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Defending Larry Flynt: Why Attacking Flynt's "Outing" of Sexual Affairs is Misguided

by
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&
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"I have one goal and one goal only: to expose the hypocrisy on Capitol Hill."¹

For all of the scorn heaped upon him for the infamous *Hustler* magazine cover depicting a woman's body being devoured by a meat grinder,² and for all of the media celebration given to his free-speech, precedent-setting victory over Jerry Falwell,³ Larry Flynt's ultimate legacy may prove to be neither pornographic nor profane. It may, in fact, be a

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1. Gordon Smith, *Flynt Helps Illustrate What a Mess U.S. is In*, SAN DIEGO UNION-TRIB., Jan. 16, 1999, at A3 (quoting Larry Flynt about his decision to expose the sexual affairs of members of Congress).

2. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE* 583 (1992) (describing the protests of anti-pornography feminist groups that used the cover to criticize *Hustler*).

3. See *Hustler v. Falwell*, 485 U.S. 46 (1988). The case was featured in Milos Forman's film *The People vs. Larry Flynt*, Columbia Pictures 1996. See generally David Ansen, *Naked Ambition*, NEWSWEEK, Dec. 23, 1996, at 62 (reviewing the movie); Benjamin Svetkey, *Porn on the 4th of July*, ENT. WKLY., Jan. 31, 1997, at 16 (reviewing the movie).

legitimate advertisement—not an ad parody about Falwell and incest—that tests our assumptions about political speech, privacy, and journalism.

The facts from Flynt's latest controversy are straightforward and, by this time, fairly well known. America's Pornographer-in-Chief forks over \$85,000 to purchase a full-page advertisement in *The Washington Post* in October, 1998.⁴ The ad offers \$1 million to anyone who can prove having an adulterous affair with a member of Congress or a high-ranking government official.⁵ More than 2000 calls come in.⁶ Within a matter of months, the advertisement leads to information that forces the hand of United States Representative Robert L. Livingston (R-La.), causing the House Speaker-designate to admit to adultery, relinquish his claim to the speakership, and quit Congress. Flynt then moves on to his next target, alleging that Representative Robert Barr (R-Ga.), one of the thirteen house managers in the impeachment trial of President Bill Clinton and a staunch pro-life advocate, paid for his second wife to have an abortion in 1983⁷ and had an affair in 1985.⁸ Flynt is roundly condemned by politicians and mainstream journalists.⁹

That condemnation is misguided. Flynt merely operates within a framework of journalism and politics that was already in place. He rides in its wake. It is a framework that thrives on revelation of the intimate and that was, in fact, created by the very mainstream journalists and politicians who now condemn him. Flynt simply pushes the envelope, testing the boundaries of that system. He is like a court jester¹⁰ who, through his antics, simultaneously mocks and informs.

4. See WASH. POST, Oct. 4, 1998, at A11 (containing the full-page advertisement that has sparked the controversy).

5. See *id.*

6. See William Booth, *Larry Flynt: Both Ears to the Ground*, WASH. POST, Jan. 11, 1999, at C01.

7. See Judy Mann, *Flynt's Assault on Hill*, WASH. POST, Jan. 15, 1999, at C11.

8. See Smith, *supra* note 1, at A3.

9. "It is almost too delicious to watch Mr. Flynt throw his higher-minded colleagues in the news business into conniptions." Frank Rich, *Larry Flynt Stoned*, N.Y. TIMES, Jan. 16, 1999, at A17.

10. "From medieval times until the 17th century licensed fools or jesters were commonly kept at court, and frequently in the retinue of wealthy nobles." WILLIAM ROSE BENET, *THE READER'S ENCYCLOPEDIA* 356-57 (2d ed. 1965).

Flynt claims he wants to expose the hypocrisy in Washington of self-righteous politicians.¹¹ The hypocrisy narrative is far from new or unusual in the world of investigative journalism. As communication scholars James Ettema of Northwestern and Theodore Glasser of Stanford observe, "a common strategy of investigative journalism is to hoist public officials on the petard of their own words."¹² Journalists have long exposed hypocrites for preaching one thing but practicing another. Such was the downfall of 1984 presidential aspirant Gary Hart.¹³ Indeed, the press reported every detail about Hart's liaison with Donna Rice in his Washington, D.C. townhouse and on a boat ride to Bimini.¹⁴

The real hypocrites exposed by Flynt are not just two-faced politicians but the journalists who attack him for getting the scoop on Livingston that they either were unable or unwilling to discover. Lest these self-righteous journalists forget, it was Flynt and his attorney, Alan L. Isaacman, who won them the First Amendment¹⁵ protection to express caustic criticism of public officials in *Hustler v. Falwell*.¹⁶ Journalists by the drove supported Flynt at that time. Briefs of amici curiae in the case were filed on behalf of Flynt by, among others, the Association of American Publishers, the Reporters Committee for Freedom of the Press, and Richmond Newspapers, Inc.¹⁷

11. As Flynt told a reporter from *USA Today* in December, 1998, "We've got a couple of 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.

