

University of Missouri-Kansas City School of Law

UMKC School of Law Institutional Repository

Faculty Works

Faculty Scholarship

1-1-2008

Falwell v. Flynt Trial, 1984

Douglas O. Linder

University of Missouri - Kansas City, School of Law

Follow this and additional works at: https://irlaw.umkc.edu/faculty_works



Part of the [Legal History Commons](#)

Recommended Citation

Douglas O. Linder, *Falwell v. Flynt Trial, 1984*, Famous Trials (2008).

Available at: https://irlaw.umkc.edu/faculty_works/807

This Paper is brought to you for free and open access by the Faculty Scholarship at UMKC School of Law Institutional Repository. It has been accepted for inclusion in Faculty Works by an authorized administrator of UMKC School of Law Institutional Repository.

The Falwell v. Flynt Trial (1984)

by Douglas O. Linder

Asked about his first sexual experience by an interviewer, Reverend Jerry Falwell said, "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 thought 'What the hell!'" Falwell went on to describe a Campari-fueled sexual encounter with his mother in an outhouse near Lynchburg, Virginia. Neither the incestuous sex nor the interview ever happened, of course. They sprang from the imagination of a parody writer for *Hustler* Magazine. When the Campari parody ad appeared in the November 1983 issue of *Hustler*, the founder of the politically-engaged organization Moral Majority sued, alleging defamation and intentional infliction of emotional distress. The trial and appeals that followed would provide great theater, produce a landmark Supreme Court ruling on the First Amendment, and eventually lead to one of the most unlikely of friendships.

Shortly after his discharge from the Navy at age 22, Larry Flynt launched a career in the adult entertainment business that would, within just over a decade, make him one of the nation's best known pornographers. When recession pushed his string of Ohio-based strip clubs toward bankruptcy in 1974, Flynt turned what had been a black-and-white newsletter called the "Hustler Newsletter" into the most sexually explicit magazine in the United States. The publication in August 1975 issue of nude photos of Jackie Kennedy Onassis brought attention and dramatically increased sales for *Hustler*. Obscenity trials soon followed, including one in Georgia, where Flynt was shot and paralyzed by a white supremacist outraged by photos in *Hustler* showing an interracial couple.

Flynt's growing pornography empire also attracted criticism from many religious leaders, including the the Reverend Jerry Falwell. Falwell co-founded the socially conservative and politically active Moral Majority in 1979, an organization that was credited with helping to elect Ronald Reagan the next year. Falwell promoted an anti-abortion, anti-gay, pro-Israel agenda. He was especially outspoken in his criticism of pornography, which he claimed threatened the moral health of the country.

In August 1983, Flynt and a group of editors and lawyers met in the conference room of Larry Flynt Publications in Los Angeles. The group debated an idea for an ad parody that had been suggested by a consultant named Michael Salzbury. Salzbury proposed a parody of the well-known advertisements for Campari, which featured celebrities relating their "first times" (playing on the obvious double-entendre) drinking the popular liqueur. The parody, as the idea was developed, had Jerry Falwell recounting his "first time," which turned out not to be not his first taste of Campari, but rather his first sexual encounter—a drunken adventure with his mother in an outhouse. Falwell's anti-pornography crusade always made him an inviting target for *Hustler* satire, and the group was especially enthusiastic about the parody ad because of what they saw as the humorous contrast between the outhouse encounter and the actual lifestyle of the evangelical teetotaler. In the ad, Falwell is quoted as saying, "We were drunk off our God-fearing asses on Campari...and Mom looked better than a Baptist whore with a \$100

donation." At the insistence of legal counsel, the group agreed to place at the bottom of the ad the words: "Ad parody. Not to be taken seriously."

As he left a Washington, D. C. news conference in November 1983, Falwell was asked by a reporter whether he had seen the parody ad featuring in the latest issue of *Hustler*. He glanced at the ad and brushed off the reporter's question. Back home in Lynchburg later that day, however, Falwell asked a staff member to buy the current issue of the magazine. Falwell later testified that when he saw the parody ad, "I think I have never been as angry as I was at that moment." He never believed, he said, that "human beings could do something like this" and "felt like weeping." The most troubling aspect of the satire, according to Falwell, was "the besmirching and defiling of my dear mother's memory."

