THE FREE SPEECH COALITION & ADULT ENTERTAINMENT: AN INSIDE VIEW OF THE ADULT ENTERTAINMENT INDUSTRY, ITS LEADING ADVOCATE & THE FIRST AMENDMENT

CLAY CALVERT* & ROBERT RICHARDS**

TABLE OF CONTENTS

INTRODUCTION

A previously little-known organization from the smoggy San Fernando Valley suddenly found its name indelibly etched in the annals of First Amendment[1] jurisprudence in April 2002 when the

* Associate Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The authors thank Rachel Frankel, Lee Langston and Sean Misko of the Schreyer Honors college at The Pennsylvania State University for their research and editorial assistance that contributed to this article.

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

[1] The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

United States Supreme Court handed down its decision in *Ashcroft v. Free Speech Coalition.*[2] The majority opinion, which features grandiose rhetorical flourishes about the purposes of free speech[3] and drew withering wrath from grandstanding politicians,[4] struck down as fatally overbroad[5] a federal law criminalizing so-called virtual child pornography.[6] It also catapulted the victorious lead respondent, the Free Speech Coalition, into public limelight for provoking from the Court a majority opinion that was simultaneously derided by one member of Congress as "sid[ing] with pedophiles over children"[7] and lauded by Hollywood as "enormously valuable creatively."[8]

What, then, is the mission of this organization with the noble-sounding, constitutionally-charged name? Surely, given the expansive nature of the term "free speech" in its moniker, the group must be about more than just contesting and challenging a narrow category of laws that prohibit the possession and distribution of images that appear to be of minors engaged in sexually explicit conduct.

Initially, a look at its Web site describes the Free Speech Coali-

---

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

2 535 U.S. 234 (2002).

3 For instance, Justice Anthony Kennedy, in authoring the opinion of the court, wrote that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Id.* at 253.

4 Mark Foley (R-Fla.), co-chairman of the Congressional Missing and Exploited Children's Caucus, told a reporter for *The Washington Post* after the opinion was handed down that it

> has set back years of work on behalf of the most innocent Americans. Whether in movies or photographs, it doesn't make a difference whether or not the person engaged in sex is actually a child. If it looks like a child and is said to be a child, pedophiles have found their fix – and their search for true child pornography will only be enhanced.

Charles Lane, *Law Aimed At 'Virtual' Child Porn Overturned, High Court Says Ban Too Broadly Worded*, WASH. POST, Apr. 17, 2002, at A01.

5 *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 764-65 (1997) ("A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.").

6 The law in question was rooted in the Child Pornography Prevention Act of 1996, which expanded the definition of child pornography to include an image that "appears to be, of a minor engaging in sexually explicit conduct," even if a real child was not used in the creation of the image. 18 U.S.C. § 2256(8)(B) (2002).

7 Rep. Mark Foley (R-Fla.) *quoted in* John Schwartz, *Swift, Passionate Reaction to Pornography Ruling*, N.Y. TIMES, Apr. 17, 2002, at A18.

8 John H. Weston *quoted in* Linda Greenhouse, *'Virtual' Child Pornography Ban Overturned*, N.Y. TIMES, Apr. 17, 2002, at A1 ("a Los Angeles lawyer who has advised Hollywood studios on their potential liability under the law.").

tion as "the only organization that is truly dedicated to protecting and fighting for all *your* First Amendment Rights."[9] While the organization does indeed fight zealously for First Amendment rights, as this article later makes clear,[10] that quotation does not reveal the underlying nature of the Free Speech Coalition, let alone to whom the word "your" refers. For whose First Amendment rights is this group fighting? One must dig a little deeper to answer that question.

In particular, in its brief filed with the United States Supreme Court, the organization's primary purpose becomes clear:

> The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Free Speech represents more than six hundred businesses and individuals involved in the production, distribution, sale, and presentation of non-obscene, adult-oriented materials.[11]

The generic, catch-all title of "Free Speech Coalition" thus cloaks and provides the kind of favorable cover that one might expect from an organization representing the producers and distributors of one of the most controversial[12] forms of expression in the United States – sexually explicit content. Of course, the same holds true for the names of the anti-First Amendment, pro-censorship organizations counterpoised to the Free Speech Coalition. They go by benign titles such as "Citizens for Decent Literature"[13] and "National Center for Children and Families."[14] Indeed, the

---

9 Free Speech Coalition, *How FSC Fights for Your Rights*, *at* http://www.freespeechcoalition.com/rights.htm (last visited Feb. 5, 2004) (emphasis added).

10 *See infra* Part II.A.

11 Brief for Respondents at 9 n.7, Ashcroft v. Free Speech Coalition, 2000 U.S. Briefs 795 (July 2, 2001) (No. 00-795).

12 *See* DON R. PEMBER, MASS MEDIA LAW, 2003/2004 436 (McGraw Hill 2003) ("No First Amendment issue generates more emotion in Americans than does the regulation of the sale and distribution of obscene and other erotic materials" and noting that today "war is being waged against a far wider range of erotic material, much of it material that is not considered legally obscene.").

13 Citizens for Decent Literature, founded by Charles H. Keating, has been described as a "moral vigilante" group. EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 552 (1992). It "was renamed after Charles Keating's involvement in the 1989-1990 home savings and loan scandals was made known. It was later called National Coalition Against Pornography and is now known as Children's Legal Foundation." *Id.* at 650.

14 This organization describes itself on its Web site as:

> a specialized resource to those who enforce state and federal obscenity and child exploitation laws, to counsel federal, state, and local legislators on the constitutionality and effectiveness of amendments to existing criminal and civil codes; and to provide a training and information clearinghouse on the specialized issues involved in illegal pornography and First Amendment related cases.

latter organization filed an amicus curiae brief on behalf of the government in support of the Child Pornography Prevention Act of 1996 and against the Free Speech Coalition in *Ashcroft v. Free Speech Coalition.*[15]

Sparing the titular verbal gymnastics,[16] the fact is that the Free Speech Coalition finds itself alone in the important position of leading advocate for an industry that is paradoxically popular and reviled. Adult entertainment, despite its growing popularity – a fact measured in raw economic terms by the sheer amount of money spent on it each year[17] – and steady movement towards mainstream American culture,[18] comes under constant attack from legislative bodies.

> NLC also provides advice and information to community leaders and concerned citizens on the laws and their enforcement at the local and national levels. NLC works to accomplish its mission through tested legal tools, the filing of "friend of the court" amicus curiae briefs in important cases, law enforcement training seminars, legal and reference publications, one of the nation's largest specialized law libraries on child exploitation and pornography, video resources and guidance manuals for professionals involved in sexual exploitation issues, citizen conferences to build support for law enforcers media appearances to educate the public on the issue, and federal [sic] state, and local legislative assistance. In each of these areas, we have a strong record of accomplishment.

National Law Center for Children and Families, *NLC Profile, at* http://www.nationallawcenter.org/profile.htm (last visited Sept. 19, 2004) .

15 Brief Amici Curiae of the National Law Center for Children and Families, National Coalition for the Protection of Children & Families, and the Family Research Council, in Support of Petitioners, Ashcroft v. Free Speech Coalition, 2000 U.S. Briefs 795 (Apr. 23, 2001) (No. 00-795).

16 *Cf.* ELVIS COSTELLO AND THE ATTRACTIONS, *The Loved Ones, on* IMPERIAL BEDROOM (Columbia 1982) (singing "Spare us the theatrics and the verbal gymnastics, we break wise guys just like matchsticks.").

17 *See* Lev Grossman, *Keep Off the Grass,* TIME, Apr. 28, 2003, at 71 (describing "America's $10 billion porn industry.").

18 *See* Evan Pondel, *Porn Film Company Moves into Sports with Line of Snowboards,* THE DAILY NEWS OF LOS ANGELES, May 9, 2003 (observing that adult entertainment is a "world that has become increasingly more mainstream with the ease of access to adult films."). As Chad Beecher, the organizer of the 2003 Erotica LA Convention, observed, "Sex is so much more mainstream now." Julia Gaynor, *The Alternatives; Erotica Goes Mainstream,* L.A. TIMES, June 19, 2003, Calendar Weekend (Part 5), at 16. One indicator of pornography's entrance into American mainstream culture is the fact that the "most hyped new show on television is *Skin,* airing on Fox and starring Ron Silver as a porn mogul. Ironically, *Skin* doesn't show much skin, but it does push boundaries that network executives would not have even dreamed about pushing only a few years ago." Dave Berg, *Porn Goes Mainstream; Spotlights Shine on Formerly Shunned 'Culture,'* WASH. TIMES, Nov. 4, 2003, at A21. Beyond *Skin,* there is, in general, a "new more tolerant attitude toward porn in Tinseltown." Adult video stars like Jenna Jameson, now have been used in ad campaigns by Abercrombie & Fitch, Pony and Jackson Guitars, where once they could not cross over to the mainstream. *Id.* Ultimately, there is a "new mainstream acceptance of porn." *Id. Skin* has "already been deemed another example of the mainstreaming of adult entertainment." Ted Johnson, *Stone Cold Fox,* VARIETY, Sept. 1, 2003, at 52. It is, however, just "the latest of a wave of mainstream projects on TV and film and in books, peeling back the plain brown wrapper from the world of pornography." Bill Keveney, *Hollywood Gets in Bed with Porn,* USA TODAY, Oct. 17, 2003, at 1E.