12. JAMES S. ETTEMA AND THEODORE L. GLASSER, CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE 94 (1998).

13. "During the 1984 primary season, the media staked out the Georgetown townhouse of Colorado Senator Gary Hart while he was a front-runner in the campaign. He subsequently left the presidential race amid allegations of an extramarital affair." PHILIP PATTERSON & LEE WILKINS, MEDIA ETHICS: ISSUES AND CASES 154 (3d ed. 1998).

14. See CLIFFORD G. CHRISTIANS ET AL., MEDIA ETHICS: CASES & MORAL REASONING 119 (4th ed. 1995).

15. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST., amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment's Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

16. 485 U.S. 46 (1988).

17. See *id.* at 47.

Flynt, however, somehow is now fair game for attack by others in the media because he is outside of the mainstream. He is not one of them, or so they want us to believe. He is not a journalist but rather a smut peddler or bottom-feeder, terms which are attacks on his character and are used to lessen his credibility as a journalistic player.¹⁸ Brand him with these monikers and ad hominem attacks and suddenly Flynt becomes an easy rube to pillory and to cast aspersions upon.

In the era of Matt Drudge and his infamous on-line *Drudge Report*,¹⁹ however, who is to say how one is to define journalist? It is a profession, after all, that does not require a license, a fixed course of education, or any examination, unlike law or medicine.²⁰ Although courts, by necessity, attempt to define journalist when individuals assert a journalist's privilege not to testify in court,²¹ these definitions are legal constructions that engage in specious distinctions between the amorphous and equally undefinable concepts of

18. David Broder, for instance, remarked on PBS that "the bottom-feeders" are now setting the agenda. Rich, *supra* note 9, at A17.

19. The *Drudge Report* is "a gossip column focusing on gossip from Hollywood and Washington, D.C." Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998). It is best known for breaking the story of the relationship between President Bill Clinton and erstwhile White House intern Monica Lewinsky. See PETE HAMIL, NEWS IS A VERB: JOURNALISM AT THE END OF THE TWENTIETH CENTURY 8-9 (1998) (observing that "an amateur gossip 'zine called the *Drudge Report*" broke the story).

On the question of whether Matt Drudge is a journalist, Marvin Kalb recently observed in an interview:

You know, journalism is not a profession where you have to be bonded or licensed. Anybody can become a journalist. Anybody can walk in a room and say, I've got a pad and a pen, and I'm a reporter. Which is exactly what Matt Drudge has done, I might add.

Gloria Berger, *Matt Drudge is Not My Colleague*, HARV. INT'L J. PRESS/POL., Summer 1998, at 132.

Mike Godwin, counsel to the Electronic Frontier Foundation, calls Drudge "the Internet's first political gossip columnist." MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 94 (1998).

20. See JAMES FALLOWS, BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY 150 (1996) (arguing that journalism is not a profession because it lacks fixed standards for admission and does not require mastery over a specialized field of knowledge). "When one asks who they [journalists] are, there is a debate over whether the designation *journalist* applies only to those employed by media organizations or also to 'lonely pamphleteers,' freelance writers, and others." Everette E. Dennis, *Foreword* to DAVID H. WEAVER & G. CLEVELAND WILHOIT, THE AMERICAN JOURNALIST IN THE 1990S, ix-x.

21. See *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

news and entertainment.²² Indeed, New York University's Neil Postman notes, "television tends to turn its news into a form of entertainment."²³ The product is "infotainment."

