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OBSCENITY PROSECUTIONS AND THE BUSH ADMINISTRATION: THE INSIDE PERSPECTIVE OF THE ADULT ENTERTAINMENT INDUSTRY & DEFENSE ATTORNEY
LOUIS SIRKIN

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I. INTRODUCTION

In late May of 2006, the United States Department of Justice unsealed a federal grand jury obscenity indictment in Phoenix, Arizona against southern California-based Jeff Mike Productions, Inc. ("JM Productions") and its principal, Mike Leonard Norton.1 The indictment stemmed from the sale and distribution in late 2005 and early 20062 of four allegedly obscene DVDs – Gag Factor 15,3 Gag Factor 18, Filthy Things 6, and American Bukkake 134 – to Tempe, Ari-


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2. See Indictment, supra note 1, at 3-4 (setting forth specific dates of November 8, 2005, January 25, 2006, and February 28, 2006, as well as time period from January 1, 2006, through April 11, 2006, when defendants JM Productions and Mike Leonard Norton either transferred or sold allegedly obscene DVDs to Arizona).


zona-based Five Star Video, LLC, ("Five Star Video"), which was also indicted.\(^5\) Obscenity\(^6\) falls outside the scope of First Amendment protection of free speech.\(^7\) Therefore, those who allegedly distribute and ship obscene material may be prosecuted under federal law.\(^8\)

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6. The term "obscenity" is a legal term of art. The United States Supreme Court in *Miller v. California* created a three-part test for obscenity that focuses on whether the material in question (1) appeals to a prurient interest in sex, when taken as a whole and judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law, in its display of sexual conduct; and (3) lacks serious literary, artistic, political, or scientific value. See 413 U.S. 15, 24 (1973) (reaffirming holding of *Roth v. United States*, 354 U.S. 476, 489 (1957), that obscene material is not protected by First Amendment, and holding that states may regulate obscene material in accordance with three-part test).

7. See U.S. CONST. amend. I. (stating that "Congress shall make no law . . . abridging the freedom of speech, or of the press"). The Free Speech and Free Press Clauses of the First Amendment are incorporated through the Fourteenth Amendment's Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that rights protected by First Amendment are fundamental personal rights protected not only against abridgment by Congress, but also by states via Fourteenth Amendment's Due Process Clause). Obscene material is one of the few categories of speech that falls outside the scope of First Amendment protection. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.") (citation omitted).

The defendants quickly responded to the federal government and the administration of President George W. Bush by issuing a passionate joint statement that did not mince words:

This prosecution represents a pointless and arbitrary waste of scarce investigative, prosecutorial and judicial resources. Instead of protecting Americans from actual crime, the government is trying to make criminal the offering of movies which only willing adults can see. These are films made by and for consenting adults. Somehow President Bush believes that it should be a crime to distribute photographs of sexual acts which are perfectly lawful to engage in.9

The DVDs at issue, as Mark Kernes wrote for the adult industry trade publication Adult Video News, “fall somewhat outside standard adult video fare. In Gag Factor 15, for instance, Ashley Blue essays a parody of Iraq’s Abu Ghraib prison, where prisoners are tortured through throat-fucking.”10 Put differently, this is not the kind of mainstream adult content produced by such companies as Wicked Pictures, which targets the couples market, requires male actors to wear condoms, and distributes movies with engaging storylines.11

The federal prosecution of JM Productions, therefore, comes as little surprise given the nature of its products. This is especially true since the government, under the leadership of embattled U.S. Attorney General Alberto Gonzales, is “now mounting the biggest attack on porn since the Reagan Administration 20 years ago.”12

11. See Sherri Ackerman, Sex in the City, TAMPA TRIB. (Fla.), Nov. 23, 2003, at 1 (writing that “national adult film companies, such as Wicked Pictures, cater to female viewers with erotic movies featuring story lines and romance”); see also Nick Madigan, Sex Videos on Pause, and Idled Actors Fret, N.Y. TIMES, Apr. 25, 2004, at Section 9, 1 (observing that Wicked Pictures “insist[s] that its male actors wear condoms while filming”); Jose Martinez, Risky Mix: Driving & Sex Flicks, DAILY NEWS (N.Y.), Apr. 18, 2004, at 8 (quoting Daniel Metcalf of Wicked Pictures for proposition that “[w]e create couples-friendly adult films to be watched in the privacy of your home.”).
12. Seth Lubove, Obscene Profits, FORBES, Dec. 12, 2005, at 98 (describing federal crackdown efforts against pornography). Between 2001 and 2005, the Bush Administration secured forty obscenity convictions, compared to four convictions during the entire Clinton Administration. See id. (describing recent increase in obscenity prosecutions). Moreover, since 2001 the Justice Department’s “anti-porn” budget has doubled, increasing to $42 million a year. See id. (noting recent budget increases).
This assault includes the U.S. Justice Department’s formation in 2005 of the Obscenity Prosecution Task Force (OPTF),\textsuperscript{13} which aims to enforce obscenity laws in order to protect families and children.\textsuperscript{14} Indeed, some have speculated that the “signature issue” for Gonzales’s tenure as Attorney General “may end up being his press to increase enforcement of obscenity laws to protect minors.”\textsuperscript{15}

This potential Gonzales legacy could very well turn out to be true, especially if the government gains a conviction in its other ongoing, high-profile obscenity prosecution in United States v. Extreme Associates, Inc.\textsuperscript{16} The case against southern California-based

\textsuperscript{13} See Dan Eggen, 
\textit{Gonzales Earns Praise, Despite Lack of Policy Change}, WASH. POST, May 16, 2005, at A4 (writing that Gonzales “formed a task force to focus on prosecuting obscenity cases, attracting praise from religious conservatives, who have been lukewarm to Gonzales because of some of his Texas judicial rulings related to abortion”); see also \textit{Washington in Brief: Justice Dept. to Set Up Pornography Task Force}, WASH. POST, May 6, 2005, at A5 (describing task force and noting that it “will include trial lawyers from the department’s Child Exploitation and Obscenity Section as well as experts on organized crime, seizing assets and computer crime”).


\textsuperscript{15} James Gordon Meek, \textit{Yes, Gonzales Can Really Tell Bush ‘No’}, DAILY NEWS (N.Y.), May 29, 2005, at 28 (noting Justice Department’s emphasis on enforcing obscenity laws under Gonzales). In March 2007, it was revealed that at least two U.S. Attorneys – Daniel G. Bogden and Paul Charlton – were fired under the leadership of Attorney General Gonzales, in part, because they apparently did not want to prosecute obscenity cases. See Richard A. Serrano and Richard B. Schmitt, \textit{Justice Dept. Attempted to Curb Fallout}, L.A. TIMES, Mar. 20, 2007, at A1 (writing that Justice Department officials “were upset with Daniel G. Bogden in Las Vegas for not bringing enough obscenity prosecutions”); Richard A. Serrano, \textit{Ouster of U.S. Attorneys: Memos Raise Questions}, L.A. TIMES, Mar. 14, 2007, at A1 (describing how Brent Ward, head of Justice Department’s obscenity task force, complained to D. Kyle Sampson, former chief of staff to Gonzales, “about Charlton and Bogden,” and quoting an email that Ward sent to Sampson in which Ward wrote that “[w]e have two U.S. attorneys who are unwilling to take good cases we have presented to them”); Sam Howe Verhovek, \textit{In Vegas, Attorney Firing is an Outrage}, L.A. TIMES, Mar. 25, 2007, at A21 (writing that one internal Justice Department email suggested “that Bogden was canned for not pursuing obscenity cases more vigorously”); see also Eric Lipton and David Johnston, \textit{Gonzales’s Critics See Lasting, Improper Ties to White House}, N.Y. TIMES, Mar. 15, 2007, at A24 (describing background behind firings of seven U.S. Attorneys in December 2006, and writing that “[f]ormer prosecutors said Mr. Gonzales, relying on advisers who were less experienced prosecutors than their predecessors, took a doctrinaire approach on policy matters, giving front-line lawyers much less discretion on death penalty, gun crime, immigration and even obscenity cases”) (emphasis added).

Extreme Associates, Inc. ("Extreme Associates") and its owners, Robert Zicari and Janet Romano, better known in the adult industry as Rob Black and Lizzie Borden, marked "the beginning of a crackdown on obscene material sold throughout the United States." The New York Times described the lawsuit as constituting "a major test of the Bush administration’s campaign against pornography." The case already spawned an opinion from the United States Court of Appeals for the Third Circuit in United States v. Extreme Associates, Inc., which reversed the lower court's decision dismissing the obscenity indictment on constitutional privacy grounds. District Court Judge Gary Lancaster’s now-reversed opinion in Extreme Associates rested, in part, on the United States Supreme Court’s decision in Lawrence v. Texas, which held unconstitutional a Texas anti-sodomy statute that criminalized private sexual conduct among consenting adults. If affirmed, the lower court’s


18. Torsten Ove, Indictments Made in Pittsburgh Signal Wider U.S. Attack on Porn, PIT. POST-GAZETTE, Aug. 8, 2003, at A1 (signaling mounting pressure against vendors of obscene material). When questioned about whether the lawsuit against Extreme Associates would trigger other obscenity proceedings, Andrew Oosterbaan, chief of the Child Exploitation and Obscenity Section at the Justice Department, commented that the prosecution is "not the first and it won’t be the last." Id. Oosterbaan added that “[i]n the next several months, you can expect there will be more indictments.” Id.


20. See Extreme Associates, 431 F.3d at 161-62 (concluding that directly applicable Supreme Court precedent regarding obscenity governs case and rejecting lower court’s conclusion that Supreme Court’s constitutional privacy jurisprudence requires dismissal of indictment).

21. See Extreme Associates, 352 F. Supp. 2d at 587 (citing Lawrence v. Texas, 539 U.S. 558 (2003)) (holding, under rationale of Supreme Court’s decision in Lawrence v. Texas, that government cannot rely on “moral code” to criminalize and prosecute distribution of obscene material via Internet in privacy of one’s home). In dismissing the indictments against Extreme Associates, Robert Zicari, and Janet Romano, U.S. District Court Judge Gary L. Lancaster noted the significance of the Supreme Court’s decision in Lawrence v. Texas:

The Lawrence decision, however, is nonetheless important to this case. It can be reasonably interpreted 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. Such is the import of Lawrence to our decision.

Id. at 591.
decision in *Extreme Associates* would have facilitated further spread and mainstreaming of adult content\(^2\) and fueled continued growth of an already $12.6 billion per year adult entertainment industry.\(^3\) Like JM Productions’ movies, *Extreme Associates*’ content also pushes the envelope of pornography,\(^4\) with Zicari calling his content “horror-porn.”\(^5\) As U.S. Attorney Mary Beth Buchanan,\(^6\) the woman spearheading the *Extreme Associates* prosecution, once described it, the “material produced by *Extreme Associates* depicts several rape scenes, where women are beaten, slapped, spit upon and degraded in every way possible. And then, in each segment, the woman is ultimately killed.”\(^7\)

In September 2006, Buchanan unveiled yet another federal obscenity indictment, this time against a 54-year-old woman from Donora, Pennsylvania, named Karen Fletcher, who allegedly “posted fictional stories online about the rape, torture and murder of children.”\(^8\) In announcing the charges, Buchanan stated, “[u]se of the Internet to distribute obscene stories like these not only violates

\(^2\) Cf. 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, 431 (2005) (arguing, prior to appellate court decision in *Extreme Associates*, that district court’s decision “may well represent the end of obscenity enforcement actions as we know them”).


\(^4\) See G. Beato, *Xtreme Measures*, *Reason*, May 2004, at 24, 25-26 (writing that movies produced by Rob Black and Lizzie Borden represent content “that even fellow pornographers find objectionable. Their videos are products of a jaded, hypermediated era: explicit porn coupled with the over-the-top gore of slasher movies and the stunts and gross-out spectacles of reality TV . . .”).

\(^5\) See Andrea Cavanaugh, *'Horror-Porn' Suit Tossed*, L.A. Daily News, Jan. 22, 2005, at N4 (quoting Zicari regarding proposition that his content is “horror-porn” and that “at least it has a plot”).


\(^7\) *Nightline: Nightline in the Extreme* (ABC television broadcast, Jan. 24, 2005).

\(^8\) Paula Reed Ward, *Woman Charged over 'Vile' Web Stories*, *Pitt. Post-Gazette*, Sept. 28, 2006, at B2 (reporting federal obscenity indictment against Fletcher). The Fletcher indictment is particularly noteworthy because, unlike standard obscenity cases that involve allegedly obscene pictures or films, the lawsuit targeted Mrs. Fletcher’s stories, the text of which were posted on her website. *See*
federal law, but also emboldens sex offenders who would target children."\textsuperscript{29}

All of this attention and litigation is neither going unnoticed nor unfelt in the United States by an adult industry that is being prosecuted, ironically, as it is mainstreaming and gaining popular acceptance.\textsuperscript{30} In fact, increased prosecution of pornography is shaking some segments of the industry to their cores after thriving during Bill Clinton’s presidency, when efforts to enforce obscenity laws were largely abandoned.\textsuperscript{31} As Randy Dotinga wrote for \textit{Wired News} in June 2006, shortly after the indictment was unsealed against JM Productions, “[o]bscenity prosecutions are taking a toll on the porn industry as publishers embrace an every-man-for-himself approach under relentless Bush administration attacks.”\textsuperscript{32}

This Article provides a unique examination of both ongoing prosecutions, including the censorial atmosphere that breeds such efforts, and obscenity law from the perspective of leading figures in the adult entertainment industry. In particular, Part II of the Article pivots on an exclusive and wide-ranging in-person interview conducted in October 2006 by the authors with Cincinnati-based

\textit{id.} (describing difference between Fletcher’s prosecution and typical obscenity prosecution).

