viewed as invitations to join in a process of interpreting standards. The protection extended to opinion by the common law privilege of fair comment trades on exactly this understanding.³¹⁶

It does not follow that opinions do not claim to be true or do not solicit agreement on the basis of their truth, but it does follow that opinions are in their nature debatable. To impose sanctions for "false" opinions is to use the force of law to end this potential debate by imposing legally definitive interpretations of the cultural standards at issue. To the extent that we understand the identity of a society or community to subsist in the meaning of its standards, the exact question posed by the regulation of false opinions is whether that identity should, so to speak, be left to bubble up through dispersed processes of communication and deliberation, or whether it should be hegemonically established by legal institutions. The common law crime of seditious libel explicitly rested upon the latter approach, upon the notion that, as Lord Holt stated in 1704, "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist."³¹⁷ The first amendment's

in the Campari parody at issue in *Falwell*, which is "outrageous" not merely because of its style, but also because of its substance.

³¹⁵ See C. LARMORE, PATTERNS OF MORAL COMPLEXITY 20-21 (1987); see also R. BEINER, *supra* note 297, at 142-44.

³¹⁶ Indeed this understanding was the very *ratio decidendi* of the court in *Carr v. Hood*, 170 Eng. Rep. 985 n.*, 1 Camp. 357 n.* (K.B. 1808), which premised its decision on the need to avoid "a monopoly of sentiment and opinion." *Id.*; see *supra* p. 627.

³¹⁷ *Queen v. Tutchin*, 14 Howell's State Trials 1095, 1128 (Q.B. 1704).

repudiation of seditious libel would appear at first blush to reject this approach.

The regulation of false statements of fact, on the other hand, poses a very different question. Although legal determinations of the truth or falsity of factual statements may pose an inherent risk of error,³¹⁸ they do not foreclose those processes of deliberation and discussion through which the identity of a community is forged: as Arendt writes, "[f]acts are beyond agreement and consent."³¹⁹ Their truth does not ultimately depend upon any interpretation of the local and particular standards of a given community.

The regulation of uncivil opinions also poses a very different question. Civility rules do not purport to distinguish true from false statements, but instead purport to define, in complementary fashion, community and individual identity. Thus if the state were to punish an opinion because it was outrageous, there would be no necessary implication about the truth or falsity of the opinion. Of course in implementing such a punishment the state would itself be authoritatively applying a general cultural norm (the civility rule) to a particular communicative act (the opinion), and hence to that extent authoritatively establishing community identity. But it is one thing for the state itself to express an authoritative opinion ("The Campari parody is outrageous"), and it is quite another for it to prohibit others from expressing such opinions ("Jerry Falwell is outrageous").³²⁰

The pattern of contemporary first amendment doctrine, which permits the state to regulate in private discourse false statements of fact and outrageous opinions, but not false opinions, is thus not without potential justification. The question, however, is whether the justification is sufficient. It seems correct to conclude that, at some point or another, the state must assume responsibility for determinations of factual accuracy, because any other conclusion would lead to paralysis. The primary constitutional concern should be to calibrate the ever-present risk of error (the state's, as well as the speaker's) to the value of maintaining freedom of expression. It also seems correct to conclude that, at some point or another, the state must be able authoritatively to construe its own civility rules. These rules are deeply important to the maintenance of community identity, especially

³¹⁸ See *supra* pp. 659–60. The law can compensate for this risk of error by various devices, ranging from the allocation of burdens of proof to the actual malice standard of *New York Times*. See *supra* p. 660; see also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

³¹⁹ H. ARENDT, *supra* note 299, at 241.

³²⁰ See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2556–57 (1989) (Stevens, J., dissenting) ("The content of respondent's message has no relevance whatsoever to the case."); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 243–44 (1983) (arguing that limitations on profanity are restrictions on the manner rather than the content of expression).

so because they tend to mark the boundaries between speech and conduct.

But the question of whether the state may ever determine the truth or falsity of opinions, and hence use force to cut off debate about the meaning of the cultural standards interpreted by those opinions, seems much more problematic than the contemporary reading of *Gertz* would suggest. There are plainly circumstances in which good reasons exist for using law in this fashion. To pick a particularly obvious example, lay persons must often depend upon the opinions of experts, like lawyers or doctors, and hence as to laypersons these opinions are not really debatable. It makes sense, therefore, for the law to hold such experts legally accountable, within a certain range, for the truth or falsity of their opinions. When the law does this, it is in essence hegemonically establishing authoritative cultural standards upon which persons can rely.³²¹

The example of expert opinion illustrates the deeper issue: speech, and most particularly speech apart from public discourse, belongs to a dense texture of social action and is therefore often regulated as a form of action. The *Gertz* dictum, however, primarily conceives speech as a vehicle for the communication of ideas and perspectives. The contemporary interpretation of *Gertz* radically privileges these communicative qualities of speech. Speech does of course contain these qualities, but it also contains in significant respects the attributes of social action. To regulate speech as action is to fix the social relations in which persons stand connected to one another; to privilege speech as a medium of ideas is to create a clear and safe space within which persons can step back from those relations and reflect upon them, and so avoid committing themselves to those relations.

There are very good reasons for establishing that space within the sphere of public discourse. But the matter is considerably more complicated outside of that sphere, for the simple reason that in everyday life we often want persons to be committed to, and to be held to, the standards of particular social roles. But if this perspective is correct, then the blanket application of the *Gertz* dictum to opinion in non-public discourse may have been too hasty. We may need instead to reflect, on a case-by-case basis, on the relative importance of maintaining the flexibility and open-textured quality of specific cultural standards.³²²

³²¹ See *Aman, SEC v. Lowe: Professional Regulation and the First Amendment*, 1985 SUP. CT. REV. 93, 93-95.

³²² The Court's commercial speech doctrine points heavily in this direction, for it permits commercial speech, which is not public discourse, to be regulated if it is "misleading" or "more likely to deceive the public than to inform it." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). The doctrine makes no distinction between opinion and fact.

IV. DEFINING THE DOMAIN OF PUBLIC DISCOURSE

If the first amendment extends special constitutional protection to public discourse by insulating it from the enforcement of community norms,³²³ it is necessary to distinguish public discourse from other speech. In contemporary doctrine, however, this distinction is notoriously ill-conceived and unreliable.³²⁴ In fact it is commonly accepted that the Court's efforts in this direction have resulted in a dreadful mess.³²⁵ It is important to assess the causes of this failure, however, before attempting to hazard any recharacterization of the specific domain of public discourse. In doing so one must begin with the observation that contemporary doctrine has attempted to mark the boundaries of the domain of public discourse in roughly two ways. The first focuses on the content of speech, the second on the manner of its dissemination.

