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HUSTLER MAGAZINE v. FALWELL: A MISLITIGATED AND MISREASONED CASE

JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL, By Rodney A. Smolla.* New York: St. Martin's Press 1988. Pp. 336. $18.95

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Professor Rodney A. Smolla deserves acclaim for his workmanlike examination of first amendment tensions in *Jerry Falwell v. Larry Flynt: The First Amendment on Trial.* He illuminates the conflicting social traditions and moral ambivalence that find expression in the dichotomous lives of Reverend Jerry Falwell and the unlovable, cretinous Larry Flynt. He deftly traces the origins, tactics, and evolution of the litigation which eventuated in a holding that an advertising parody in *Hustler Magazine* depicting evangelist Jerry Falwell as a modern-day Elmer Gantry was constitutionally insufficient to justify an emotional distress damage award.

The reader is rewarded by a meticulous dissection of the pretrial and trial maneuvering of the lawyers. Vignettes of the protagonists, antagonists and supporting cast in the lawsuit are entertaining and exhilarating. Further, the legal, social, and political contexts that enveloped the case are illuminated with depth and animation.

Smolla ultimately pronounces that:

> The Supreme Court's opinion in *Falwell v. Flynt* is a triumphant celebration of freedom of speech. Far from signalling the disintegration of America's moral gyroscope, the opinion reaffirms the most powerful magnetic force in our constitutional compass: that essential optimism of the American spirit, an op-

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> timism unafraid of wild-eyed, pluralistic, free-wheeling debate (p. 303).

But that exhilarating exegesis of the first amendment does not sustain the *Hustler Magazine v. Falwell*[1] ruling. *Hustler Magazine*'s venomous satire of Falwell should have triggered damages liability because it was the product of bigotry and emotional hate, not mental deliberation. In addition, the "fighting words" exception to the first amendment[2] made Falwell's claim constitutionally irreproachable. These theories of liability, unargued by Falwell's attorneys, would have left undisturbed "wild-eyed, pluralistic, free-wheeling debate" (p. 303) correctly cherished by Smolla and first amendment votaries. One lesson of *Hustler Magazine v. Flynt* is that bad lawyering frequently makes bad law.

I. The Facts

Reverend Jerry Falwell evoked perfervid animosity in the publisher of *Hustler Magazine*, Larry Flynt. Flynt's rebellion and belligerence against convention and traditional American moral values was a congenital tropism. Falwell's conservative preachings and celebrity status outraged Flynt because they fostered what the latter belittled: adherence to organized religion; marital fidelity; sexual abstinence; rejection of homosexuality; abstemiousness; and condemnation of the obscene, indecent, and vulgar. Yet, the litigation between Flynt and Falwell did not arise from a personal vendetta. Its source was Flynt's virtually pathological animosity toward persons who believed bacchanalian behavior was less morally worthy than the puritanical.

The debasing advertisement triggering the *Hustler Magazine v. Flynt* lawsuit made no appeal to reason. It sought to villainize Falwell and religion generally by the exploitation of unthinking emotion and prejudice.

The advertisement portrayed Falwell as a featured celebrity endorsing the products of Campari Liqueur, including the following apocryphal interview:

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1. 108 S. Ct. 876 (1988), *rev'g* Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).
2. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

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 on 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? (pp. 1-2).

Inconspicuously typed below the advertisement was the disclaimer: "Ad Parody—Not to Be Taken Seriously." It discredited the advertisement as a contribution to robust debate over religion, religious creeds, or the pulpit in American life, or criticism of hypocritical preachers such as Jim Bakker or Jimmy Swaggart. As substantiated in a Flynt deposition, its purpose was vindictive: to settle an imagined score with Reverend Falwell who animadverted generally against practices characteristic of Flynt's private life (p. 54). Indeed, Flynt lamented his lawyer's advice regarding inclusion of the advertising disclaimer (p. 54).

