ALAN ISAACMAN AND THE FIRST AMENDMENT: A CANDID INTERVIEW WITH LARRY FLYNT'S ATTORNEY

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INTRODUCTION

For all of his extensive appellate experience across the country during his thirty-plus years as an attorney, Alan L. Isaacman freely admits that he has argued only one case before the United States Supreme Court. That case and Isaacman's successful argument in it, however, represent perhaps the most important and stunning free-speech triumph in the past twenty-five years—*Hustler Magazine, Inc. v. Falwell*.[1] And after actor Edward Norton's portrayal of him in the Milos Forman film, *The People vs. Larry Flynt*,[2] Isaacman is perhaps the most well-known First Amendment attorney in the United States today.

This article features an exclusive interview conducted by the authors with Mr. Isaacman in September 2000. In it, Mr. Isaacman discusses for the first time for any law journal his views on the First Amendment's freedom of speech and the United States Supreme Court's controversial test for judging obscenity, reflects back on the *Falwell* case and its importance in First Amendment jurisprudence, addresses current governmental concerns for regulating

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[1] 485 U.S. 46 (1988). Anthony Lewis, the long-time columnist and Supreme Court reporter for *The New York Times* who was a Lecturer on Law at Harvard Law School from 1974 to 1989, described the case this way:

> The decision in *Hustler v. Falwell* was important for freedom of speech generally. It showed that the Supreme Court, including judges considered conservative, had an expansive sense of the kind of speech about public matters that the Constitution requires American society tolerate—not just George Washington as an ass but Jerry Falwell and his mother in an outhouse.

ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 233 (1991). For an excellent analysis of the case and the Supreme Court's opinion, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990).

[2] Columbia Pictures 1996.

media portrayals of violence and sex, and considers the movie, *The People v. Larry Flynt*, as well as his own representation of Flynt over the past twenty-plus years.

Part I of this article provides a brief biographical sketch of Mr. Isaacman's career. Part II then contains the authors' interview with Mr. Isaacman, including author-added footnotes that define concepts mentioned by him. Finally, in Part III, the authors analyze Mr. Isaacman's remarks and comments.

I. ALAN ISAACMAN

Alan Isaacman grew up in Harrisburg, Pennsylvania.[3] He studied business—specifically, accounting—as an undergraduate at Pennsylvania State University, graduating in 1964, and then went on to attend law school at Harvard. After graduating from Harvard Law School in 1967, Mr. Isaacman headed west and moved to the Los Angeles area.

After arriving in California, Mr. Isaacman entered the MBA program at UCLA and worked in the tax department at Price Waterhouse in Beverly Hills to support himself. He also started a computer company with two other individuals, including a friend from Penn State, before selling his interest in the business and turning his attention full-time to the law.

Mr. Isaacman clerked for one year, from 1969-1970, with then-U.S. District Court Judge Harry Pregerson.[4] Next, he practiced civil litigation with a Los Angeles-area firm, McKenna & Fitting, before joining the then-recently opened federal public defender's office. Mr. Isaacman later became head of litigation in the Los Angeles office of Pryor, Cashman, Sherman & Flynn, before joining Cooper, Epstein & Hurewitz, a prominent entertainment law firm, in 1978. Mr. Isaacman was head of litigation at Cooper, Epstein & Hurewitz from 1978 to 1993. While working at that firm, Mr. Isaacman first met Larry Flynt in 1978 when Flynt moved his operations from Columbus, Ohio to California. In late 1993, Mr. Isaacman formed Isaacman, Kaufman & Painter where he practices today.

Mr. Isaacman resides in the Los Angeles area with his wife, Deb, and their six-and-a-half-year-old triplets—Aubrey, Alison, and David.

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[3] Unless otherwise indicated, all of the information in this Part was gathered during the authors' September 15, 2000 interview with Mr. Isaacman. *See infra* Part II (describing in more detail the circumstances surrounding the interview).

[4] Harry Pregerson later was elevated to the United States Court of Appeals for the Ninth Circuit.

II. THE INTERVIEW

The interview took place on the warm afternoon of Friday, September 15, 2000, in a conference room at the law offices of Isaacman, Kaufman & Painter. The firm's offices are located in Beverly Hills, California in an eighth-floor suite at the Flynt Publications Building at 8484 Wilshire Boulevard on the corner of LaCienega. The conference room's exterior glass wall provided a smog-tinged view in the distance of the Hollywood Hills, including the famous "HOLLYWOOD" sign.

A maroon and gold "L.F.P., Inc." flag flapped in front of the mid-rise office building, along with the flags of California and the United States. The building, which has a larger-than-life-size bronze statue of a horse-riding John Wayne in front of the main entrance, houses a number of different Flynt-related companies, including L.F.P., Inc., Flynt Aviation, Inc., L. Flynt, Ltd., and Flynt Digital.

The entire interview was recorded on audio tape. The tapes were later transcribed by a professional stenographer and then reviewed by the authors. The authors made minor changes in syntax, but did not alter the substantive content or meaning of Mr. Isaacman's comments. Mr. Isaacman then reviewed the transcript for accuracy and signed a verification form acknowledging that it accurately reflected the interview. A copy of this verification form is on file with the authors of this article. Mr. Isaacman, however, had no editorial control over the authors' questions, analysis and commentary regarding his remarks and he did not review this manuscript prior to publication.

From the initial seventy-six-page, double-spaced transcript of the entire interview, the authors culled and selected for inclusion in this article only the portions that seemed most relevant to the First Amendment aspects of Mr. Isaacman's practice.[5] In some cases, the authors' questions and Mr. Isaacman's responses were moved into one of the eight sections found below to provide a more cohesive focus around particular themes.

Each of these eight theme-based sections includes a brief preface prepared by the authors. Each preface, in turn, introduces the

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[5] Mr. Isaacman's practice is, in his own words, "very broad" and includes business clients who have nothing to do with either the entertainment or intellectual property areas of law. Not only has Mr. Isaacman served as a special master presiding over the damage phase of a major copyright infringement case in Los Angeles, he also practices criminal law. For instance, he recently represented an individual accused of growing marijuana in a case that focused attention on California's controversial medical marijuana law. *See* Lee Condon, *Testing the Marijuana Law*, DAILY NEWS OF L.A., Aug. 4, 1997, at N1.

cases, concepts and issues that are addressed by Mr. Isaacman within that section. The authors also have added footnotes, where relevant, to provide further background material for the reader.

Questions posed by the authors, as well as all of the authors' comments made during the course of the interview, are designated collectively by the word "QUESTION," while Mr. Isaacman's answers and remarks are designated by the word "RESPONSE."

A. *Reflections on the First Amendment: Its Meaning and Importance*

PREFACE: 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."[6] In this section, Mr. Isaacman reflects on the meaning of those words.

In the course of his comments, two important theories for protecting speech are raised—Meiklejohnian theory and the marketplace of ideas. Philosopher-educator Alexander Meiklejohn[7] believed that "the principle of the freedom of speech springs from the necessities of the program of self-government."[8] In a self-governing democracy—one in which the "rulers and ruled are the same individuals"[9]—wise decisions about public policy require that "all facts and interests relevant . . .shall be fully and fairly presented."[10] As Meiklejohn wrote, "self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[11]

Meiklejohn, in brief, privileged political speech—speech, as he put it, "upon matters of the public interest"[12]—above other

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

[7] Meiklejohn was far more than a free speech theorist. *See generally* ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (Cynthia Stokes Brown ed., 1981) (combining a collection of Meiklejohn's educational, philosophical, and legal writings with biographical information) [hereinafter MEIKLEJOHN: TEACHER]. Meiklejohn "wanted higher education to develop social intelligence in students" which he defined as "the ability to control one's social environment." MICHAEL R. HARRIS, FIVE COUNTERREVOLUTIONISTS IN HIGHER EDUCATION 46 (1970). Ultimately, he believed "that the college, standing apart from its social environment, should develop in its students the intelligence to become responsible citizens of a democratic society." *Id.* at 163.

[8] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948).

[9] *Id.* at 12.

[10] *Id.* at 26.

[11] Alexander Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245, 255.

[12] MEIKLEJOHN, *supra* note 8, at 24.

types of expression.[13]

The other theory of speech discussed in this section is the marketplace of ideas. United States Supreme Court Justice Oliver Wendell Holmes, Jr. introduced the marketplace of ideas rationale for protecting speech to First Amendment jurisprudence over eighty years ago.[14] Dissenting in *Abrams v. United States*,[15] one of the Court's earliest attempts to define the scope of free expression, Holmes wrote:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[16]

Today, the economic-based[17] marketplace metaphor "consistently dominates the Supreme Court's discussion of freedom of speech."[18] Although it often is criticized by academics,[19] Professor Martin Redish observes that "over the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for accept-

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[13] The theory is criticized, in part, because of the difficulties in defining political speech. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 15 (1992) (observing that "the self-governance theory proves incapable of supporting a principled limitation to conventional 'political' speech, because in modern life it is virtually impossible to identify any topic that might not bear some relation to self-governance.").

[14] *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 237 (1991) (writing that Holmes "introduced" the marketplace of ideas into First Amendment jurisprudence). Although Holmes introduced the metaphor into First Amendment jurisprudence, the theory has "its roots in John Milton and John Stuart Mill." *Id.*

[15] 250 U.S. 616 (1919).

[16] *Id.* at 630 (Holmes, J., dissenting). Holmes's dissent in *Abrams* "marked a transformation in First Amendment jurisprudence." Joseph A. Russomanno, *"The Firebrand of My Youth": Holmes, Emerson and Freedom of Expression*, 5 COMM. L. & POL'Y 33, 34 (2000). In particular, it marked a more expansive and libertarian interpretation of the First Amendment. *See id.* at 40, 45; *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY 18 (1986) (observing that "within the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech.").

[17] *See* Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 542 (1998) (observing that the marketplace metaphor "suggests a hands-off approach to speech regulation. Economic marketplace forces, not legislators, should guide and control the distribution of messages.").

[18] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989); *see also* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a rather recent review of the Court's use of the marketplace metaphor).

[19] *See generally* Robert Jensen, *First Amendment Potluck*, 3 COMM. L. & POL'Y 563, 573-76 (1998) (setting forth various critiques of the marketplace of ideas metaphor).

ance among a consuming public."[20] The premise of this idealistically free and fair competition of ideas is that truth will be discovered or, at the very least, conceptions of the truth will be tested and challenged.[21]

With this background on both Meiklejohnian theory and the marketplace of ideas metaphor in mind, the article now turns to the first section of the interview with Mr. Isaacman.

QUESTION: We would like to start with a question of constitutional importance. What does the First Amendment's protection of freedom of speech mean to you?

RESPONSE: The First Amendment's protection of freedom of speech is what we all depend on to make our democracy work. It has been said to be the cornerstone of a democratic society because it is through the interchange of ideas, the public statements about candidates and campaign positions, and the discussion of governmental operations that the citizenry becomes informed and is able to then cast votes intelligently or to take action necessary to protect the democratic principles that we all adhere to.[22]

QUESTION: How has your view about the First Amendment changed over time?