For instance, municipalities across the United States today are stepping up efforts both to zone the locations of sexually oriented businesses[19] – entities sometimes known by the double entendre-laden acronym SOBs[20] – and to regulate the activities inside them.[21] In the process, they also seek to reduce the First Amendment rights of adults to receive non-obscene expression,[22] be it speech in the form of erotic dancing[23] or adult videos.[24] Such stat-

---

19 *See, e.g.*, Julia Ferrante, *4 Stores Shut Out by Adult Ordinance*, TAMPA TRIB., June 12, 2003, at Pasco 1 (describing how an ordinance passed in January 2003 by officials in Pasco County, Fla., "limits sexually oriented businesses to I-2 industrial zones at least 1,000 feet from neighborhoods, churches, day care centers, schools and parks."); Mike Connolly, *Putnam Limits Adult Businesses; Officials Want to Prevent Strip Clubs from Opening*, CHARLESTON DAILY MAIL (W. Va.), Jan. 29, 2003, at P7A (describing the approval by the planning commission of Putnam County, West Virginia, of an ordinance that requires new adult businesses such as strip clubs, adult bookstores and adult movie theaters to be "at least 2,000 feet from any church, school, day-care center, government office, residence, library, park, business serving alcohol or another adult business. Signs also must be smaller than 30 square feet and cannot depict seminude men or women.").

20 *See, e.g.*, Heather May, *LDS Sues to Head Off Strippers; Dead Goat Saloon: The Church's Real Estate Arm Says a Sexually Oriented Business Will Hurt its Financial Interests*, SALT LAKE TRIB., Oct. 17, 2003, at A1 (using the acronym "SOB" to stand for "sexually oriented business"); Bridget Hall Grumet, *Church Fights to Drive Out Strip Club*, ST. PETERSBURG TIMES, Aug. 26, 2003, at North Pinellas Times 4 (describing the acronym SOB as "countyspeak for sexually oriented business" in North Pinellas, Florida).

21 For instance, in September 2003, the Los Angeles City Council voted unanimously to ban lap dancing, prohibit direct tipping and impose a six-foot buffer zone between dancers and patrons at adult entertainment establishments. Jessica Garrison, *New Curbs on Strip Clubs OKd*, L.A. TIMES, Sept. 17, 2003, California Metro (Part B), at 1. The Los Angeles measure would apply to "any bodily contact between dancers and customers in strip clubs, bikini bars and adult bookstores." Braden Phillips, *National Brief West: California: Council Bans Erotic Dances*, N.Y. TIMES, Sept. 17, 2003, at A18. In November 2003, after pressure from the adult industry that included a "$400,000 [effort] to collect enough signatures to force a referendum on the new law," the council members reversed course and voted to "allow near-naked women to keep gyrating in men's laps, a lucrative form of adult entertainment known as lap dancing." Jessica Garrison, *L.A. Council Retreating on Lap-Dance Ban*, L.A. TIMES, Nov. 19, 2003, at 1. Elsewhere, the city council of San Antonio, Texas passed an ordinance in 2003 that "prohibits nude dancing, lap dances and locked VIP rooms in clubs within city limits." Mariano Castillo, *Guide to San Antonio and South Texas; Government; Review Current Laws*, SAN ANTONIO EXPRESS-NEWS, Aug. 17, 2003, at Special Section 60X. The city council of Toledo, Ohio approved changes in January 2003 to a city ordinance that now "requires nude dancers [to] stay 6 feet away from patrons and perform on stages at least 18 inches tall." *Strip Clubs File Suit to Stop Regulations*, ASSOC. PRESS STATE & LOCAL WIRE, May 22, 2003.

22 *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (writing that "[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . .").

23 The United States Supreme Court has held that nude dancing "is expressive conduct," even if "it falls only within the outer ambit of the First Amendment's protection." City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).

24 Sexually explicit motion pictures are protected by the First Amendment unless they are either obscene or contain child pornography involving real children. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); *see also* Miller v. California, 413 U.S. 15, 23 (1973) (writing that it "has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) (observing that the First Amendment protection of free speech "does not embrace certain

utes targeting adult businesses often end up being challenged in expensive court battles:[25] there were at least nine federal appellate court decisions in 2003 alone regarding laws affecting sexually oriented businesses,[26] and the United States Supreme Court granted certiorari to another in October 2003.[27] Those cases often – too often, from the perspective of adult businesses – pivot on a "puzzling doctrine"[28] known as secondary effects[29] that is incredibly favorable to the municipalities seeking to control the adult-oriented businesses.[30] It is no surprise, then, that one of the immedi-

---

categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children.*") (emphasis added).

[25] In one recent battle, the owner of a video store that rented, among other subjects, adult videos spent "almost $100,000 to fight" a San Antonio, Texas zoning ordinance. Lisa Sandberg, *Porn Vendor Victory has Hefty Price Tag; Appeals Court Ruling Against S.A. Ordinance may have Broad Impact*, SAN ANTONIO EXPRESS-NEWS, Nov. 3, 2002, at 1B. In another case, the parent corporation of an adult entertainment establishment called Fantasy Adult Video in Beaverton, Oregon, "incurred considerable expense" in the process of "hiring consultants who found the company's other Portland-area Fantasy outlets had not generated criminal activity, noise or urban blight in their neighborhoods." Richard Colby, *Beaverton, Ore., Revives Debate Over Adult Business Hours*, OREGONIAN, Sept. 12, 2003.

[26] *See* BGHA, LLC v. City of Universal City, 340 F.3d 295 (5th Cir. 2003) (upholding zoning and licensing regulations imposed on sexually oriented businesses in Universal City, Texas); Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003) (upholding an hours-of-operation statute imposed on sexually oriented businesses in Arizona); Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301 (11th Cir. 2003) (striking down, on First Amendment grounds, a zoning ordinance affecting sexually oriented businesses in Cocoa Beach, Florida); Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251 (11th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 26774 (2003) (ruling in favor, based on First Amendment grounds, of sexually oriented businesses which challenged physical-layout restrictions and a public nudity statute in Manatee County, Florida); Artistic Entm't, Inc. v. City of Warner Robins, 331 F.3d 1196 (11th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 26873 (2003) (upholding an ordinance that prohibited the consumption of alcoholic beverages at adult entertainment facilities in Warner Robins, Georgia); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003) (striking down, on First Amendment grounds, a zoning regulation affecting sexually oriented businesses in San Antonio, Texas); SOB, Inc. v. County of Benton, 317 F.3d 856 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 104 (2003) (affirming the district court's decision that a ban on live nude dancing in Benton County, Minnesota, is constitutional); Tool Box v. Ogden City Corp., 2004 U.S. App. LEXIS 854 (10th Cir. 2004) (reversing a 2003 appellate court opinion and holding that protective covenants applicable in an industrial park used to deny a permit for a sexually oriented business were not an unconstitutional prior restraint on expression); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003) (upholding an ordinance that prohibited the sale, use, or consumption of alcohol on the premises of sexually oriented businesses).

[27] City of Littleton v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 383 (2003) (granting certiorari on the issue of whether the judicially created requirement of prompt judicial review entails a prompt judicial determination or a prompt commencement of judicial proceedings).

[28] Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1148 (2003).

[29] *See infra* Part II.D. This doctrine "is a method of First Amendment analysis that essentially reduces the severity of scrutiny with which courts analyze a restriction where a purpose behind the regulation is to reduce negative secondary effects that can be associated with speech." Brandon K. Lemley, *Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine*, 35 J. MARSHALL L. REV. 189, 192 n.13 (2002).

