

Texas Review of Entertainment & Sports Law
Fall 2007

Article

***1 STOPPING THE OBSCENITY MADNESS 50 YEARS AFTER ROTH V. UNITED STATES**

Clay Calvert [FNa1]

Robert D. Richards [FNaa1]

Copyright (c) 2007 The University of Texas at Austin School of Law Publications, Inc.; **Clay Calvert**; Robert D. Richards

Abstract

On the 50th anniversary of the U.S. Supreme Court's 1957 decision in **Roth** v. United States declaring obscene expression outside the scope of First Amendment protection, this Article calls for jettisoning and abandoning **obscenity** jurisprudence as we know it and, instead, affording speech that would currently be obscene with First Amendment protection.

Drawing on in-person interviews conducted by the authors with leading adult entertainment industry attorneys and key figures in the industry, the Article initially sets forth ten different reasons why **obscenity** law should be abolished. These ten reasons sweep up numerous variables that stretch broadly to cover technological, economic, legal and social forces. The article then proposes three different policy recommendations for addressing sexually explicit expression in the future.

Summary

I.	Introduction.	2
II.	Ten Reasons to Abandon Ex- tant Obscenity Law In the United States.	8
	A. The Three Ps of Protec- tion: Popularity, Privacy and Per- manence.	8
	1. It's Popular.	8
	2. It's Private & Personal.	10

3. It's a Permanent Reality and It's Not Going Away.	14
B. The Problems of Miller and Any Test for Obscenity .	15
1. It's Now a Community of One.	15
2. No Matter How Offensive It May Be, It's Educational.	17
3. Definitional Difficulties: It's All in the Eye of the Behold- er.	18
C. It's a Matter of Self- Regulation and Common Eco- nomic Sense.	21
1. Health, Safety & Zoning Regulations Are in Place And En- forceable.	21
2. Economic Interests and Counter Speech Will Limit Some Content.	25
3. There are More Important Issues to Worry About & Prosec- ute.	26
4. It's a Legitimate Business, Economic Engine & Employment Opportunity.	26
III. A Trio of Recommendations for the Future.	28
A. Implementing a .KIDS Top-Level Domain Name for the Web.	28
B. Treating Words Differ-	30

ently From Images.

	C. Stopping the Government From Making End Runs Around Obscenity .	32
IV.	Conclusion.	38

*2 I. Introduction

Fifty years ago, the United States Supreme Court in **Roth v. United States** [FN1] held--on the first occasion it squarely addressed the issue--that “**obscenity** is not within the area of constitutionally protected speech or press” [FN2] under the First Amendment. [FN3] Today, a half-century after **Roth** escorted the judiciary down the tortuous and tumultuous path of addressing what former Supreme Court Justice John Harlan once called an “intractable **obscenity** problem,” [FN4] it is time to jettison **obscenity** law as we know it.

Obscenity jurisprudence post-**Roth** has disturbingly witnessed prosecutions targeting, among other examples, the stand-up routines of the late comedian and social commentator Lenny Bruce, [FN5] the photographs of Robert Mapplethorpe, [FN6] a musical nightclub performance *3 by rap group 2 Live Crew, [FN7] and the acting of Jack Nicholson, Rita Moreno, Ann-Margret and Candice Bergen in the movie Carnal Knowledge. [FN8] It also has been used--and is still used today in some states--to ban common sex toys such as vibrators. [FN9] And in late 2006, more than three decades after its 1972 release when it “made its unprecedented conquest of legit audiences” [FN10] and ushered in what the New York Times Magazine famously headlined “Porno Chic,” [FN11] the movie Deep Throat was targeted for **obscenity** by detectives in North Stafford, Va. [FN12]

In scrapping a jurisprudence that pivots on an aging, three-pronged approach articulated in *Miller v. California* [FN13] --a tack, as argued later, that is concurrently confusing and out of touch with recent technological, social and legal developments [FN14]--the country will save taxpayer dollars now spent on **obscenity** cases that target images depicting sexual conduct between consenting adults. Those prosecutions pander to the censorial proclivities of religious conservatives and anti-pornography feminists while simultaneously serving the political aspirations of federal and local prosecutors. Funds currently squandered both on the U.S. Department of Justice's 2005 **Obscenity** Prosecution Task Force [FN15]--created in *4 2005--and on current federal **obscenity** prosecutions in cases like *United States v. Extreme Associates* [FN16] and *United States v. Five Star Video* [FN17] are better devoted to addressing real sex crimes. In particular, the money saved should be funneled to the following efforts:

- tracking down and prosecuting sexual predators who prey on children surfing the Internet [FN18] and providing more resources for organizations such as the Internet Crimes Against Children Task Force, [FN19] instead of leaving the job to controversial citizen-vigilante groups like Perverted Justice [FN20] and television news magazines like Dateline that engage in made-for-ratings sting operations; [FN21] and
- finding and prosecuting those who use and exploit children in the making and distribution of child pornography. [FN22]

Part I of this Article offers ten different reasons why, on the not-so-golden anniversary of **Roth**, **obscenity**

law in the United States must be abolished. [FN23] Part II of this Article then proposes and defends three different recommendations for how to proceed in the future with the regulation of sexually explicit content in a manner that protects minors *5 while preserving the rights of consenting adults to view such material in the privacy of their homes. [FN24] In particular, the authors call for:

- the implementation of a .KIDS top-level domain name for the Web;
- courts to distinguish, when considering laws targeting sexually explicit content, between words and images, with regulation of the former subject to closer scrutiny unless the words are uttered in a public location where a majority of individuals within hearing distance are under the age of 14 years; and
- the government to stop chipping away at the adult entertainment industry from the edges of the law, as it currently is doing under its new enforcement of age-verification and record-keeping requirements via 18 U.S.C. § 2257 against so-called secondary producers of adult content.

Finally, the Article concludes in Part III by calling attention to potential problems, including computer-generated virtual sexual realities, that may arise in the future and could require attention from either legislative bodies or the judiciary. [FN25]

The analysis and recommendations articulated in this article are not made lightly; they come after years of writing many law journal articles addressing contemporary issues related to the regulation of sexually explicit content, including several articles based on in-depth, first-person interviews conducted with more than a dozen individuals and attorneys directly connected to the adult entertainment industry. [FN26] These revealing interviews have *6 helped to provide a perspective infused with the realities of **obscenity** law and litigation, gleaned from both adult industry attorneys such as Paul Cambria, Jeffrey Douglas and Louis Sirkin, and leading players in the adult entertainment industry such as Stormy Daniels, Larry Flynt, Max Hardcore, Nina Hartley, Joy King, Mark Kulkis, Ira Levine, Sharon Mitchell and John Stagliano. This Article draws on their comments and quotations to support the authors' arguments and, in the process, to move the article beyond the realm of exploratory academic theory to the actualities of adult entertainment.

Four important points must be made before turning to Part I. First, the authors' analysis and comments here focus exclusively on **obscenity** law, not the regulation and prohibition of child pornography. We are not calling for the abolishment of either child pornography statutes [FN27] or the U.S. Supreme Court's jurisprudence on that subject. [FN28] Suffice it to say, the authors are against the sexual exploitation of minors.

Second, the authors focus only on: 1) content involving and depicting sexual conduct and activity engaged in by consenting adults, and 2) sexually charged words spoken and/or written voluntarily by consenting adults, such as nightclub comedy routines and explicit magazine articles describing sexual practices. The authors are against any person being forced to engage in either sexual conduct or sexual speech--spoken or printed--against their will.

Third, the authors do not believe that anyone should be compelled to view images depicting sexual conduct between consenting adults; likewise, we do not believe that anybody should be required to hear a raunchy comedian "work blue" [FN29] on stage in the confines of a darkened comedy club. The authors believe that exposure to such material should be a matter of choice left to consenting adults; just as the government should not deprive individuals of this choice, neither should viewing or hearing sexually explicit adult content be mandatory. As Luther Campbell, the lead singer of 2 Live Crew, aptly put it after his group was acquitted of **obscenity** charges stemming from a 1990 nightclub performance, where audience members were required to be at least 21

years of age, “If *7 people want to come and see us perform, you can. If you don't, you don't.” [FN30] One of today's biggest adult female stars, Stormy Daniels, expressed a similar sentiment to the authors in the summer of 2006, observing, “I don't think that everyone should watch adult--I don't think that I should force it down anyone's throat. But, I do think that it should fall under free speech because if it doesn't, where does it stop?” [FN31]

Fourth, and perhaps most important, the authors do not argue that material now considered obscene under Miller cannot be regulated at all by the government. Rather, sexually explicit content may be permissibly regulated, but any regulations should be subject to the rigorous strict scrutiny standard of judicial review to which other types of content-based laws--including those targeting core political speech [FN32]--are subject in First Amendment jurisprudence. [FN33] This means that sexually explicit content--no matter how “obscene” it may be under the Miller test--is protected by the First Amendment, and any regulation targeting it is presumptively invalid and must pass the strict scrutiny standard of review. [FN34] Any alleged harms that supposedly justify such content-based regulation of sexually explicit speech must be supported by substantial social scientific evidence, much like courts now demand of laws targeting the alleged harms of violent content of video games. [FN35] As this Article later makes clear, harms to morality no longer are sufficient to justify laws targeting sexually explicit expression after the Supreme Court's 2003 decision in *Lawrence v. Texas*. [FN36] The Supreme Court voted in favor of protecting the rights of consenting adults to engage in once forbidden and morally offensive--at least, to some people--sexual activities in the privacy of their own homes. Even conservative Justice Antonin Scalia acknowledged in his *Lawrence* dissent that the majority opinion in that case calls “into question” statutes targeting “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and **obscenity**.” [FN37]

*8 With these four important points in mind, the authors now turn to ten different reasons why **obscenity** law as we know it in the United States today must be abandoned and why sexual expression involving the actions or words of consenting adults, no matter how graphic or offensive they may be, deserves First Amendment protection.

II. Ten Reasons to Abandon Extant **Obscenity** Law In the United States

The following ten reasons for abolishing **obscenity** law as we know it in the United States are listed neither in order of importance nor in terms of strength of argument. Rather, the reasons must be viewed collectively in making the case against the current state of **obscenity** law. The reasons are also practical; they are not rooted in the professorial playground of free speech theory. Rather, the ten rationales sweep up numerous variables that stretch broadly to cover technological, economic, legal, and social forces that make the 50th anniversary of *Roth v. United States* a propitious time to jettison **obscenity** law.

In particular, Section A covers what might be considered the “Three Ps” of why **obscenity** law should be abandoned--popularity, privacy, and permanence--and why sexually explicit content involving consenting adults should be protected from production to distribution to dissemination to possession. Section B then turns to three major problems that plague the test for **obscenity** articulated in *Miller v. California* and that militate against laws that prohibit **obscenity**. Finally, Section C examines a potpourri of reasons for abolishing laws against **obscenity**. These reasons range from self-regulation and self-censorship in the adult industry in the United States to the economic benefits of protecting sexually explicit content to better spending of taxpayer dollars on issues more important than sexual content involving consenting adults.

A. The Three Ps of Protection: Popularity, Privacy and Permanence

Consumption of sexually explicit adult speech is a popular activity--one largely done in the privacy of the home--that seems to possess a permanent, almost insatiable appeal that the twin forces of laws and prosecutors can neither suppress nor contain. This section articulates arguments tied to the popularity, privacy, and permanence of sexually explicit expression that collectively militate in favor of abandoning **obscenity** laws in the United States.

1. It is Popular

It is impossible to deny that sexually explicit content involving consenting adults is incredibly popular today. As the Los Angeles Times wrote in April 2006, "Sex is big business. The porn industry's main trade publication, Adult Video News, estimated global 2005 sales at \$12.6 billion." [FN38] That total includes, according to Congressional testimony, "Internet distribution hitting \$2.5 billion in 2005." [FN39] Echoing sentiments and figures expressed by the Los Angeles Times, the Denver Post observed in 2006:

*9 Pornography is a booming business. Online porn alone grew from \$1 billion in 2002 to \$2.5 billion by the end of 2005. Visits to adult websites have exploded in just a few years, rising to 34 million unique users in 2004, up from 23 million in 2001. Mobile pornography--porno for cell phones, PDAs and devices like video iPods--also is predicted to grow from \$700 million last year to \$2.1 billion by 2009. [FN40]

Sexually explicit content has mainstreamed in American culture. Even vociferous critics such as author Pamela Paul acknowledge this, as she recently wrote that pornography is "seamlessly integrated into popular culture" [FN41] and "the all-pornography, all-the-time mentality is everywhere in today's pornified culture." [FN42] Journalist Claire Hoffman wrote in December 2006 for the Los Angeles Times that "porn stars such as Jenna Jameson, whose autobiography made the New York Times bestseller list, have pushed adult entertainment into the mainstream in places as far-flung as Buffalo, Moscow and Shanghai." [FN43] Even gay-themed pornography is gaining mainstream acceptance. [FN44]

As it has mainstreamed and grown in popularity, sexually explicit adult content inversely has decreased as a target for widespread public condemnation. [FN45] Paul Cambria, an adult industry defense attorney who has represented Larry Flynt's LFP, Inc. empire, expressed a similar sentiment about increasing acceptance of sexually explicit speech during a July 2003 interview with the authors, observing:

As time goes on, the bar gets higher because people have seen more and have become accustomed to more, and, consequently, they accept more. That's why, in the last ten or twelve years, there really have been no federal prosecutions. What that's done is to allow the community as a whole to become educated about what is out there and what people are consuming. It's obvious that it's acceptable to a large number of people because they're spending literally billions of dollars on adult material. There is no greater barometer of acceptance than people taking their money and allocating it toward something like that. [FN46]

Cambria, in fact, was a firsthand witness to such acceptance and tolerance in the courtroom in an **obscenity** prosecution that he argued against in the Midwest in 2000. [FN47] A *10 twelve-woman jury outside of St. Louis, Mo. held that two sexually explicit videotapes --Rock Hard and Anal Heat--were not obscene. [FN48] The tapes were far from tame; as one newspaper story described them, they "depicted anal, oral and vaginal sex among women and between men and women. They also depicted sex acts with objects." [FN49] The acquittal by the all-woman jury is indicative of both the kind of acceptance that sexually explicit adult content is gaining and, conversely, the difficulty that prosecutors experience today in gaining **obscenity** convictions.