A. *The Domain of Public Discourse in Contemporary Doctrine*

1. *The Content of Speech: Matters of Public Concern.* — Contemporary doctrine delineates the domain of public discourse primarily through an assessment of the content of speech. The Court has a standard account of this approach: "We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open' and have consistently commented on the central importance of protecting speech on public issues."³²⁶ As a doctrinal matter, therefore, the Court has most comprehensively attempted to define public discourse by distinguishing speech about "matters of public concern" from speech about "matters of purely private concern."³²⁷

³²³ I do not mean to imply, of course, that the first amendment protects only public discourse. See Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1671-73 (1987).

³²⁴ See Wright, *Speech on Matters of Public Interest and Concern*, 37 DE PAUL L. REV. 27 (1987). For a more general discussion of the difficulties of the public/private distinction, see Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

³²⁵ See, e.g., Franklin, *supra* note 323, at 1657.

³²⁶ *Boos v. Barry*, 108 S. Ct. 1157, 1162 (1988) (citations omitted) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

³²⁷ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion); see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). For about a decade this distinction remained obscure. The Court had reasoned in *New York Times* that the first amendment embodies "a profound national commitment" to robust public debate, see 376 U.S. at 270, in order to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Court had thus proposed that speech necessary for democratic self-governance be immunized from the community civility standards enforced by the common law tort of defamation, unless a speaker had published false statements of fact

Although the "public concern" test rests on a clean and superficially attractive rationale, the Court has offered virtually no analysis to develop its logic.³²⁸ Indeed, as matters now stand, the test of "public

with "actual malice." See *id.* at 283. *New York Times* extended this immunity to criticism of the "official conduct" of public official plaintiffs, because such criticism was manifestly at the core of democratic self-governance. See *id.* at 282. In keeping with this rationale, the Court soon expanded the application of the actual malice rule to "anything which might touch on an official's fitness for office," *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), as well as to the fitness of candidates for elective public office, see *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971). The apogee of this line of analysis was Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which proposed to apply the *New York Times* requirement of actual malice to all speech involving matters of "public or general interest." *Id.* at 43.

The clarity of this reasoning was obscured in 1974, however, when the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), struck a compromise position which required that the actual malice standard be applied only if a defamation plaintiff were a "public person," meaning a public official or a public figure, but which also extended some constitutional protection to all speech, whether or not it could be characterized as public discourse. See *id.* at 342, 347. *Gertz* held that in the absence of actual malice states could not enforce common law rules regarding presumptive and punitive damages for defamatory speech, and that the Constitution also required that plaintiffs prove a defendant is at "fault" before receiving damages. See *id.* at 347, 349-50. Although these constitutional restrictions intruded less deeply into the operation of community civility rules than did the restrictions required by the *New York Times* actual malice standard, they were nevertheless quite important. See Post, *Foundations of Defamation Law*, *supra* note 72, at 713-14, 738-39. The rationale for these restrictions was unclear, however, because to the extent that they applied to speech unrelated to matters of democratic self-governance, they could not be justified by the same reasoning as that which underlay *New York Times*. To date the Court has been unable or unwilling to offer any alternative rationale.

In recent years, therefore, the Court has begun to reformulate the *Gertz* compromise in such a way as to make the distinction between public discourse and other speech determinative for the reach of constitutional restrictions on the enforcement of community civility rules. In *Dun & Bradstreet*, for example, the Court reinterpreted *Gertz* to eliminate any constitutional restraints on common law rules of presumptive and punitive damages so long as defamatory speech involves only private plaintiffs and is about "matters of purely private concern." *Dun & Bradstreet*, 472 U.S. at 759-60 (plurality opinion). Although the Court did not expressly discuss whether it would also remove the constitutional requirement of "fault" in such circumstances, it nevertheless left the clear implication "that the constitutional requirement of fault in a private plaintiff defamation case applies only if the subject matter of the defamatory falsehood pertains to a matter of 'public concern.'" *Cox v. Hatch*, 761 P.2d 556, 559 (Utah 1988).

In the 1986 decision of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court held that where speech "is of public concern" a plaintiff must bear the burden of proving falsity, even if the plaintiff is a private figure. See *id.* at 775-76. The Court did not indicate who would bear this burden if a plaintiff were a private figure and a defendant's speech were "of exclusively private concern," although the Court did delphically remark that in such circumstances "constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.* One commentator has concluded that "the logic of *Dun & Bradstreet*" would lead to the conclusion that in such circumstances the first amendment would require no change in "the unvarnished rules of the common law." Smolla, *supra* note 8, at 471.

³²⁸ See Allred, *From Connick to Confusion: The Struggle To Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75, 81 (1988); Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 25-27 (1987).

concern" "amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it."³²⁹ To begin to comprehend the causes for this failure, one must note the ambiguity in the adjective "public" in the phrase "public concern." Sometimes the adjective signifies that the speech at issue is about matters that ought to be of interest to those who practice the art of democratic self-governance. I shall call this the "normative" conception of public concern. Sometimes, however, the adjective connotes that the speech at issue concerns matters that large numbers of people already know, and thus are "public" in a purely empirical sense. I shall call this the "descriptive" conception of public concern.

The doctrinal test that the *Falwell* opinion uses to distinguish public discourse from other speech hovers equivocally between these two conceptions of public concern. Under the rule proposed by *Falwell*, which tracks traditional first amendment doctrine in the area of defamation, the *New York Times* actual malice standard applies if the plaintiff is a public figure or a public official.³³⁰ The "public official" branch of this doctrine flows directly from the normative concept of public concern, which reflects the core purpose of *New York Times* to protect speech about matters pertinent to democratic self-governance. But the "public figure" branch is ambiguous, half justified by the notion that speech about public figures is normatively relevant to democratic self-governance,³³¹ and half by the notion that speech about public figures concerns matters of "notoriety" that have, in a purely descriptive sense, already caught "the public's attention."³³² In the end, therefore, the public official/public figure test must be justified by reference to either the normative or descriptive conception of "public concern."³³³ An understanding of the ills that underlie contem-

³²⁹ Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U.L. REV. 241, 259 (1987).

³³⁰ See *Falwell*, 108 S. Ct. at 882.

