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## Preacher Man v. Porn King: A Legal, Cultural, and Moral Drama Starring Jerry Falwell, Larry Flynt, and the First Amendment

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# Preacher Man v. Porn King: A Legal, Cultural, and Moral Drama Starring Jerry Falwell, Larry Flynt and the First Amendment

by *Tory L. Lucas*

## Introduction

When the Reverend Jerry Falwell (Falwell) died on May 15, 2007, numerous media reports chronicled Falwell's life, focusing on his religious and political contributions to American society. As lawyers, we might focus on Falwell's legal contributions. Specifically, we should remember that Falwell helped produce a landmark United States Supreme Court decision on the scope of the First Amendment's protection of speech.

If you take one part proselytizing, political Southern Baptist televangelist, one part obnoxious, media-seeking



pornographer, and one part First Amendment free speech, the combustible mixture is likely to produce a colossal legal, cultural, and moral battle. That is precisely what happened between 1983 and 1988 in the famous free-speech case of *Falwell versus Larry C. Flynt (Flynt) and Hustler Magazine (Hustler)*.<sup>1</sup>

Observers of the law might ask why Falwell forged a path to a landmark First Amendment free-speech case and provided enormous free publicity to Flynt's First Amendment and pornography crusade by challenging the legality of a crude and distasteful ad that Flynt published in *Hustler* that was a sexual parody of a famous Campari Liqueur advertisement. Instead of parodying Campari, however, Flynt used the ad parody to depict Falwell as a drunken hypocrite who had engaged in sexual relations with his mother. Hoping to provide members of the Nebraska Bar Association with some light reading drizzled with legal commentary, this article will introduce the famous players involved in the case, discuss the case itself along with its historical significance, and offer some commentary on why Falwell might have sued Flynt and *Hustler* in the first place.

Before going any further, however, it is only responsible to warn the reader that this article contains graphic and adult language. Any article quoting Flynt would be hard-pressed not to include some type of viewer discretion warning. In an effort to diminish the extent of shocking language and to somewhat sanitize this article for public consumption, I have taken the liberty of performing a bit of censoring to tone down Flynt's rhetoric by substituting lesser offensive words for the more offensive words used by Flynt. To be sure, Flynt and *Hustler* felt like they were under no obligation to self-censor and did not. With a little imagination, of course, you are free to reverse

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course on my censorship by replacing my toned-down language with the authentic and colorful language used by Flynt.

## The Players

To better understand *Falwell v. Flynt*, one must understand the nature of the people involved in the case. When the major players are exposed, it should have been obvious that a battle royal was brewing. There can be no doubt that the players involved in the case made this legal, cultural, and moral battle a prominent media spectacle.

Before his recent death, Falwell was a nationally known televangelist and fundamentalist Southern Baptist minister. He founded the Old Time Gospel Hour, the Moral Majority, and Liberty University. He was the pastor of Thomas Road Baptist Church in Lynchburg, Va, for decades. Some credit—or accuse depending on political stripe—Falwell of being a large part of the political movement often referred to as Christian conservatism. To be sure, Falwell constantly sought ways to press his religious and political beliefs in any and all available media outlets. A federal court once described Falwell as being “the central focus of abiding public interest and concern” who “has aggressively nurtured the public spotlight to promote and disseminate his personal views to as wide an audience as possible.”

Falwell’s nemesis, Flynt, who is still alive, also has spent a lifetime nurturing “the public spotlight to promote and disseminate his personal views.” While Falwell spent his life advocating his conservative religious and political beliefs, Flynt has devoted his life to making money in the sex industry and to engaging in shocking and distasteful behavior. Flynt adoringly describes himself as the undisputed King of Porn. Flynt joined the United States Army when he was 14 by lying about his age. Flynt later served in the United States Navy. By the time Flynt reached the age of 21, he had been bankrupt once and married twice. He later founded *Hustler*, which has proven to be a lucrative-yet-controversial adult magazine. Flynt’s initial folly in the sex industry began when he opened a strip bar called the Hustler Club in Ohio. Flynt later opened a string of strip bars by the same name. To publicize the strip bars, Falwell created a newsletter bearing the same name, *Hustler*, and that move began Flynt’s sex empire. Within four years of turning the strip-bar newsletter into a circulated magazine, *Hustler* reaped \$13,000,000 in profits and had 2,000,000 subscribers. With his wealth and fame growing, Flynt commissioned a statue in his honor. Consistent with his desire to engage in shocking behavior, the statue depicted Flynt as an eight-year-old boy losing his virginity to a chicken on his grandmother’s farm. From the start, Flynt’s irreverence to anything and everything was on full display. Over the years, *Hustler* has published graphic sexual photographs of women and men, which may not be as shocking as its publishing scenes dealing with excrement, mutilation, bestiality, bondage, and dismemberment. Needless to say,

Flynt’s outrageous and shocking ad parody of Falwell certainly was not out of the ordinary given Flynt’s track record.

