Hustler v. Falwell: Worst Case in the History of the World, Maybe the Universe

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Introduction

There you are, in your faculty office, sipping morning coffee and checking your email. A student with a pained expression sheepishly knocks on your door, half ajar. She says, "Professor, there's something that you should see, if you haven't already." She hands you a copy of *Hustler* magazine, a magazine so smutty that purveyors of *Playboy* and *Penthouse* would have primly, and at least publicly, abjured subscribing to it.[1] "Look at page twenty-eight," your student dolefully instructs you. You thumb through the magazine's pages of flesh and filth, and on page twenty-eight, you see an ad parody featuring you—or, rather, a fictitious "you" that has been brazenly concocted by *Hustler*'s editors—casually recounting with bemused satisfaction your first time having sex. In the parody, this "you" tells the interviewer that your first time took place in an outhouse . . . while you were drunk . . . with your mother.[2]

Two minutes after reading the *Hustler* parody, you are mortified to realize the inevitable: that numerous people at the law school—your colleagues, the dean, and, worst of all, the students—have seen this parody. You soon discover that the parody has now been posted online in gossipy blogs. Your friends at other law schools have emailed you, shocked and empathetic. You hear snickering by students as you walk past them in the courtyard. And, after a day consumed by silent angst and apprehension, your mother calls you, her voice choked by sobs of torment.

Should *Hustler* be entitled to publish such a parody about you? If you're a public figure—if you are "intimately involved in the resolution of important public questions or, by reason of [your] fame, shape events in areas of concern to society at large"[3]—then according to the Supreme Court in *Hustler Magazine v. Falwell*, yes.[4] Considering the emotional devastation that such a decision can unleash, the Court, one would expect, should have varnished its

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[1] Rodney A. Smolla, Jerry Falwell v. Larry Flynt: The First Amendment on Trial 38 (1988) (describing *Hustler* as incomparably more offensive than *Playboy* and *Penthouse*).

[2] The facts are derived from *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[3] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring), *quoted in Hustler,* 485 U.S. at 51.

[4] *Hustler*, 485 U.S. at 51.

decision with a splendid justification. But it didn't; not by a long shot. And while *Hustler Magazine v. Falwell* probably will not show up on anyone's radar for the Worst Supreme Court Case Ever, there are a couple of reasons for treating it as such.

One, in a startling act of moral indifference, the *Hustler* Court made public figures appallingly vulnerable to emotional injury, thereby violating basic expectations for moral decency.

Two, the *Hustler* opinion is, unlike many atrocious court opinions, still good law, and unlike, say, *Bush v. Gore*, there is no discernible segment of the population that has prudently dismissed the opinion as a sham.

And, three, dreadful though it is to acknowledge, my students have lauded, year after year, the *Hustler* opinion as eminently sensible and a logical victory for the Enlightenment. Perhaps needlessly sensitive to charges of didacticism, I have been reluctant to disturb my students' rosy assumptions, but, running low on the resources of patience, and growing crankier with age, I am now eager to reform those assumptions. (I hasten to add, however, that none of what I say is meant to disparage the *decision* in *Hustler*, only its opinion, a distinction whose explanation would warrant, alas, another essay.)[5]

For now, let us begin with what the *Hustler* opinion made susceptible to assault: civility, along with its correlate, dignity.

I. Civility and Dignity Matter

Notwithstanding its conventional affiliation with politeness, civility is more than good manners.[6] Civility is indispensable as the social glue that holds a community together by preempting conflict.[7] For civility is "the sum of the many sacrifices we are called to make for the sake of living together."[8] Civility, so conceived, is the means by which we obtain societal peace.[9] Note here the etymological intimations of civility's function as a social adhesive; we find the word *civility* in *civilization* and *civil* society.[10]

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[5] I have offered an alternative and, to my mind, better, justification for the Court's decision in *Hustler*. *See* John M. Kang, *In Praise of Hostility: Antiauthoritarianism as Free Speech Principle*, 35 Harv. J.L. & Pub. Pol'y 351 (2012) (arguing that an adjudicative principle of antiauthoritarianism should underwrite highly offensive speech against public figures and public officials) [hereinafter Kang, *Hostility*].