RESPONSE: It has broadened the longer I'm in the field and the longer that I'm alive. I recognize also what an important aspect of individual liberty it is. It's just something we all take for granted—that we can say what we want to say. Those of us who have been born in totalitarian societies recognize that that's just a great luxury and great freedom that we have. We take it as a birth right. We're not afraid to express our opinion, even against the powerful.

QUESTION: Now your first response touched primarily on the political speech issues, wise decision-making—a kind of Meiklejohnian view of free speech. Some people would limit the First Amendment protection to purely political speech. Judge Robert Bork, for instance, believes that the First Amendment only protects

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20 Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999).

21 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 753 (1997). The theory is attacked by some scholars, however, as "unpersuasive as an account of the search for social and political truth." Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1352 (1998).

22 Mr. Isaacman's comments regarding the interchange of ideas and public statements about candidates for office echo the words of the late Justice William Brennan's majority opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that opinion, Brennan described "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. Brennan added that "the right of free public discussion of the stewardship of public officials" was "a fundamental principle of the American form of government." *Id.* at 275.

political speech.[23] In your view, does the First Amendment go beyond protecting merely speech about politics?

RESPONSE: It absolutely goes beyond protecting speech about politics. Our life is as rich as it is, from a cultural standpoint, because people can enjoy humor. They can enjoy artistic works, theater, drama, newspaper articles, columnists, sports reports, entertainers, *The Tonight Show*, David Letterman—all these things that we see every day because the First Amendment is there.[24] And we are not stifled in our expression or enjoyment of other people's views and expressions because the First Amendment protects us all.

QUESTION: Do you think the United States Supreme Court's view of freedom of expression has changed over time?

RESPONSE: I think the Supreme Court's view, if anything, has expanded.[25] I think at this point the almost sacred stature of the First Amendment is something that's clear and not just with those who are supposedly liberal jurists but also with those who are conservative. In the *Falwell* case,[26] the opinion was written for the Court by Chief Justice Rehnquist. We see time and again that justices who were reputed to be conservative justices are coming down in favor of the First Amendment.[27] First, in terms of free speech, I

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23 In an often-cited law journal article, Bork wrote three decades ago that "constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 20 (1971). Bork, it should be noted, wrote at the end of that same article that his remarks "are intended to be tentative and exploratory." *Id.* at 35. Twenty-five years after that article appeared, Bork wrote that the judiciary must learn "to understand that the First Amendment was adopted for good reasons, and those reasons did not include the furtherance of radical personal autonomy." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 153 (1996); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 201 (1996) (writing that "some scholars who accept the instrumental view as the exclusive justification of free speech have argued, as Robert Bork did, that the First Amendment protects nothing but plainly political speech, and does not extend to art or literature or science at all.").

24 Mr. Isaacman's view that the First Amendment protects more than just speech about politics is widely adopted by the courts. *See* McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 999 (Cal. Ct. App. 1988) (observing that the First Amendment's protections of speech and press "extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books.").

25 *But see* David L. Hudson, Jr., *Speaking of Firsts . . .*, ABA J., Oct. 2000, at 30. (contending that the Supreme Court "has become less predictable in First Amendment cases over the years").

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

27 William Rehnquist was nominated to the United States Supreme Court by Republican President Richard M. Nixon in 1971. He later was elevated to the position of Chief Justice in 1986 by Republican President Ronald Reagan, two years prior to the *Falwell* decision. An example that illustrates Mr. Isaacman's point involves the controversial symbolic conduct of flag burning. Justice Antonin Scalia, a conservative nominated to the Court by President Reagan, sided with the majority decision to protect Gregory Lee Johnson's First Amendment right to burn an American flag in political protest outside of the Republican National Convention in 1984. *See* Texas v. Johnson, 491 U.S. 397 (1989).

think in former years you might have seen less support for the First Amendment than we see today. I think it has actually broadened. I think the tensions are always there—tensions that deal with real issues and with really deeply felt injuries sometimes. And some of the people who are out there on what may be viewed as the other side of the First Amendment are really protecting things and protecting concerns that are real, legitimate concerns. So it's sometimes difficult to protect the First Amendment in a given situation.

QUESTION: With all the calls to regulate the Internet and censor television violence and movies,[28] does the public either appreciate or understand the true importance of free expression and the First Amendment?[29]

RESPONSE: You know, I think the public, on any given question, is as likely as not to come out with an answer that is contrary to the First Amendment because they don't recognize that the First Amendment really comes into play. At the same time, if you were to ask them, "Do you subscribe to the First Amendment or support it?," they'll say, "Yes, it's very important."

QUESTION: So it's a contradiction?

RESPONSE: It's a contradiction, one that changes when you're in these controversies and you recognize the First Amendment aspect to it. And that's the defense for your client—trying to educate everybody in the process, including all the judges who don't see the First Amendment interest, particularly if they're not used to dealing with these issues. Not many of them are, and the same holds true for many juries.

QUESTION: How do we better educate the public about the importance of the First Amendment?

RESPONSE: In several ways—education in schools, coverage in the media, and just in common discourse. Cases that involve First

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28 In September 2000, the Federal Trade Commission ("FTC") released "an exhaustive study that found the entertainment industry systematically marketed violent, adult-oriented films, music and video games to consumers under 17 years old." Jube Shiver, Jr., *FCC To Examine Children's Exposure to TV Sex, Violence*, L.A. TIMES, Sept. 13, 2000, at A1. The Federal Communications Commission ("FCC") announced just one day after the release of the FTC report that it would examine the amount of sex and violence aired by the nation's television stations. *See id.* Later in that same month, the Senate Commerce Committee held hearings grilling Hollywood entertainment executives about their marketing practices. Greg Schneider, *Studios Make Limited Vow On Violence*, WASH. POST, Sept. 28, 2000, at A1.

29 The Center for Survey Research and Analysis at the University of Connecticut, on behalf of the Freedom Forum's First Amendment Center, conducted a telephone survey of over one thousand individuals in April 2000 regarding their feelings about the First Amendment. *See* Jean Patman, *Survey shows public would restrict America's freedoms*, FREEDOM FORUM NEWS ONLINE, *at* http://www.freedomforum.org/news/2000/06/2000-06-29-06.nml (June 29, 2000) (on file with author). A slim majority of the respondents—fifty-one percent—felt that "the press in America has too much freedom." *Id.*

Amendment issues are getting more exposure and that helps too. You guys, as professors, are doing your part. You're helping to mold minds.

When you believe in the First Amendment, you believe that the better ideas come out as a result of people being able to express and interchange their ideas. They talk about the marketplace of ideas, and I believe in that.[30] The marketplace doesn't work every time, but in the long run, it's going to work a lot more than any other way that I can think of. So I think that's how the public becomes better educated about the importance of the First Amendment.

QUESTION: If you could propose and draft any article of First Amendment-related legislation, what would it be, and why?

RESPONSE: I think the area where I have the most personal contact with the fringes of the First Amendment is the area of sexual depictions. Sexual displays—movies, Web sites, Internet expression, print media and broadcast—seem to be where most of the First Amendment problems come into play. I'm not saying that that's the most important part of the First Amendment, but I do think that's probably the area which is the most controversial on a broader scale. So, because of my own personal experience, I would think that that's where I would like to see something drafted that really kind of lets producers, distributors and consumers understand what it is that they are allowed to take part in and what the government will not bother them about. This would help to reduce the chilling effect that exists today.[31]

B. *Sexually Explicit Speech and Its Regulation*

PREFACE: The First Amendment issues associated with the regulation of words and images that depict sexual conduct, whether in print, celluloid or digital form, remain a source of lingering debate in the law. The traditional stumbling block has been the inability to define adequately what is legally "obscene."[32]

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[30] It is interesting to note that in the United States Supreme Court's opinion in *Falwell*, Chief Justice Rehnquist invokes the marketplace metaphor to support the Court's ruling in favor of *Hustler* and Larry Flynt. *See Falwell*, 485 U.S. at 56 (observing that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas") (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 746 (1978)).

[31] The concept of a chilling effect relates to the problem of self-censorship that may occur when laws are vague. *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 871-72 (1997) [hereinafter *Reno*] (discussing the "special First Amendment concerns" raised by the chilling effect that vague laws produce).

[32] As Justice Potter Stewart once wrote, the United States Supreme Court in obscenity cases "was faced with the task of trying to define what may be indefinable." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

That definition is critical because, more than forty years ago, the United States Supreme Court ruled that obscene speech falls outside the scope of First Amendment protection[33] and thus its distribution and exhibition are subject to criminal prosecution.[34] In the evolution of this doctrine, the Court needed to construct a test—a line that, if crossed, would dismantle the shelter of constitutional protection afforded to sexually explicit materials. Drawing that line has proved to be a formidable task.[35]

The result was a three-part test, announced in *Miller v. California*,[36] that set forth the guidelines used 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 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.[37]

If all three prongs of the test are met, then any First Amendment protection for the work in question dissolves. 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.[38]

In this section of the interview, Mr. Isaacman gives his thoughts on the *Miller* obscenity standard.

QUESTION: In 1973, the United States Supreme Court in *Miller v. California* created a three-part test defining obscenity. What is your view of the *Miller* test?

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[33] *See* Roth v. United States, 354 U.S. 476, 481 (1957).

[34] The possession of obscene materials in one's home, however, is not a crime. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[35] From 1957 to 1973, the United States Supreme Court reviewed numerous petitions for certiorari in cases involving its definition of obscenity. The justices became sharply divided over whether a workable definition would ever be possible. For a discussion of the internal struggle the justices faced during this time, see ROBERT D. RICHARDS, UNINHIBITED, ROBUST, AND WIDE OPEN: MR. JUSTICE BRENNAN'S LEGACY TO THE FIRST AMENDMENT 47-73 (1994).

[36] 413 U.S. 15 (1973).

[37] *Id.* at 24. (citation omitted).

[38] 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." *Id.* at 30.

RESPONSE: I think the *Miller* test is an unworkable test. I think it's one that ought to be thrown out, and I think there ought to be either a different standard or no standard adopted in the areas that *Miller* is brought to bear.

It's just a hit or miss situation and depends on the prosecutor. It also depends on the juries—the same thing can be obscene in front of one jury and not obscene in front of another jury. Something may be protected in Des Moines or in New York City and not in Salt Lake City or Mobile, Alabama. It doesn't make sense to me that we're all citizens of the same United States and that a citizen in one place is able to say something and have the protection of the national constitution while a citizen in another place in the country can be thrown in jail for saying the same thing. So I think *Miller* is just totally unworkable. I could go through that in great detail if you had a lot more time.

QUESTION: So is it the contemporary community standards part of the *Miller* test that is the most problematic?

RESPONSE: The contemporary community standards part is as problematic as any part. It is probably the most offensive to me of any of them because of the apparent contradiction with the notion that we are all citizens of the same country. We're all protected by the United States Constitution. It's the same First Amendment and yet, under *Miller*, it means one thing in one place and another thing somewhere else. But I think it doesn't matter which problem with the *Miller* test that you focus on. It's very, very difficult to understand what it means.

