

LARRY FLYNT UNCENSORED: A DIALOGUE WITH THE MOST CONTROVERSIAL FIGURE IN FIRST AMENDMENT JURISPRUDENCE

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I. INTRODUCTION

Although the "C" in Larry C. Flynt stands for Claxton,¹ it could just as easily represent controversy. The publisher of pornographic magazines such as *Hustler*,² *Barely Legal* and *Chic* has been called everything from "sleaze merchant"³ and "old slimemeister"⁴ to "smut peddler"⁵ and "sultan of smut."⁶ He has been sued, not surprisingly,

by a number of the feminists whom he has lambasted in *Hustler*.⁷

Flynt, indeed, has done many outrageous things in his life since leaving his poverty-ridden Appalachian birthplace of Lakeville in Magoffin County, Kentucky.⁸ He once sought nomination as the Republican Party candidate for president of the United States.⁹ He has sent free monthly sub-

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¹ Claxton was the first name of Larry Flynt's father. LARRY FLYNT, AN UNSEEMLY MAN 7 (1996) [hereinafter FLYNT].

² Arthur Kretchmer, an editor of another adult entertainment publication, *Playboy*, once described *Hustler* "as shamelessly vulgar as its reputation suggests. It is not merely sexually explicit, it is perverse; the magazine thrives on gross, racist and scatological humor. Its overt aim is to shock one and all." Arthur Kretchmer, *My Turn: Justice For 'Hustler'*, NEWSWEEK, Feb. 28, 1977, at 13. *Hustler* is known for, among other dubious distinctions, publishing the first scratch-and-sniff centerfold. Christine Bertelson, *Hustler: 20 and Still Unrepentant*, ST. LOUIS POST-DISPATCH, May 17, 1994, at C1.

For his part, Larry Flynt once described *Hustler*—shortly before he was shot in 1978—as "a satire. It is one big put-on." *The Bloody Fall of a Hustler*, TIME, Mar. 20, 1978, at 20.

³ Mary Battiata, *Falwell Suit Against Flynt Opens in Va.*, WASHINGTON POST, Dec. 4, 1984, at C5 (quoting television evangelist Jerry Falwell during a recess on the first day of the civil trial involving Falwell's lawsuit against Flynt for libel and intentional infliction of emotional distress) [hereinafter Battiata]. Conversely, Flynt has also called Falwell "a liar, a hypocrite, and a glutton." Mary Battiata, *'Felt Like Weeping,' WASH-*

INGTON POST, Dec. 5, 1984, at A18.

⁴ Hanna Rosin, *Hustler*, NEW REPUBLIC, Jan. 6, 1997, at 20.

⁵ James J. Kilpatrick, *When Freedom is Difficult to Live With*, NATION'S BUS., Apr. 1977, at 9.

⁶ CURRENT BIOGRAPHY YEARBOOK 1999, 199 (Clifford Thompson ed., 1999).

⁷ See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1190-91 (9th Cir. 1989) (involving a lawsuit filed by outspoken feminist and anti-pornography crusader Andrea Dworkin against *Hustler* based on the magazine's quite candid criticism of her); *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 892 (9th Cir. 1988) (involving a lawsuit filed by Dorchen Leidholdt, described by the Ninth Circuit as a "vigorous opponent of pornography," against *Hustler* based on the magazine's description of Leidholdt and other women in its "Asshole of the Month" feature as, among other things, a "frustrated group of sexual fascists"); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 879 (9th Cir. 1988) (involving a lawsuit for invasion of privacy, libel, intentional infliction of emotional distress, trespass and conversion filed by Peggy Ault, founder of an organization in Oregon opposed to an adult video store, against *Hustler* based on the magazine's recognition of her as its "Asshole of the Month" and the accompanying description of Ault as "tightassed housewife" and "crackpot").

⁸ For background on Flynt's birthplace and early upbringing, see FLYNT, *supra* note 1, at 1-23.

⁹ *Off and Hustling*, WASHINGTON POST, Nov. 25, 1983, at A3. Flynt ran on a platform of fighting sexual repression and keeping "Big Brother out of your bedroom." *Id.* When asked why he was running as a Republican, Flynt responded that "I'm wealthy. I'm white. I'm pornographic. And, like Ronald Reagan, I've been shot for what I believe in." *Hustling on the Hustings*, WASHINGTON POST, Oct. 8, 1983, at A2.

Not surprisingly, the ill-fated campaign involved a free speech controversy when Flynt threatened to force television stations to show campaign commercials featuring hard-core sex acts. Martin Schram & James R. Dickenson, *Ad Nauseam*, WASHINGTON POST, Dec. 2, 1983, at A3.

scriptions of his flagship publication, *Hustler*, to the president, vice president, every member of Congress and all of the justices on the United States Supreme Court.¹⁰ Ironically, he was arrested in the Supreme Court for screaming obscenities—an unprecedented incident—at those same justices.¹¹ He has been arrested as well in a federal district court in Los Angeles on charges of desecrating a flag for wearing an American flag as a diaper.¹² He has gone from pornographer to born-again Christian and then back again to pornographer.¹³ He has seen himself portrayed on the silver screen as an “unlikely American antihero” in the 1996 Milos Forman film, *The People vs. Larry Flynt*.¹⁴ More recently, in 1998, he purchased a full-page advertisement in *The Washington Post*, offering \$1 million to anyone who had proof of an adulterous affair with a member of Congress.¹⁵

For all of this controversy, however, it is the United States Supreme Court’s 1988 decision in *Hustler Magazine, Inc. v. Falwell*¹⁶ that firmly plants Larry Flynt in First Amendment jurisprudence. The Court protected the magazine’s right to ridi-

cule public-figure Jerry Falwell,¹⁷ turning back his claim for intentional infliction of emotional distress¹⁸ resulting from an ad parody published in *Hustler* in its November 1983 issue. The parody suggested that Falwell, the founder of the Moral Majority and a nationally known minister, had engaged in “a drunken incestuous rendezvous with his mother in an outhouse.”¹⁹ The Court, reversing the decision of the United States Court of Appeals for the Fourth Circuit, held that public figures such as Falwell could not recover for intentional infliction of emotional distress based on publications such as the *Hustler* ad parody without also proving actual malice,²⁰ a standard applicable to public figures and officials in defamation law.²¹

While the *Falwell* case grabs all of the attention in law school, it should be noted that Larry Flynt’s actions on behalf of the First Amendment stretch beyond protecting his pornographic publications. For instance, after the United States invaded the tiny island nation of Grenada in October 1983 and imposed a virtual blackout on the press there, Larry Flynt stepped up and filed a federal lawsuit—*Flynt v. Weinberger*²²—against Defense Secre-

¹⁰ Chuck Conconi, *Personalities*, WASHINGTON POST, Sept. 20, 1983, at C3. Justice Sandra Day O’Connor reportedly was the only justice to write back to Flynt, asking him to cancel her subscription—a request that he refused to honor. Al Kamen & Ed Bruske, *Lawyers*, WASHINGTON POST, Oct. 24, 1983, at D2.

¹¹ *Flynt Pleads Innocent in Court Incident*, WASHINGTON POST, Nov. 24, 1983, at B6.

¹² Chuck Conconi, *Personalities*, WASHINGTON POST, Nov. 18, 1983, at C2.

¹³ See Rudy Maxa, ‘Honey, There’s More People Who Believe in God Than Porn,’ WASHINGTON POST, Nov. 22, 1977, at B1 (describing Flynt’s brief turn to religion). Regarding his decision to abandon his born-again status, Flynt once remarked:

I got over being a born-again Christian. I was fortunate enough to seek help. In my opinion, people who are born-again Christians are nothing other than manic-depressives. They get in a manic phase, and they do see the visions, they do hear the voices, and it’s nothing more than a chemical imbalance that causes it. If these people would just take a lithium, they would be O.K.

Leah Garchik, *Personals*, SAN FRANCISCO CHRON., Aug. 4, 1995, at C20.

¹⁴ John Marks, *Hustler in Hollywood*, U.S. NEWS & WORLD REP., Dec. 9, 1996, at 79.

¹⁵ Margaret Carlson, *Indecent Proposal*, TIME, Oct. 19, 1998, at 58. Mr. Flynt addresses questions from the authors about this advertisement in this law journal article. See text *infra* Part II.E.

¹⁶ 485 U.S. 46 (1988).

¹⁷ One can learn more about Jerry Falwell online at the official home page of Jerry Falwell Ministries on the Internet. See generally JERRY FALWELL MINISTRIES, at <http://www.falwell.com> (last visited Jan. 27, 2001).

¹⁸ See generally Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469 (2000) (describing the tort of intentional infliction of emotional distress and analyzing its viability as a theory of legal relief against the media).

¹⁹ *Hustler*, 485 U.S. at 48.