Falwell’s choice of an attorney to represent him against Flynt and *Hustler* reeks with irony. For legal representation, Falwell picked Norman Ray Grutman, the New York attorney made famous by representing Bob Guccione and *Penthouse Magazine* (*Penthouse*), a major competitor of *Hustler* in the adult magazine business. An obvious reason for Falwell’s choice of attorney was Grutman’s representation of *Penthouse* in an eerily similar case involving an ad parody with explicit sexual depictions of Miss Wyoming competing in the Miss America Pageant. See *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). Additionally, Grutman represented *Penthouse* and defeated Falwell in 1981 when Falwell sued *Penthouse* for printing an interview that Falwell had given to two freelance journalists. See *Falwell v. Penthouse Int’l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981). Grutman’s later receipt of legal fees from Falwell and his religious ministry—in essence, an attorney who made his livelihood representing *Penthouse* receiving his fees from little old church ladies—has been described as “a sort of Baptist-to-*Penthouse* Iran-Contra connection.” Grutman has stated, however, that he did not charge Falwell his full rate because of the principle involved. Perhaps another irony.

Flynt’s attorney, Alan Isaacman, has been a mainstay for Flynt for years, mainly because Flynt routinely finds himself in trouble with the law. Isaacman, a Harvard Law School graduate and member of an entertainment law firm in Beverly Hills, has represented numerous Hollywood celebrities, including Lionel Richie, Geraldo Rivera, Jerry Lewis, and Rock Hudson. His main client, however, has always been Flynt. It has been said that Isaacman is a perfect fit for Flynt, because Isaacman has never subscribed to *Hustler* and comes across as kind of boyish. Isaacman’s persona implies that he has absolutely no sleaze about him, a curious and telling juxtaposition to Flynt’s persona.

Finally, even the trial judge added drama to the case. The trial judge in *Falwell v. Flynt* was Chief Judge James Clinton Turk of the United States District Court for the Western District of Virginia. Judge Turk had been the trial judge in the earlier First Amendment case in which Falwell sued *Penthouse*, a case won by Grutman on behalf of *Penthouse*. Judge Turk also was the trial judge in the *Penthouse* case involving the ad parody of Miss Wyoming. Grutman again defended *Penthouse* in that case and won.

## The Case

What actually happened to prompt Falwell to sue Flynt and *Hustler*, setting up a legal, cultural, and moral drama that played out over the course of the 1980s? The November 1983



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edition of *Hustler* contained a full-page ad parody implying that Falwell's first sexual experience was with his mother in an outhouse. Centered at the top of the page in big, bold letters was the title, Jerry Falwell talks about his first time, with Falwell's photograph appearing just beneath the title. A small asterisk appeared next to the title, referring the reader to the very bottom of the page where, in very small letters, a legal disclaimer of sorts appeared: AD PARODY—NOT TO BE TAKEN SERIOUSLY. The magazine's table of contents referred to this page as a parody: Fiction. Ad and Personality Parody. To even the most casual observer, it should have been painfully apparent that Flynt and *Hustler* were parodying a famous public figure.

A Campari Liqueur bottle and a glass of Campari graced the bottom of the page, along with the famous Campari advertising slogan, Campari—You'll never forget your first time. *Hustler* based its ad parody on a very successful advertising campaign used to promote Campari. Campari is an alcoholic aperitif, a type of bitters, that dates to 1860s Italy. At least since 1900, Campari has used hip and fashionable advertising to market its product. Relevant here, Campari used a highly successful, even if somewhat controversial, advertising campaign that involved celebrities discussing their first time drinking Campari. Although the advertisements focused on Campari, each advertisement contained a double entendre with obvious sexual undertones, making it appear that the celebrities also were discussing their first sexual experiences. This series of Campari advertisements gave *Hustler* its motivation for depicting Falwell's "first time."<sup>22</sup>

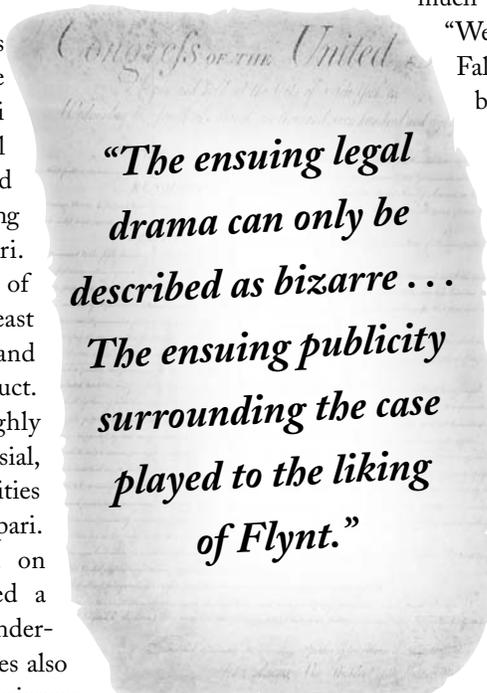
The *Hustler* ad parody appeared to trace the Campari advertisements' use of sexual innuendo by having Falwell discuss his "first time" in the context of drinking Campari. In addition to depicting Falwell as discussing his first time drinking Campari, however, the ad parody also depicted Falwell's discussing his first sexual experience. In a question-and-answer format, the ad parody began with Falwell saying his "first time was in an outhouse outside Lynchburg, VA." With an apparent reference to Campari, Falwell then stated that he "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!'" When the "Interviewer" asked Falwell if it was odd that he made it with his mother, Falwell responded, "I don't think so. Looks don't mean that much to me in a woman."

