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FIRST AMENDMENT MARTYR, FIRST AMENDMENT OPPORTUNIST: COMMENTARY ON LARRY FLYNT'S ROLE IN THE FREE SPEECH DEBATE*

RODNEY A. SMOLLA*

Good afternoon and thanks for staying. I'll begin with a little story. If you watch the movie *The People vs. Larry Flynt*,¹ there's a fictional scene in the movie that I want to use as my theme. Larry Flynt is played by Woody Harrelson, as you may remember if you've seen the movie, and Larry Flynt's lawyer, Alan Isaacman, is played by Ed Norton — two very good performances. And in actual life, of course, it was very difficult to be Larry Flynt's lawyer. If you were Alan Isaacman, you were always dealing with the over-the-top outrageousness and behaviors of your own client making your efforts to defend your client and keep him out of jail and to keep him from paying money damages all the more difficult.

There's a moment in which the exasperated and almost depressed Alan Isaacman is in despair. Larry Flynt is at the top of his private jet, the very jet you just heard referred to, and he looks down at his lawyer. He wants to buoy him up a little bit, and he says: "Alan don't be so melodramatic. You don't want to quit me. I'm your dream client. I'm the most fun. I'm rich, and I'm always in trouble."²

* © Rodney Smolla

* Rodney Smolla is president of Furman University and author of *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*. He spoke Feb. 19, 2010, as the academic keynote of the *First Amendment Law Review*'s symposium on sexually explicit speech and the First Amendment. At the time of his address, Smolla was the dean of the Washington & Lee University School of Law. This is an edited reproduction of his comments.

1. THE PEOPLE VS. LARRY FLYNT (Columbia Pictures 1996).
2. *Id.*

Now, I know that Larry Flynt never said that to Alan Isaacman. The reason I know that is I know who really wrote those words. I did. When I wrote a book about the case Mr. Flynt was just talking about, I was recounting how hard it was to be Flynt's lawyer. Recounting some of the frustrating moments he had. And I said, "Larry Flynt is a defense lawyer's dream: wealthy and always in trouble."³ I at least have the solace of knowing that Oliver Stone and Milos Forman felt good enough about the book I wrote to steal at least one line.

But it is interesting, if you think about it. It is interesting that here we are at one of the country's great universities. We're at a law school. This is a learned environment, and one would think a civilized environment. You're going to have a symposium about very serious issues, about some of the central defining questions in our constitutional experience. You invite, of all people, as a lead off speaker of all people, Larry Flynt to this campus. He packs them in. Not only does he pack them in. He makes the headline, above the jump, of *The Daily Tar Heel*, big picture.⁴ Although the journalism here is accurate, reasonably balanced, there is a quality of hero worship to Larry Flynt. I saw it just now watching you. You all thought he was funny. You're enjoying his wit. You're enjoying his charm, and you're enjoying his humanity.

There's a kind of simplistic story here. The story is: He is an outrageous guy, and he engages in speech that is offensive to mainstream sensibilities. For that he gets hammered by the government and by people like Jerry Falwell who don't want views that they disagree with to have freedom in this country. Therefore, he's a martyr for civil liberties and freedom of speech, and it's worth the University of North Carolina's *First Amendment Law Review* paying tribute to that martyrdom because that, as Larry

3. RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 28 (St. Martin's Press 1st ed. 1988).

4. Katy Charles, *Porn King Flynt States His Case*, DAILY TAR HEEL (Chapel Hill, N.C.), Feb. 19, 2010, at 1, available at http://www.dailytarheel.com/index.php/index.php/article/2010/02/hustlers_larry_flynt_defends_first_amendment_in_unc_speech (presenting the same article as the hardcopy version but under a different headline which that reads "Hustler's Larry Flynt Defends First Amendment in UNC Speech").

Flynt just articulated, is the core free speech principle. You've got to protect even that speech, in the words of Oliver Wendell Holmes, "that [you] loathe and believe to be fraught with death."⁵

So I thought it would be fun to be — I guess if I was Flynt's lawyer I'd be the devil's advocate — I'll be the opposite of that and try to unpack a little bit of this and explore it with you. I want to talk first of all about why it is Flynt and *Hustler* magazine and his empire receive any First Amendment protection. It's interesting, you heard a little bit of it here, and it's also in the paper here. I underlined it. The paper says Flynt "didn't even know the First Amendment applied to him when he began working in adult entertainment."⁶ So I want to talk a little about that. I want to talk some about who the First Amendment applies to and then about what it is that it applies to. The who and the what.