[30] The "doctrine allows for the proscription or prohibition of certain expression where the Court is satisfied that the secondary effects, such as an increase in crime or a decrease

ate legislative goals of the Free Speech Coalition is to end the "over-regulation of our industry"[31] and, in particular, to call for state legislation affecting the secondary effects doctrine.[32]

From issues as diverse as the regulation of virtual child pornography in cyberspace to the control of sexually oriented business in cities, the Free Speech Coalition is a critical player defending the First Amendment rights of a burgeoning adult entertainment industry. With its victory before the United States Supreme Court in 2002,[33] the organization proved itself a force to be reckoned with. This article provides, for the first time, an in-depth examination of the Free Speech Coalition, centered on an exclusive dialogue-analysis conducted by the authors with both Kat Sunlove, the Free Speech Coalition's executive director and former head of legislative affairs, and Jeffrey J. Douglas, the chair of the Free Speech Coalition's current board of directors. Douglas is also an attorney[34] who has defended envelope-pushing adult industry figures such as Max Hardcore in criminal prosecutions.[35]

In particular, this wide-ranging article provides the views of Sunlove and Douglas not only about the case of *Ashcroft v. Free Speech Coalition*, but also on a number of critical issues and topics facing the adult entertainment industry today. These include:

- Current criminal obscenity prosecutions, including high-

---

in property values, are the actual aim of the government regulation or statute." Marc M. Harrold, *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 431 (2002).

31 *See* Free Speech Coalition, *Legislative Goals*, *at* http://www.freespeechcoalition.com/goals.htm (last visited Feb. 5, 2004).

32 *See* Free Speech Coalition, *Legislative Agenda*, *at* http://www.freespeechcoalition.com/agenda.htm (last updated July 18, 2003).

33 Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

34 Douglas, a member of the State Bar of California since 1982 who is based in Santa Monica, did his undergraduate work at the University of California at Berkeley and received his J.D. from the UCLA School of Law. State Bar of California, Attorney Search Page, *at* http://members.calbar.ca.gov/search/member.aspx (last visited Sept. 13, 2004).

35 *See* Mark Kernes, *Child Porn Charges Against Max Hardcore Dropped* (July 2002) (describing Douglas as representing Max Hardcore in a prosecution in Los Angeles), ADULT VIDEO NEWS, *at* http://www.adultvideonews.com/legal/leg0702_01.html. Max Hardcore is "a hugely successful porn impresario who specializes 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*, THE GUARDIAN (London), June 5, 2002, Guardian Features, at 3. Hardcore was prosecuted on obscenity charges in 2002 for a video called *Max Extreme #4*, a video described by Steve Nelson, the editor-in-chief of the *Adult Video News*, as "rather tame considering the later productions." Steve Nelson, *Max Hardcore Trial Travesty*, ADULT INDUSTRY NEWS (July 21, 2002), *at* http://ainews.com/Archives/Story3636.phtml. In October 2002, Hardcore's trial ended in a hung jury, with Hardcore proclaiming victoriously that he had "'taken the best of what they could throw at me.'" Steve Nelson, *Max Hardcore: "Victory is Ours!,"* ADULT INDUSTRY NEWS (Oct. 10, 2002), *at* http://ainews.com/Archives/Story3962.phtml.

profile cases involving Extreme Associates and Max Hardcore;

- Current legislative initiatives and the difficulty that the adult entertainment industry faces in its lobbying efforts;
- The mainstreaming of adult entertainment in the United States;
- The impact of a conservative White House and Attorney General John Ashcroft on the adult entertainment industry;
- The regulation of sexually explicit speech on the Internet, including a proposal to create a ".xxx" top-level domain for sexually explicit Web sites; and
- Other legal challenges facing the Free Speech Coalition's constituents.

In the process, Sunlove and Douglas also provide background on the Free Speech Coalition, including its history, budget and their own involvement with the organization. In addition, Sunlove speaks more generally about both the purpose of the First Amendment – why it is important to protect freedom of expression – and the mainstreaming of adult entertainment.[36] The authors of this article, in turn, analyze and critique their remarks.[37]

For some readers, this article may seem like an odd juxtaposition – to analyze and discuss, in the scholarly context of a law journal, a subject matter (adult entertainment) that is anything but scholarly and far more carnal than cerebral. Still others may think that it glorifies pornography simply because it provides a forum to those in the adult entertainment industry, thereby legitimating their enterprise. But the economic reality tells the true story and proves the legitimacy of their content, the adult entertainment industry is "a bigger moneymaker than the NFL, NBA and Major League Baseball combined."[38] According to a January 2004 article in *Time*, "Americans rent upwards of 800 million pornographic videos and DVDs a year, compared with 3.6 billion nonpornographic videos. Nearly 1 in 5 rentals is a porn flick."[39]

The constitutional reality, in turn, is that the First Amendment provides that mega-industry – the adult entertainment industry churns out 11,000 movies each year, compared with mainstream

---

[36] *See* Craig D. Lindsey, *The Jizz Age X-Rated Starlets Bust Through the Fourth Wall*, HOUSTON PRESS, Oct. 16, 2003, at Calendar/Highlights ("The adult entertainment industry has officially entered the American mainstream. The proof is everywhere.").

[37] *See infra* Part III.

[38] Paul Lomartire, *It's a Dirty Business (And You'd be Surprised Who's in It)*, PALM BEACH POST, Aug. 15, 2002, at 1E.

[39] Pamela Paul, *The Porn Factor*, TIME, Jan. 19, 2004, at 99, 101.

Hollywood's annual production of about 400[40] – with a very controversial shield. To not address the subject in a law journal format with the individuals at the top of the adult entertainment industry's leading trade association and advocacy group is to ignore these twin realities and, in so doing, to ignore a segment of the law that affects so many people's daily lives, whether they are producers, distributors or consumers of this most controversial form of media content.

I. THE SETTING

The interview took place on Friday, December 5, 2003, at the headquarters of the Free Speech Coalition situated in an industrial park section of Chatsworth, California. It is, of course, an appropriate home for an organization representing members of the adult entertainment industry, given that the San Fernando Valley often is described as the "porn capital of the world,"[41] "the world capital of porn,"[42] or, more simply, "Porn Valley."[43] In fact, just a few blocks away from the Free Speech Coalition's offices, is an "Adult Warehouse" selling videos, magazines and novelties and the home of Astral Ocean Cinema, Inc.[44] According to some estimates, "[t]here are close to 9,000 people employed in porn, in the San Fernando Valley."[45]

The Free Speech Coalition's rather austere and Spartan offices at 9640 Owensmouth Avenue are located in first-floor space donated by the building's primary tenants, M&M Sales, a distributor of adult sex toys, and Goalie Entertainment, Inc., a full-service adult retail management company.[46] The non-descript building was the scene of a raid in August 2000 when federal marshals, customs agents and Internal Revenue Service Agents searched the

---

40 *See id.*

41 Dana Bartholomew, *Porn Fair Expects 25,000 Visitors*, THE LOS ANGELES DAILY NEWS, July 15, 2001, at N4.

42 Johnny Maldoro, *Bright Lights, Fake Titties*, THE VILLAGE VOICE, Jan. 28, 2003, at 45.

43 Dana Kennedy, *Film; The Fantasy of Interactive Porn Becomes a Reality*, N.Y. TIMES, Aug. 17, 2003, Arts and Leisure, at 7.

44 *See* Astral Ocean Cinema, *at* http://www.astralocean.com (last visited Sept. 13, 2004) (describing the sexually explicit products of this company, which has its sales and distribution offices located at 21905 Plummer Street in Chatsworth, California).

45 *Eyewitness News* (KABC-TV television broadcast, Nov. 1, 2002).

46 *See* Goalie Entertainment, Inc., *at* http://www.goalie-usa.com/index2.htm (last visited Sept. 13, 2004) (describing Goalie as "the LARGEST full-service ADULT retail management company in the United States. Our stores offer a wide variety of sexually explicit magazines and videos, as well as the latest in adult novelties, multi-channel video arcades, and private preview rooms. To the adult industry, Goalie offers an integrated management package of consultation, services, and support.").

Goalie offices and seized computer and business records.[47] The office of Sunlove, with its gray-painted walls and utilitarian feel, reflects the non-profit nature of the Free Speech Coalition and, as she suggests later in this article, its increasingly tight budget. Her cluttered desk is filled with business-related files and a computer.