²⁰ Actual malice, a fault standard adopted by the United States Supreme Court in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), can be found in the publication of a statement with knowledge of its falsity or with a reckless disregard for whether the statement is true or false. Reckless disregard for the truth, in turn, exists when a defendant “in fact entertained serious doubts as to the truth of his publication” or acted with a “high degree of awareness of . . . probable falsity.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). The Supreme Court also has observed that although a failure to investigate information standing alone will not support a finding of actual malice, “the purposeful avoidance of the truth is in a different category.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989).

²¹ *Hustler*, 485 U.S. at 56. Defamation includes both the libel and slander torts. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements to state a cause of action for defamation include: (1) a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

²² 588 F. Supp. 57, 58 (D.D.C. 1984). The lawsuit ultimately was dismissed on grounds of mootness. *Id.* at 58. For

tary Caspar Weinberger, Secretary of State George Shultz and other members of the Reagan Administration.²³ The lawsuit was based on the First Amendment rights of the news media and the public's right to know.²⁴ "A total news blackout is unacceptable and not consistent with the First Amendment, and is unconstitutional," Flynt remarked at the time.²⁵

It is no surprise, then, given the seeming contradictions of this complex man, that he considers himself to be "the most misunderstood person in America."²⁶ This article attempts to dispel some of those misunderstandings by letting Mr. Flynt give his own opinions in an academic forum on issues of constitutional concern. It features an exclusive interview with Mr. Flynt conducted by the authors regarding the *Falwell* decision;²⁷ his beliefs about the meaning and importance of the First Amendment and whether he considers himself to be a First Amendment hero;²⁸ his views on society's infatuation with regulating sexual imagery;²⁹ his criticism of the United States Supreme Court's standards for obscenity law;³⁰ his reflections on his business enterprises;³¹ and his reasons for publishing the controversial advertisement in *The Washington Post* described above.³² The article concludes with the authors' critique and commentary of the interview.³³

II. THE INTERVIEW

The authors interviewed Larry Flynt in his Beverly Hills, California office on the afternoon of Friday, December 8, 2000. The publishing operation—L.F.P., Inc.—occupies the ninth and tenth floors of the glass-walled Flynt Publications building located at 8484 Wilshire Boulevard. Mr. Flynt's office is on the tenth level, the building's top floor. The building also is home to several of Flynt's other business ventures, including Flynt

Digital, Flynt Aviation and L. Flynt, Ltd. Additionally, its eighth floor houses the law offices of Isaacman, Kaufman & Painter, a firm that includes one of Mr. Flynt's main First Amendment attorneys, Alan Isaacman.³⁴

A visitor to the tenth floor is greeted by an attentive receptionist whose desk sits in a recessed foyer, which at the time of this interview was festooned with holiday swags and garlands wrapping the columns that framed the reception area. The top-floor executive suite, constructed almost in a crescent shape, is decorated with colorful Tiffany lamps and objets d'art. The walls are adorned with large oil paintings, ornately framed to create the ambiance of a highly professional, lucrative business headquarters. There are, in other words, no scantily clad women or other indicia that the primary business that makes all of this opulence possible is pornography. The waiting area outside Mr. Flynt's office is furnished with Victorian-style seating. At this time of the year, numerous potted red poinsettia plants dotted the floor.

Inside Mr. Flynt's personal office is a spacious seating area, tastefully decorated, and a large desk constructed of deep wood, intricately carved, with a glass-top covering. The furniture sits upon dark carpeting with deep green and yellow tones, and imprints of leaves. The desk looks busy—to one side the latest issues of the magazines constituting the Flynt publishing empire cover nearly half of the space, to the other side is Mr. Flynt's thin-line personal computer. In the middle is a large multilined telephone providing easy communication access to the phalanx of assistants employed by L.F.P., Inc. The remainder of the desk space is taken up with various artifacts that reflect Flynt's interests, including the Freedom Forum's First Amendment Calendar that features daily quotations about free speech and free press (Larry

more background on access to military operations including Weinberger, see Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 GEO. L.J. 931 (1985).

²³ Chuck Conconi, *Personalities*, WASHINGTON POST, Oct. 27, 1983, at D3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ John Lombardi, *Porn Again*, L.A. MAG., Nov. 1996, available at 1996 WL 8925989.

²⁷ See text *infra* Part II.A.

²⁸ See text *infra* Part II.B.

²⁹ See text *infra* Part II.C.

³⁰ See text *infra* Part II.D.

³¹ See text *infra* Part II.E.

³² See text *infra* Part II.F.

³³ See text *infra* Part III.

³⁴ Alan Isaacman has represented Larry Flynt in dozens of cases, including before the United States Supreme Court in *Falwell*, 485 U.S. 46. Isaacman was portrayed by actor Edward Norton in the 1996 Milos Forman film *The People vs. Larry Flynt*, although the Isaacman character in the movie was actually a composite of several Flynt attorneys. For a discussion of Alan Isaacman's contributions to First Amendment jurisprudence, including his long-standing representation of Larry Flynt, see Clay Calvert and Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. ____ (2001).

Flynt himself is quoted on the 2001 calendar³⁵), and a framed editorial cartoon that depicts a husband and wife looking at a newspaper headline that reads: *Clinton Impeached; Livingston Resigns*. The husband asks his wife, "Who does this leave as the most powerful man in America?" She answers simply, "Larry Flynt."

Above the credenza behind Mr. Flynt's desk is a large, gold-framed painting of a landscape of mountains and streams. The credenza itself is home to a model replica of his Gulf Stream jet (a picture of the black jet doubles as his computer's screen saver). Two black and green vases bookend the credenza, which also includes family photographs and a model stagecoach.

The interview, which lasted just over an hour, took place in Mr. Flynt's office. It was recorded on audiotape. The tape was transcribed verbatim by a professional secretary.³⁶ The authors made minor editorial changes to the transcript, mostly to correct syntax. Some of the questions and responses were reordered to reflect the themes and sections in this part of the article. A copy of the revised transcript was forwarded to Mr. Flynt for his review in late December 2000. Mr. Flynt returned to the authors a signed statement verifying that the transcript accurately reflected his remarks.³⁷ Mr. Flynt exercised no editorial control over the conduct of the interview or the content of this article.

A. Reflections on the Legacy of *Hustler Magazine, Inc. v. Falwell*

In this section, Mr. Flynt assesses the lasting impact and importance of his 1980s legal battle with Reverend Jerry Falwell. He also describes his personal relationship today with Reverend Falwell, which, judging from his remarks below, is surprisingly cordial. Mr. Flynt's comments, in fact, suggest that today he is more upset with the main-

stream media's paucity of coverage of the United States Supreme Court's decision in the *Falwell* case than he is with Reverend Falwell. He attributes the allegedly scant coverage, in part, to a "pompous attitude" on the part of most journalists. On the other hand, Mr. Flynt seems very pleased—although somewhat surprised—by the extensive amount of time that the case often receives in law school classrooms today.

INTERVIEWER: It's been about a dozen years now since the United States Supreme Court issued its unanimous opinion³⁸ in *Hustler Magazine v. Falwell*.³⁹ What has been, in your mind, the legacy of this opinion?

FLYNT: I wasn't sure of the effect it would have at the time of the decision, mainly because I was very naïve. We had lost at both the trial court level⁴⁰ and at the Fourth Circuit Court of Appeals.⁴¹ Had those decisions been allowed to stand, it would have meant that you would no longer need to prove libel to collect damages. All you would have to do is prove intentional infliction of emotional distress.

Well, you know, any political cartoonist or editorial writer wants to inflict emotional distress. That's their business. From the time my decision came out, there was a transformation among *The Tonight Show*, [David] Letterman and *Saturday Night Live*. They have become much more cutting edge. I know it was because their attorneys were standing in the background saying, "Hey, you can do this because of this case where Larry Flynt won." Now, I mean, no one ever said that. But it was obvious what was going on when you saw the monologues and the skits change.

INTERVIEWER: Certainly they say things they never would've thought about in the past and are getting away with it.

FLYNT: Yeah.

INTERVIEWER: If the Supreme Court had ruled

³⁵ The calendar is published each year by the Freedom Forum, an organization devoted to First Amendment issues. Larry Flynt's quote in the 2001 calendar appears on the November 21 page, and it reads: "If the First Amendment is intended to protect anything, it's intended to protect offensive speech. If you're not going to offend anyone, you don't need protection. Larry Flynt, publisher, *Hustler*, 1998."

³⁶ All original notes and interview tapes are on record with the authors.

³⁷ A copy is on file with COMMLAW CONSPECTUS.

³⁸ The decision was 8-0 with Justice Anthony Kennedy, who had just joined the Court, not voting. *High Court Voids Falwell Award*, L.A. TIMES, Feb. 24, 1988, at 1.