\textsuperscript{29} \textit{Pa. Woman Charged with Obscenity for Online Child-Torture Stories, ASSOCIATED PRESS}, Sept. 28, 2006, available at http://www.firstamendmentcenter.org/news.aspx?id=17458. Fletcher’s website allegedly contained “excerpts of stories about child sex, torture and murder,” which users could access by paying a fee. \textit{Id.} According to prosecutors, one of the featured stories available to users “described the torture and sexual molestation of a 2-year-old.” \textit{Id.}

\textsuperscript{30} See Arnold H. Loewy, \textit{Obscenity: An Outdated Concept for the Twenty-First Century}, 10 NEXUS 21, 27 (2005) (observing, from author’s perspective as Graham Kenan Professor at University of North Carolina at Chapel Hill School of Law, that “pornography has become more mainstream”); see also 60 Minutes: Porn in the USA (CBS television broadcast, Sept. 5, 2004) (including assertion of CBS news journalist Steve Kroft that “[o]ne of the biggest cultural changes in the United States over the past 25 years has been the widespread acceptance of sexually explicit material: pornography” and noting that “a product that was once available only in the back alleys of big cities has gone corporate, delivered now directly into homes and hotel rooms by some of the biggest companies in the US”).

\textsuperscript{31} See Loewy, supra note 30, at 22 n.7 (“Several commentators have noted that the Clinton Administration in general, and Attorney General Janet Reno in particular, made it a policy to limit obscenity prosecutions in order to focus the Department of Justice’s resources on other threats that they judged to be more pressing or dangerous.”); see also Eric Schlosser, \textit{Reefer Madness: Sex, Drugs, and Cheap Labor in the American Black Market} 202 (Houghton Mifflin 2003) (“The Clinton administration largely abandoned efforts to enforce the obscenity laws, discontinuing the policies of the Reagan and Bush administrations.”).

defense attorney H. Louis Sirkin in his firm’s offices. Sirkin, who successfully argued Ashcroft v. Free Speech Coalition before the U.S. Supreme Court, represents defendants in both the JM Productions and Extreme Associates prosecutions. It is not surprising that he is a go-to lawyer in these cases, with the Pittsburgh Post-Gazette observing that Sirkin “has an impressive track record in defending obscenity cases.” In this part of the Article, Sirkin candidly discusses his views regarding free speech, obscenity law, the jury selection process in obscenity cases, and the adult industry’s treatment of Rob Black during his prosecution, among other subjects.

Part III of the Article provides richer context and understanding, as it presents the views of six important individuals associated with the adult entertainment industry today – Larry Flynt.

33. For a further discussion of attorney H. Louis Sirkin’s background and professional accomplishments, see infra notes 46-73 and accompanying text. For a further discussion of the interview process, see infra notes 74-76 and accompanying text. For a further discussion of Sirkin’s observations, opinions, and remarks regarding the protections of the First Amendment, see infra notes 77-84 and accompanying text. For a further discussion of Sirkin’s comments regarding Rob Black and Extreme Associates, see infra notes 85-103 and accompanying text. For a further discussion of Sirkin’s view of obscenity law and obscenity litigation, see infra notes 104-131 and accompanying text.

34. 535 U.S. 254, 258 (2002) (holding unconstitutional, on overbreadth grounds, portions of Child Pornography Prevention Act of 1996 that criminalized so-called virtual child pornography, which features images of what appears to be minors engaged in sexual conduct but is produced without using real children); see also Linda Greenhouse, Justices Weigh Law Barring Virtual Child Pornography, N.Y. Times, Oct. 31, 2001, at A13 (describing and quoting portions of Sirkin’s oral argument before United States Supreme Court, and noting how Sirkin was representing Free Speech Coalition, “an adult entertainment trade association that brought the constitutional challenge”).


37. Flynt has been described as a “pornographer and First Amendment rabble-rouser.” Shelly Branch, Larry Flynt’s New Target: Black Men, WALL ST. J., Dec. 21, 1999, at B1. Flynt’s primary company, LFP, Inc., is the publisher of sexually explicit magazines such as Hustler and Barely Legal. See generally Clay Calvert & Robert Richards, Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence, 9 COMMLAW CONSPECTUS 159 (2001) (profiling Flynt and including his observations, opinions, and comments on multiple free speech-related issues).
Max Hardcore, Tom Hymes, Joy King, Sharon

38. Hardcore, who has been prosecuted for obscenity in the past and whose offices were raided in October 2005 by law enforcement officials, has been described as a "hugely successful porn impresario who specialises [sic] in getting his actresses to dress in young girls' clothing, spitting and urinating on them, choking, gagging and inserting speculums into their vaginas and anuses and widening them to extreme degrees." Katharine Viner, Feminism Today: While We Were Shopping. . ., GUARDIAN (London), June 5, 2002, at Features 3; see also Dana Harris, Hu'd Porn-Ucopia, DAILY VARIETY, Aug. 15, 2005, at 1 ("The Los Angeles vice office spent 18 months on the case of Max Hardcore, a pornographer accused of obscenity in connection with his tape 'Max Extreme 4.'"); Tristan Taormino, Sexual Nostalgia, VILLAGE VOICE, Oct. 19, 2005, at 125 ("Just last week, Max Hardcore's offices were raided by the feds, and copies of several of his recent movies were seized for possible prosecution."); Max Hardcore Biography: Who the Hell is Max Hardcore?, http://www.maxhardcore.com/whosmax/index.htm (last visited Feb. 9, 2007) (providing Hardcore's official biography on his company's Internet website).

In December 2004, an Ohio appellate court held that a video called Max Hardcore Extreme Volume Number Seven was obscene by the standards of the average person in Hamilton County, Ohio. See Ohio v. Jenkins, 2004-Ohio-7131, ¶ 48 (Ohio. Ct. App. Dec. 30, 2004) (concluding that video is obscene because it features extreme hardcore sexual activity such as scenes depicting up close and invasive camera views of anal penetration, stretching of bodily orifices, and scene in which actress siphons fluid out of anal cavity with plastic tubing). Comparing Max Hardcore Extreme Volume Number Seven to another pornography film, Gangland 17, the court observed that while Gangland 17, "despite its graphic content, still seems to be about sex, . . . Max Hardcore seems to be about something else." Id.


40. King, vice president of special projects for adult movie company Wicked Pictures, is the woman who helped make porn star Jenna Jameson a recognizable name in American popular culture. See CARLY MILNE, NAKED AMBITION 346 (Carroll & Graf 2005) ("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."). King is a frequent source for mainstream news media stories about the adult industry, including in publications such as The New York Times and Daily Variety. See, e.g., Dana Harris, Porn Pirates Go Unpunished, DAILY VARIETY, Jan. 24, 2005, at 8 (citing King in story about piracy of adult videos and noting that King "says it's not uncommon to open a box of returns from a retailer and discover that half the copies are pirated materials"); see also Nick Madigan, Sex Videos on Pause, and Idled Actors Fret, N.Y. TIMES, Apr. 25, 2004, at Section 9, 1 (quoting King in story about HIV outbreak in adult movie industry). In her autobiography, Jameson writes that King's "number one objective was simple: to get my face in the media." JENNA JAMESON, HOW TO MAKE LOVE LIKE A PORN STAR: A CAUTIONARY TALE 369 (Regan Books 2004). She also calls
Mitchell,41 and John Stagliano42 – on subjects including: (1) obscenity law; (2) the forces and historical context behind the current obscenity prosecutions; and (3) Robert Zicari (also known as Rob Black), the man behind Extreme Associates.43 The authors conducted in-person interviews with each of these individuals in or near the Los Angeles area during June and July of 2006.44 All of

King “a person who didn’t take no for an answer” and describes her as “a hard-core motherfucker whom no man dared to mess with.” Id.


42. Stagliano runs an adult movie company called Evil Angel Productions. See The Evil Empire, http://www.evilangel.com/home (last visited Feb. 23, 2007) (advertising and selling Evil Angel DVDs and video); see also Despite U.S. Campaign, a Boom in Pornography, N.Y. TIMES, July 4, 1993, at Section 1, 20 (describing Stagliano’s assertion that “his Los Angeles company, Evil Angel Productions, would gross more than $1 million this year, as against the $34,000 he made in 1990, when he released only eight tapes”).

Stagliano is credited with inventing what is known as “gonzo” pornography. See LEGS McNEIL & JENNIFER OSBORNE, The Other Hollywood 584 (Regan Books 2005) (quoting Stagliano for proposition that “[p]eople give me credit for inventing ‘gonzo porn’ because a lot of people have imitated me”). Stagliano was once described in the Weekly Standard as “one of porn’s top directors, a Cato Institute benefactor, and an unapologetic gluttonous enthusiast.” Matt Labash, Among the Pornographers, WkLY. STANDARD, Sept. 21, 1998, at 20. Stagliano was described nearly a decade ago by author and journalist Eric Schlosser as “the nation’s leading director of hard-core videos, a porn auteur whose distinctive cinéma vérité style of filmmaking has been widely imitated.” Eric Schlosser, The Business of Pornography, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 43. In 2006, Mike Ramone, editor-in-chief of the Adult Video News trade publication, called Stagliano “arguably the most influential pornographer this industry has ever seen.” Richard Abowitz, Moveable Buffet: Growth Pains for S&M-Tinged Show, L.A. TIMES, Jan. 8, 2006, at E27. Stagliano recently produced an erotic dance show, The Fashionistas, in Las Vegas, Nevada, which has been described as “original, fresh and independent.” Mike Weatherford, ‘Fashionistas’ Anniversary a Good Sign, LAS VEGAS REV.-J., Oct. 2, 2005, at 1).

43. For a further discussion of Robert Zicari (also known as Rob Black) and Extreme Associates, see infra notes 85-103 and accompanying text.

44. The interviews took place, in person, with the following individuals at the following dates and locations: (1) Larry Flynt on June 6, 2006, in his tenth-floor
the interviews were recorded on audiotape by the authors and later transcribed for purposes of this Article, with some comments either re-ordered for purposes of the themes and sections of this Article or deleted because they were irrelevant or redundant. The authors verify both the existence and accuracy of the material from the transcripts; minor changes for syntax and grammar were made in some statements that did not alter the substantive content of their statements.

Finally, Part IV provides a brief analysis of the remarks of all of the individuals featured in this Article. This part of the Article is kept intentionally short because one of the goals of the authors is not to provide an academic deconstruction of their words, but rather to let them stand on their own. The authors thus leave the ultimate role of interpretation and dissection of their unique perspectives to those legal scholars who criticize, critique, and comment on pornography and obscenity jurisprudence.

II. LOUIS SIRKIN AND THE VIEW FROM THE LITIGATION FRONT

Louis Sirkin may be best known nationally in legal circles as the man who successfully argued before the United States Supreme Court against the constitutionality of a federal law criminalizing virtual child pornography. The case not only “generated a great

office at the headquarters of LFP, Inc., located at 8484 Wilshire Boulevard in Beverly Hills, California; (2) Max Hardcore on July 19, 2006, at his home in Altadena, California (street address withheld for privacy reasons); (3) Tom Hymes on July 18, 2006, in “The Blvd” restaurant and bar in the front side of the Four Seasons-owned Regent Beverly Wilshire hotel located at 9500 Wilshire Boulevard in Beverly Hills, California; (4) Joy King on June 7, 2006, at the restaurant Kate Mantalini located in the Warner Center at 5921 Owensmouth Avenue in the San Fernando Valley town of Chatsworth, California; (5) Sharon Mitchell on July 14, 2006, in her office at the headquarters of the Adult Industry Medical Health Care Foundation at 4630 Van Nuys Boulevard in Sherman Oaks, California; and (6) John Stagliano on July 10, 2006, at his beachfront home on the Pacific Coast Highway in Malibu, California (street address withheld for privacy reasons).

45. For a further discussion of the views and remarks of figures in the pornography industry, see infra notes 139-41 and accompanying text.


Arguing against the law that banned fake images of child pornography, Sirkin explained to the Supreme Court justices that “[i]f there’s a murder that looks real on the screen, we don’t go out and charge anyone with murder.” Linda Greenhouse, Justices Weigh Law Barring Virtual Child Pornography, N.Y. TIMES, Oct. 31, 2001, at A1 (quoting Sirkin’s oral argument in Ashcroft v. Free Speech Coalition).
deal of publicity," but it provoked an opinion that, as Harvard University Professor Frederick Schauer observed, "flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography." Although the opinion was blasted by now-disgraced Congressman Mark Foley (R. - Fla.), who said "the Supreme Court had sided with pedophiles over children," journalists for mainstream news media outlets hailed it as "a major victory for free-speech advocates, who worried that the law represented the thin edge of a wedge that could be used to justify ever-broader censorship," "a robust affirmation of free speech rights," and "[a]ffirming that free speech principles apply with full force in the computer age."

Sirkin's résumé, however, runs much deeper than his role in litigating Ashcroft v. Free Speech Coalition when it comes to defending and protecting the display or sale of sexually provocative speech. Most notably, Sirkin represented the Contemporary Arts Center in Cincinnati, Ohio, in the early 1990s when it came under attack from anti-pornography groups and local law enforcement officials for displaying the sexually explicit yet artistic photography of Rob-

Sirkin also contended that if the law were upheld, then "[v]isual messages of adolescent sexuality will be barred regardless of their artistic or scientific merit."  