Let's talk first about *the who*. Not the Super Bowl halftime show. *The who* in terms of speaker identity. One of the legacies of many of Larry Flynt's First Amendment battles is a kind of democratizing doctrine that currently exists in First Amendment law in which there's a fair amount of hostility, particularly from the Supreme Court of the United States, in drawing distinctions based on the identities of speakers. Although this symposium has been largely about Flynt's sexual speech, his career as a pornographer, and to some degree his attack speech, his attack on Reverend Falwell in the parody in which he humorously described Falwell as having sex with his mother in an outhouse,⁷ in fact precisely because Flynt is rich and always in trouble, he's had many, many different kinds of intersections with modern First Amendment doctrine.

He's partly the martyr that he portrays himself to be and that, perhaps to some degree, is because he's rich enough to fight these battles. So, for example, he is one of the people who has litigated to the hilt the whole question of confidential sources

5. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

6. Charles, *supra* note 4.

7. See SMOLLA, *supra* note 3, at app. I (providing a reproduction of the *Hustler* advertisement).

because he often gets dirt on people by paying lots of money to get it and then exposing people that he thinks are hypocritical. He's often in a situation where some tribunal wants to know who it was that gave him the material that led to the story. One of the great showdowns was a case in which he received undercover tapes of a drug sting of a famous auto manufacturer, Mr. DeLorean, and as you may remember if you saw the movie, under pain of contempt refuses to reveal the source.⁸

He's also been a kind champion of the idea of press rights, of the special rights of journalists, in an area of First Amendment law known as the access cases.⁹ These are cases that test the proposition: Do journalists have some right — different in kind from others — to have access to institutions, to news events, to theaters of war, etc.? Larry Flynt brought a suit against the Department of Defense to contest those rules that prevented journalists from having access to the field of battle; this particular case involved the invasion of Grenada.¹⁰

As Flynt himself suggested in his remarks, there are sort of two levels to this question. The first is: Do we want a First Amendment doctrine that recognizes formal rights on behalf of certain speakers that are different in kind from those others enjoy? The two classic examples being journalists and academics: These have been the two great battlefields in modern times. Do professors

8. *Id.* at 42.

9. *See generally* *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003) (dismissing a First Amendment-based challenge to the military's "embedding" program for journalists), *aff'd on other grounds*, 355 F.3d 697 (D.C. Cir. 2004); *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985) (*per curiam*) (finding the challenge to the United States' decision "to prohibit press coverage of the initial stages of the United States military intervention in Grenada" moot). In both cases, Flynt sued the Department of Defense over restrictions on press access to military operations. *See Rumsfeld*, 245 F. Supp. 2d at 96-97; *Weinberger*, 762 F.2d at 134-35. In *Rumsfeld*, he was seeking a declaration that the embedding program, which allowed journalists to accompany soldiers in the field with some restrictions, was unconstitutional as applied to *Hustler* because journalists for that magazine were denied a place in the program. *See Rumsfeld*, 245 F. Supp. 2d at 96-97. In *Weinberger* he sought declaratory and injunctive relief relating to the U.S. military's press ban during the initial invasion of Grenada. *See Weinberger*, 762 F.2d at 134.

10. *See Weinberger*, 762 F.2d 134.

have rights different in kind from others? Do journalists have rights different in kind from others? Do media entities, like *Hustler* magazine or The New York Times Company, have rights different in kind from others? Do corporations called Duke or UNC, do universities have rights different in kind from other speakers? Flynt's been very much involved in those.

Then there is a second tier to the question, which is: Even if you were going to posit that there is a reporter's privilege to protect confidential sources or some right of access that journalists have to cover a war, would Larry Flynt count? Would *Hustler* count? Is it a member of the media? He talked, and I'm sure he gets great satisfaction out of this; I know that he does because I've been at a few other events with him over the years. He talks quite gleefully about the fact that when the case involving Jerry Falwell was at the court of appeals level¹¹ — it was the Fourth Circuit actually, not the Fifth Circuit as he suggests, but he's not a lawyer and who cares other than lawyers what number the court is — he talks about the fact that he fought that alone, originally, when that case was originally litigated in Roanoke and then litigated in the Fourth Circuit. But once the Fourth Circuit judgment affirming the verdict of \$200,000 for infliction of emotional distress took place, suddenly other media speakers decided they would align themselves with Mr. Flynt and *Hustler* magazine.¹²

I was one of those folks back in those days. I actually wrote one of those briefs that he, kind of ambivalently, kind of smugly, talked about. I wrote a brief on behalf of *The New York Times*, *The Los Angeles Times*, and a number of other speakers as *amici* in the case. Indeed there were many friends of the Court as that case wound itself up to the U.S. Supreme Court, making the same point

11. See generally *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986) (affirming the finding for Falwell on an intentional infliction of emotional distress claim and against Falwell on a libel claim), *rev'd sub nom.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

12. See *Hustler*, 485 U.S. at 47 (noting that *amicus* briefs urging reversal were filed by the American Civil Liberties Union, the Association of American Editorial Cartoonists, the Association of American Publishers, the Reporters Committee for Freedom of the Press, and by Richmond Newspapers, Inc., among others).