³⁹ 485 U.S. 46.

⁴⁰ See *Flynt Cleared of Libel But Must Pay \$200,000*, N.Y. TIMES, Dec. 9, 1984, at 1 (describing the jury's decision to hold Flynt liable for intentional infliction of emotional distress despite absolving him of liability on the libel cause of action).

⁴¹ *Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986) (setting forth the opinion of the Fourth Circuit concluding that "the evidence is sufficient to sustain the jury's verdict against the defendants for intentional infliction of emotional distress"); see also *Falwell Award in Hustler Ad Suit Upheld*, L.A. TIMES, Aug. 7, 1986, at 16 (describing briefly the Fourth Circuit's decision).

in favor of Jerry Falwell, how would that have affected media content—everything from television content to hard news and journalism?

FLYNT: I think it would have had a chilling effect on the First Amendment. Everyone in the media would've been restrained by the fact that whoever their subject was would not have to prove libel in order to collect damages.

When we attempted to enlist the mainstream media's support to write amicus briefs at the trial court level and at the Fourth Circuit, none of them would come onboard. They didn't want to associate themselves with us. But, as soon as the Supreme Court granted certiorari, they all came onboard because then they saw it as affecting their turf and what the consequences of a Falwell victory would mean to them.

INTERVIEWER: Do you think that the mainstream media now better appreciate what you've done for the First Amendment?

FLYNT: No, because even a celebrated case like that should've received a lot of media attention when the decision was handed down by the high court. We got a minimal amount of coverage on this. Normally, the journalists who cover the Supreme Court for the various networks will stand on the steps of the Court and analyze in detail every decision that is handed down on a given day. That did not take place in our case. Although the mainstream media have benefited from it, they are reluctant to give us any recognition for bringing this about.⁴²

INTERVIEWER: Why do you think that is? Do you think it's because of the adult entertainment industry connection?

FLYNT: I think it's a pompous attitude—that it

was *Hustler* instead of *The New York Times* that made parody protected speech. I think that if it would've been one of them, you know, it would've been a major story.

INTERVIEWER: They just didn't give it the attention it deserved because of that?

FLYNT: Yeah.

INTERVIEWER: Are you pleased with the attention that *Hustler Magazine, Inc. v. Falwell*⁴³ receives these days in law school lecture halls?

FLYNT: I thought that *New York Times v. Sullivan*⁴⁴ in 1964 probably would have been the key First Amendment case of this past century.⁴⁵ But it appears that my case seems to get the most attention in law school because it's so interesting, you know—making parody protected speech. And I'm glad they're doing it. On the other hand, I'm surprised.

INTERVIEWER: The hardest assignment that I ever had students do was to try to write the dissenting opinion in *Falwell*.⁴⁶ I said, "Okay, it's an unanimous opinion. You try to write the dissent." They hated that assignment more than anything else because they couldn't come up with a dissent.

FLYNT: I could have written the dissent. In the Supreme Court chambers, I felt it was cut and dry. I saw it as an issue of a pornographer versus a preacher.⁴⁷ I couldn't see those justices coming down on my side. When it was an unanimous decision, however, it had a lot to do with my attitude [change] about the Court.

INTERVIEWER: How so?

FLYNT: Well, Chief Justice Rehnquist wrote the majority opinion.⁴⁸ He summed it up pretty much in a paragraph when he said that simply because government finds speech offensive does not give

⁴² This echoes Mr. Flynt's sentiment in his autobiography, in which he writes that "[t]he mainstream press has never been friendly to me, and at times has been openly hostile. Yet some of the most important court cases affecting freedom of the press—cases in which I was a litigant—have been treated only as ordinary news." FLYNT, *supra* note 1, at 209.

⁴³ 485 U.S. 46.

⁴⁴ 376 U.S. 254. In *Sullivan*, the United States Supreme Court held that public officials seeking to recover damages in defamation actions for falsehoods regarding their official conduct must prove actual malice. *Id.* at 279–80. The Court in *Falwell* would borrow the actual malice standard from defamation law and require public figures and public officials seeking to recover damages for emotional anguish allegedly caused by publications under the theory of intentional infliction of emotional distress to prove actual malice. *Falwell*, 485 U.S. at 56. The malice standard employed by the Court in evaluating the ad was "whether [the ad's] publication was suf-

ficiently outrageous to constitute intentional infliction of emotional distress." *Id.* at 50. See generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991) (providing a review and analysis of the *Sullivan* case).

⁴⁵ The Supreme Court's opinion in *Sullivan* clearly is important in First Amendment jurisprudence. It has been described, for instance, as providing "a major modern context for defining the underlying meaning of the First Amendment." LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 5 (1991).

⁴⁶ See, e.g., Clay Calvert & Robert D. Richards, *Defending Larry Flynt: Why Attacking Flynt's "Outing" of Sexual Affairs is Misguided*, 21 HASTINGS COMM. & ENT. L.J. 687, 689 (1999).

⁴⁷ Norman Roy Grutman, counsel for Jerry Falwell during the case against Mr. Flynt, characterized the case in a similar, albeit more dramatic, fashion as "a pitched battle between the forces of good and evil." Battiatia, *supra* note 3, at C5.

⁴⁸ *Falwell*, 485 U.S. at 47.

it the right to suppress it.⁴⁹ I thought he capsulated that point pretty well.

INTERVIEWER: What is your relationship today with Jerry Falwell?

FLYNT: Well, back in 1996, I did the Larry King Show with Reverend Falwell. When we were waiting to go on the set, he came over to me and said, "Well, this thing is over with. I think we should bury the hatchet."

INTERVIEWER: He said that?

FLYNT: Yeah.

INTERVIEWER: How did you feel?

FLYNT: I said, "Well, I'm not too happy about burying anything. I've spent \$2.5 million in legal fees."

INTERVIEWER: Would that be the amount you spent on that case—\$2.5 million?

FLYNT: Yeah, but I told him, "Okay." So, to this day, when he comes to L.A., he always contacts me for lunch. We get together and we talk.

I debated him at the Southern Newspaper Publisher and Editors Conference down in Boca Raton, Florida a year ago. He had trouble making connections to get back to Lynchburg, Virginia. I own an airplane, so I said, "Oh, I'll drop you off."

INTERVIEWER: It's kind of ironic that you're giving a flight home to the guy who sued you.

FLYNT: Yeah, I gave him a flight home. But get this—when we landed in Lynchburg, his wife, his son and his grandkids all came onboard the plane to get their picture taken with me.

INTERVIEWER: You were involved in many legal battles prior to the *Falwell* case.⁵⁰ Did you see this case when it first arose as significantly different from and more important than those other cases?

FLYNT: No. The ad parody was clearly identified as a parody and not to be taken seriously.⁵¹ I initially thought that, legally, we were on solid ground. Then, when we found out that the trial would not take place in California but would take place in Falwell's backyard in Lynchburg, my feelings started to change about the significance of the case and our ability to win. Although it was

somewhat of a victory at the trial level when they threw out the libel claim—but they still left in the intentional infliction of emotional distress—we thought we would win in the Fourth Circuit. We didn't. So, when we got it to the Supreme Court, there was no reason to feel optimistic.

INTERVIEWER: As we mentioned earlier, Chief Justice Rehnquist's opinion in *Hustler Magazine v. Falwell*⁵² is read by hundreds of law students across the country each year. If you were a law professor teaching the case, what would be the single most important aspect that you would hope the students would come away with from that case?

FLYNT: They must remove themselves from any biases and accept the fact that the First Amendment is absolute. We have our libel laws to deal with libelous speech, but the problem that exists today is we've had free speech for so long that it's lost its value.

If you ask anyone in America if they feel we should have a right to free speech, they'll always say "yes." But then, if you say, "Well, how about this?" They say, "Well, I'm not so sure about that." They always want to qualify their position on free speech.

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.

B. The First Amendment and Its Meaning

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or the press."⁵³ In this section, Mr. Flynt describes his beliefs about the meaning of the First Amendment's protection of free speech. In the process, he discusses perhaps the most controversial form of expression in the United States today—child pornography. He also considers the controversial constitutional right to privacy⁵⁴ and

⁴⁹ See *id.* at 55 (quoting the Court's earlier decision in *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978), for the proposition that "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it").

⁵⁰ See, e.g., William Booth, *Larry Flynt: Both Ears to the Ground*, WASHINGTON POST, Jan. 11, 1999, at C1.

⁵¹ For a reprint of the ad parody that gave rise to the lawsuit, see JOHN D. ZELESNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 188 (3d ed. 2001).

⁵² 485 U.S. at 47.

⁵³ U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause, and therefore apply to state and local governmental entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁵⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that an unenumerated "right of privacy older than the Bill of Rights" protected both a married couple's right to use contraceptives and the right of doctors to provide information about contraceptive devices to married couples).

its relationship with the First Amendment's protection of expression.