What does "prurient interest" mean? I mean, whether to the average person, applying contemporary community standards, there is a dominant theme in the material taken as a whole that appeals to a prurient interest in sex? If you figure out what the dominant theme of the material is and you figure out the average person—who he is or who she is—and then you try to guess what the contemporary community standards are, what is prurient interest? Prurient interest is a "morbid interest in sex" for example.[39] Does that mean that you must be morbid and that there's got to be something the matter with you psychologically? Or does a normal,

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[39] The Supreme Court observed back in 1957 that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to *prurient interest*." *Roth*, 354 U.S. at 487 (emphasis added). In that case, the Court remarked in a footnote that prurient interest is equivalent to "a shameful or morbid interest in nudity, sex, or excretion." *Id.* at 488 n.20 (quoting a portion of the A.L.I. Model Penal Code). *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (considering the meaning of the word "prurient" within the context of a state obscenity statute).

average person have morbid interests? Is that a contradiction of terms?

QUESTION: The prurient interest standard is something that I always ask my students to think about when I teach the *Miller* test. I tell them that they should go home that night and think about whether their own interest in sex is morbid and shameful.

RESPONSE: Well, that's the thing. I haven't looked up the definition in the dictionary lately but morbidity in the medical field often involves sickness. So does that mean if something appeals to my morbid interests, there's some sick part of me? I mean, do I have a morbid interest? If no matter how explicit something is sexually, for example, do any of us have a morbid interest that it could appeal to? If something appeals to me and it's extremely explicit, and I say, "Hey, it appeals to me and it's very explicit," does it meet the morbid interest test?

That's what I don't understand. And it has always seemed to me to be just absurd to adjudicate obscenity with respect to a certain kind of sexual behavior, where two people are making love, expressing great intimacy, having pleasurable experiences with each other as consensual adults. Yet, you have one person shooting another or stabbing them or committing some horrific mayhem, and that's *not* obscene.

QUESTION: Jurisdictional issues in cyberspace seem to be a problem, especially relating to the community standard requirement that is applied in the *Miller* test that you just spoke about.[40] How should courts deal with the community standards issue on the Internet?

RESPONSE: Well, to me, the Internet shows the absurdity of the community standards requirement. When you are hosting a Web site in California and people from around the world get to view what you have on your Web site, do you then need to make sure that you know what the standards are in the most restrictive jurisdiction in this country? Otherwise, you are subject to prosecution there because people from the community can access and download your images. You are going to have a very, very pristine Web site or collection of Web sites before you're done with it. So I

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[40] A federal appellate court in June 2000 observed that *Miller* "has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications." American Civil Liberties Union v. Reno, 217 F.3d 162, 180 (3d Cir. 2000) [hereinafter *ACLU*]. The court remarked that the *Miller* "community standards test continues to be a useful and viable tool in contexts other than the Internet and the Web under present technology." *Id.*

think that the community standards part of *Miller* has absolutely no application on the Internet.

I also think that as we progress we're going to, more and more, recognize that we don't want a community standards application done on the basis of what is acceptable in Salt Lake City for minors to determine what adults in New York City can view on the Internet.

QUESTION: You criticized the *Miller* test. You mentioned you would scrap it. If you had to put another piece of legislation in its place, would it be one to protect all sexually explicit speech, or is this simply a problem that's so intractable that we could never create an effective test?

RESPONSE: My guess is that obscenity is indefinable. It's such a personal, individualistic view. What's obscene to one person may be poetic to another person.[41] It's something that the government ought not be involved in. The government should not be involved with trying to determine what's obscene unless there is the most compelling evidence that a particular form of speech really did cause great injury, and I don't think that exists. I don't think we know that today.

QUESTION: Would that compelling evidence be generated through social science research? Is that what you're suggesting would be necessary to show the compelling interest?

RESPONSE: I think so. I think that's what you need. I think you would need as scientific a study as you could do in a sociological or clinical setting.

QUESTION: Okay, conversely, if there were a piece of First Amendment-related legislation or judicial test that you could overturn, if you were a judge or justice, what would it be and why?

RESPONSE: Well, I've already spoken about the *Miller* test. I would overturn that one. I would think that that is probably the most perplexing test that's present in the law, certainly on any kind of widespread basis. There are even problems with the third prong of *Miller* that I haven't spoken about—trying to determine what is serious scientific, literary, artistic, or political values. It's just a matter of individual value judgment.

C. *Sex, Violence and Media Censorship*

PREFACE: In recent years, Congress has tried, albeit unsuccess-

[41] Mr. Isaacman's statement is reflected in the United States Supreme Court's admonition in 1971 that it is "often true that one man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25 (1971).

fully, to reduce the reach of sexually explicit material in cyberspace. Finding appropriate ways to curb the seemingly unfettered access of minors to so-called adult materials while simultaneously balancing First Amendment interests of free expression continues to elude lawmakers and courts.

The Communications Decency Act ("CDA")[42] was part of a sweeping overhaul in 1996 of telecommunications law in the United States.[43] The CDA was designed to penalize those who knowingly distributed to minors "indecent" and "patently offensive" material on the Internet.[44] The difficulty with defining the material to be proscribed—fathoming what was covered by the terms "indecent" and "patently offensive"—ultimately proved fatal to the measure.[45]

Undeterred, Congress subsequently passed the Child Online Protection Act ("COPA").[46] This measure regulated material knowingly posted on the World Wide Web that was defined as "harmful to minors" based upon "contemporary community standards."[47] In June 2000, the United States Court of Appeals for the Third Circuit affirmed the district court's preliminary injunction against enforcement of COPA.[48] The court reasoned that because the contemporary community standards requirement would be impossible to discern on the Internet—a medium accessible worldwide—publishers would be unreasonably burdened by being held to "the most restrictive and conservative state's community standard in order to avoid criminal liability."[49]

The entertainment industry also recently came under fire by the federal government for marketing violent materials to young people.[50] In September 2000, the Federal Trade Commission ("FTC") issued a massive report that concluded that movies, music and video games containing violent content were aggressively targeted to children under age seventeen.[51] The report sparked a

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42 47 U.S.C. § 223(a)-(e) (1996).

43 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §151) (1996).

44 *Reno*, 521 U.S. at 849.

45 *See id.* at 870-72.

46 Pub. L. No. 105-277, 112 Stat. 2681 (codified at 47 U.S.C. §231) (1998).

47 *ACLU*, 217 F.3d at 165.

48 *See id.* at 181.

49 *Id.* at 166.

50 *See* David E. Rosenbaum, *Violence in Media is Aimed at Young, FTC Study Says*, N.Y. TIMES, Sept. 12, 2000, at A1.

51 *See* FTC, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries: Before the S. Comm. on Commerce, Sci., and Transp.*, 106 CONG. (2000), *available at* http://www.ftc.gov/os/2000/09/violencerpttest.htm (Sept. 13, 2000) [hereinafter FTC Report].

round of congressional hearings and asked entertainment executives to end the practice.[52] FTC Chairman Robert Pitofsky called on the industry to regulate itself, but also suggested that new regulations would arise if industry efforts failed—despite obvious First Amendment considerations that occur when government compels speech.[53] Not to be outdone by the FTC, the Federal Communications Commission ("FCC") also joined in the fray, announcing in September 2000 that it would examine the amount of sex and violence broadcast by the nation's television stations.[54]

In this section Mr. Isaacman provides his thoughts about government efforts to curtail sexually explicit and violent content in entertainment.

QUESTION: A steady stream of legislation regulating sexually explicit speech on the Internet flows out of Washington.[55] Why do you think Congress is so obsessed with regulating sexual expression on this new medium?

RESPONSE: I think there are a couple reasons. Number one, I think there's just a general hang-up in our country about sex. It's a hot-button issue for politicians to push. Often they have a choice between dealing with really difficult issues and something that inflames people or appeals to their passion. And it's easier sometimes to say, "let's go after the sex," and not deal with the tough things such as the competing interests for dollars and taking care of the aged or drugs or health care. All of those issues really are difficult to figure out—they are things where you have to allocate scarce resources and you've got a lot of different interest groups wanting those resources. So that's one reason and it's easy for people to understand and you don't lose them when you talk to them.

When you're out there as a politician and you have to deal in sound bites and you can attack Hollywood or something because Hollywood is showing what consumers want to see, maybe that's really what guides politicians. If consumers didn't want to see it, they wouldn't show it. And then the moral arbiters in our country say that that's terrible to show this kind of thing and so what hap-

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52 *See generally* Schneider, *supra* note 28, at A1 (describing a Sept. 27, 2000, hearing of Hollywood executives before the Senate Commerce Committee).

53 *See* Rosenbaum, *supra* note 50, at A1.

54 *See* Shiver, Jr., *supra* note 28, at A5.

55 *See Reno*, 521 U.S. 844 (declaring portions of the Communications Decency Act, which regulated "indecent" and "patently offensive" communications on the Internet, unconstitutional); See also *ACLU*, 217 F.3d 162 (affirming the lower court's decision to issue a preliminary injunction stopping the enforcement of the Child Online Protection Act which regulated communications on the World Wide Web that were "harmful to minors").

pens is that you see grandstanding and you see it more likely than not around election years. I think that's what you're seeing now.

QUESTION: Sexually explicit speech proliferates on the Internet.[56] Is this a medium to which the government should take a hands-off approach to speech regulation, letting economic marketplace forces dictate the content on the Web?

RESPONSE: There is an area that most of us seem to agree upon and that area is where minors are involved—young people, underaged people. Everybody seems to think that they should be protected, but you don't even see a lot of discussion on it from a scientific standpoint. We just kind of take it for granted that eight-year-old and ten-year-old children shouldn't see sexually explicit behavior. And maybe that's true. That's probably part of my makeup too, where I come from, in terms of my upbringing. Whether there's any basis to that from a scientific standpoint or sociological standpoint or developmental standpoint, I don't know the answer. But to the extent that there is enough basis for the government to say we're going to regulate the Internet to protect minors, but not to do it to deprive adults of the freedoms that they are otherwise entitled to under the First Amendment, I think that that's perhaps tolerable, and I think most of us probably, in today's world, would accept that.

QUESTION: You mentioned protecting children. Under the Supreme Court's strict scrutiny standard of review for content-based regulations, the government must prove a compelling interest.[57] The asserted interest often is protecting minors. Courts almost reflexively seem to accept that the protection of minors is a compelling interest,[58] and therefore the constitutional problems always lie on the narrowly tailored means prong. Are you suggesting that the courts take a closer look at the first half—the goal, the compelling end—and that maybe social science research could inform the question of whether, indeed, there really is harm to minors or

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[56] According to Forrester Research, a company that tracks the Internet pornography industry, the market for online adult fare now is worth approximately $1 billion in sales annually. *See* David Lazarus, *Tricks of the Trade*, S.F. CHRON., Sept. 11, 1999, at D1.

