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Weighing Between Freedom of Speech and Rival Interests in Hustler Magazine Inc. v. Falwell

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Abstract: *Hustler Magazine Inc. v Falwell* was a 1987 landmark case that expanded the scope of First Amendment protections. The Supreme Court ruled that a publication made by Hustler magazine was constitutionally protected, despite containing material that vehemently disparaged televangelist Jerry Falwell. Significantly, this case limited the ability of public figures to recover damages for infliction of emotional distress. Though the Court had previously qualified the extent of free speech, it declined to do so in this instance because factors such as precedent, the history of First Amendment applications, and the consequences of a ruling adverse to Hustler each weighed in the magazine's favor. This paper analyzes primary sources including oral arguments and Court opinions to demonstrate why Falwell lost the case. In particular, both sides' arguments are examined through the analytical frameworks established in Philip Bobbitt's *Constitutional Fate*, a work which describes multiple avenues for assessing the constitutionality of laws.

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While the Supreme Court typically places a high value on the constitutional guarantee of freedom of speech, there have been a number of instances in which it has ruled that the government can limit this right. These situations often occur when the speech in question is outweighed by other public interests. One landmark ruling in which the Court had to balance the First Amendment with other such interests occurred in *Hustler's Magazine Inc. v Falwell*. In this case, the justices had to decide whether a state could limit speech on the basis that it was excessively cruel and distressing to its subject. Though the state's interest was a legitimate one, the Court found that the speech was constitutionally protected for three reasons: the U.S. has a history of allowing satirical commentary, there are no clear standards that the Court can use to consistently identify outrageous speech, and any attempt by the Court to shield a public figure from harmful publications might inhibit freedom of speech more broadly.

The tort in *Hustler* resulted from a dispute between two people of vastly different political views. The matter arose when Larry Flynt, the founder of *Hustler Magazine*, created an ad parody that depicted Jerry Falwell as having an incestuous relationship with his mother in an outhouse. In response, Falwell sued Flynt in Federal District Court for intentional infliction of emotional distress and libel. The jury found against Falwell for the libel claim but awarded him damages for emotional distress. Flynt appealed this decision up to the U.S. Supreme Court. His lawyer, Alan Isaacman, explained during oral arguments, "...to fill out the political context... what we have here are people who are at opposite ends of the political spectrum, engaging in... uninhibited robust and wide open debate..."¹ According to Isaacman, regardless of how distasteful the publication may have been, it was a form of political expression. Flynt was stating his view of Jerry Falwell, a famous televangelist whom many regarded as a leader in morality. Through depicting the pastor

¹ Oyez. (n.d.). *Hustler Magazine, Inc. v. Falwell*, 00:04:58 - 00:05:15

in a shocking setting, Flynt was suggesting that Falwell was not as moral as he pretended to be. This ad parody was simply another entry in their long history of “robust and wide open debate.”

Isaacman’s insistence that the ad parody was political commentary served a practical purpose. In *New York Times v. Sullivan*, the Supreme Court precluded public figures from suing for defamatory publications except for in very particular circumstances. Delivering the opinion of the Court, Justice Brennan wrote, “...debate on public issues should be uninhibited, robust, and wide-open, and... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”² Essentially, the Court insulated the critics from censure. By arguing that the *Hustler* publication was nothing more than a hyperbolized critique of Falwell, Isaacman hoped to invoke the *New York Times* precedent to protect his client’s speech. Falwell’s lawyer, Norman Grutman, was aware of the *New York Times* precedent and of the risk it posed to his case. For that reason, he endeavored to show that the *New York Times* protections did not extend to Flynt’s ad parody. Grutman argued before the Court, “...the *New York Times* formulation... is inappropriate and irrelevant for this tort... The gravamen of this, as I say, interstitial tort is on the harm that was inflicted on the victim, and the constitutional measure here is intentionality.”³ The “gravamen” — or essence — of Grutman’s argument was that the ad parody went so far beyond the pale of regular political commentary that it was in fact a different sort of speech. It accomplished little beyond being excessively distressing and unforgivably cruel to its subjects, thus forfeiting its constitutional protections. As the Respondent argued, even public figures, who must endure a wider breadth of criticism than most people, are protected from this speech.