47. Ronald J. Krotoszynski, Jr., Childproofing the Internet, 41 BRANDEIS L.J. 447, 460 (2003).  
49. Ironically, Foley, former co-chairman of the Congressional Missing and Exploited Children’s Caucus, resigned from the U.S. House of Representatives in September 2006 “following the discovery of sexually explicit Internet messages he sent to teenage boys.” R. Jeffrey Smith, Foley Built Career as Protector of Children, WASH. POST, Oct. 1, 2006, at A4. Several leading Republican Congressmen issued a joint statement after his resignation calling Foley’s actions “unacceptable and abhorrent,” and demanding “the full weight of the criminal justice system” be brought against Foley. See Jonathan Weisman & Charles Babington, GOP Leader Rebuts Hastert on Foley, WASH. POST, Oct. 1, 2006, at A1 (including quoted portions of joint statement issued by House Speaker J. Dennis Hastert (R-Ill.), House Majority Leader John A. Boehner (R-Ohio), and Majority Whip Roy Blunt (R-Mo.)).  
52. Joan Biskupic, 'Virtual' Porn of Children Protected, USA TODAY, Apr. 17, 2002, at 1A.  
ert Mapplethorpe.\textsuperscript{54} The exhibit "included Mapplethorpe’s impeccably composed flower pictures juxtaposed with photographs of men engaged in sadomasochistic acts, as well as two portraits of children with their genitals exposed."\textsuperscript{55} As the Washington Post vividly described the dramatic events of April 7, 1990 in downtown Cincinnati:

Police and sheriff’s officers swept into the packed Contemporary Art Center here today and ordered more than 400 visitors to leave while they took videotaped evidence to support obscenity charges against a public showing of the controversial Robert Mapplethorpe photo exhibit.

The police action was taken after a Hamilton County grand jury, whose nine members paid the $4 admission fee and quietly viewed the exhibit with other patrons this morning, returned an indictment against the art center and its director, Dennis Barrie, a few hours later.\textsuperscript{56}

During his opening argument to the jury in the Mapplethorpe case, Sirkin contended, among other things, that:

- "Art is not always pleasing to our eyes. Art is to tell us something about ourselves;"\textsuperscript{57}
- "[T]his exhibit had serious value both for its artistic and technical aspects but also for its political aspects;"\textsuperscript{58} and
- The exhibit "shows a period of American history in the 1970s which we may never ever have again – and maybe perhaps we should never have again. But it does show something and records something and fulfills all the functions that we ever want art to show us."\textsuperscript{59}

Ultimately, Sirkin’s arguments and skills in the courtroom proved successful, as the jury acquitted the museum and its direc-


\textsuperscript{55} Marisa Guthrie, Interview Scenes Blur Focus of Showtime’s ‘Dirty Pictures,’ \textit{Boston Herald}, May 27, 2000, at 28.


\textsuperscript{58} Id.

\textsuperscript{59} Isabel Wilkerson, Jury Hears Passionate Arguments as Obscenity Trial Opens in Ohio, N.Y. \textit{Times}, Sept. 29, 1990, at Section 1, 8.
tor, Dennis Barrie, of obscenity charges in October 1990. After this high-profile victory, Sirkin told members of the news media that the Midwestern jury’s decision was a “a signal to everybody that before they start shutting down museums and telling people what they can say and what they can see, they better realize there is a protection out there, and it is the greatest document ever written.” Particularly impressive was the fact that the triumph came in a city nicknamed “Censornatti” for its prosecutors’ frequent attempts to target sexual expression. Given this reputation and proclivity for censorship, it is perhaps not surprising that Sirkin’s law firm, Sirkin, Pinales & Schwartz LLP, is headquartered in Cincinnati.

But Sirkin’s ties to Cincinnati run deeper than the location of his firm’s offices or the city’s affinity for suppressing free expression. Indeed, Sirkin was born in this city located on the banks of the Ohio River and just north of Kentucky, and he earned both his undergraduate and law degrees at the University of Cincinnati.

Sirkin’s home state also has kept him busy. He has represented Larry Flynt, one of the most famous figures in the adult entertainment industry, as well as other clients that range from nude dancing establishments to, in one case, a 32-year-old Ohio woman who sold homemade videos on the Internet that showed her having sex.

60. See Isabel Wilkerson, Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case, N.Y. TIMES, Oct. 6, 1990, at Section 1, 1 (reporting on jury’s acquittal of Contemporary Arts Center and its director, Dennis Barrie).

61. Id. (referring to decision as victory for Bill of Rights).


63. See id. (describing numerous prosecutions in Cincinnati for obscenity based crimes).


66. See generally Lawrence Budd, Deputy Chief Pleads Not Guilty, DAYTON DAILY NEWS (Ohio), Nov. 10, 2004, at B1 (describing Sirkin as lawyer from Cincinnati known for representing founder of Hustler magazine, Larry Flynt); Lawrence Budd, Many Hope to Hustle Flynt and His Store out of Town, DAYTON DAILY NEWS (Ohio), Dec. 20, 1999, at 1A (describing Sirkin as Flynt’s lawyer and noting Flynt’s long history of battles with Cincinnati’s “anti-pornography lobbyists”).

67. See generally Clay Calvert & Robert Richards, Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence, 9 COMMLAW CONSPECTUS 159 (2001) (profiling Flynt and including contents of in-depth interview conducted with him by authors in December 2000).

68. See, e.g., Nancy Bowman, Judge To Hear Total Xposure Case Today, DAYTON DAILY NEWS (Ohio), Aug. 12, 2003, at B3 (reporting Sirkin as defending club called “Total Xposure” in criminal case to declare it public nuisance).
with multiple partners. In the latter case, Sirkin successfully had the conviction reversed by the state appellate court. There is a virtual laundry list of Ohio state and federal court decisions that bear Sirkin’s name as the lead attorney defending adult entertainment businesses and/or their proprietors. He also has defended individuals involved in or connected with the most reprehensible forms of sexually explicit content: child pornography.

In this Article, Sirkin directs his comments and focus to the authors’ questions about the purpose of free speech under the First Amendment, censorship, obscenity law, and the current prosecutions of Extreme Associates and JM Productions. Before turning to the text of that interview, however, the Article first describes the interview setting, methodology, transcription, and editing processes.


72. See generally, e.g., Cam I, Inc. v. Louisville/Jefferson County Metro Gov’t, 460 F.3d 717 (6th Cir. 2006) (representing adult entertainment bookstores in challenge to adult entertainment ordinance); Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs., 411 F.3d 777 (6th Cir. 2005) (defending adult cabaret featuring clothed, semi-nude, and nude dancers in First and Fourteenth Amendment challenge to ordinance targeting secondary effects of sexually oriented businesses); Gateway Entr’l Corp. v. City of Garfield Heights, No. 96-3673, 1997 U.S. App. LEXIS 34116 (6th Cir. Nov. 25, 1997) (representing adult-oriented business that challenged, on First and Fourteenth Amendment grounds, zoning code of Ohio municipality).

73. See generally United States v. Wagers, 452 F.3d 534 (6th Cir. 2006) (involving unsuccessful appeal of man sentenced to 180 months in federal prison for receiving and possessing child pornography via Internet, and rejecting Sirkin’s arguments that affidavits supporting search warrants in case were not based on probable cause).
A. The Interview Setting, Recording, Transcription and Editing Processes

The interview took place on Friday, October 20, 2006, in Louis Sirkin’s office, located in the ninth-floor home of Sirkin, Pinales & Schwartz LLP in the Fourth & Race Tower at 105 West Fourth Street in downtown Cincinnati, Ohio. On the wall behind Mr. Sirkin’s desk is a framed poster featuring a black-and-white photograph of Dr. Martin Luther King, Jr., captured during his “I Have a Dream” speech during the March on Washington in August 1963. The photograph contains the following text: “The Bill of Rights guarantees freedom of speech. Otherwise, it might all have been a dream.” On his desk sits an over-sized marble paper weight, inscribed on which is another statement seemingly appropriate for a man who spends much of his working life defending the liberty of free speech: “He that would make his own liberty must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself. Thomas Paine, 1787.”

It is not just the free-speech and libertarian aphorisms that catch a visitor’s eye in Sirkin’s office. Abundant evidence of Sirkin’s love for his family and favorite baseball team, the hometown Reds, is displayed in the form of photographs of grandchildren and Reds’ memorabilia; also omnipresent are mementos from various court appearances and a framed achievement award presented to him in 2004 by the third-year class at his alma mater, the University of Cincinnati College of Law. Sirkin, in fact, now teaches a course there on habeas corpus and post-conviction remedies.

The interview, which lasted nearly three hours, was recorded on audiotape with a table-top microphone placed on Sirkin’s desk. The authors transcribed the tapes later in October 2006 and then proofread the transcripts for typographical errors. The authors made a few minor changes in syntax but did not alter the substantive content or materially change the meaning of any of Sirkin’s statements. Some of Sirkin’s responses and answers were then reordered to reflect the themes and sections of this Article, and other portions of the interview were deleted as extraneous or redundant for the goals of this Article. Footnotes have been added, where relevant, to add details or to elucidate concepts and cases referenced during the interview. The authors retain the original audio record-

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ings and the printed transcripts of the interview with H. Louis Sirkin.

For purposes of full disclosure and the preservation of objectivity, the authors wish to emphasize several points. To begin, neither of the Article’s authors had met Sirkin prior to the interview. In addition, Sirkin did not preview the specific questions he would be asked, which the authors hoped would allow for greater spontaneity of response. Moreover, Sirkin reviewed neither the raw transcript from his interview, nor any drafts of this Article.

B. The Interview

This part of the Article is divided into three sections, each pivoting on particular themes and topics and providing Sirkin’s answers to questions on those subjects. In particular, Section 1 is foundational, focusing on Sirkin’s opinions and viewpoints about the purpose of free speech under the First Amendment and why it should protect adult content in particular. During this discussion he also addresses the general subject of censorship and First Amendment principles such as viewpoint neutrality.

Building on this foundation, Section 2 concentrates on Rob Black and includes Sirkin’s very candid and frank views on the adult entertainment industry’s lack of support for Black’s content and his obscenity case. This section also presents Sirkin’s remarks about the prosecution in United States v. Extreme Associates, as well as his comments on the motives for such prosecutions and the general climate of censorship of sexually explicit matter. Sirkin makes it clear in Section 2 that, in his mind, Rob Black is a modern-day Lenny Bruce, pushing and testing society’s views of free speech through challenging content.

Next, Section 3 explores Sirkin’s opinions about obscenity law in the United States and includes his views on the three-part test articulated by the U.S. Supreme Court more than 30 years ago in Miller v. California, as well as the strategies and tactics Sirkin employs in obscenity trials and the jury selection process. His comments in Section 3 also touch on the obscenity prosecution of the Mapplethorpe photographs in Cincinnati. Importantly, the third section describes the linchpin for Sirkin’s initial argument before


76. 413 U.S. 15 (1973) (establishing three-pronged test to determine obscenity). For a further discussion of the Court’s three-part test for obscenity developed in Miller, see supra note 6.
Judge Lancaster – the United States Supreme Court’s groundbreaking 2003 opinion in Lawrence v. Texas.

Each of the three sections of the interview is set forth in a question-and-answer format.

1. The First Amendment, Free Speech & Protection of Adult Content

In this foundational section, Louis Sirkin discusses several issues. To begin, he explains his near absolutist position on the meaning of free speech, as well as his beliefs about why the First Amendment should protect adult entertainment. In the process, he also begins to reveal his passionate displeasure with the adult industry’s general lack of support for Rob Black, a topic discussed in much more detail in Section 2. Other topics addressed in Section 1 include viewpoint neutrality, our society’s seemingly ceaseless obsession with censorship of sexual content, and the notion that censorship is like cancer.

QUESTION:
What, in your opinion, is the primary purpose or goal of free speech as it is protected under the First Amendment?

ANSWER:
I think the picture on my wall explains it all. It’s a photograph of Martin Luther King, Jr. addressing a crowd in Washington, with the inscription, “The Bill of Rights guarantees freedom of speech; otherwise, it might all have been a dream.”

To me, it’s the foundation of democracy: the ability to speak and to engage in expressive conduct. It should never be infringed upon.

QUESTION:
Would you, then, consider yourself an absolutist in terms of the First Amendment?77

ANSWER:
I consider myself an absolutist. I would give some qualification, as I have some concern about where to draw the line when it relates to child pornography. I don’t know if I’m influenced because of the political overtones related to it, but once something is in print, it’s in print. I think that people, individually, should have the right to decide for themselves what they want to censor. How-

ever, anything that in any way encourages the creation of child pornography is something that I'm still struggling with.

QUESTION:
Would you thus draw a distinction between the production of child pornography versus the possession of it?

ANSWER:
Yes. Those who produce it certainly should be prosecuted, and it's clearly a crime – no ands, ifs, or buts about it. Just as I believe anything that is non-consensual in filmmaking, except for actual footage in wars and things like that, should be prohibited.

QUESTION:
Why should the First Amendment protect adult entertainment and sexually explicit content?

ANSWER:
As I often have said, protecting sexually explicit content under the First Amendment is the battlefield for free speech. It's the area for people who have taken on the position of being soldiers willing to fight the battle. I believe it's important that sexual expression be out there and that the people producing it be protected because they really are the freedom fighters. The political people hush up; they don't take the positive position that expression should be protected. Indirectly, it helps that sexual content is part of the battle because the spin-offs are the Martin Luther Kings of the world.