[57] *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (writing that the government may regulate the content of speech "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

[58] The United States Supreme Court, in considering the constitutionality of the Communications Decency Act, observed that it has "repeatedly recognized the governmental interest in protecting children from harmful materials." *Reno*, 521 U.S. at 875. Lower courts have followed the Supreme Court's lead in this respect. *See* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) (holding that the government has "a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts").

whether minors need to be protected?[59]

RESPONSE: Yes, I'm curious about that issue myself, I really am. I question basic premises just naturally—it's part of my make up, I suppose. I think it's part of what a good lawyer does, particularly a litigator. We don't start with accepting basic premises. We start with a case by analyzing jurisdiction and don't assume that it deserves to be here or that the court has the power and the right to adjudicate this matter. I don't know the accuracy of this assumption that minors being exposed to sexual depictions is a bad thing. I think our society has a lot of room to be criticized in the area of sex because I think a lot of people have sexual hang-ups that trace to the early attitudes that sex is somehow forbidden or that sex is bad or evil, and I'm not sure we do the best job of educating or informing young people about sex and how it ought to be treated.

QUESTION: On September 11, 2000, the Federal Trade Commission released a report criticizing the entertainment industry for what it called "pervasive and aggressive marketing" of violent films, music and electronic games to children.[60] The Commission called upon the entertainment industry to step up efforts to regulate itself and to end target marketing to children. In your view, does the entertainment industry share the blame for violent behavior in some youth or is the government using the industry as a convenient scapegoat for a disturbing social problem?

RESPONSE: The question you just asked is a good question. Part of the difficulty in answering the question is that there is, in my view, too little scientific evidence to tell what causes violent behavior. Is it the exhibition of other violent behavior? Do people then imitate it and try to emulate the performance of the people they see in a movie, for example? And I don't know the answer. One could argue that viewing violence actually provides an outlet for hostile or aggressive feelings.[61] Therefore, people who get a chance to see it, perhaps some of them won't act it out because they've had a chance to experience it in a motion picture theater.

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59 Professors Jeremy Cohen and Timothy Gleason suggest the links between communication research and communication law, emphasizing that there is "an intersection of interests where law is based on behavioral and social assumptions about communication." JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 15 (1990).

60 *See supra* note 51 and accompanying text.

61 This theory is referred to in social science literature as "the catharsis hypothesis, which suggests that viewing television violence causes a reduction of aggressive drive through a vicarious expression of aggression." WERNER J. SEVERIN & JAMES W. TANKARD, JR., COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA 309-10 (4th ed. 1997). "In all the hundreds of studies investigating the effects of television violence, only a handful support the catharsis hypothesis." *Id.* at 310.

On the other hand, maybe it does plant ideas and maybe it makes it look cool to do certain kind of things, and you get imitative behavior out of it.

In a society where you have 250 million people, you're going to get people doing different things for different reasons. It's easy to pick one and interview that person who said, "Well, I actually committed these serial murders because I read *Hustler* magazine."[62] Then people will say, "Well, the guy must be telling the truth about this." We don't believe him on anything else he says in his life, but since he said what we want to hear, we're going to believe him and we have to assume that he really knows what he's talking about.

So you have all of these problems and we don't know the answers. We don't really know what the effect is that viewing violence has.[63] We do have a very strange attraction in this country to violent behavior and it's very strange that we have such a powerful gun lobby and so much reluctance on the part of the political leaders to restrict hand guns, for example, that are really useful only to hurt or kill human beings. At the same time, people are quick to go in and say, "You can't show certain kinds of sexual behavior."

QUESTION: We seem so uptight in the United States about portrayals of sex in the media. Do you ever see a time when society will get over its "hang-up" about sex?

RESPONSE: Well, I'm an optimist so I think that society will, in time, cure most, if not all, of its ills. Maybe new ones will arise. I think sex is something that has positive aspects and negative aspects in the way people deal with it, and as we become more intelligent, we're going to be able to deal with the negative aspects better than we do now.

D. *Reflections on Hustler Magazine, Inc. v. Falwell*

PREFACE: In 1988, the United States Supreme Court issued its

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62 Mr. Isaacman's comment here reminds one of the controversy surrounding the execution-eve interview with convicted serial killer Ted Bundy who attributed his problems, in part, to pornography. *See* Janny Scott & John Dart, *Bundy's Tape Fuels Dispute on Porn, Antisocial Behavior*, L.A. TIMES, Jan. 30, 1989, at 1. At one point in the interview, Bundy stated that "you reach a point where the pornography only goes so far, you reach that jumping off point where you begin to wonder if maybe actually doing it would give you that which is beyond just reading it or looking at it." *Id.* Anti-pornography advocates pounced on Bundy's comments to support their pro-censorship views. *See generally* Jerry Kirk, *Ted Bundy Shows Us the Crystallizing Effect of Pornography*, L.A. TIMES, Feb. 8, 1989, at Metro 7 (writing that "Ted Bundy, like so many who have gone unnoticed before him, reminds us that the time has come to stand together in opposing pornography.").

63 *See generally* Barrie Gunter, *The Question of Media Violence*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 163 (Jennings Bryant & Dolf Zillmann eds., 1994) (providing an overview of research on the effects of media violence).

opinion in *Hustler Magazine, Inc. v. Falwell*[64] protecting the magazine's right to ridicule public-figure Jerry Falwell. The Court, without dissent,[65] turned back Falwell's claim for intentional infliction of emotional distress[66] resulting from an ad parody published in *Hustler* in its November 1983 issue. The ad 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."[67] 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,[68] a standard applicable to public figures and public officials in defamation law.[69]

After the Court issued its opinion, Flynt remarked "I'm excited, absolutely delighted. Even though the suit had no merit in the beginning, I still spent over $1 million in attorney's fees. There is no way to get those back. It's what you call paying to defend the First Amendment."[70]

Mr. Isaacman was the attorney to whom Larry Flynt turned to defend himself, his magazine and the First Amendment in that case. Mr. Isaacman argued the case before the United States Supreme Court on behalf of *Hustler* and its publisher, Larry Flynt, at

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64 485 U.S. 46 (1988).

65 Seven justices joined in the opinion of the Court. *See id.* at 47. Justice White wrote a brief concurrence, while Justice Anthony Kennedy, who had just joined the Court, did not take part in the decision. *See id.*

66 *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).

67 *Falwell*, 485 U.S. at 48.

68 Actual malice, a fault standard adopted by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is the publication of a statement with knowledge of its falsity or with a reckless disregard for whether the statement is true or false. *See id.* at 279-80. Reckless disregard for the truth, in turn, exists when a defendant "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968), or acted with a "high degree of awareness of . . . probable falsity." 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).

69 *See Falwell*, 485 U.S. at 56. Defamation includes both the libel and slander torts. *See* 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 at least one third party; (3) fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the statement. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

70 *High Court Voids Falwell Award*, L.A. TIMES, Feb. 24, 1988, at 1.

one point telling the justices that "*Hustler* has every right to say that man [Falwell] is full of b.s."[71]

The following are Mr. Isaacman's reflections on that case and the Supreme Court's opinion.

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

RESPONSE: The *Hustler* case made it clear to everybody that the First Amendment is alive and well in the everyday life experiences of our citizenry. It made it clear that you can poke fun at public figures. It was a very graphic kind of illustration.

It meant that Jay Leno can have his monologue and not worry, and that the cartoonist can do his daily cartoons in a newspaper without fear, and that the sports columnist can express his or her views. Likewise, political candidates can poke fun at their opponents and engage in hyperbole. The decision just made it very clear—where you had these two public figures at the opposite ends of the political spectrum going at it, with one saying things about the other in a way that tended to be humorous but insulting, and the other saying I'm going to court to get the jury to stop you from doing this—that if Larry Flynt can engage in that kind of parody, then all of us can feel safe in saying what we want to say as long as it's not a knowing falsehood.

QUESTION: The *Falwell* opinion was cited recently in the Fourth Circuit Court of Appeals' decision in *Food Lion, Inc. v. Capital Cities/ ABC, Inc.*,[72] as standing for the proposition that plaintiffs seeking publication damages cannot make "end-runs" around the First Amendment by pleading causes of action other than defamation.[73] Do you think mainstream journalists will now better appreciate the importance of both the *Falwell* decision and Larry Flynt's contributions to First Amendment jurisprudence?

RESPONSE: And his lawyer's contributions.

QUESTION: And his lawyer's contributions.

RESPONSE: I think so. I think every time there's an affirmation

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[71] David G. Savage, *Hustler-Falwell Case Enlivens High Court,* L.A. TIMES, Dec. 3, 1987, at 4.

[72] 194 F.3d 505 (4th Cir. 1999). The *Food Lion* case focused on the liability issues arising from the newsgathering efforts of ABC television reporters working for the show *Prime-Time Live* to obtain hidden-camera videotape for an investigative report on alleged food mishandling practices at Food Lion stores. *See id.* at 510.

[73] *See id.* at 522-23. The Fourth Circuit in *Food Lion* wrote that "*Hustler* confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times.*" *Id.* at 523.

of this case, this holding, that more people will appreciate its widespread applicability. I think it's a very important First Amendment case, and it's very important, in part, because the issues are so easy to understand. You have the tension between what is arguably emotional distress—I say "arguably" because I was never convinced it was great emotional distress, although it was professed to be very grave[74]—and how important it is not to hurt other people's feelings and how deeply somebody can feel hurt when he or she is ridiculed in public. On the other hand, you could see the efficacy of certain kinds of public speech, and there's no better way to make a very compelling point than to say something about another person that is humorous and holds him up, sometimes, to ridicule, but that makes a telling point in the process.

QUESTION: If the Supreme Court had ruled in favor of Jerry Falwell, how would that have affected media content—everything from television comedy to hard news and journalism?

RESPONSE: I think that what would've happened is that you would find the network censors out in full force. They would be telling us what you can't do. They would tell the comics on TV and the commentators and the people who are participating in shows that discuss public figures, "You can't say these things. You know you're going to hurt somebody's feelings. It doesn't matter whether it's true or not. It doesn't matter whether it's something that is not capable of verification, maybe something that's just an opinion. If it causes emotional distress to the person, then you can't say it."

How do you tell whether it's going to cause somebody emotional distress? We'd be talking about being hauled in front of a jury. In a courtroom setting, things look much graver than they do when you're sitting in front of a TV or in a movie theater with a box of popcorn next to you. So you've got to err on the side of caution. Basically, speech in all forms gets killed if the Supreme Court doesn't rule in favor of Larry Flynt.

QUESTION: Politicians now use late night talk shows to get their points across and to banter with the talk show host. Do you think that would be any different if the *Falwell* decision had gone the other way?

RESPONSE: No question about it. I think it would be very much

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[74] At trial, Jerry Falwell testified that the ad parody made him feel "like weeping." Falwell v. Flynt, 797 F.2d 1270, 1276 (4th Cir. 1986). Ron Goodwin, a Falwell colleague, "testified that Falwell's enthusiasm and optimism visibly suffered as a result of the parody." *Id.* at 1277. Goodwin also stated that Falwell's ability to concentrate on the myriad details of running his extensive ministry was diminished. *See id.*

different. I think politicians would be sued by other politicians on a regular basis. I think others around them would be suing. I just think you would have the courts filled with people who were saying, "Look at all the distress I was having."