² *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), 270

³ Oyez. (n.d.). *Hustler Magazine, Inc. v. Falwell*, 00:46:29 - 00:46:40

The question then before the Court was how to balance two rival interests in the arena of political debate. On the one hand was the state's interest in protecting its citizens from emotional distress. On the other was Flynt's First Amendment interest in being able to express himself without government censure. Isaacman argued that the First Amendment took precedence, saying, "And that's what the First Amendment says, that you have to protect the speaker. *Bose* is intended to protect the speaker. It's not intended to protect the emotionally distressed interest that the state is seeking to protect..."⁴ Similar to *New York Times, Bose Corp. v. Consumers Union of United States* was a landmark case in which the Court held that even publications that contained disparaging information about another person were protected so long as they were not made with actual malice. A statement is considered to be made with actual malice when a speaker knowingly makes a false statement of fact out of a desire to sully the reputation of his target. Isaacman sidestepped the *Bose* caveat with a semantic argument. He said, "...there was no actual malice in this case because this can't be perceived."⁵ No reasonable person would read the publication and believe that the reverend had actually had sex with his mother. Because Flynt did not intend to convince people to the contrary, he was technically not making a false statement of fact. Thus, there could not have been actual malice. This is precisely why the Federal jury found against the reverend on the libel claim. Moreover, the Petitioner's point in citing *Bose* was to illustrate that, historically in disputes involving injurious publications, the Court had decided to protect the speaker's First Amendment rights over the subject's emotional state.

There is a logical reason that the Court would prioritize the protection of speech, even in cases of intentional harm. First, punishing Flynt for his publication would set a bad precedent.

⁴ Oyez. (n.d.). *Hustler Magazine, Inc. v. Falwell*, 00:08:30 - 00:08:45

⁵ *Ibid*, 00:07:05 - 00:07:08

Justice Scalia asked Isaacman how often he thought a jury would find a defendant liable for intentional infliction of emotional distress. The lawyer responded,

Almost every time that something critical is said about somebody, because how can any speaker come in and say I didn't intend to cause any emotional distress... If you say something critical about another person, and if it's very critical, it's going to cause emotional distress.⁶

The sort of sharp and caustic criticism that arises in political debate is bound to cause hurt feelings. Awarding damages for this would invariably inhibit people's ability to express their opinions. Moreover, this would temper the "robust" political debate that is a mainstay of American democracy. Isaacman warned, "And if Jerry Falwell can sue because he suffered emotional distress, anybody else in public life should be able to sue because they suffered emotional distress... All it does is allow the punishment of unpopular speech."⁷ In essence, Isaacman's argument appealed to the fundamental pillars of American democracy. He demonstrated that a ruling in favor of the Respondent would undermine freedom of speech across the United States and create a protective barrier around all public figures.

However, the right to free speech is not an absolute right, and in certain circumstances the government can limit it. Justice Scalia illustrated this point in an exchange with the Petitioner:

Mr. Isaacman, to contradict Vince Lombardi, the First Amendment is not everything. It's a very important value, but it's not the only value in our society, certainly. You're giving us no help in trying to balance it, it seems to me, against another value which is that good people should be able to enter public life and public service.⁸

Scalia was not immediately moved by Isaacman's absolutist argument. He felt that the right to free speech could be abridged when the speech in question ran afoul of other public values. One value that Scalia mentioned was that "good people should be able to enter" into public office. The

⁶ Oyez. (n.d.). *Hustler Magazine, Inc. v. Falwell*, 00:30:46 - 00:30:53

⁷ *Ibid.*, 00:30:18 - 00:30:26

⁸ *Ibid.*, 00:24:19 - 00:24:45

conservative justice was concerned that if regular people were not in some way protected from the types of sharp attacks to which Flynt had subjected Falwell, then few would dare to venture into the arena of public debate.

Scalia's question invokes a particular method of constitutional analysis, one which judges will often employ in their adjudication. Philip Bobbitt, a leading constitutional scholar, called this approach the prudential argument. In his book *Constitutional Fate*, he wrote, "Prudential argument is self-conscious to the reviewing institution and need not treat the merits of the particular controversy... instead advancing particular doctrines according to the practical wisdom of using the courts in a particular way."⁹ Court decisions do not occur in a vacuum. Especially when cases are heard in the Supreme Court, the decisions that follow can have far reaching implications. In some cases, judges are especially "self-conscious" of the power of the judiciary and the consequences of deciding one way or another. When this happens, the judges do not decide solely based on "the merits of a particular controversy," but they also consider the effects of their decision. During oral arguments, Scalia used a prudential argument to suggest that if the Court was to uphold Flynt's First Amendment right completely, then the result would be that "good people" entering public life would be subjected to intolerably vicious attacks and thus dissuaded from public service.