The ad parody then had Falwell explaining that he and his mother "were drunk off [their] God-fearing asses on [a] Campari" drink called a "Fire and Brimstone" and that his "Mom looked better than a Baptist whore with a \$100 donation." The "Interviewer" then stated, "Campari in the crapper with Mom. How interesting. Well, how was it?" Falwell responded that the "Campari was great, but Mom passed out before I could [ejaculate]." Obviously, the ad parody implied that Falwell and his mother had sex in the outhouse. When the "Interviewer" asked, "Did you ever try it again," Falwell responded, "Sure. Lots of times. But not in the outhouse. Between Mom and the [feces], the flies were too much to bear." When the "Interviewer" stated, "We meant the Campari," the ad parody had Falwell saying, "Oh, yeah, I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bull[] sober, do you?"

At the bottom of the interview and above the Campari advertising slogan, the ad parody again referenced Campari: "Campari, like all liquor, was made to mix it up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnoekered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. **Campari. The mixable that smarts.**"

After *Hustler* published the ad parody of Falwell and his mother, a reporter asked Falwell if he had seen the copy of *Hustler* containing the ad parody. Falwell, of course, indignantly replied that he had not. Curious about the ad parody, Falwell sent an employee to retrieve a copy of *Hustler*, not wanting to go buy it himself. When Falwell saw the ad parody, he was incensed. Falwell responded by filing a \$45,000,000 federal lawsuit against Flynt and *Hustler*. Falwell pressed three theories: first, he claimed invasion of privacy, i.e., his name and likeness were wrongly appropriated for advertising or trade without his consent; second, he asserted a defamation claim of libel; and third, he claimed intentional infliction of emotional distress.

The ensuing legal drama can only be described as bizarre. Rodney A. Smolla, the current Dean of the University of Richmond School of Law and the author of a book entitled, *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*, described the trial as "the sort of political and cultural drama that periodically plays itself out in American courtrooms, reminiscent of Tennessee's Scopes 'Monkey Trial' of 1925 or the battle between Abbie Hoffman and his cohorts against



*Congress of the United States*  
"The ensuing legal drama can only be described as bizarre . . . The ensuing publicity surrounding the case played to the liking of Flynt."

Judge Julius Hoffman and Mayor Richard J. Daley in the ‘Chicago 7’ trial.” The ensuing publicity surrounding the case played to the liking of Flynt.

## Enormous Publicity

Even a casual observer of Flynt’s career might have issued a warning to Falwell to be cautious in pursuing litigation against Flynt. Flynt, the self-proclaimed King of Porn, has never met a camera he did not like nor has he ever failed to capitalize on an opportunity for publicity. He also has openly crusaded for his beliefs over the years. Falwell’s lawsuit simply fanned Flynt’s flames for publicity.

After the ad parody ran in November 1983, Falwell raised money for a legal battle against Flynt. True to form, Flynt capitalized on the controversy spawned by the lawsuit by again running the ad parody in March 1984. Instead of the ad parody appearing in a single issue of *Hustler*, the ad parody was widely disseminated by Falwell, Flynt, and the media.

Once Falwell sued Flynt and *Hustler*, Flynt did not simply lie down and defend the case on the merits. He wanted to play it for all it was worth. On August 8, 1984, Flynt filed a federal lawsuit in California against Falwell, the Moral Majority, and the Old Time Gospel Hour. Can you guess what the lawsuit claimed? Flynt claimed that Falwell infringed on Flynt’s copyright of the ad parody by using it to raise money for a court battle against Flynt. The drama was only in its infancy.

It was a near certainty that Flynt was going to use the case to abuse the legal process and pester Falwell. Indeed, Flynt’s antics during litigation are almost legendary. An enjoyable movie entitled, *The People vs. Larry Flynt*, accurately portrayed some of Flynt’s more notorious courtroom stunts. One of Flynt’s most famous stunts was rolling<sup>3</sup> into federal court wearing the American flag as a diaper. Additionally, Flynt’s refusal to release the infamous John DeLorean tapes regarding the government’s drug bust of the famed millionaire also provided Flynt with substantial media coverage. Flynt’s refusal to comply with a court order resulted in his being held in contempt.

While in jail for his conduct in the DeLorean case, Flynt gave his deposition in the Falwell case. During the deposition, Flynt refused to refer to Falwell by his proper name. He insisted on referring to Falwell as “Farwell.”<sup>4</sup> In addition to butchering Falwell’s name, Flynt would not even state his own name. When asked to state his name, Flynt responded, “Christopher Columbus Cornwallis I.P.Q. Harvey H. Apache Pugh. They call me Larry Flynt.” When asked if he is known as Larry Flynt, he said, “No. Jesus H. Flynt, Esquire.” Flynt also testified in his deposition that he did not write the ad parody of Falwell, claiming Yoko Ono and Billy Idol actually wrote the ad parody. When Flynt was asked in the deposition whether he

intended to destroy or harm Falwell’s integrity, he responded that his intent was “[t]o assassinate it.” According to Flynt, Falwell was a glutton, a liar, and a hypocrite.

Using his increasing fame and notoriety to his advantage, Flynt ran for President in 1984. His campaign slogan was *A Smut Peddler Who Cares*. Flynt even named Jesus to replace him as the publisher of *Hustler*. According to Flynt, Jesus also happened to endorse Flynt for President, which Flynt described as the first time in 2,000 years that either Jesus, “the Holy Ghost, or the Father has ever endorsed a political candidate.”<sup>5</sup> Needless to say, *Hustler* sales increased as a result of the case and Flynt’s publicity stunts.