The interview lasted approximately two hours. It was recorded on two different audio cassette tapes. The tapes were later transcribed by a professional secretary and then reviewed by the authors. The authors made minor changes in syntax, but did not alter the substantive content or meaning of the comments of either Sunlove or Douglas. Some of the questions and responses were reordered to reflect the themes and sections in Part II of this article, and other portions of the interview were deleted as extraneous or redundant. A copy of the revised transcript was then forwarded to Sunlove and Douglas in early February 2004. Sunlove returned to the authors in late February 2004, the transcript with both minor revisions (the authors input all of these changes) and signed statements verifying that the transcript, with those changes, accurately reflected their remarks. Neither Sunlove nor Douglas, however, exercised any editorial control over either the conduct of the interview or the content of this article. They did not even review the article itself before it was submitted to this journal.

For purposes of full disclosure and the preservation of objectivity, it should be noted that neither of the authors of this article has ever been a member of the Free Speech Coalition, has ever worked for or on behalf of the organization, or has ever contributed money or time to support its efforts. In fact, neither author had met either Sunlove or Douglas in person prior to the date of this interview. The interview had been arranged by telephonic and email correspondence.

II. THE INTERVIEW

This part of the article is divided into eight sections, each of which includes a brief introduction to the section's theme, followed by a question-and-response format. The authors have added footnotes, where relevant, to both the questions and responses to enhance details, define concepts and provide citations to cases mentioned.

---

[47] Mark Kernes, *Feds Raid Goalie Warehouses in Five Cities*, ADULT VIDEO NEWS (Oct. 2000), *at* http://www.adultvideonews.com/archives/200010/bone/by1000_03.html.

A. *The Free Speech Coalition: Its Roots, Members and Mission*

When it comes to speech, two of the most controversial and loathsome forms in the United States are child pornography[48] and sexually explicit content involving consenting adults.[49] Speech falling into the former category is so reviled that it has long been held to fall outside the scope of First Amendment protection,[50] while expression in the latter category is the bane of groups ranging from the religious right[51] to the feminist left.[52]

What group, then, would simultaneously take on a law targeting child pornography and take up the representation of the adult film industry? The answer is the Free Speech Coalition, an organization described variously in the mainstream media over the past decade as "a California-based consortium of the largest adult video producers,"[53] "a trade association for the X-rated industry,"[54] and "a trade group started by X-rated movie theaters."[55]

The Free Speech Coalition's executive director, a position she assumed on November 1, 2003, is Kat Sunlove.[56] She once was "known as Mistress Kat Sunlove back when she was one of the Bay

---

48 *See, e.g.*, Daniel S. Armagh, *Symposium: The Fate of the Child Pornography Act of 1996: Virtual Child Pornography: Criminal Conduct or Protected Speech?*, 23 CARDOZO L. REV. 1993, 1995-96 (2002) (observing that child pornography "has no value as speech, and no lawful purpose in a civilized society. Previous decisions by the Supreme Court have correctly held child pornography to be outside the protection of the First Amendment. That determination was based on its lack of value in the market place of ideas and its harm to children, not upon its method of production."); Karen Weiss, *"But she was only a child. That is obscene!" The Unconstitutionality of Past and Present Attempts to Ban Virtual Child Pornography and the Obscenity Alternative*," 70 GEO. WASH. L. REV. 228, 228 (2002) ("The mere thought of children engaging in sexual behavior brings shock and disgust to the mind of the average American.").

49 *See, e.g.*, JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 426-27 (4th ed. 2003) (observing that the regulation of sexually explicit speech "seems destined to remain forever in the spotlight of heated public debate" and noting the "moral indignation" that some feel toward such material).

50 *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of the First Amendment"); Osborne v. Ohio, 495 U.S. 103, 103 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography.").

51 *See, e.g.*, Mark Cromer, *Porn Jitters*, L.A. WEEKLY, Feb. 23, 2001, News, at 22 (describing efforts by "the Religious Right to degrade the First Amendment" and attack the adult entertainment industry during the era of President Ronald Reagan, including the then-Attorney General Edwin Meese's commission on pornography).

52 *See generally* CATHARINE MACKINNON, ONLY WORDS (1993) (arguing that pornography exploits, degrades and subjugates women); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality, in* PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 515 (Catherine Itzin ed., 1992) (providing Dworkin's views on pornography).

53 Joe Williams, *Porn Seems Headed for Mainstream*, DESERET NEWS, Feb. 23, 1997, at AA7.

54 Carolyn Said, *Sex Sells on the Internet*, S.F. CHRON., Nov. 19, 1997, at B1.

55 David A. Sylvester, *Gilroy Residents Want Limits on Porn Stores*, S.F. CHRON., Jan. 4, 1993, at A17.

56 *See* Free Speech Coalition, *New Leadership at FSC, at* http://www.freespeechcoalition.com/EDannounce.htm (last visited Apr. 22, 2004) (describing how Sunlove took over as executive director, replacing William Lyon).

Area underground's legends."[57] Sunlove also was "president and former publisher of the Emeryville-based *Spectator* sex magazine and its online version."[58]

Such a background is not unusual at the Free Speech Coalition. The organization once had as its spokesperson "porn-meister"[59] William "Bill" Margold,[60] a "longtime actor, director, writer and porn industry activist"[61] who in the late 1990s was "a kind of elder statesman, mentor and father figure to young porn actors."[62] Today he serves as a Free Speech Coalition board member.[63]

In this section, Sunlove and Jeffrey Douglas provide background on the organization, its history, membership and their own involvement with the Free Speech Coalition. In addition, Douglas provides an insider's view about the efforts in the early 1990s to crack down on the adult entertainment industry and about some of the current battles the organization is fighting.

QUESTION: Can you please start by telling us a little about the history of the Free Speech Coalition? When and why it was founded and who was originally involved in its creation?

DOUGLAS: The Free Speech Coalition is the current form of an adult industry trade association that evolved from the Free Speech Legal Defense Fund.

In 1990, in response to a series of search warrant executions by the federal government – its third major sting operation against the adult industry – a group of likely targets who had not yet been searched felt it was a good idea for the industry to come together to have a focused response to this attack. Those targets essentially were the remaining leaders of manufacturing on the video side.

---

[57] Joe Garofoli, *Of Human Bondage*, S.F. CHRON., Aug. 4, 2002, at Chronicle Magazine 22. She "is perhaps the only Sacramento lobbyist who can look back on her previous career and say, 'I mean, you start to wonder, how many nipples can I squeeze?'." *Id.*

[58] Josh Richman, *East Bay Web Sites Prosper with Adult Services Ads; Explicit Offers Don't Violate the Law, Experts Say*, ALAMEDA TIMES-STAR (Alameda, Calif.), Feb. 4, 2002, at Front Page.

[59] *See L.A. Dolce Vita; Media & Politics*, NEW TIMES L.A., May 18, 2000, at Best Of (describing interviews in *Dork Magazine* with "such out-there celebs as porn-meister Bill Margold.").

[60] *See* Anne Burke & Yvette Cabrera, *Tragic; Glendale Officer Killed Seeking Beating Suspect in Chatsworth Officer, Gunman Killed in Chatsworth*, LOS ANGELES DAILY NEWS, May 29, 1997 (identifying Margold as "a spokesman for the Free Speech Coalition, an adult entertainment trade association.").

[61] *Porn Trade's Little Piece of the Action*, S.F. EXAMINER, Nov. 20, 1997, at E-1.

[62] *Id.*

[63] *See* Joe Schoenmann, *COMDEX-Rated*, LAS VEGAS REV. J., Nov. 20, 1997, at 1A (describing Margold as a "California promoter and board member of the Free Speech Coalition.").

At the time, it was unclear how broad the operation was going to be. The question of whether it was just going to target manufacturers or was going to go throughout the industry was unresolved.

An organization called the Free Speech Legal Defense Fund thus was formed, and it had a variety of different aims and purposes. It wasn't particularly well focused, except for the notion that we had to stand together.

By 1992, the prosecutions had settled into a pattern. Most of the cases ended up settling – no time, corporate pleas and large amounts of money turned over directly to the Justice Department. Instead of calling them fines, they called them liquidated forfeitures so the money could go directly into the budget of the prosecuting agency and investigating agency.

QUESTION: Were they using the RICO [Racketeer Influenced and Corrupt Organizations Act] statute at that time?

DOUGLAS: The search warrants had RICO allegations, so they got the snapshot of the financials of the businesses at the time. But no RICO allegation was ever made arising out of any of the thirty-odd cases on which search warrants were filed. But they used the financial statements to say, "Okay, I want $2 million," and then negotiated down to $1.25 million or something.

The Justice Department raised in the neighborhood of $25 million. This was amazing, considering that it had fewer than ten lawyers in this special unit, the Child Exploitation and Obscenity section.