Obscenity laws thus should be abandoned because they only serve to chill and reduce the amount of this very popular form of speech is available in the marketplace of ideas, [FN50] thereby limiting the ability and right of consenting adults to see, hear, and view other consenting adults engaging in sexually explicit acts or using sexually explicit language. As Justice Thurgood Marshall wrote for the Supreme Court in its 1969 opinion in *Stanley v. Georgia* [FN51] upholding the right of adults to possess--but not to distribute, disseminate, or sell--obscene speech, the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." [FN52] If certain forms of sexually explicit content are not popular or profitable, then they will not be produced. [FN53] It is better to leave such matters to marketplace economic forces than it is to leave them to taxpayer-funded government censorship and prosecutorial discretion. In brief, **obscenity** laws should be discarded because they can infringe on content that many consenting adults want to watch.

2. It is Private and Personal

Not only is sexually explicit content exceedingly popular and profitable, it is also largely consumed in private places where the odds of accidental or unintentional public exposure are very limited. With the advent of the VCR, the DVD, and the Internet--each a post-Miller development--and the concomitant disappearance from the national landscape of grimy adult movie theatres like the kind where actor Paul Reubens of Pee Wee Herman was once allegedly caught masturbating, [FN54] the consumption of sexually explicit content increasingly is done in the privacy of the home, where unwitting adults and children are less likely to be accidentally exposed to it. As adult content producer Max Hardcore told the authors in 2006, "It's in the privacy of your own home. And if you don't like, don't watch it. My movies aren't broadcast on cable. It's not like you're going to stumble across it." [FN55] *11 Ira Levine, an editor of *Hustler's Taboo* magazine and the husband of veteran adult film star Nina Hartley, concurs with the importance of privacy, observing:

I do think the privacy factor is something--you don't have to walk into an adult bookstore to see it, but then again, you no longer have to go to an adult bookstore to see porn. You can get it on TV or you can get it in the back room of the mom-and-pop video store where you rent the stuff for the kids in another room. It's not that hard to find. I think a lot of the stigma attaching to acquiring a product has dissipated over the years. [FN56]

During a June 2006 interview, Larry Flynt contextualized the relationship among privacy, the development of new technologies as they have expanded the consumption of sexually explicit content, and the ultimate futility of government efforts to prevent and censor it. Flynt observed:

As we moved into the seventies, we got the VCR. The VCR made it possible for people to watch these movies in the privacy of their own homes. Through the seventies and most of the eighties, the videocassette market was on fire. Then, the Internet started to blossom. There was no holding back--there were just so many venues. And the government was just like the little Dutch boy trying to close the holes in the dike and they just couldn't do it. [FN57]

The potential danger of children being exposed on the Internet to sexually explicit expression in a private home on computers can be easily mitigated in a number of ways. These ways range from parental monitoring and supervision of in-home computer use [FN58] to the installation of filtering software like that now mandated for public libraries and public schools that want to receive the so-called government e-rate [FN59] to rigorous age-verification procedures enforced by adult entertainment Web sites. [FN60] As adult producer John Stagliano notes about the relationship between privacy and protection of minors from exposure to sexually explicit content:

Being able to do it in the privacy of your own home is so much different than earlier days. In the 1970s, the only way to market porn was to have a storefront or a moviefront with a marquee where you

had to advertise it, putting that information in the face of children and families. That doesn't have to be done *12 now, and it's much easier and more acceptable when people can just go into their own little back room and access porn--it doesn't have to be exposed to children. [FN61]

Some kids inevitably will be able to access sexual content without their parents knowing about it, just as some kids will always be able to find someone to sell them a pack of cigarettes or an adult to purchase alcohol for them. But just as cigarettes and alcohol remain lawful products for adults to consume and the nation does not make them illegal simply because they happen to fall into the hands of some intrepid minors, so should sexually explicit speech involving images or words of consenting adults be lawful products. As Justice Anthony Kennedy wrote for the U.S. Supreme Court in 2002 in *Ashcroft v. Free Speech Coalition*, [FN62] “[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children.” [FN63]

When comedians describe what many would consider to be obscene acts in their nightclub performances--simply imagine a comedian telling his or her version of “The Aristocrats” joke made famous by the 2005 movie of the same name [FN64]--those descriptions inevitably occur in the confines of comedy clubs where patrons typically must be at least eighteen years of age. In such cases, there is very little likelihood that minors will be in the audience; the simple solution is for aggressive carding for age verification at the ticket window, not censoring the speech inside the club.

The privacy argument for striking down laws targeting obscene speech is now gaining roots in the law. In 2005, U.S. District Court Judge Gary F. Lancaster tossed out the **obscenity** indictment against Extreme Associates, Inc. and its operators, Robert Zicari and Janet Romano. [FN65] Interpreting the U.S. Supreme Court's decision in *Lawrence v. Texas* as “holding that public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality,” [FN66] Judge Lancaster concluded that federal statutes that forbid the distribution of obscene material cannot survive the strict scrutiny standard of judicial review; such statutes “burden an individual's fundamental right to possess, read, *13 observe, and think about what he chooses in the privacy of his own home by completely banning the distribution of obscene materials.” [FN67]

In reaching this decision, Judge Lancaster specifically observed, “[t]here are numerous ways to protect minors from exposure to obscene materials that are less restrictive than a complete ban on the distribution of such material to consenting adults.” [FN68] Judge Lancaster noted, “computer software is available that parents, or other supervising adults, can install on their computers that would effectively filter sexually explicit material when minors are surfing the Internet. This software allows the adult user to disable the filtering device when the computer is being used by an adult, if desired.” [FN69]

Although the Third Circuit reversed Judge Lancaster's decision and reinstated the **obscenity** indictment, the appellate court did so without considering or addressing the substantive arguments articulated by Lancaster. [FN70] The appellate court applied what it called the “Agostini doctrine,” [FN71] deciding that whether *Lawrence* weakened Supreme Court precedent upholding **obscenity** laws was “irrelevant for purposes of ruling on the instant indictment” [FN72] and held only that it was:

satisfied that the Supreme Court has decided that the federal statutes regulating the distribution of **obscenity** do not violate any constitutional right to privacy. For district and appellate courts in our judicial system, such a determination dictates the result in analogous cases unless and until the Supreme Court expressly overrules the substance of its decision. [FN73]

The authors believe the legal argument for striking down laws prohibiting the dissemination and distribution of obscene material is quite clear: if *Lawrence* provides consenting adults with the right to engage in whatever non-violent sexual conduct they see fit in the privacy of their own homes, then surely it also gives consenting

adults the right to privately watch other consenting adults engage in whatever sexual conduct they so choose. As Taboo editor Ira Levine puts it, “Anything that is legal to do ought to be legal to say, and if it's legal to do, it ought to be legal to make and sell a picture of. The activities that are depicted in porn are not illegal in and of themselves, so how does making and selling a picture of them suddenly make them illegal?” [FN74]

In summary, consumption today of sexually explicit adult material--with the advent of the Internet, DVD, and Video On Demand--occurs largely in the privacy of the home rather than in public places where adults and minors might be accidentally exposed to it. [FN75] The Supreme Court's privacy and substantive due process jurisprudence--embodied in *14 Lawrence v. Texas-- now buttresses First Amendment-based free speech arguments to support protection for the distribution and sale to consenting adults of material that would currently be obscene under Miller. Therefore, **obscenity** laws must be abandoned, and First Amendment protection must be given to such content.

3. It is a Permanent Reality and It is Not Going Away

Perhaps Larry Flynt, the man behind the adult entertainment empire of Hustler magazine and LFP, Inc., put it best in a December 2000 interview with the authors. He observed:

Ever since the Victorian era, the rich and the privileged have always had their leather-bounded issues of pornography. But today the local video store and newsstand have become the poor man's art museum. And now, when we move into this era of wireless communication, the genie's out of the bottle. [FN76]

Flynt is not alone in such sentiments. As Joy King, Vice President of Special Projects for adult movie company Wicked Pictures and the woman credited with helping to make adult actress Jenna Jameson a household name, [FN77] told the authors in the summer of 2006, “I don't think the [adult entertainment] industry is ever going to go away. The genie is out of the bottle. It's not leaving any time soon.” [FN78] King added, “technology in general has made it far more accessible for people to get the material than ever before, and I think that automatically opens the door to having more interest in it.” [FN79]

Adult producer Max Hardcore echoes this view, noting that sexually explicit adult content:

certainly is more accessible than it ever has been. It used to go in to the smut shop. You couldn't even get a Playboy at most stores. It has now all opened up and, once people saw it, they said, ‘Hey, I like this type of entertainment and I want to buy it.’ With the Internet, things have really just exploded. [FN80]

A key point here is that the law of **obscenity** will never be able keep up with the rapid technological changes that enable people to receive sexually explicit expression in myriad ways. As Michael Klein, President of Hustler TV, told the authors in 2006, “We're doing stuff on the mobile phones already now in Europe where we have a Hustler mobile platform.” [FN81] Klein added that Hustler TV now is working on a burn-to-DVD basis and already has “done certain things with iPods where you can download clips to that.” [FN82] He *15 stated: “There's always going to be something new. Everyday I have somebody come to me and say, ‘I have the greatest new technology for you guys and the newest thing.’ I must get about twenty calls a week like that.” [FN83]

Indeed, as the Washington Post pointed out in January 2006, “it is an old joke that every new technology is driven by porn.” [FN84]

In a July 2006 interview with the authors, Flynt echoed Klein's views about the seemingly inexorable march of technological developments in the adult industry, which manages to always stay one step ahead of the law while simultaneously making sexual content even more accessible to larger numbers of people. “There are some things that are unforeseen. We've moved into this new, vast era of wireless communication. We know the genie is out of the bottle, but we don't know where it is going,” [FN85] Flynt observed. “In a deal that I signed last

year, a guy gave me--I think--\$1.4 million a year to give him the cell phone lines for any of my content that they want to use, whether they're picking up pictures or videos or what have you. You can download it right on your handset and look right at it. . .so how many deals like that will come?" [FN86]

If adult content is not going away--if the genie really is out of the bottle, as both Larry Flynt and Joy King claim, [FN87] and if new technologies will allow people to receive the content in any number of ways--then **obscenity** laws that are designed to stop adult content will ultimately prove as unsuccessful as the so-called war on drugs has been in stopping the use of illegal narcotics. In brief, **obscenity** laws should be abandoned because they will do little to stop our appetite for sexually explicit material, and they siphon taxpayer dollars better spent on matters like those mentioned in the Introduction. [FN88]

B. The Problems of Miller and Any Test for **Obscenity**

This section focuses on three major problems with the workability of the Miller test. These problems plague modern **obscenity** jurisprudence in the United States and militate in favor of abolishing it.

1. It is Now a Community of One

The Miller test was developed more than thirty-three years ago, long before the Internet made the receipt and consumption of sexual imagery available in the privacy of the home. As adult producer Mark Kulkis of Kick Ass Pictures [FN89] told the authors in February 2006, "In the old days people had to seek [adult materials] out by going to the shady side of town, but now--thanks to the Internet--from within their own home, they can have basically anything they want in terms of porn." [FN90]

*16 In brief, people now can watch sexually explicit adult content both on their computers via the World Wide Web and on their television sets via satellite and cable channels with pay-per-view and video-on-demand options, such as Hustler TV. [FN91] No one needs to go out into the community to purchase pornography and, concomitantly, no one else in the community necessarily is aware of who is viewing sexual explicit content. The consumption of sexual content thus is private, subverting the whole notion of community and rendering the concept nugatory. As Michael Klein, the President of Hustler TV, told the authors in 2006:

There's not really a need [for **obscenity** laws] because you're making a decision for yourself. The material is not being bandied out and about. It is offered in the discretion of your own home. You have the choice--whether it's on the Internet or on your TV. You're deciding what you're going to watch, so you don't really need people out there deciding, 'Well, you should not really have the opportunity to be able to see that.' [FN92]

Yet the Miller **obscenity** test specifically focuses on the notion of community standards and lets other people who are not publicly exposed to the speech in question get to decide what a person is able to see. The first prong of the standard asks, "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." [FN93] With the advent and explosive growth of the Internet, however, the community ultimately now has become a community of one--the lone person who purchases and watches the material in the privacy of his or her home. No one else in the community needs to be disturbed by it, and there is no longer any need for jurors to attempt to fathom the supposed standards of the community for material that is viewed and consumed by one person isolated from the rest of the community.