that Mr. Flynt made quite well, which is: if you allow famous people to sue for hurt feelings because of satire or parodies of them, then you make it impossible for *Saturday Night Live* to do its business, for Gary Trudeau to do his business, for the long history of political cartooning and lampooning that is part of our society to go forward. And that was the argument that persuaded the Court unanimously, including Chief Justice Rehnquist.¹³

As you might think, I think there is a lot more complexity to this. Fascinatingly, there is a kind of double-edged sword to this because it is true that First Amendment doctrine today has evolved. It has actually evolved even more radically in the years since Flynt was involved, to insist that we, for the most part, will not countenance distinctions based on the identity of speakers. That's good news in a sense for the egalitarian instincts that we have as Americans, the idea that all of our speech is created equal. It's actually ambivalent though in some respects from the perspective of the mainstream media.

For example, the Supreme Court of the United States has, in my view, rejected the notion that the press as an institution enjoys any First Amendment protections over and above those of ordinary citizens. There is a battle that is ongoing over the right of reporters to keep their sources confidential. There was a brief period in which there was a fair amount of momentum for the notion that there might be a First Amendment privilege that protected journalists. The Supreme Court decided a case, *Branzburg v. Hayes*,¹⁴ quite a famous case, many of you have probably read it, in which it appeared that by a 5-4 vote the Court rejected the idea of a journalist's privilege, over the dissent of Justice Potter Stewart,¹⁵ one of the justices that has gotten a lot of attention today for his famous pithy remark about obscenity.¹⁶

13. *See id.*

14. 408 U.S. 665 (1972).

15. *Id.* at 725-52 (Stewart, J., dissenting).

16. In trying to define what material falls into the unprotected category of obscenity, Stewart said of hardcore pornography:

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

But in a magnificent bit of First Amendment lawyering by very able media lawyers, that ostensible loss for the press was spun into a temporary victory at least, focusing on a concurring opinion written by Justice Lewis Powell¹⁷ — a very cryptic, short, three or four paragraph opinion that some were able to massage into the notion that journalists do enjoy a qualified First Amendment privilege against the revelation of their sources. But, in more recent times that view has lost its momentum, and if anything all of the law is now moving in the opposite direction as a matter of First Amendment doctrine. A very impressive piece of writing by Seventh Circuit Judge Richard Posner, a very famous American conservative intellectual from the University of Chicago, blasted the idea that the Powell concurrence stood for the proposition that there was a special journalists' privilege.¹⁸ And, most famously in recent times, the controversy over Valarie Plame, Scooter Libby and Judith Miller, and her confidential sources for *The New York Times*, resulted in the rejection of any journalists' privilege in the

in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

17. *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring).

18. See *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). *McKevitt* arose out of a criminal prosecution in Ireland. *Id.* at 531. The defendant was seeking access to tapes of interviews that biographers in the United States had conducted with David Rupert, who was expected to be the key witness against the defendant in the trial. *Id.* Notably, Rupert did not object to the tape recordings of the interviews being turned over, but the biographers asserted a journalist's privilege argument to withhold them. *Id.* Justice Posner wrote:

Some cases that recognize a reporter's privilege suggest that it can sometimes shield information in a reporter's possession that comes from a nonconfidential source

The cases that extend the privilege to nonconfidential sources express concern with harassment, burden, using the press as an investigative arm of government, and so forth; see the *Gonzalez*, *LaRouche*, and *Cuthbertson* opinions. Since these considerations were rejected by *Branzburg* even in the context of a confidential source, these courts may be skating on thin ice.

Id. at 532-33 (citations omitted).

D.C. Court of Appeals.¹⁹ And, notwithstanding the fact that two well known American advocates — Ted Olson on the conservative side and Floyd Abrams on the liberal side — joined together to try to get that reversed, the Supreme Court didn't even accept review of the case.²⁰

I'll share with you a little anecdote, and I'm going to come back to this in a minute. It happens that Justice Powell went to the Washington & Lee Law School and the law school has his papers. Although deans don't have much time to do any research, I actually wandered down one day to rummage through the papers a little bit. They were intriguing to me. I found the papers from *Branzburg v. Hayes*. I meant to bring them except some personal circumstances kept me from looping back to the law school where I had my file on the desk for this symposium. I can't bring my show-and-tell for you, but if you doubt my word, send me an email and I'll send it to you in PDF. I have the score sheet that Justice Powell kept in the chambers. It was a simpler day. He had a grid that he kept for every case and it had all nine justices, a little box with each justice's name, and then he'd write in his own handwriting a little comment. So you can follow the score sheet to *Branzburg v. Hayes*. There are four justices that voted to affirm and four justices that voted to reverse and then you look in the Powell box and it says, in his own handwriting, clear as can be: "Affirm, as I do not think there is a const. privilege."²¹ He joined the majority opinion. He just wrote separately to reflect.