This unit had only two things to do: child pornography cases and obscenity cases. They didn't do any child pornography cases, however, so these guys were just doing obscenity cases. In a six- or seven-year period, they averaged less than one case per attorney per year, which is astounding.

QUESTION: It's a lot of time to devote to it, but they got $25 million out of that, right?

DOUGLAS: Right. They didn't have to go back to anybody for funding or justify their existence because they didn't need any money from the [United States] Senate. This was around 1992 and 1993. Because the prosecutions, while troubling, were no longer an attack on the fundamentals of the adult entertainment industry, the organization began to evolve to be something closer to a trade association.

It was a top-heavy organization. The board of directors was made up of the captains of industry, and they were raising money from everyone in the industry. There really wasn't an appropriate focus, though, and it was difficult for the people who were donat-

ing money to see why they were doing it. Without a clear focus, there was a lack of support and interest. The organization was on the verge of disappearing, as its predecessors had done.

Then, a new board of directors came in, which began my formal involvement with the organization and the focus shifted dramatically. The new board represented a very good cross section of the industry, from actors and actresses to retailers, distributors, and mail order operations, as well as manufacturers and modeling agents. The organization became a true trade association with an internal mandate to improve the quality of life for the people who were working in the industry in every area, whether it was health issues, workplace issues or others.

QUESTION: What year was this again?

DOUGLAS: 1994 or 1995.

QUESTION: That's when it became the Free Speech Coalition, is that right?

DOUGLAS: It had become the Coalition a couple years earlier – the Legal Defense Fund was just a very, very poor name – but that's when we formally declared and viewed ourselves as a trade association and accomplished some remarkable things. Once there were definable goals, we were able to address them.

QUESTION: How many members does the Free Speech Coalition have today, and from what sectors of the adult entertainment industry do they come?

SUNLOVE: The membership right now is a little bit lower than the normal average of 500 or 600 members across the board. We're at around 350 or 400 right now, so we've got a big push on membership. As for where the members come from, we cover the waterfront. We have members from the talent side of the industry, and everyone from individuals who pay a low fee to the titans of the industry, who pay much higher dues. We have manufacturers and distributors of video products, as well as toy manufacturers, Internet publishers, and adult nightclubs.

QUESTION: So it really sweeps up the whole industry?

SUNLOVE: Yes. We really like to see ourselves as an umbrella organization. Of course, we work with other groups that also represent certain portions of the industry.

QUESTION: Who are some of the major names or players in the adult industry that belong to the Free Speech Coalition?

DOUGLAS: Every name that anyone who is reading this article is likely to know.

SUNLOVE: The big ones.

QUESTION: Wicked, Vivid, and all the major production companies?

DOUGLAS: Yes, including Hustler.

SUNLOVE: In terms of toys and products, Doc Johnson, Topco Sales, and California Exotic Novelties – all the really big toy companies. In terms of the video producers and distributors, we have Metro Home Video and Legend Video.

DOUGLAS: All of the major manufacturers too. I don't know how this applies to the rest of Hollywood, but the distinction here is that there are production companies – they literally make movies – and manufacturers that do the final edits, put it out, and are the center of the distribution chain. So, a typical movie will say in the credits, "Vivid Video presents a Cinnamon Production." There's a separate company, Cinnamon, that films the movie, which has presold it to Vivid, the company that does its distribution.

QUESTION: There are now regional chapters of the Free Speech Coalition. What do these chapters do, and what is their relationship to the main organization?

SUNLOVE: Well, there are chapters in place in Virginia, Maryland, D.C., and Ohio. We're developing one in Illinois.

DOUGLAS: And Florida.

SUNLOVE: Florida and Missouri are in the works. The most active state chapters are in that eastern block, the Maryland group, because that area is headed up by John Katz, who also is a First Amendment attorney. And one of the notable things that group has done recently was to submit an amicus brief on a very important First Amendment adult entertainment case back there. Its brief, apparently, was a real critical factor in the successful outcome of that case.

They put out press releases and bring their members together to talk about local issues that are brewing. State chapters are important because they are familiar with the local politics.

I'm a lobbyist in California with a long-term, thirty-year relationship with a lot of folks in Sacramento, but I'm nobody when I go to Colorado or somewhere else. Legislators there would say, "Who are you? How many votes do you bring?" So, we need to develop organic leadership at the state level so those folks – with our guidance – can learn how to address their state issues.

QUESTION: Are there certain states that you're targeting because there is a particular need in a part of the country that is not being covered right now?

SUNLOVE: It is probably less motivated by that and more motivated by seeing where leadership springs up. In other words, some-

body reaches out to us and says, "We'd like to put a chapter together." The chapters that are in development came about that way.

QUESTION: The Free Speech Coalition is a non-profit entity, is that correct?

SUNLOVE: That's true.

QUESTION: So where does the Free Speech Coalition find the money that it needs to conduct the lobbying efforts and pursue legislation? Is money a problem for this organization?

DOUGLAS: We shake down everyone that does an interview with us.

SUNLOVE: A substantial amount of our budget comes from our membership dues. We also do some fundraisers throughout the course of the year. Our biggest one is called "Night of the Stars," which has been going on for fifteen or sixteen years. We raise tens of thousands of dollars that way, so that helps us. Those are basically the two main areas of raising revenue.

Then, when we had special projects, such as lobbying days up in Sacramento, [California] I had no problem picking up the phone and saying, "Okay, I need some scholarship money. I need you to pay for this and that." We get sponsors that way. So, rather than take these special projects directly out of our budget, we ask folks to support some of these special projects.

QUESTION: What is the "Night of the Stars"? Can you tell us about that?

DOUGLAS: It's an event we call "Prom Night for the Industry." It's the lifetime achievement awards in a variety of categories in production and performance. It's also an opportunity for everyone to get all dressed up. It's sort of analogous to the Screen Actors Guild's lifetime achievement awards.

QUESTION: Anything more about the budget?

DOUGLAS: One of the things that this organization has avoided – something that befell its predecessors – is getting involved with extremely expensive conceptual litigation.

In the past, someone would always say, "Let's challenge this component of the *Miller*[64] definition." Some of my colleagues would come to us and explain why funding this $100,000 or $250,000 litigation would fundamentally change the face of the First Amendment for all eternity. That was a significant financial

---

[64] Miller v. California, 413 U.S. 15 (1973). *See infra* notes 147-149 and accompanying text.

drain on the predecessor organization, and, since 1995, we haven't done that.

The only time we get involved in litigation is when it's a truly critical issue. *Ashcroft v. Free Speech Coalition*[65] worked out well for us. For that sort of thing, we try to fundraise in a targeted fashion.

QUESTION: In terms of the dues, do they vary depending on who the people are?

SUNLOVE: It depends upon how big the company is and what the category is. For our retailers, for example, it would depend on how many stores they have. It would be $300 per store, so chains would pay more than just an individual retailer.

QUESTION: How did you each become involved with the Free Speech Coalition? What attracted you to it?

SUNLOVE: Eighth-grade civics class, I guess. I've been a political person all my life. Politics is where the power is, and the power is what's controlling aspects of my life. I want to be part of that; I don't want somebody else deciding for me.

In terms of my involvement in adult entertainment, my partner, Layne, introduced me to SM[66] [sic] in our love play, which at first I thought was really weird. But it was so much fun and we proceeded to be very outspoken advocates for exploring this, for those who had an interest in it. I wrote an advice column called the "Kat Box," and I received zillions of letters from people all saying basically the same thing: "I have this weird fantasy – I want to be spanked." I would respond, "Let me tell you honey, you're not alone." I saw this as a little bit of my Texas missionary zeal, and I wanted to tell these folks that they needed to come out of the closet. This is harmless fun, just another variation of sex play.

QUESTION: When were you writing the column and for whom?

SUNLOVE: This was in the early 1980s. About 1980, I started writing it for a magazine in San Francisco called *Spectator*. After that, I wrote for *Chic*, one of the *Hustler* publications for a few years. Because of my interests, and as I started working with *Spectator*, I became aware of the Adult Film Association of America and that was the first of these incarnations of a trade association to which I belonged.

I just felt it was important because I knew the importance of coalition politics – standing together in order to present a front, especially when you're a minority or when you're in some kind of

---

65 535 U.S. 234 (2002). *See supra* note 24 and *infra* Part II.B.

66 [Editor's Note: S & M is the abbreviation for sadomasochism which is "the derivation of pleasure from the infliction of physical or mental pain either on others or on oneself." Webster's Third New International Dictionary 1998 (1986).]

an unpopular position. My background is in Black politics, so I have a grip on it. Then, in just one evolution after another, I just kept being part of the trade association.