Falwell decided to sue Larry Flynt and *Hustler Magazine* for \$45 million. To raise money for the legal effort, Falwell sent out two mailings. The first, addressed to a half million members of the Moral Majority described the ad parody, while the second mailing to 30,000 "major donors" included (with eight offensive words blacked out) a copy of the actual Campari ad. Falwell's letter warned readers that "the billion-dollar sex industry, of which Larry Flynt is the self-described leader, is preying on innocent, impressionable children to feed the lust of depraved adults." The letter concluded with a request: "Will you help me defend myself against the smears and slander of this major pornographic magazine--will you send me a gift of \$500 so that we may take up this important legal battle?" The two letters, plus a third letter sent to 750,000 Old Time Gospel Hour fans, raked in over \$717,000 to fund Falwell's lawsuit.

Flynt counter-attacked in two ways. First, he filed a copyright infringement suit against Falwell for republishing *Hustler's* Campari ad without permission. (The suit was later dismissed by a federal district court in California on the grounds that Falwell's use fell within the "fair use" exception under the Copyright Act.) Second, to add fuel to the fire, Flynt ran the Campari parody ad again--this time in *Hustler's* March 1984 issue.

Falwell chose Norman Ray Grutman, a flamboyant New York attorney who had previously successfully defended *Penthouse Magazine* against another suit brought by Falwell, to represent him in his suit against Flynt. Grutman's "gloves off" style of litigating struck Falwell as just what was needed in a suit against someone he considered a world class scumbag.

Grutman's complaint, filed in federal court the Falwell-friendly Western District of Virginia, alleged three grounds for recovery: (1) the defendants used Falwell's name and likeness for commercial purposes without consent; (2) the defendants defamed Falwell by falsely accusing him of committing incest with his mother; and (3) the defendants intentionally "inflicted emotional distress" on Falwell through their malicious and outrageous publication of the parody ad. Trial of the case would take place before Chief Judge James Turk.

Allan Isaacman, a Harvard-trained lawyer with a disarming "Huck-Finn-goes-to-law-school-quality"⁽¹⁾ about him, took control of the defense. Isaacman's basic strategy to people it seemed, it was not clear why it was a joke--what's so funny about incest anyway? The answer, as Isaacman developed his theme, was that the juxtaposition of a great evangelist with the image of a drunken encounter in an outhouse was obviously farcical and was intended, above all, to make a significant political statement about Falwell's alleged hypocrisy.

A Memorable Deposition

Grutman's pre-trial deposition of Flynt took place in a room at a federal prison in North Carolina, where the pornographer was temporarily residing as the result of a contempt of court conviction. It came a low point in Flynt's life. He was paralyzed, depressed, bearded and unkempt, suffering from painful bedsores, and on numerous medications. Flynt was handcuffed to his hospital gurney as he rolled in for his deposition.

What followed ranks as perhaps the most bizarre, vulgar, and self-destructive depositions in legal history. It began with Flynt claiming or pretending to receive "radio signals." Flynt interrupted a question from Grutman to transmit a message to an unseen friend over his imaginary radio: "Bravo November, bravo whiskey...Eleven bravo....They know what that means, Bob. Can you give me an ETA on it?" Answers damaging to the defense came in rapid succession and Isaacman seemed powerless to stop them, as Flynt responded to Grutman's questions even when his attorney said, "I instruct the witness not to answer that" (at more than one point telling his attorney "to shut up.")

Flynt seemed eager to take responsibility for the decision to place the parody ad: "Everything that has ever went in Hustler should have had my approval, and anything that went in that id not--the son of a bitch is either dead, got the shit kicked out of him, or dead." Asked by Grutman whether he had "any information that Reverend Falwell ever committed incest with his mother," Flynt first claimed that the report came from Captain Joe Sivley of the Bureau of Prisons and later stated that he had an affidavit signed by three people from Lynchburg who witnessed the encounter from a nearby house. He freely admitted that he ran the ad to "settle a score" with Falwell for his criticism of his private life and said he included the small disclaimer at the bottom only at the insistence of his in-house lawyer (David Kahn), who Flynt identified only "that asshole sitting over there." His goal was "to assassinate" Falwell's integrity. Flynt claimed the actual content of the ad was a collaborative effort that included the help, among others, of Billy Idol, Yoko Ono, Ted Nugent, and Jimmy Carter.

Asked by Grutman whether he had an aversion to organized religion, Flynt replied, "You better bet your sweet ass I do." Does that go for the Bible too? "Goddamn right I do." Flynt launched into his philosophy of pornography and argued that he had been waging an unappreciated and secret war against child pornography and child molesters. "What we got to stop doing is we got to stop fucking with the kids, you know," he said in a serious tone. "When you mess with the kids, we got a special place for you, down here at the Rock." Flynt said efforts to combat child molesters would be aided if Falwell was

kept off the air: "Give him a pack of seed corn and send him to Israel and let him tell them what thou hath said."