The night before the oral argument before the Supreme Court, I was watching Jay Leno. He was doing a monologue that involved Douglas "K. for Kilo" Ginsburg.[75] Leno talked about Ginsburg and his smoking of marijuana, and the show did a little skit that talked about Ginsburg running into this fellow who used to work in the Reagan White House, Michael Deaver.[76] It was very humorous and it made Ginsburg look very silly and Deaver look like a drunk. It was a very ridiculous kind of thing. If I were Deaver or Ginsburg, I would balk at that. I wouldn't want anybody doing that to me. But it was funny, at least if you're not one of those people connected to it. Now there you go—either one of those people could easily come in and sue if *Falwell* went the other way.

QUESTION: Let's go back to that time. Can you tell us how you first became involved in this celebrated case?

RESPONSE: I first entered into this celebrated case when the parody was published in November 1983 in an issue of *Hustler* magazine. That magazine came out about six weeks or so before the cover date, so it was about late September. Very shortly after it hit the newsstands, Falwell filed a lawsuit. I got called immediately when it happened—that's when I first heard about it. There was a lawsuit filed back in Lynchburg, Virginia, in federal court. The attorney for Falwell was Norman Grutman, who's now deceased.[77]

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[75] Judge Douglas H. Ginsburg was nominated to the United States Supreme Court by President Ronald Reagan in 1987, but he was pressured shortly thereafter to ask the President to withdraw his nomination after he admitted smoking marijuana on several occasions. *See* Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor,'* N.Y. TIMES, Nov. 8, 1987, at A1.

[76] Michael K. Deaver was a White House aide who was convicted of three counts of perjury for giving false testimony to a congressional subcommittee and a federal grand jury regarding his lobbying activities. *See* Robert L. Jackson, *Jury Convicts Deaver of Three Perjury Counts*, L.A. TIMES, Dec. 17, 1987, at 1. Deaver's memory of events was allegedly clouded by his alcoholism. *See id.*

[77] Norman Roy Grutman, a 1955 graduate of Columbia Law School, tried more than one thousand cases and spent eighteen years as the principal attorney for *Penthouse* publisher Bob Guccione and his enterprises before he died of cancer at age sixty-three in 1994. *See Norman Grutman; Penthouse, Falwell Lawyer*, L.A. TIMES (Home Edition), June 29, 1994, at A12. Grutman actually worked against Falwell in a case in 1981 when Falwell tried to prevent distribution of an issue of *Penthouse* that contained an interview with Falwell. *See id.* Falwell apparently was so impressed by Grutman's representation of *Penthouse* in that matter that Falwell hired Grutman in 1983 to represent him in his $45 million suit against *Hustler* and Larry Flynt for the outhouse ad parody. *See id.* In a 1997 op-ed column published in *The Washington Post*, First Amendment advocate and journalist Nat Hentoff, who once squared off against Grutman on CNN's *Crossfire* program, described Grutman as "a

Grutman was a long-time nemesis of Larry Flynt. Grutman also represented *Penthouse* magazine, and there was a series of battles that we had had with that rival publication and its publisher, Bob Guccione.[78]

I met Larry in 1978 when he moved his operation from Columbus, Ohio to Los Angeles. I began representing him out here in California and then, as time went on, I took over other places as well. So as soon as the *Falwell* suit was filed, it was brought to my attention and I took it on.

QUESTION: When you looked at Falwell's complaint, what did you think of it? What did you think of the merits of the arguments therein when you first read it?

RESPONSE: I thought the case would be a very tough one. I thought it would be very tough because of the location, number one. It was in his backyard—it was in Lynchburg, Virginia. There were 63,000 people in Lynchburg at the time, and the Thomas Grove Baptist Church where he was then pastor had 21,000 members, so it seemed to me that everybody was either a member or the next door neighbor of a member. Jerry Falwell was the head of Liberty University and on television all the time, had a big following, was the head of the Moral Majority, and ran the Old Time Gospel Hour. Ronald Reagan was in the White House. Jerry had a lot of—at least, reported—influence there as a political supporter. So, I thought it was going to be a very difficult case.

QUESTION: Did you recognize the constitutional importance of this case early on or did you just view it as another legal battle involving Larry Flynt?

RESPONSE: At the time of this lawsuit, conditions were very difficult. Larry Flynt was in the news a lot. He was having a difficult time with the judicial system unrelated to the Falwell lawsuit. Larry got involved in the John DeLorean mess in California,[79] and a lot

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combative man of sweeping self-confidence." Nat Hentoff, *Larry Flynt Bowdlerized*, WASH. POST, Mar. 8, 1997, at A23.

[78] Bob Guccione, as publisher of *Penthouse* magazine, was the publisher first "responsible for displaying a girl's genitalia." EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 577 (1992). In the language of the adult industry, *Penthouse* "went pink" in August, 1971, a move that rapidly increased that magazine's circulation. *See id.* at 578-79. *See generally* LARRY FLYNT, AN UNSEEMLY MAN 190-91 (1996) (describing Larry Flynt's "dislike for the pretensions of *Penthouse* publisher Bob Guccione").

[79] John Z. DeLorean was a "maverick auto magnate accused of conspiring to import $24 million worth of cocaine." Jerry Adler & Martin Kasindorf, *A Smut Peddler Who Cares?*, NEWSWEEK, Nov. 14, 1983, at 58. Larry Flynt obtained and released to CBS copies of important videotapes made in the FBI's investigation of DeLorean and he played an audio tape for reporters purporting to be of DeLorean stating that he wanted no part of the drug deal. *See id.* Flynt claimed he obtained the tapes from the government, remarking that

of antics occurred.[80] So we had a lot of problems and a lot of pressures. We had been dealing with Falwell's lawyer, with whom we were fighting other battles. Tension was very high the whole time.

I went back to Virginia a few days before the trial. The trial started on a Monday. I recognized that we had two classic kind of cult characters of our time. Both of them had very strong followings, and I thought it was great we had them in the same courtroom with this kind of an issue. I had this outrageous ad parody, and I walked around Lynchburg that first weekend back there. I walked around town and showed people on the street this ad parody and asked them what they thought about it. Most of the people I showed it to thought it was funny. They laughed at the thing. But when we got into the courtroom, these people just thought it was the worst thing. I mean, you could tell by their looks. Here you have Jerry Falwell saying this is the worst thing that ever happened to him. Everyone on the jury was a Southern Baptist or primitive Baptist. They had a lot of religious people and they really didn't like Larry Flynt and didn't like *Hustler* magazine, and I don't think they cared much for this kind of humor. I think that was the problem we had in the Fourth Circuit Court of Appeals too, that same kind of attitude.[81]

QUESTION: In light of that attitude, what was your legal strategy for refuting Falwell and his intentional infliction of emotional distress theory?

RESPONSE: Well, I was handicapped to a large extent with the

"everyone has his price." *DeLorean Case: Trial by Video?*, ECONOMIST (U.S. edition), Oct. 29, 1983, at 44.

[80] When Flynt was called into federal court to reveal his source for the tapes in the DeLorean case, he wore an American flag as a diaper—an action for which he was charged with desecrating the flag by Judge Robert Takasugi. *See* Chuck Conconi, *Personalities*, WASH. POST, Nov. 18, 1983, at C3. Flynt violated a condition of his bond in that matter when he left California and flew to Alaska. *See Larry Flynt Arrested After Flying to Alaska*, N.Y. TIMES, Dec. 2, 1983, at A18. When he was arrested in Alaska after a bench warrant was issued for his arrest, Flynt was dressed in a Santa Claus suit. *See id.* Also in November 1983, Flynt was arrested in the United States Supreme Court on the order of Chief Justice Warren E. Burger after Flynt yelled, "Fuck this court. You denied me the counsel of my choice." Al Kamen, *Flynt Arrested After Cursing Supreme Court*, WASH. POST, Nov. 9, 1983, at A1. Flynt also was wearing a shirt with the words "Fuck this court" when he was arrested at the Supreme Court. *See Flynt Pleads Innocent in Court Incident*, WASH. POST, Nov. 24, 1983, at B6. In his autobiography, Flynt writes about the incident, "[a]s the justices rose, looking like nine solemn priests in their judicial vestments, my anger overtook me. I shouted from the audience, 'You're nothing but eight assholes and a token cunt!'" FLYNT, *supra* note 78, at 192. Mr. Flynt was in the Court at the time for oral argument on the jurisdictional issues of Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

In addition, in November 1983, Flynt announced that he was running for the Republican presidential nomination. *See Off and Hustling*, WASH. POST, Nov. 25, 1983, at A3. In December 1983, he announced that he was dropping his short-lived campaign for president. *See Personalities*, WASH. POST, Dec. 10, 1983, at D3.

[81] Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

intentional infliction of emotional distress claim. First of all, it was always a defamation case.[82] We all looked at it as a defamation case—not just our side, but the other side and the judge. It was getting common in those days to do some ancillary kind of pleadings. So you put invasion of privacy and intentional infliction of emotional distress in the case, but it's just another way to recover for defamation basically. You ought not to be able to recover for some ancillary claim that's based on defamation. So we all treated it that way, as a defamation case, and that's why the trial victory for the defense was really a very big thing. I thought that victory was as impressive as what we did in the Supreme Court, although the Supreme Court decision is what everybody knows about.

My problem was that Larry had given a deposition where he said that he intended to cause emotional distress, that he intended to assassinate the character of Falwell.[83] He knew it would hurt him in his profession and that's what he intended. So I argued to the judge at the charging conference that he had to instruct the jury that the same First Amendment defenses apply on the intentional infliction of emotional distress claim as on the libel claim. You can't have inconsistent verdicts. The judge said, "Don't worry about that. I don't want to keep repeating myself and I don't think it's something we have to worry about. But if they come back your way on defamation and for the plaintiff on intentional infliction of emotional distress, I'll take care of it."

I don't think the judge had any thought at all that the jury would come back for us with an inconsistent verdict. But, that's what happened. We moved for a J.N.O.V.,[84] and the judge took it under submission. The judge came back and said, "Well, it really wasn't the publication itself that caused the harm." Actually, I never understood exactly what he meant. The judge was trying to make a distinction that it was the publisher's conduct, as opposed to his speech, which caused injury. It was actually putting this ad parody together, publishing it, and then putting it out there—that whole act of publishing it—was what this case was about. And

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[82] Falwell's complaint included multiple causes of action, including invasion of privacy, libel and intentional infliction of emotional distress. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 47-48 (1988).

[83] Part of deposition transcript is quoted in the intermediate appellate decision in the case. *Falwell*, 797 F.2d at 1273. Among other things, Flynt, who identified himself at the deposition as "Christopher Cornwallis I. P. Q. Harvey H. Apache Pugh," testified that the parody was written by Yoko Ono and Billy Idol. *See id. See generally* Post, *supra* note 1, at 609 n.33 (containing excerpts from this deposition and including Professor Post's observation that "Flynt was obviously irrational and deeply disturbed during his deposition").

