
PREFACE

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COMMLAW CONSPECTUS has once again made a major and timely contribution to our understanding of complex legal and policy issues that affect the world of mass communications. Consistently through the past decade, COMMLAW CONSPECTUS has identified and analyzed the emerging topics in this field, thus providing an invaluable resource for scholars, practitioners and students. It is a singular honor and privilege, from the perspective of an appreciative reader, to have the opportunity to introduce this issue. This is an especially rich collection of essays on important and pertinent issues.

As the legal focus has shifted rapidly toward Internet legal questions, it is especially fitting that two major articles in this issue address different facets of digital law and policy. In one of the lead articles, Christopher Boam poses a basic issue of Internet law-making—the degree to which content posted or disseminated in digital form can and should be the target of government regulation. Understandably, most of our concern in this area has been with such elusive matters as “indecency,” “harmful to minors” and “virtual child pornography,” to name the three issues of content regulation that are currently before the U.S. Supreme Court. One of the two very thoughtful student comments focuses helpfully on the virtual child pornography issue, which the high Court has just agreed to review early in its 2001 term.

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After his law school graduation, O'Neil clerked for U.S. Supreme Court Justice William J. Brennan, Jr. In 1963 he began his law faculty career, first as a teacher at the University of California-Berkeley and then as a teacher-administrator. His posts included provost of the University of Cincinnati, vice president of Indiana University and president of the state-wide University of Wisconsin system.

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But Mr. Boam wisely reminds us that there is much more to regulation than these highly visible and politically volatile areas of legislative concern—and that we need to understand the technology of the process far better than most regulators seem to have understood it to date.

The other lead article, by James Assey and Demetrious Eleftheriou, picks up a theme on which Boam touches—the privacy directive of the European Union—and gives it central emphasis in a most timely and helpful manner. The EU Draft Directive has indeed posed a dilemma for a substantial part of the digital community in this country. It also has aroused deep concern among media groups and others who seek to keep open the widest channels of access to information, because U.S. compliance would potentially deprive U.S. mass media and other information-seekers of a substantial domestic resource, not to mention the international implications for a world increasingly linked through instantaneous global communications.

The *piece de resistance* of this issue of the COMMLAW CONSPECTUS is a remarkable interview with Larry Flynt, which might justifiably be subtitled “pre-eminent pornographer tells all.” The interview, conducted by Clay Calvert and Robert Richards, has very special meaning for me. The organization that I direct, the Thomas Jefferson Center for the Protection of Free Expression, sev-

Government, chairman of the Council for America's First Freedom, director of the Commonwealth Fund and the James River Corporation, and chair of the American Association of University Professors Committee on Academic Freedom and Tenure. He serves as a trustee for the Teachers Insurance & Annuity Association, WVPT Public Television and the Piedmont Council for the Arts.

From 1975–1995 O'Neil served as a trustee for the Carnegie Foundation for the Advancement of Teaching. He also has chaired the National Association of State Universities and Land-Grant Colleges, a commission on the future of Virginia's judicial system and a commission of the Markle Foundation on media coverage of presidential elections.

eral years ago brought Mr. Flynt and his adversary, the Reverend Jerry Falwell, together with their respective attorneys at a conference designed to revisit the Supreme Court case of *Hustler Magazine, Inc. v. Falwell*.

Though we did not appreciate its uniqueness at the time, this gathering marked the one and only occasion on which these titanic clients and their lawyers have publicly discussed the case. Flynt and Falwell themselves, as the interview notes, have long since buried the hatchet, and periodically get together for private sessions.

What is so valuable about the interview is that it faithfully captures the fascinatingly complex maverick that is Larry Flynt. At one point during our conference, he was asked whether he would continue to push the envelope of sexually explicit content even if the readership of *Hustler* were to decline sharply. Those of us who view him as a champion of First Amendment values confidently expected an affirmative answer. Instead, what we got was a long and reflective pause, followed by an almost offhand, "Well, I'm a businessman."

The gist of his reply, yielding a rare insight into the real Larry Flynt, was that if not enough people wanted to read salacious material, there might be publishers who would continue to assault social mores and tastes, but they probably would not include Larry Flynt. This was a low moment for those who tend to excuse many of Mr. Flynt's aberrations (such as being the 20th century's only litigant to disrupt proceedings of the Supreme Court) on the ground that he has, after all, been an indefatigable fighter for free expression.