³³¹ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 146-55 (1967) (plurality opinion); *id.* at 163-65 (Warren, C.J., concurring).

³³² *Gertz*, 418 U.S. at 342. Note, for example, the ambiguity of the Court's characterization of Jerry Falwell as a "public figure." See *Falwell*, 108 S. Ct. at 882 & n.5. The Court cited *Who's Who in America* to the effect that Falwell "is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications." *Id.* at 882 n.5.

³³³ The difference between the constitutional protection afforded to speech about public persons and that afforded to speech of public concern about private persons indicates that the domain of public discourse is not an undifferentiated terrain. It instead contains different categories of speech which may receive different forms of constitutional protection. The distinction between speech about public persons and speech of public concern about private persons is thus not a distinction between public discourse and other forms of communication, but rather a difference internal to the domain of public discourse itself. In fact the Court's justification

porary doctrine must begin with an analysis of each of these two distinct conceptions of "public concern."

(a) *The Normative Conception of "Public Concern."* — The Court is most comfortable with the normative conception of "public concern," and in most instances its use of the phrase signifies that the content of the speech at issue refers to matters that are substantively relevant to the processes of democratic self-governance. But it is not difficult to see why this conception of public concern would lead directly to a doctrinal impasse. Democratic self-governance posits that the people, in their capacity as a public, control the agenda of government. They have the power to determine the content of public issues simply by the direction of their interests. This means that every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern. The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate.

The Court fully recognizes this difficulty. It underlies the Court's firm and correct conviction that "governments must not be allowed to choose 'which issues are worth discussing or debating' To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."³³⁴ It also lies at the root of the Court's initial rejection in *Gertz* of Justice Brennan's plurality opinion in *Rosenbloom v. Metro-media, Inc.*,³³⁵ which proposed to apply the *New York Times* requirement of actual malice to all speech involving matters of "public or general interest."³³⁶ The Court repudiated this proposal because of its doubts concerning "the wisdom of committing . . . to the conscience of judges" the task of determining "what information is relevant to self-government."³³⁷

Certain speech, of course, is clearly and obviously recognizable as substantively relevant to democratic self-government. Most speech about public officials falls into this category. But it does not follow from this fact that speech less easily recognizable can with confidence

for providing greater constitutional protection to speech about "public figures" than to speech about private figures involving matters of public concern turns almost entirely on considerations of individual equity, considerations that have little to do with defining and protecting speech necessary for democratic self-governance. See *Gertz*, 418 U.S. at 344-46; Branson & Sprague, *The Public Figure-Private Person Dichotomy: A Flight from First Amendment Reality*, 90 DICK. L. REV. 627, 634-37 (1986).

³³⁴ Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 538 (1980) (citations omitted) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972)); see *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

³³⁵ 403 U.S. 29 (1971).

³³⁶ *Id.* at 43.

³³⁷ *Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)).

be ruled out as irrelevant to matters of public concern. Robert Bork, for example, once proposed limiting constitutionally protected speech to that "concerned with governmental behavior, policy or personnel."³³⁸ Bork's proposal was attractive because it seemed to follow so directly from the logic of democratic self-governance, and to offer a clean and precise definition of speech about matters of public concern.

On closer inspection, however, Bork's proposal proved inadequate, because it missed the fundamental point that the first amendment safeguards public discourse not merely because it informs government decisionmaking, but also because it enables a culturally heterogeneous society to forge a common democratic will. The formation of this will depends upon the ability of public discourse to sustain deliberation about our identity as a people, as well as about what specifically we want our government to do. That is why most would unquestionably consider as public discourse the public discussion of such issues as the proper role of motherhood, the disaffection of the young, and the meaning of American citizenship, even if this discussion did not occur within the specific context of any proposed or actual government action.³³⁹

The public realm, as Hanna Pitkin has eloquently remarked, is where the "people determine what they will collectively do, settle how they will live together, and decide their future, to whatever extent that is within human power."³⁴⁰ To decide these things, however, is to engage in a process of "collective self-definition," of determining "who we shall be, for what we shall stand."³⁴¹ To classify speech as public discourse is, in effect, to deem it relevant to this collective process of self-definition and decisionmaking. There is obviously no theoretically neutral way in which this can be done. Speech can be deemed irrelevant for national self-definition only in the name of a particular, substantive vision of national identity. If this is done with the authority of the law, possible options for democratic development will be foreclosed.

The problem can be illustrated by Samuel Warren's and Louis Brandeis' famous article *The Right to Privacy*,³⁴² published in 1890, which virtually created the common law tort of invasion of privacy.³⁴³ The origins of the article were said to lie in the outrage which Warren, a genuine Boston Brahmin, felt at newspaper reports of his private

³³⁸ Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971).

³³⁹ Recall, in this context, that *Cantwell v. Connecticut*, 310 U.S. 296 (1940), itself viewed debates about "the realm of religious faith" as quintessential public discourse. See *id.* at 310.

³⁴⁰ Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 343 (1981).

³⁴¹ *Id.* at 346.

³⁴² Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

³⁴³ See Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954) (discussing the application of the Brandeis privacy conception to the modern era).

entertainments.³⁴⁴ Warren and Brandeis argued that such gossip was not of public concern and that it usurped "the space available for matters of real interest to the community."³⁴⁵ Yet, in retrospect, public fascination with the doings of the rich and the aristocratic at the turn of the century may have played an integral part in the general movement toward the creation of the welfare state, with its progressive tax and other instruments of wealth redistribution. Although reports of Samuel Warren's particular dinner parties may well have lacked significance, they formed part of this much larger process by which the people, as a public, came to alter their vision of the nation. In retrospect, therefore, Warren's and Brandeis' dismissal of such gossip as merely "idle" and as the bearer only of "triviality,"³⁴⁶ has come to seem an unattractive example of self-serving class prejudice.³⁴⁷

The fundamental theoretical difficulty faced by writers like Warren and Brandeis, who would place limits on what *ought* to be pertinent to the formation of a common democratic will, is that any effort substantively to circumscribe public discourse is necessarily self-defeating, for it displaces the very democratic processes it seeks to facilitate.

(b) *The Descriptive Conception of "Public Concern."* — The descriptive conception of "public concern" promises a way out of this impasse. It appears to offer courts a means of maintaining the boundaries of public discourse in a manner that remains neutral with respect to the competing claims of speech to be relevant to issues of democratic governance. The descriptive conception defines "speech involving matters of public concern" as speech about issues that happen actually to interest the "public," which is to say to "a significant number of persons."³⁴⁸ The conception thus flows from a purely empirical notion of the public; it classifies as public discourse expression about the common stimuli that in fact establish the existence of a public.³⁴⁹

³⁴⁴ See A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 70 (1946); D. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* 20-25 (1972).