[6] As the philosopher Thomas Hobbes morosely observed long ago, without civility the life of man is "poor, nasty, brutish, and short." Thomas Hobbes, Leviathan 76 (Edwin Curley ed., Hackett 1994) (1651). *See* John M. Kang, *The Uses of Insincerity: Thomas Hobbes's Theory of Law and Society*, 15 L. & Literature 371, 378–81 (2003) (arguing that civility is the basis for civil society) [hereinafter Kang, *Insincerity*]; John M. Kang, *Manliness and the Constitution*, 32 Harv. J. L. & Pub. Pol'y. 261, 293–97 (2009) (making an analogous argument) [hereinafter Kang, *Manliness*].

[7] Kang, *Manliness*, *supra* note 6, at 293–94; Kang, *Insincerity*, *supra* note 6, at 378–81.

[8] Stephen L. Carter, Civility: Manners, Morals, and the Etiquette of Democracy 11 (1998).

[9] Kang, *Insincerity*, *supra* note 6, at 378–81.

[10] For further etymological connections deriving from "civility," see Kang, *Manliness*, *supra* note 6, at 293–94.

Also, civility is more than necessary for society. It is crucial for the well-being of the individual.[11] For civility is indispensable to protect the individual's sense of dignity.[12] An individual derives his sense of self-worth in large part from how others treat him, an axiom that has found support from sociologists.[13] So too, it is an article of faith that has been eagerly adopted by institutions seeking to denigrate the individual's sense of self-worth for the purpose of controlling that individual.[14] The great sociologist Erving Goffman has found such examples of systematic degradation, what might otherwise constitute the tort of emotional distress, in "total institutions," institutions dedicated to the complete regulation of the individual, such as prisons, concentration camps, and mental hospitals.[15]

Given the centrality of civility to the individual's well-being, it is unsurprising that the common law of libel, which currently finds expression in different state jurisdictions, seeks to protect "the standing of the person in the eyes of others."[16] To wit, the common law does not pad the right of the speaker by burdening the victim with the task of proving that the speaker had delivered a misstatement of *fact* about the victim; under the common law, hurtful *opinions* about the victim are also actionable.[17] This latter view is explained in part by Justice Stewart's observation about what is at stake morally in libel law: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being."[18] Note how the "wrongful hurt" refer-

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[11] ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 128–29 (1995).

[12] *Id.*; *see also* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 196–97 (1986).

[13] POST, *supra* note 11, at 128–29. The University of Chicago sociologist George Herbert Mead examined how a person derives his sense of individual identity by belonging to some group and by adopting the group's view of himself. *See* GEORGE H. MEAD, MIND, SELF & SOCIETY 135–226 (Charles W. Morris ed., 1970). Mead concluded: "What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct." *Id.* at 162. Therefore, one may infer that if a community constantly violates the norms of civility toward a particular individual and abuses him, that individual will experience difficulty in developing a stable sense of self.

[14] POST, *supra* note 11, at 128.

[15] ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 12–92 (1961). Goffman observed:

> The recruit comes into the [total institution] with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance, he is immediately stripped of the support provided by these arrangements. In the accurate language of some of our oldest total institutions, he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified.

Id. at 14.

[16] POST, *supra* note 11, at 128. The following cases define libel as the "malicious defamation of a person" that exposes him to "public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse": Ragland v. Household Fin. Corp., 119 N.W.2d 788, 790 (Iowa 1963) (quoting an Iowa law defining libel); State v. Haider, 150 N.W.2d 71, 73–74 (N.D. 1967) (quoting a North Dakota law defining libel); Johnson City v. Cowles Commc'ns, Inc., 477 S.W.2d 750, 752 (Tenn. 1972) (quoting a Tennessee law defining libel).

[17] *See supra* note 16.

[18] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (emphasis added).

enced by Justice Stewart can be caused by those statements which are rooted in opinion, not simply fact, and that, so too, the "dignity" and the "worth" of a human being can be just as easily demolished by opinion.

Be that as it may, contrary to Justice Stewart's declaration, not "*every* human being," is entitled to the same degree of protection against offensive speech, or so the Supreme Court has ruled.[19] In the next section, I discuss how the Court in *Hustler Magazine v. Falwell* made clear that "public figures" do not enjoy the protection afforded ordinary citizens.[20] I will explain in the next section why the Court's reasons for this decision are manifestly unconvincing.

II. The Case Background and Court Opinion

The story of *Falwell v. Hustler Magazine* begins with two men who were, on some level, utter opposites. On-air host of the "Old Time Gospel Hour," the Reverend Jerry Falwell was a conservative and unusually influential Baptist preacher who publicly condemned pornography.[21] Larry Flynt was the eccentric and foul-mouthed publisher of the scandalously X-rated *Hustler*.