## Landmark First Amendment Battle

In addition to Falwell’s failure to heed any cautionary warnings that Flynt would use the lawsuit to conduct a media circus, I assume that Grutman counseled Falwell that the First Amendment would not lie dormant during Falwell’s lawsuit against Flynt and *Hustler*. Organizations and individuals devoted to First Amendment causes also decided not to stand mute. A massive lawsuit against a magazine and its publisher over a parody of a public figure sent shockwaves through the First Amendment community. Although very few organizations or individuals stood up publicly for Flynt’s ad parody of Falwell, many organizations supported Flynt’s Constitutional fight. Believing the First Amendment’s protection of free speech was under attack, many organizations stood to defend it. Organizations later filing briefs of *amici curiae* with the Supreme Court included the American Civil Liberties Union, the Association of American Editorial Cartoonists, the Association of American Publishers, Home Box Office, the Law and Humanities Institute, the Reporters Commission for Freedom of the Press, Richmond Newspapers, and Volunteer Lawyers for the Arts.

From the beginning, Falwell had an extremely challenging case to win in the face of Flynt’s First Amendment protection. Ever since the Supreme Court decided the landmark free-speech case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), it has been undisputed that the Constitution protects “freedom of expression upon public questions . . . to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” The Supreme Court has declared that “a fundamental principle of our constitutional system” is the “maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people.” Indeed, it has been widely recognized that “a prized American privilege [is] to speak one’s mind, although not always with perfect good taste, on all public institutions.”



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Over six decades ago, Judge Learned Hand wrote that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” Indeed, Justice William J. Brennan, writing for the Court in *Sullivan*, explained that America has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” As early as 1940, the Supreme Court recognized, “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.”

Thus, the Supreme Court in *Sullivan* held that when speech impacts a public official, a defamation claim—whether slander or libel—relating to official conduct can only pass Constitutional muster when the speech “was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Speech about public officials not intended to be true, such as rhetorical hyperbole, however, is by definition exempted from defamation claims. In the face of *Sullivan*, Falwell and Grutman faced some weighty constitutional issues in their attempt to recover damages against Flynt and *Hustler* for the ad parody of Falwell. First, courts were confronted with the question of whether Falwell, a public religious figure who often spoke about political and cultural issues, should be treated like a public official for First Amendment purposes. Second, courts had to determine whether a public figure could manufacture an intentional infliction of emotional distress claim to avoid asserting a defamation claim that fell under *Sullivan’s* heightened standard. The final issue involved a tricky analytical maneuver that tried to untangle speech with a political purpose from speech with no purpose other than to cause personal pain, i.e., speech intended to inflict emotional harm on the public figure. Flynt’s ad parody of Falwell was the perfect test case for a resolution of these issues and for a determination of *Sullivan’s* reach.

Notwithstanding long odds, Falwell was allowed to try his case to a jury. After Falwell and Flynt presented the case to the jury, Judge Turk dismissed Falwell’s invasion of privacy claim. But Judge Turk allowed the jury to consider the libel and intentional infliction of emotional distress claims because Flynt

had openly admitted that he had intended to assassinate Falwell’s integrity by the ad parody, in essence conceding that he had intended to inflict emotional distress on Falwell. The jury returned a verdict for Flynt and *Hustler* on Falwell’s libel claim, finding that no reasonable person would have believed that the ad parody described actual events. On the other hand, Grutman and Falwell secured a jury verdict for damages for the intentional infliction of emotional distress claim. The jury awarded \$100,000 in actual damages, \$50,000 in punitive damages against Flynt, and \$50,000 in punitive damages against *Hustler*. The United States Court of Appeals for the Fourth Circuit affirmed.

Five judges of the Fourth Circuit, however, dissented from the court’s denial of a petition for rehearing en banc. In an eloquent, passionate, and detailed opinion penned by Judge J. Harvie Wilkinson III, who has appeared on many short lists for nominees to the Supreme Court, the dissent implored their colleagues to reconsider such a monumental and important free-speech case. The dissent strongly believed that the panel opinion’s allowing “political figures to recover solely for emotional harm . . . surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate.” The dissent likened Falwell to a political figure because he “is at the forefront of major policy debates; he enjoys the most intimate access to the highest circles of power; he possesses a forum for presenting his views and establishing his character; he has sought and relished the give-and-take of political combat.” According to the dissent, Falwell was a member of a certain category of public figures, similar to public officials, that although he did not hold public office or cast votes on policy issues, he was an integral part of political life in the same vein as officials who do hold public office and vote. To be sure, the dissent made clear that although the Supreme Court has distinguished between public officials and public figures whose fame is not tied to political achievements, such a distinction did not exist in a case involving Falwell.

Even though the dissent felt “a profound repugnance for the communication” in the ad parody, believed that the ad parody “was an utterly unwarranted and offensive personal attack” on Falwell, and considered *Hustler* to be “a singularly unappealing beneficiary of First Amendment values and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate,” the dissent nonetheless believed that the First Amendment did not allow Falwell to recover emotional distress damages—or damages under any other theory—as a result of the ad parody. The dissent made clear that public figures such as Falwell should expect to draw “the vehement, caustic, and sometimes unpleasantly sharp attacks” that are certain to, and are indeed intended to, create emotional distress.