Mark Kulkis, the President of Kick Ass Pictures, clearly captured this concept during a February 2006 interview, stating:

You can't use community values anymore because the material is going directly from the producer to the consumer. In Rob Black's case, [FN94] for example, he sent that tape from his warehouse directly to this person who requested it, so that eliminates all of the arguments that kids are being exposed to it. The Internet really blasts apart the notion that community standards apply because the material is sent electronically to the person who requests it. [FN95]

Adult producer John Stagliano concurred with this viewpoint during a 2006 interview, stating, "I like the argument to say that there is a community of one through the Internet. That certainly is what I believe in politically and what certainly is the most healthy way for human beings to interact with each other." [FN96] Stagliano adds that "[t]echnology has *17 advanced to the point where now we can make the community one person--an individual person." [FN97]

The concept of community in Miller is particularly problematic in the Internet age, where material can be downloaded in any community--just as it was in Pittsburgh, Pa. in the case against Southern California-based Extreme Associates--and held subject to that community's standards. [FN98] The Miller court made possible such prosecutorial forum shopping when it rejected a national standard for **obscenity**, writing that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty States in a single formulation, even assuming the prerequisite consensus exists." [FN99] This particularly rankles attorney Alan Isaacman, the man who argued *Hustler Magazine v. Falwell* before the Supreme Court:

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. [FN100]

In a December 2000 interview, Larry Flynt echoed Alan Isaacman's concerns about the Miller test's inclusion of community standards. Flynt stated:

You know, eventually the Supreme Court will have to revisit the Miller test. They really copped out by leaving it up to the individual communities to set their own standards on **obscenity**. What you're doing is you're asking filmmakers in San Francisco or L.A. or in New York to second-guess what viewing habits are in Biloxi, Mississippi. It's just the most ridiculous thing you can think of. [FN101]

The problems with the Miller test go far beyond the use of contemporary community standards. The next two subsections make this clear.

2. No Matter How Offensive It May Be, It is Educational

If the First Amendment exists to protect any kind of speech, it exists to protect speech that people find offensive. Adult producer John Stagliano eloquently stated:

The whole purpose of the First Amendment was to protect speech that people didn't like. This is speech that they don't like. It's completely irrelevant-- whether it's adult entertainment or some other kind of **obscenity** or something like that--because the purpose of the First Amendment was to protect speech *18 that you don't like. There's no need for a First Amendment to protect speech that goes along with the status quo. That is the whole point of it. [FN102]

The notion that offensive speech requires protection is seconded by others in the industry. Joy King of Wicked Pictures stated:

Whenever you have speech--whatever it is--that is unpopular, it requires protection. I don't like people who are skinheads. I don't like what they have to say. I don't like racism. But I don't have the right

to tell those people that they can't say things. I don't like it and I don't want to listen to it, but they have the right to say it, just as much as I have the right to watch adult entertainment. [FN103]

No matter how offensive sexual speech may be to some people, it merits protection. And while it seems difficult at first glance to believe, even the hardest and most graphic forms of sexual expression--those that some people may find offensive--may have educational value.

Defense attorney Louis Sirkin explained this concept during an October 2006 interview with the authors:

Here's what I say to the jurors: 'I'm not advocating that this is what you go home and do, but it has an educational value because maybe you'll see things that you'll say to yourself, 'I will never do that,' and that's a learning process. You've now educated yourself that these activities do happen, that there are people who might do that and that people aren't going to die from it.' [FN104]

Sirkin later added the particular strength of this argument when it comes to defending gay sexual content in an **obscenity** prosecution:

I will sometimes focus on the educational value of the material. In a sense, a lot of the gay material has been easiest to defend by saying, "Look, if you're curious as to what people of the same sex will do, here's a film that can show you it. You can see people not being hurt by it and enjoying it. It may not be what you want, but again, you can get an education by watching it." [FN105]

In brief, the First Amendment should protect sexually explicit expression because it serves educational functions for those who consume it, even when they find it repulsive and reject the behaviors it portrays.

3. Definitional Difficulties: It is All in the Eye of the Beholder

In 1964, Justice Potter Stewart famously captured the subjectivity of defining **obscenity** when he wrote, "I know it when I see it." [FN106] Seven years later, the Supreme Court *19 took this logic one step further in protecting a person's First Amendment right to wear the word "Fuck" on a jacket in a public courthouse, writing that it is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." [FN107]

But the Court failed to heed this logic when it adopted the Miller test just two years later, trying at the time to articulate a concrete standard for an inherently subjective matter and leaving massive definitional difficulties for judges and juries to sort out. These problems are well recognized by those who represent the adult industry.

Louis Sirkin, the attorney who in 1990 successfully defended the Contemporary Arts Center in Cincinnati against an **obscenity** prosecution for displaying a collection of photographs by Robert Mapplethorpe, [FN108] and who in 2007 represents the defendants in the **obscenity** prosecution in *United States v. Extreme Associates*, [FN109] perhaps best captured some of the definitional problems of the Miller test when he told the authors in October 2006:

I agree with position that Justice Brennan took in his dissent in Miller. The problem with it is definitional: What does it mean? I don't think it's fair to publishers. When I cross a red light, I know it's red, even if I'm color blind, because of the positioning of the lights. Here, this is an abstraction. We still are battling what it means to appeal to a prurient interest--and to whose prurient interest. If you say an average person, there has to be an object of it. [FN110]

The lack-of-adequate-notice, red-light analogy was echoed in June 2006 by Michelle Freridge, then the executive director of the adult industry's leading trade association, the Free Speech Coalition. As Freridge put it:

Obscenity law is like an unposted speed limit--you're going down the road, you're passing some people and some people are passing you. There's no posted speed limit. You don't know what's okay and what's not okay, so you make a decision and you decide. But then, as you're going down the road and you get pulled over, the cop says "you're going too fast," but it's not posted anywhere so how do you know? [FN111]

Adult industry attorney Jeffrey J. Douglas captures this viewpoint about the vagaries of **obscenity** law even more succinctly, noting in a December 2003 interview with the authors that, "**obscenity** prosecutions are complicated-- uniquely so when compared to anything else. You don't know that it's a crime until the jury tells you whether it is." [FN112]

*20 Attorney Alan Isaacman, the man who successfully argued on behalf of Larry Flynt before the Supreme Court in *Hustler Magazine v. Falwell*, [FN113] calls **obscenity**, "indefinable. It's such a personal, individualistic view. What's obscene to one person may be poetic to another person." [FN114] He added that the Miller test "is probably the most perplexing test that's present in the law, certainly on any kind of widespread basis." [FN115]

Among the troubling definitional problems with the Miller test--in addition to the concept of community discussed earlier--are:

- The term "prurient interest": The first prong of the Miller test requires consideration of whether the material in question appeals to a prurient interest. [FN116] The Supreme Court observed in *Roth v. United States* [FN117] that a prurient interest is equivalent to "a shameful or morbid interest in nudity, sex, or excretion." [FN118] This does very little, however, to clarify the definitional problem of prurient interest. As attorney Alan Isaacman pointed out in the authors' interview with him:

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. 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, average person have morbid interests? Is that a contradiction of terms? [FN119]

- The idea of taking a work as a whole: This concept is particularly problematic on the Internet for several reasons. First, what is the "whole" of a Web site? Does it include links to other content and links to other Web sites? Do those sites that are linked constitute part of the Web site as a whole?

Second, Web sites often feature small segments of much longer sexually explicit adult movies that can be purchased and viewed in isolation from the rest of the movies. Does the small clip constitute the work as a whole under Miller, or must the clip be viewed in the context of the entire movie? This is more than an idle question. As attorney Jeffrey Douglas explained to the authors in 2003, the government filed charges in its current case against Extreme Associates, in part, based on "downloadable segments from Extreme Associates' Web site. These are 60-second, 180-second segments." [FN120] Douglas contends the federal government is:

*21 trying to do an end-run around the **obscenity** requirement that material be taken as whole. Obviously, sixty seconds of a movie--even though it is accessible as a downloadable unit--is not how the film was created, so it substantially undermines the notion of taking it as a whole. [FN121]

- The question of whether speech has serious literary, artistic, political or scientific value: The Supreme Court held in Miller that jurors must determine, in considering whether speech is obscene, if the message or expression in question "taken as a whole, lacks serious literary, artistic, political, or scientific value." [FN122] As

adult producer Mark Kulkis observed in a February 2006 interview, “It’s such a vague line to determine what has scientific, literary, political or artistic merit. That’s such a subjective thing that it’s basically pointless to try.” [FN123] Larry Flynt expressed a similar sentiment during a December 2000 interview with the authors, stating, “one man’s pornography is another man’s art, you know.” [FN124]

Ultimately, given the multiple problems of vague concepts riddled with definitional holes like the Miller test, former Supreme Court Justice William Brennan had it correct; in a May 1972 memorandum circulated among the other justices during discussion about the forthcoming decision in *Miller v. California*, he wrote, “it has proved impossible to separate expression concerning sex, called **obscenity**, from other expression concerning sex, whether the material takes the form of words, photographs or film.” [FN125] Brennan labeled the tumult of the law in this area “the **obscenity** quagmire” [FN126] and “an intolerable mess.” [FN127] Brennan’s logic is reflected in Justice Douglas’s dissent in *Miller*, in which he wrote, “[o]**bscenity**--which even we cannot define with precision--is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.” [FN128] It is now time for this dissenting logic in *Miller* to prevail; laws prohibiting the sale and distribution of **obscenity** should be abolished.

C. It is a Matter of Self-Regulation and Common Economic Sense

This section moves beyond the problems with the Miller test to consider four additional reasons why **obscenity** law should be abolished.

1. Health, Safety, and Zoning Regulations Are in Place Already and Enforceable

In the spring of 2004, the adult entertainment industry was rocked by a health scare that literally brought production in the multibillion-dollar business to a halt. [FN129] Veteran *22 adult actor Darren James had returned to California after filming in Brazil and immediately resumed shooting sex scenes with several women before discovering that he had contracted HIV while on location in South America. [FN130] Although this incident appears to play into the hands of forces that oppose adult entertainment, the industry’s immediate response to the health crisis and its unparalleled ability to contain the HIV outbreak effectively demonstrate why the government should stay out of the adult business.

In what might be considered a model of self-regulation, the adult entertainment industry supports its own health services clinics that monitor and regularly test for sexually transmitted diseases. The clinics are operated by the Adult Industry Medical Health Care Foundation [FN131]--popularly known as AIM--and were founded by former adult actress Sharon Mitchell, who earned a doctorate in human sexuality after finishing her film career. The industry requires performers to be tested monthly for gonorrhea, chlamydia, and HIV. [FN132] This required testing led to the discovery of James’ infection and the resulting quarantine list of more than 50 performers with whom he had had direct or indirect contact. [FN133] The industry responded by halting production while AIM tested and retested the string of performers who potentially were exposed to the disease. [FN134] In all, five actors tested positive for HIV. [FN135] Because adult industry standards require testing before performers may come onto the set, AIM is able, through its record-keeping, to notify any actor who might have come in contact with an infected individual.

As AIM’s executive director Sharon Mitchell told the authors during an interview in 2006:

There’s a standard protocol. We immediately contact the person that has a positive result and get them in for retesting to verify. While their blood is being retested that day, we get a list of their partners and

their partners' partners--the first and second generation. We notify them, bring them all in for testing and ask them not to work until they're cleared. What we do is retest them, usually about every seven to nine days, using a battery of early-detection and very specific tests, and then after that every thirty to sixty days, depending upon where they were in the exposure. Then they can go back to work. We want to eliminate the spread, so we pull them out of the population. [FN136] *23 Despite the rapid response plan and highly successful rate of disease containment--all without government intervention--a month after the industry-imposed production moratorium was lifted in 2004, state lawmakers held a hearing in Van Nuys, Cal. to consider "how and whether to regulate the porn industry." [FN137] Mitchell labeled efforts to keep the government at bay "a constant battle. They've been edging and edging and pushing and pushing. We've tried as best we can to keep their nose from coming underneath the tent, but we have to do certain things." [FN138]

One of those "things" is a strict reporting requirement when someone tests positive for a sexually transmitted disease. [FN139] AIM adheres to the regulations, but Mitchell also believes that because AIM is a private clinic--not a government entity--the clientele feel more comfortable seeking out its health services. As she observed, "These people would go underground if they were fearful of the government monitoring them. They wouldn't come in to test, and that would pose a serious threat to the general population." [FN140]

Similarly, when testifying at the 2004 hearing in Van Nuys, Mitchell told lawmakers that government efforts to establish sex industry worker employment conditions would backfire because "making condom use mandatory would drive porn producers underground." [FN141] In short, the system that currently exists-- one in which the industry polices itself and studiously opposes government entanglements--works well. As for lawmakers' concerns about the health ramifications for sex performers, Mitchell suggested that, "it's safer than your neighborhood bar." [FN142] She backs that statement up with evidence gathered daily at AIM's two clinics in the San Fernando Valley, observing:

You've got this group of people that have sex for a living who probably know more than most public nurses. You've got to remember, that's all that these people do. If they're down for a case of chlamydia, in which they're down for about six days, they can lose a considerable amount of money. There's a benefit to screening and preventive education. It definitely works. Clearly, the general population at this age is infected with chlamydia and gonorrhea anywhere from 10 to 12 percent. Here it's 1.8 percent. [FN143]

Larry Flynt concurred with this sentiment in a commentary he published in the Los Angeles Times at the time of the Darren James outbreak, writing, "[y]ou have a greater likelihood of getting HIV from your neighbor, who is not tested on a regular basis, than from a performer in the industry whose medical records are, in effect, an open book." [FN144] Beyond the individual-risk issue, Flynt pointed out the economic self-interest of the adult industry in monitoring the conduct of its acting talent:

*24 Those of us who are in the business want to protect our investment; we are not going to do anything that is stupid or shortsighted. We are most certainly not going to do anything that we believe will harm another human being. The safeguards are already in place. They have worked for the last five years. Leave them alone, and they will continue to work. [FN145]

If the safety and protection of society at large--rather than just the potential harms to adult entertainment workers--is what truly motivates government to watch over the porn industry, well-settled zoning laws should quell those concerns and obviate the need for **obscenity** law. As this Article earlier made clear, [FN146] the trend in the use of adult products has been in the direction of more private, personal consumption of adult entertainment through DVDs and the Internet and, consequently, away from the public displays of adult content in specialty theaters. But even in those communities where adult theaters or live-performance, sexually-oriented businesses thrive, time-tested zoning law--through the 1986 Supreme Court-ordained "secondary effects doc-

trine"--enables local authorities to guard against those unsavory elements that may germinate around such businesses. [FN147]

In *City of Renton v. Playtime Theatres, Inc.*, [FN148] the Court found that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place and manner regulations." [FN149] In a marked departure from subjecting what ordinarily would be considered a restriction based on expressive content to the strict scrutiny standard [FN150] and a stunningly sympathetic bow to government authority, the Court re-crafted the rule to aid municipalities attempting to clean up seedy areas of town. Rather than focus on the sex-related expression taking place inside such establishments for regulatory purposes, municipalities that concentrate on secondary effects instead may look to "the impact on public health, safety and welfare" that results merely from having the adult business in the area. [FN151] Moreover, evidence of adverse secondary effects that the lawmaking bodies may rely upon in creating restrictions on such businesses need not be based upon direct proof; rather, they are permitted to "rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address." [FN152] Stated differently, local governments can look to problems experienced by other similarly situated communities to bolster their own restrictions rather than be forced to commission costly studies that take into consideration the vicissitudes of the actual environs. Adverse secondary effects might include such things *25 as "crime rates, property values, and the quality of the city's neighborhoods" [FN153]--all characteristics unrelated to the sexual nature of the expressive activity taking place inside such establishments.