For years, Flynt raged against Falwell and other leaders of what the former derided as "organized religion."[22] Flynt resented their moral denunciations of pornography and angrily mocked them as blowhard hypocrites.[23] In November 1983 Flynt raised his loathing to new heights by publishing a now infamous parody of Falwell.[24] The parody was meant to spoof the Campari Liqueur ads popular in the 1980s in which a contrived interviewer asked a celebrity about her "first time," with the latter phrase playing with the double-entendre of the celebrity's first time sipping Campari and her first time trying sex.[25] *Hustler*'s ad parody depicts Falwell casually narrating his first time having sex with his mother.[26] The cruel ribaldry unleashed by *Hustler* against Falwell can be best conveyed by reproducing the parody in its entirety:[27]

> Falwell: My first time was in an outhouse outside Lynchburg, Virginia.
> Interviewer: Wasn't it a little cramped?
> Falwell: Not after I kicked the goat out.
> Interviewer: I see. You must tell me all about it.
> Falwell: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"
> Interviewer: But your mom? Isn't that a bit odd?
> Falwell: I don't think so. Looks don't mean that much to me in a woman.
> Interviewer: Go on.
> Falwell: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a $100 donation.

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[19] Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)).
[20] *Id*. (quoting *Curtis Publishing*, 388 U.S. at 164).
[21] Smolla, *supra* note 1, at 8–9, 108.
[22] *See id*. at 56.
[23] *Id*. at 23, 153.
[24] *Id*. at 22.
[25] *Id*. at 21.
[26] *Id*. at app. I.
[27] *Id*.

> Interviewer: Campari in the crapper with Mom . . . how interesting. Well, how was it?
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> Falwell: The Campari was great, but Mom passed out before I could come.
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> Interviewer: Did you ever try it again?
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> Falwell: Sure . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.
>
> Interviewer: We meant the Campari.
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> Falwell: Oh, yeah, I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit *sober*, do you?[28]

Accompanying the parody was an unexpectedly guarded disclaimer written in tiny but readable letters at the bottom: "AD PARODY—NOT TO BE TAKEN SERIOUSLY."[29] *Hustler*'s table of contents also echoed that the depiction of Falwell was "Fiction" and "Ad & Personality Parody."[30] These lawyerly addendums were unable to salve the wounded Reverend Falwell,[31] whose staffer had forwarded to him a copy of the salacious magazine. "I somehow felt that in all of my life I had never believed that human beings could do something like this,"[32] he rued. "I really felt like weeping."[33] He felt like doing something more than weeping: Falwell sued Flynt and his magazine for $45 million.[34]

Falwell presented three causes of action against Flynt: one for invasion of privacy, the second for libel, and the third for emotional distress.[35] Falwell lost on the first two claims.[36] On the claim for invasion of privacy, Falwell lost because he failed to show, in accordance with Virginia state law, that Flynt had appropriated Falwell's name or likeness for "advertising."[37] After all, *Hustler*'s parody was not an advertisement, just a spoof of one.[38] So, too, Falwell was unable to persuade the jury that he was a victim of libel because a libel claim in Virginia required the plaintiff to show that the defendant had made an inaccurate factual representation regarding the plaintiff.[39] But *Hustler* had never made any representations of fact; it offered only parody.[40] The jury thus dismissed the libel claim.[41] However, Falwell won $150,000 on the claim for emotional distress, a verdict upheld by the federal appellate court.[42] Flynt appealed the verdict on the claim of emotional distress, and the U.S. Supreme Court eventu-

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[28] *Id*. (emphasis omitted).
[29] *Id*.
[30] *Id*. at 2–3.
[31] *Id*. at 3.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] Falwell v. Flynt, No. 83-0155-L-R, 1985 U.S. Dist. LEXIS 20586, at *1 (W.D. Va. Apr. 19, 1985), *aff'd*, 797 F.2d 1270 (4th Cir. 1986).
[36] *Id*. at *1–2.
[37] *Id*. at *1 n.1.
[38] *Id*. at *1; *see also* SMOLLA, *supra* note 1, at app. I.
[39] *Falwell*, 1985 U.S. Dist. LEXIS 20586, at *2.
[40] *Id*. at *1.
[41] *Id*.
[42] *Falwell*, 1985 U.S. Dist. LEXIS 20586, at *2; Falwell v. Flynt, 797 F.2d 1270, 1278 (4th Cir. 1986).