At the same time, I moved through the industry in a variety of roles, from workshop facilitator and journalist to stage performer. I even did a couple of adult films, but that was never my focus. Then, in 1987, the *Spectator* ran out of money, so the other employees and I bought the company. It was one of those "let us make you an offer that you can't refuse" deals, and I became the president of that corporation and eventually a publisher of the newspaper.

Through all this, I was still trying to stay in touch with the trade association. We began doing lobbying for *Spectator*, particularly in Sacramento, because in the late 1980s, California started to pass laws that affected newsstand distribution of so-called harmful matter[67] – legal adult material.

The Free Speech Coalition fell into place. I was not active, at that point, in terms of the development of its formation. I was a little occupied at *Spectator* in those days. When I finally decided to leave *Spectator* as publisher, I went to Sacramento to become the lobbyist and the legislative affairs director for the Free Speech Coalition.

QUESTION: Jeffrey, how did you become involved?

DOUGLAS: All I ever wanted to do since adolescence was to be a criminal defense attorney. When I began practicing as a criminal defense attorney, a partner in my firm was one of only a handful of people that represented the adult industry in California. There were probably only three or four lawyers and he was one of them. When he retired, I pretty much inherited his practice, but there was a problem. The clients did not want to be represented by some hippie-kid lawyer, so most of them fled. But a handful stayed and one, in particular, ended up becoming a very significant player in the industry – New Beginnings. I just focused on risk assessment and compliance.

I also have a very strong political orientation. When the Free Speech Legal Defense Fund was organized, one of the ideas was that there should be a clearinghouse of information about obscenity prosecutions nationwide. This was the end of the Reagan administration and the beginning of the first Bush administration – the absolute peak of obscenity prosecutions.

---

[67] *See* CAL. PEN. CODE § 313.1 (Deering 2004) (setting forth California's penal code section on the distribution and exhibition of material that is harmful to minors).

The government had an enormous amount of funding, and there was a great deal of pressure. Attorney General Edwin Meese demanded that every U.S. Attorney's office designate one attorney to work full time on child pornography and obscenity. That lasted, I think, about two or three hours. Frankly, there wasn't that much work in the middle of Kansas.

In any event, the idea of this clearinghouse came up at the Free Speech Legal Defense Fund, and the organization invited bids to do it. I was the only one who took it really seriously and put together this big, thick packet while everyone else was faxing one-page proposals. So I began working for the Coalition on a desktop publication called "No Censorship." I nearly bankrupted myself – it was a financial disaster.

B. Ashcroft v. Free Speech Coalition

The United States Supreme Court's 2002 opinion in *Ashcroft v. Free Speech Coalition*[68] striking down two sections of the Child Pornography Prevention Act of 1996 (CPPA) already has given rise to a bevy of law journal articles, with scholars split over whether the opinion was correct.[69] Yet for all of the legal scholarship published about the outcome of the case, none of it has delved beneath the opinion of the United States Supreme Court to actually get a first-hand, inside perspective from the organization that took up the case in the first place and then secured a First Amendment victory. This section gives Sunlove's views not only on the opinion itself, but also on the background of the case, tracing the Free Speech Coalition's involvement with it from start to finish.

Before turning to her views, however, a brief background on the Supreme Court's decision is important for a richer understanding of Sunlove's remarks. Justice Anthony Kennedy wrote the majority opinion of the court, holding that two portions of the CPPA – one that defined child pornography to include a visual image that "appears to be, of a minor engaging in sexually explicit con-

---

68 535 U.S. 234 (2002).

69 *Compare* David L. Hudson, Jr., *A First Amendment Focus: Reflecting on the Virtual Child Porn Decision*, 36 J. MARSHALL L. REV. 211, 221 (2002) (calling the majority opinion a victory for "freedom of thought, freedom of speech, and the First Amendment" and concluding that the "opinion primarily stands for the principle that speech cannot be outlawed unless the government can establish a factual record showing that the speech actually directly caused the harm."), *with* Sue Ann Mota, *The U.S. Supreme Court Addresses the Child Pornography Prevention Act and Child Online Protection Act in* Ashcroft v. Free Speech Coalition *and* Ashcroft v. American Civil Liberties Union, 55 FED. COMM. L.J. 85, 98 (2002) (arguing that the dissenting opinion of Chief Justice William Rehnquist was correct and that the challenged provisions of the CPPA are constitutional).

duct"[70] and the other which swept up a visual image that "conveys the impression"[71] of a minor engaging in such conduct – were "overbroad and unconstitutional."[72] While the government argued the law was necessary on several grounds,[73] Kennedy and the majority rejected each argument. In the process, Kennedy articulated several key points, each of which represents a triumph of free speech over speculative fears:

- *The First Amendment protects freedom of thought*: Justice Kennedy wrote that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[74]
- *Protected speech is protected speech*: Justice Kennedy emphasized that it "turns the First Amendment upside down"[75] to argue, as the government did, "that protected speech may be banned as a means to ban unprotected speech."[76] He added that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech."[77]
- *Harm from speech must be proved before the speech can be stopped*: In rejecting the government's arguments about the multiple harms it claimed were caused by virtual child pornography, Justice Kennedy admonished that "[w]hile the Government asserts that the images can lead to actual instances of child abuse . . . the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[78] He added that the "Government has shown no more than a remote connection between speech that

---

70 18 U.S.C. § 2256(8)(B) (2002).
71 18 U.S.C. § 2256(8)(D) (2002).
72 *Free Speech Coalition*, 535 U.S. at 258.
73 The government argued that virtual child pornography both whets the appetites of pedophiles to molest children and is used by pornographers to entice minors to participate in the creation of real child pornography. *Id.* at 251-54. The government also asserted that "its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well." *Id.* at 254. Finally, the government attempted to justify the law on a "prosecution rationale – that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt." *Id.* at 259 (Thomas, J., concurring).
74 *Id.* at 253.
75 *Id.* at 255.
76 *Id.*
77 *Id.*
78 *Id.* at 250.

> might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[79]

Kennedy's opinion was met by dissenting opinions from the Court's most conservative members, Chief Justice William Rehnquist and Justice Antonin Scalia. It was also met by a swift response from Congress, which already has reacted to the opinion in *Free Speech Coalition* by passing another law that sweeps up virtual child pornography, this one known as the PROTECT Act.[80]

With this background in mind, the article now turns to the comments of Kat Sunlove regarding the Supreme Court case that carries her organization's name.

QUESTION: How and why did the Free Speech Coalition first become involved with the attack against certain sections of the Child Pornography Prevention Act of 1996?

SUNLOVE: Our material evolves generally out of fantasy, and because of that, our First Amendment lawyers were disturbed by the language regarding "what appears to be a minor" or conveys the impression of being a minor. Some of our producers and distributors have talent that present themselves as the teeny-bopper high school cheerleader with bobby socks – the Catholic school girl look. This is all clearly fantasy[81] – we're not dealing with underage people.

---

79 *Id.* at 253-54.

80 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 678 (current version at 18 U.S.C. § 2252A(c)). *See* Nick Anderson, *New Bill Targets 'Virtual' Child Porn*, L.A. TIMES, Feb. 25, 2003, at 14 (describing the Senate's unanimous approval of a new version of the law struck down by the Supreme Court). That legislation was eventually rolled into the so-called "Amber Alert" legislation that was signed into law by President George W. Bush in April 2003. *See also Bush Signs Amber Alert Bill*, NEWSDAY (N.Y.), May 1, 2003, at A08 (noting how the bill makes virtual child pornography illegal).

81 The idea that this is fantasy is one that Sunlove brought up during a CNN interview in 2002, in which she stated:

> It is important for me to point out that the industry that I represent, the mainstream adult entertainment industry, does not produce child pornography. We did not challenge this law in order to protect our own interests. We are in the business of making adult products for adults with adults. But there is a very important First Amendment issue here. This law would basically have criminalized a thought crime, *fantasy material*, material where no child is harmed and no child is involved.

CNN Talkback Live: Pope Orders American Cardinals to Rome; Virtual Child Pornographers Find First Amendment Loophole (CNN television broadcast, Apr. 16, 2002) (emphasis added).

As I said on the *Nightline* interview,[82] you're talking about the thought police here because these are imagined images and "appears to be" certainly would sweep up a 21-year-old actress who looks young.[83] Sometimes it's very difficult to tell. The underlying assumption there – since we know this law was really designed to get at adult entertainment – is that it's a content issue and we should not fantasize these kind of youthful images.