The Supreme Court, every time it has commented on the issue and has described *Branzburg v. Hayes*, which it has never done in much depth — it does it in a throw away sentence, a parenthetical at the end of a citation — whenever it's gone back it's referred to its own decision as rejecting the idea of a reporter's privilege. It's similarly rejected the idea of any academic freedom right or academic freedom privilege that inures either to

19. See *In re Miller*, 397 F.3d 964, 965 (D.C. Cir. 2005).

20. *Miller v. United States*, 545 U.S. 1150, 1150 (2005) (denying petition for writ of certiorari).

21. Papers from Justice Lewis F. Powell, Jr., Supreme Court Case File No. 70-85 (argued Feb. 23, 1972) (on file with *First Amendment Law Review* and Washington & Lee University School of Law).

universities or to individuals within the universities — students at a state university like the University of North Carolina or faculty members here. Although they surely enjoy robust First Amendment freedoms, and although the Court often uses the phrase “academic freedom,”²² it really uses it in the same way you and I would use the phrase “artistic freedom.” It doesn’t mean it as a load-bearing independent doctrine. In one of the most significant cases, a case involving the University of Pennsylvania, in which the Supreme Court refused to give the University of Pennsylvania the equivalent of a reporter’s privilege, this was a privilege to keep from others the tenure files of someone at the University of Pennsylvania, the Supreme Court said: There’s no special First Amendment academic freedom privilege, just like there’s no special journalist’s privilege.²³

The most recent example of this is the *Citizens United* case,²⁴ the case that has gathered so much controversy in the last several weeks involving the *Hillary* movie and the decision by the Supreme Court that it is unconstitutional to prevent corporations from engaging in political speech for or against a candidate for public office. One of the sleeper issues in that case is that the Court found as one of the most significant rationales the idea that to recognize the constitutionality of those restrictions required it to accept as legitimate under First Amendment law a distinction between media and non-media companies.²⁵ That unwillingness to recognize that it was appropriate to have two First Amendment standards — one that applied to media companies and one that applied to non-media companies — was one of the animating impulses behind Justice Kennedy’s majority opinion.

22. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (repeatedly using the phrase “academic freedom”); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (using the phrase “academic freedom” four times throughout the majority opinion and dissent).

23. *Univ. of Penn. v. Equal Employment Opportunity Comm’n*, 493 U.S. 182, 201 (1990) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

24. *Citizens United v. Fed. Election Comm’n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

25. *Id.* at ___, 130 S.Ct. at 906.

I bring all of this up just to show you the kind of fascinating, almost ironic, complexity of this. It really is fair to say that Larry Flynt's crusades were very powerful in bringing into First Amendment doctrine the notion that we're all in this together. I have the same First Amendment rights as *The New York Times*, at least in terms of the identity of the speaker. Fascinatingly, the other side of that coin appears to be that those rights will only be the default rights that we all enjoy. We will not accept as part of First Amendment doctrine the idea that there are *media speakers*, whatever that may mean, that enjoy greater rights. I should say, it's one of the themes I've listened to throughout the day; the Internet has had a powerful impact on that. We talked a lot about the impact of the Internet on our underlying conceptions of what speech is protected and not protected and evolving standards of obscenity. It has also been one of the forces that has caused the Court to not be willing to identify special rights for journalists. You see this in the *Citizens United* case. You see it in a number of other recent decisions. It's because it is no longer possible to speak as coherently as we used to speak about what a journalist is or is not. The very fact that in some sense we could all be journalists, we could all have futures like Larry Flynt, I suppose, if you wanted, has made the Court reluctant to draw doctrinal lines in that direction.

Lastly, before I get on to the content issues here, money matters a lot. Of course, money is what the *Citizens United* case is all about. For those that think the Supreme Court got it wrong, what they fear is the potential corrupting influence of large aggregations of money, often other people's money, the money of shareholders brought to bear to influence the political process. When Larry Flynt says that when he first started out here that he didn't think of this as a First Amendment enterprise, he's being absolutely truthful. He thought of this as a money-making enterprise. There's no question about that. I got to know a lot about him writing the book. He and Jerry Falwell both are very, very interesting characters, and have a lot more in common than you might think. I mean that, actually, in a complimentary way. They're both extraordinary marketers. They're both in a certain way extraordinary entrepreneurs.