Flynt fought Falwell's ideology not by stimulating reasoned discourse, but by a knowingly false, *ad hominem* advertisement calculated to marshal religiously bigoted responses in readers. The inflammatory advertisement purported to assert the following:

> - that Falwell's initial sexual experience was with his mother in an outhouse while inebriated;
> - that he frequently indulged in sexual intercourse with his mother;
> - that his mother was sexually promiscuous; and
> - that he was an alcoholic by necessity to enable him to preach a religious creed that he disbelieved.

None of these false insinuations contributes to reasoned debate or reflection over whether Falwell's teachings are meritorious. They are akin to Adolph Hitler's emotion-laden lies regarding persecution of German ethnics to justify aggression against Austria, Czechoslovakia, Poland, and Yugoslavia, or KKK tirades against "niggers." The goal of such speakers is to alter public sentiment by stimulating close-minded responses.

The advertisement's disclaimer added nothing to a reasoned examination of Falwell's character or religious or political views. Its purpose was to shield Flynt from a libel suit by renouncing factual assertions. Flynt probably hoped the vicious caricature of Falwell would injure his reputation, cause emotional distress, and evoke verbal or physical retaliation that would boost the circulation of *Hustler Magazine* and hurl Flynt into the public limelight.

In sum, the vulgar advertisement of Falwell undercut reasoned discourse and debate, the foremost building blocks of self-government. It sought to evoke an unthinking dislike of Reverend Falwell to gratify Flynt's perverse sense of joy in ridiculing traditional moral values. The advertisement was no more worthy of legal protection than a spite fence constructed to inflict harm for its own sake.[3]

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3. *See, e.g.*, Welch v. Todd, 260 N.C. 52, 133 S.E.2d 171 (1963); Larkin v. Tsavaris, 85 So. 2d 731 (Fla. 1956).

II. The Litigation

Falwell sued Flynt and *Hustler Magazine* for invasion of privacy, libel, and intentional infliction of emotional distress.[4] The district court directed a verdict against Falwell on the privacy claim. The jury returned a verdict for Flynt and *Hustler Magazine* on the libel claim. It found that the small-type disclaimer stripped the Falwell parody of any factual assertions in the mind of a reasonable reader.[5] According to the Supreme Court, only false statements of fact can justify damages in defamation suits initiated by public personages like Falwell.[6] The jury, however, ruled for Falwell on the intentional infliction of emotional distress claim. It awarded $100,000 in compensatory damages and $50,000 in punitive damages against both defendants. The court of appeals affirmed the damage judgment,[7] but the Supreme Court reversed.[8]

Writing for the Court, Chief Justice William Rehnquist declared that the government interest in protecting public figures from emotional distress inflicted by speech that is patently offensive and intended to cause such harm cannot trump the first amendment when the speech as reasonably interpreted contains no factual assertions regarding the public figure involved.[9] The first amendment, Rehnquist explained, furthers the common quest for truth and the vitality of society as a whole by safeguarding the free flow of opinions and ideas. There is no such thing as a "false" idea, he insisted.[10] The right to criticize public men and measures is a prerogative of American citizenship. According to Rehnquist, emotional distress damage claims are unavailable to public figures absent clear and convincing proof of a false statement of fact published with knowledge that it was false or with reckless disregard of whether it was accurate.[11] Otherwise, Rehnquist conjec-

4. 108 S. Ct. at 877-78.

5. *Id.* at 882-83.

6. Gertz v. Welch, 418 U.S. 323, 339-40 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967) (plurality opinion) (Warren, C.J., concurring).

7. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

8. 108 S. Ct. 876 (1988).

9. *Id.* at 882-83.

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

11. *Id.* at 880.

tured, public debate about public figures would be stifled and first amendment goals thwarted.

Rehnquist noted that political cartoonists such as Thomas Nast contributed to political colloquy and reflection through biting burlesques of "Boss" Tweed.[12] Other cartoonists similarly enriched political discourse with distorted imitations featuring President Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder. These types of cartoons were all calculated to cause emotional upset or injury in the caricatured figure.