It becomes clear from his comments that Mr. Flynt is a First Amendment absolutist.⁵⁵ This view, of course, has never been adopted by a majority of the justices of the United States Supreme Court.⁵⁶ Although Mr. Flynt is an absolutist, it is clear that he nonetheless supports punishing individuals who use minors in the production of child pornography. This suggests that Mr. Flynt makes a clear distinction between conduct (the creation and production of child pornography) and speech (the images that result from the conduct).⁵⁷

Mr. Flynt's absolutist position today, it should be noted, is consistent with his First Amendment beliefs in the past. For instance, after he was arrested for screaming obscenities at the justices of the United States Supreme Court in November 1983, Flynt argued to a federal magistrate during a related bond hearing that "free expression is an absolute. You don't have a right to compromise it, nor does the Supreme Court."⁵⁸ With this background in mind, the article now turns to this portion of the interview.

INTERVIEWER: What does the First Amendment's freedom of speech protection mean to you?

FLYNT: It means just what it says. It says, "Congress shall make no law."

INTERVIEWER: Some people who consider themselves absolutists are, in fact, qualified absolutists,⁵⁹ meaning that they would make exceptions

in some extreme cases such as child pornography.⁶⁰ In your view, are there ever any circumstances in which speech may be abridged?

FLYNT: Absolutely not. I even disagree with the famous justice who said that you can't scream fire in a crowded theater.⁶¹ I think you can. I feel that if someone is hurt as a result of you doing that, then [you] can be prosecuted for it. That's a very poor analogy to justify stifling free speech.

This child pornography issue—I'm getting so sick of it. I've been in this business for over 26 years, and I've never seen it.⁶² I'm not saying it doesn't exist. Anyone who uses a child in the production of pornography should be prosecuted to the fullest extent of the law. They should be prosecuted for violating the rights of someone who is not old enough to speak for themselves. But to say that a particular image is obscene because a minor might be involved—I think it's that people are so upset about the issue that they advocate censorship because there's nothing else that they can do.

A better analogy on that issue is your local newspaper. You can publish the most gory photographs on the front page of a mutilated, decapitated body. You might even win the Pulitzer Prize for it. But if you publish a photograph of two people making love, you may go to jail. Now that says a lot about the priorities of a society that condones violence and condemns sex. And that's the issue.⁶³

⁵⁵ "Absolutism is the view that: 'Congress shall make no law . . . abridging the freedom of speech' means that Congress shall make NO LAW abridging the freedom of speech." STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 13 (1990).

⁵⁶ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 750 (1997) ("Although the First Amendment is written in absolute language that Congress shall make 'no law,' the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression."); see also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 5 (1996) (observing that the Supreme Court has interpreted the First Amendment "not as an absolute bar to state regulation of speech but more in the nature of a mandate to draw a narrow boundary around the state's authority"); *Konigsburg v. State Bar of Calif.*, 368 U.S. 869 (1961) (Brock, J., dissenting).

⁵⁷ *Cf. Reynolds v. U.S.*, 98 U.S. 145, 167 (1878) (holding that a party's religious beliefs cannot be accepted as justification for a criminal act).

⁵⁸ Al Kamen, *Flynt Arrested After Cursing Supreme Court*, WASHINGTON POST, Nov. 9, 1983, at A1. Mr. Flynt also remarked at that time that, if he were elected president of the United States, he would put those who violate the First

Amendment inside glass cages so that people could see "what perverts really look like." *Id.*

⁵⁹ See RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 24 (1991) (describing some jurists as "qualified absolutists").

⁶⁰ Child pornography falls outside the scope of First Amendment protection. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "not entitled to First Amendment protection"); see also *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography").

⁶¹ The justice to whom Mr. Flynt refers to here is Oliver Wendell Holmes, Jr., who wrote in one of the Court's first efforts to determine the scope of free expression that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁶² *But see Ferber*, 458 U.S. at 774 (upholding conviction of bookstore owner for films depicting young boys masturbating).

⁶³ Mr. Flynt has focused on the violence/sex dichotomy in the past. For instance, after he was sentenced to up to 25 years in prison for engaging in organized crime and pander-

INTERVIEWER: Has your view about the First Amendment changed over the years?

FLYNT: Yes. I realized early on that there was so much apathy out there because people were born into this culture where they had free speech and individual rights and liberties. They felt they would last forever. So, it was hard to get them motivated and to realize that these freedoms could be lost as easily as [they were] gained.

In our last century, there was a guy who, not long before he started exterminating the Jews, at the top of his agenda was censorship. When he started burning books, he didn't start with the classics. He started with the so-called garbage and pornography that nobody wanted to see. Eventually, it led to Voltaire and Shakespeare.

That's why I speak on college campuses as often as I can—to get these kids to realize that it's essential that they not be apathetic to any of their freedoms.

INTERVIEWER: Are you hopeful about it when you hear back from these students?

FLYNT: Oh, it's so much better now than it was in 1977.⁶⁴

INTERVIEWER: Why do you think that is?

FLYNT: I think the culture itself has had a lot to do with it. I believe people now can freely ask themselves this question: "Do I have the right to read or view whatever I want to in the privacy of my own home?" And they always say yes.

While they share even family values, they don't advocate imposing these values on other people. And I think it's that sort of mentality among the American people that is really leading down the path of independence.

INTERVIEWER: Sounds like the right of privacy is related, then, to the right of free speech—that in the privacy of one's home we should have the ability to do things. Is there a relationship there between privacy and the First Amendment?

FLYNT: Absolutely, because the Supreme Court has said that in the privacy of your own home you have the right to read or view what you want. Isn't that a paradox when you realize that they are saying obscenity is illegal, but if you want to view it in your own home you can?

INTERVIEWER: How do you get it in order to read it?

FLYNT: Yeah, have a printing press in the basement of your house.

INTERVIEWER: Everybody's got their own studio in their own basement.

INTERVIEWER: How much money do you think you've spent on attorneys fees and litigation costs defending yourself to First Amendment cases over the years?

FLYNT: Someone asked me that question last year. I had the accounting department along with the law firms try to get me a rough figure. From 1974 until now, it's roughly \$50 million.

INTERVIEWER: As a follow up to that question, do you think that amount is too much to pay—too much of a price to pay—for free speech and is it worth the cost?

FLYNT: Obviously it's been worth it. I'm just fortunate enough to have been able to afford it. There are a lot of people who are not that fortunate.

INTERVIEWER: Do you think that causes them to back down and not challenge or not take on these challenges to the First Amendment?

FLYNT: Yeah.

INTERVIEWER: You write in your book, *An Unseemly Man*, that "it began to dawn on me that it was possible I might be spending as much time in court defending *Hustler* as running it."⁶⁵ How many free speech cases do you estimate that you and or any of your publications have been party to over the years?

FLYNT: Oh, probably—I'm just guessing—sixty or seventy. Of course, so many of them have been thrown out on summary judgment. Some went to trial. Some didn't.

INTERVIEWER: If I could just follow up briefly to that. When you started in this business, could you have ever dreamed that you'd be spending so much time in court? Or is that part of your nature—you're a fighter and you knew you would challenge these types of infringements?

FLYNT: No, when I started *Hustler* the only thing I wanted to do was have fun and make money while I was doing it. I didn't think I had to stand

ing obscenity, Mr. Flynt released a statement that read, "I would like to pose this question: murder is a crime, writing about a crime is not. Sex is not a crime, writing about it is. Why?" *Hustler Publisher Draws 7 to 25 Years*, WASHINGTON POST, Feb. 9, 1977, at C7.

⁶⁴ The year 1977 was when Larry Flynt was first arrested on obscenity charges in Cincinnati, Ohio. Joel Stein, *Larry Flynt, the Sequel*, TIME, Apr. 20, 1988, at 64.

⁶⁵ FLYNT, *supra* note 1, at 121.

in a courtroom and listen to a judge sentence me to twenty-five years in prison before I realized that freedom of expression was something that could no longer be taken for granted.⁶⁶ I was more or less caught up in that First Amendment issue rather than seeking it out.

INTERVIEWER: Do you consider yourself to be a First Amendment hero?

FLYNT: Well, heroes die for their country, so that exempts me. I would not give my legs for anything or anyone.⁶⁷ Of course, I also think that if you could lift a lot of those boys' faces out of the mud in Vietnam and ask them if they had to do it over [again] would they give their life for their country, I think a lot of them would say no.

INTERVIEWER: Good point. You were once quoted as saying, "I used to think one person could make a difference. Now, I'm not so sure."⁶⁸ Do you consider yourself to have made a difference in First Amendment jurisprudence for your willingness to fight free speech battles across the country?