One of Larry Flynt's insights was that being at the bottom can sell. One of his crusades was to attack what he thought was hypocritically fancy pornographic material. It's no accident his arch-enemies were people like Bob Guccione, the publisher of *Penthouse* magazine, even *Playboy*, and that they hated him too. To them, Larry Flynt was giving obscenity a bad name because he basically said: I'm just selling sex. I don't need articles by Norman Mailer. I don't need stuff about surround sound stereo systems. You know, I'm just here to actually sell the sex, pure and simple, and to deliver it. If you look at his life, he simply moved from running strip clubs, and basically prostitution rings, into mass-marketing through *Hustler* magazine. It was all selling that and making money.

Now, I'm going to switch to the content side and try to link some of the things I've just talked about. We've heard a lot of talk today about the First Amendment perspective on the issues we've been describing. My friend and colleague Dean [Katharine] Bartlett did a wonderful job in describing that. I think — it's helpful though, in light of many of the comments we heard — Professor [William] Van Alstyne's description of *Mein Kampf*, Larry Flynt's own description of the connection to the Holocaust, what many of the other commentators have talked about — to roll the free speech clock back a bit and to realize that there's at least two very solid, very quintessentially American, and very defensible conceptions about what freedom of speech is — not just who qualifies, but what qualifies — that have long been in tension and continue to be in tension in our society in my view.

The particular case I'm going to pick out for this — a case almost all of you have read, all of you who are law students have read — *Chaplinsky v. New Hampshire*.²⁶ In my view, if you had to read two cases ever in the free speech tradition, you could read *Chaplinsky* on the one hand, in fact you could read one paragraph, you all know the one I'm going to be talking about, and maybe the dissenting opinion of Oliver Wendell Holmes in *Abrams v. United States*.²⁷ You don't really need to read the other 700 cases, alright.

26. 315 U.S. 568 (1942).

27. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

In some ways, it's an epic battle between the thoughts in those two very famous paragraphs, both of which are very powerful.

Let me remind you of that famous passage in *Chaplinsky*. The sentence you're most likely to remember is the one that says there are several narrow categories of speech, the proscription of "which ha[s] never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' — those which by their very utterance inflict injury,"²⁸ and so on. That sort of statement of the categories in *Chaplinsky* of unprotected speech, particularly that phrase "fighting words," most of us had to remember when we took our constitutional law course. I took my course with Professor Van Alstyne and I remember writing down "fighting words." It's really the next sentence that you should remember. The next sentence, in one sentence, brilliantly captures a very powerful conception, one conception, of what free speech should mean.²⁹ We might call it the *European conception* today. We've talked a lot about Europe's approach to freedom of speech. In some ways it perfectly encapsulates that, probably encapsulates what most of the rest of the world, except the United States, thinks of freedom of speech.

The Court then gives you the philosophical underpinnings for why it is those other categories are not protected. It says: These contribute virtually nothing to the marketplace of ideas. They add very little to public discourse. There's not any ideas in them and whatever ideas might be there, the harm they cause, the damage they do to morality and order far outweighs any plausible benefit they might have.³⁰ So the Court is basically saying that to be protected under the First Amendment, there is a kind of affirmative element and negative element. The affirmative element is: you've got to show us something worthy of protection. You've at least got

28. *Chaplinsky*, 315 U.S. at 571-72 (citations omitted).

29. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572 (citing ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 50 (Harvard Univ. Press 1941)).

30. *See Chaplinsky* at 572.

to show us an idea. You've got to at least show us you're contributing something to the project of discourse, to the project of debate, to the enlightenment of society. Secondly, it's saying: Even if you can get past that, which is the minimum to even qualify, there is going to be some speech that we're just certain as a society has got such low marks in terms of its contribution, but such high marks in terms of the damage, we're confident it does, that we can justify its abridgement. The Court says, here are some of the classic examples: libel is an example, obscenity is an example, and fighting words are an example. I doubt when the law clerk or Justice [Frank] Murphy wrote that, they meant that to be the full list; it became the *Chaplinsky* list. I doubt that was the project at the time. I think it was more evocative. These are the kinds of things, they don't add much, but they sure as heck cause a lot of damage, therefore a decent society will be able to proscribe them.

That notion is in tension, if you will, it's in powerful tension with the libertarian vision of the First Amendment, the Larry Flynt vision. It's in tension on both levels. Larry Flynt, I think, would say: "Who is to say whether there is some contribution to the world of ideas? Who is telling me this is not a contribution?" And then he'd say: "And who's got any real proof that it's hurting anybody? Who could show me that it damages children? Who could show me that it causes divorces? Who could show me that it contributes to rape?" So to pick up the very nice visual case that I think Larry Walters in the earlier panel did, here you have today's paper. Here you have Larry Flynt up here.³¹ And here you have the sexual assault issue that UNC and half the campuses in the country are struggling with.³² The fact that sexual assault is vastly unreported on a lot of American campuses. What Larry Flynt says is: "You show me the proof that this story really connects with that story. You show me that there's really some cause and effect. If you can't show me that, then I deserve First Amendment protection because you haven't made the rigorous case that the First Amendment requires."