The dissent explained why free-speech principles protected Flynt's ad parody: "The reason for this is obvious. Political satire and parody aim to distress. This genre of commentary depends upon distortion and discomfiture for its effect. The best political humor may be in bad taste. The cartoonist's nightmare may be that the intended victim of all his insult and ridicule indeed fails to suffer emotional distress, but instead finds the whole thing merely funny and calls up the cartoonist, not to complain, but to ask for the original." Although less than thrilled to protect Flynt's speech, the dissent recognized that in order to adequately protect speech against public officials, Flynt's speech also had to be protected: "Nothing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress. Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air. While *Hustler's* base parody is unworthy of this or any tradition, the precedent created by the cause of action against [Flynt and *Hustler*] may one day come to stifle the finer forms of this genre." Indeed, the dissent thought that there exists nothing "more thoroughly democratic than to have the high-and-mighty lampooned and spoofed."

Noting that the jury expressly found that that no reasonable person could have believed that the ad parody contained actual facts about Falwell's personal life, the dissent explained that the jury obviously took the ad parody "for what is was, namely a tasteless, silly, and scurrilous bit of nonsense." The dissent noted that the only way a public figure such as Falwell could recover from such an ad parody would be to allow recovery whenever speech "strayed beyond the bounds of common decency." The dissent was unwilling to forge this path into uncharted territory. Agreeing that the defense verdict on the libel claim appropriately applied First Amendment law, the dissent implored the court to advance a legal principle that once the libel claim was defeated, the case should have ended: "An additional action for emotional distress does not belong in the hands of political figures," because "the constitutional principles of freedom of expression preclude attaching adverse consequences to utterances other than defamatory falsehoods."

In the end, the dissent showed that allowing the tort of intentional infliction of emotional distress to proceed against a public figure in the face of a defeated defamation claim would "prove a profound and ominous inhibitor of speech" and

"threatens to disrupt our historic reliance on [the] marketplace [of ideas] to regulate political speech." The dissent would have reversed the district court's entry of judgment on the emotional distress claim: "The possibility that controversial political figures could run to court and recover for emotional distress, when a jury has found no false statement of fact, no libel, and no reputational damage, undermines the First Amendment and its core purpose of protecting political debate."

The Supreme Court viewed the case in an entirely different light than did the district and circuit courts, instead agreeing with much of what was written by Judge Wilkinson. Falwell's legal victory against Flynt and *Hustler* lasted only as long as it took for the Supreme Court to hear and decide the case.

Say what you want about Flynt and *Hustler*, but Falwell's lawsuit involved a parody of a public figure, perhaps striking near the heart and soul of free-speech rights in America. In an opinion written by the late Chief Justice William Rehnquist, a unanimous Supreme Court exerted little effort in reversing the Fourth Circuit. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

According to the Supreme Court, the case presented the "novel question" of "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." The Court wasted little time recognizing that protecting Falwell against the rhetorical ravages of Flynt would undermine the First Amendment's protection across the board. The Court explained that the heart of First Amendment protection is "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." The Court explained that "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." According to the Court, the First Amendment actually encourages robust political debate which no doubt tends to produce speech that is critical of public officials and public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."

Addressing the argument that Flynt's speech was unprotected because it served no other purpose than to assassinate Falwell's integrity, the Supreme Court noted that "even when a

Congress of the United States

***"While *Hustler's* base parody is unworthy of this or any tradition, the precedent created by the cause of action against [Flynt and *Hustler*] may one day come to stifle the finer forms of this genre."***

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speaker or writer is motivated by hatred or ill will his expression [is] protected by the First Amendment.” The Court understood that the First Amendment’s protection of political speech—political cartoons and satire in particular—could only continue unabated if the First Amendment protected Flynt’s ad parody of Falwell: “Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject . . . The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided.” Countering Falwell’s argument that the outrageous ad parody distinguished it from political cartoons, the Court responded, “There is no doubt that the caricature of [Falwell] and his mother published in *Hustler* is at best a distant cousin of [historical] political cartoons . . . , and a rather poor relation at that. If it were possible [to lay] down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ‘outrageous’ does not supply one. ‘Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. 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.”

Extending *Sullivan’s* reach to Falwell’s lawsuit, the Supreme Court held, “We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” Applying this principle to Flynt’s ad parody of Falwell, the Court explained that Falwell clearly was a public figure as contemplated by First Amendment jurisprudence. Given the holding that public figures enjoyed no right to pursue a tangential tort of intentional infliction of emotional distress claim for outrageous conduct because such a claim is inconsistent with the First Amendment, the Court stated that the tort of defamation was the only available tort that Falwell could pursue to recover for harm caused by Flynt’s ad parody. Because Falwell was a public figure, any hope of recovery on his libel claim was lost when the jury found that no reasonable person could have viewed the ad parody as describing actual

facts or events. Siding with Flynt and *Hustler*, the Court reversed the judgment in Falwell’s favor.