[84] J.N.O.V. is an abbreviation for "judgment non obstante veredicto; judgment notwithstanding verdict." BLACK'S LAW DICTIONARY 749 (5th ed. 1979).

then, when we got to the Fourth Circuit, we argued that this is really protected speech. The appellate court said, "Well look, actual malice really applies. We understand that, but when it applies it means something different in the context of intentional infliction of emotional distress. It really doesn't have anything to do with whether you knew it was false or probably false." The appellate court just changed the definition of actual malice.

QUESTION: How much did Mr. Flynt contribute then to your legal strategy, inadvertently or otherwise?

RESPONSE: You fellows have to tell me when you're done interviewing him what his answer is to that question. I'm kind of curious to hear that myself.

There were two periods in this case. There was a period when he was giving his deposition, and he was down at that time. He was incarcerated on a contempt charge which we later got set aside and dismissed, and he was not in good shape. He was saying whatever he thought he could to say the opposite of what he thought I wanted him to say. I don't think he was terribly happy with me at that time. I don't think he was happy with the world. I think he was just trying to say what he felt was going to cause the most problems for himself and for me defending the case.

But he said these very things: that Falwell really did have sex with his mother, that it wasn't fanciful, and that Larry had witnesses and affidavits from witnesses.[85] And he intended to cause emotional distress to assassinate his character, all these things I mentioned earlier. That didn't help for his defense. So I can't view that as any contribution.

When we got to trial, he was in much better condition. He was now out of custody and he had been dealing with the problems that he had, so he was in much better shape. He came in and he did a very, very good job on the witness stand. So, to that extent, he certainly contributed. And then finally, last but not least as they say, he like clockwork paid the legal bills.[86] So he was able to help us.

QUESTION: The definition of a good client?

RESPONSE: That's right.

QUESTION: You had some difficulty, didn't you, in getting the

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[85] *See generally* Post, *supra* note 1, at 609 n.33 (containing excerpts from this deposition).

[86] According to one 1997 article, "Flynt's total estimated legal outlays over the years exceed $50 million." Matt Labash, *The Truth vs. Larry Flynt*, WKLY. STANDARD, Feb. 17, 1997, at 19.

support of the mainstream press to file amicus curiae briefs on your behalf. Why do you think that was the case?

RESPONSE: We did have difficulty, and I think there were two reasons for it. One was, I think, a significant reluctance to be associated with *Hustler* magazine and Larry Flynt at that point. He was, as I mentioned to you, involved in some very controversial kinds of things at the time where there was a lot of news attention being given to him. His magazine was one that a lot of the mainstream media did not want to be associated with. That was one aspect of it.

The other aspect, which was probably equally as important, was that the attorneys for the mainstream media, I believe, thought that the Fourth Circuit decision—it was a 3-0 decision against us basically affirming the trial court's denial of our motion for J.N.O.V. and allowing the emotional distress claim to stand—was not likely to be disturbed by the Supreme Court. I think the mainstream media concluded, through their attorneys, that if the Supreme Court granted review, the best they could hope for is a 4/4 split. I think they thought there was a solid conservative block that was not going to vote our way and we might not even get a 4/4 split, so the result would be that the Fourth Circuit decision would be a national decision. So they would much prefer to be able to argue this is some kind of a *Flynt* or *Hustler* decision limited to the Fourth Circuit—a kind of aberrational decision. So I think that was their situation.

However, once the Supreme Court granted certiorari, they came in and filed their amici briefs and they were very helpful in the process.[87] I also have to say that a number of the lawyers for the different media members met with me in Washington, D.C., sometime before the Supreme Court hearing. I went through a couple of sessions where they acted as the panel of justices, maybe two or three different panels, and I would make the argument and they would question me and then we would all discuss strategy. It was very helpful and they came from out of state to do it, as well as the local attorneys there in Washington. So I was grateful for them doing that.

QUESTION: Chief Justice Rehnquist's opinion in *Hustler v. Falwell* is read by hundreds of law students across the country each

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87 *See Falwell*, 485 U.S. at 47 (identifying briefs of amici curiae filed on Flynt's behalf by the American Civil Liberties Union Foundation, the Association of American Editorial Cartoonists, the Association of American Publishers, Inc., Home Box Office, Inc., the Law & Humanities Institute, the Reporters Committee for Freedom of the Press, Richmond Newspapers, Inc., and Volunteer Lawyers for the Arts, Inc.).

year.[88] 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?

RESPONSE: I think the single most important aspect is that the First Amendment freedom of speech is essential to the working of our democracy and that the freedom to criticize public officials and public figures is central to the relationship between the government and its citizens and is a very important aspect of individual liberty. That's probably what I would say is the most important thing to take away from that case.

QUESTION: Now, all modesty aside here, how does the decision in *Falwell* stack up against other First Amendment cases, such as *New York Times v. Sullivan*[89] or *Miller v. California*[90] in terms of its importance?

RESPONSE: *New York Times v. Sullivan* is an important case—there's no question about that. I can't think of any First Amendment case in our lifetime that's more important than that case.[91]

I think the *Flynt v. Falwell*[92] case is an extremely important decision, not only because of the principles involved but also because of the personalities and the subject matter and the notoriety and publicity, all of which are related to each other. It has a very educational or informative aspect because of all these different ingredients. You'll see statements of these principles in other cases but people—a lot of people—won't care so much about it. In my view, they did a movie about Larry Flynt largely because of the case. Now you can talk to the writers or the producers and see if they have a different view, but I think that was a very, very significant thing. The case is just easily understood and captures a lot of people's attention.

QUESTION: The *Falwell* case garners the most public attention, but are there other cases involving Mr. Flynt that you think the public should be aware of?

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88 The case, for instance, is excerpted in several leading law school casebooks. *See generally* MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 477-83 (6th ed. 2000); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 84-86 (1999).

89 376 U.S. 254 (1964).

90 413 U.S. 15 (1973).

91 Isaacman is in good company with this assessment. For instance, University of Chicago Law Professor Cass Sunstein considers *Sullivan* to be "one of the defining cases of modern free speech law." CASS SUNSTEIN, THE PARTIAL CONSTITUTION 205 (1993). Likewise, Lee C. Bollinger, a First Amendment scholar and the current President of the University of Michigan, contends that *Sullivan* "provided a major context for defining the underlying meaning of the First Amendment." LEE C. BOLLINGER, IMAGES OF A FREE PRESS 5 (1991).

92 797 F.2d 1270 (4th Cir. 1986).

RESPONSE: You know there are hundreds of cases that I've handled for Larry Flynt. I mean just so many cases. There were probably five cases all by themselves that had Gerry Spence on one side and I was on the other side for Larry.[93] And they all had interesting principles of law involved.

E. *Larry Flynt: Politics, Public Perception and the Movie*

PREFACE: In the past five years, Larry Flynt increasingly has moved out of the shadows of pornography and into the public spotlight. In December 1996, the controversial Milos Forman film, *The People vs. Larry Flynt*,[94] elevated Larry Flynt's stature.[95] Just two years later, Mr. Flynt made headlines again when, in the middle of President Clinton's sex scandal with erstwhile White House intern Monica Lewinsky, he purchased an advertisement in *The Washington Post* offering to pay women who could prove they had a sexual affair with a member of Congress.[96] This wide-ranging section of the interview stretches across these topics. In the process, Mr.

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[93] For a fascinating series of cases in which attorneys from Cooper, Epstein & Hurewitz—the law firm for which, at that time, Alan Isaacman was the head of litigation—and Spence, Moriarity & Schuster—the firm headed by Gerry L. Spence—did battle, see Dworkin v. Hustler Magazine, Inc., 867 F.2d. 1188 (9th Cir. 1988), *cert. denied*, 493 U.S. 812 (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 (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 (9th Cir. 1988) (involving a lawsuit for invasion of privacy, libel and intentional infliction of emotional distress 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"). In one instance, Gerry Spence actually filed a lawsuit against Flynt for libel and other related causes of action stemming from a July 1985 issue of *Hustler*. Spence v. Flynt, 647 F. Supp. 1266 (D. Wy. 1986). Cooper, Epstein & Hurewitz was once again involved in that case opposing Spence. *See id.*

[94] Columbia Pictures 1996

[95] The movie was criticized for lionizing Larry Flynt as a First Amendment hero while glossing over the alleged harms of pornography. For instance, Laura Kipnis wrote that the movie "sanitizes Flynt's career into one long, noble crusade for the First Amendment" and "reeks of class condescension, taming Flynt's cantankerous, contrarian life into the most conventional story as possible." Laura Kipnis, *It's a Wonderful Life*, VILLAGE VOICE, Dec. 31, 1996, at 37-38; *see* Hanna Rosin, *Hustler*, NEW REPUBLIC, Jan. 6, 1997, at 20 (arguing that, in the movie, "the old slimemeister has been retrofitted as a hardscrabble defender of American freedoms" and contending that "in the movie, *Hustler* is almost accidentally in the nudie business (which is, by the way, presented as pretty innocent). Its real mission is social progress.").

[96] *See generally* 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) (describing the controversy surrounding the advertisement and arguing that Flynt was unfairly attacked by some mainstream journalists for its publication).

Isaacman also discusses actor Edward Norton's portrayal of him in *The People vs. Larry Flynt.*

QUESTION: When Larry Flynt ran a full-page ad in *The Washington Post* back in 1998 offering $1 million to anyone who could prove a sexual escapade by a member of Congress, he was lambasted by many mainstream journalists for engaging in checkbook journalism and sleazy tactics.[97] Are these journalists just hypocrites?

RESPONSE: Well, there is so much hypocrisy around in every area. I don't want to categorize these journalists as hypocrites. Some of them may be hypocrites, but some of them may not be. I'll tell you, there's a ton of hypocrisy and the one thing that came out of it, at least came out to me from my own involvement in that process that you just referred to with *The Washington Post* ad, was that there was certainly plenty of hypocrisy among some members of Congress.

QUESTION: There seems to be a contradiction. Of late, Larry Flynt is accorded more deference and credibility in the popular press than he was prior to the release of Milos Forman's 1996 movie *The People vs. Larry Flynt.* Why do you think it is that he's accorded more deference and credibility?

RESPONSE: I think there are a few reasons. I think that the film kind of made him more understandable and maybe more of a sympathetic character to a lot of people. I think his participation on the periphery of the impeachment process attracted a lot of support. I think many people who have no use for *Hustler* magazine appreciated what he did there, valued it. He was one person outside the political process that some people thought came to the aid of the President who was, in some people's view, being unfairly attacked and exposed the hypocrisy that was part of the whole process. And then I also think that if you live long enough, you can outlive your enemies. And he gained respectability just in time.

QUESTION: How accurately do you think the movie portrayed your client?

RESPONSE: I thought the movie portrayed him very accurately.