Mainstream journalists, of course, did not ignore Flynt's outing of Livingston. They covered it. He just beat them to the scoop. As Howard Kurtz of *The Washington Post* wrote, Flynt is now setting the agenda for the news business.²⁴

And it is a business. Journalists who criticize Flynt because they see his efforts as nothing more than a crass tactic to boost circulation—he readily admits an anticipated short-term circulation increase for *Hustler* of 10 to 12 percent as a result²⁵—should look at their own employers first. The fact today, as it always has been, is that news is a commodity sold by a business with bottom-line interests.²⁶ And the profit pressures are getting worse. After conducting an extensive investigation with editors, reporters, publishers and media analysts, the prestigious *Columbia Journalism Review* concluded in mid-1998 that "the news product that lands on newsstands, doorsteps, and television screens is indeed hurt by a heightened, unseemly lust at many companies for even greater profits."²⁷

So where are we now? After more than one year of constant, non-stop sex scandal coverage, members of the media find themselves in a unique position on this story. They can still report the muck but blame it on a man they dub a repulsive pornographer. The media have taken full advantage of the get-out-of-the-gutter-free card Flynt has handed them. While journalists publicly chide Flynt for spreading sexual dirt, they cover it with great alacrity. After all, most Americans who have registered their opinions on Flynt's outings of politicians did *not* learn about them while

22. See *id.* at 130.

23. NEIL POSTMAN & STEVE POWERS, *HOW TO WATCH TV NEWS* 155 (1992).

24. See Howard Kurtz, *Larry Flynt, Investigative Pornographer*, *WASH. POST*, Dec. 19, 1998, at C1.

25. See Ronald Grover, *Larry Flynt's Latest Hustle*, *BUS. WK.*, Jan. 18, 1999, at 94.

26. See John Morton, *Can High Profits and High Quality Coexist?*, *AM. JOURNALISM REV.*, Jul-Aug. 1998, at 72 (describing "the eternal conflict in the newspaper business between the quest for profit and the duty to perform public service").

27. Neil Hickey, *Money Lust: How Pressure For Profit is Perverting Journalism*, *COLUM. JOURNALISM REV.*, July-Aug. 1998, at 28, 30.

leafing through the pages of *Hustler*. They simply followed the mainstream media's comprehensive coverage of Flynt's public discourses.²⁸

Rather than attack Flynt, we should thank him. In particular, his outer-edge-of-journalism style forces us to consider important questions about political speech, democratic self-governance, privacy, and journalism. Is speech about the past sexual infidelities of politicians speech of public concern, that promotes a Meiklejohnian conception of wise and informed decision making,²⁹ or is it a private matter that should be left between the individuals involved and ignored by the media? Should journalists ever report on past sexual infidelities of politicians? When should journalists embargo or hold back on reporting allegations of sexual improprieties that they do discover? When should mainstream news organizations hold off on reporting allegations that non-mainstream organizations have broken? When, if ever, is it worth paying for information in the checkbook journalism³⁰ style that Flynt boldly practiced? Is the construct of "character" used without sufficient justification by journalists to move facts from the private lives of individuals to the public sphere?

Today, as communications scholar Samuel Winch writes, "so-called 'mainstream' journalists do what they can to discredit and minimize the importance of stories they dislike even as they feel compelled to report the details of them."³¹ Nothing reveals this more than the latest Flynt caper. The question now is why do journalists feel compelled to do so? Is it because they know the stories will sell their publications? Alternatively, is it because they feel these stories are what

28. Flynt was interviewed about his allegations on *Rivera Live*, *Larry King Live*, *20/20*, *Good Morning America*, and *CBS This Morning*. See Felicity Barringer, *Separating News From Sleaze in the Age of Flynt*, N.Y. TIMES, Jan. 17, 1999, at Week in Review 3.

29. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960) (writing that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government"). For Meiklejohn, speech ultimately served the goal of "the voting of wise decisions." *Id.* at 26.

30. Checkbook journalism may be defined as "the buying for cash of information that one can print or air." A. DAVID GORDON & JOHN MICHAEL KITROSS, CONTROVERSIES IN MEDIA ETHICS 270 (2d ed. 1999).

31. SAMUEL P. WINCH, MAPPING THE CULTURAL SPACE OF JOURNALISM 144 (1997).

readers need to be informed citizens? No matter how one answers these questions, we should thank Flynt for pointing out the depths to which both journalism and politics have plunged at the end of the twentieth century. After all, we live in a world in which, according to a recent poll conducted by the Pew Research Center, more people— 48 percent of those surveyed— can identify Larry Flynt as the publisher paying for information on the marital infidelities of members of Congress than can name William Rehnquist— 19 percent— as the person presiding over the impeachment trial of President Clinton.³²

32. See Howard Kurtz, *Hooray for Larry Flynt?*, WASH. POST, Jan. 25, 1999, at C1.