FLYNT: I don't know because when you look at the historical landscape—had Lincoln not been president, had Roosevelt not been president, had Kennedy not been president—who knows what the consequences would've been? But if I have any legacy to leave at all, I'd like for it to be that I have contributed to expanding the parameters of free speech. But what it does over the evolving landscape, I'm not sure how much different things would work out.

C. Sex, Society and Censorship

In this section, Mr. Flynt argues that the church for too long has misguided society's views toward sexuality. For centuries, he contends, the church

held on to its influence by controlling the flow of information, but in modern times innovations in communications technologies, such as the Internet, have made information accessible on a mass scale. Despite this progress, the church continues to influence societal freedoms by injecting itself into the nation's politics. Mr. Flynt suggests that even today no one is elected to Congress without some religious affiliation. In turn, the religious constituencies exert great pressure on lawmakers to pursue a conservative policy agenda, including restrictions on pornography.⁶⁹

He also reflects on the prospect of a George W. Bush presidency—the day of the interview was the date when the Florida Supreme Court ordered a manual recount of more than 40,000 contested ballots in the presidential election⁷⁰—and laments that federal obscenity prosecutions will undoubtedly increase under a Republican administration despite what he sees as a mainstreaming of pornography in many sectors of middle-class America.

INTERVIEWER: Why do you think it is that in the United States that we're so hung up about sex and yet violence is a whole different matter?

FLYNT: Great question. For the most part most people don't get it, but it's the church. The church has had its hand on our crotch for over 2000 years. The government is exceedingly moving in that direction, feeling that if it can control our pleasure center, it can control us. Ever since the Victorian era, the rich and the privileged have always had their leather-bounded issues of pornography. But today the local video store and newsstand have become the poor man's art museum. And now, when we move into this era of wireless communication, the genie's out of the bottle.

⁶⁶ Larry Flynt was sentenced in Feb. 1977 to up to twenty-five years in prison for engaging in organized crime and pandering obscenity. Peter Bonventre et al., *A Dirty Book Goes to Jail*, NEWSWEEK, Feb. 21, 1977, at 34. The trial in that case lasted five weeks, with Hamilton County Prosecutor Simon Leis, Jr. convincing the jury in Cincinnati that Flynt violated a little-used Ohio statute on organized crime by virtue of dealing with editorial and printing operations located in cities other than Cincinnati. *A Bad Case Makes Worse Law*, TIME, Feb. 21, 1977, at 51; see also *Flynt v. Leis*, 434 F. Supp. 481 (S.D. Ohio 1977) (upholding the constitutionality of OHIO REV. CODE ANN. § 2907.31 (1973)).

⁶⁷ Flynt was shot in Mar. 1978, leaving him without the use of his legs and confining him to his gold-plated wheelchair. Mindy Fetterman, *Hustler Magazine's Flynt is Shot; Condition is Critical*, WASHINGTON POST, Mar. 7, 1978, at A1

(describing the shooting in Lawrenceville, Ga., which occurred while Flynt was outside a courthouse where he was being tried on obscenity charges).

⁶⁸ C. Ray Hall, *In the Limo with Larry*, COURIER-J. (Louisville, Ky.), Jan. 11, 1997, at 12S.

⁶⁹ See, e.g., Thomas B. Edsall, *Conservative Allies Plot Separate Routes; Christian Coalition Set to Open 'Road to Victory' Sessions Today*, WASHINGTON POST, Sept. 13, 1996, at A20; see also Thomas B. Edsall, *Tilt to Right on Morality is Seen as Risky for Gore*, WASHINGTON POST, Aug. 20, 2000, at A8.

⁷⁰ See Marego Athans & Ann LoLordo, *Gore brought back from the brink as Fla. high court orders recount*, BALTIMORE SUN, Dec. 9, 2000, at 1A (describing the Florida Supreme Court's decision on Dec. 8, 2000 in *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000)).

Centuries ago people were controlled by information. And that information was held by the church and the government. Today, that's no longer possible and I know it makes the ruling class very uncomfortable, but it's something they're going to have to deal with because I can't see them ever [being] able to roll back the clock.

INTERVIEWER: As you said, the genie's out of the bottle now because the Internet makes everything accessible. So how has the Internet affected the pornography industry?

FLYNT: Well, it makes it more pervasive. You've got to understand that there was a logical transformation that took place in the last century. James Joyce's *Ulysses* was banned for 12 years, along with *Lady Chatterley's Lover* and *Fanny Hill*.⁷¹ We were talking about books. And then came the X-rated film industry and video. Then came cable TV and now the Internet. And, so, it was just one new medium after another that made this information accessible to the people.

Of all of these television shows that have been on and I've seen other people talk about censoring the Internet, I never hear one of those bastards bring up the fact that there's at least a dozen browser systems that are great in terms of blocking content you don't want your kids to receive. The one that we even recommend on our website is one called Net Nanny, which we think is probably the best one out of the whole group.⁷²

So it's just like when the entertainment industry and the politicians agreed on the v-chip,⁷³ but now nobody seems that concerned about using it.⁷⁴ Now, they have the technology to block out the material you don't want your kids to see on the computer, but people are interested in censorship, not solutions.

You see, the materials that I produce and publish are for consenting adults, not for children. That issue rings true with everybody I know in this industry. Believe me, I know 90% of people in this industry, and I don't know anyone that has any interest in selling this material to children.

INTERVIEWER: Why do you think Congress, then, is so obsessed with regulating sexual expression on the Internet?

FLYNT: I thought I answered that question earlier with my statement about the church.

INTERVIEWER: Is it because the religious constituencies place so much pressure on them?

FLYNT: Yeah, I'll take a different stab at that. You won't find one single member of the House or the Senate that has been elected without a religious association attached to his name. So these groups have influence on their legislators. And then you have the religious right, which is a very well-organized constituency that brings a lot of pressure—not just on issues like pornography—but on abortion as well.⁷⁵ I think that's what the legislators are responding to.

INTERVIEWER: Do you think the religious right is as active today as it was, let's say, ten years ago?

FLYNT: I'll say they're more active and will become even more active if [George W.] Bush gets in there.

INTERVIEWER: What do you think about that? What will happen in the event that there's a George W. Bush presidency? Do you think we'll see increasing efforts to regulate?

FLYNT: Well, you know, my attorney sort of depressed me the other day. I'm not talking about Alan Isaacman;⁷⁶ I'm talking about Paul Cambria who was one of my trial attorneys in that first case in Cincinnati.⁷⁷ He's probably the best obscenity

⁷¹ See generally EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 1-97* (providing background and analysis on the regulation of both *Ulysses* and *Lady Chatterley's Lover*, as well as other works of literature such as Emil Zola's *The Earth (La Terre)*).

⁷² See HUSTLER.COM, RSACI AND SITE BLOCKING INFORMATION, at <http://www.hustler.com/rsaci.html> (last visited Feb. 17, 2001).

⁷³ See FEDERAL COMMUNICATIONS COMMISSION, VIEWING TELEVISION RESPONSIBLY: THE V-CHIP, at <http://www.fcc.gov/vchip/> (last modified Sept. 15, 2000) (explaining the nature and use of the v-Chip technology).

⁷⁴ See, e.g., Paul Farhi, *Parents Not Tuned to V-Chip; New TV Device Arrives Unnoticed*, WASHINGTON POST, June 29, 1999, at A1.

⁷⁵ See, e.g., Martin Kettle, *Religious Right on the Rise: As Christian Blockbusters Take On Hollywood, Congress Prepares to*

Limit Right to Choose: Abortion Pill Under Threat, GUARDIAN, Feb. 8, 2001, at 19; Michael Tackett, *Stay on the Right, Bush Told Religious Conservative He Must Stand Firm Against Abortion to Win*, CHI. TRIB., Apr. 8, 2000, at 3.

⁷⁶ Alan L. Isaacman argued in defense of Mr. Flynt and Hustler Magazine, Inc. before the United States Supreme Court in *Falwell*, 485 U.S. 46. Today, the offices of Isaacman's law firm—Isaacman, Kaufman & Painter—are located in the same Beverly Hills building with Mr. Flynt's business offices.

⁷⁷ See *Flynt v. Leis*, 434 F. Supp. 481 (S.D. Ohio 1977). In 1976 Paul Cambria helped defend Mr. Flynt, his wife and his brother against charges of obscenity and organized crime. Flynt was prosecuted and convicted; however, his convictions were later overturned on appeal. Dan Horn, *Flynt Betting County 'More Rational' Now*, THE CINCINNATI POST, Apr. 8 1998, at 1A.

lawyer in America. He said that during the Reagan-Bush presidency, they averaged 120 federal prosecutions a year on obscenity.⁷⁸ During the Clinton administration, zero.⁷⁹ So, he says if Bush gets in, I think we can look to turning the clock back.