QUESTION:
When you mention those “freedom fighters,” are you talking about people like Larry Flynt?

ANSWER:
Yes, I'm thinking about Larry. I even put Rob Black in that class. I know that a lot of people in the adult industry are trying to shove him out, which I find interesting. I often have said that there is a line of division in these things. Everybody has something they don't like – that's what the First Amendment really is all about: protecting material that individuals, on their own, don't like. I'm surprised that people who have taken advantage of anti-censorship movements and who have been protected by that are now willing to impose censorship on someone like Rob Black or even Max Hardcore. I'm surprised by it, and I think they need to reevaluate their positions.
QUESTION:
Why do you think that is? Do they only want to protect more mainstream content?

ANSWER:
The only thing I can think of is that it is political. They're trying to protect themselves in their own economic way. I don't believe it's to protect their artistic expression. I think it's to protect themselves.

QUESTION:
Is it important for the First Amendment to be a viewpoint-neutral document?78

ANSWER:
It is really important. Every side should have its right to speak. We should allow people the right to speak, whether I like it or not. There's a difference between inflicting harm on somebody or burning their house down and expressive speech. Expressive speech is important. The answer to speech is let me speak louder.79

Let's put it all on the table, then you can walk away and take from it what you want. The only way you're going to do that is to be viewpoint neutral. I would hope that if an American Nazi came in here wanting to be represented, I would say, "I hate your guts, but I'll defend you because I believe in the principle."

My idol is David Goldberger, who represented the American Nazi Party in Skokie.80 I have developed a friendship with David as

78. See DONALD E. LIVELY et al., FIRST AMENDMENT LAW: CASES, COMPARATIVE PERSPECTIVES, AND DIALOGUES 56 (2003) (discussing effects of Supreme Court's "content-neutrality requirement" in context of First Amendment jurisprudence). The authors make clear that "government may not restrict speech simply because it dislikes speech on a particular subject or, even more egregiously, disagrees with the speaker's viewpoint on that subject." Id. (emphasis added). For instance, the United States Supreme Court has held that mandatory student fee assessment at public universities must be disbursed to student groups on a viewpoint-neutral basis. See Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 221 (2000) (holding First Amendment allows public university to charge its students activity fees for purpose of funding programs that facilitate extracurricular student speech, so long as programs are "viewpoint neutral").

79. This response suggests that Mr. Sirkin is a believer in the "counterspeech doctrine" under which the preferred remedy for speech with which we disagree is not censorship but is, instead, "to add more speech to the metaphorical marketplace of ideas." Robert D. Richards & Clay Calvert, COUNTERSPEECH 2000: A NEW LOOK AT THE OLD REMEDY FOR "BAD" SPEECH, 2000 BYU L. REV. 553, 554 (2000).

80. See generally Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978) (identifying Goldberger as counsel for National Socialist Party of America, also known as American Nazi Party, and ten individual members of that organization when municipality sought to restrict their rights to demonstrate and display swastika).
a professional colleague. He really defended his belief in the First Amendment. I admire that because he took a lot of flak for that. That's my idol because that's what we're supposed to do.

QUESTION:
Why are we so obsessed with regulating sexual content when there are so many larger issues to occupy our attention?

ANSWER:
It's power – it gives control over that secret part of everybody's life. It gives us something to say and gives us justification as to why we're engaged in all these things. It's all related to the sexual wars.

QUESTION:
In an interview we conducted in July at his home in Altadena, California, Max Hardcore stated, "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." Do you agree with that assessment?

ANSWER:
Yes, I do. The 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.

QUESTION:
In a May 2004 article published in Reason magazine that focused on the prosecution of Extreme Associates, you were quoted as stating, "I consider censorship a cancer. Once it starts, it spreads pretty rapidly." Can you please elaborate a little bit on what you meant?

ANSWER:
Like the worst forms of cancer, censorship spreads to freedom of thought and liberty. It will quickly dilapidate what we really believe in.

81. This references the fact that the San Fernando Valley is "known to some as Porn Valley since it is home to most of the nation's pornography industry." Brad A. Greenberg, Frisky Kitty Battle Lands in Judge's Lap, DAILY NEWS (L.A.), July 17, 2006, at N1. By some estimates, "[a]s many as a thousand women arrive annually in the San Fernando Valley to perform in the industry's 13,000 movies." Dave Gardetta, The Teenager & the Porn Star, L.A. MAC., Nov. 2006, at 152, 154.

82. See infra p. 346 (quoting Max Hardcore in interview with authors).

83. See Beato, supra note 24, at 33 (quoting Sirkin's comments during presentation at Adult Entertainment Expo).
Let’s face it, the original American founders were really rather debauched people. We see, as generations go on and on, the number of children out there by former presidents of the United States.\textsuperscript{84} Now, with the Internet, in the comfort of my private arena, I can be anything I want to be online. I can bullshit in whatever way I want until I cross the magic line and become a criminal. The most inner thoughts now get expressed, and people get punished for them.

2. \textit{Rob Black and the Prosecution of Extreme Associates}

In this section, H. Louis Sirkin first addresses what he perceives as the motives for the government’s prosecution of Rob Black and Extreme Associates. In the process of defending Black’s content, Sirkin criticizes in no uncertain terms those individuals in the adult industry who would attempt to draw lines and distinctions between their own content and that of Black and Extreme Associates. Sirkin also lauds the district court opinion of Judge Gary Lancaster in \textit{United States v. Extreme Associates}, contends that “Rob Black is what Lenny Bruce was in 1960,” and makes it clear that his defense of Black is not about money or income but rather the larger principle of defending free speech.

**QUESTION:**
What motivates today the prosecution of Rob Black by the federal government?

**ANSWER:**
It’s political. It fulfills a political promise and an agenda. Why should the federal government really give a damn about whether I watch a Rob Black movie? What’s really interesting is that the movie they have criticized the most — \textit{Forced Entry}\textsuperscript{85} — actually has a story. It’s a combination of \textit{Texas Chainsaw Massacre} and a part reminiscent of \textit{The Best Little Whorehouse in Texas} with Rob playing the reporter’s role.\textsuperscript{86} It has a theme and a story. Sure, it has violence

\textsuperscript{84} For instance, former President Thomas Jefferson “has fallen deeply out of fashion, suspect as the slave-holding country squire and sexual exploiter of the much younger Sally Hemings, the bondswoman and mistress who bore him children.” Tim Rutten, \textit{In Jefferson’s Letters, a Man, Not a Myth}, \textit{L.A. Times}, May 31, 2006, at E1 (book review).

\textsuperscript{85} See Harris, supra note 38 (describing \textit{Forced Entry} as “film that centers on graphic rape and murder.”).

\textsuperscript{86} The musical \textit{The Best Little Whorehouse in Texas} has been described by one reviewer as:

[A] cute, silly show, full of cartoonish caricatures, bawdy shenanigans, and playful jabs at political hypocrisy, based on the real-life Chicken Ranch in La Grange, Texas.

and it connects sex and violence, but we’ve had that on film for years. I really don’t know why they picked that movie, but they did. It became easy. Rob had a big mouth and he challenged them, saying “Come get me.”

QUESTION: You’re talking about the PBS Frontline documentary American Porn87 about the adult industry, right?

ANSWER:

Yes. It goes to show how deceptive broadcasting has become. They lured him into it by letting him think they were going to do an objective, neutral story, but they never do. That’s why I won’t let clients talk to 20/20 or any of those programs unless they allow us some editorial rights because God only knows what way they’re going to present it.

So the government thought this was going to be an easy case, but they didn’t realize that we were going to raise a legitimate Law-rence issue. We had a judge who was willing to listen to it.89 The tragedy of it is that poor Judge Lancaster is taking a lot of crap for it.

QUESTION:

How much moxie does it take for a judge based in Pittsburgh to throw out the federal obscenity charges?

Fondly described in the show as a “li’l ole bitty pissant country place,” it operated with the congenial acceptance of local authorities until a TV reporter from Houston ran a weeklong expose, hinting at organized crime and stirring up a media frenzy. Public pressure forced the governor to close it down.

Karen Campbell, Ann-Margret’s a Trouper, but Some Fatigue Shows, BOSTON GLOBE, Apr. 18, 2002, at D1; see also Alvin Klein, A Scintillating Whorehouse,” N.Y. TIMES, Sept. 9, 1984, at Section NJ, 19 (reviewing musical Best Little Whorehouse in Texas and noting that house of ill-repute at center of play is done in, partly, by “an obnoxious television news reporter”).


88. See Harris, supra note 38 (writing that production of Extreme Associates’ movie Forced Entry was shown on PBS’ Frontline documentary, “American Porn”). The documentary showed the Frontline crew “leaving the porn set in disgust” and adding that “[w]ithin the porn industry, there’s no doubt that Extreme intended to rile the PBS crew and, by extension, [Attorney General John] Ashcroft’s crew.” Id.

ANSWER:

It takes a lot. I really admire him for doing it. It’s a very well written opinion. It’s going to be the law, but it may take a long time.

QUESTION:

In an interview we conducted in July in Malibu, California, John Stagliano stated that “[b]oth JM and Extreme were so far out and much stronger than what most other people are doing.” Is that the case — that their content is much stronger than what most other companies in the adult industry are doing — or is that inaccurate?

ANSWER:

To be candid, I’m not familiar with what everybody is making so it’s difficult for me to say. I don’t come across this stuff. I look at the AVN90 monthly, but I’m not familiar with all the content that’s out there.

But does it make any difference? Lenny Bruce kept saying “fuck you” 120 times.91 Is that different from saying it once or twice?

Sex is sex. Using toys is using toys. Anal sex is anal sex. Whether it’s semen being licked off the chest or there’s a device inside that catches it and looks like it’s coming out of the anal cavity, it is a movie.


91. Bruce was a comedian known for his “outspoken method of expressing his extreme views as to organized religion, sexual mores, [and] his frank use of four-letter words.” Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269, 1271 (S.D. N.Y. 1970). In 1964, a jury in Cook County, Illinois convicted Bruce of giving an obscene performance that, as the Supreme Court of Illinois wrote in tossing out the conviction, entailed the following:

[A] 55-minute monologue interspersed 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.

People v. Bruce, 202 N.E.2d 497, 497 (Ill. 1964). In grudgingly reversing the conviction, the Illinois high court wrote, “[w]hile we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes, we must concede that some of the topics commented on by defendant are of social importance.” Id. at 498.
What makes [Stagliano's] stuff any better in playing on the taboo than somebody else's stuff? I get critical of him. I would say to him, "Don't you censor when you don't want to be censored." That's like a dictator saying, "I'm a nice dictator because when I kill you, I'm going to give you a lethal injection, but I'm going to give you a shot of good scotch before I do it."

I have a great deal of respect for John, but he's wrong. If you're going to play the game, then you're going to play the game.

My rule is this: it has to be consensual and you don't harm anybody in making it. If you deliberately harm somebody and you force them to do it when they didn't want to do it, that is sexual assault.

QUESTION:

What about the appearance of someone being harmed in the film? Is that what the government tries to focus on with Rob Black?

ANSWER:

Sure. They try to, but it's no different than what you see in Texas Chainsaw Massacre. Those movies are horrendous in how realistic they try to make them. In the movie Jaws, think how realistic the bite off the leg looked. That's Hollywood and it's all an illusion.

QUESTION:

With respect to Rob Black, do you think there is a misconception about him out there? We did hear a lot of negative things about him during our interviews with industry people this summer. What would you like people to know about Rob Black?

ANSWER:

Rob Black is what Lenny Bruce was in 1960. Look now what we say about Lenny Bruce. Look how much some people in comedy

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92. See generally Glenn Lovell, The First Cut Was the Deepest; 'Chainsaw' Creator Cites '70s Mindset of Original Film, HOUSTON CHRON., Oct. 26, 2003, at Zest 10 (describing movie Texas Chainsaw Massacre as "a sinewy, seriously demented shocker" and noting that it "has become a genre touchstone: its macabre, at times slapstick humor and grisly set design (butcher-block wallpaper, bone-framed chairs) have influenced several monster hits including Seven and Silence of the Lambs").

93. See generally Vanity Fair Presents the 50 Greatest Films of All Time, VANITY FAIR, Sept. 2005, at 287 (nam ing Steven Spielberg-directed Jaws as one of top fifty films of all time and noting that failure of mechanical shark in shooting of movie "turned out to be a blessing, as it caused Steven Spielberg to shoot more scenes from the shark's point of view. Most audiences found the shark's-eye view much scarier than seeing the unconvincing robotic monster.").

94. See generally, e.g., RONALD K.L. COLLINS & DAVID M. SKOVER, THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON (2002) (providing compre-
and show business went to bat for Lenny Bruce, posthumously, to get his conviction pardoned. It’s just a matter of taste.

Rob says a lot of things. They all say a lot of things. I’d rather hear some of the things that Rob says than hear that someone is making $18 billion a year in this business. I don’t give a shit how much money you make in your industry. If you’re a good businessman, that’s wonderful – get yourself on the Fortune 500 list, if that means something to you.

If you tell me you’re fighting for a principle, then you’re fighting for a principle and you’re willing to take a sword. If you bleed, you bleed.

Rob is part of a family in the adult industry. To me, it’s entertainment designed and made for adults, and he’s part of that industry.

I think that, at times, Richard Pryor got offensive in talking about black people. I think, at times, some of the stuff that Saturday Night Live did on Chelsea Clinton was in poor taste. That doesn’t mean they’re not brilliant comics and don’t have the right to do it. It’s real easy: if I don’t like it, I turn off the set. That’s exactly what they can do.

hensive biography of Bruce’s life, including his legal battles with obscenity cases in Chicago and New York City and public opinion of Bruce).