Perhaps ironically, even Falwell never really believed he had a chance of winning. In 1997, Falwell confessed that he had anticipated losing at the circuit level, but he certainly was not surprised when he lost unanimously before the Supreme Court.<sup>6</sup>

## Why Did Falwell Sue Flynt and *Hustler*?

To me, Falwell had to anticipate a major legal, cultural, and moral battle when he filed his \$45,000,000 lawsuit against Flynt. Falwell surely knew Flynt would use Falwell’s good-versus-evil lawsuit as free publicity to sell more magazines and engage in even more outrageous behavior. Falwell also had to be aware that serious free-speech issues were involved and his chances of succeeding were slim. Why then did Falwell pursue litigation against a backdrop of major free-speech issues when his opponent would have an absolute field day with the case? Even if Falwell believed that he could prevail in his lawsuit against Flynt and *Hustler*, I believe three other reasons underpinned Falwell’s decision to bring the lawsuit. First, Falwell sued for money. Not only was Falwell hoping to garner an outsized judgment, he also was keenly aware that he could raise substantial sums of money by the frequent publicity that this kind of legal, cultural, and moral battle would bring. Second, Falwell’s feelings were hurt because his deceased mother was depicted in Flynt’s despicable ad parody. As many sons might do, Falwell wanted to defend the honor of his deceased mother. Finally, Falwell likely pursued litigation because he really believed that it was a fight of good versus evil, a preacher versus a porn king. Falwell thought that it was unthinkable that good should cower to evil.

## Money

Falwell, like Flynt, used the case to raise loads of money. Falwell’s lawsuit against Flynt and *Hustler* itself sought \$45,000,000 in damages, a healthy amount today but certainly an even healthier amount in 1983. The jury returned a \$200,000 verdict for Falwell. As noted above, however, that accession to wealth was short-lived, but securing money from a legal judgment was not the only game available to Falwell.

Like Flynt, Falwell never shied away from publicity. As a fundamental televangelist and conservative political commentator, Falwell constantly kept himself on the airwaves and in front of his supporters for over five decades. Falwell’s reaction to Flynt’s ad parody was no different—Falwell saw an opportunity to raise money.

Immediately after reviewing the ad parody, Falwell went on a torrid publicity and fundraising campaign. His conservative political lobbying group, the Moral Majority, immediately sent

a letter to 500,000 members seeking contributions to help Falwell pursue a lawsuit against Flynt and *Hustler*. The group sent another mailing to 26,900 major donors seeking at least \$500 per donor to “take up this important legal battle” to defend Falwell and his mother “against the smears and slander of this major pornographic magazine.” Within 30 days, the letter to major donors alone raised \$45,000. The Old Time Gospel Hour, which sponsored Falwell’s television and radio broadcasts throughout the world, also mailed a solicitation letter to 750,000 supporters. Over the next month, those supporters contributed \$672,000 to Falwell’s legal crusade. Falwell’s overall fundraising campaign amassed nearly \$1,000,000 in his fight against Flynt’s pornographic machine.

Suffice it to say, Falwell used the publicity surrounding his lawsuit to raise money from his supporters. Although he raised vast amounts of money from the publicity, money certainly was not the only reason Falwell sued Flynt and *Hustler*.

### Deceased Mother’s Honor

Please place yourself in Falwell’s shoes for a moment. Regardless of whether Falwell was a public figure, no rational person could argue that Flynt’s ad parody would not offend the vast majority of people—at least those with mothers. It is safe to deduce that Falwell pursued litigation in part because he was hurt that his deceased mother was involved in the ad parody.

Describing his reaction once he learned about the ad parody, Falwell stated that he had “never been as angry as I was at that moment. I somehow felt that in all my life I had never believed that human beings could do something like this. I really felt like weeping.” Although *Hustler* clearly noted that the Falwell piece was an ad parody and that it was not to be taken seriously, Falwell said he took it as “seriously as anything I have ever read in my life.” Frankly, who can blame him.

Falwell’s subsequent fundraising campaign revealed that his hurt feelings that his deceased mother was used in the ad parody motivated him to sue Flynt and *Hustler*. In a letter sent to the major donors of the Moral Majority immediately after *Hustler* published the ad parody, Falwell made the following plea: “Will you help me defend my family and myself against the smears and slander of this major pornographic magazine—will you send a gift of \$500 so that we may take up this important legal battle?” In a similar plea in the same letter, Falwell asked his donors to help defend his mother’s memory.

When CNN interviewer Larry King asked Falwell about his initial reaction to the ad parody, Falwell replied:

... my mother had ... just shortly passed, and she was 82 and a sweet wonderful Godly lady. I am a public figure like you are, and [ridicule] goes with the territory but ... If my mother hadn’t been in [the ad parody], it would have been just a chuckle and walked on. But with my mother, wife, children ... My reaction was this is over the line. I am a public figure, but I think—you know, nothing is unlimited. The First Amendment is not without limits.

In the same interview, Flynt even recognized that if a parody showed him having sex with his mother, he would have regarded the ad “as maybe a poor parody” and that he would have been “hurt.” Flynt, however, was adamant that although he would have been hurt, he would have known that the First Amendment foreclosed any lawsuit.

A major motivation behind Falwell’s bringing his lawsuit, regardless of its merits, the money, or Flynt’s publicity campaign, was Falwell’s anger that Flynt used Falwell’s deceased mother in a degrading light in order to attack Falwell.

### Good vs. Evil

Finally, whether you believe that Falwell pursued litigation to win on the merits, to raise money, or to assuage his hurt feelings that his deceased mother also was lampooned, this case pitted good versus evil in Falwell’s mind. As my title indicates, this case pitted a nationally known preacher against a nationally known pornographer. Cultures collided. Opposing viewpoints on religion and morality met head on. Falwell and Flynt existed on the far edges of nearly every cultural and moral issue. Flynt’s ad parody was a hard volley in a life-long cultural war between Falwell and Flynt.