INTERVIEWER: That's a politician's standpoint. But Americans do spend an awful lot of money on sexually explicit media content, such as magazines and videos and so forth.⁸⁰ Do you think that the adult entertainment industry is becoming more mainstream? Do you see it becoming even more mainstream at some point in the future?

FLYNT: Obviously, it's becoming more mainstream. I don't know if you've seen our store on Sunset [Boulevard], Hustler Hollywood.⁸¹ But you can very well feel in that store like you're in Saks Fifth Avenue or Nieman Marcus. People feel comfortable shopping there, whether they're men or women. And the store has been hugely successful. We're opening others now. We've got one opening next week in Cincinnati.⁸²

INTERVIEWER: Going back to Cincinnati?

FLYNT: Yeah.

INTERVIEWER: You have to challenge Cincinnati a little bit?

FLYNT: Oh, I just sort of tweak them a little bit.⁸³

D. On Obscenity Laws in the United States

Obscene speech is not protected by the First

Amendment.⁸⁴ Determining when speech is obscene, of course, is a difficult matter. In *Miller v. California*,⁸⁵ the United States Supreme Court set forth a three-part test to assist the trier of fact in making an obscenity determination. Specifically, that test, which remains in effect today, asks: (a) whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁸⁶

If all three prongs of the test are met, then any First Amendment protection for the work in question dissolves.⁸⁷ Critics of the *Miller* test point to the confusion jurors face in applying it, along with the disparate results across jurisdictions when differing community standards are used.⁸⁸

In this section of the interview, Mr. Flynt gives his thoughts on the *Miller*⁸⁹ obscenity standard. There is no initial question in this section, as Mr. Flynt's comments about *Miller* were unprompted and took place immediately after the conclusion of the authors' questions regarding sex, society and censorship set forth above in Part C.

FLYNT: You know, eventually the Supreme Court will have to revisit the *Miller* test.⁹⁰ They really copped out by leaving it up to the individual communities to set their own standards on ob-

⁷⁸ Rachel Roemhildt, *You Wouldn't Know It, But Porn is Illegal*, WASHINGTON TIMES, Nov. 5, 1998, at A2 (calling the Reagan-Bush era "the repressed years" because of the peak in obscenity prosecutions).

⁷⁹ See *id.*; see also *Fifteen Governors Come Out for Obscenity Law Enforcement*, US NEWSPAPER, Nov. 1, 1999, available at 1999 WL 22283116.

⁸⁰ The adult entertainment industry was estimated to be a \$10 billion business in 2000. John Accola, *XXX-Rated E-Commerce*, ROCKY MOUNTAIN NEWS, May 21, 2000, at 1G.

⁸¹ Hustler Hollywood is located at 8920 Sunset Boulevard in West Hollywood, Calif. The store reportedly has revenue of more than \$200,000 per month. Elise Ackerman, *Sex sells. Latte sells. But in the same store?*, U.S. NEWS & WORLD REP., May 10, 1999, at 48 [hereinafter Ackerman].

⁸² Hustler Hollywood opened in Monroe, Ohio on Dec. 15, 2000. Melanie Pantan Cox, *Flynt's Hustler Hollywood Opens Its Doors for Business*, DAYTON DAILY NEWS, Dec. 16, 2000, at 3B. The store sells more than 10,000 different adult and nonadult items such as adult toys, sexual and nonsexual greeting cards, body oils, men's and women's apparel, videos and magazines. *Id.*

⁸³ It was in Cincinnati where Mr. Flynt was convicted by a jury in Feb. 1977 for pandering obscenity and engaging in organized crime. Peggy Lane, *Publisher Remains Jailed As Court*

Delays on Appeal, WASHINGTON POST, Feb. 10, 1977, at A3. For a brief summary of Flynt's long-running obscenity battles in Cincinnati, see Warren Cohen, *The Flynt's Latest Hustle in Cincinnati: Can Lingerie Skirt the Rules on What's Adult?*, U.S. NEWS & WORLD REP., May 1, 2000, at 26.

⁸⁴ See generally *Roth v. United States*, 354 U.S. 476, 485 (1957).

⁸⁵ 413 U.S. 15 (1973).

⁸⁶ *Id.* at 24 (citation omitted).

⁸⁷ See *State v. Kam* 748 P.2d 372, 375 (Haw. 1988) ("It follows that those statutes [that] meet the requirements of Miller will not infringe on any constitutionally protected rights under the First Amendment.")

⁸⁸ The Court in *Miller* specifically rejected the application of a uniform national community standard, writing that questions of whether speech appeals to a prurient interest or is patently offensive "are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Miller*, 413 U.S. at 30.

⁸⁹ *Id.* at 24 (three-prong test for what constitutes obscenity).

⁹⁰ See *id.*

scenity. What you're doing is you're asking filmmakers in San Francisco or L.A. or in New York to second-guess what viewing habits are in Biloxi, Mississippi. It's just the most ridiculous thing you can think of.

And the various tests that they have for obscenity at home like social, political, literary, artistic value—I mean, one man's pornography is another man's art, you know.⁹¹ It's just too subjective to define. I think of Potter Stewart who said, "I don't know how to identify it, but I know it when I see it" or something like that.⁹²

I think Justice William O. Douglas really did a lot in those early years to guide the Court on the question of obscenity.⁹³ He always took the position that it's too subjective in nature.⁹⁴ It's sort of like the concept of sin. What might be to one is not to another. Therefore it's better left in the minds of man. As far as I'm concerned—and not because he was a liberal—to my way of thinking, I just believe he was probably one of the most intelligent justices we had in the last century.

INTERVIEWER: You mentioned that the Supreme Court at some point is going to have to change the three-part *Miller* obscenity test.⁹⁵ Are you confident that someday they will change the *Miller* test and maybe even scrap the *Miller* test?

FLYNT: Well, they're going to have to. I just talked to my local attorney in Cincinnati. He just won a huge obscenity case with an all-woman jury and an average age of 50.⁹⁶

⁹¹ This comment parallels the United States Supreme Court's 1971 observation that "it is nevertheless often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁹² Mr. Flynt's reference here is to Justice Potter Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Justice Potter Stewart observed that only "hard-core pornography" should be criminally actionable, adding famously that:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case [*Les Amants*] is not that.

Jacobellis, 378 U.S. at 197 (Stewart, J., concurring).

⁹³ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563–64 (1975) (Douglas, J., dissenting in part and concurring in the ruling in part) ("No matter how many procedural safeguards may be imposed, any system which permits governmental officials to inhibit or control the flow of disturbing and unwelcome ideas to the public threatens serious diminution of the breadth and richness of our cultural offerings."); *Freeman v. Maryland*, 380 U.S. 51, 61–62 (1965) (Douglas, J., concurring) ("I do not believe any form of cen-

INTERVIEWER: Really?

FLYNT: Cambria just won a big obscenity case in St. Louis with twelve women.⁹⁷

INTERVIEWER: The times they are a changing.

FLYNT: Average age of 56.

INTERVIEWER: Wow.

FLYNT: The prosecutors are not getting convictions because a lot of people are seeing this as harmless. If someone wants to enhance or improve their sex life by using marital aids or pornography, that should be their business and not the business of the government.

E. Larry Flynt: The Business Man

From less than humble beginnings in rural Kentucky to a lavish and massive publishing empire⁹⁸ based in Beverly Hills, California, Larry Flynt, for some, embodies the American dream. It is literally a "rags-to-riches" story about the journey of a poor boy, born to sharecroppers, who eventually makes millions by capitalizing on a simple economic principle: supply and demand.

His product, however, is not without its critics. For those who loathe his handiwork, Mr. Flynt's business successes better resemble a nightmare—a major malfunction in social taste. Despite the diverse viewpoints about the man himself or how he makes his living,⁹⁹ his financial success is an overwhelming testimony to the changing attitudes toward pornography in the United States.

ship—no matter how speedy or prolonged it may be—is permissible."); *Superior Films, Inc. v. Dept. of Educ. of State of Ohio, Div. of Film Censorship, et al.*, 346 U.S. 587, 5889 (1954) (Douglas, J., concurring) ("In order to sanction a system of censorship I would have to say that 'no law' does not mean what it says, that 'no law' is qualified to mean 'some' laws. I cannot take that step.")

⁹⁴ See *supra* note 93.

⁹⁵ *Miller*, 413 U.S. at 24.

⁹⁶ See Michele Munz, *Jury Finds Explicit Videos From Store Are Not Obscene*, ST. LOUIS POST-DISPATCH, Oct. 27, 2000, at 1 (describing the decision referred to by Larry Flynt involving sexually explicit videotapes rented from a store called Family Video in O'Fallon, Missouri outside of St. Louis). The all-woman jury decided after approximately two-and-a-half hours of deliberation that the videos—*Anal Heat* and *Rock Hard*—which depicted anal, oral and vaginal sex among women and between men were not obscene. *Id.*

⁹⁷ See *id.*

⁹⁸ See Ronald Grover, *Larry Flynt's Latest Hustle*, BUS. WK., Jan. 18, 1999, at 94 (noting that L.F.P., Inc. publishes 32 "monthly and commemorative publications") [hereinafter Grover].