95. See John Kifner, No Joke! 37 Years After Death Lenny Bruce Receives Pardon, N.Y. Times, Dec. 24, 2003, at A1 (describing Bruce as “the potty-mouthed wit who turned stand-up comedy into social commentary,” detailing his posthumous pardon in 2003 by New York Governor George E. Pataki “37 years after being convicted of obscenity for using bad words in a Greenwich Village nightclub act,” and noting “[a]dvocates of the First Amendment as well as his fellow comedians – who began a petition drive this year for the pardon – rejoiced at the turn of events”).

96. See generally Andrew Dansby, Dirty Mouth for a Dirty World, Houston Chron., Dec. 18, 2005, at Zest 4 (“Pryor’s LPs exploded with profanity and frank sexual chatter . . .”).

97. See Frank Rich, Public Stages: The Chelsea Show, N.Y. Times, Feb. 28, 1993, at Section A66 (“Only ‘Saturday Night Live’ has been rude, casting Julia Sweeney, who specializes in androgynous geeks, as Chelsea [Clinton, daughter of former President Bill Clinton and United States Senator Hillary Rodham Clinton (D. – N.Y.)] in a pre-inaugural sketch.”); see also J.E. Bourgoyne, Be Nice to Chelsea, Times-Picayune (New Orleans, La.), Feb. 11, 1993, at A29 (noting Chelsea Clinton had to “deal with such slight[s] as the recent ‘Wayne’s World’ sketch on ‘Saturday Night Live’ in which characters Garth and Wayne suggested the 13-year-old isn’t as attractive as Vice President Al Gore’s daughters”); Paige Wiser, Past Presidents’ Girls – On Their Own Terms, Chi. Sun-Times, June 15, 2004, at Features 44 (describing Chris Farley’s portrayal of Chelsea Clinton on Saturday Night Live). In a re-run of one particular episode, the show actually deleted the “Wayne’s World” sketch discussed above in which characters Garth and Wayne poked fun at Chelsea for not being as attractive as Vice President Al Gore’s daughters. See SNL Drops Chelsea Sketch in Re-run, Atlanta J., July 6, 1993, at A8 (noting absence of Chelsea sketch in re-run episodes of Saturday Night Live).
In that sense, I am really critical of the adult entertainment industry, and I would stand before them and say that. I don’t like it when they refer to themselves as pornographers because it has a bad taste to it.

When you’re making those kinds of dollars, you owe something back to the audience. People who have made the money – the John Staglianos – and who have been given the credit forget that, at one point in their careers, people said the same thing about them. They owe it to the Rob Blacks to say, “Okay. I may not buy it and I’m not going to encourage it, but I’m going to stand behind you.”

I’ve been really discouraged and disappointed in the adult industry in their treatment of Rob Black. I’m really upset with the adult industry because, as I have said, “You may not like what Rob Black has produced, you may not like what JM Productions has produced, but they’re taking the heat, and they’re on the forefront. If they collapse, then next it’s you.”

QUESTION:
Is it the lack of financial support or the comments made that upset you?

ANSWER:
I would feel better about the lack of financial support if they would not bad-mouth him. Who they’re hurting in not helping Rob with financial support, to be honest with you, is me – they’re hurting my law firm and my associates. They’re hurting a First Amendment lawyer who is devoted and committed to the principles.

I will candidly say that I think I’ve done more in a positive sense all around for the adult industry than any single lawyer has ever done. I took a case that nobody probably would have taken. Everybody said we couldn’t win the CPPA case. It became a major victory for both the adult industry and, certainly, for mainstream Hollywood without any recognition from them, other than an article that the CCV99 wrote that I’ll go down in history being in support of kiddie porn, which is the last thing in the world I support.


99. “CCV” refers to Citizens for Community Values, an organization founded in 1983 in Cincinnati by Jerry Kirk that recognizes “that sexually oriented businesses, pornography, obscenity, promiscuity, and sexual abuse threaten the moral fabric of our society” and that “takes seriously our call to expose the harms of pornography and unhealthy or destructive lifestyles.” Citizens for Community Val-
I look at it that way, in who they’re not supporting. I’ve been involved in the 2257 litigation\(^\text{100}\) and I did Mapplethorpe, which really brought serious censorship to light. And we did it professionally. We worked with the material that we had. Photographers throughout the world will tell you, “Well, look at that subject matter, it’s crap. Come on, what can be artistic about a fist up an ass or a bullwhip up an ass? What could be artistic about one guy urinating or, I think, really ejaculating, into the mouth of another man? What could be artistic about a guy’s nuts in a mousetrap?” Those were the pictures. We got away from the subject matter and said, “Look, photography is an art. It’s a single art and it’s the timing in the photograph that matters. It’s the quality of it. It’s the centering. It’s the lighting. That’s what’s brilliant about it – taking the picture at the precise moment.” That brought credibility to what we were defending.

I defended Pier Paolo Pasolini’s film, Sala: 120 Days of Sodom,\(^\text{101}\) here in Cincinnati.\(^\text{102}\) We didn’t get a lot of national attention. We kept it on the theme that this was a censorship issue. I didn’t go out there talking about money. We never talked about the money aspects of it. When I get out publicly talking about censorship, you

\(^\text{100}\) See Free Speech Coalition v. Gonzales, 406 F. Supp. 2d 1196, 1199 (D. Colo. 2005) (identifying Sarkin as one of plaintiffs’ attorneys in case seeking to enjoin enforcement of 18 U.S.C. § 2257, which imposes age-verification and record-keeping requirements on original producers and “secondary producers” of adult movies).

\(^\text{101}\) The movie was described in 2003 in Cleveland Scene as “one of the most notorious films ever made.” Strike Up the Banned, Cleveland Scene (Ohio), Sept. 17, 2003, available at http://www.clevescene.com/2003-09-17/calendar/strike-up-the-banned/ (reviewing Italian film Sala: The 120 Days of Sodom). The author also added the following comments about the film:

It’s also borderline reprehensible in its resetting of the Marquis de Sade’s novel in Fascist Italy. A group of teens is rounded up and shipped to a mansion, where they are subjected to the Circle of Obsessions (where they are raped and sodomized), the Circle of Shit (where they are forced to eat feces), and the Circle of Blood (where many are tortured to their deaths).

\(^\text{102}\) See Terry Lawson, Film Rental Spurs Charges In Cincinnati, Dayton Daily News (Ohio), July 1, 1994, at 2B (“The City of Cincinnati filed six separate charges of pandering obscenity against a Cincinnati gift shop, its owners, and two of its employees . . . for renting a vice officer a video of the 1975 Italian film Sala: The 120 Days of Sodom.”); see also Bill Sloat, Judge Views Italian Film, Will Rule on Obscenity Case, Plain Dealer (Cleveland, Ohio), Sept. 27, 1994, at 5B (quoting Sarkin’s argument during hearing in case that movie is “a depiction of how power corrupts and the abuses of power,” and noting that Sarkin “said the movie was no more obscene than ‘Schindler’s List’ or ‘The Pawnbroker,’ and was not as graphic as the ‘Friday the 13th’ horror films”).
don't hear me talking about how fifty million Americans want to read this stuff and want to look at it.

I want First Amendment lawyers to be involved in protecting the animal rights protesters, the war protesters, and whoever else is out there operating in a free-speech environment.

I think the adult industry – John Stagliano and a lot of those guys – need to be scolded because they’re afraid Rob Black brought heat on them. Bullshit. But for Black, it would be them. The government absolutely believes that anything that shows the human genitals is a problem.

Black took a lot of the heat off of gay producers because the government would be after them right and left. There’s the political balance scale on prosecuting them because the gay producers would start to scream, “You’re picking on us.” So they went after Rob Black.

I want the adult industry to accept the fact that I’m not in this for the bucks. Believe me, I’m not. It’s never been that economically rewarding. We’re struggling economically on the Black case. I’ve already gone through a petition for certiorari to the United States Supreme Court. This case faces trial and a great investment of time.

So, again, I say to those guys in the adult industry, “Guys, I’m the one getting screwed here. I’m out there fighting for you and you’re saying, ‘screw you’ – to me, not to Rob Black. In a sense, you’re saying ‘screw you’ to yourselves because it’s going to come back to haunt you.” It’s bullshit. They need to look in the mirror. They’re making the same kind of material that the right wing thinks is terrible. They’re putting that same stuff in the hotels in this country. Don’t tell me it’s any better. That’s like saying, “I’m a hired killer, but I do it painlessly. There’s not a lot of blood, and I smile while I’m doing it. I don’t use a cheap target gun; I use a sophisticated .357 magnum.”

I would like people to recognize the importance of the Rob Black case. It’s to make the world aware of the fact that the people who are out there making sexually explicit material in the industry are regular people. They’re mothers, fathers, and kids, too. They are people who don’t believe they are doing anything wrong. They should feel comfortable about themselves and who they are. In

general, I wish that's the way people would look at everybody I've met.

3. **Obscenity Law: Litigation, Strategies, and Tactics**

In this section, H. Louis Sirkin begins by expressing his opinion of the *Miller* test for obscenity. He then discusses how the *Miller* standard was applied and used in defending the Mapplethorpe photography exhibit in Cincinnati. In a major point of disagreement with another high-profile attorney who defends adult content, Paul Cambria, Sirkin makes it clear that he does not counsel or advise clients about what material to include or not include in movies in order to avoid a possible obscenity prosecution. As he puts it later in this section, "I don't get into that with them - it's for them to make their own decisions about what to put in a movie." Other topics discussed in this section include (1) the importance, when it comes to protecting the right of people to view sexually explicit content, of the United States Supreme Court's decision in *Lawrence v. Texas*; (2) forum shopping in obscenity cases; and (3) strategies and tactics in selecting juries in obscenity cases.

**QUESTION:**

In 1973, the United States Supreme Court in *Miller v. California* created a three-part test defining obscenity that is still in use today, more than thirty years later. What is your opinion about the usefulness and workability of the *Miller* test?

**ANSWER:**

I like the *Miller* test because I'm afraid of the alternative in the current political climate. If you would have asked me that question ten or fifteen years ago, my position might have been otherwise.

It certainly has been usable. It defended an art museum here in Cincinnati.

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105. For a further discussion on the test used to determine whether speech is obscene under the First Amendment, see supra note 6.

106. See generally Patti Hartigan, *Mapplethorpe's 'Chilling Effect,'* BOSTON GLOBE, Oct. 6, 1991, at 1 (writing that in October 1990, a jury unfamiliar with art museums "cleared the Contemporary Art Center [in Cincinnati] and its director, Dennis Barrie, of obscenity and child pornography charges for exhibiting photographs by the late Robert Mapplethorpe").
Ultimately, though, I agree with the position that Justice [Douglas] 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. If you logically look at Miller, nothing really would ever violate it, but I don’t think it’s ever been looked at logically. It’s been misused and misinterpreted over the years by those who want to take advantage of it. On the other hand, it has provided a degree of protection, and I’m afraid of the alternative.

QUESTION:
If you had your druthers, would you scrap it altogether?

ANSWER:
If I had my druthers, I would scrap it and go back to what the framers really said – no law means no law.

QUESTION:
You brought up the Contemporary Arts Center and the Mapplethorpe case here in Cincinnati. Can you please discuss the difference in strategies and tactics you might use in defending a case like the one involving the photographs of Robert Mapplethorpe and the Contemporary Arts Center compared to defending the videos of Rob Black and JM Productions?

ANSWER:
First, we were defending a recognized arts center that was accredited by the American Association of Museums. To the intellectual world, the work, in essence, was not anything that was prohibited. People were out there in support of it, and the ability to get expert witnesses from the art world was no problem.

107. See Miller, 413 U.S. at 37 (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and conically has failed."). Justice Douglas added that "[o]bscenity – which even we cannot define with precision – is a hodgepodge. 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." Id. at 43-44 (Douglas, J., dissenting).

108. For a further discussion of the Mapplethorpe case, see supra notes 54-65 and accompanying text.

109. See American Association of Museums, http://www.aam-us.org/aboutaam/index.cfm (last visited Feb. 20, 2007) (describing purpose of American Association of Museums and noting that it represents the "entire scope of museums and professionals and nonpaid staff who work for and with museums").
QUESTION:
So, you are saying you could prove serious artistic value?

ANSWER:
Right. It fit into that prong of Miller, but I also felt that none of the photographs that were charged really fit into the appeal to prurient interests prong.110 Certainly, today, some of the photographs would still be controversial. What most people don’t realize is that a lot of the Mapplethorpe photographs – particularly in the prosecution here in Cincinnati – had racial overtones and certainly blended into the homophobia that exists in this particular community. That’s why they thought it was the ideal place to bring this charge. What they didn’t realize is that this community still has some commitment to the artistic world.

QUESTION:
What did those jurors say after the trial ended?

ANSWER:
They really went with the idea that it had serious artistic value and that it had a message. Certainly the photography was artistic. The jury had no problem at all with the artistic value – it was an eight-person jury and I think the vote was seven to one for acquittal on the obscenity charge right away. The evidence was just overwhelming as to the serious artistic value. The one juror that initially had said that he would vote for guilty changed pretty quickly.