The Chief Justice conceded that the Falwell ad parody was at best a "distant cousin" of political cartoons. He insisted, nevertheless, that neither an "outrageousness" standard nor any other principled rule would permit separating the one from the other without subverting the mission of the first amendment.[13]

Rehnquist acknowledged that "vulgar," "offensive," and "shocking" speech is subject to regulation in some circumstances, and that suppression of "fighting" words—those which by their very utterance inflict injury or tend to invite an immediate breach of the peace—is compatible with the first amendment.[14] Falwell's damage award, however, did not rest on these exceptions to free speech protection.

III. A Mislitigated and Misreasoned Case

The outcome of *Hustler Magazine v. Falwell* is unsettling and unsatisfactory for three reasons. First, the symbol and substance of the first amendment becomes an object of ridicule rather than reverence when it safeguards expression that laymen intuitively sense lacks any plausible nexus to cerebral activity, a common search for truth, or education. Additionally, the 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. As Justice Oliver Wendell Holmes recognized: "The law is

12. *Id.* at 881.
13. *Id.* at 881-82.
14. *Id.* at 882.

the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[15]

Further, Falwell should have recovered damages under the "fighting words" exception to the first amendment.[16] Flynt's parody was intended to provoke a breach of the peace or other retaliation by Falwell through falsely blackening his character and that of his mother. Why Falwell's attorney failed to argue a fighting words theory of recovery is puzzling.

A.

The influence of the first amendment should extend beyond its use in adjudicating cases. It should symbolize a preference for a mentally reflective citizenry and officialdom and a disdain for opinions or decision making dominated by arbitrariness or prejudice. As Justice Louis Brandeis remarked in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[17]

Flynt's vulgar parody of Reverend Falwell furthered none of the first amendment aspirations Brandeis elucidated. It did not foster the development of individual faculties. Indeed, the advertisement dulled mental development by stimulating the uncritical or prejudiced aspects of the mind to tarnish Falwell's credibility and ideas by falsely depicting the Reverend as a sexually aberrant, hypocritical alcoholic who enjoyed intercourse with his mother.

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15. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).
16. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
17. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

According to the jury, the advertisement conveyed no facts that might have enriched societal debate or individual understanding of Falwell as both a public figure and religious leader. The caricature did not assist an iota in fostering intelligent private or public opinion to inform government policy, church-state relations, or moral standards.

Neither did it aid the discovery or spread of political truth, nor vindicate the freedom to speak as you think. By its own disclaimer, the *Hustler Magazine* advertisement disavowed any effort to discover or spread any type of truth. Additionally, the parody did not reflect Flynt's "thinking" about Falwell or religion, but only unthinking hatred and bigotry. It was akin to asserting that all blacks are niggers afflicted with mental retardation and an insatiable lust to rape white women. Both stem from a resistance to thoughtfulness, not its employment.

The advertisement undermined the type of public debate of Falwell and his creed that advances enlightened self-government. Instead, it attempted to choke debate by falsely branding Falwell a moral and religious fraud. Education cannot occur without a watering of facts or plausible, thoughtful opinions.

The first amendment should symbolize to the citizenry a constitutional preference for reason over bigotry to safeguard a civilized society. *Hustler Magazine v. Falwell* mocked this desideratum by equating a vulgar advertisement communicating neither facts nor ideas with pointed political cartoons with earmarks of clever thinking. Adolph Hitler and his chief propagandist Joseph Goebbels in Germany stirred nationwide hatred of Jews by repeated appeals to anti-Semitism and religious stereotyping. Their rhetorical evils did not promote thinking within the German population, but only acquiescence in the Holocaust and complicity in Khristallnacht. Flynt's hate-filled parody of Reverend Falwell holds the same dangers of riotous conduct and mindless intolerance as did Hitler's tirades against the Jews.[18]

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18. These fears are reinforced by the current neo-Nazi video computer games proliferating in West Germany. Styled "The Nazi," one computer game presents 21 questions with one of three possible answers eliciting praise. For instance, to the question: "A Turkish boy comes at you, what do you do?" One answer is: "I'd bash him in." That answer is denounced as "too humane to the bastard." Praise is reserved for the answer: "I would give him a