This prudential argument created an opening for the Respondent by qualifying the reach of First Amendment protections. Using another form of constitutional analysis, Grutman would attempt to widen this opening further. In his brief, Grutman cited a concurring opinion from *Rosenblatt v Baer*, a case in which the Court faced the question of whether or not a newspaper could be found liable for defamation for comments made about public figures: "Justice Stewart in

⁹ Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press, 1982., 7

his concurrence in *Rosenblatt v. Baer*... explained that the Ninth and Tenth Amendments to the Constitution preserve the fundamental right of every human being to be free from speech so oppressive as to exceed all possible bounds of decency.”¹⁰ “Decency” is not a term that appears in the Constitution, nor is a concurring opinion considered to be doctrinally binding on the courts. Yet Grutman found this piece of Stewart’s concurrence to be compelling enough to afford it prominent space in his brief. Clearly, Grutman considered the concept of “decency” to be both real and legally powerful. This idea is further supported by the rest of Stewart’s concurrence. The justice wrote, “The right of a man to the protection of his own reputation from... wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.”¹¹ Stewart opined that although the right to dignity is not explicitly named in the Constitution, it exists in practice as a “fundamental” part of “any decent system of ordered liberty.”

This approach, called the ethical approach, is similar to its prudential counterpart in that it considers extraconstitutional factors. Bobbitt explained,

By ethical argument I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or ethos, of the American polity that is advanced in ethical argument as the source from which particular decisions derive.¹²

When using an ethical approach, the Court focuses less on what the Constitution actually says and more on perceived American “ethos.” This approach implies that American societal values can be invoked to make a legitimate legal argument. The ethical approach, furthermore, is an especially powerful tool for those attempting to appeal to rights that exist in practice, if not in writing. The

¹⁰ Grutman, Norman, et al. Brief for Respondent in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Accessed via Westlaw., 18

¹¹ *Rosenblatt v. Baer*, 383 U.S. 75 (1966)., 92

¹² Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press, 1982., 94

following analysis of the First Amendment illustrates this point: “The First Amendment, as the Framers repeatedly said... is merely a concrete application to a specific institution of larger notions of limited government and free political exchange.”¹³ The First Amendment only explicitly prohibits Congress from passing laws that abridge the freedom of speech, assembly, religion, press and petition. Yet in explicitly naming these rights, it establishes a broader spirit — that is that people have the right to engage in “free political exchange” without government interference. Thus, the spirit that derives from the First Amendment could be used, for example, to argue that the President is prohibited from signing any executive order that impinges upon people’s freedom of speech. Even though the executive branch is mentioned nowhere in the First Amendment, it is clear that American institutional values would not tolerate such an act.

Grutman’s case relied heavily on the ethical approach, and in particular on the notion that the American polity, when creating its institutions of government, sought to protect human decency. By this logic, Flynt’s statements were so heinous and antagonistic towards Falwell’s dignity that they fell outside the boundaries of constitutional protection. However, there is an inherent risk in relying heavily on ethical arguments, with some arguing that the ethical approach is weaker than its sister frameworks: “...making ethical arguments is often a dangerous enterprise; one is often tempted to reject another's approach on the grounds that it does not truly engage in ethical argument, when in reality it simply employs an ethical structure different from one's own.”¹⁴ Having an argument that hinges on an ethical analysis is “dangerous” because our American ethos are numbered and varied enough that, in one particular matter, both sides can

¹³ Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press, 1982., 101

¹⁴ Redish, Martin. *Judicial Review and Constitutional Ethics*. *Michigan Law Review* 82, no. 3 (1984): 665–679. Accessed via Westlaw., 669

invoke two different societal values to support their points. Indeed, this is precisely what happened in *Hustler Magazine v Falwell*. Isaacman countered Grutman’s argument by saying, “There is a public interest in allowing every citizen of this country to express his views. That’s one of the most cherished interests that we have as a nation.”¹⁵ True, there may be a societal value that people should be protected from obscene publications. Yet there is also a deeply “cherished” societal value that people should be able to speak freely. Grutman’s argument was weak because it was based almost entirely on the idea that protecting people from intentional infliction of emotional distress is more important than maximally protecting speech — that one core societal value was more important than another.

Furthermore, there was little historical basis for Grutman’s argument. If anything, an examination of the history of criticisms against public figures supports Flynt’s position. This analytical framework, which the Court used in its 9-0 opinion finding for Flynt, is the historical approach. “Historical argument is argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution. Such arguments begin with assertions about the controversies, the attitudes, and decisions of the period.”¹⁶ Using this framework, judges can look back to the historical and political contexts in which the Constitution was ratified and infer from those clues how the Framers intended the Constitution to be understood. Writing for the Court, Justice Rehnquist discussed the history of political cartoons and satire in America and recalled numerous examples of public figures getting viciously attacked through these media. Discussing cartoonists, Rehnquist wrote, “From the viewpoint of history, it is clear that our political discourse would have been considerably poorer without them.”¹⁷ While these publications

¹⁵ Oyez. (n.d.). *Hustler Magazine, Inc. v. Falwell*, 00:21:16 - 00:21:31

¹⁶ Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press, 1982., 7

¹⁷ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Westlaw., 55

may have been tremendously emotionally harmful to their subjects, they were nonetheless invaluable pieces of political commentary. The fact that they endured for so long indicates that the framers prioritized protecting political speech, even when it was caustic and distressing. Granted, Flynt's publication may have been considerably less tasteful and exalted than the examples that Rehnquist cited, but it is still part of the same genre of publications.