But the big change came over the years in the attitude about the two photographs of the two children. There were two photos that the museum was charged with disseminating or displaying sexually explicit material of minors. The jury had absolutely no problem finding those pictures to be innocent pictures of the kids and voted not guilty immediately on the first vote. Years later, when we went up to meet with the cast and crew filming Dirty Pictures111 in Canada, they were saying how they were shocked by the two pictures of the children. To show the difference between 1990 and 2000, when the film was being made, and the attitude and the propaganda that’s really come up during the course of the Bush Admin-

110. For a further discussion on the three prongs of the Miller test used for obscenity, see supra note 6.

111. See Tom Shales, ‘Pictures’: Worth a Thousand Words, WASH. POST, May 27, 2000, at C1 (critiquing 2000 Showtime movie, starring James Woods and concerning notorious photographs by Robert Mapplethorpe). Shales described the movie as “gripping, provocative, alarming and – though the word can be off-putting when applied to movies – important, one of the best films ever to premiere on the Showtime network.” Id.
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Obstruction is just incredible. These pictures were innocent pictures of children – in no way were they designed to appeal to anybody’s prurient interests. But how much fear has been instilled in people today is the amazing thing to me.

QUESTION:

Do you expect more obscenity prosecutions in the last couple of years of the Bush Administration?

ANSWER:

Well, they keep threatening them. They’ve been saying it over and over again since the Bush Administration took office. Then they said they got stalled because of 9-11. Now, they’ve put a bunch of people in an obscenity task force unit again. They keep threatening that they will bring prosecutions. The only ones I’ve seen are the Extreme Associates case and the new one down in Arizona against Five Star and JM Productions. I also know that they executed a search warrant on Max [Hardcore] over a year ago, but nothing has evolved from that yet.

QUESTION:

People often discuss the Cambria list when it comes to things not to put in a movie or on a box cover in order to avoid an obscenity prosecution. Do you have your own list of items about what to avoid in producing adult entertainment?

ANSWER:


113. See Max Hardcore Raided by Feds in Obscenity Probe, http://www.free speechcoalition.com/MaxRaid.htm (last visited Feb. 20, 2007) ("Federal law enforcement officers acting on behalf of The Child Exploitation and Obscenity Section (CÉOS) of the U.S. Department of Justice (DoJ) conducted a raid today on Max Hardcore’s studio, Max World Entertainment, in an obscenity probe targeting five specific adult-oriented titles, all of which were seized.").

114. See, e.g., 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, 163-64 (2004) (describing Cambria list, which takes its name from adult industry attorney Paul Cambria, as listing certain items in adult movies that are likely to attract attention of prosecutors); see also Tristan Taormino, Panic in Pornville, VILLAGE VOICE, Feb. 20, 2001, at 146 (describing development and evolution of Cambria list and noting that at least one version of it admonishes self-censorship in adult industry, with advice about what not to include on box covers and in movie content, including: "[n]o shots with the appearance of pain or degradation. No blindfolds. No wax dripping. No bondage or bondage-type toys or gear unless very light. No forced sex, rape themes, etc.").
I don't get into that with them -- it's for them to make their own decisions about what to put in a movie. I'm a First Amendment lawyer and when they make their decisions and have a problem, then we'll defend it. I won't criticize anybody else's material.

Paul [Cambria] is a very dear friend of mine, and he's been very outspoken about what he doesn't like and what he prefers not to defend. He has publicly said, in the lead article in the Vanderbilt Law Review that was written about him, that he wouldn't represent Extreme Associates. That troubles me. We're First Amendment lawyers and we don't pick the material. I'm not a censor, and I don't believe in censorship. You either believe in it or you don't.

Producers of adult materials get frustrated when they come to us and ask, "How do we avoid getting in trouble?" The only answer is, "Censor yourself -- don't go in the business. If you're in this business, you take that risk." When I get calls about avoiding problems, I tell them that if they're really serious about avoiding it, just don't get in the water.

QUESTION:

Do you expect more of the type of forum shopping that government does in these types of cases?

ANSWER:

Yes. They always have done that and they always will. I think they chose Pittsburgh in the Extreme Associates case because of the cooperation of the U.S. Attorney there. It was an opportunity for her -- a very charming lady, probably a very competent lawyer, and she argued in the Third Circuit.

But the issue that was really involved in that case provided a tough hurdle for us. We know what the Supreme Court had said, and there's a general philosophy, that courts should not declare laws unconstitutional if they can avoid it. If we go to trial in Extreme Associates and there's an acquittal, the court never really has to face our substantive argument. And that will be recurring later on.

I also think Pittsburgh was chosen to take advantage of the fact that it has a female U.S. attorney, believing that would give them an

115. See Calvert & Richards, supra note 114, at 154, 158 (quoting Cambria as stating that "Mr. Black had contacted me to represent him initially, but I declined and referred it to Lou Sirkin, who was the fellow who defended the Mapplethorpe case."). Cambria also noted that Rob Black is "a good friend of mine," adding that Cambria doesn't think that "guys like Rob Black and Extreme Associates are the ones that should be fighting the battle of free speech in the adult fields." Id.

116. The U.S. Attorney involved in the Extreme Associates case was Mary Beth Buchanan. For a further discussion of Mary Beth Buchanan's role in this case, see supra notes 28--29 and accompanying text.
edge. What they don’t realize is that I have the most talented young female attorney in the country – Jennifer Kinsley – who’s my associate and no one can match her.  

QUESTION: 

Can you please explain the importance, in your mind, of the United States Supreme Court’s decision in Lawrence v. Texas when it comes to protecting the right of consenting adults to view sexually explicit content?

ANSWER: 

I think the laws that ban the right to view sexually explicit content really have been based upon morality. I don’t think there is anything other than anecdotal evidence that ever has shown a correlation with anti-social behaviors as a result of viewing sexually explicit material. When you go back and look at Paris Adult Theatre v. Slaton and what the Court talks about, the only justification is they just know it’s not decent.

My analysis, going back to the historical development of obscenity law, is that the Supreme Court – back in 1957 in Roth v. United States – really and truthfully believed the concept, in the first prong, that the average male will look at this material, get an erection, and masturbate. And Roth was pre-Kinsey. The overwhelming belief was that masturbation was sinful, shameful, and was going to make you blind. I really think that, if the Kinsey Report had been finished, the outcome might have been different. I think the only justifications are morality and decency, and I believe that Lawrence clearly discusses how morality and decency are evolving terms that change over time. That’s the significance of that case.

We’ve come to a day when the clash that really seems to exist in this country today is individualism versus this collective idea that “We know what’s best for you.” When it comes to that, the sexual

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118. 413 U.S. 49, 68 (1973) (finding that obscene material is not protected by First Amendment and that obscene materials do not receive constitutional immunity from regulation on mere basis that they are shown only to consenting adults).

119. 354 U.S. 476, 485 (1957) (holding that obscenity is not constitutionally protected speech or press).

120. This is in apparent reference to the work of Alfred Kinsey, who issued a number of different reports on sex and sexuality. See generally The Kinsey Institute: Data from Alfred Kinsey's Studies, http://www.kinseyinstitute.org/research/ak-data.html (last visited Feb. 20, 2007) (detailing sex research conducted by Kinsey between 1948 and 1953).
choices have evolved, starting with *Griswold v. Connecticut*.[121] Sex now is not looked at as something that’s just for procreation. It’s entertainment, it’s enjoyable, it’s fulfilling, and it creates intimacy. We’ve evolved to this point. *Lawrence v. Texas* clearly says that morality is not justification for laws.[122]

The other important point about *Lawrence* was the fact that the Court was so willing, within a 20-year span, to revisit the issue after *Bowers v. Hardwick*.[123] I thought that was amazing to show the evolvement again. It seems like we’ve had these conflicting things, bombarding each other. The Court is really evolving while the Administration is going the other way. Now the concern is, although we still feel a little secure with a five-person majority on the Court, that [John Paul] Stevens isn’t a kid anymore.[124] Hopefully, he can hang in there. The important Justice right now is [Stephen] Breyer for the future.[125] He has to be the swing vote.

**QUESTION:**

Did you test out the privacy and substantive due process argument prior to the argument before Judge Lancaster?

**ANSWER:**

I started developing that argument in 1982 and 1983.

Scott Nazarine wrote the motion for *Extreme Associates* when he was a third-year law student in 2003. We lost him for a year when he was a clerk to a U.S. district judge court in Louisiana, but we got him back.

Earlier, however, not under substantive due process but under substantive rights of privacy, I did the same development, starting

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121. 381 U.S. 479, 486 (1965) (recognizing that state law banning both use of contraception and counseling about its use violates historic right to privacy in marital relationship).

122. See 539 U.S. 558, 577 (2003) (holding government may not use morality as legitimate state interest to justify prohibiting particular conduct).

123. 478 U.S. 186, 188 (1986) (upholding Georgia state anti-sodomy statute). The statute in question provided, in relevant part, that “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” *Id.*


125. Today, Justice Anthony M. Kennedy is often considered the pivotal swing vote on the nation’s high court. See *id.* at 13 (writing that “this year [2006], with O'Connor's retirement, Kennedy stood alone in deciding the outcomes in the most divisive cases”). Justice Breyer, together with Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg, is sometimes thought of as being part of “a fairly solid liberal bloc.” Eric Black, *Analysis; 4 Conservatives, 4 Liberals, and Justice Kennedy*, STAR TRIB. (Minneapolis, Minn.), Jan. 14, 2006, at 1A.
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with *Griswold* up through *Roe v. Wade*. I wasn’t as reluctant then to use and mention *Roe v. Wade* as I am in this climate, but the argument that we’ve gone to is a zone of privacy.

The whole idea of *Stanley v. Georgia* had nothing to do with allowing you the freedom of your ideas and all that; it was simply that your home is your castle. *Griswold* really was that too, dealing with privacy in your bedroom. Then, it evolved into the idea that the rights shouldn’t just be for married women, but unmarried women also should have those same privacy rights to make family planning. And then the big jump came in *Roe* because it was a privacy right to control and make determinations about your own body, even though it wasn’t going to be performed in your home. You were going to go to a clinic, so the right moved with you. So when I argued, I talked about a zone of privacy that surrounds us and moves with us.


Fortunately, because of computers, everything is now so easily saved. I was trying a lot of Texas cases in that time when we were really raising it. When *Lawrence* came and when I got that “Freedom Isn’t Free Award” from the Free Speech Coalition in June 2003, in accepting it, I said, “The future is *Lawrence v. Texas*. This is where we have to go – we have to leave the First Amendment argument and take off on substantive due process.”

We tried it here on a Max Hardcore case, but the judge felt compelled not to do it. Then we used it in Pittsburgh.

**QUESTION:**

When you say substantive due process, are you speaking about a right of privacy within substantive due process?

**ANSWER:**

It’s the idea of liberty of choices that I’m allowed to make. One is this basic dealing with human sexuality – I should be allowed to get turned on, and I should be allowed to pick what turns me on.

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128. *See id.* at 559 (holding that First and Fourteenth Amendments protect right to private possession of obscene materials in home).

Look, if I can masturbate with my right or left hand, I should certainly be able to go out and buy a vibrator to do the same thing. I should be able to go out and buy something that appears to look like a penis or a vagina. I should be able to use those things to self indulge. It’s a private decision for me as an individual – as a citizen in a free society. It’s a basic freedom to be comfortable with my own decisions – that I’m not a freak and I should be able to go out and do these things.

I should be able to watch a sexually explicit movie for whatever reason I want. If I want to get an erection from it and I want to screw my wife or boyfriend or girlfriend, I should be able to do it, just as I should be able to take Viagra. If I can buy Viagra to get an erection, why can’t I do these other things? It doesn’t make sense.

**QUESTION:**

Is the zone of privacy argument something you use with juries?

**ANSWER:**

We do so indirectly. What I try to do with juries is emphasize the idea that, number one, logic tells you that the average person in any community in America has a healthy interest in sex. If I watch a sexually explicit video – no matter what the content – and it turns me on and I have a normal sexual reaction to it, either by masturbating or screwing my partner, there is nothing wrong with it – nothing unhealthy or morbid.

Some of the movies, to me, would not turn on anybody in any community and therefore, theoretically, do not appeal to any sexual interest. Thus, it misses the first prong, right off the bat.¹³⁰

For years and years, that’s how we tried these cases. We got into that struggle. As the courts became conservative, they’re not giving us that leeway. I say, “It’s if the average person, applying contemporary community standards, would find that the material, taken as a whole, would appeal to a prurient – morbid and shameful – interest. That’s the average person of this community.” What really furthers it is if it’s fetish material; then it’s got to be to the morbid and shameful interest of the average member of that fetish group. Therefore, it has to cause them to do something shameful.

I come from the era of sexology that says, “Whatever consenting adults do that doesn’t hurt each other is fair game, healthy and there’s nothing wrong with it.” Unless you believe in a Chris-

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¹³⁰ This assertion is in reference to the first prong of the three-prong *Miller* test. For a further discussion of the *Miller* test, see *supra* note 6 and accompanying text.
tian philosophy that says there’s a devil in us — even in Judaism, there’s the dybbuk — that stirs this morbid and shameful thing inside of us, you’ve got to accept that this is healthy. Except for fundamentalists, I really don’t think people fully believe the devil-made-me-do-it concept. Therefore, logically, nothing is really obscene.

Young lawyers shy away from the first prong and instead focus on the third prong of Miller.

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.

QUESTION:

Can you please tell us a little bit about what you look for in potential jurors in obscenity cases and the types of questions you commonly ask in voir dire?

ANSWER:

We’ve gone through cycles with that. I will preface my response with the fact that it’s getting more and more difficult in federal courts to have the input of the lawyer. Many federal judges have taken over the questioning. The federal rule says the court may allow the attorneys to follow up with questions. Many courts will not allow the lawyers to directly question the jurors. We can submit questions, but the judges have the power to either ask them or not. Of course, you don’t get the same follow-up if you have to submit the questions. It’s made a big change in jury selection over the past twenty or twenty-five years.