31. See Charles, *supra* note 4.

32. See Charlotte Lindemanis, *Sexual Assault Often Untold: Rape Often Not Reported at UNC*, DAILY TAR HEEL (Chapel Hill, N.C.), Feb. 19, 2010, at 1.

I want to unpack that a little more, and unpack it by getting into one of the issues that I heard talked about a lot today. You take the *Chaplinsky* view and take, lets say, the Holmes marketplace view, it's very interesting that on both the affirmative side and the negative side, the *Chaplinsky* conception of freedom of speech is thinking about freedom of speech as part of a societal good, as part of a communal, community good. The whole idea is we protect freedom of speech because it's good for us as a people. It's good for us as a democracy. It's good for us as a society. If what you're saying can't be connected in some way to society, to civilization, then it doesn't deserve any special protection because it is not doing us as a collective any good. Then the negative side is very much the same, and when we can see through our democratic processes that it does a lot of rupture to society, that it's hurting us in some very serious way, that collective decision that it's damaging us will trump at least a modest amount of contribution.

You think of the Holmes view and the Larry Flynt position that has really reached ascendancy to a large degree in a whole basketful of cases in the Supreme Court. The claim for protection of freedom of speech has nothing to do with what's the communal good. What did we hear a lot about during the afternoon? You don't have to watch it. But if I want to make it and some people want to watch it, those people ought to be able to do it. They ought to be able to see it. So it's really thinking of speech's value entirely of the individual person. In fact, the rhetoric of First Amendment groups is entirely tied to individual rights; the right of the individual to see it, the right of the individual to produce it. There's no attempt to discuss it as a collective value. Then on the harm side, going back to John Stuart Mill, and the strong libertarian civil liberties tradition out of which modern First Amendment law rose, the notion is that society can't play that trump card without very strong evidence showing a nexus between the harm it is claiming and the speech. In the incitement case, and the threat cases, and violence cases, and most of the cases we talk about in modern First Amendment doctrine, what the doctrines demand is a tightness in that connection.

Now, *Chaplinsky* is not entirely dead. I want to compare for you two strains of First Amendment law that both come from the

Chaplinsky philosophy and compare how they each have fared. One involves hate speech — so, racist, homophobic, religious attacking speech, in which groups are attacked based on a group's or individual's identity. The other is sexually explicit speech, obscene speech. It is no accident, it is quite interesting, that throughout the day we heard those two sometimes interwoven and talked about together.

The first great hate speech case decided by the Supreme Court doesn't even make it into most constitutional law case books anymore. It's a shame that it doesn't because it is maybe the most eloquent discussion of the *Chaplinsky* theory. It's a case called *Beauharnais v. Illinois*,³³ probably now overruled. It's a 1952 decision involving an Illinois hate speech law. Illinois made it a crime to disparage groups on the basis of racial identity. A racist group in Chicago, my hometown, was distributing racist leaflets attacking African Americans.

The leader, a guy named Beauharnais, is prosecuted and found guilty. He asks for a libertarian instruction. He asks for the jury to be instructed: Before I can go to jail for my racist leaflets, the state of Illinois should have to prove that my speech posed a clear and present danger to the eruption of violence against African Americans. The Illinois Supreme Court said: No, you're not entitled to that instruction, relying on *Chaplinsky*.³⁴ The Supreme Court of the United States affirmed, relying on *Chaplinsky*. In an opinion written by Justice Felix Frankfurter, the only Jewish member of the Court at the time, he refers to the events, the recent events — World War II and the Holocaust — and he says Illinois is entitled to make the judgment that this kind of racist speech corrodes the social fabric and leads to the kind of derailing of our society that recent events have taught us about.³⁵ That this is speech that is especially corrosive of the idea of a society. It is an eloquent restatement of the theory of *Chaplinsky*, as applied to hate speech. The fascinating thing about *Beauharnais* is that there is no

33. 343 U.S. 250 (1952).

34. See *People v. Beauharnais*, 97 N.E.2d 343, 346-47 (Ill. 1951), *aff'd sub nom.* *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

35. See *Beauharnais*, 343 U.S. at 258.

requirement of a causal connection and no requirement of proof. The intuition, the democratic assessment that this stuff does not contribute much to the marketplace of ideas, this is just mean, evil, attacking racism. But it sure as heck can cause trouble and harm. We may not be able to prove that this speech caused this lynching, or this beating on this day, but we have this overall sense that rings true that this stuff can really damage us as a society, and damage our notion of community and damage our morality and order.