The deposition deteriorated, ended with a string of venomous attacks by Flynt on Grutman and his client. Flynt warned Grutman, "You're all going to be on your knees before we finish here." He alleged that Falwell had been behind the assassination attempt on him in Georgia and issued a final threat: "I'm no longer settling for psychological pain. You and Mr. Falwell and the rest of the 'Falwellians' have to crawl back to New Orleans, 'cause I'm the real one."

Alan Isaacman's main focus, as the opening of trial in Virginia loomed, was to get Flynt's off-the-wall deposition thrown out. Isaacman feared what a jury might do if they watched the angry and self-defeating videotaped performance by his client. He sought to convince Judge Turk that Flynt the videotape should be ruled inadmissible on the ground that Flynt was, at the time of his deposition, mentally incompetent because he was on medication and in the manic phase of a manic-depressive syndrome. Grutman countered by arguing that the deposition should be admitted, with the jury free to consider Flynt's mental state in deciding how much weight to apply to his testimony. After a pre-trial hearing, Judge Turk ruled in Flynt's favor and ordered the deposition excluded, only to reverse himself on the first day of trial. The jury would see the videotape.

Jerry Falwell Goes to Court

On December 4, 1984, Reverend Jerry Falwell settled into the witness stand in Judge Turk's Roanoke, Virginia courtroom. At Grutman's urging, Falwell described his family's long history in Virginia, dating back to the founding of Lynchburg in 1757. He told the jury about his father's troubles with alcoholism and said, "Since I became a Christian in 1952, I have been and am a teetotaler." Falwell described his relationship with his mother as "very, very intimate" and said that she was "a very godly woman, probably the closest to a saint that I have ever known." After a series of questions that developed Falwell's many ministerial accomplishments, Grutman returned to the subject of Falwell's mother: "Mr. Falwell, specifically, did you and your mother ever commit incest?" "Absolutely not," Falwell replied.

Falwell testified about the political activism that had propelled him to become "the second most-admired American behind the president." Asked whether he "had attempted to influence public opinion against pornography," Falwell answered, "With every breath in my body." Grutman handed Falwell copies of Hustler magazines and asked him to comment on various cartoons and couplings found in the publication:

Did you and Chief Justice Burger ever engaged in the kind of conduct [sodomy] that is depicted in the December 1983 [cartoon]?

We have not.

Does [this magazine] contain pictures of lesbians?

It does.

Full color?

Full color.

Does it show naked women lewdly exposing themselves?

Yes.
Does it have pictures of interracial sex?
It does....

From his skewering of *Hustler* generally, Grutman turned his attention to the Campari ad. Falwell testified that his anger over the ad had lasted "to this present moment." He described his reaction as the most intense he had ever had in his life. He admitted that if "Flynt had been nearby, I might have physically reacted." The ad, according to Falwell, "is the most hurtful, damaging, despicable, low-type personal attack that I can imagine one human being can inflict upon another."

When Larry Flynt took the witness stand on December 6, he looked far different than the man the jury saw in his videotaped deposition. He looked relaxed and clean-cut in a three-piece suit. Isaacman asked Flynt to tell the jury how he felt during his unfortunate encounter with Grutman five months earlier: "I was in terrible pain...and I'd been in solitary confinement for several months, handcuffed to my bed most of the time." He testified that, under the weight of his paralysis and mounting legal problems, he was suffering from paranoia and manic depression "that can trigger things."

Turning to the parody ad, Isaacman asked Flynt to explain how he hoped readers would react. "Well, we wanted to poke fun at Campari for their advertisements, because of the innuendos that they had," Flynt said. The choice of Falwell for the ad was because "it is very obvious that he wouldn't do any of those things; that they are not true; that it's not to be taken seriously." The target was all the more appropriate, Flynt argued, because of Falwell's political activities: "There is a great deal of people in this country, especially the ones that read *Hustler* magazine, that feel that here should be a separation of church and state. So, when something like this appears, it will give people a chuckle. They know it was not intended to defame the Reverend Falwell, his mother, or members of his family, because no one could take it seriously." Flynt testified that Falwell was "good copy" and that he bore no "personal animosity towards Reverend Falwell."