Hustler Magazine v. Falwell wrongly teaches the citizenry that an outpouring of venom against a disliked person is as constitutionally respectable as informed, reflective discourse buttressed by pertinent facts. As Brandeis recognized in *Whitney*, a nation dominated by bigots or the close-minded is a nation unfit for democracy. That political axiom was verified in Germany and Italy under Nazi and Fascist rule. The Supreme Court should have sustained Falwell's damage recovery by proclaiming that the first amendment is not a suicide pact for the ethos of reason indispensable for civilized life.[19]

B.

Hustler Magazine v. Falwell contains the earmarks of a decadent society reluctant to draw distinctions between virtue and vice, between the ennobling and the degrading. The opinion of Chief Justice Rehnquist lamented an inability to demarcate a principled first amendment line between the political cartoons of Nast and debased, repugnant parodies exemplified by the Falwell portrayal.

But as Justice Holmes taught, all law depends on matters of degree "as soon as it is civilized."[20] As Holmes explained:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.[21]

The Supreme Court could have rationally separated political cartoons from Larry Flynt's bilious caricature of Falwell if it was confident that gratification of bigotry was less morally worthy than mental deliberation. The *Hustler Magazine* advertisement contained neither facts nor ideas generated by mental activity.

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potassium cyanide capsule and tell him it was a sweet." *See Nürnberger Nachrichten*, January 5, 1989.

The first amendment should not prevent the United States from prohibiting the importation or domestic production of such glorification of intolerance and hatred.

19. *Cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("for while the Constitution protects against invasions of individual rights, it is not a suicide pact.").

20. LeRoy Fibre Co. v. Chicago, Milw. & St. Paul Ry. Co., 232 U.S. 340, 354 (1914) (Holmes, J., concurring).

21. Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

Rehnquist erred in assuming that the advertisement conveyed an idea ascribable to thought. What was the idea? Was it that religious preachers should be disbelieved or religion disavowed? If so, why were not Jim Bakker or Jimmy Swaggart featured? The conspicuous failure of Rehnquist to describe the idea Flynt putatively communicated in the advertisement confirms the futility of the task, like attempting to handcuff an eel.

Supreme Court precedent justified a first amendment line between Flynt's appeal to religious prejudice and Nast's political satire. In *Young v. American Mini Theaters*,[22] the Court sustained a zoning ordinance prohibiting the location of "adult" theaters or bookstores within 500 feet of a residential area or within 1,000 feet of particularized business land uses. Writing for a plurality, Justice John Paul Stevens intuitively recognized a constitutional difference between genuine thought and gratification of degrading appetites. He remarked:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "specified Sexual Activities" exhibited in the theaters of our choice.[23]

In *Beauharnais v. Illinois*,[24] the Court upheld application of a statute making criminal the defamation of any " 'class of citizens, of any race, color, creed or religion [that exposed the objects] to contempt, derision, or obloquy, or which [was] productive of breach of the peace or riots.' "[25] The statute was invoked to punish the public distribution of an emotionally inflammatory leaflet designed to arouse racial hatred. The leaflet demanded that Chicago officials " 'halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons by the Negro,' "[26] called for the unity of one million self-respecting white Chicagoans, and vituperated that " '[i]f persuasion and the

22. 427 U.S. 50 (1976) (plurality opinion).
23. *Id.* at 70.
24. 343 U.S. 250 (1952).
25. *Id.* at 251.
26. *Id.* at 252.

need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.' "[27]

Speaking for the Court, Justice Felix Frankfurter noted that " '[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.' "[28] Frankfurter understood that the utterances at issue sought exploitation of man's emotions and racial prejudice, not development of informed opinion. He recounted the teachings of history:

> From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.[29]

Frankfurter added that foreign immigration and Negro migration to Illinois during the war years erupted in race riots and bombings fomented in part by "false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[30] The *Beauharnais* decision thus differentiated between speech calculated to provoke emotional frenzy and speech enhancing understanding or contemplation.