While Flynt used the trial to engage in media-capturing theatrics and to pursue the most extreme protection under the First Amendment, Falwell used the case to argue that Flynt’s speech at issue in the ad parody had no place in a moral America. To be sure, Falwell viewed the case as America’s Minister versus America’s Pimp. Viewed on a larger scale, Falwell saw the case as involving an eternal battle between God and Satan.

Ever since founding the Moral Majority, Falwell had waged a crusade against secular humanism and moral relativism,

Congress of the United States

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which he believed were at the root of everything bad in America. Falwell believed that the Constitution is America's moral charter and reflects our character as a people. He believed America was founded as a moral nation to save a corrupt world. Based on these fundamental beliefs, Falwell argued that the Constitution cannot protect destructive speech. Falwell adamantly preached that the First Amendment cannot tolerate ideas or speech repugnant to America's core values.

At trial, Falwell's attorney, Grutman, constantly hammered the theory that this case involved good versus evil. Grutman consistently portrayed the case as not involving the First Amendment, but rather the horrible sleazy sinfulness of Flynt. Grutman even called Senator Jesse Helms, the conservative North Carolina Republican, to testify that Falwell was one of America's greatest men of integrity. Falwell's strategy and public theme was that good was pitted against evil in this case.

Immediately after the ad parody was published, Falwell began a massive fundraising effort. In a letter to supporters of the Old Time Gospel Hour, Falwell in essence wrote that good must take a stand against evil:

I was ready to cut another 50-100 stations—when someone showed me a full-page liquor advertisement that appeared in the November issue of *Hustler Magazine*—a pornographic tabloid . . .

When I saw it—I decided that, in a society containing people like Larry Flynt, the Old Time Gospel Hour must remain on the air—on every station . . .

I have established the Old Time Gospel Hour SURVIVAL FUND.

In his letter to the major donors of the Moral Majority, Falwell explained that religious Americans must not tolerate pornographers operating without opposition:

Sane and moral Americans all across our nation are outraged by how much these pornographers are getting away with these days. And pornography is no longer a thing restricted to back-alley bookshops and sordid movie houses.

Now pornography has thrust its ugly head into our everyday lives and is multiplying like a filthy plague. Flynt's magazine, for example, advertises pornographic telephone services where, for a fee, men or women will engage in an obscene phone call with you! . . .

Cable pornography with its "X"-rated and triple "X" rated films can bleed over into a regular cable system right into your own living room . . .

And there, in my opinion, is clear proof that the billion-dollar sex industry, of which Larry Flynt is a self-declared leader, is preying on innocent, impressionable children to feed the lusts of depraved adults.

For those peddlers, it appears that lust and greed have replaced decency and morality.

In 1997 while appearing on CNN's Larry King Live, Falwell reiterated his belief that "pornography is a scourge on society." In that same interview, Falwell explained, "[P]ornography hurts anyone who reads it, garbage in, garbage out. I think when you feed that stuff into your mind, it definitely affects your relationship with your spouse, your attitude towards life, morality." When asked what was worse for America, Philip Morris, the cigarette manufacturer, or *Hustler*, Falwell stated, "*Hustler* is worse than about anything I can think of. This will give you heart cancer. [*Hustler*] will send you to hell, in my opinion." Stated simply, Falwell used the litigation against Flynt and *Hustler* to attack pornography. To the point, Falwell also used the lawsuit to wage a cultural and moral battle against Flynt, pitting good versus evil.

On the other side of the cultural and moral divide stood Flynt, who believes the only absolute in America is absolute free speech. He has steadfastly preached that the First Amendment protects his outrageous, indecent, and disgusting speech. In sum, Flynt believes that the Constitution gives him the absolute right to reject anyone's view of absolute truth. To that end, he has consistently labeled Falwell as a hypocrite, phony, and liar. According to Flynt, Falwell's beliefs traveled in a different solar system from Flynt's beliefs. Flynt has openly stated that he disagrees with absolutely everything that Falwell has ever preached. In fact, Flynt was diametrically opposed to Falwell and his conservative religious beliefs. Flynt has made a career out of his total irreverence to organized religion and God. Because Falwell represented organized religion and God to Flynt, Flynt unmercifully attacked and ridiculed Falwell and his beliefs. Falwell, as a religious fundamentalist, believed the Bible is God's Word. Flynt, in an interview given to *Vanity Fair* during the litigation, described his theology with shocking vulgarity:

*Matthew* 16, verse 18, okay? I say also unto thee that thou art Peter, and upon this rock I will build my church. Peter was [Jesus' penis], the rock meant he had [an erection] and [the] church [was] his philosophy—life is supposed to be one big orgasm! And there's only one commandment: Do unto others as you would have them do unto you—but do it *first*.

In addition to his kind words on the Book of Matthew, Flynt espoused his overall views on the *Bible*:

This is the biggest piece of [feces] ever written. It's been [messed] with since the beginning of time. Religion's done more harm than any other single idea; every war since the beginning of time was the fault of religion. I mean, ask the Jews what they think about religion.

Needless to say, Flynt's inflamed and blasphemous rhetoric heated Falwell up to his boiling point.