Now *Beauharnais* basically gets overruled. The Supreme Court, like often happens, has never written the words “*Beauharnais* has been overruled,” but I can list you nine cases and put them on the exam if you want, that have got to stand for the proposition that it’s no longer good law. *Brandenburg v. Ohio*,³⁶ the famous Ku Klux Klan case, requires a very high level of proof of incitement today, the very opposite of *Beauharnais*.³⁷ A case that I argued in the Supreme Court of the United States, *Virginia v. Black*,³⁸ involving a cross burning, carries the same sort of notions. You’ve got to demonstrate there’s a true threat.³⁹ We could go on and on. Flag burning cases. Truthfully, the *Falwell v. Flynt*⁴⁰ case. The mere capacity of speech to upset our sensibility, our sense of morality and decency, isn’t enough to justify its abridgement. So that libertarian view has trumped in the main.

Fascinatingly, though, the one hold out in our legal doctrine is *Miller v. California*⁴¹ and its progeny. Whatever the realities of

36. 395 U.S. 444 (1969) (per curiam).

37. *Id.* at 447 (noting that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

38. 538 U.S. 343 (2003).

39. *Id.* at 359 (citing *Watts v. United States*, 394 U.S. 705 (1969)) (“‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”).

40. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

41. 413 U.S. 15 (1973). In *Miller*, the Court laid out a three-prong test to determine if a work is obscene:

modern obscenity prosecutions may be, whatever the realities of the huge engine of money it produces, the extent to which Americans may access it and so on, in our formal law *Miller* is a direct linear descendant of the theory of *Chaplinsky*. *Chaplinsky* was relied upon by the Court in *Roth v. United States*,⁴² the case that said obscene speech does not get protection in the First Amendment.⁴³ And *Miller*, of course, relies on *Roth*.⁴⁴ And if you think about it, for many of the reasons many of the other panelists have talked about, it makes perfect *Chaplinsky* logic.

To the extent that what Larry Flynt or others are selling is sexual conduct of a sort, the part that goes to the part of the brain that Professor Van Alstyne was talking about,⁴⁵ to the extent that's

(a) whether "the average person, applying contemporary community standards" would find that 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.

Id. at 24 (citation omitted).

42. 354 U.S. 476 (1957).

43. *Id.* at 492.

44. See *Miller*, 413 U.S. at 19 n.2 (noting "that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the *Roth* case").

45. Professor William Van Alstyne, during a comparison of European and American approaches to free speech, provided the following explanation of pornography:

It does not hit the frontal lobes. Part of the definition of pornography in a technical sense, is that you feel. It is meant to bypass the critical centers up here and it goes directly to the hypothalamus. The true function of operational pornography and obscenity is more like a pill that you ingest, that is meant to trigger, autonomically, certain physiological responses. It may increase pulse rate, heightened blood flow and a variety of other things.

You've seen it all on the advertisements.

William Van Alstyne, Lee Professor of Law, William and Mary Law School, Address at the *First Amendment Law Review* Annual Symposium: Sexually Explicit Speech and the First Amendment (Feb. 19, 2010), available at

what's being packaged and sold, it's not an idea in the view of *Miller v. California*. It's not contributing to the marketplace of ideas. Without proof, without clarity in the social science evidence, just the intuition that it can't be good, that it's probably hurting children, it probably creates bad attitudes toward sexuality, it probably contributes to sexual aggression, or at least it could – well, that is all it takes under *Chaplinsky*, given that conception of freedom of speech. The whole notion in the *Roth-Miller* line of cases, that we do not declare something obscene if there is redeeming social value, is designed as the free speech safety valve for telling us this isn't the stuff that falls within the first prong of *Chaplinsky*, in which there is no contribution to the marketplace of ideas. This is actually art. This is actually literature.

It's of course one of the fascinating elements of the free speech story that the most significant and notorious early day prosecutions for obscenity involved things that to us as moderns, it was only seventy or eighty years ago, but to us seem unthinkable. The idea that one book named *Ulysses* could be declared obscene. The idea that a book by D.H. Lawrence could be declared obscene. That's good for Larry Flynt's side. You heard him say: If you can burn *Hustler*, it doesn't take long before you can burn *Lady Chatterly's Lover* or *Ulysses*. That's his core argument. There are no tools that allow you to distinguish between the two.

I'm going to end by talking about the one place in American life where I think *Chaplinsky* and Holmes are still fighting an even fight. Neither side has been able to win, for good reason actually. I kind of like the evenness of the battle. It's like I like a good, close UNC-Duke basketball game. Who wants a twenty point blowout? Give me that overtime. What is it? It's the American university. I talked a little earlier about academic freedom as a cousin of press freedom and so on. If you think about it, you're on a great campus like this, there is a part of our lives that is organized around *Chaplinsky* principles, and there is a part of our lives that is organized around marketplace of ideas principles. Of course, on a certain level we think of the university as the ultimate marketplace

of ideas. We think of it as a place where students have freedom of speech and academic freedom and professors do. All ideas are open game, and we'll even invite Larry Flynt to a campus and you can't kick him out. He's got a right to his views too. In that sense we are super-marketplace imbibers on the American campus. It's part of the scientific method. It's part of the tradition of the liberal arts. It's part of the tradition of debate in law schools, et cetera.