⁹⁹ See *supra* notes 3–6 (describing some of the terms that Mr. Flynt has been called during his life).

Mr. Flynt has moved beyond the publishing industry. In December 1998, he ventured into the retail business by opening a store—Hustler Hollywood—on Sunset Boulevard in Los Angeles. The clean, well-lit store and latte bar competes on appearances with any upscale bookstore or department store—although, not surprisingly, most of the merchandise is adult in nature. In December 2000, he opened a second Hustler store—this time in Monroe, Ohio, near Cincinnati—amid mixed reactions from the townspeople.¹⁰⁰ He plans to open more stores throughout the country.¹⁰¹ Moreover, he may take them public.¹⁰²

Mr. Flynt also is playing his hand in the gaming industry. In the summer of 2000, he and his attorney Alan Isaacman opened a \$35-million casino in Gardena, California.¹⁰³ The facility caters to “people who mean business when they play cards.”¹⁰⁴ Mr. Flynt has transformed the operation into a family affair, employing his wife, Liz, to manage the gift shop.¹⁰⁵

Adult entertainment is an industry on the move. Aided by easy-access technology, it has grown into a \$10 billion per year business in this country.¹⁰⁶ As Mr. Flynt’s comments below suggest, the bulk of his profits come from the adult business operations, but a sizable amount derives from his other ventures.

INTERVIEWER: Many people know you from your work in the adult entertainment industry but you have so many other business ventures. I saw a number of them outside your building on the sign. How much of your business has been in the adult entertainment area and how much of it is in other things?

FLYNT: We’ll probably do about \$130 million in our adult titles. That’s counting the Internet, which is adult as well, and counting the stores.

INTERVIEWER: That’s a year, the \$130 million figure?

FLYNT: Yeah, and about \$20 million at the casino we just opened up down in Gardena, which is south of here.

INTERVIEWER: We were doing research for background. We found one quote regarding a professor—something that you’d said regarding the readership of Hustler. You said something to the effect that you would prefer to have ten truck drivers rather than one college professor reading your magazine.¹⁰⁷ As two professors, we were highly offended by that remark.

FLYNT: You know, when I first delivered that speech it was at Harvard in 1977. I said I’m just interested in selling magazines. I said, “I would rather have ten truck drivers reading us than one college professor.” But after that we did our demographics study, and we found that it was not necessarily the truck drivers reading us. It was your better-educated people on a whole reading the magazine.

F. Bringing Down the Hypocrites

As the introduction to this article suggests, Larry Flynt is known for controversy not only in pornography but also in politics. His political maneuvers often focus on exposing hypocrisy wherever he finds it—and he finds it in a variety of places. In this section, he discusses the motivations behind his organized campaign during the impeachment hearings on President Bill Clinton in the fall of 1998. Troubled by what he thought of as biased coverage of the president’s transgressions, Mr. Flynt was inspired to place an advertisement¹⁰⁸ in *The Washington Post* offering up to \$1 million to anyone who could prove an “adulterous

¹⁰⁰ Melanie Pantone, *Flynt’s Hustler Hollywood Opens Its Doors for Business*, DAYTON DAILY NEWS, Dec. 16, 2000, at 3B (quoting a variety of reactions from area residents to the grand opening).

¹⁰¹ See Ackerman, *supra* note 81, at 48 (describing how Larry Flynt’s business ventures have gone mainstream and his plans to open at least forty stores nationwide).

¹⁰² Grover, *supra* note 98, at 94.

¹⁰³ Dianne Bates, *Clubs; All Decked Out; Wanting a Plush Place to Play Cards, Larry Flynt Opens the Flamboyant Hustler Casino in Gardena*, L.A. TIMES, Aug. 17, 2000, at F44.

¹⁰⁴ *Id.*

¹⁰⁵ Larry Flynt and Liz Berrios, his fourth wife, were married in June 1998. Irene Lacher, *Sunday Brunch; Out and About*, L.A. TIMES, June 28, 1998, at E1. Berrios was Flynt’s

nurse and has been credited as the individual who checked Mr. Flynt into a clinic and got him off of painkillers. *Id.*

¹⁰⁶ Timothy Egan, *Porn Inc.; Selling Pornography Becoming Big Business for Our Nation’s Biggest Corporations*, PLAIN DEALER, Oct. 27, 2000, at 1E (describing how corporate acquisitions have placed some of the nation’s leading businesses squarely into the adult entertainment industry). General Motors Corp., for example, through its DirecTV subsidiary, “now sells more graphic sex films every year than does Larry Flynt.” *Id.*

¹⁰⁷ David Gelman & Jon Lowell, *Paydirt*, NEWSWEEK, Feb. 16, 1976, at 69 (“We sell to the Archie Bunker of America . . . [W]e would rather have ten truck drivers reading us than one college professor.” (quoting Mr. Flynt)).

¹⁰⁸ See WASHINGTON POST, Oct. 4, 1998, at A11.

sexual encounter” with a member of Congress or high-ranking government official.

The fishing exhibition proved fruitful. Shortly after the ad ran, Mr. Flynt announced that he had learned of four affairs involving incoming Speaker of the House Bob Livingston, a Republican from Louisiana.¹⁰⁹ Livingston moved swiftly and resigned before the details were published.¹¹⁰ Mr. Flynt’s efforts did not stop there. With the assistance of freelance writer Dan Moldea,¹¹¹ he uncovered other indiscretions by lawmakers and published his findings in *The Flynt Report*,¹¹² a full-color glossy magazine widely distributed at newsstands across the country for the cover price of \$4.99. Mr. Flynt’s disclosures firmly established him as a political force of major proportion throughout Capitol Hill.¹¹³

The news media balked at Mr. Flynt’s bounty hunting, seeking instead to criticize his tactics.¹¹⁴ Mr. Flynt, as noted in Part A above, is not a fan of the mainstream media. He argues that profits—not integrity—drive news coverage in this country.¹¹⁵ Nonetheless, he predicts that his reporting methods eventually will be employed by other news organizations in the United States. This section now turns to Mr. Flynt’s comments.

INTERVIEWER: Back in 1998, when you took out that ad in *The Washington Post*, were you just so fed up with politics as usual that that’s why you did it? What was your motivation?

FLYNT: Every night, when I went home and

turned on the television, it was bash Clinton night regardless of what channel you put on. But at the same time they would show the polls saying Clinton had a 70% approval rating.¹¹⁶ So, I’m thinking, “Wait a minute. Something’s wrong because who’s speaking for 70% of America? I know who’s speaking for the 30%, but who’s speaking for the 70%?”

And, you know, I took out that ad in the *Post* and it immediately brought down Livingston.¹¹⁷ Bob Barr had stood on the floor—this is another thing that pissed me off about the media—of Congress and said that abortion is equivalent to murder. Still, he urged his wife to have an abortion. And the media gave him a pass on that. I mean, they reported it, you know, but I felt that they really weren’t doing their job.

INTERVIEWER: It would be attempted murder by his definition then.

FLYNT: Well, the day Livingston resigned he did an interview with *The New York Times* and he referred to me as being a “bottom feeder,”¹¹⁸ and [the media] called me for a comment. And I said, “Yeah, that’s right, but look what I found when I got down there.”¹¹⁹

INTERVIEWER: How did you feel when you heard that he was resigning?

FLYNT: Well, you know, the first day he came out and said that he may have strayed from his marriage, but that he was never involved with an employee, a lobbyist or anybody from his cam-

¹⁰⁹ 1999 CURRENT BIOGRAPHY YEARBOOK 1999 203.

¹¹⁰ *Damage Beginning to Pile Up From Larry Flynt*, BUFFALO NEWS, Dec. 30, 1998, at 2B (noting that Rep. Robert Livingston (R-LA) referred to his downfall as a product of “Flyntism,” while others dubbed it “the politics of personal destruction”).

¹¹¹ See Matt Labash, *Clinton’s Hustler*, WKLY. STANDARD, Jan. 25, 1999, at 12 (describing Moldea’s pride in working as Larry Flynt’s “chief investigator in the anti-hypocrite program”).

¹¹² The findings are contained in Vol. IV, No. 1 of *The Flynt Report*, an eighty-two-page undated issue of the magazine.

¹¹³ See Mark Jurkowitz, *Playing Dirty; Galled by ‘Hypocrisy.’ The Rogue Porn King Larry Flynt Dives into Washington Muck*, BOSTON GLOBE, Dec. 29, 1998, at D1 [hereinafter Jurkowitz] (“Larry Flynt has been at ground zero of Washington’s toxic sex scandal. Every columnist with 80 lines to fill invokes his name.”).