In *Bethel School District v. Fraser*,[31] the Court sustained the discipline of a high school student for delivering a political nominating speech replete with sexual innuendo and metaphor. Writing for the Court, Chief Justice Burger maintained:

> [I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of

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27. *Id.*
28. *Id.* at 257 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).
29. *Id.* at 259 (footnotes omitted).
30. *Id.* at 261.
31. 478 U.S. 675 (1986).

> terms of debate highly offensive or highly threatening to others.[32]

The *Bethel* decision acknowledges the legitimate government interest in fostering appeals to reason rather than unthinking visceral responses to bolster intellectual habits that underwrite community decency.

In short, Rehnquist could have drawn a principled line in *Hustler Magazine v. Falwell* that denied first amendment protection to *Hustler Magazine*'s ad, which was calculated to arouse emotional hostility towards Falwell, while protecting political cartoonists who employ contemplative faculties in their trade. Permitting Falwell protection from Flynt's parody would not place religious figures or religion beyond harsh reproach or scrutiny. Flynt might have republished Clarence Darrow's devastating cross-examination of William Jennings Bryan at the celebrated *Scopes* trial if he genuinely wished to question or jape at religious dogma. He might have hired investigative reporters to follow the sexual and financial misdeeds of Jim Bakker and Jimmy Swaggart if he wished to expose moral failings in religious figures. A Falwell litigation victory could have avoided suppression of any speech or criticism of religious figures or creeds that is the product of thought.

The progress of civilization has been the progress of reason over close-minded intolerance. In constitutionally equating Larry Flynt's vices with Thomas Nast's virtues, *Hustler Magazine v. Falwell* is an obstacle to that progress. The Constitution was drafted and ratified by a society that saluted the Age of Reason and inveighed against the arbitrary, the intolerant, and the intellectually vacuous. That discrimination deserves expression in first amendment jurisprudence.

C.

The "fighting words" exception to the first amendment endorsed in *Hustler Magazine v. Falwell* provided an additional legal theory justifying a Falwell triumph. In *Chaplinsky v. New Hampshire*,[33] the Court upheld punishment for the use of insulting "fighting"

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32. *Id.* at 683.
33. 315 U.S. 568 (1942).

words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[34]

The *Hustler* ad parody of Falwell epitomizes fighting words. The jury found that the false portrayal of Reverend Falwell as a morally decadent hypocrite who enjoys sex with his mother engendered emotional distress in Falwell. That type of distress would tend to incite in an average person a desire for physical retaliation to defend honor. The incitement of Falwell clearly was as great as that punished in *Chaplinsky* in which the Court declared the epithets "damned racketeer" and "damned fascists" would provoke the ordinary individual to reprisal.[35]

Why did Falwell's attorney omit a fighting words justification for a damage recovery? Professor Smolla leaves the issue unexplored. A fighting words theory carried the attraction of avoiding more pioneering first amendment doctrine withdrawing protection for expression calculated to appeal to bigoted or irrational instincts.

Virginia law arguably recognizes a tort action for psychological injuries inflicted by fighting or insulting words. A Virginia criminal statute punishes false publications or words "which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace."[36] A violation of such criminal laws frequently establishes the foundation for a private tort remedy entitling the injured party to damages.[37]

CONCLUSION

Professor Smolla's informative chronicling of the *Hustler Magazine v. Falwell* litigation is a delight for those who celebrate reasoned discourse. It is provocative, insightful, lucid, but ultimately unpersuasive in concluding that a defeat for Flynt would have meant a defeat for the first amendment and the cultivation of intellectual customs that sustain tolerant societies.

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34. *Id.* at 571-72.
35. *Id.* at 574.
36. VA. CODE ANN. § 18.2-417 (1988).
37. *See* PROSSER AND KEETON ON TORTS § 36 (W. Keeton 5th ed. 1984).