In another interesting way, we have a kind of confidence in our ability to decide whether something is or is not speech worthy of credit within an academic environment and whether it does or does not on the negative side cause some disruption that we think is not worth a candle in terms of its credit. Part of that is because we're in the free speech business all the time. We judge speech all the time. We admit students based on their essays. We hire faculty based on the content of their materials. We make decisions to deny tenure or grant tenure based on content. We grade exams based on the lucidity of what the student says. We can't operate, we're incoherent, if we can't make judgments about professional quality. Now what we say is — and I think most of us believe this — is that we're not penalizing you on viewpoint alone. So we wouldn't refuse to hire a professor or tenure a professor purely because of their views one way or the other on *Roe v. Wade*.⁴⁶ We wouldn't grade two constitutional law exams differently because one student agreed with our view of gun control and the *Heller*⁴⁷ case and another student had a different view. But we do have this sense that we're able to separate those viewpoint judgments from qualitative judgments as to what is worthy or not worthy of credit.

Even beyond that, we have other norms of civilization and community building. So one of the reasons that, although we have to be careful exactly about how they are phrased and how they are worded and what the content is, we generally rule out of bounds — in many settings on a campus such as this — personal attack, hate speech, the kinds of attacks that we think are not making a genuine contribution in any intellectual way to some debate, but are in fact an affront to our sense of morality and good order.

46. 410 U.S. 113 (1973).

47. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

Last little point — I promised you I'd talk about the Internet at the very end — if you think about the basic doctrinal structure of *Miller v. California*⁴⁸, there is a fascinating, almost schizophrenia with regard to the concept of community. On the redeeming value prong, the law, the current doctrine is, that it is not judged by community standards.⁴⁹ Chapel Hill is not allowed to apply its view of what is redeeming serious value. Nor is Los Angeles. That is a kind of concession to the marketplace of ideas writ large and to the notion that we're one national marketplace and we don't want localities picking and choosing about what makes it as a minimal amount of free speech that will trigger the protections of the First Amendment. But, of course, as we've also heard, Professor Van Alstyne talked about it, the official doctrine from the Supreme Court of the United States at least, not withstanding some interesting recent court of appeals decisions, the official doctrine is that the community standards, in terms of what is patently offensive, test is local.⁵⁰

Now why would that be? I think it's because, even though we heard fascinating debate today, it's almost impossible to conceive of the second side of *Chaplinsky*, the affront to morality and good order, without thinking of a community. You can't get your arms around it without thinking in terms of a community. Our communities are, for the most part, local. A university is one of the few places in modern American life where there's still some sense of community. I mean, you all think of yourselves as Tar Heels, a lot of you, and you love Carolina Blue and you have a certain loyalty. There's a feeling that it means something to be part of that place. You're proud of that. There's a sense of cohesiveness and values that wraps itself around it. There's probably more sense of community to be a member of UNC campus than there is to be,

48. 413 U.S. 15 (1973).

49. See *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (rejecting the argument that the value of a work prong of the *Miller* test should be judged based on community standards and clarifying that the proper inquiry is based on a “reasonable person” standard).

50. See *Miller*, 413 U.S. at 30 (1973) (affirming that “what appeals to the ‘prurient interest’ or is ‘patently offensive[]’” is judged by community standards)(internal citations omitted).

even of Chapel Hill, not a giant area. The Internet has done a lot to bust up locality and to break through the conceptions that we have that identity is local. And to break through even the notion of a local community and the idea that morality and order are even something that we as a society can get ourselves around.

Now Larry Flynt is great at making money. The mainstream media kind of came to his rescue by writing those beautiful *amicus* briefs. You know: "Wow, we're in it with you, Larry." Now we're the ones who need the bailout. It's a struggle for most of the cities of this country to find a business model that will allow a local newspaper to exist. That would be a great loss for American society if they disappeared and all that we have are national mainstream sort of Internet outlets because one of the things, whether you hate your local newspaper or love your local newspaper, one of the things it does is it forms community. It's a community former. It's a place where there's a kind of cohesive identity, a sense of morality and order, and so on, that extends just beyond the family itself. As we're in a process in the evolution of our culture where those community builders are dissolving, you see it in the pressures in things like obscenity doctrine. But you see it overall in a kind of overall pressure on that side of us that doesn't think *Chaplinsky* is so horrible, that doesn't think it's necessarily bad to want to have some norms of decency and order around which we organize ourselves.