Municipalities endeavoring to reign in sexually-oriented businesses have made extensive use of the Supreme Court's generous zoning precedent. [FN154] In short, the body of Supreme Court case law that has grown up around sexually-oriented businesses provides ample protections to municipalities that seek to protect their citizens from the untoward consequences that may result from having such adult establishments in their communities. Moreover, the effect of such zoning restrictions and the self-policing of the industry in terms of the containment of sexually transmitted diseases serve to relegate **obscenity** law to nothing more than an anachronistic impingement on expression aimed solely at a receptive and welcoming adult population.

2. Economic Interests and Counter Speech Will Limit Some Content

If **obscenity** law is abandoned today, there still would be forces that limit the production, distribution, and sale of sexually explicit material.

First, if a certain type of sexually explicit content involving consenting adults does not sell to an audience, then it will not generate a profit and, ultimately, will no longer be produced. Some forms of extreme content that lack an audience simply will largely disappear.

Second, the First Amendment gives those who object to sexually graphic adult expression the right to protest in public against it and try to change people's views about it. In brief, they can engage in counter speech. [FN155] For example, anti-porn feminists like Catharine MacKinnon try to change people's opinions through their scholarly writings. [FN156] Those who abhor both sexual expression and those who purvey it thus are free to try to win the battle against it in the court of public opinion. There is, for instance, a Web site called "Hustling the Left" that is highly critical of Hustler magazine and its founder, Larry Flynt. [FN157] As this Web site stated in January 2007:

We, the contributors to this new website, are using our First Amendment right to expose and critique hate speech. We are focusing here on corporate pimp and pornographer Larry Flynt because so many politicians and pundits from the Left have failed to comment on, much less confront Flynt's hate speech.

While Flynt's censored speech has been celebrated in mainstream film, the multibillion *26 dollar sexxxism industry is mimicked in commercial advertising and pornography's themes and aesthetics are commonplace on TV shows. [FN158]

Obscenity law thus should be abolished because debates about its merits are better fought in the marketplaces of ideas as opposed to courts of law. Those who are against sexually explicit material are allowed under the First Amendment to speak out and criticize it to their hearts' content.

3. There are More Important Issues to Worry About and Prosecute

Max Hardcore perhaps put it best when he told the authors in 2006: "I think the real **obscenity** is not what is going on out in the San Fernando Valley, it is what's going on in Iraq, Afghanistan, and Israel--that's the real **obscenity**." [FN159] It's a viewpoint with which attorney Louis Sirkin concurs, noting that "[t]he violence that is going on in the world today is truly obscene. There's no question about it. The incidents that have happened in the schools-- the danger and the fear--are the real American tragedy." [FN160]

Indeed, one would think that there are far more serious and pressing matters for the government to address than spending taxpayer dollars targeting sexually explicit material under **obscenity** laws. As the Introduction to this Article suggested, the federal government should go after real sex crimes that are especially heinous, namely the sexual exploitation of minors and child pornography. [FN161] As the Washington Post reported in July 2006, the Cyber Tipline of the National Center for Missing and Exploited Children receives "about 1,500 reports a week" of children who allegedly have been victimized by online sexual predators. [FN162] Michelle Collins, director of the Exploited Child Unit at the National Center for Missing and Exploited Children, explained in that article that "[n]o one wants to be alarmist. But in the area of child porn and child sex abuse, if the public were to truly understand the volume of what we're dealing with, it would be quite a shock." [FN163] Money now spent on **obscenity** prosecutions involving content depicting the sexual conduct of consenting adults would be much better spent supporting efforts like Project Safe Childhood, [FN164] which "aims to combat the proliferation of technology-facilitated sexual exploitation crimes against children." [FN165]

Attacking images of consenting adults engaging in consensual sexual activity is simply a waste of time and money in 2007. It is yet another reason why **obscenity** laws should be abolished.

4. It is a Legitimate Business, Economic Engine, and Employment Opportunity

When asked in July 2006 why the First Amendment should protect sexually explicit adult entertainment, Dr. Sharon Mitchell, the former adult actress who today runs the Adult *27 Industry Medical (AIM) Health Care Foundation where adult actors and actresses are tested monthly for HIV and sexually transmitted diseases, responded, "Because we are citizens of the United States, we pay taxes and this is a job. It may not be the job that you agree with, but your son or daughter may grow up to be a porn star because it is a legitimate job and we need to be protected like everyone else." [FN166]

Noting the economic opportunities for women in adult entertainment, actress Stormy Daniels told the authors in 2006, "I own my own company. I write my own scripts and make the money. It's my face that sells the tapes, so they have to make me happy. If I'm so exploited, how come it's the only industry in the world where women make double what the men make?" [FN167] Bruce David, the long-time editorial director of Hustler magazine, added in a 2006 interview with the authors, "In the sex industry, the women come in and get \$500 to do a sex scene that lasts twenty minutes. That's not the worst kind of exploitation." [FN168]

Beyond the individual financial opportunities, there is the larger economic benefit for society at-large of pro-

pecting sexually explicit expression that may be obscene: taxation. As Nina Hartley told the authors in 2006, “porn is an economic engine in California.” [FN169] This is something that Michelle Freridge says some California politicians now understand, noting that, “California [politicians] are very objective--they recognize that the industry is a major employer in the state, generates a tremendous amount of revenue, pays taxes and is communicative.” [FN170] She adds that, “they see the industry as a legitimate, legal part of their citizenship and a good tax base.” [FN171]

The adult industry itself is now far more professionalized than it ever was before. As Freridge observed:

What we are seeing is that the mainstreaming is not only happening among consumers, it is happening with the industry itself. As a result, the businesses, rather than identifying as rebels and as partly illegal--because of the laws thirty years ago, many of them were treated like they were illegal, so they behaved as if they were illegal--a lot that behavior is dropping off. There's a desire in the industry for professionalism, for acceptance in the mainstream community and for respect from other business leaders. [FN172]

The people who are the business leaders in the industry now are business professionals--they have master's degrees, they worked at mainstream business before they *28 worked in adult, many of them owned mainstream companies and now own adult businesses as well as those mainstream companies. [FN173]

Joy King of Wicked Pictures concurred with Freridge's sentiments about the increasing professionalization of the adult entertainment industry. “It is a real business--we're run like a real company and we really have meetings where we discuss and strategize. That's the frustrating thing for me--that people make assumptions that we're not business people when clearly we are,” [FN174] King stated.

Bruce David of Hustler notes that the individuals who work at the adult empire that is LFP, Inc. are “just normal people trying to find a niche for themselves. I suppose we attract a certain type of maverick personality and that's good--that's what I want. But just because the person is a maverick doesn't mean he is building bombs in his basement at night. He's going home to his family just like me.” [FN175] And as Bruce David's immediate boss, Larry Flynt, observed during a June 2006 interview with the authors, “The biggest misconception about me, and it probably flows through the whole industry, is that people who don't know me think that I'm this seedy old guy in the basement of this building cranking out pornography. They don't realize that I have a business to run.” [FN176]

Given the individual economic opportunities generated by the adult entertainment industry, as well as the macro-level tax base it provides and the accompanying professionalization within the industry in the United States, **obscenity** laws should be abolished.

Keeping in mind the ten reasons articulated above why **obscenity** jurisprudence under **Roth** and Miller should be abolished, this Article now spells out three recommendations for the future regulation of sexually explicit speech.

III. A Trio of Recommendations for the Future

A. Implementing a .KIDS Top-Level Domain Name for the Web

A major concern of the federal government in recent years has been access of minors on the Internet to sexually explicit images and stories. For instance, Congress has adopted two now-enjoined measures--the Commu-

nications Decency Act [FN177] and the Child Online Protection Act [FN178]--to shield minors from such material. Given the unconstitutionality of such statutes, however, other proposals have also been considered.

*29 In 2006, the Internet Corporation for Assigned Names and Numbers (ICANN) [FN179] rejected a proposal for adopting “a domain name that ends in .xxx for pornographic sites.” [FN180] Adoption of such a stop-level .xxx domain would have created a virtual red light district on the Internet. [FN181] Perhaps surprisingly, some conservative groups, such as the Family Research Council, opposed the .xxx idea, contending it would “simply breed more smut.” [FN182] Tony Perkins, president of the Family Research Council, wrote in 2005 that, “[p]ornographers will be given even more opportunities to flood our homes, libraries and society with pornography through the .xxx domain.” [FN183] Perkins asserted that, “[s]ome naively suggest that passing a new law to force pornographers to move to .xxx will solve the problem but that will not work either. Law means nothing to hardcore pornographers.” [FN184]

Many in the adult entertainment industry objected to the .xxx proposal as well, [FN185] seeing it as a “step toward government censorship and segregation of adult Internet content.” [FN186] As Mark Kernes, senior editor of the Adult Video News trade publication, told one newspaper reporter, “The establishment of .xxx is the first step in zoning adult material out of existence on the Internet.” [FN187] In an April 2006 letter to ICANN, Hustler publisher Larry Flynt also railed against the .xxx top-level domain, calling it “an inherently dangerous idea with no real purpose.” [FN188]

During the course of his July 2006 interview with the authors, Hustler TV President Michael Klein also questioned the .xxx top-level domain idea, stating:

It doesn't really make sense. All it is going to do is make it harder for our sites because people are not going to know to put the XXX on there. Is it really going to prevent a child from going to the site? They'll just add the XXX at the end. It's not going to make any difference--all it is going to do is put a crimp in our business because those who don't realize you have to do that and are looking for a Hustler site or a Vivid site are going to be, “Geez, what happened? I just put in hustler.com and I can't find it.” [FN189]

But the adult entertainment industry has not simply played the role of critic here. Indeed, it actually supports a legislative solution that the authors of this Article encourage *30 both the federal government and ICANN to take seriously. In particular, the adult industry trade association, the Free Speech Coalition, supports adoption of a .kids top-level domain as a safe harbor for kids to surf the Web. [FN190] It is a move that was supported in 2002 by Ruben Rodriguez, then-director of the exploited child unit of the National Center for Missing & Exploited Children, in the slightly different context of a federal bill known as the Dot Kids Implementation and Efficiency Act of 2002 that called for adoption of a second-level .kids domain name with the “kids.us” country code (as compared to a global, top-level “.kids” domain). [FN191] During testimony before the U.S. Senate Commerce, Science and Transportation Committee's Subcommittee on Science, Technology and Space, Rodriguez said that a second-level “.kids.us” domain would create “a protected place on the Internet for children to learn, grow, and play” and “establish a child-friendly space on the Internet by providing access to material that is both suitable for minors and is not harmful to minors.” [FN192]

Today, the Free Speech Coalition openly advocates a top-level “.kids” domain name. As the organization states on its Web site, “Instead of herding protected speech into a ‘virtual ghetto,’ a content-positive .KIDS TLD [Top-Level Domain] should be created where children can find child-friendly websites, making it far easier for parents to filter .KIDS in than it will be for them to filter adult content out!” [FN193] The time now is ripe for Congress and ICANN to consider the creation of such a safe top-level domain for minors. Congress, after all, clearly supported the concept of such a second-level domain, [FN194] so this is not a radical solution and should have some traction. As adult producer Mark Kulkis told the authors during a February 2006 interview, “with the

.kids domain, parents could filter so that their kids only see the stuff for kids. Problem solved.” [FN195]

B. Treating Words Differently From Images

Lenny Bruce once was prosecuted and convicted in Illinois for words uttered during a comedy routine that supposedly were used in an obscene fashion. [FN196] Today, comedians *31 commonly use words to paint visual pictures of sexual acts, either for purposes of humor, social commentary, or a combination of both; the movie *The Aristocrats* readily comes to mind here. [FN197] As Ray Richmond describes it in the *Hollywood Reporter.Com*, the movie “has no sex or violence but serves up graphic descriptions of incest, bestiality, urination, defecation, vomiting, brutal rape, child sexual abuse and every depraved, unspeakable and vile act imaginable. This is, perhaps without question, the singularly most profane film ever made. And it's hilarious.” [FN198]

Importantly, because the joke at the center of *The Aristocrats* includes only the use of words, no real people--either adults or children--are abused, harmed, or in any other way injured. The only harm is the mere mental offense to the tastes and standards of decency of some people who hear the joke and visualize images in their head; those individuals, of course, do not have to be exposed to the joke if they do not want to be exposed. No one forces them to watch *The Aristocrats* or to go to a comedy club to hear a comedian tell the joke.