In his cross-examination, Grutman began by asking, "Is it the Larry Flynt that we are seeing here today in court the real Larry Flynt, or is the real Larry Flynt the one we saw on the television screen in your June 15 deposition?" Flynt answered calmly, "I'm more myself today than I was then. And the reason why I didn't use any obscenities [in my testimony] is I see no reason to offend this jury here." Grutman's research had turned up a despicable statement in Flynt's past and the attorney wanted the jury to know about it, the better to want to punish him with a hefty award of damages. "In 1975, did you give an interview in which you said, 'I like to lay beneath a glass coffee table and--.'" Isaacman leaped to his feet with an objection, but Grutman continued to shout over him: "and watch my girl shit--." "I would beg Your Honor, please," Isaacman pleaded. Judge Turk said, "I'll let him ask the question and then let's move on." Grutman plowed ahead with Flynt's stomach-turning statement, which included not only an explicit description of excretory functions, but also his "fantasy" about having anal intercourse with ten-year-old paper boys and then slitting their throats with a razor. Flynt tried gamely to explain the statement as "a bizarre joke that had no more seriousness than the Jerry Falwell parody," but one look at the jury could tell anyone that serious damage had been done to

the defense game plan. Later, Grutman asked Flynt about another interview, one conducted for Vanity Fair in 1984: "Do you remember saying of the Bible, 'This is the biggest piece of shit ever written'?" Flynt could not recall the statement, but said he could not deny having made it.

The jury heard from other witnesses. They listened to witnesses, such as conservative U. S. Senator Jesse Helms, vouch for the good character of Jerry Falwell. An advertising agent for Campari testified that his company had nothing to do with the parody ad and was very upset by it. A Moral Majority executive confirmed that Falwell was seriously distressed when he first saw the parody ad. A doctor who treated Flynt testified that he was manic and heavily medicated at the time of his deposition. Still, in the end, the trial was largely a two-man show: evangelist Jerry Falwell versus pornographer Larry Flynt.

Grutman told the jury in his closing argument that "the eyes of the country are on Roanoke." The jury had a chance to stand up for decency and civility. Grutman warned against "letting loose chaos and anarchy." "Are you," Grutman asked, "going to turn America into the *Planet of the Apes*?"

On December 8, Judge Turk instructed the jury on the libel and intentional infliction of emotional distress claims. He threw out the appropriation claim on the ground that Falwell's name and likeness had not been used to promote a commercial product. Judge Turk told jurors that for there to be a defamation the defendant must have made false statements about the plaintiff that were "reasonably understood as real facts." The intentional infliction of emotional distress claim, on the other hand, required no such believability; it was enough if the defendant intended to inflict distress on the plaintiff and that his expression was outside accepted bounds of decency.

The jury of eight women and four men returned with their verdict later that day. The jury concluded that the parody ad could not be understood as factual, and thus Falwell's libel claim failed. The jury did, however, decide that Larry Flynt and Hustler Magazine intended to inflict cause Falwell emotional harm and did so in a way that offended decency. The jury awarded Falwell \$100,000 in compensatory damages and \$100,000 in punitive damages. Given the judge's instructions, any other verdict would have been a surprise.

On to the Supreme Court

Initial appeal rounds went to Falwell. A three-judge panel of the Fourth Circuit Court of Appeals, based in Richmond, unanimously upheld the jury's damage award. The court relied heavily on Flynt's testimony that he intended through his ad parody "to assassinate" Falwell's character. The full appeals court turned down a request for rehearing *en banc* on a vote of 6 to 5. Judge J. Harvie Wilkinson, a respected conservative jurist, wrote a dissent from the decision not to rehear the case in which he warned that the precedent may stifle political satire which "tears down facades, deflates stuffed shirts, and unmask hypocrisy."

Flynt's attorneys, Alan Isaacman and David Carson, filed a petition for certiorari in the United States Supreme Court. After some initial reluctance caused by the distasteful nature of the publication and parody ad, institutions and organizations supporting a free press came to *Hustler's* aid in the form of amici briefs. Among the groups sending arguments to the Supreme Court were The Richmond Times, Reporters Committee for a Free Press, and the Association of American Editorial Cartoonists. On March 20, 1987, the Court announced that it would hear arguments in *Hustler Magazine vs. Jerry Falwell*. Free speech supporters saw the case as an opportunity for the Supreme Court to expand upon its assertion of fact (not protected if false, damaging to another's reputation, and made recklessly) / expression of opinion (protected speech) distinction.