³⁴⁵ Warren & Brandeis, *supra* note 342, at 196.

³⁴⁶ See *id.*

³⁴⁷ Don Pember, for example, writes that "[t]he Warren-Brandeis proposal was essentially a rich man's plea to the press to stop its gossiping and snooping." D. PEMBER, *supra* note 344, at 23.

³⁴⁸ B. HENNESSY, *PUBLIC OPINION* 8-9 (3d ed. 1975).

³⁴⁹ Modern political scientists have in general abandoned the normative definition of the public characteristic of the sociology of the 1930's, and have instead preferred to investigate the concept of the public as a purely empirical phenomenon. For examples of this tendency, see W. BENNETT, *PUBLIC OPINION IN AMERICAN POLITICS* 12-63 (1980), which adopts a "situational perspective" that regards the public as "the collection of individuals who actually form and express opinions on a specific issue at a particular time," *id.* at 13; and V. KEY, *PUBLIC OPINION AND AMERICAN DEMOCRACY* 8-17 (1961), which defines public opinion broadly to encompass all opinions held by individuals that "governments find it prudent to heed," *id.* at 16.

The influence of the descriptive conception is visible in the Court's doctrinal efforts to make constitutional protection depend upon the "public figure" status of plaintiffs.³⁵⁰ These efforts have led some courts to classify speech as public discourse depending upon whether it is about a plaintiff whom "statistical surveys" indicate enjoys "name recognition" among "a large percentage of the well-informed citizenry."³⁵¹

The attempt to define public discourse in purely descriptive terms, however, is subject to the powerful objections of being both over- and underinclusive. The definition is overinclusive because it extends constitutional protection to speech about matters that seem trivial and irrelevant to democratic self-governance.³⁵² The definition would classify as public discourse speech about prominent celebrities, even if such celebrities have only negligible "involvement in or influence on public policy matters."³⁵³ Examples such as Johnny Carson or Carol Burnett come immediately to mind.³⁵⁴ The definition is underinclusive because it would exclude from public discourse speech about matters which, although unknown, obviously pertain to the processes of democratic self-governance. The exposé of heretofore secret government misconduct, or the discussion of an especially high but as yet unnoticed rate of teenage suicide, both concern issues that ought to be well-known, even if they in fact are not; any acceptable definition of public discourse must include them.

Both objections to the descriptive conception of "public concern" rest on the assumption that the true touchstone of public discourse must lie in a substantive evaluation of whether the content of speech is relevant for self-governance. The argument that the descriptive conception is overinclusive assumes that speech about matters that are manifestly irrelevant can be identified in a principled way. The argument that the definition is underinclusive assumes that speech about matters that are manifestly relevant can be identified. Therefore to the extent that these objections carry weight, and they seem to me very strong, we are brought around full circle and returned to our initial lack of any principled method of determining what kinds of issues ought to be excluded from the domain of public discourse.

³⁵⁰ See Franklin, *supra* note 323, at 1665.

³⁵¹ *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1295 & n.20 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); see *Harris v. Tomczak*, 94 F.R.D. 687 (E.D. Cal. 1982).

³⁵² The Court's development of the doctrine of the limited purpose public figure can be read as a response to this overinclusiveness. The doctrine holds that the mere fact that an individual is involved in a prominent "public controversy" is not enough to make her into a public figure: the controversy must be of a certain "sort," of a kind that is related to "the resolution of public questions." *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

³⁵³ Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 917 (1984).

³⁵⁴ See *Branson & Sprague*, *supra* note 333, at 636-37; Franklin, *supra* note 323, at 1665.

The descriptive conception of public concern nevertheless retains a certain appeal, because it focuses attention on the social preconditions for the maintenance of public discourse. One of these preconditions is the exposure of the participants in public deliberation to common stimuli.³⁵⁵ Speech about well-known matters concerns the very stuff that makes public discussion possible. Such speech thus reinforces and amplifies the bonds of public life. Although speech about Johnny Carson differs in important ways from speech about explicit government policy, the ability of the public to deliberate about government policy depends upon the fund of experience common to members of the public, and speech about commonly known matters increases the depth of that experience. Speech about prominent celebrities may therefore influence in subtle and indirect ways public deliberation of public policy: it may provide common points of reference for debate, or crystalize common concerns, or shape common metaphors of understanding. Learning of a prominent athlete or entertainer's struggles with drugs or alcohol may well lead the public to a different and perhaps more (or less) sympathetic understanding of the social problem of substance abuse. Discussion of the World Series may lead to an altered perception of the national character.

The claim of speech about well-known matters to constitutional protection as public discourse thus depends on the assumption that public speech is indivisible, that communication for one purpose, such as gossip, will influence communication for another, such as self-government. This assumption underlies that "overwhelming" dialectic that Harry Kalven once predicted would lead the definition of public discourse "from public official to government policy to public policy to matters in the public domain."³⁵⁶

But the extent of interdependence among forms of public speech is an empirical question, and without empirical data all that can be said is that public discourse will probably be impoverished, to some unspecifiable degree, whenever the enforcement of community civility standards diminishes speech about well-known matters. It does not follow from this that speech about well-known but seemingly trivial issues must be included within public discourse. But it does counsel caution in the exclusion of such speech from public discourse, particularly if, as a normative matter, the content of the speech at issue cannot definitively be excluded as irrelevant to matters of self-governance.

2. *The Manner in Which Speech Is Disseminated: Of the Media/Nonmedia Distinction and Other Conundrums.* — If the strand of

³⁵⁵ See *supra* p. 635.

³⁵⁶ Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

contemporary doctrine that attempts to define public discourse in terms of the content of the speech at issue is ultimately inadequate and self-contradictory, it at least has the advantage of explicit judicial thematization. The second strand of contemporary doctrine, which focuses on how speech is disseminated rather than on its content, is much more obscure, and must be gathered together out of the dark corners of the Supreme Court's opinions. But although the Court has not yet attempted to formulate this second strand of doctrine in the shape of formal rules, its influence on the Court's judgments is nevertheless distinctly visible.