First, what you try to do is let potential jurors know what they’re going to see and that they’re not to judge this on their first gut reaction to it. We also say to them, “Look, the mere fact that it’s sexually explicit or contains sexual activity doesn’t mean that it violates the law. Terms like ‘pornography’ have nothing to do with this case. It’s whether the material is obscene.”

Unlike any other case they would potentially hear, not only must the jurors make a determination of whether a person did “A” and violated the law, but they also must make a decision on whether the law, in fact, was violated. In other words, they first have to determine whether the material was obscene. If it’s not obscene, the case is over.
They are going to be given instructions that tell them how obscenity is defined. When courts allow me to do it, I try to tell them:

The definition of obscenity has ingredients to it. It's just like making an apple pie. There are certain ingredients that go into it and if I'm missing something — if I don't use apples — you can call it whatever you want, but it ain't it. If it's missing one of the ingredients that the court will instruct you on, it's not obscene.

We do that with the example of obscenity law.

Sometimes we're fortunate enough to have the trial court, before voir dire starts, give the Miller definition of obscenity — the three-prong test.131 Then, we can refer to it, but often they won't do it because they feel it's not appropriate to give instructions on the law yet, even as a preliminary matter. In those cases, we'll tell the jury that the court will later instruct them about the Miller test, which has three parts, but we won't get further into it.

We also try to educate them by saying, "Your duty here is not to tell us what your community standards are; you are to apply contemporary community standards to at least two parts of the test. You are not to determine that; you are to find it." This is one of the constant arguments we have in these cases. I know that courts have said that prosecutors don't have to put on any evidence of what contemporary community standards are. I believe they do. I believe the jury needs to have something to go to other than what their experience is. It's not just a matter of common sense. We tell them, "You don't go around asking your neighbors, 'What do you think is shameful to do sexually? What will you watch?'")

We tell them that this case is going to involve that which is the most innermost of their thoughts and fantasies that we very seldom ever talk about, and they're going to have to sit there and openly discuss this material at the end of the case. We say, "You have to judge the material as a whole and you've got to give an absolute commitment that you will watch the video or the movie from beginning to end. If you will not do that, then you cannot sit here because you have to take the work as a whole." Judges have been really good with that if a juror says, "I won't."

The judge tells them that they are going to see a variety of sexual activity. Most people say, "I can watch all that," except when you say, "You're going to see men doing it with men." Then, the

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131. For a further discussion of the Miller three-prong obscenity test, see supra note 6 and accompanying text.
guys will say, "Wait a minute." So we make sure they know what they will see.

I always try to educate them that this material is for entertainment. It's out there. The mere fact that it is sexually explicit doesn't mean it's against the law. This is part of the adult entertainment industry. Everybody has different views on that. Again, you didn't pick this out – they picked it out. This also isn't the environment for which this material was made; it was something made to watch privately. We start, at this point, to kick in the idea that, at least in this country, it is a matter of choice and decisions. That's the whole political environment.

Then, we want to find out how many have seen sexually explicit material. When I first started doing this in the seventies here, people were very reluctant to raise their hands. The few that did would always try to justify it by saying, "I saw it when I was in the army" or "I saw it at a stag."

When we got into the eighties, especially the late eighties, people were starting to say, "You know, we saw it. We were curious about it. We were at a card party and somebody suggested we watch it." They were very relaxed and un-reluctant to raise their hands and start the dialogue. Some of the stuff that came out was wonderful because somebody would say, "Let me ask you a question: Are there kids in this?" No. "Is he in this?" No. "Did anybody force anybody to watch it?" No. "Then, what are we doing here?" Boy, that's great when you can get that. We're still getting a little bit of that, but people again are afraid to be open about it.

We know the estimates are that fifty million people have viewed sexually explicit material in this country. Recently, in a case in New Castle, Kentucky, more people did raise their hands than I had seen for a while in the last couple of years. But overall, I'm beginning to see the reluctance of the people to raise their hands and to hear people again giving justifications for having seen it.

We also ask how many have computers at home and how many have surfed the Web and seen things pop up. It's a little more difficult today.

What I have discovered is that women are more easily accepting of bodily activities than men. My big thing, when I first starting doing this, was showing ejaculation, particularly ejaculation on a woman's face. But one of the psychologists we used in a case started teasing me about that and told me that I have to watch it and keep watching it until I become comfortable. That was a woman psychologist! She said, "Look, it's just a bodily function." Wo-
men are used to changing diapers and that sort of thing. They have a higher comfort level with bodily functions.

I tried a case in Cincinnati in 1985 or 1986, and I had seven women and one male on the jury. They ranged in age from 21 to 55. That jury was out twenty minutes before coming back with an acquittal. I didn’t use any experts. It was six sexually explicit videos, five of which we were only able to get two hung juries on in Butler County where we used experts. Here in Cincinnati, we didn’t use any experts. I was beaming that day as they came back with the acquittal.

Somewhere along the line we’ve lost this ability – and it’s why I get mad at the adult industry saying Rob Black has crossed the line – to tolerate things we don’t like. People are going to have different strokes for different folks. As long as it’s consensual and it doesn’t hurt anybody in the making of it or viewing of it, it’s nobody’s business. And I should defend it. That’s what I try to convey to a jury. I want people who are willing to accept that.

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.”

No matter what I like in entertainment and what other people like in entertainment, we’ve got to tolerate it. My wife tolerates my constant obsessive-compulsive nature to have to watch sporting events.

III. Perspectives of Adult Entertainment Industry Leaders On Obscenity Law, Prosecutions, and Rob Black

This part is divided into two sections, each of which involves comments, remarks, and opinions from a number of leaders in the adult entertainment industry on a different theme. Section A concentrates on obscenity law, as well as the context and forces behind today’s federal prosecutions. Section B is devoted to Rob Black and the prosecution of Extreme Associates.

A. Obscenity Law and the Context and Forces Behind Today’s Prosecutions

In this section, three leading veteran U.S. producers of adult entertainment – Larry Flynt, Max Hardcore, and John Stagliano –
discuss obscenity law and the current federal prosecutions, as well as the motives, forces, and historical context that guide and underlie the prosecutions. In addition, Joy King, vice president of special projects for a top adult movie company, Wicked Pictures, provides her thoughts on these issues.

Taken collectively and viewed in the aggregate, these observations and remarks provide critical context for a greater understanding of both the political environment and legal pressures under which those in the adult industry must work today. The comments of Flynt, Hardcore, King, and Stagliano are set forth in alphabetical order.

1. **Hustler Publisher Larry Flynt**

   We didn’t have any federal obscenity prosecutions when Clinton was president. Clinton was smart – he knew that it was an uphill battle, and there were other things that he should be spending his time on. If we get a Republican in again, we’re in for a lot of trouble. If we get lucky enough to get a Democrat, it will be good for the industry.

   We stay away from necrophilia, bestiality, and pedophilia. The Cambria list saved a lot of guys millions of dollars and kept them out of jail.\(^{132}\) Paul Cambria knows what states are very quick to prosecute and which ones have the good prosecutors that are able to get convictions. They just notified all of the distributors don’t ship to Georgia, Utah, and Kansas.

   The censorship that I do today thus is self-censorship. No matter what I put in a magazine, if I can’t distribute it to people all over the country, I’m not going to make any money and they’re not going to get to see it. We have to decide where that envelope is. In the beginning we did push the envelope, but we reached a point where we realized that distribution is more important than pushing the envelope.

   These obscenity verdicts – and this has been this way for thirty years – can go either way. The government would rather have a store owner do a forfeiture. For example, a guy who owns thirty stores – they make him forfeit twenty-five stores, fine him four or five million dollars, and then he doesn’t have to go to jail. The guy is so scared about going to jail that he goes along with the forfeiture.

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132. For a further discussion of the Cambria list, see *supra* note 114 and accompanying text.
A lot of people didn’t go with the forfeiture. They fought and they’re still around – they’re a good bunch of guys and they believe just like I do. I’m not just blowing smoke – if these guys felt that they were wrong and they were harming anybody, they’d walk away. These are guys like Eddie Wedelstedt, Teddy Rothstein, and Ron Braverman.

2. Adult Producer Max Hardcore

Nobody had gotten popped for a long time, so people were pushing and pushing and pushing. More gang bangs, more harder content, more teen-themed videos, and people felt pretty safe in doing just about anything they wanted to do. I had been in the business coming out of the Reagan years when I started, so I knew that things could go back at any time. I was aware of that. Things kind of go in cycles – Clinton was good for the industry, good for the economy, and he didn’t get us involved in any quagmire wars. Things were going pretty good, but I knew that things could change and that if Republicans were to get in to office, it


135. See generally Mark Rollenhagen, Starman Associate Will Pay $1 Million, Plain Dealer (Cleveland, Ohio), July 23, 1996, at 1B (describing how “Ronald Braverman, 49, of Beverly Hills, Calif., pleaded guilty in U.S. District Court to conspiring to defraud the government by obstructing the IRS” and noting that he “runs Health Devices Corp., a Los Angeles-based company that manufactures electronic sexual aids under the name Doc Johnson Enterprises”).

136. During the presidency of Ronald Reagan, then-U.S. Attorney General Edwin Meese III created what was known as the “Meese Commission” to study the impact of pornography. See Frederick S. Lane III, Obscene Profits 106-08 (2000) (discussing creation of Meese Commission). The Meese Commission’s report spurred “Presidents Reagan and [George Herbert Walker] Bush to launch far-reaching prosecutorial campaigns against pornography producers, resulting in the indictment, conviction, and imprisonment of hundreds of business owners.” Id. at 107.
would be a real problem. Sure enough, what I thought was going to happen did happen.

When Bush gets out of office, hopefully they’re going to refocus themselves on the real problems that we have in society.

We’re thinking all the time, whether it’s Bush or Clinton or whoever the next guy will be, we have to consider the market. I make two different versions. I make a world – or European – version and I make a U.S. version. I pretty much know what’s going to pass the muster, yet they can pick little bits out of any movie and say, “Well, this could mean that the girl is really underage” or whatever.

We don’t have a national, uniform obscenity code, and they won’t clarify for us what is and isn’t accepted. The smart money knows where not to ship and what not to do, like you don’t put pissing, fist fucking, and pooping – I never did that anyway – or gagging a girl until she vomits in the U.S. version. There are some states that are particularly bad.

What I’ve done is separate my business – I’m strictly a manufacturer, I’m not a shipper. I sell my work to a third party who, in their best judgment, knows the shipping game. It’s a tremendous responsibility. I have two companies that I work with primarily – one is EXP that does my domestic releasing, and the other is Jaded Video.com\textsuperscript{137} that does my mail order. It is easier, but it also gives me that firewall, as it were, between me and the authorities. It has always been, in our business: you ship it to the cop, you take the money, you get popped.

I think the status quo is pretty much going to stay the same as long as they’re going to dedicate money, the Justice Department, and law enforcement to stop it. They know they can’t stamp it out, so they are going to try to control it as best they can.

I think they have to cater to the right-wing element and say, “We’re doing something. This is a vile sickness that’s in our midst, and we have to stamp it out.” The other thing is that they keep obfuscating the distinction between adult pornography and child pornography. The reality is that no mainstream pornographer has anything whatsoever to do with child pornography. Of course, we know this, but the public doesn’t know this.

It’s a frustrating situation, but I do what I do, of course, to make money. First of all, I love what I do. I enjoy the creative pro-

cess and making things that last – and one of the things that lasts the longest is movies, if they’re good. I really enjoy my work, and I also, in some way, enjoy pushing the limits and rubbing their faces in it and saying, “Yes, I can do that.” In some way, I enjoy that. I don’t enjoy writing out checks for $20,000 and $25,000 a pop for lawyers, but it’s part of the business. It’s part of the budget. You know, there’s tape, douches, toilet paper, and lawyers fees. If you’re going to play it and you’re going to be out at the pointy end of the charge, you’re going to take some hits.

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.

3. Wicked Pictures’ Joy King

Even though we recognize that we’re producing a legal product – there’s nothing illegal about what we’re doing – and it’s legitimate business and all of those things, we have to be realistic about the markets and where we’re shipping into and what’s acceptable and what’s not acceptable.

There are unfriendly states that just don’t want the product. Nobody is forcing anybody to watch porn. Nobody is forcing anybody to buy it, for God’s sake. That always amazes me. But we’re not going to ship into a state that clearly doesn’t want us in there. There are certain counties in Texas and Utah. There’s a prosecution in Dallas-Fort Worth right now. There have been a lot of cases. There are cases in places where you wouldn’t even think there would be an issue – upstate New York and places like that. In Florida, more in the panhandle, since it’s the South. And with legislators who have a conservative constituent that they have to do it and make happy.