To convict Lenny Bruce for telling a joke that paints an offensive mental picture of a sex act, as he did with the infamous “Thank You Mask Man” routine, [FN199] or to convict a comedian for telling his or her version of *The Aristocrats'* joke, really amounts to convicting a person for creating a thought crime. This conflicts with fundamental values recognized by the Supreme Court. As Justice Anthony Kennedy wrote for a majority of the Supreme Court in 2003 in *Lawrence v. Texas*, “liberty presumes an autonomy of self that includes freedom of thought.” [FN200] Just one year earlier, Kennedy opined in *Ashcroft v. Free Speech Coalition* [FN201] that, “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.” [FN202]

This important, Supreme Court-mandated public policy must be taken into account when efforts are made by the government to restrict sexually explicit expression. As the authors argued in the Introduction, speech now considered obscene merits First Amendment protection and any regulations targeting it must be subject to the rigorous strict scrutiny standard of judicial review that applies to other types of content-based laws. [FN203] In applying this test to government efforts to regulate or punish sexual expression that involves only words and does not include any physical images--photographs, drawings, videotape, DVDs, etc.--of actual sexual conduct between adults, courts must weigh heavily into the *32 equation the freedom of thought concerns present in both *Lawrence* and *Free Speech Coalition*. If laws targeting sexual expression involving consenting adults are presumptively unconstitutional, as the authors argue here, then laws targeting sexual expression involving only written or spoken words must be considered presumptively unconstitutional to an even greater degree. This is particularly true if Judge Lancaster's interpretation in *United States v. Extreme Associates of Lawrence*, holding that “public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality,” [FN204] is correct. Sexually charged words are only “bad” because they offend someone's morals; no physical harm comes from them, and if the government claims it does, then it must introduce substantial supporting evidence to prove those claims. [FN205]

It is a fact of modern life that sexual speech that some people find offensive is used every day. Shielding kids from it is almost as futile as shielding kids from images of violence, and as Judge Richard Posner wrote in

2001 when striking down a law limiting minors' access to violent video games, “the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” [FN206] While there may not be high intellectual value in uses of certain language such as “fuck” or “cocksucker” that describe sexual acts, Posner's “bubble” logic applies here, just as it applied to violent video games, something that many people also probably do not find to be of intellectual value.

However, to strike the balance between protecting minors from such speech and the First Amendment right of adults to receive and hear it, the authors offer the caveat that sexual words should not be treated different from images if they are uttered in a location or venue where a majority of individuals within hearing distance are under the age of fourteen years, such as a public grade school or middle school. This would comport with the Supreme Court's jurisprudence limiting sexual expression in public schools. [FN207]

Ultimately and with the above caveat in mind, sexual words and sexual images must be treated differently by courts, with the former deserving more protection than the latter when efforts are made to suppress them.

C. Stopping the Government From Making End Runs Around **Obscenity**

As this article earlier noted, [FN208] the federal government currently is proceeding directly against the adult entertainment industry through both criminal prosecutions and a targeted task force. These efforts create a visible symbol of government resources expended to weaken a form of entertainment that is simultaneously wildly popular among some individuals in this country while highly offensive to others. The authors already have argued that federal law enforcement time and taxpayer dollars would be better spent if directed to more pressing national problems involving real sex crimes against children. [FN209]

*33 What is not so publicly apparent, however, is that the federal government also continues to engage in a costly effort to attack adult entertainment businesses not by targeting the content of their products directly but, instead, by piling on onerous record-keeping requirements that, if violated, carry hefty criminal penalties. [FN210] Moreover, these measures that chip away at the adult industry from around the edges, rather than through a noticeable frontal attack, often are painstakingly tucked inside more broad-sweeping legislation that is likely to sit well with the American public.

In one of the most recent efforts, on July 27, 2006, President George W. Bush signed into law House Bill 4472, [FN211] popularly dubbed the “Adam Walsh Child Protection and Safety Act of 2006.” Named for a six-year-old boy who was abducted and murdered in Florida back in 1981 [FN212] and whose father became a child advocate and host of the syndicated television program “America's Most Wanted,” [FN213] this law “creates a grant program to help state governments track sex offenders' whereabouts through address verification mailers, requires local authorities to notify probation agencies immediately after a sex offender registers or updates registration, and provides grants to help pay for electronic monitoring units for sex offenders.” [FN214]

Buried deep in Title V of the measure--a part of the bill purportedly designed for “Child Pornography Prevention”--is a section that spells out “record keeping requirements for simulated sexual conduct.” [FN215] This section amends [Section 2257 of Title 18 of the United States Code](#) (hereinafter “2257 requirements” and discussed more fully below) and requires that

any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter that (1) contains 1 or more visual depictions of simulated sexually explicit conduct; and (2) is produced in whole or in part with materials which have

been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce; shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction. [FN216]

The specific records required under the Act are the identical to the 2257 requirements for visual depictions of actual--compared to simulated--sexually explicit conduct. [FN217] The *34 2257 requirements were created with the purpose of ensuring--by requiring proof of age [FN218]--that no one who performs in sexually explicit scenes is under the age of eighteen.. [FN219] But merely obtaining age verification is not sufficient. The law requires that those documents be maintained [FN220] and kept on file for seven years. [FN221]

*35 Each copy of the work also must prominently display information about the location of the books and records. [FN222] Finally, investigators authorized by the U.S. Attorney General, without prior warning:

are authorized to enter without delay and at reasonable times any establishment of a producer where records . . . are maintained to inspect during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, for the purpose of determining compliance with the record-keeping requirements of the Act and any other provision of the Act. [FN223]

According to information posted on the adult industry's leading trade association's--the Free Speech Coalition-Web site, the most recent congressional foray into required record-keeping may also signal a backdoor approach by the U.S. Department of Justice "to reinvigorate" the distinction between primary and secondary producers [FN224] and thus produce *36 a heavy and duplicative burden on many small businesses with relationships with the original producer of the adult material.

The Justice Department initially differentiated between primary and secondary producers and imposed burdens on both groups in 1992 when it created regulations designed to enforce the Child Protection Restoration and Penalties Enhancement Act of 1990. [FN225] That effort resulted in defining the primary producer as "any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct" and the secondary producer as "any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct." [FN226]

The Tenth Circuit U.S. Court of Appeals, however, ruled that the Justice Department overstepped its authority in fashioning the regulations designating two types of producers, finding that, "Congress intended its words 'but does not include . . . any other activity which does not involve hiring, contracting for[,] managing, or otherwise arranging for the participation of the performers depicted' to have some meaning and effect." [FN227] Secondary producers, under the Justice Department's definition, were beyond the scope of the statute. As the court so aptly noted, "This is not a case of verbal ambiguity presenting accepted alternative meanings; it is one of an agency twisting words to reach a result it prefers." [FN228]

But when it comes to burdening sexual expression, the government does not give up easily. In 2003, that burden grew more onerous when Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) of 2003. [FN229] In June 2004, as a result, the Justice Department published a proposed rule in the Federal Register to update regulations design to comply with the PROTECT Act and "to bring the regulations up to date with current law, to improve understanding of the regulatory system, and to make the inspection process effective for the purposes of the Child Protection and **Obscenity** Enforcement Act of 1988, as amended, relating to the sexual exploitation and other abuse of children." [FN230]

Once again, the Justice Department used the opportunity to resurrect record-keeping requirements on sec-

ondary in addition to primary producers. In rejecting several comments made in response to the proposed rule, the Justice Department observed that, “[i]f the producers (primary and secondary) of sexually explicit depictions cannot document that children were not used for the production of the sexually explicit depictions, then they must take whatever appropriate actions are warranted to comply with the child exploitation, **obscenity**, and record-keeping statutes.” [FN231] As for the constitutional argument, the Department of Justice dismissed it, suggesting, “The First Amendment is not offended by *37 making it unlawful knowingly to fail or refuse to comply with the record-keeping or labeling provisions of this valid statute.” [FN232]

Indeed, the Justice Department put into effect new regulations with, inter alia, an expanded definition of secondary producer, [FN233] which the Free Speech Coalition described in its lawsuit seeking to enjoin the provision as “a broad catch-all phrase” that “makes employees of computer web sites or anyone who merely agrees to manage content on a website computer a secondary producer subject to the requirements of the statute and regulations.” [FN234]

The plaintiffs further argued that, “Section 2257 applies to a broad range of expression that does not have anything to do with children.” [FN235] Arguably, the Justice Department’s new regulations are designed merely to create overly burdensome requirements on the adult industry, for “the extension of Section 2257 to ‘secondary producers’ exponentially increases the numbers of individuals and entities subject to the requirements of the statute.” [FN236]

On December 28, 2005, the adult industry was handed at least a temporary victory on the issue of secondary producers. U.S. District Judge Walker D. Miller issued a preliminary injunction in favor of the Free Speech Coalition and other adult industry plaintiffs by agreeing that the Tenth Circuit’s decision in *Sundance Associates, Inc. v. Reno* [FN237] was binding on the government. [FN238] Judge Miller wrote, “The Tenth Circuit specifically held that § 2257(h) is unambiguous and that the plain language of the statute excludes persons ‘who basically have had no contact with the performers.’” [FN239] The regulations still are in force against primary producers. [FN240] Both parties in the case have appealed to the Tenth Circuit. [FN241]

The long and twisted history of § 2257 unquestionably illustrates the lengths the government will go to burden the adult entertainment industry--even when it is obvious that the regulations run far askew of their intended purpose of protecting children from sexual exploitation. And, once again, it is clear that the government squanders resources when it seeks out ways to erect perilously high hurdles to block an industry that provides a popularly desired product that is protected by the First Amendment.

*38 IV. Conclusion

Debate about whether to regulate sexually explicit speech now considered obscene under the Supreme Court’s test from *Miller v. California* will likely only increase in the coming years as adult content continues to mainstream and expand in popularity in the United States. As we grow more tolerant and become accustomed to seeing more types and variations of sexual content, there may be more calls for doing away with **obscenity** laws. Certainly, however, there also will be serious pushback from some quarters against its proliferation, but developing technology renders such resistance nugatory; people who want it will be able to get it. The pornography genie is out of the bottle, as Larry Flynt and Joy King put it. [FN242]

This Article has identified ten different reasons why **obscenity** laws should be abolished in the United States. While none of those reasons standing alone may provide sufficient justification for relegating **Roth** and **Miller** to the ash heap of failed First Amendment jurisprudence, the reasons, when viewed collectively, provide

what the authors consider to be a strong argument for their termination. The authors, of course, give credit to the many people in the adult industry who, via in-depth interviews, have shared their thoughts over the years about the First Amendment, **obscenity** law, and the regulation of the adult industry.

In the future, the law will have to wrestle with unforeseen issues created by new technologies that surely will make the receipt and consumption of sexual expression possible in ways we cannot now imagine. Virtual sexual realities through computer generation will someday probably give lawmakers pause for concern, as they likely will argue that only conduct--not speech--is at stake in such scenarios and thus First Amendment concerns are no longer at issue. Yet virtual sexual realities are no more than thoughts and fantasies made possible through technology and protected under Lawrence and Free Speech Coalition. [FN243]

The government must resist the temptation to back-door efforts to regulate the adult industry that are unnecessary, as Part III, Section C has made clear. It will take the substantial courage of lawmakers to resist the powerful lobbying efforts and influences of certain interest groups that will generate much media attention with their arguments to uphold and strengthen **obscenity** laws, but ultimately the power of the First Amendment's freedom of expression must prevail to prevent sexual censorship as we evolve as a nation in our views about sex and sexuality.

[FNa1]. Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The authors thank Thomas S. Markey and Lauren M. Pisieczko of The Pennsylvania State University for their careful review and commentary on early drafts of this Article.

[FNaa1]. Professor of Journalism & Law and Founding Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1983, M.A. 1984, Communication, The Pennsylvania State University; J.D., 1987, The American University. Member, State Bar of Pennsylvania.

[FN1]. 354 U.S. 476 (1957).

[FN2]. *Id.* at 485.

[FN3]. The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law ... abridging the freedom of speech, or of the press.” U.S. Const. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[FN4]. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part).

[FN5]. Bruce was prosecuted for obscene comedic routines multiple times, including for performances in both Los Angeles and San Francisco, Calif., as well as in Chicago, Ill., and Greenwich Village, N.Y. See generally Ronald K. L. Collins & David M. Skover, *The Trials of Lenny Bruce: The Fall and Rise of an American Icon* (2002) (providing a comprehensive biography of Bruce's life, including his legal battles with **obscenity** cases in California, Illinois and New York).

[FN6]. See generally Isabel Wilkerson, *Cincinnati Jury Acquits Museum In Mapplethorpe **Obscenity** Case*, N.Y.

Times, Oct. 6, 1990, at § 1, 1 (describing how a jury comprised of four women and four men acquitted the Contemporary Arts Center in Cincinnati, Ohio, and its director, Dennis Barrie, of **obscenity** charges stemming from an exhibition of photographs by Robert Mapplethorpe).

[FN7]. See generally Sara Rimer, Rap Band Members Found Not Guilty In **Obscenity** Trial, N.Y. Times, Oct. 21, 1990, at § 1, 1 (describing how “a six-member jury today acquitted members of the band of **obscenity** charges arising from their performance at a nightclub”). The group was also convicted of **obscenity** by a federal judge for the album “As Nasty As They Wanna Be,” although a federal appellate court later reversed that decision. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), rev'd, *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992).

[FN8]. See *Jenkins v. Georgia*, 418 U.S. 153, 155 (1974) (reversing the **obscenity** conviction in Georgia of a theater manager for showing the 1971 film *Carnal Knowledge* in a movie house).