The origin of the phrase "matters of public concern" in first amendment doctrine, for example, lies in the important 1940 decision of *Thornhill v. Alabama*.³⁵⁷ In *Thornhill*, the Court considered the question of whether labor picketing was constitutionally protected expression. The Court began its analysis with this premise: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."³⁵⁸ The Court thus defined public discourse not merely in terms of the content of the speech at issue, but also in terms of the manner in which that speech was disseminated. The basic idea was that speech must be communicated "publicly" in order to qualify as public discourse.

This focus on the manner of dissemination is plainly discernible in the *Falwell* opinion, which refers to "the area of public debate about public figures."³⁵⁹ Although the second use of the adjective "public" in this phrase refers to the content of speech, its first use concerns instead the manner in which speech is communicated. It points toward a "genre" in which speech is distributed in such a way as to be understood as "public" debate. *Falwell* refers again to this genre in the prophylactic rule which it formulates at its conclusion. *Falwell* explicitly confines the rule to recoveries for the tort of intentional infliction of emotional distress "by reason of publications such as the one here at issue."³⁶⁰ The point, although never explicit, is apparently that Flynt communicated his attack on Falwell in a public way, rather than in a private letter or in a personal late-night telephone call. The Court's formulation of the rule implies that if Flynt were to convey the very same words as those in the *Hustler* parody to Falwell in a private manner, they might not be included within the domain of public discourse, and might not receive the same degree of constitutional protection. The Court's citation of Justice Harlan's

³⁵⁷ 310 U.S. 88 (1940).

³⁵⁸ *Id.* at 101-02 (footnote omitted).

³⁵⁹ *Falwell*, 108 S. Ct. at 881.

³⁶⁰ *Id.* at 882.

carefully phrased conclusion in *Street v. New York* strengthens this implication: "It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."³⁶¹

The boundaries of public discourse, therefore, are to some extent dependent upon the ways in which speech is disseminated. Although the judgment that speech is being communicated in a "public" manner ultimately depends upon the particular context of a specific communicative act, at least three generic factors have influenced the Court's approach to this question: the intent of the speaker, the size of the speaker's audience, and the identity of that audience. The Court's sensitivity to the intent of a speaker that her speech form part of public discourse³⁶² manifests itself in the Court's image of "the lonely pamphleteer who uses carbon paper or a mimeograph."³⁶³ Even if that pamphleteer manages to distribute her message to only a very few people, the Court will nevertheless consider her efforts as part of "the flow of information to the public."³⁶⁴ The reason cannot be that the pamphleteer's message has in fact been received by the large number of people who constitute the public. It must instead be that when a speaker disseminates messages "at large" in this way, it signifies that she *intends* her speech to be widely distributed and to form part of public debate.

The Court has sometimes been influenced in these matters by a rather special concept of intention, which does not turn on the actual purposes or motivations of any specific person, but rather on the generic intent attributable to a particular form of communication. The very act of distributing pamphlets on the street carries with it, so to speak, its own presumptive intent. This notion of generic intent appears in Justice Powell's plurality opinion in *Dun & Bradstreet*,³⁶⁵ which concludes that a credit report is not within the domain of public discourse in part because the report is "solely in the individual interest of the speaker and its specific business audience," and is "solely motivated by the desire for profit."³⁶⁶ Justice Powell's evaluation of motivation does not turn on the actual state of mind of the *Dun & Bradstreet* employees who wrote the credit report, an issue upon which no evidence appeared in the record. It is rather a generic attribution of intent to a particular genre of speech. Justice Powell's reasoning can thus be understood as pointing toward a general legal conclusion that commercial credit reports are written primarily for the

³⁶¹ *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

³⁶² See *In re Primus*, 436 U.S. 412, 426-31 (1978).

³⁶³ *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

³⁶⁴ *Id.* at 705.

³⁶⁵ 472 U.S. 749 (1985) (plurality opinion).

³⁶⁶ *Id.* at 762.

purpose of profit, and that this purpose counts against their classification as public discourse.

The Court's use of this concept of generic intent is also evident in *Miller v. California*,³⁶⁷ in which the Court excluded obscene speech from the domain of public discourse, in part because obscene speech portrays "hard-core sexual conduct for its own sake, and for the ensuing commercial gain."³⁶⁸ The Court's attribution of intention to the generic category of obscene speech could not possibly have constituted an empirical description of the particular motivations of individual writers or film-makers. It must instead be interpreted as an ascriptive attribution of a specific social purpose to an entire genre of speech. The Court explicitly contrasted this purpose to the one it deemed appropriate to public discourse, the intent to bring "'about . . . political and social changes desired by the people."³⁶⁹

A second factor relevant to the determination of whether speech has been disseminated in a public manner relates to the size of its audience. The importance of this factor arises from the social foundations of public discourse. Widely distributed speech itself becomes a shared stimulus of the kind necessary for the creation of public discourse; thus the "emergence of the mass media and of the 'public' are mutually constructive developments."³⁷⁰ If speech about well-known matters deepens public experience, widely distributed speech makes even heretofore secret matters well-known, and thus extends the range of public experience. The same potential for impoverishing public discourse inheres in censorship of either kind of speech.

This fact, together with the concept of generic intent, can perhaps shed some light on the difficulties faced by the Court on the question of whether constitutionally to distinguish between media and non-media defendants.³⁷¹ Speech disseminated through the mass media is by definition widely distributed, and hence is singularly "public-generating."³⁷² The generic intent attributable to such speech, moreover, is at least presumptively that of desiring to contribute to public debate.³⁷³ Thus media speech, simply by virtue of the manner of its

³⁶⁷ 413 U.S. 15 (1973).

³⁶⁸ *Id.* at 34-35.

³⁶⁹ *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1966)). The common law tort of invasion of privacy contains a similar tension between the intent associated with commercial enterprise and the intent associated with public discourse. See *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986).

³⁷⁰ A. GOULDNER, *supra* note 181, at 95.

³⁷¹ For two recent accounts of these difficulties, see Smolla, Dun & Bradstreet, Hepps, and Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1561-64 (1987); Pownell, *Defamation and the Nonmedia Speaker*, 41 FED. COMM. L.J. 195, 210-15 (1989).

³⁷² See A. GOULDNER, *supra* note 181, at 106.

³⁷³ For a clear example of how this presumption operates in the common law, see Arrington

distribution, presents a strong prima facie claim to be classified as public discourse.³⁷⁴ Of course this claim is defeasible; obscene speech, for example, can be distributed through the mass media. But the existence and strength of the claim makes the exclusion of media speech from public discourse difficult and controversial.