I don’t think we’ll ever see a day where we will sit back and say, “Whew, I’m glad that’s over.” It would be fabulous to think that, but when we talk about these things and say, “It’s a very conservative administration right now so the prosecutions are crazy.” Even in the Clinton years, when we breathed a little sigh of relief and didn’t have either a lot of attention drawn toward the negative and a lot of obscenity prosecutions, we still had a lot of local legislation – local zoning regulations. There are still a lot of issues that people don’t realize are out there where you have smaller communities trying to regulate the adult industry in their county. Even in the best of times, I don’t think we can ever sit back and take that collective sigh of relief.
4. *Adult Producer and Gonzo Porn Progenitor John Stagliano*

Some companies are being rather conservative in their content, but you have to look at this whole thing in the context of what we've been doing in porn since the 1980s, since I've been in it. Then, you never showed anything that looked like force and you couldn't have a girl get slapped. That stuff just wasn't sold until the late 1990s – then it became very popular and now, a lot of people are shooting it. Before Clinton was in office, there were prosecutions, and people would never do anything that looked like force, rape, or anything like that – not in the mainstream. You've got to consider that if you are in the mainstream business and not selling a small mail order or just on the Internet, then you have to sell through distributors. Distributors have to worry about the legal ramifications of what they are selling, so they are not going to buy something that is too outside the norm. Right now, distributors are buying stuff that is pretty strong – there's choking, slapping, and really strong sex that looks like play-rape or really rough stuff. Extreme's videos were a bit stronger than that. Now there are some manufacturers who don't do things as strong as what Extreme does. Whether or not it was a reaction to Extreme's case, most of those companies were on the more conservative side to begin with anyway.

Both JM and Extreme were so far out and much stronger than what most other people are doing. Probably we would tone it down a bit [if there are convictions], but we don't do what they do there at those companies. I really shy away from degradation, although it is present in a lot of strong sex acts anyway, and there's some of it in some of my directors' movies. But not nearly to the extent that JM does it or Extreme does it. I just personally don't get off on that much degradation. It's a game that I'm not into, personally. I hate condemning something just because I'm not into it because I don't think that's fair, but it seems to me there are some people who do it and it's a real psychological thing and not just sexual fun.

I think the only thing [law enforcement] is looking for is more power. In each individual case and each individual person, what they're interested in is more power for their department or what they're doing. There may be some people, on occasion, who feel a really strong moral sense – that this is a really bad thing. However, the real motivating factor that propagates this whole thing is the fact that politicians in power would like to feel more important. By bringing prosecutions, they feel more important – like they're doing good – but it's a really difficult situation because they have
power over other people’s free choices. They have an incentive to want to tell other people how to live their lives.

The whole notion of community standards, to begin with, is difficult. Looking back to 1973 when the [Miller] decision came about, it wasn’t that terrible of a compromise – it almost made sense, I think, to say, “We’re not going to censor everything. We don’t really know what should be censored or not. Let’s just let it be community standards because there are some communities that are real conservative and then there are some communities like New York and San Francisco where anything goes.” In fact, that’s what happened – you could find the hardest European porno in New York and San Francisco throughout the 70s and 80s when things were much more repressed. In a way, then, I thought it was a lesser of the evils in terms of censorship.

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. It does seem like there are still communities, and communities get angry at aberrant individuals – that’s the history of civilization, that somebody is different is ostracized, thrown in jail or sent out on his own to forage for himself. This is kind of what they’re doing to us people who like pornography – or what they would like to do with us.

Technology has advanced to the point where now we can make the community one person – an individual person. Also there’s a greater recognition, I think, in the world that people are going to have divergent opinions and that we’re better off if we tolerate each other. That’s what globalization is all about.

B. Rob Black: Showman, Antagonist and Litigation Lightening Rod

In this section, leaders of the adult industry express their views and opinions on Rob Black, the man whose company is the target of the federal government’s ongoing obscenity prosecution in United States v. Extreme Associates, Inc. It quickly becomes apparent from their comments that many in the adult industry find very little appealing either about Black or his movies’ content. Such sentiments against Black are one reason why the industry has not unified or rallied behind his case, despite the Free Speech Coalition’s filing

138. For a further discussion of the Extreme Associates case, see supra notes 16-21 and accompanying text (providing case law for interviews contained in Section B).
of a friend-of-the-court brief on his behalf. The comments of
the individuals interviewed by the authors for this section of the Article – Larry Flynt, Max Hardcore, Tom Hymes, Joy King, Sharon Mitchell, and John Stagliano – are set forth in alphabetical order.

1. Hustler Publisher Larry Flynt

Rob Black called me and asked me for a contribution. I
wouldn't give him a nickel. Here's my position: There are certain
things you don't do, not because you don't feel you have the right
to do them, but because they are indefensible in court. You can't
take a girl and shove her head in a commode full of shit, pull her
up, and have a camera on her face and have that as part of your
video. There's no erotic theme there – it serves no purpose. When
this guy produces it – his company is called Extreme Associates and
he named it properly – he's making it difficult for the whole industry.
I hope he'll get acquitted, but I don't think he will. Obviously
they went after him instead of coming after me because he is the
worst.

The really bad stuff is on the Internet. That's what the govern-
ment has got to decide if they want to go after. Here we do what we
call vanilla sex. The real heavy stuff is out there on the Internet
– the material that the Rob Blacks of the world distribute.

2. Adult Producer Max Hardcore

Rob's a showman – or would like to be a showman – and he'd
like to feel that he's a martyr. I know Rob real well. He was talking
to me when he was just starting to get into the business, and I was
already established. He just wants to cause a commotion. I don't
agree with that business philosophy. In our business, I like to try
to not inflame them and let the movies speak for themselves.

I would never say, "Bring it on." I take the opposite approach
of Rob Black. I keep quiet and I'm certainly not going to make
statements like that. It just aggravates them, and then you become
a special pet project for them. If they can't get you the first time,
you'll come back and get you the second time. And they'll keep on
coming. They've got more money than you've got, so it doesn't
make a lot of sense. I'm resigned to it. I look at it like, "Okay, this

139. Flynt made a similar assertion to a reporter in 2004 in response to "the Justice Department's operation to rid the nation of porn." Laura Sullivan, Justice Department Sets Sights on Mainstream Porn, PIT. POST-GAZETTE, Apr. 11, 2004, at A-10 (quoting Flynt as stating, "Everyone's concerned. We deal in plain old vanilla sex. Nothing really outrageous. But who knows, they may want a big target like myself.").
is what I’ve got to do.” I really hate going down to court. I think it’s a complete and utterly total waste of time for everybody involved when there are much more serious things that society is facing.

3. Tom Hynes, Former Communications Director of the Free Speech Coalition

Most people don’t know about this because they don’t buy the stuff. If you know about Rob Black in this situation, then you’re already dirty.

That’s what the feds do – they pick the extreme guys. It’s a divide-and-conquer tactic. The Internet has only made it worse. Child pornography, for all intents and purposes, was eradicated from this country, and the Internet brought it all back. There is, in fact, a tremendous amount of tension between the established players and the quote-unquote Web rats, whether they’re in this country or whether they’re from overseas.

4. Wicked Pictures’ Joy King

I’ve known Rob Black for years and years, and the guys from JM Productions – they’re going through their own battles right now. It’s an unfortunate situation that those guys want to be out there pushing the envelope. I don’t like what they do, but I certainly support and recognize their right to do it.

I don’t believe there is any support on a financial level for Rob Black. I think that was a great point of dissent for him. He felt the industry should have backed him a little more monetarily. The problem is that he’s never supported any of the industry trade associations, so it’s really difficult for the industry to gather around him in his time of need when he spit on everybody else for his entire career. That’s tough – so there’s a little infighting in the industry, but you’ll find that anywhere.

5. AIM Health Care’s Sharon Mitchell

Some of the people that work in the Rob Black stuff are really great, nice people. They are nice, normal people, but they’re just portraying something and that’s what they’re getting paid to do that day. It’s okay with them – they’ve agreed to do it.

It’s as if some of the stuff is not titillating, but it’s almost like horror – you can’t take your eyes off of it because you can’t believe what’s going to happen next. It’s unbelievable. I don’t know any-
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one who gets turned on by that stuff, but maybe people do. I think it’s more of, “Can you top this?”

If NBC is hanging siblings and secretaries off cliffs with “Fear Factor,” then that’s what the porn industry is doing in its own genre.

6. Adult Producer and Gonzo Porn Progenitor John Stagliano

The fact is there is this huge tide that is moving toward stronger and stronger sex in the porn business, and Extreme has been in the forefront of that. That’s just what’s selling and what people like to see right now — or what a lot of people like to see right now — and there’s a big market for that.

My encounters with him [Rob Black] have not been that pleasant, and I really don’t like the guy, but that’s another issue.

We’re doing stronger stuff than ever before at my company. I wouldn’t be doing what Rob Black did, anyway, in his movies, and I don’t think it has affected me at all simply because I have just been going along with the tide and the excitement and discovery of doing harder stuff or, more precisely, I’ve been letting my directors get away with doing that at my company. I’ve done some of it, like in the movie Fashionistas. The Buttman movies — there’s almost never anything near that strong.

Ostracizing someone like Rob Black wouldn’t be a bad idea. The thing is, it’s a free speech issue that he’s dealing with and Rob Black is a showman — he likes to think of himself as that. His affiliation with wrestling is very similar to his affiliation with porn. He does things in an over-the-top way. That being said, I don’t think he’s a great person because he has stiffed a lot of people that he owes money to. That reinforces a stereotype that pornographers are bad people. I try to portray a different stereotype or a different type of person to give an example that we do have good business people in the porn business. The fundamental problem is that porn is somewhat looked down upon in society so that the best talent, if they’re capable of making movies in the straight business, will tend to make movies in the straight business and not in the porn business. What you get is some people who are more willing to do things that are controversial, more willing to do things that are a little bit shady in the public’s eye, so the quality of people in the

140. For a further discussion of Stagliano’s production of Fashionistas, see supra note 42 and accompanying text.
porn business, in general, may be somewhat less than the quality of the people in Hollywood, although that certainly is an arguable point. On the lower rungs of Hollywood, you get a lot of really shady people – probably just as many as in porn.

IV. ANALYSIS AND CONCLUSION

When it comes to Rob Black, one thing certainly seems clear: he is not a popular person among the leading players in the adult industry interviewed for this Article.142 From John Stagliano's brutally frank statement, “I really don't like the guy” and his equally strong suggestion that “[o]stracizing someone like Rob Black wouldn't be a bad idea,” to Max Hardcore's observation that Black "just wants to cause a commotion," to Larry Flynt's assertion that Black is “making it difficult for the whole industry,” Rob Black appears to be an outsider in an industry known for its renegades and colorful figures. As Joy King observed, part of Black's “problem is that he's never supported any of the industry trade associations, so it's really difficult for the industry to gather around him in his time of need when he spit on everybody else for his entire career.”

Despite personal animus and disdain for Rob Black and his content, no one interviewed for this Article went so far as to say that he or she hopes that Black and Extreme Associates are convicted. Indeed, they seem to hope for his exoneration, perhaps because a conviction would have a ripple effect on the entire adult industry.

As Flynt stated, “I hope he'll get acquitted.” It's a sentiment echoed by Joy King, who remarked in relation to both the Extreme Associates and JM Productions cases, “I don't like what they do, but I certainly support and recognize their right to do it.” And as Sharon Mitchell points out, the people who work in Black's productions are “just portraying something and that's what they're getting paid to do that day. It's okay with them – they've agreed to do it.” This sentiment taps into something that Rob Black himself suggested during a segment of ABC's "Nightline" news program when he proclaimed, “[t]here's nothing wrong with what we do. We're not murderers. We make movies.”143

Ultimately, it may be left to a jury to determine whether some of those movies are obscene. If they are deemed obscene – and if a conviction also is handed down in the prosecution of JM Produc-

142. For a further discussion of Rob Black's reputation in the adult industry, see supra notes 138-41 and accompanying text.
tions – then the future of adult videos and DVDs may radically change, at least when it comes to their content and the nature of the sexual acts depicted.

The man who will help a jury determine that outcome is the same one who passionately supports Rob Black, his attorney H. Louis Sirkin. Sirkin makes abundantly clear his disgust with the members of the adult industry like John Stagliano who have not supported Black, either financially or in terms of their public comments about the content of Extreme Associates’s movies. As Sirkin bluntly put it:

I’ve been really discouraged and disappointed in the adult industry in their treatment of Rob Black. I’m really upset with the adult industry because, as I have said, “You may not like what Rob Black has produced, you may not like what JM Productions has produced, but they’re taking the heat, and they’re on the forefront. If they collapse, then next it’s you.”

For Sirkin, Rob Black is akin to Lenny Bruce, another man who pushed the envelope of American sensibilities and tastes, all the while simultaneously pushing the envelope of First Amendment protection. Beyond concerns about free speech, privacy, and substantive due process, Sirkin expresses that he “would like people to recognize the importance of the Rob Black case. It’s to make the world aware of the fact that the people who are out there making sexually explicit material in the industry are regular people.”

Michael Stipe, lead singer for Georgia-based group R.E.M., once sang that “Lenny Bruce is not afraid.” If it really is the case, as Louis Sirkin asserts, that Rob Black is a modern-day Lenny Bruce, then it also is equally clear that Sirkin is not afraid – not afraid of defending Black, not afraid of going without a monetary profit on his defense of Black, and not afraid to speak his own mind about those in the adult industry who bad-mouth Black. The works of Rob Black may, for some people, be a long way from those of Robert Mapplethorpe. For Louis Sirkin, however, who had defended the artistic creations of both men, they are treated equally, as it all comes back to the First Amendment’s safeguard of free speech and Sirkin’s near absolutist belief in its scope of protection.

144. Supra Part II, Section B, Subsection 2.
Sirkin's obvious passion for the First Amendment, tempered only by his concerns about the production of child pornography, is evident through both his words and his actions, which include — as the Black case aptly illustrates — defending clients others would prefer to ignore. His career-long commitment to the protection of civil liberties, grounded in his solid and successful counsel to the adult entertainment industry, places him squarely as a leader on the front lines of what he identified here as “the battlefield for free speech.”