In reality, there is no harm in what goes on in our minds. The only harm is when an actual child is involved. So, we felt there was a principle here that we should defend, even though it affected a very small percentage of our members. Most of the major producers don't try to infantilize their stars.

QUESTION: Like the magazine called *Barely Legal*?

SUNLOVE: Right, exactly. But look, "barely legal" doesn't mean not legal. It means 18 years old. So it's an enticing come-on for those who like the young. There's a beauty about youth and innocence that is really very aesthetic.

Our attorneys said, "This really should be challenged." Again, we did it not so much because our industry needs it, but because of the tremendous damage to the First Amendment. There were principles at stake that affected Hollywood movies as well. Movies like *Animal House* and *Lolita* immediately would become contraband. So, it's a tough one. We couldn't even get the ACLU to come on with us.

QUESTION: Really?

SUNLOVE: Nobody would touch it. That's why we are the plaintiffs; we were the only ones willing to step up to challenge this law. It's really gratifying when you take on a hard battle like that, and you know you're taking a big risk, but you win because you're right.

One of my favorite lines in working with this industry is, "We have truth on our side. All we have to do is tell it." That's really my style. My motto is "just put it out there because it's so often not what people think it is." It's largely an educational process.

QUESTION: How much money, in terms of attorneys' fees and

---

[82] *Nightline: You May Know It When You See It, But Can You Believe Your Eyes?* (ABC television broadcast, Feb. 12, 2001).

[83] During the *Nightline* segment to which Sunlove refers, she stated, in relevant part:

> I'm a parent. I'm a mother. I'm a grandmother, now. That's really as far from our interests as you could get. But, fantasy, on the other hand, the wide range of – of interests and ideas and thoughts and fantasies that adults can have as part of their sex life, that's all part and parcel of our policies and our philosophies and our publishing content.

Id.

other litigation expenses, did it cost the Free Speech Coalition to fight the battle against the government?

SUNLOVE: I know what is remaining. There's a balance to be paid to my dear friend, Lou Sirkin. I don't really know how much we overall spent.

QUESTION: How did you get Lou Sirkin to come on board?

SUNLOVE: Lou's just a true believer – one of the most noble people I have ever met. I'm honored to count him as a friend. We couldn't stop him once he thought somebody was willing to fund this and to give him the go-ahead. Other lawyers were fighting to get it. Paul Cambria wanted to take the case, but I wasn't in on those negotiations.[84] I don't think you get much better than Lou Sirkin for these kind of cases.

QUESTION: How important for the adult entertainment industry was the decision in the case?

SUNLOVE: There's a public relations benefit to that kind of a victory, and we got a huge bounce in our PR out there. Of course, not all of it was positive because some people saw it as defending child pornography. Generally speaking, in the world of lawyerly intellect, it was very well received. It was called the most important First Amendment victory in decades. I love it.

Yet, for our members, it's pretty distant. We had to explain to them why this was important because they're not making that kind of material.

QUESTION: In one sense, does it feel that you gained a victory more for the mainstream film houses? In the opinion, Justice Kennedy writes about films like *American Beauty* and *Traffic.*

SUNLOVE: Right.

QUESTION: So, in a way, it's almost like you took up a torch for mainstream movies rather than adult entertainment.

SUNLOVE: I think that is how it ended up. Our choice to take the case was a principled First Amendment fight.

We knew that we were going to be defending Hollywood movies, but that wasn't our purpose. We didn't do it to befriend them. In fact, we toyed with putting a full-page ad in *Variety* saying, "Where were you when we were out there fighting your fight?"

QUESTION: Congress now has passed another bill that targets virtual child pornography. Will the Free Speech Coalition be in the fight against that one as well?

SUNLOVE: I know that there has been some talk among the

---

84 Cambria is an attorney "who represents Larry Flynt and Vivid Entertainment." Frank Rich, *Finally, Porn Does Prime Time,* N.Y. TIMES, July 27, 2003, § 2, at 1.

attorneys to challenge this one as well, but I believe that they are not moving in that direction right now. That's due, in part, to finances. Quite frankly, Lou Sirkin is unwilling to take another case until we can pay off the first one, and that's been a little slow going. Our budget this year was damaged a little when our dues didn't get paid by all of our folks. So, I don't think we're going to move against this law.

QUESTION: Was the Free Speech Coalition ever threatened in any way during the fight over the CPPA?

SUNLOVE: No, I don't believe so.

QUESTION: The religious right didn't come after you?

SUNLOVE: No. I've been threatened by them, but for other reasons. They didn't like my "mistress" title on the show, shall we say? I used to get death threats on my phone.

QUESTION: Really?

SUNLOVE: There are some crazy people out there.

C. *Legislative Initiatives and the New Agenda*

While the virtual child pornography case of *Ashcroft v. Free Speech Coalition* put the organization in the public spotlight, the Free Speech Coalition is actively involved in numerous other legal issues. In particular, lobbying in Sacramento, California, for new laws that better serve the needs of its constituents is of prime importance to the Coalition.

Of course, being a lobbyist was not always easy, especially when your former life was in S & M and you represent the adult entertainment industry. Shortly after Kat Sunlove went to the state capital of California to work as a lobbyist, the following item appeared in the *State Net Capitol Journal*:

> LEGISLATIVE TIE-UP. Political reformers accuse the Legislature of being dominated and controlled by special-interest lobbyists. That accusation took on new meaning this week with the arrival of Kat Sunlove, a.k.a. "Mistress Kat." Sunlove, who has spent nearly two decades in the "sex biz" has been signed on to lobby for an adult entertainment industry trade association, the Free Speech Coalition. According to a flier labeled "Mistress Kat Goes to the Capitol," Sunlove will work to advance a legislative agenda that is "sex industry-friendly." She boasts of a Masters Degree in Political Science, a year of law school and "formidable experience as a dominant mistress." Now legislators insist they don't play favorites with lobbyists. But you've got to believe that with all the attention being focused on what goes on behind closed presidential doors, it'll be tough for Mistress

> Kat to get past the outer office, even with legislators who agree to meet with her. Of course, if she brings her whip along . . . .[85]

As this section makes clear, there's been a great deal of progress made by both Sunlove and the Free Speech Coalition since such quips were commonplace. Sunlove talks below about some of the organization's current legislative and lobbying initiatives. She also articulates her immediate goals for the Free Speech Coalition.

QUESTION: What are some of the current legal battles the Free Speech Coalition is fighting today or some of the legislative issues or lobbying issues you've been dealing with?

SUNLOVE: Our lobbying work has changed a lot over the years that I've been in Sacramento, which is about six or seven years now. In the beginning, it was very much an educational process – educating legislators on the difference between adult obscenity and child pornography. We also spent time fighting back poorly drafted laws and laws that were designed solely to run adult businesses out of town – extreme zoning issues and other kinds of licensing and regulatory schemes.

For example, there was a bill a couple of years ago that would have allowed counties to zone jointly, which suggested that California could then be one large zone away from adult businesses.

QUESTION: So, all the adult video stores would have to be located in Temecula?

SUNLOVE: One of those towns. We fought that one back, and there have been others, such as the one dealing with harmful matter and how it's displayed. In the last couple of years, however, we have focused more on the proactive side, fortunately, and not always having to be defensive.

For instance, we've been shopping a bill that Al Gelbard, one of our First Amendment lawyers, and Jeffrey Douglas drafted. The bill deals with the seizure of business records during an investigation. No charges may have been filed, but the authorities could come in and seize the records.

These days, records are kept on a 30-gig hard drive. The authorities could come in and take your entire computer, with your payroll, inventory, sales records and everything. That alone can put somebody out of business.

So, we drafted a law that would allow for a non-judicial mecha-

---

85 *Dope and Dish from Under the Dome*, STATE NET CAPITOL J., Feb. 2, 1998, at Isabella's Ear.

nism so that, during the course of this investigation, a business, within a reasonable time, could obtain copies of the evidence. Finally, this year and after a lot of trying, I was able to convince a longtime acquaintance, John Burton, who's the state senate president pro-tem, to submit it to legislative counsel.

Then, however, I struggled and struggled to find an author for the bill. I finally found one based on my old political connections – about one degree of separation in Tom Bradley's 1969 campaign[86] – and a person who knew my ex-husband and all these mutual friends. I got Assemblymember John Longville[87] from the San Bernardino area to author the bill.[88]

My first challenge, of course, was to develop a coalition of other organizations to get behind the bill so that we could disappear. We didn't want the bill to be labeled as being sponsored by us. It was an interesting process because the first proposal that we were shopping around used, as an example, a child porn case that had dead-ended with no charges ever being brought, but had put the person out of business. That was our example.