Media speech is thus unique because it carries within it this prima facie claim to constitute public discourse, a claim based entirely on the manner of its distribution rather than on its content. This singularity explains the Court's continual attraction to a distinction between media and nonmedia defendants.³⁷⁵ But on close inspection the uniqueness of media speech lies only in the particular way in which it grounds its claim to be public discourse, a claim whose substance it shares with many other kinds of communication. Five members of the Court can therefore state, without internal contradiction, that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."³⁷⁶

A third factor that has influenced the Court in determining whether speech has been disseminated in a public manner is the identity of the audience to whom the speech is addressed. Speech that is widely distributed is assumed to be addressed to the public. The same assumption applies to speech that is actually communicated to only a few people, so long as it is distributed to strangers "at large." The question of audience arises, therefore, only in those cases where speech is specifically addressed to a few designated persons. In such a context, the Court has implied that the very same speech can be public discourse when communicated to one audience, but be constitutionally unprotected if communicated to another.³⁷⁷ Even speech "communicate[d] privately"³⁷⁸ to one person can be public discourse, if that person is, for example, a government official,³⁷⁹ rather than someone merely in contractual privity with the speaker.³⁸⁰

3. *The Failure of Contemporary Doctrine.* — The failure of contemporary doctrine, then, stems from two distinct causes. First, the

v. New York Times Co., 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), *cert. denied*, 459 U.S. 1146 (1983).

³⁷⁴ For examples of judicial recognition of the strength of this claim, see *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1983); and *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366, 568 P.2d 1359, 1362-63 (1977).

³⁷⁵ See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986); Smolla, *supra* note 371, at 1564.

³⁷⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting); see also *id.* at 773 (White, J., concurring in the judgment).

³⁷⁷ See *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983).

³⁷⁸ See *id.* at 146.

³⁷⁹ See *id.*; *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979).

³⁸⁰ Cf. *Dun & Bradstreet*, 472 U.S. at 762 (plurality opinion) (declining to extend first amendment protection to a credit report).

criterion of "public concern" lacks internal coherence. Second, the importance ascribed by the Court to the circumstances surrounding the dissemination of speech exerts extraordinary pressure toward specific, contextual judgment. Even if the "public concern" test could be given coherent and definitive meaning, the classification of speech as public discourse would nevertheless depend upon a wide array of particular variables inherent in specific communicative contexts. Thus notwithstanding the importance of the normative and descriptive concepts of public concern, the complex contextualizing force of circumstances will sometimes exclude from public discourse even speech whose content plainly pertains to democratic self-governance and well-known persons.

Chaplinsky v. New Hampshire,³⁸¹ in which the defendant publicly called a city marshal a "damned Fascist" and a "racketeer," provides an extreme example of this phenomenon. The specific context of the defendant's speech convinced the Court that the communication at issue was a species of "personal abuse" rather than public discourse, and that it therefore enjoyed no constitutional protection.³⁸² *Chaplinsky* is remarkable precisely because the subject of the defendant's speech was the official conduct of a public officer, a fact that would ordinarily qualify speech *prima facie* as public discourse. *Chaplinsky* illustrates, therefore, the powerful force of circumstances in the classification of speech. The same point might be made hypothetically by imagining what would happen if Flynt had privately mailed the *Campari* parody to Falwell's mother, or had telephoned Falwell in the middle of the night to read him the words of the parody. In such circumstances no court would classify the speech as public discourse, notwithstanding the unchanged content of Flynt's communication.

The many factors relevant to the classification of speech as public discourse thus resist expression in the form of clear, uniform, and helpful doctrinal rules. The Court's efforts to fashion simple doctrinal tests is no doubt due to the imperative of articulating crisp and predictable constitutional guidelines so that speakers will not face a margin of legal uncertainty that might induce self-censorship. It is consequently all the more remarkable that the Court's doctrine should be so demonstrably overwhelmed by the pressure of contextualization. Because of this pressure the Court's attempt to explain what it actually means to inquire whether speech involves "matters of public concern" has collapsed into the conclusion that the inquiry "must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."³⁸³

³⁸¹ 315 U.S. 568 (1942).

³⁸² See *id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

³⁸³ *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

B. An Alternative Conception of the Domain of Public Discourse

The underlying cause of this pressure toward contextualization becomes clear when we recall that the first amendment establishes a distinct domain of public discourse in order to implement our common belief in such values as neutrality, diversity, and individualism.³⁸⁴ It follows that the domain of public discourse will extend only so far as these values override other competing commitments, such as those entailed in the dignity of the socially situated self,³⁸⁵ in the importance of group identity,³⁸⁶ or in the necessary exercise of community authority.³⁸⁷ The boundaries of the domain of public discourse are located precisely where the tension between these competing sets of values is most intense, and where some accommodation must consequently be negotiated.

The boundaries of public discourse thus define the relative priorities of our national values. They mark the point at which our commitments shift from one set of goals to another. In locating these boundaries we use the Constitution to facilitate social conditions that reflect the hierarchy of our values, and in this way exercise "our capacity for human self-constituting."³⁸⁸ Because our values do not come to us in the abstract, but rather through the critical apprehension of our cultural inheritance, this process of self-constituting is also a process of self-discovery. For this reason "how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history."³⁸⁹

Courts manifest their respect for this distinctive history when they attempt to fix the boundaries of the domain of public discourse by reference to the social norms that create for us the "genre" of public discourse. These norms form part of our cultural inheritance; they determine when we instinctively perceive speech as "public." The common law tort of invasion of privacy, which looks to "the customs and conventions of the community" in order to determine whether speech is about matters "of legitimate public interest,"³⁹⁰ demonstrates the power of these norms. Such customs and conventions, like all community norms, are highly contextual. They have a "socially de-

³⁸⁴ See *supra* pp. 629-33.

³⁸⁵ See *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2609 (1989); *id.* at 2618 (White, J., dissenting); *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988); *Dun & Bradstreet*, 472 U.S. at 757-61 (plurality opinion).

³⁸⁶ See *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952); Post, *supra* note 158, at 329-35.

³⁸⁷ See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (authorizing the trier of fact in obscenity cases to apply "contemporary community standards").

³⁸⁸ Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 168 (1987).

³⁸⁹ *Id.* at 169.