Another recurrent issue in Grutman's litigation was that he offered the justices little help in singling out the *Hustler* publication for censure while protecting more reasonable criticisms. In his brief, Grutman wrote, "The high threshold of proof required for a case of intentional infliction of emotional distress involves intentional conduct as well as conduct that is so excessive and outrageous as to pass beyond all bounds of what can be tolerated in a civilized society."¹⁸ Grutman's contention was that certain kinds of speech were "outrageous" and "excessive" that they would appear obviously intolerable to judges and juries. However, terms like "outrageous" and "excessive" are subjective. What may be "outrageous" to one person may be reasonable to another. Rehnquist pointed to this weakness in the Respondent's case: "'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."¹⁹ While Grutman would have the Court believe that some publications are so cruel that any reasonable jury would limit it, the fact is that the jury's verdict would depend on the "tastes" of its members. By raising this concern, Rehnquist made a prudential argument. The inability to draw a clear line with objective criteria of what is punishable would

¹⁸ Grutman, Norman, et al. *Brief for Respondent in Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Accessed via Westlaw., 8

¹⁹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), 55

lead to unacceptable judicial inconsistency and would create an impediment to more legitimate forms of speech.

Grutman's failure to provide the Court with a clear metric by which to punish Flynt's speech while protecting legitimate political commentary proved fatal to his case. As Justice Rehnquist wrote, "If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard..."²⁰ The Court may have been prepared to find in favor of Falwell. Like most people, the justices saw that the publication was distasteful and ultimately not valuable to public discourse. However, even if Grutman had prevailed with his ethical argument — that speech which unduly debased a person's dignity violated societal values and was unprotected — he offered no means to consistently recognize when speech committed this transgression. The charge that Flynt's speech was sufficiently outrageous did not satisfy the Court's need for a "principled standard." As such, the First Amendment prevailed over the emotional distress interest. Rehnquist concluded, "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."²¹ The Court decided that intentional infliction of emotional distress did not supersede Flynt's First Amendment claim, because in the free exchange of ideas, emotional distress is bound to occur. Furthermore, popular speech which is readily embraced by the public needs little protection. It is precisely that which people do not want to hear, and which the majority finds offensive, that needs protection.

However, Grutman likely missed a key opportunity to win the case while leaving traditional First Amendment protections in place. According to Bruce Fein, author of *Hustler*

²⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), 55

²¹ *Ibid.*

Magazine v. Falwell: A mislitigated and misreasoned case, "...the 'fighting words' exception to the First Amendment made Falwell's claim constitutionally irreproachable."²² In previous cases, the Court has held that "fighting words" were not protected forms of speech. In the case which established this precedent, *Chaplinsky v State of New Hampshire*, the Court explained the dangers of such statements: "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."²³ Statements made with the express purpose of goading someone into committing a "breach of the peace" are subject to punishment. Certainly, in the case of *Hustler*, the charge that Falwell was so morally corrupt that he would engage in sexual relations with his mother should have constituted fighting words — it is not hard to imagine how such a statement would tempt even a reasonable person into breaching the peace. However, Grutman never pursued this line of reasoning, and the Court did not consider this aspect in its adjudication.

In the end, Falwell's team mislitigated the case. Rather than invoking the "fighting words" precedent, he relied heavily on the idea that the Constitution did not protect speech that was patently offensive and intentionally distressing, even when made about public figures. Yet this largely ethical argument did not survive a historical and prudential analysis. In the United States, the right to free speech is one of the most highly regarded privileges enjoyed by the American people. Fittingly, it is protected by the very First Amendment to the Constitution, and a person's freedom of speech is only limited in very particular circumstances. Had the Court found for Falwell on the ethical argument, they would have in effect stated that the First Amendment was subservient

²² Fein, Bruce. "Hustler Magazine v. Falwell: A Mislitigated and Misreasoned Case." *William and Mary Law Review* 30, no. 4 (1989): 905–917. Accessed via Westlaw., 905

²³ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)., 572

to other, more abstract public interests. Furthermore, they would have run the risk of hampering free political exchange more broadly. It only makes sense that the Court declined to do so.

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