[FN9]. In 2006, the U.S. Supreme Court declined to reverse a Texas appellate court decision that upheld a state law criminalizing the promotion and sale of an “obscene device” after undercover officers purchased a “crystal cock vibrator” at an adult bookstore in El Paso County. *Texas v. Acosta*, 2005, No. 08-04-00312-CR, 2005 Tex. App. LEXIS 7170 at *8-9 (El Paso [8 th Dist.] August 31, 2005, pet ref'd), cert. denied, 127 S. Ct. 129 (2006). In upholding the Texas statute, the state appellate court reasoned that “it is appropriate for the State to act to protect the social interest or order, morality, and decency by restraining commercial dealing in non-communicative objects designed or marketed for use primarily for the stimulation of human genital organs.” *Texas v. Acosta*, 2005 Tex. App. LEXIS 7170, at *8. In August 2006, the city of Sandy Springs, Georgia, passed a law banning sex toys as “obscene.” See Cynthia Daniels, *Sandy Springs; Council OKs Ordinance to Ban Obscene Material*, Atlanta J.-Const., Aug. 20, 2006, at 11ZH (describing the ordinance and noting that vibrators are allowed only if used for a “sexuality class or as prescribed by a doctor”).

[FN10]. Jim Ridley, *The Harder They Come: The Subversive Mainstream Friendliness of Shortbus*, New Times Broward-Palm Beach, Oct. 19, 2006, <http://www.browardpalmbeach.com/2006-10-19/film/the-harder-they-come> (last visited Sept. 24, 2007).

[FN11]. See Manohla Dargis, *A Cautionary Tale Arguing for Freedom of Expression*, N.Y. Times, Feb. 11, 2005, at E13 (discussing the movie *Deep Throat* and noting the New York Times Magazine headline).

[FN12]. Steve Javors, *Virginia Adult Store Owners Targeted for Obscenity*, Free Speech Coalition, Nov. 8, 2006, available at <http://www.freespeechcoalition.com/FSCView.asp?coid=963> (last visited Dec. 22, 2006).

[FN13]. 413 U.S. 15, 24 (1973). The test for **obscenity** established in *Miller* focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Id.*

[FN14]. See *infra* Part II, Section B (setting forth the arguments why the current **obscenity** jurisprudence under *Miller* must be abolished).

[FN15]. See **Obscenity** Prosecution Task Force Web site, <http://www.usdoj.gov/criminal/optf> (last visited Dec. 3, 2006) (describing the roles and duties of the task force and noting that it “investigates and prosecutes the producers and distributors of hardcore pornography that meets the test for **obscenity**, as defined by the Supreme Court of the United States.”).

[FN16]. 352 F. Supp. 2d 578 (W.D. Pa. 2005), rev'd, 431 F.3d 150 (3d Cir. 2005), cert. denied, 126 S. Ct. 2048 (2006).

[FN17]. Indictment, United States v. Five Star Video, L.C. (D. Ariz. May 23, 2006), http://www.usdoj.gov/criminal/press_room/press_releases/2006_4616_2_06-01-06obscenityfivestarindict.pdf (last visited Dec. 3, 2006).

[FN18]. See Encarnacion Pyle, Plenty of Sex Traps, Bullies Lurk on Web, Columbus Dispatch, Aug. 10, 2006, at A1 (citing a University of New Hampshire study, “based on telephone interviews with 1,500 youths aged 10 to 17 and their parents or guardians,” showing that in 2005 “thirteen percent of youngsters reported being sexually solicited” on the Internet and that “[f]our percent of youths had been asked to send a sexual picture of themselves in the past year.”).

[FN19]. This program “was created to help State and local law enforcement agencies enhance their investigative response to offenders who use the Internet, online communication systems, or other computer technology to sexually exploit children.” Internet Crimes Against Children Task Force website, <http://www.icctraining.org> (last visited Dec. 14, 2006). See Preying on Kids, St. Louis Post-Dispatch, Oct. 18, 2006, at B8 (writing that “[a]ll 50 states share a \$14 million budget for the Internet Crimes Against Children program, which hardly seems adequate to address such a ubiquitous problem.”).

[FN20]. The organization describes itself as a “civilian watchdog group” that is “dedicated to finding and exposing those users in regional chatrooms with predatory tendencies towards children” and that “recruits volunteer contributors who pose as underage children in chatrooms.” Perverted Justice, <http://www.perverted-justice.com/guide> (last visited Dec. 14, 2006).

[FN21]. See Thomas Korosec, Suburb Cries Foul After Fatal Sex Sting, Houston Chron., Nov. 7, 2006, at A1 (describing the controversial tactics of Perverted Justice and its relationship with Dateline in conducting sting operations on Internet predators); Susannah Rosenblatt, Web Sex Predator Watchdogs: Good Guys or Grandstanders?, L.A. Times, Oct. 7, 2006, at B1 (describing Perverted Justice as a “powerful machine for targeting adults whom website volunteers call potential pedophiles, and exposing them to shame and arrest,” but noting that “its taste for media attention and role of ad hoc police force has brought criticism” and adding that “[a]lthough legal and law enforcement officials agree that eradicating Internet predators is tough, many remain leery of joining forces with the Perverted Justice crew.”); Allen Salkin, Web Site Hunts Pedophiles, and TV Goes Along, N.Y. Times, Dec. 13, 2006, at A1 (describing Perverted Justice as “an anti-pedophile group” that “is best known for putting its online volunteers at the disposal of the television newsmagazine ‘Dateline NBC,’ which has broadcast 11 highly rated programs in which would-be pedophiles are lured to ‘sting houses,’ only to be surprised by a camera crew and, usually, the police,” and noting that Perverted Justice “has emerged as one of the most effective unofficial law enforcement groups in the country, a kind of Neighborhood Watch of the Net.”).

[FN22]. See Rosenblatt, *supra* note 21, at B1 (writing that “FBI cases opened against online child pornographers and those using the Internet have increased 2000% in the last decade, according to agency statistics.”).

[FN23]. See *infra* notes 38-175 and accompanying text.

[FN24]. See *infra* notes 176-240 and accompanying text.

[FN25]. See *infra* notes 241-242 and accompanying text.

[FN26]. See Robert D. Richards & **Clay Calvert**, **Obscenity** Prosecutions and the Bush Administration:

The [Inside Perspective of the Adult Entertainment Industry and Defense Attorney Louis Sirkin](#), 14 *Vill. Sports & Ent. L.J.* 233, 243-84 (2007) (including comments by defense attorney Louis Sirkin and adult industry figures including Larry Flynt, Max Hardcore and John Stagliano); **Clay Calvert** & Robert D. Richards, Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content, 9 *Vand. J. Ent. L. & Tech. L.* 255, 263-69 (2006) (featuring the comments and remarks of five leading women from all aspects of the adult entertainment industry, including Stormy Daniels, Michelle Freridge, Nina Hartley, Joy King and Sharon Mitchell); Robert D. Richards & **Clay Calvert**, Free Speech, Pornography & the Mainstreaming of Adult Entertainment: Mark Kulkis and the New Voice of the Adult Video Industry, 1 *Ent. L. Rev. U. Fla.* (forthcoming Jan. 2007) (centering on an exclusive interview conducted with Mark Kulkis, the head of adult video producer Kick Ass Pictures); **Clay Calvert** & Robert D. Richards, [Vulgarians at the Gate: Privacy, Pornography & the End of Obscenity Law as We Know It](#), 34 *Sw. U. L. Rev.* 427, 432-44 (2005) (examining the ongoing prosecution of Southern California-based Extreme Associates, Inc., and its proprietors, Robert Zicari and Janet Romano); **Clay Calvert** & Robert D. Richards, [Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate](#), 6 *Vand. J. Ent. L. & Prac.* 147, 149-68 (2004) (centering on an interview conducted with adult entertainment industry defense attorney Paul Cambria); **Clay Calvert**, [Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity](#), 28 *Seattle U. L. Rev.* 61, 75-91 (2004) (examining the recent crackdown by the Federal Communications Commission on indecent and profane broadcast content); **Clay Calvert** & Robert D. Richards, [The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment](#), 22 *Cardozo Arts & Ent. L.J.* 247, 257-302 (2004) (examining the work of the Free Speech Coalition on behalf of the adult entertainment industry, and including interviews with adult entertainment industry defense attorney Jeffrey Douglas and former Free Speech Coalition head and chief lobbyist Kat Sunlove); **Clay Calvert**, [The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation](#), 40 *Cal. W. L. Rev.* 231, 254-60 (2004) (examining laws targeting so-called child modeling Web sites that often feature images of young girls in bikinis and underwear); **Clay Calvert**, [Opening Up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States](#), 107 *Dick. L. Rev.* 253, 258-72, 277-86 (2002) (calling for an academic privilege to view child pornography when done so for purposes of scholarly research, and providing the first scholarly critique of efforts to curb the content of child modeling Web sites); **Clay Calvert** and Robert Richards, [Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence](#), 9 *CommLaw Conspectus* 159, 161-73 (2001) (providing an in-depth interview with Hustler and Barely Legal magazine publisher Larry C. Flynt); **Clay Calvert** & Robert D. Richards, [Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney](#), 19 *Cardozo Arts & Ent. L.J.* 313, 318-47 (2001) (providing an in-depth interview with attorney Alan Isaacman and including a discussion of **obscenity** law); **Clay Calvert** & Kelly Lyon, [Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?](#), 89 *Ky. L.J.* 13, 25-63 (2000/2001) (examining the prosecution of journalist Lawrence Matthews for possessing and distributing images of child pornography while working on a story about child pornography); **Clay Calvert**, [Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped](#), 23 *Hastings Comm. & Ent. L.J.* 507, 524-28 (2001) (examining problems with the **obscenity** standard articulated in *Miller v. California* as applied in the Internet age); **Clay Calvert**, [The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?](#), 10 *Fordham Intell. Prop. Media & Ent. L.J.* 595, 598-616 (2000) (examining the federal government's regulation of virtual child pornography under the Child Pornography Prevention Act of 1996).

[FN27]. See 18 U.S.C. §§ 2251-2256 (2006) (setting forth federal criminal statutes targeting the sexual exploita-

tion of minors, including child pornography).

[FN28]. See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (holding that states “may constitutionally proscribe the possession and viewing of child pornography”); *New York v. Ferber*, 458 U.S. 747, 756 (1982) (holding that child pornography is not protected by the First Amendment freedom of speech and observing that “the States are entitled to greater leeway in the regulation of pornographic depictions of children” than under the test for **obscenity** created in *Miller v. California*, 413 U.S. 15 (1973)).

[FN29]. This phrase is used to describe comedians who use profane language in the routines. Cf. Devra First et al., *Did You See The One About...?*, *Boston Globe*, Nov. 25, 2005, at D1 (illustrating the use of this phrase by writing that “[b]ecause she works blue, Sarah Silverman’s been compared to Lenny Bruce”) (emphasis added).

[FN30]. Rimer, *supra* note 7, at §1, 1.

[FN31]. Interview with Stormy Daniels, adult video star, in Valley Village, Cal. (June 15, 2006). For the official biography of Stormy Daniels describing her background and work in the adult entertainment industry, see Club Stormy Daniels, <http://www.clubstormydaniels.com/bio.html> (last visited Jan. 5, 2007).

[FN32]. See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346-47 (1995) (describing political speech as occupying “the core of the protection afforded by the First Amendment,” using the term “core political speech,” and holding that “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”).

[FN33]. See *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 804 (2000) (defining the strict scrutiny standard as requiring that a regulation “be narrowly tailored to promote a compelling government interest, and if a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”). See generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

[FN34]. See *American Civil Liberties Union of Nev. v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006) (writing that when an “ordinance is content-based, it is presumptively invalid” and will be upheld only if the government proves the regulation is “the least restrictive means of furthering a compelling government interest.”).

[FN35]. See *Interactive Digital Software Ass’n v. St. Louis County, Missouri* 329 F.3d 954, 958-59 (8th Cir. 2003) (writing, in the process of declaring unconstitutional a St. Louis County, Mo., ordinance restricting minors’ access to video games depicting violence, that the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way,” and adding that, in this case, St. Louis County “has failed to present the ‘substantial supporting evidence’ of harm that is required before an ordinance that threatens protected speech can be upheld.”) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

[FN36]. 539 U.S. 558 (2003). The decision in *Lawrence*, which declared unconstitutional a Texas anti-sodomy law, overruled the Court’s opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[FN37]. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (emphasis added).

[FN38]. Dawn C. Chmielewski & Claire Hoffman, *Porn Industry Again at the Tech Forefront*, *L.A. Times*, Apr. 19, 2006, at A1.

[FN39]. Katie Hafner & Matt Richtel, Google Resists U.S. Subpoena Of Search Data, N.Y. Times, Jan. 20, 2006, at A1.

[FN40]. Douglas Brown, Pornopolis, Denver Post, July 9, 2006, at L-01.

[FN41]. Pamela Paul, Pornified: How Pornography is Transforming Our Lives, Our Relationships, and Our Families 4 (2005).

[FN42]. *Id.* at 5.

[FN43]. Clair Hoffman, Sex and This City ... er, Valley, Actually, L.A. Times, Dec. 3, 2006, at S29.

[FN44]. See Richard Mullins, Gay-Themed Pornography Finds Increasing Acceptance, Tampa Trib. (Fla.), Nov. 10, 2006, at 6 (writing that “[g]ay pornography is the fastest-growing segment of adult entertainment and has never been more available to its customers,” and quoting Paul Allen, publisher of NightMoves, a Tampa-based adult magazine, for the proposition that “gay porn is mainstream now....”).

[FN45]. See John Horn, The XXX Factor, L.A. Times, July 1, 2006, at E1 (writing that “porn - though still widely reviled - is no longer as socially condemned as it once was,” and adding that “Hollywood's inhibitions about sexually explicit content are receding so fast that a number of established independent film directors have started making movies in which their actors, rather than simulating sex, are having intercourse and performing other graphic sex acts with their costars.”).

[FN46]. **Clay Calvert** & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 Vand. J. Ent. L. & Prac. 147, 152-53 (2004).

[FN47]. See Michele Munz, Jury Finds Explicit Videos From Store Are Not Obscene, St. Louis Post-Dispatch, Oct. 27, 2000, at 1.