³⁹⁰ RESTATEMENT (SECOND) OF TORTS § 652D comment h (1977); see *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

terminated variability"³⁹¹ which requires judgment to "take account of what the *situation* requires, not what an abstraction demands."³⁹² Their perception and application require the exercise of what Georg Simmel calls "moral tact."³⁹³

It is through the exercise of such "tact" that Justice Murphy in *Chaplinsky* "knew" that the defendant in the case was engaged in a private fracas rather than a public debate.³⁹⁴ The norms interpreted by this tact represent a tacit reconciliation of the competing demands of public discourse and community life. The law can ignore them only at the price of resolving conflicts of value through abstractions cut off from the conventions that give meaning to everyday experience.

There are, however, three reasons why it is impossible to maintain a pure fidelity to these norms. First, any such fidelity would require the kind of extreme contextualization ordinarily associated with the common law dignitary torts,³⁹⁵ and such contextualization would conflict with the need for first amendment rules to be clear and predictable in order to minimize self-censorship. Second, because the norms that define public speech, like all social norms, are the product of a specific community, and because different communities may have different norms, a pure fidelity to "moral tact" would hegemonically establish the dominance of the perspectives of a particular community.³⁹⁶ Third, and most important, a pure methodology of moral tact conflicts with the constitutional function of public discourse, which is to establish "a cleared and safe space" in which a common democratic will may be forged. The application of social norms must thus continually be examined in order to determine whether they actually serve this function.³⁹⁷

The logic of democratic self-governance, however, cannot itself provide an unqualified guide for doctrinal formulation. The normative concept of public concern lacks coherence precisely because all speech is potentially relevant to democratic self-governance, and hence

³⁹¹ E. GOFFMAN, *RELATIONS IN PUBLIC* 40 (1971); see Post, *Foundations of Privacy*, *supra* note 72, at 968-74.

³⁹² Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 460 (1987) (emphasis in original).

³⁹³ See G. SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 324 (K. Wolff trans. 1950).

³⁹⁴ Similarly, it is through the exercise of such tact that the Court has elaborated the "common-sense" distinction between commercial speech and public discourse. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

³⁹⁵ For a discussion of contextualization in the common law tort of invasion of privacy, see Post, *Foundations of Privacy*, cited above in note 72, at 968-72, 979-85.

³⁹⁶ For an elaboration of this point in greater detail, see *id.* at 976-78.

³⁹⁷ The Warren and Brandeis article, cited above in note 342, illustrates how an unreflective application of these norms can restrict public discourse in ways that are incompatible with the full exercise of democratic self-governance.

according to democratic logic all speech ought to be classified as public discourse.³⁹⁸ But this conclusion is unacceptable, for our commitment to the values of public discourse does not automatically and always override other competing commitments. The conclusion is also internally inconsistent, because the paradox of public discourse requires that critical interaction must at some point be bounded.³⁹⁹ Critical interaction suspends the civility rules that make possible rational deliberation. Hence the very possibility of rational deliberation may be endangered if the boundaries of critical interaction were to sweep too extensively. An uncontrollable expansion of critical interaction threatens to undermine the very purpose for which we establish public discourse.

Sensitivity to this potential dynamic is evident in a decision like *Bethel School District No. 403 v. Fraser*,⁴⁰⁰ in which the Court permitted a school to censor "lewd speech" on the grounds that it was "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"⁴⁰¹ so as to "inculcate the habits and manners of civility."⁴⁰² It is also apparent in *FCC v. Pacifica Foundation*,⁴⁰³ in which the Court permitted the FCC to enforce "contemporary community standards" to prohibit the broadcasting of "patently offensive" speech at "times of the day when there is a reasonable risk that children may be in the audience."⁴⁰⁴ In reaching this conclusion the Court reasoned that "broadcasting is uniquely accessible to children" and hence could frustrate "the government's interest in the 'well-being of its youth'"⁴⁰⁵ "and in supporting 'parents' claim to authority in their own household.'"⁴⁰⁶ In both cases, therefore, the Court refused to expand the arena of critical interaction in such a way as significantly to impair the processes by which communities socialize the young and cause them to identify with community norms that the Court viewed as necessary for rational deliberation.⁴⁰⁷

Thus just as the exercise of moral tact is by itself an insufficient guide to the demarcation of the boundaries of public discourse, so

³⁹⁸ See *supra* pp. 669-72.

³⁹⁹ See *supra* pp. 642-44.

⁴⁰⁰ 478 U.S. 675 (1986).

⁴⁰¹ *Id.* at 683.

⁴⁰² *Id.* at 681 (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

⁴⁰³ 438 U.S. 726 (1978).

⁴⁰⁴ *Id.* at 731-32 (quoting *In re Pacifica Found. Station*, 56 F.C.C.2d 94, 98 (1975)).

⁴⁰⁵ *Id.* at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).

⁴⁰⁶ *Id.* at 749 (quoting *Ginsberg*, 390 U.S. at 639 (1968)); see *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2836-37 (1989).

⁴⁰⁷ For a discussion of such processes, see Cahill, *Children and Civility: Ceremonial Deviance and the Acquisition of Ritual Competence*, 50 *SOC. PSYCHOLOGY Q.* 312 (1987).

also is the logic of democratic self-governance. In fact the placement of these boundaries appears to require accommodation to three very different kinds of concerns and judicial methodologies. The logic of democratic self-governance presses toward solutions that maximize the domain of public discourse. The paradox of public discourse requires a social and functional analysis of the dynamic interrelationship between critical interaction and rational deliberation. And the need to reconcile the values of public discourse with those of community life exerts pressure toward specific and contextual judgments.

The real problem with contemporary doctrine is not that it fails to attain some overarching reconciliation among these competing considerations, for it is doubtful that such a reconciliation can be theoretically achieved, but rather that it fails to articulate with sufficient clarity what is actually at stake in the definition of public discourse. We need to establish a domain of public discourse that is amply sufficient to the needs of democratic self-governance, but that is also reasonably sensitive to competing value commitments, to the pre-existing social norms that define the genre of public speech, and to the social consequences implied by the paradox of public discourse. Doctrinal formulation should assist courts in the evaluation of these considerations, rather than masking them under wooden phrases and tests.

Implicit in this conclusion is the startling proposition that the boundaries of public discourse cannot be fixed in a neutral fashion. From the perspective of the logic of democratic self-governance, any restriction of the domain of public discourse must necessarily constitute a forcible truncation of possible lines of democratic development. Because this truncation must ultimately be determined by reference to community values, the boundaries of a discourse defined by its liberation from ideological conformity will themselves be defined by reference to ideological presuppositions.⁴⁰⁸ *Fraser, Pacifica Foundation, Chaplinsky*, and *Miller* are all examples of such ideologically determined boundaries to the domain of public discourse.