QUESTION: The movie obviously took some liberties with the Edward Norton version of Alan Isaacman. The character apparently represented a composite of several of Larry Flynt's attorneys.

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97 In his 1996 autobiography—two years prior to *The Washington Post* ad—Larry Flynt wrote that "the mainstream press has never been friendly to me, and at times it has been openly hostile." FLYNT, *supra* note 78, at 209.

Consequently, how accurately do you think that movie portrayed you?

RESPONSE: Far less accurately.

QUESTION: How so?

RESPONSE: Well, number one, Edward was portraying a composite character and by saying that, in many respects, he was portraying somebody who wasn't ever present. The attorneys in Larry's life have been very different from one another. I was obviously the attorney who was involved in most of these proceedings and had been around the longest.

When I started to represent Larry back in 1978, I had been practicing law for ten years or so. The movie made Edward's character look like he was just out of law school. I had tried a lot of cases before I ever represented Larry and I thought it was not believable that Larry Flynt, who could afford to hire experienced counsel, would pick some green attorney, some attorney who really did not have experience and say, "Go in there and fight for my liberty." I expressed that to Milos Forman, but he told me the movie really wasn't about me. It was about Larry so don't worry about it.

QUESTION: What is your relationship with Edward Norton?

RESPONSE: I didn't know who Edward was when he was first selected. I met him, obviously, before the shooting started. Forman kept telling me Edward was going to be a big star and a wonderful actor—and he is a wonderful actor. Edward was portraying the character that he saw in his mind and he really didn't meet me until just a couple of days before they started shooting. We spent a few days together then. I think that was a useful process. Edward, in real life, was twenty-six or twenty-seven years old at the most, so he's not going to look like an older actor or act like one because he's not that old. But he's clean cut and I think he did a nice job.

F. *The First Amendment and Journalism*

PREFACE: The framers of the Bill of Rights placed enough confidence in journalists to provide the press, as an institution, explicit protection in the First Amendment.[98] Today, however, the public places little faith and confidence in the press, often believing journalists to be unfair and biased in their reportage.[99] This lack of

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[98] 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. (emphasis added).

[99] *See* W. LANCE BENNETT, NEWS: THE POLITICS OF ILLUSION 1-2 (4th ed. 2001) (writing that "polls show that growing majorities of people believe that reporters introduce their

confidence may have drastic implications for the amount of protection that the press receives under the First Amendment. It has been argued, for instance, that "a public that does not value the press when it plays its role as educator and watchdog is a public primed to penalize it."[100] Mr. Isaacman reflects on this issue in this section of the interview.

QUESTION: In media attorney Bruce Sanford's recent book, *Don't Shoot the Messenger*, he writes that a "canyon of distrust" between the public and the press harms the First Amendment.[101] Do you agree?

RESPONSE: I think the distrust makes it a lot tougher for the First Amendment to be applied rigorously and valued as well. I think that distrust causes some people to think that there are weaknesses in the system where we can't believe what people say or that the media may be saying things because of a hidden agenda. So, I think it does point out the vulnerabilities of the First Amendment.

QUESTION: Does the sometimes suspect conduct of investigative journalism, such as the use of deception and hidden cameras,[102] actually do more harm than good when it comes to the public's perception of protecting freedom of the press?

RESPONSE: I think the answer to that is yes. I mean, that's not to say that people should never engage in that behavior, but I think by definition in some instances it's going to do more harm than good because it's hard to find any good out of some of the behavior and you can certainly see the harm. We have to reign in this kind of behavior. These people are getting tricked and they're having to submit to intrusive behavior. It's very common for an audience of average people to identify with the average person who is getting deceived by a member of the media who is manipulating the situation and editing what's being shown "victimizing" the person.

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own political views into the news and generally do not even get the facts straight"); JOHN C. MERRILL, JOURNALISM ETHICS: PHILOSOPHICAL FOUNDATIONS FOR NEWS MEDIA 1 (1997) (writing that "numerous surveys in recent years have shown that the public has little faith in, or respect for, the press").

100 Clay Calvert, *The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later*, 22 VT. L. REV. 493, 517 (1998).

101 BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 11 (1999). Sanford argues that "the public's anger toward the media is being played out in the nation's courts, where judge after judge is limiting the public's right to receive information all in the name of controlling the 'profiteering' news media." *Id.* at 9.

102 See Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (considering the media's liability for fraud and trespass stemming from the use of deception and hidden cameras).

G. *Larry Flynt's Contributions to First Amendment Jurisprudence*

PREFACE: Larry Flynt is, to say the least, a controversial figure. Gloria Steinem, in a 1997 commentary in *The New York Times*, denigrated his First Amendment accomplishments and equated Flynt with the Nazis.[103] In 1999, however, Flynt was honored for his First Amendment accomplishments by a prominent communications law journal.[104] In this section, Mr. Isaacman considers Larry Flynt's contributions to First Amendment jurisprudence.

QUESTION: What has Larry Flynt meant and contributed to the First Amendment?

RESPONSE: Well, in the First Amendment area, there's no question that he has been, as far as my clients are concerned, the most active. I can safely say that he may have almost a monopoly in certain areas of First Amendment type of matters. I think that, by producing his publications, he has given an opportunity for the First Amendment to be defined and for the limits of expression to be defined. The fact is that he has published things that invoke or cause others to invoke the judicial process. But he has defended his position and had lawyers go out there, and us in particular, and fight these battles. He's not somebody that was quick to settle cases, so the issues were fully litigated. There were resolutions reached on very important issues.

QUESTION: If there hadn't been a Larry Flynt, how do you think First Amendment jurisprudence would be different today?

RESPONSE: It's hard to speculate. Maybe somebody would have come along or some other situation would have made the same points. But there are wide areas of our culture and, you know, our media would be uncertain as to what the limits are—what expression is permissible, what expression isn't permissible. I really think that his cases, collectively, have broadened the expanse of the First Amendment and reinforced it in a very strong way.

QUESTION: So it's essential, then, for a vigorous and hearty First Amendment to have somebody like Larry Flynt?

RESPONSE: I think so. I think for a society like ours he's a ne-

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103 "A pornographer is not a hero, no more than a publisher of Ku Klux Klan books or a Nazi on the Internet, no matter what constitutional protection he secures." Gloria Steinem, *Hollywood Cleans Up Hustler*, N.Y. TIMES, Jan. 7, 1997, at A17. Flynt counters that "Gloria Steinem is an ancient, worn-out old relic whose only claim to fame is urging some ugly women to march." Benjamin Svetkey, *Porn on the 4th of July*, ENT. WKLY., Jan. 31, 1997, at 16.

104 Flynt received the Roscoe Barrow Memorial Award presented by the executive board of the *Hastings Communications and Entertainment Law Journal* in September 1999. *See 1999 Roscoe Barrow Memorial Award*, 21 HASTINGS COMM. & ENT. L.J. (pages unnumbered) (Summer 1999).

cessity. I think he's a necessity and I think it strengthens the rights of every American to have the issues that he raises be treated in the manner that the courts have treated them, which is usually on the side of the First Amendment protections.

H. *Larry Flynt: The Client*

PREFACE: Mr. Isaacman has represented a number of celebrities throughout the years, including but not limited to Rock Hudson, Geraldo Rivera and Jerry Lewis. After the movie *The People vs. Larry Flynt*, however, the client with whom the public most associates him surely is Larry Flynt. Mr. Isaacman, in fact, has represented Flynt in over one hundred cases since first taking on some of Flynt's California-based work when Flynt moved to Los Angeles in 1978. In this section, Mr. Isaacman discusses what it is like to represent Flynt and how his relationship with Flynt has affected his practice.

QUESTION: In the movie *The People vs. Larry Flynt*, Woody Harrelson, as Larry Flynt, tells Edward Norton who is playing you, "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." Is, in fact, Larry Flynt your dream client or, conversely, have you ever dreamed of having a client like Larry Flynt?

RESPONSE: Well, I don't usually dream about clients to tell you the truth. That line that you just quoted is something that I used in somewhat of jest to people back in 1983. For example, someone would say to me, "Alan, how can you represent Larry Flynt?" I had been practicing, by that point, for fifteen years. I had done a lot of work in the federal courts in Los Angeles and I knew a lot of the judges and attorneys. We were friends and that kind of thing. Then, they would see a lot of behavior that was kind of unusual, bizarre behavior. And I'm representing this guy and they'd say, "How can you represent him?" So the line you just gave is what I would give back. I mean, the guy's always in trouble. You know, he's got very interesting cases and he can pay his bills and does.

QUESTION: The movie portrays you and Larry Flynt as good friends. Is that the case?

RESPONSE: Yes, we are.

QUESTION: Has your representation of Larry Flynt affected your business? Do you think it attracted clients, or has his self-proclaimed description as an "unseemly man"[105] driven some away?

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[105] This quotation is suggested directly by the title of Larry Flynt's own book. LARRY FLYNT, AN UNSEEMLY MAN (1996) (cited *supra* note 78).

RESPONSE: It's hard to tell who would have come to me for representation that did not come to me for representation. I don't know of any client that has left because of Larry Flynt. Many of my clients are long-standing clients that have been around for years. Jerry Lewis was a client before Larry was a client. So people like Jerry might ask me, from time to time, when some kind of news event occurred involving Larry. But my relationships with these other clients are independent relationships, so we're friends or business contacts. I don't think it's hurt my business. Maybe some people have come to me because they have heard of me now. I'll tell you one thing that has happened—there has been a non-stop succession of calls and letters from around the country from people who have no money to pay for an attorney, who have run out of lawyers, or no lawyers will talk to them, asking me to take their case.

QUESTION: Is there a bag of letters there somewhere?

RESPONSE: We try to respond to them all, and obviously I can't take their cases for the most part. But I try to pay attention to their concerns and let them know in a nice way what they might do next, or I say I can't help them.

QUESTION: Over the years, have people or organizations verbally attacked you because of your association with Larry Flynt?

RESPONSE: Mostly, no. It's surprisingly little. I think most people seem to have recognized that Larry Flynt is his own person and I'm my own person. I have a role to play as a lawyer and I do that. You know, it's an unusual thing in a sense. When people get to meet Larry, they're often surprised at the reaction. He's got a charm about him that's disarming. And I think, when people meet me, and I'm obviously a much less public individual than he is, they maybe have a harder time reconciling me with their notion of Larry Flynt. They don't see us as two peas in the same pod.