[FN48]. *Id.*

[FN49]. *Id.*

[FN50]. The marketplace of ideas theory for protecting expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” Matthew D. Bunker, *Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity 2* (2001). The metaphor first became a part of First Amendment jurisprudence more than 75 years ago with Supreme Court Justice Oliver Wendell Holmes, Jr.'s oft-quoted admonition that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[FN51]. 394 U.S. 557 (1969).

[FN52]. *Id.* at 564.

[FN53]. See *infra* Part II, Section C, Subsection 8.

[FN54]. See Geoff Edgers, Pee-Wee's Back In The 'House, Boston Globe, July 26, 2006, at F3 (“Fifteen years ago, in an adult movie theater in Sarasota, Fla., Pee-wee Herman died. Yes, police arrested Paul Reubens, the man behind the houndstooth suit and claimed he had been masturbating during a film entitled ‘Nurse Nancy.’”

The legal penalties were minor \$50 and 50 hours of community service.”).

[FN55]. Interview with Max Hardcore, adult movie producer, in Altadena, Ca. (July 19, 2006). For official biographical information on Max Hardcore, see Max Hardcore Biography, <http://www.maxhardcore.com/whoismax/index.htm> (last visited Jan. 5, 2006).

[FN56]. Interview with Ira S. Levine, adult movie producer and adult magazine editor, in L.A., Cal. (June 5, 2006).

[FN57]. Interview with Larry C. Flynt, head of LFP, Inc., in Beverly Hills, Cal. (June 6, 2006).

[FN58]. As Michael H. Klein, the president of Hustler TV, told the authors in 2006, “Parents should be regulating what they do with their kids. I have a son who is 11 years old and I don't put the computer in his room. It's in a room where I have access and I can monitor what goes on in there.” Interview with Michael H. Klein, President of Hustler TV, in Beverly Hills, Cal. (June 30, 2006).

[FN59]. See *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (upholding, against a First Amendment challenge, the Children's Internet Protection Act that prohibits public libraries from receiving federal assistance for Internet access unless such libraries install software to block or filter obscene or pornographic computer images).

[FN60]. See, e.g., *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 581-83 (W.D. Pa.), rev'd on other grounds, 431 F.3d 150 (3d Cir. 2005) (describing the multiple steps that a postal inspector had to take in order to obtain access and membership to the Web site of adult content provider Extreme Associates in the ongoing **obscenity** prosecution in Pittsburgh, Pa.).

[FN61]. Interview with John Stagliano, adult movie producer, in Malibu, Cal. (July 10, 2006). Stagliano is the man behind the highly successful and long-running “Buttman” adult series, as well as the adult movie company called Evil Angel. See generally Buttman Web site, available at <http://www.buttman.com/tour.php> (last visited Jan. 5, 2007); Evil Angel Web site, available at <http://www.evilangel.com> (last visited Jan. 5, 2007).

[FN62]. 535 U.S. 234 (2002).

[FN63]. *Id.* at 252.

[FN64]. The movie *The Aristocrats* is a comedy-documentary by magician Penn Jillette and comedian Paul Provenza in which some very well known comics like Bob Saget and Gilbert Gottfried give their own nasty takes on the dirtiest joke ever told involving a father, mother, son, daughter and a dog. As A.O. Scott wrote in reviewing *The Aristocrats* for the *New York Times*, the movie is:

possibly the filthiest, vilest, most extravagantly obscene documentary ever made. Visually, it is as tame as anything on PBS or VH1's ‘Behind the Music,’ but there is scarcely a minute of screen time that does not contain a reference to scatology, incest, bestiality and practices for which no euphemisms or Latinate names have been invented.

A.O. Scott, *A Filthy Theme And Variations*, *N.Y. Times*, July 29, 2005, at E1.

[FN65]. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005), rev'd, 431 F.3d 150 (3d Cir. 2005), cert. denied, 126 S. Ct. 2048 (2006).

[FN66]. *Id.* at 591.

[FN67]. *Id.* at 595-96.

[FN68]. *Id.* at 594.

[FN69]. *Id.* at 595.

[FN70]. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150 (3d Cir. 2005).

[FN71]. *Id.* at 156 (referencing the case of *Agostini v. Felton*, 521 U.S. 203 (1997), and writing that “[w]e reaffirm our intent to adhere strictly to the principle articulated by the Supreme Court in *Agostini*”).

[FN72]. *Id.* at 161.

[FN73]. *Id.*

[FN74]. Interview with Ira S. Levine, adult movie producer and adult magazine editor, in L.A., Cal. (June 5, 2006).

[FN75]. As Larry Flynt described it during a July 2006 interview in linking privacy of home viewing with technological developments, video on demand “is the future because it is in the house.” Interview with Larry C. Flynt, head of LFP, Inc., in Beverly Hills, Cal. (July 5, 2006).

[FN76]. **Clay Calvert** and Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 *CommLaw Conspectus* 159, 167 (2001).

[FN77]. See Carly Milne, *Naked Ambition* 346 (2005) (writing that “King is best known for her role in helping catapult Wicked Pictures contract sensation Jenna Jameson to the top of the industry. By working with non-traditional media, King helped Jameson overcome some of the negative stereotypes that exist about the adult industry.”).

[FN78]. Interview with Joy King, Vice President of Special Projects for Wicked Pictures, in Woodland Hills, Cal. (June 7, 2006).

[FN79]. *Id.*

[FN80]. Interview with Max Hardcore, adult movie producer, in Altadena, Cal. (July 19, 2006).

[FN81]. Interview with Michael H. Klein, President of Hustler TV, in Beverly Hills, Cal. (June 30, 2006).

[FN82]. *Id.*

[FN83]. *Id.*

[FN84]. Mike Musgrove, *Technology's Seamier Side*, *Wash. Post*, Jan. 21, 2006, at D01.

[FN85]. Interview with Larry C. Flynt, head of LFP, Inc., in Beverly Hills, Cal. (July 5, 2006).

[FN86]. *Id.*

[FN87]. See *supra* notes 76 and 78.

[FN88]. See *supra* notes 18-22 and accompanying text.

[FN89]. See Kick Ass Pictures, available at <http://www.kickass.com> (last visited Jan. 1, 2007).

[FN90]. Interview with Mark Kulkis, President of Kick Ass Pictures, in Hollywood, Cal. (Feb. 25, 2006).

[FN91]. See Hustler TV, available at <http://www.hustlertv.com> (last visited Dec. 31, 2006).

[FN92]. Interview with Michael H. Klein, President of Hustler TV, in Beverly Hills, Cal. (June 30, 2006).

[FN93]. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)) (emphasis added).

[FN94]. This is a reference to the prosecution in *United States v. Extreme Associates*, with “Rob Black” being the stage name for Extreme Associates' proprietor Robert Zicari.

[FN95]. Interview with Mark Kulkis, President of Kick Ass Pictures, in Hollywood, Cal. (Feb. 25, 2006).

[FN96]. Interview with John Stagliano, adult movie producer, in Malibu, Cal. (July 10, 2006).

[FN97]. *Id.*

[FN98]. See *U.S. v. Extreme Ass., Inc.*, 431 F.3d 150 (3d Cir. 2005).

[FN99]. *Miller*, 413 U.S. at 30.

[FN100]. *Clay Calvert* & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 *Cardozo Arts & Ent. L.J.* 313, 323 (2001).

[FN101]. *Clay Calvert* and Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 *CommLaw Conspectus* 159, 169-70 (2001).

[FN102]. Interview with John Stagliano, adult movie producer, in Malibu, Cal. (July 10, 2006).

[FN103]. Interview with Joy King, Vice President of Special Projects for Wicked Pictures, in Woodland Hills, Cal. (June 7, 2006).

[FN104]. Interview with H. Louis Sirkin, attorney, in Cincinnati, Ohio (Oct. 20, 2006).

[FN105]. *Id.*

[FN106]. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[FN107]. *Cohen v. California*, 403 U.S. 15, 25 (1971).

[FN108]. See *supra* note 6.

[FN109]. See *U.S. v. Extreme Ass., Inc.*, 431 F.3d 150 (3d Cir. 2005).

[FN110]. Interview with H. Louis Sirkin, attorney, in Cincinnati, Ohio (Oct. 20, 2006).

[FN111]. Interview with Michelle Freridge, then-executive director of the Free Speech Coalition, in Chatsworth,

Cal. (June 19, 2006).

[FN112]. **Clay Calvert** & Robert D. Richards, [The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment](#), 22 *Cardozo Arts & Ent. L.J.* 247, 284 (2004).

[FN113]. 485 U.S. 46 (1988).

[FN114]. **Clay Calvert** & Robert D. Richards, [Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney](#), 19 *Cardozo Arts & Ent. L.J.* 313, 325 (2001).

[FN115]. *Id.*

[FN116]. See *supra* note 13 (setting forth the three-part test for **obscenity** from *Miller v. California*).

[FN117]. 354 U.S. 476 (1957).

[FN118]. *Id.* at 488 n.20 (quoting a portion of the A.L.I. Model Penal Code).

[FN119]. *Id.* at 323-24.

[FN120]. **Clay Calvert** & Robert D. Richards, [The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment](#), 22 *Cardozo Arts & Ent. L.J.* 247, 285 (2004).

[FN121]. *Id.*

[FN122]. *Miller v. California*, 413 U.S. 15, 24 (1973).

[FN123]. Interview with Mark Kulkis, President of Kick Ass Pictures, in Hollywood, Cal. (Feb. 25, 2006).

[FN124]. **Clay Calvert** and Robert Richards, [Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence](#), 9 *CommLaw Conspectus* 159, 170 (2001).

[FN125]. Robert D. Richards, *Uninhibited, Robust, and Wide Open: Mr. Justice Brennan's Legacy to the First Amendment* 61 (1994).

[FN126]. *Id.*

[FN127]. *Id.*

[FN128]. *Miller v. California*, 413 U.S. 15, 43-44 (1973) (Douglas, J., dissenting).

[FN129]. *HIV Cases Put Adult Film Industry on Pause*, *St. Petersburg Times (Fla.)*, Apr. 17, 2004, at 2B (noting that the “industry took a cautionary approach to the scare, which was revealed by the health agency that the industry created several years ago as part of its self-policing of sexually transmitted diseases.”).

[FN130]. Harrison Sheppard, *Adult-Film Law Mulled Before HIV Outbreak*, *Daily News (L.A.)*, May 11, 2004, at N1 (noting that one of the fears associated with government-mandated testing requirements is that it “could drive filming underground or out of state, meaning the productions would continue with even less oversight”).

[FN131]. See AIM Web Site, available at <http://www.aim-med.org> (last visited Jan. 2, 2007) (describing the foundation's mission as caring “for the physical and emotional needs of sex workers and the people who work in the Adult Entertainment Industry. Through our HIV and STD testing and treatment, our counseling, and support-group programs, we are happy to be serving the sex worker community. Our goal is to provide health care for the body, mind, emotion, and spirit.”).

[FN132]. *Id.*

[FN133]. Fifth Adult Actor Tests Positive for AIDS Virus, City News Service, May 5, 2004.

[FN134]. Troy Anderson, Adult-Film Moratorium Lifted, Daily News (L.A.), May 13, 2004, at N3 (noting that “[f]ive adult-film performers have tested positive for HIV in recent weeks, halting most production in the multi-billion-dollar adult-film industry.”).

[FN135]. Fifth Adult Actor Test Positive for AIDS Virus, *supra* note 133.

[FN136]. Interview with Sharon Mitchell, former adult movie actress and founder of the Adult Industry Medical Health Care Foundation, in Sherman Oaks, Cal. (July 14, 2006).

[FN137]. Porn Industry Hearing, City News Service, June 4, 2004 (quoting a legislative aide as saying the “[p]anel is considering ‘the appropriate state and local government role in protecting workers' health and safety in the adult film industry and how to address the topic in a manner that best protects both the performers and the general public’”).

[FN138]. Interview with Sharon Mitchell, former adult movie actress and founder of the Adult Industry Medical Health Care Foundation, in Sherman Oaks, Cal. (July 14, 2006).

[FN139]. *Id.*

[FN140]. *Id.*

[FN141]. See Porn Industry Hearing, *supra* note 137.

[FN142]. Interview with Sharon Mitchell, former adult movie actress and founder of the Adult Industry Medical Health Care Foundation, in Sherman Oaks, Cal. (July 14, 2006).

[FN143]. *Id.*

[FN144]. Larry Flynt, Porn World's Sky Isn't Falling, L.A. Times, Apr. 23, 2004, at B13.

[FN145]. *Id.*

[FN146]. See *supra* Part II, Section A, Subsection 2.

[FN147]. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

[FN148]. *Id.*

[FN149]. *Id.* at 49.

[FN150]. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (noting that “a content-

based restriction” is valid “only if it satisfies strict scrutiny,” which mandates that any such regulation “be narrowly tailored to promote a compelling Government interest”).

[FN151]. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (finding that Pennsylvania's “interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood.” *Id.* at 293).

[FN152]. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 442 (2002) (observing that “[i]n Renton, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is ‘reasonably believed to be relevant’ for demonstrating a connection between speech and a substantial, independent government interest.” *Id.* at 438).

[FN153]. *Id.* at 434.

[FN154]. See **Clay Calvert** & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. Legis. & Pub. Pol'y 287 (2003-04) (detailing the application of the Supreme Court's precedent in numerous cases across the United States).

[FN155]. See generally Robert D. Richards & **Clay Calvert**, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. Rev. 553 (2000) (discussing the notion of counter speech and its application in First Amendment jurisprudence).

[FN156]. See generally Catharine A. MacKinnon, *Only Words* 40 (1993) (calling pornography “the power of men over women, expressed through unequal sex, sanctioned both through and prior to state power,” and contending that with pornography “men masturbate to women being exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured and killed”).

[FN157]. See *Hustling the Left*, available at <http://www.hustlingtheleft.com> (last visited Jan. 1, 2007).

[FN158]. *Id.*

[FN159]. Interview with Max Hardcore, adult movie producer, in Altadena, Cal. (July 19, 2006).