¹¹⁴ See, e.g., Clay Calvert & Robert D. Richards, *Defending Larry Flynt: Why Attacking Flynt’s “Outing” of Sexual Affairs is Misguided*, 21 HASTINGS COMM. & ENT. L.J. 687 (1999).

¹¹⁵ Jurkowitz, *supra* note 113, at D1.

¹¹⁶ During the month when Mr. Flynt ran the advertise-

ment—Oct. 1998—President Clinton’s job-approval ratings were “soaring.” William Schneider, *The Nation; Politics; An Election About Nothing*, L.A. TIMES, Oct. 25, 1988, at M1. On Oct. 15, 1998, for instance, *The New York Times* reported that 63% of the 926 adults randomly surveyed by telephone from across the country approved of the way President Clinton was doing his job. Alison Mitchell & Janet Elder, *Congress’s Rating Continues to Slip in Inquiry’s Wake*, N.Y. TIMES, Oct. 15, 1998, at A1.

¹¹⁷ See Howard Kurtz, *Larry Flynt and the Barers of Bad News*, WASHINGTON POST, Dec. 20, 1998, at F01 (describing Speaker-elect Bob Livingston’s decision to resign). Flynt remarked at the time, “We’ve got a couple big fish that I just really wouldn’t be able to sleep well at night without letting the public know what hypocrites they are.” Martha T. Moore, *Flynt Says He’s Not Done With Congress*, USA TODAY, Dec. 22, 1998, at 7A.

¹¹⁸ Katherine Seelye, *Impeachment: The Passing Scene; Resignation Was Prompted by Desire to Send Message*, N.Y. TIMES, Dec. 21, 1998 at A29.

¹¹⁹ Indeed, Mr. Flynt was quoted in early 1999 in *Business Week* as stating, “I read where Livingston called me a bottom feeder. Sure, but look what I found at the bottom.” Grover, *supra* note 98, at 94.

paign.¹²⁰ We were laughing while he was saying this because those were our sources—a lobbyist, an employee and a judge in Louisiana, his home state. So I knew it was just going to be a matter of time before he was going to have to resign. It didn't surprise me.

INTERVIEWER: Some journalists criticized your efforts in that case because it was akin to paying money for information and thus against some tenets of journalism.¹²¹ Do you think they're hypocrites?

FLYNT: No. Checkbook journalism¹²² is very prevalent in the U.K. Our media in this country try to pretend that they're above it. But I'll tell you, it's on the radarscope—it's coming.¹²³

The first that we saw of it was on Barbara Walters' interview with Monica Lewinsky.¹²⁴ She scheduled the interview to air on the date that her book was going on sale.

INTERVIEWER: Not a coincidence.

FLYNT: So that was something that had to have been negotiated with Lewinsky's attorneys and Walters.

Especially since we're involved in this twenty-four-hour news cycle, people will be paying for information. I still have a responsibility to maintain the same journalistic standards as the mainstream media even if I'm paying a source. If you get it wrong, it's wrong, whether you're paying the source or not. So I don't understand why the mainstream media have such a problem. A lot of these people are destitute. It's their only chance to make a little money. Why not go for it?

INTERVIEWER: It will probably come around to that—more journalists will be doing it in the future. Talking about that twenty-four-hour news cycle, do you think that's because the cable channels need to fill the time that they'll be doing that or is it ratings driven.

FLYNT: Well, it's not so much filling the time as it is competition. You know you now have

MSNBC, Fox and CNN. They're all three at each other's throats in a big way. So it will be in an effort to try to one up them.

III. ANALYSIS AND CONCLUSION

Although the authors believe it is better to let Mr. Flynt's remarks stand on their own rather than engaging in the exercise of academic interpretation, a few brief comments seem in order. First, what is perhaps most striking about Mr. Flynt's responses and comments during the interview is the extent to which they reveal his familiarity with and knowledge of the law—from the *Miller* obscenity test and the *Sullivan* decision to the historical underpinnings of censorship in the United States and the chilling effect that he believes would have resulted had Jerry Falwell prevailed in the case against him. The interview also exposes the profound depth of Mr. Flynt's passion about the First Amendment as an absolute shield for free speech. For an individual who dropped out of high school during his freshman year and ran away from home to join the Army at the age—the underage, in fact—of 15 years,¹²⁵ Mr. Flynt shows a strong background on legal issues affecting a free press.

This, of course, may not be surprising given that his business is safeguarded by the First Amendment. On the other hand, it is clear that his is not a detached client who leaves the legal issues up to his attorneys; he knows what is going on.

A second theme that the interview makes clear is this—Larry Flynt puts his money where his mouth is. As he readily acknowledged, when he got started in the adult entertainment industry, he knew very little about the First Amendment. What mattered most to him was making money and having fun.¹²⁶ But the cold reality of censorship jolted him into the forefront of the First

¹²⁰ See Ellen Joan Pollock, *Impeachment of the President: Flynt, Nemesis of Rep. Livingston, Haggles With Women Accusers*, WALL ST. J., Dec. 21, 1998, at A8 (reporting Flynt's agreement to pay four women for their stories about Rep. Livingston).

¹²¹ See To the Editor, *Larry Flynt v. the News Media*, N.Y. TIMES, Dec. 26, 1998, at A26.

¹²² See generally LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES* 160–61 (1990) (describing the practice of checkbook journalism, and the ethical implications and questions that it raises for reporters and editors).

¹²³ Others have argued, in fact, that checkbook journalism is already here. As one recent textbook on media ethics observes, "Today it seems as though the only media organizations that do not engage in checkbook journalism are those that don't have enough money to enter the bidding!" A. DAVID GORDON & JOHN MICHAEL KITROSS, *CONTROVERSIES IN MEDIA ETHICS* 270 (2d ed. 1999).

¹²⁴ See generally CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 26–27 (2000) (describing the Walters-Lewinsky interview).

¹²⁵ FLYNT, *supra* note 1, at 14–17.

¹²⁶ See *supra* text accompanying Part B.

Amendment battleground, foraging for constitutional protection for his own adult-oriented publications and mainstream journalism alike. What sets Mr. Flynt apart from so many others who have been thrust into similar battles is that he has relished the challenge, pouring, by his own tally, "roughly \$50 million"¹²⁷ into the mix.

He recognizes, however, that his financial success has enabled him to make that commitment where others have had to succumb to the chill of censorship for lack of resources. Nonetheless, his estimated "sixty or seventy" free speech and press cases to which he has been involved represent a remarkable personal commitment to the First Amendment cause, particularly given his own health circumstances coupled with the stresses associated with litigation. Granted, as he pointed out during the interview, in some instances—particularly criminal matters—he was "more or less caught up in that First Amendment issue rather than seeking it out."¹²⁸ Those circumstances should not detract from the fact that his challenges, in many ways, have expanded the protection of the mainstream press.

While he may be considered an outcast by some in the mainstream media, Mr. Flynt is astutely aware of the conventions of traditional journalism—and when he breaks them, he does so deliberately. His comments about checkbook journalism¹²⁹ reflect an understanding of how his practices differ from those of other news organizations, although he believes that changes for the mainstream press are on the horizon. He also recognizes that traditional journalists would prefer not to be associated with him or his First Amend-

ment activities. The lack of support given to him in the early stages of the *Falwell* case made him acutely aware of that position. Moreover, even after several news organizations joined in during the latter stages of the case, they still provided little coverage to the landmark decision.

Another point of interest raised by the interview is the extent to which Mr. Flynt is responsible, in part, for helping to mainstream the pornography industry. The Hustler Hollywood stores about which he speaks are indicative of this trend. The venue on Sunset Boulevard in West Hollywood, for instance, has glass exterior walls—a feature that is more than a symbolic gesture in suggesting that pornography need not hide anymore. No one sneaks in and out of Hustler Hollywood.

The authors believe that interviews with primary sources such as Mr. Flynt are essential for promoting a better understanding of legal issues as seen through the eyes of participants in First Amendment controversies. Mr. Flynt's reflections on everything from the *Miller* test to the *Falwell* case are now accessible to scholars—professors and students—everywhere. Mr. Flynt's willingness to fund First Amendment fights, whether it is to protect parody and satire or to help mainstream journalists gain access to the scene of military operations,¹³⁰ is rare in these times when many media operations would rather settle cases than fight them. This makes his reflections even more important. Those reflections now may be considered and discussed or, as too often happens with the ideas embodied in law journal articles, overlooked and forgotten.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See supra* Part II.A.

¹³⁰ *See supra* notes 22–24 and accompanying text (describing Flynt's lawsuit seeking access to military operations in Grenada).