Given these stark differences in fundamental beliefs, there can be little surprise that a cultural and moral collision occurred between Falwell and Flynt in addition to the legal battle that had erupted. Falwell spent his entire career espousing a belief in a moral America while Flynt has spent his career tearing down those beliefs. Regardless of one's legal, cultural, or moral viewpoint, one must agree that Falwell's case against Flynt and *Hustler* fundamentally boiled down to a fight over morals—a battle of good and evil.<sup>7</sup>

## Conclusion

Falwell's lawsuit against Flynt and *Hustler* had all of the ingredients to make a dramatic legal, cultural, and moral battle: nationally known media magnates with diametrically opposing viewpoints on all cultural and moral issues; nationally known litigators; religion; pornography; free-speech issues under the First Amendment; and a landmark Supreme Court decision. Given the expected, enormous publicity the lawsuit would produce and the predictable response from the Supreme Court, I believe that Falwell waged his legal battle against Flynt and *Hustler* to help Falwell raise millions of dollars, to defend the honor of his recently deceased mother, and to publicly wage a cultural and moral battle of good versus evil. Flynt obviously won the legal battle. As for the greater cultural and moral battle, each person reading this article probably carries his/her own opinions and occupies a different space in that battle. With the First Amendment unflappably governing this battle, we can be assured that public debate will continue—even without Falwell and Flynt as combatants—with little legal interference. And as lawyers, we must serve as guardians of the First Amendment and protectors of unfettered public debate. Perhaps the only constant will be that even as the issues constantly change in the greater cultural and moral battle, the First Amendment and its protection of speech stands firm against any battle that may erupt against it. 

## Endnotes

- <sup>1</sup> Some readers might feign ignorance of *Hustler*. To put it mildly, *Hustler* is an adult magazine. In 1983, *Hustler* had over 2,500,000 subscribers and a pass-along readership of nearly 20,000,000.
- <sup>2</sup> It might be interesting to note that Campari made an appearance in a movie entitled, *The Life Aquatic with Steve Zissou*. At one point in the movie, Bill Murray's character, Steve Zissou, ordered an intern to get him a Campari.
- <sup>3</sup> Flynt uses a wheelchair because he is paralyzed from the waist down. On March 6, 1978, Flynt was shot while defending an obscenity lawsuit in Gwinnett County, GA. The assassin's bullet left Flynt in a state of paralysis and in need of a wheelchair to be mobile.
- <sup>4</sup> It is interesting to note that when I ran spell checker on this article, the recommended spelling of Falwell was "Farwell." I imagine that Flynt would be amused with that recommended spelling.
- <sup>5</sup> It might be worth noting that Flynt actually experienced a religious conversion to Christianity in 1977 as a result of the efforts of Ruth Carter Stapleton, an evangelist who also happened to be President Jimmy Carter's sister. After Flynt's religious experience, he "cried for God." Realizing that 98% of

Americans believed in God and not nearly as many purchased pornography, Flynt reinvented *Hustler* to mix sex and religion. Flynt proclaimed that he became "a hustler for God." Flynt's religious conversion was short-lived.

- <sup>6</sup> It is interesting to note that another case dealing with an adult magazine's ad parody had just ended a year before Flynt ran the ad parody of Falwell. Before Flynt parodied Falwell, *Penthouse* had published an ad parody entitled, Miss Wyoming Saves the World, which depicted Miss Wyoming getting ready to perform her talent of baton twirling in the Miss America Pageant when she remembered her college experience of making a football player levitate while she performed fellatio on him. While on stage in the Miss America Pageant, Miss Wyoming performed fellatio on the baton and lost the Pageant. Nonetheless, as Miss Wyoming then considered what her poise-and-intelligence answer would have been, she dreamed that she could "save the world" with her "real talent" of "performing" with the entire Soviet Central Committee, Marshall Tito, and Fidel Castro. Indeed, the parody had Miss Wyoming dreaming of becoming the ambassador of love and peace. Finally, the ad parody also showed Miss Wyoming performing fellatio on her coach, who also levitated.

The actual Miss Wyoming, Kimerli Jayne Pring (Pring), an accomplished baton twirler, failed to find the humor in *Penthouse's* parody. Through her famed attorney, Gerry Spence, Pring sued *Penthouse*, which happened to be represented by Grutman. Although Pring won a \$26,500,000 jury verdict, the Tenth Circuit Court of Appeals reversed, holding that the First Amendment protected *Penthouse's* parody because any reasonable person would have believed it was obvious that *Penthouse's* speech was complete fantasy and fiction. Thus, a defamation claim inherently failed. Using words that Grutman certainly had to take to heart a year later when he took Falwell's case against Flynt and *Hustler*, the Tenth Circuit explained, "The [ad parody] is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied. [*Penthouse*] should not have been tried for its moral standards. Again, no matter how great its divergence may seem from prevailing standards, this does not prevent the "application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication or particular subject matter."

- <sup>7</sup> Throughout their publicity battles, Falwell steadfastly predicted that he would help convert Flynt to Christianity and that Falwell hoped to be there to hug Flynt when it happened. Flynt vowed that it would never happen and even challenged Falwell's sincerity on his desire to convert Flynt. With Falwell's recent death, it appears that Flynt deflected Falwell's hopes on the conversion issue as well. After Falwell's death, Flynt surprisingly wrote an editorial for the *Los Angeles Times* entitled, Larry Flynt: My Friend, Jerry Falwell. In the article, Flynt wrote, "I'm sure I never changed [Falwell's] mind about anything, just as he never changed mine. I'll never admire him for his views or his opinions." Flynt also wrote, however, that the ultimate result of his lifelong battle against Falwell was unexpected and shocking—he and Falwell had become friends. Indeed, Flynt described how Falwell had visited Flynt every time Falwell was in California and that the two men exchanged Christmas cards.