ally decided in his favor.[43] Chief Justice Rehnquist, writing for the Court, didn't deny that the parody was reprehensible yet insisted that it deserved First Amendment protection.[44]

For support, Justice Rehnquist argued that offensive, even abhorrent, speech was entitled to protection under certain circumstances so that the audience would be more likely to discover some truth: "At the heart of the First Amendment," he declared, "is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[45] The essence of Justice Rehnquist's position rested on the justification—what I will call the justification from truth—that the First Amendment should enable the audience to deliberate a diversity of views in order to arrive at better ideas of the truth.[46] Put aside for now whether this justification from truth is plausible in the abstract; none of the precedents which Justice Rehnquist marshals, precedents embodying the justification from truth, bear any resemblance to the facts of *Hustler*. What he offers instead is a paradigmatic example of that which we implore our students to eschew—flabby legal reasoning.

III. The Legal Precedents are Inapposite

Justice Rehnquist argues that a string of Supreme Court cases has used the justification from truth to underwrite speech and that the facts in *Hustler* are similar to the facts in those cases; according to Justice Rehnquist, then, *Hustler*'s parody should also be upheld by the justification from truth. "'The freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself,'" Justice Rehnquist recited, "'but also is essential to the common quest for truth.'"[47] As the internal quotation marks indicate, these words are taken from another source, in this instance, Justice Rehnquist's own words from his dissenting opinion in an earlier case, *Bose Corp. v. Consumers Union of United States*.[48] And by so quoting himself, Justice Rehnquist reassuringly implies that the logic in the earlier case can be confidently transposed to the circumstances of *Falwell v. Hustler Magazine*.

But the facts in the two cases are quite different. In *Bose Corp.*, *Consumer Reports* magazine had published an unflattering review of the Bose 901 audio speakers.[49] The review, according to the Court, "describ[ed] the system and some of its virtues" but noted that the

> individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.[50]

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[43] Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988).
[44] *Id*. at 50.
[45] *Id*.
[46] *Id*. at 50–51.
[47] *Id*. at 51 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)).
[48] *Bose Corp*., 466 U.S. at 503–04.
[49] *Id*. at 487–88.
[50] *Id*. at 488 (internal quotation marks omitted).

Consumer Reports then followed with a warning:

> We think the *Bose* system is so unusual that a prospective buyer must listen to it and judge it for himself. We would suggest delaying so big an investment until you were sure the system would please you after the novelty value had worn off.[51]

One can quibble that these and other statements by *Consumer Reports* amounted to libel, as Bose did in vain before the Supreme Court,[52] but one cannot deny that the published assessments by *Consumer Reports*, a periodical formally dedicated to informing the public, were attempts to help the audience discern the truth about a given product's value.[53]

Hustler's parody, by contrast, was—by its own admission—an "AD PARODY—NOT TO BE TAKEN SERIOUSLY," and a "Fiction."[54] What made the parody so mischievous and, to the readers of *Hustler*, presumably droll, was not that it contained a modicum of truth or potential truth but that it was an unbounded exercise in raw juvenilia whose narrative plausibility could only be savored in the realm of fantasy. Unlike *Consumer Reports*, Larry Flynt's pornographic magazine never sought to educate the public or to help it to discern the truth. In this light, read again Justice Rehnquist's appropriation in *Hustler* of his own words from *Bose Corp.*: "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."[55] How can *Hustler*'s parody be "essential to the common quest for truth"? More precisely, what "truth" is being earnestly urged by the parody? The parody itself claims that it is "NOT TO BE TAKEN SERIOUSLY."[56]

Justice Rehnquist, however, proceeded to insist that *Hustler*'s parody was an heir—a distant and rather shabby heir, he admitted, yet one nonetheless—to a long line of parodies without which "our political discourse would have been considerably poorer."[57] He elaborated:

> Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate. Nast's castigation of the Tweed Ring, Walt McDougall's characterization of Presidential candidate James G. Blaine's banquet with the millionaires at Delmonico's as 'The Royal Feast of Belshazzar,' and numerous other efforts have undoubtedly had an effect on the course and outcome of contemporaneous debate.[58]

Read again the last sentence: "[Political parodies] have undoubtedly had an effect on the course and outcome of contemporaneous debate."[59] Even if this were true, Justice Rehnquist's examples from history fail to resonate with the facts of *Falwell*. For Justice Rehnquist's examples from history are preg-