III. AUTHORS' COMMENTARY AND ANALYSIS

This part of the article contains the authors' critique of the remarks given by Mr. Isaacman during their September 15, 2000, interview. Mr. Isaacman's comments speak for themselves and should promote scholarly discussion and debate among First Amendment professors and practitioners. The authors' were struck, however, by three particular sets of remarks that perhaps bear at least brief analysis here: 1) his comments regarding problems with the *Miller* test and, in particular, its applicability to

the Internet;[106] 2) his willingness to challenge the often unquestioned assumption that minors necessarily are harmed by viewing media depictions of sex and violence, and Mr. Isaacman's concomitant belief that real-world research on media effects might be beneficial in this area;[107] and 3) his remarks regarding the lasting impact of the *Falwell* opinion.[108]

A. *Miller*

During the interview, Alan Isaacman made clear his belief that the *Miller* test for obscenity should be abolished given its unworkability. While all three parts of the test are problematic, the "community standards" prong causes him the most difficulty because of the inconsistent results that occur when different judges and juries view adult material. As he succinctly stated, "a citizen in one place is able to say something and have the protection of the national constitution while a citizen in another place in the country can be thrown in jail for saying the same thing."[109]

The difficulty is only exacerbated when the *Miller* test is applied to the Internet. The true folly of trying to apply a "community standard" to a worldwide medium has not escaped the attention of the courts. The first hint that the old model might not work came in *United States v. Thomas*.[110] The Sixth Circuit Court of Appeals ruled that, in the case of electronic bulletin boards carrying sexually explicit messages, the "community standard" to be applied to the material in question should be determined by the location where the material was *received*.[111] The rationale here was not novel, as seven years earlier the Supreme Court had reached a similar conclusion with respect to dial-a-porn services.[112] In both cases—electronic bulletin boards and telephones—the distributor had control over who viewed the messages and—even more important—what communities the messages infiltrated.

That is not the case, however, with the World Wide Web. As

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106 *See supra* notes 32-41 and accompanying text.

107 *See supra* notes 55-63 and accompanying text.

108 *See supra* notes 64-92 and accompanying text.

109 *Supra* Part II, § B.

110 74 F.3d 701 (6th Cir. 1996). In this case, a California couple ran an electronic bulletin board service that included chat groups and sexually explicit photographs and materials that could be downloaded by subscribers to the service. *See id.* at 706. A subscriber service such as this differs markedly from a Web site where anyone with an Internet connection can access the posted material.

111 *See id.* at 711.

112 *See* Sable Comm. of California v. FCC, 492 U.S. 115 (1989). The Court made clear that the technology existed to enable the company to ascertain the locale of incoming calls to the service. *See id.* at 125.

Mr. Isaacman pointed out during the interview, "the Internet shows the absurdity of the community standards requirement."[113] The Third Circuit Court of Appeals recently agreed, writing:

> It is essential to note that under current technology, Web publishers cannot 'prevent [their site's] content from entering any geographic community.' As such, Web publishers cannot prevent Internet users in certain geographic locales from accessing their site; and in fact the Web publisher will not even know the geographic location of visitors to its site.[114]

Thus, if the "community standard" prong of *Miller* were to apply to the Internet, it would necessarily have to be the standard from the "most restrictive and conservative" jurisdiction and such a requirement, according to the court, "imposes an impermissible burden on constitutionally protected First Amendment speech."[115] Mr. Isaacman correctly suggested that the result would be a "very, very pristine Web site or collection of Web sites" and, accordingly, a watered-down application of the First Amendment in cyberspace.[116]

B. *Harm to Children and Social Science Research*

Protecting children from exposure to untoward images and dialogue in the media has long been the subject of debate in legal and societal organs.[117] For instance, the Payne Fund Studies conducted from 1929 through 1932 focused on the influence of a then-new medium—motion pictures—on children.[118] The questions about media effects and children have never gone away, especially when it comes to sexually explicit speech and violence.

In the 1970s, the Pacifica Foundation made headlines when its New York-based radio station, WBAI, aired a mid-afternoon monologue by comedian George Carlin that heralded seven "filthy words" that cannot be said on the public airwaves.[119] The Federal Communications Commission labeled Carlin's piece "indecent," a term which is "intimately connected with the exposure of children

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113 *Supra* Part II, § B.

114 *ACLU*, 217 F.3d 162, 169 (internal citations omitted).

115 *Id.* at 166.

116 116 *Supra* Part II, § B.

117 *See* A. DAVID GORDON & JOHN MICHAEL KITTROSS, CONTROVERSIES IN MEDIA ETHICS 182 (2d ed. 1999) (arguing that sexual content in the media has been a concern for a much longer time than violence in the media and has been subject to numerous attempts to regulate it).

118 *See* SHEARON A. LOWERY & MELVIN L. DEFLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH: MEDIA EFFECTS 21-43 (3d ed. 1995) (discussing the Payne Fund Studies).

119 *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[120] In short, the FCC was permitted to fashion a category of speech—one with lesser First Amendment protections—primarily because "broadcasting is uniquely accessible to children, even those too young to read."[121]

To justify a regulation on a particular type of media content such as sexually explicit speech, the government must prove that it has a compelling interest.[122] The question of whether harm to children truly amounts to a compelling government interest until recently has received very little attention from legal scholars.[123] The concept was essentially accepted as part of society's collective wisdom—an underlying assumption that few bothered to question.

Alan Isaacman, in this interview, has challenged this blanket assumption. As he discussed, there appears to be general agreement that young people should be protected from sexually explicit images *without* conclusive evidence from the social scientific community that supports this proposition.[124] He contends that this time-worn assumption might be traced to "early attitudes that sex is somehow forbidden or that sex is bad or evil . . . ."[125] and thus government has a compelling need to restrict young people's knowledge of the subject. Accordingly, a legal standard of review—strict scrutiny—employed in content-based speech restrictions, such as cases involving adult materials, may be predicated upon unproven premises—all in the name of protecting children.

This same type of paternalism permeated the recent Federal Trade Commission Report calling upon the entertainment industry to stop targeting children in its marketing of violent movies, music, and electronic games.[126] Mr. Isaacman criticized the all-too-common practice of politicians blaming the media for causing social ills, observing that "When you're out there as a politician and

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120 *Id.* at 732. (internal citation omitted).

121 *Id.* at 749.

122 *See* United States v. Playboy Entertainment Group, 120 S. Ct. 1878, 1886 (2000) (writing that "if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest").

123 *See* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children From Controversial Speech*, 53 VAND. L. REV. 427, 433 n. 19 (2000) (writing that only two articles by legal scholars prior to the author's own article had even raised the issue with respect to the interest of shielding children).

124 *See supra* Part II, § C.

125 *Id.*

126 *See* FTC Report, *supra* note 51, and accompanying text.

you have to deal in sound bites and you can attack Hollywood or something because Hollywood is showing what consumers want to see, maybe that's really what guides politicians."[127] His view that other reasons exist for violence in society certainly is backed up by research. As Edward Donnerstein, a social scientist at the University of California-Santa Barbara who studies television violence, observes, "it is very clear that there are a multitude of factors which contribute to violent behavior, and they all interact with each other. There is no single cause, just as there is no single cause for any type of behavior we want to examine."[128] Nonetheless, the media continue to provide a convenient scapegoat in an age when their popularity is especially low.[129]

The legal community may be well advised, then, to consider Mr. Isaacman's comments both questioning the assumption of harm to children and contending that, perhaps, research from social science could be used to inform the legal community's discussion on this critical issue.

C. *Falwell*

Faced with what even the most casual observer would view as insurmountable odds, Alan Isaacman began the long journey to the United States Supreme Court in Jerry Falwell's backyard in 1984—with a jury of conservative, Southern Baptists and a much-maligned pornographer for a client. By the time the trial ended in December, the judge had directed a verdict in favor of Larry Flynt and *Hustler* magazine on the invasion of privacy count[130] and the jury had ruled in favor of the defendants on the defamation count, leaving only the intentional infliction of emotional distress claim[131] and the chance for Mr. Isaacman to carve out a new national standard protecting subsequent generations of satirists, comedians, politicians, journalists, cartoonists and, yes, pornographers.[132]

Without question, a key contribution by Mr. Isaacman to First Amendment law was his winning argument to the Supreme

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127 *Supra* Part II, § C.

128 Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827, 828-29 (1994).

129 *See* Calvert, *supra* note 100 and accompanying text.

130 *See* Falwell v. Flynt, No. 83-0155-L-R, 1985 U.S. Dist. LEXIS 20586, at *1 (W.D. Va. April 19, 1985).

131 *See id.* at *2.

132 The United States Court of Appeals for the Fourth Circuit rejected the argument that public figures raising claims of intentional infliction of emotional distress must prove actual malice. *See* Falwell v. Flynt, 797 F.2d 1270, 1274 (4th Cir. 1986) (holding that "we do not believe that the literal application of the actual malice standard which they seek is appropriate in an action for intentional infliction of emotional distress.").

Court—an argument that unified liberal and conservative justices—in *Hustler v. Falwell*,[133] though he views the jury's verdict on the defamation claim in the trial court as "impressive" as the victory in the Supreme Court—just without the resultant fanfare.[134] Scores of legal practitioners and scholars recognize the lasting impact of the Supreme Court's decision on all levels of speech, from political debate to situation comedy.

Thanks to the *Falwell* decision, political debate is not limited to a scripted cheer or a camera-staged give-and-take between well-coached candidates. Instead, as the Supreme Court long ago recognized, political discourse "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[135] Those attacks can come in a variety of forms. The justices reaffirmed that notion in the *Falwell* opinion, when they observed, "[d]espite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate."[136] The ruling also paved the way for the comedic, though vitriolic, characterizations of public figures in such popular television venues as *The Tonight Show* or *Saturday Night Live.*

Finally, the true legacy of this opinion may well be found in the warning it gave to those attempting to work around First Amendment protections. As the torts of defamation and invasion of privacy over the years amassed a legion of First Amendment defenses, plaintiffs began looking for alternative ways to short-circuit these protections by pleading tangential causes of action—those not yet ripe with constitutional safeguards. Courts now are able to rely upon the *Falwell* case to shut down this practice[137] and keep not only the letter, but also the spirit, of the First Amendment intact.

CONCLUSION

Law journals traditionally publish either case and legislative analyses or what might be called ivory tower think pieces—those manuscripts in which professors or law students challenge current

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133 485 U.S. 46 (1988).

134 *See* Part II, § D.

135 *Sullivan*, 376 U.S. at 270. (internal citations omitted).

136 *Falwell*, 485 U.S. at 54.

137 *See Food Lion*, 194 F.3d at 522 (The court did not permit the supermarket chain to avoid proving actual malice by pleading causes of action other than libel and, in effect, make "an end-run around First Amendment strictures.").

legal practices or propose new paradigms. This article does not fit neatly into either of these two categories. In fact, the format of this article—an in-depth interview with a person whose arguments have influenced First Amendment jurisprudence and captured the minds of both liberal and conservative justices on the United States Supreme Court—is highly unusual in the law journal realm.

The authors believe, however, that such first-hand interviews with primary sources are essential for promoting a better understanding of legal issues as seen through the eyes of practitioners and participants in First Amendment controversies. Part of the role of legal scholars, we believe, is to peel away the veil of academia and plant scholarship firmly in a real-world setting.

That said, Mr. Isaacman's reflections on everything from the *Miller* test to the *Falwell* case are now accessible to scholars—professors and students—everywhere. Those reflections may be considered and discussed or, as too often happens with the ideas embodied in law journal articles, overlooked and forgotten. In either case, the authors thank the editors of this journal for recognizing the merit of a different breed of law journal article.