On the cold morning of December 2, 1987, spectators began lining up outside the Supreme Court building. Jerry Falwell and his wife took seats in the front row of the spectator section of the full courtroom. Ten minutes before arguments were scheduled to begin, Larry Flynt rolled in through a side-entrance. The eight justices (one seat was vacant at the time) took their seats at the bench. Chief Justice Rehnquist nodded to Alan Isaacman, standing behind the podium, and announced, "Mr. Isaacman, you may proceed whenever you're ready."

Over the next half-hour of oral argument, attorney Isaacman deftly handled a steady stream of questions from the bench. Isaacman conceded that the state has an interest in protecting people from emotional distress, but he added, "If Jerry Falwell can sue because he suffered emotional distress, anybody else whose in public life should be able to sue because they suffered emotional distress. And the standard that was used in this case-- Does it offend generally accepted standards of decency and morality?--is no standard at all. All it does is allow the punishment of unpopular speech." Asked what public interest the parody ad could possibly serve, responded: "Hustler has every right to say that somebody who's out there campaigning against it saying don't read our magazine and we're poison on the minds of America and don't engage in sex outside of wedlock and don't drink alcohol. Hustler has every right to say that man is full of B.S. And that's what this ad parody says."

Norman Grutman followed Isaacman to the podium. Grutman opened his argument with the words, "Deliberate, malicious character assassination is not protected by the First Amendment to the Constitution." He struggled with questions from justices about how a clear line might be drawn between the Campari parody ad and other hard-hitting political cartoons and satire. Grutman suggested: "If the man sets out with the purpose of simply making a legitimate aesthetic, political or some other kind of comment about the person about whom he was writing or drawing, and that is not an outrageous comment, then there's no liability." Justice Scalia and several other justices appeared unconvinced. Scalia asked: "I don't know, maybe you haven't looked at the same political cartoons that I have, but some of them, and a long tradition of this, not just in this country but back into English history, I mean, politicians depicted as horrible looking beasts, and you talk about portraying someone as committing some immoral act. I would be very surprised if there were not a number of cartoons depicting one or another political figure as at least the piano player in a bordello." Justice O'Connor also was concerned with providing clear

guidance to satirists of all sorts: "In today's world, people don't want to have to take these things to a jury. They want to have some kind of a rule to follow so that when they utter it or write it or draw it in the first place, they're comfortable in the knowledge that it isn't going to subject them to a suit." Grutman had no real answer.

On February 24, 1988, Chief Justice Rehnquist announced the decision of a unanimous Supreme Court reversing the jury's award of damages to Jerry Falwell. Rehnquist wrote:

At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern....[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred..." Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Epilogue

In January 1997, thirteen years after their legal confrontation in Roanoke, Larry Flynt and Jerry Falwell appeared together on *The Larry King Show*. The conversation was unexpectedly civil and shortly afterwards, Falwell paid a surprise visit to Flynt in his Beverly Hills office. In an article published shortly after Reverend Falwell's death in 2007, Larry Flynt described the relationship that developed between the two old adversaries:

...[O]ut of nowhere my secretary buzzes me, saying, "Jerry Falwell is here to see you." I was shocked, but I said, "Send him in." We talked for two hours, with the latest issues of *Hustler* neatly stacked on my desk in front of him. He suggested that we go around the country debating, and I agreed. We went to colleges, debating moral issues and 1st Amendment issues — what's "proper," what's not and why.

In the years that followed and up until his death, he'd come to see me every time he was in California. We'd have interesting philosophical conversations. We'd exchange personal Christmas cards. He'd show me pictures of his grandchildren. I was with him in Florida once when he complained about his health and his weight, so I suggested that he go on a diet that had worked for me....

My mother always told me that no matter how repugnant you find a person, when you meet them face to face you will always find something about them to like. The more I got to know Falwell, the more I began to see that his public portrayals were caricatures of himself. There was a dichotomy between the real Falwell and the one he showed the public.

He was definitely selling brimstone religion and would do anything to add another member to his mailing list. But in the end, I knew what he was selling, and he knew what I was selling, and we found a way to communicate....

I'll never admire him for his views or his opinions. To this day, I'm not sure if his television embrace was meant to mend fences, to show himself to the public as a generous and forgiving preacher or merely to make me uneasy, but the ultimate result was one I never expected and was just as shocking a turn to me as was winning that famous Supreme Court case: We became friends. (2)

Footnotes:

(1) Smolla, Rodney, *Jerry Falwell v Larry Flynt: The First Amendment on Trial* (1988), p. 18.

(2) Flynt, Larry, *Los Angeles Times*, "My Friend, Jerry Falwell" (May 20, 2007)