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[51] *Id*. (internal quotation marks omitted).
[52] *Id*. at 514.
[53] *See id*. at 494–95 (discussing *Consumer Reports* employment of a sound engineer to examine the Bose sound system and to publish his findings).
[54] SMOLLA, *supra* note 1, at app. I; *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988).
[55] *Hustler*, 485 U.S. at 51 (quoting *Bose Corp*., 466 U.S. at 503–04).
[56] SMOLLA, *supra* note 1, at app. I; *see also Hustler*, 485 U.S. at 48.
[57] *Hustler*, 485 U.S. at 55.
[58] *Id*. at 54–55.
[59] *Id*. at 55.

nant with political or social criticism whereas *Hustler*'s parody is rife with nonsense. The cartoons of Nast and McDougall bristle with the message of moral indictment and the call for reform.[60] Even the cartoon portraying Washington as an ass[61] is meant to criticize the first president's mistakes and thus to cast as undeserving his vaunted authority. Justice Rehnquist is, then, correct to say that absent such biting commentary "our political discourse would have been considerably poorer."[62] The *Hustler* parody is in a different league, however. While its subjects are Falwell and his mother, the parody cannot be read as criticizing Falwell for having sex with his mother. *Hustler*'s parody, indeed, disclaims *any* interest in participating in the sort of "political discourse" referenced by Justice Rehnquist in support of *Hustler*'s parody; the parody, in *Hustler*'s own words, was "*NOT* TO BE TAKEN SERIOUSLY."[63]

Justice Rehnquist worries that "[w]ere we to hold [in favor of Falwell], 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."[64] *Webster's Dictionary*, Justice Rehnquist continued, "defines a caricature as 'the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect.' "[65] So the operative definition of caricature for Justice Rehnquist is *exaggeration*. And, faithful to his definition, all of Justice Rehnquist's recited examples from history in his *Hustler* opinion indeed harp on the theme of exaggeration: the cartoon of Washington is meant to *exaggerate* his purported obtuseness in the eyes of his detractors; Nast's cartoon of the Tweed Ring is meant to *exaggerate* the Ring's vast and corrupt power; McDougall's cartoon is meant to *exaggerate* how Blaine has been bought off by moneyed interests. Heck, for that matter, consider the zany hyperbole of my Essay's title—"Worst Supreme Court Case in the History of the *World*, Maybe the *Universe*"; the exaggeration is meant to highlight the flaws in Justice Rehnquist's opinion. *Hustler*'s parody, by contrast, does not *exaggerate* anything; it is utter fabrication.

The justification from truth, at least as Justice Rehnquist employs it, thus would seem unable to underwrite First Amendment protection for *Hustler*'s parody.

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[60] *See* 7 JAMES FORD RHODES, HISTORY OF THE UNITED STATES: FROM THE COMPROMISE OF 1850 TO THE MCKINLEY-BRYAN CAMPAIGN OF 1896, at 25 (1914) (describing the biting and relevant political criticisms by Nast against the corruption of Tweed and his cohorts); ROBERT L. GAMBONE, LIFE ON THE PRESS: THE POPULAR ART AND ILLUSTRATIONS OF GEORGE BENJAMIN LUKS 32 (2009) (describing the McDougall's cartoon as an indictment of political corruption by the rich).

[61] *Hustler*, 485 U.S. at 54.

[62] *Id*. at 55.

[63] SMOLLA, *supra* note 1, at app. I (emphasis added); *see also Hustler*, 485 U.S. at 57 (reaffirming the finding that the parody lacked factual representation).

[64] *Hustler*, 485 U.S. at 53.

[65] *Id.* (quoting WEBSTER'S NEW UNABRIDGED TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 275 (2d ed. 1979)).

IV. Conclusion

To deem any single Supreme Court case the worst ever is to court baffled groans and testy rebuke; any endeavor to do so makes one's essay instantly eligible as a candidate for a future symposium on the Worst *Essay* Ever. Why *that* case, the reader might sigh, and not another from an almost obscenely plentiful cast of evil/stupid/tragic Supreme Court opinions? While I cannot quell the reader's likely frustrations over my choice, I have tried to justify it. I have chosen *Hustler Magazine v. Falwell* because I believe that human beings deserve to be treated with dignity and that deviations from this moral position demand an exceptional explanation. Years since first reading the Court's *Hustler* opinion, I, for one, am still waiting for a good justification for such deviation.[66]

[66] Unbidden, I have tried to craft a more serviceable justification for the Court's decision in *Hustler*. *See* Kang, *Hostility*, *supra* note 5.