This kind of ideological regulation of speech is deeply distasteful, and it is best that it remain so. Democratic self-governance could easily be eviscerated if such regulation became the rule rather than the exception. The ultimate fact of ideological regulation, however, cannot be blinked. In the end, therefore, there can be no final account of the boundaries of the domain of public discourse.⁴⁰⁹ We can and

⁴⁰⁸ It is therefore no accident that the Court has been led to identify "classes of speech" that "are no essential part of any exposition of ideas," the toleration of which "is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁴⁰⁹ In the words of the French political scientist Claude Lefort, "public space" in a democracy "is always indeterminate." C. LEFORT, *DEMOCRACY AND POLITICAL THEORY* 41 (D. Macey trans. 1988).

do have firm convictions about the core of that domain, but its periphery will remain both ideological and vague, subject to an endless negotiation between democracy and community life.

V. CONCLUSION

Public discourse lies at the heart of democratic self-governance, and its protection constitutes an important theme of first amendment jurisprudence. This Article has traced the implications of that theme for a single case, *Hustler Magazine v. Falwell*, and has examined the illumination that the theme can shed on some significant and troublesome aspects of first amendment doctrine. These include the protection of offensive speech, the distinction between fact and opinion, and the use of motivation as a criterion for the regulation of speech. The primary dynamic that underlies each of these doctrinal areas is the separation of public discourse from the domination of civility rules that define the identity of communities. The first amendment preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life. The ultimate dependence of public discourse upon community life, however, suggests that this neutrality and freedom is always limited, for the very boundaries of public discourse must be located in a manner that is sensitive to ensuring the continued viability of the community norms that inculcate the ideal of rational deliberation.

The paradoxical relationship between public discourse and community resembles the paradoxical relationship that public discourse bears to state organizations structured so as to achieve explicit public objectives. Within first amendment jurisprudence this second relationship is described by what has become known as public forum doctrine.⁴¹⁰ The doctrine recognizes that although democratic deliberation must occur through the medium of public discourse, the implementation of public decisions requires the formation of organizations that will internally regulate speech in an instrumental manner so as to achieve publicly determined results.⁴¹¹ Schools could not fulfill their institutional mission of educating the young unless they were enabled instrumentally to regulate student speech;⁴¹² the armed forces could not fulfill their institutional mission of guarding the nation unless they were enabled instrumentally to regulate the speech of

⁴¹⁰ For a detailed discussion of the doctrine, see Post, cited above in note 138.

⁴¹¹ See *id.* at 1765–84.

⁴¹² See *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 567 (1988); *Healy v. James*, 408 U.S. 169, 189 (1972); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 513 (1969).

military personnel.⁴¹³ Although profoundly inconsistent with the critical freedom and neutrality that define public discourse,⁴¹⁴ this regulation is required if democratic decisions reached through public discourse are to have any actual effect.

Public discourse may thus be conceived as situated in a triangular space. In one corner is community, which regulates speech in the interests of civility and dignity. In a second is organization, which regulates speech in the interests of instrumentally attaining explicit objectives. In a third corner is public discourse, which alone carries within it the freedom of critical interaction that we, in our culturally diverse nation, associate with democratic processes. The imperatives of community life and of bureaucratic organization are powerful, and perpetually encroach upon public discourse. Because public discourse in fact depends upon both for its continued existence and effectiveness, it is like the wind described by Herman Melville that "spins *against* the way it drives."⁴¹⁵

It is possible, of course, that the public discourse which is the object of contemporary first amendment doctrine is a passing phenomenon. "[B]ureaucratic organization and instrumental rationality"⁴¹⁶ may overwhelm public deliberation, and transform it into a largely technical search for the most efficient ways of implementing explicit and given objectives, such as national security. Or, *mirabile dictu*, "the civic republican tradition"⁴¹⁷ may actually give rise to "a universal community"⁴¹⁸ founded upon a "common commitment to a moral understanding,"⁴¹⁹ which will transform public discourse into the kind

⁴¹³ See, e.g., *Brown v. Glines*, 444 U.S. 348, 354 (1980) (upholding a regulation requiring Air Force personnel to obtain prior approval before circulating petitions on Air Force bases).

⁴¹⁴ This inconsistency was envisioned by Immanuel Kant:

Many affairs which are conducted in the interest of the community require a certain mechanism through which some members of the community must passively conduct themselves with an artificial unanimity, so that the government may direct them to public ends, or at least prevent them from destroying those ends. Here argument is certainly not allowed — one must obey. But so far as a part of the mechanism regards himself at the same time as a member of the whole community or of a society of world citizens . . . he can certainly argue without hurting the affairs for which he is in part responsible as a passive member. Thus it would be ruinous for an officer in service to debate about the suitability or utility of a command given to him by his superior; he must obey. But the right to make remarks on errors in the military service and to lay them before the public for judgment cannot equitably be refused him as a scholar.

I. KANT, *What Is Enlightenment?*, in *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT?* 85, 87 (L. Beck trans. 1959). For further discussion, see Post, cited above in note 138, at 1765–84.

⁴¹⁵ H. MELVILLE, *The Conflict of Convictions*, in *BATTLE PIECES AND ASPECTS OF THE WAR* 14, 17 (1960) (facsimile of 1866 ed.) (emphasis in original).

⁴¹⁶ W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* 226 (1982); see also J. SCHAAR, *LEGITIMACY IN THE MODERN STATE* 33–37 (1981).

⁴¹⁷ W. SULLIVAN, *supra* note 416, at 159.

⁴¹⁸ *Id.* at 170.

⁴¹⁹ *Id.* at 161. John Dewey, for example, viewed the public as but a prelude to the emergence

of communal deliberation traditionally protected by the common law privilege of fair comment.

Viewed from these perspectives, the vision of public discourse that has guided first amendment doctrine since the 1930's may represent merely a temporary phase of our national life, a momentary stay against the heavy tides of order and morality. It is difficult indeed to hold on to the radical negativity demanded by that vision. In the end only time, and our ultimate convictions, will tell.

of "The Great Community." See J. DEWEY, *supra* note 184, at 211. Hence, Dewey envisioned public discourse as bounded by the enforcement of civility rules. See *supra* p. 641.