[FN160]. Interview with H. Louis Sirkin, attorney, in Cincinnati, Ohio (Oct. 20, 2006).

[FN161]. See *supra* notes 18-22 and accompanying text.

[FN162]. Jerry Markon, *Prosecutors Lead Effort Against Online Predators*, Wash. Post, June 22, 2006, at T03.

[FN163]. *Id.*

[FN164]. See *Project Safe Childhood*, available at <http://www.projectsafechildhood.gov> (last visited Jan. 1, 2007).

[FN165]. *Id.*

[FN166]. Interview with Sharon Mitchell, former adult movie actress and founder of the Adult Industry Medical Health Care Foundation, in Sherman Oaks, Cal. (July 14, 2006).

[FN167]. Interview with Stormy Daniels, adult video star, in Valley Village, Cal. (June 15, 2006).

[FN168]. Interview with Bruce David, Editorial Director of Hustler, in Beverly Hills, Cal. (July 12, 2006).

[FN169]. Interview with Nina Hartley, adult movie star, in Los Angeles, Cal. (June 5, 2006). As described by author Eric Schlosser, “Nina Hartley is the stage name of one of the most famous performers in today’s sex industry.” Eric Schlosser, *Reefer Madness: Sex, Drugs, and Cheap Labor in the American Black Market* 178 (2003). Before entering the adult entertainment industry, she graduated magna cum laude from San Francisco State with a degree in nursing. *Id.* at 179.

[FN170]. Interview with Michelle Freridge, then-executive director of the Free Speech Coalition, in Chatsworth, Cal. (June 19, 2006).

[FN171]. *Id.*

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. Interview with Joy King, Vice President of Special Projects for Wicked Pictures, in Woodland Hills, Cal. (June 7, 2006).

[FN175]. Interview with Bruce David, Editorial Director of Hustler, in Beverly Hills, Cal. (July 12, 2006).

[FN176]. Interview with Larry C. Flynt, head of LFP, Inc., in Beverly Hills, Cal. (June 6, 2006).

[FN177]. See [Reno v. American Civil Liberties Union](#), 521 U.S. 844 (1997) (holding unconstitutional, on First Amendment free speech grounds, two provisions of the Communications Decency Act of 1996 that targeted “indecent” and “patently offensive” sexual expression on the Internet).

[FN178]. See [Ashcroft v. American Civil Liberties Union](#), 542 U.S. 656 (2004) (affirming a lower court’s preliminary injunction, granted on First Amendment free speech grounds, stopping enforcement of the Child Online Protection Act, which targets sexually explicit material that is “harmful to minors”).

[FN179]. ICANN “was created in 1998 to run the domain name system under the supervision of the Commerce Department. Domain names are the addresses ending in .com, .gov and other three-letter terms that allow users to navigate the World Wide Web.” Jim Puzanghera, U.S. Unlikely to Yield Web Oversight Yet, *L.A. Times*, July 27, 2006, at C2.

[FN180]. Victoria Shannon, Internet Domain Agency Renews U.S. Contract, *N.Y. Times*, Aug. 17, 2006, at C5.

[FN181]. See generally Christopher Rhoads, Red-Light District: Plan for Adult Area Sparks a Fight on Control of Web, *Wall St. J.*, May 10, 2006, at A1 (describing the debate over the .xxx domain name).

[FN182]. Jascha Hoffman, The Porn Suffix, *N.Y. Times*, Dec. 11, 2005, at Mag. 86.

[FN183]. Press Release, Family Research Council, FRC Urges Supporters to Oppose .XXX Domain, June 17, 2005, available at <http://www.frc.org/get.cfm?i=PR05F07> (last visited Jan. 3, 2007).

[FN184]. *Id.*

[FN185]. See generally *Fight the Dot XXX*, available at [http:// www.fightthedotxxx.com](http://www.fightthedotxxx.com) (last visited Jan. 3, 2007) (listing some of the groups and businesses that oppose the .xxx top-level domain).

[FN186]. David Ho, *Risque Web Sites to be '.XXX'-Rated*, *Atlanta J.-Const.*, June 3, 2005, at 1A.

[FN187]. *Id.*

[FN188]. Letter from Larry Flynt to ICANN Representatives (Apr. 2006), <http://www.freespeechcoalition.com/images/HustlerXXXLetter.jpg> (last visited Jan. 3, 2006).

[FN189]. Interview with Michael H. Klein, President of Hustler TV, in Beverly Hills, Cal. (June 30, 2006).

[FN190]. Free Speech Coalition, Official FSC Position on .XXX, <http://www.freeSpeechcoalition.com/FSCView.asp?action=preview&coid=138> (last visited Sept. 11, 2007).

[FN191]. H.R. 3833, 107th Cong. (2d Sess. 2002). The bill passed, was signed by President George W. Bush in December 2002, and became Public Law 107-317. See Michael Geist, *Cyberlaw 2.0*, 44 *B.C. L. Rev.* 323, 353 (2003) (writing that “The Dot Kids Implementation and Efficiency Act of 2002, passed by the House of Representatives in May of 2002, requires the National Telecommunications and Information Administration (NTIA) to establish a new dot-kids second-level domain within the dot-us country-code domain. The Act provides that the dot-kids domain allows access only to material that is suitable to children under the age of thirteen.”). See generally *Congress Approves Kids' Internet Domain*, *Wash. Post*, Nov. 16, 2002, at A4. (writing that the bill “would make a ‘.kids.us’ Internet domain that would be available within a year and monitored by a government contractor to ensure the material is appropriate for children under 13. The bill won unanimous approval from the Senate on Wednesday and the House yesterday. It now goes to President Bush, who is expected to sign it.”).

[FN192]. *Child-Friendly Internet Domain: Hearing on H.R. 3833 Before the Sub. Comm. on Sci., Tech. and Space of the S. Comm. on Commerce, Sci. and Transportation, 107th Cong. (2d Sess. 2002)* (statement of Ruben Rodriguez, director of the exploited child unit of the National Center for Missing & Exploited Children).

[FN193]. Official FSC Position of .XXX, *supra* note 190.

[FN194]. See Walter Minkel, *Bush Signs Dot-Kids into Law*, *Sch. Lib. J.*, Jan. 1, 2003, at 18 (noting President George W. Bush's signing of House Bill 3833 creating a second-level “kids.us” domain).

[FN195]. Interview with Mark Kulkis, President of Kick Ass Pictures, in Hollywood, Cal. (Feb. 25, 2006).

[FN196]. Bruce was convicted by a jury in Cook County, Illinois, of giving an obscene performance that, as the Supreme Court of Illinois wrote in tossing out the conviction, centered on:

a 55-minute monologue upon numerous socially controversial subjects interspersed with such unrelated topics as the meeting of a psychotic rapist and a nymphomaniac who have both escaped from their respective institutions, defendant's intimacies with three married women, and a supposed conversation with a gas station attendant in a rest room which concludes with the suggestion that the defendant and attendant both put on contraceptives and take a picture.

Illinois v. Bruce, 202 N.E.2d 497, 497 (Ill. 1964).

[FN197]. See *supra* note 64 (describing the movie).

[FN198]. Ray Richmond, *The Aristocrats*, *Hollywood Reporter.Com*, Aug. 9, 2005, available on LEXIS-NEXIS

Academic Universe.

[FN199]. See Collins & Skover, *supra* note 5, at 101-02 (discussing the “Thank You Mask Man” joke in which Bruce, imitating the voice of the Lone Ranger, wants Tonto and a horse “to perform an unnatural act”).

[FN200]. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

[FN201]. 535 U.S. 234 (2002).

[FN202]. *Id.* at 253.

[FN203]. *Supra* notes 32-35 and accompanying text.

[FN204]. See *supra* note 66 and accompanying text.

[FN205]. See *supra* note 35 and accompanying text.

[FN206]. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

[FN207]. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding the suspension of a public high school student for making sexually suggestive speech at school assembly).

[FN208]. *Supra* notes 15-17 and accompanying text.

[FN209]. See *supra* Part II, Section C, Subsection 9.

[FN210]. 18 U.S.C. § 2257(i) (2006) (providing that “[w]hoever violates this section shall be imprisoned for not more than 5 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 10 years but not less than 2 years, and fined in accordance with the provisions of this title, or both”).

[FN211]. H.R. 4472, 109th Cong. (2006).

[FN212]. Natasha Korecki, *New Law Makes It a Felony If Sex Offender Fails to Register*, *Chi. Sun Times*, Aug. 7, 2006, at 14.

[FN213]. Kris Axtman, *Efforts Grow to Keep Tabs on Sex Offenders*, *Christian Sci. Monitor*, July 28, 2006, at 1 (noting that the law is “what child advocates are calling the most sweeping sex-offender legislation in 25 years”).

[FN214]. *U.S. House Passes Tougher Sex Offender Bill*, *St. Petersburg Times (Fla.)*, July 26, 2006, at 1.

[FN215]. H.R. 4472, 109th Cong. § 503 (2006).

[FN216]. *Id.* (emphasis added).

[FN217]. 18 U.S.C. § 2257(b). This section provides, in relevant part, that:

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct--

(1) ascertain, by examination of an identification document containing such information, the per-

former's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d) (1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

Id. (emphasis added)

[FN218]. See e.g., Records Keeping Compliance Form Pursuant to 18 U.S.C. § 2257, available at <http://www.freespeechcoalition.com/webdocs/2257RecordKeepingandInspectionForm.pdf> (last visited Jan. 3, 2007) (providing that the “[p]rimary identification document must be government issued passport, driver's license, motor vehicle department ID, or military ID: (Each should be described, including the ID number. Clear, good-quality photocopies of each must be attached to this Form and the photocopies must be signed in ink by Model)”).

[FN219]. See 18 U.S.C. § 2257 Litigation Summary Report (Aug. 2006), available at <http://www.freespeechcoalition.com/FSCView.asp?coid=713> (last visited Jan. 3, 2007) (describing the protracted litigation history of the 2257 requirements that we first enacted in 1998, but not enforced until 1995).

[FN220]. Categorization of Records, 28 C.F.R. § 75.3 (2006). This section provides that:

Records required to be maintained under this part shall be categorized alphabetically, or numerically where appropriate, and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services). Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

Id.

[FN221]. Location of Records, 28 C.F.R. § 75.4 (2006). This section provides that:

Any producer required by this part to maintain records shall make such records available at the producer's place of business. Each record shall be maintained for seven years from the date of creation or last amendment or addition. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, digital image, or picture, or other matter (including but not limited to Internet computer site or services) as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

Id.

[FN222]. Location of the Statement, 28 C.F.R. § 75.8 (2006). This section provides that:

(a) All books, magazines, and periodicals shall contain the statement required in § 75.6 or suggested in § 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears.

(b) In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in § 75.6 or § 75.7 shall be presented at the end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer.

(c) Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer.

(d) A computer site or service or Web address containing a digitally- or computer-manipulated image, digital image, or picture, shall contain the required statement on its homepage, any known major entry points, or principal URL (including the principal URL of a subdomain), or in a separate window that opens upon the viewer's clicking a hypertext link that states, "18 U.S.C. 2257 Record-Keeping Requirements Compliance Statement."

(e) For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

Id.

[FN223]. Inspection of Records, 28 C.F.R. § 75.5 (2006).

[FN224]. Free Speech Coalition website 2257/4472 FAQ, available at <http://www.freespeechcoalition.com/FSCView.asp?coid=655#one> (last visited Jan. 3, 2007) (describing the difference between primary and secondary producers as:

Roughly speaking, and with a few exceptions, a primary producer is one who makes or participates in recording an initial image of actual sexually explicit conduct, while one who takes that image and republishes it an image is a secondary producer. Both are required to keep records, but, under the regulations, a secondary producer can obtain copies of the primary producer's records, organize them, and make them available for inspection, so long as the secondary also records the primary producer's name and address).

[FN225]. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 106 Stat. 4808, 4816-17 (codified at 18 U.S.C. § 2257 (2006)).

[FN226]. *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804, 806 (10th Cir. 1998).

[FN227]. *Id.* at 810 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

[FN228]. *Id.* at 809.

[FN229]. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (codified at 18 U.S.C. § 2257 (2006)).

[FN230]. *Inspection of Records Relating to Depiction of Sexually Explicit Performances Proposed Rule*, 69 Fed. Reg. 35547 (June 25, 2004) (to be codified at 28 C.F.R. pt. 75).

[FN231]. *Inspection of Records Relating to Depiction of Sexually Explicit Performances Final Rule*, 70 Fed. Reg. 29607, 29612 (May 24, 2005) (to be codified at 28 C.F.R. pt. 75).

[FN232]. *Id.*

[FN233]. 28 C.R.F. § 75.1(c)(2) (2006) (providing that “[a] secondary producer is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image, picture, or other matter intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, including any person who enters into a contract, agreement, or conspiracy to do any of the foregoing.”).

[FN234]. Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction, *Free Speech Coalition, Inc. v. Gonzales*, Case No. 05-CV-1126-WDM-BNB (D. Colo.), at 4.

[FN235]. *Id.* at 8.

[FN236]. *Id.*

[FN237]. 139 F.3d at 804.

[FN238]. Order on Plaintiff's Motion for Preliminary Injunction, *Free Speech Coalition, Inc. v. Gonzales*, Case No. 05-CV-1126-WDM-BNB (D. Colo.), at 10.

[FN239]. *Id.* (citation omitted).

[FN240]. *Id.* at 28.

[FN241]. See, Free Speech Coalition website, <http://www.freespeechcoalition.com/FSCView.asp?action=preview&coid=137> (last visited Jan. 4, 2007).

[FN242]. See *supra* notes 85-88 and accompanying text.

[FN243]. *Supra* notes 204-205 and accompanying text.
9 Tex. Rev. Ent. & Sports L. 1

END OF DOCUMENT