What this interview reveals is the exceptional complexity of the real Larry Flynt. There is ample evidence of a willingness—indeed a relish—to test government restraints on seemingly principled grounds, such as Flynt's suit against the nearly total blackout imposed on media coverage of the 1983 invasion of Grenada.

Yet, even in such seemingly pure initiatives, as with the full-page ads during the Clinton impeachment trauma which forced the resignation of a speaker of the House, principle cannot be separated completely from such baser values as political partisanship. And just as we think we know what motivates this curious man, we are reminded that the impeachment ad campaign may have been designed more to expose perceived hypocrisy on the part of the president's accusers

than to convey support and sympathy for Bill Clinton.

One of the most appealing features of this interview is its tripartite structure. It opens, appropriately, by revisiting the great case of *Hustler v. Falwell*. Because this case was the focus of the Thomas Jefferson Center's conference, we were often asked by reporters whether the Court's ruling was as important to First Amendment law as one might infer from the high level of interest that our conference had generated. Quite candidly, we conceded there was probably more intrigue than long-term substance.

After all, Reverend Falwell had filed his suit against *Hustler* and Flynt on three grounds, only one of which even reached the Supreme Court. The invasion-of-privacy claim was a loser from the start, as the jury recognized and the court of appeals affirmed. The libel claim was a bit more durable, though the Fourth Circuit correctly ruled that the content of the infamous parody of a Campari ad could not remotely have been viewed as defamatory.

That left only intentional infliction of emotional distress as a viable issue. If there was anything remarkable about the case, it was the ease and confidence with which the justices equated that cause of action with libel, at least in the case of a public official or public figure. Two highly unusual things happened at this point in the process—things that Mr. Flynt (assuming he would fare no better in the high Court than he had below) could not possibly have anticipated. One was the striking metamorphosis of "emotional distress" from a claim that ordinarily posed no First Amendment concerns to one that now deserved the full protection of the *New York Times v. Sullivan* privilege when the plaintiff was a public figure. (We tend to forget that nonpublic figure plaintiffs have, since time immemorial, recovered damages for cruel jokes and taunts without any attention to possible free speech concerns.)

The other innovation was even more remarkable. Applying the *New York Times v. Sullivan* privilege standard meant that a public figure plaintiff could still recover but only on proof of "actual malice"—actual knowledge that the statement was false, or reckless disregard of the issue of veracity. But the Court had already ruled that the offending statements in the parodied ad were not of the sort that could give rise to a libel claim because

they lacked the requisite factual character. Moreover, Flynt's testimony included evidence of an animus that would, anywhere else, have seemed dispositive on the issue "of actual malice." When asked by Falwell's attorney whether he had meant to harm the preacher's character, the publisher volunteered, "Yeah, to assassinate it." Yet when the dust settled, the Court ruled that as a matter of constitutional law, the record simply could not sustain a finding of "actual malice."

Only one conclusion seems tenable, though no Justice stated it: When it comes to intentional infliction of emotional distress, unlike libel or false-light privacy, a public figure simply may not recover at all, because the theoretical invitation to overcome the privilege by proving "actual malice" turns out to be illusory. One cannot prove "reckless disregard" of the truth if the statement falls outside the truth-falsehood continuum. And if an admission under oath that "I meant to assassinate his character" is legally insufficient to establish actual malice, it is difficult to imagine any evidence that might possibly be more probative.

If this analysis of the *Hustler v. Falwell* ruling is

sound, then Larry Flynt got from the Supreme Court a measure of First Amendment protection far broader than he needed, or sought, or even realized at the time. Yet his perseverance through the courts, at a time of acute physical suffering from his recent grave wounding by a would-be assassin, and a time also of profound legal risk, did establish important First Amendment principles. Once again, Calvert and Richards splendidly capture in their interview the paradox of realism and idealism that is Larry Flynt.

His own take on the import of his Supreme Court triumph is hard to improve upon, even after more than a decade of analysis: "If the First Amendment gives you any right, it gives you the right to be offensive. Just because somebody may have been offended by a Falwell parody doesn't give them the right to suppress it." For establishing that principle, we owe a fair amount to Larry Flynt. And for helping us to understand how that principle entered the law, and where it fits in the larger context of First Amendment jurisprudence, we owe much to COMMLAW CONSPECTUS for sharing with us this remarkable and timely interview.