When I started talking to other co-sponsors, they said, "Let's see if we can find a different example." Jeffrey had a very good example of a campaign finance investigation that had resulted in a charity being shut down because its records were on the same computer as another business. It was a husband and wife, and she ran

---

86 Tom Bradley ran for mayor of Los Angeles, California, in 1969, "going down in defeat to incumbent Sam Yorty." Richard Pearson, *Tom Bradley Dies at 80; Mayor of Los Angeles for 20 Years*, WASH. POST, Sept. 30, 1998, at B06. Bradley, however, ran again for mayor in 1973 and was elected to the first of five consecutive terms, becoming the first African American to serve as the city's mayor. *Id.* Bradley, who would later run unsuccessfully for governor of California, died in September 1998. *Id.*

87 *See generally* John Longville, Assemblymember 62nd District, *at* http://democrats.assembly.ca.gov/members/a62/ (last visited Sept. 19, 2004) (providing links to information about Longville and his work as a member of the California State Assembly). Longville "was first elected to the California State Assembly in 1998 after serving for nearly two decades as a councilmember and then as mayor of Rialto." John Longville, Assemblymember 62nd District, *Biography Link*, *at* http://democrats.assembly.ca.gov/members/a62/bio.htm (last visited Sept. 19, 2004).

88 A.B. 1438, 2003-04 Leg., Reg. Sess. (Ca. 2003). The bill, as enrolled in September 2003, would amend the California Penal Code and provides, in relevant part:

> If a government agency seizes business records from an entity pursuant to a search warrant, the entity from which the records were seized may file a demand on that government agency to produce copies of the business records that have been seized. The demand for production of copies of business records shall be supported by a declaration, made under penalty of perjury, that denial of access to the records in question will either unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law. This declaration shall suffice if it makes a prima case that specific business activities or specific legal obligations faced by the entity would be impaired or impeded by the ongoing loss of records.

Id.

this Christmas charity. She couldn't get access to her database – everything was gone. The authorities just jerked her around and wouldn't give her the records back.

That story had some resonance in the Capital, and I just decided to start at the top. I called the California Chamber of Commerce and, sure enough, its lobbyist said, "Yes, we'd support that bill." That made all the difference in the world. Then, I got the California Retailers Association and San Diego Food and Beverage and, suddenly, this was a business bill.

When I was confronted at a fundraiser by the lobbyist for the sheriffs and police chiefs, his introduction to me was so funny. He said, "Yeah, if they take your rights away, I probably represent them." We chatted a long time about this bill, and he said he'd just been about to draft a letter of opposition on it, but when I told him how many amendments we'd taken because we'd been working with the district attorneys and the AG's office, he backed off. In the end, we went through the Assembly, the Senate Policy Committee and the Appropriations Committee without a single "no" vote.

It was just astounding. It's a really good bill. It's a common sense bill, and damned if Gray Davis[89] didn't veto it.

QUESTION: Really?

SUNLOVE: And he referenced porn in his veto message.[90]

QUESTION: Will the bill be reintroduced?

SUNLOVE: It will be reintroduced. Longville really got behind this bill because, for one thing, he told me he never had a bill go through without "no" votes. Plus, he'd never had a bill that had such strong outside industry support, so he intends to reintroduce it. My hope is that the Chamber will be the sponsor, and I'll just disappear. I have no ego about it. We just want the law passed.

---

89 Gray Davis, the former governor of California, was ousted in 2003 in a recall election and replaced by actor Arnold Schwarzenegger. *See generally* Dan Morain, *Recall Campaigners Spend $88 Million, Despite Limits*, L.A. TIMES, Feb. 4, 2004, at B6 (describing the financial cost to Schwarzenegger in his bid to unseat Davis).

90 Davis stated the following in his official veto message to members of the California Assembly:

> Under AB 1438, not only would law enforcement have to examine the documents seized within a short five-business day duration, but if law enforcement requests additional time or otherwise objects to returning the documents, the District Attorneys Office will have to intervene, become familiarized with the investigation, and file a motion with the court, all within the same short five-business days period. This process would be especially onerous for contraband materials such as pornography, which would require specialized investigators to review the material and highly skilled prosecutors versed in constitutional law to file a motion with the court for delays or denials.

California State Legislature, Veto Message, A.B. 1438, From Gray Davis to Members of the California Assembly, *at* ftp://www.leginfo.ca.gov/pub/bill/asm/ab_1401-1450/ab_1438_vt_20031014.html (Oct. 14, 2003).

QUESTION: Is that a lobbying strategy? To remove the Coalition from the picture and find other supporters that might appear more mainstream in the eyes of the legislature?

SUNLOVE: Absolutely.

QUESTION: Is that how you have to handle lobbying efforts, for the most part?

SUNLOVE: It all stems from coalition politics, which is my bread and butter. In Tom Bradley's 1969 campaign for mayor of Los Angeles, we brought in the Jewish community and the labor community, the black community and the brown community. These folks didn't always agree on everything. But they agreed on him. That's my understanding of how to get something done.

Of course, I now sit in a sensitive position because of the industry that I represent. For legislators, we represent the danger zone if they appear too close to us. I am very sensitive to that.

It's partly to protect my author – to give him cover from being seen as, "Oh, you're carrying that porn bill." Instead, it's a Chamber of Commerce bill. It's a business bill. I certainly see that.

It's not about us disappearing. Rather, it is about us being homogenized with a bunch of others. We get tremendous benefit from being identified with the Chamber of Commerce and with business issues.

QUESTION: As adult businesses continue to mainstream, do you see that stigma going away or do you think it will always be there?

SUNLOVE: You know, in my lifetime, I just don't know. We hope so. I've certainly seen a lot of changes in the twenty-four years that I've been in the industry and I'd like to think that it would become less and less of an issue. You would think that, as the public perception of us goes up in a positive way, the negative perception of us, politically, should also go away.

I would also say that both Jeffrey and I are very professional people. I did a lot of other jobs before I got into the adult entertainment industry – I'm old. We really neutralized any fears that the Chamber or the retailers had in working with us. We let them know that we were just like anybody else.

We carried a good message too. We learned how to articulate our issues and we had good friends in the legislature – we're dealing with some long-term relationships. They began to think of me as one of them, so that helps a lot. That happened after only six years of being up there with a full-time presence. So, who knows, with another ten years, where we might be?

QUESTION: In light of that history, what are your goals now as the executive director of this organization?

SUNLOVE: I miss the political focus because this has been a successful year. As I sit in this desk, however, I'm aware that we have some damaged relationships out there. I think that we've had poor communication with our membership. I intend to do something quickly about that.

QUESTION: What do you plan to do?

SUNLOVE: There wasn't enough communication telling them what we do besides lobbying days and the weekly newsletter, both of which came out of my office. It's not that we haven't done good things from this end; they just haven't been communicated. I want to quickly bring people back aboard and help them understand that the agenda going forward is one that will definitely benefit them.

I've got to focus aggressively on membership recruitment, and that's a big project. For an industry of our size, which has the kind of economic impact we do, to have only 400 members is really sad. It's an industry with an outlaw mentality – not literally, of course – and anybody who has the gall to get into this industry has to have some pretty thick skin and a certain independent streak. It is like herding cats to get these people to get up off their money, especially if they don't perceive a value-added to them.

Beyond that, in terms of programs, I'm anxious to do a targeted national voter registration drive because next year's election is utterly crucial to us. If George Bush were to get a mandate and the war in Iraq were to calm down somehow, it's entirely possible that our fortunes could take a dive quickly. I think it's really important that we mobilize what I consider to be our political constituency – our fans. Our fans just don't speak up and they are not vocal and visible. But they are there with their dollars. So, if we can get them to do what I call, "Vote for their Erotic Rights," as well as their economic interests, then I think a voter drive could really pay off for us.

In addition, we've got to do some serious fundraising and broaden from just the payment of dues. We don't want to be dependent on our dues.

In terms of membership communication, historically, we put out two publications. One is a weekly censorship newsletter that I've been doing for five or six years that summarizes censorship actions occurring around the country. That's been extremely well received. People look forward to that because it's one of a very few places where you can see compiled a week's worth of examples of somebody somewhere who's trying to curtail your First Amendment rights.

The other publication has been pretty sporadic, but it's an excellent publication. It's the *Free Speaker* and is a more intellectual journal. It has in-depth commentary and analysis on issues, such as the *Ashcroft* case. It allows us the luxury of getting some of these well-informed attorneys or other people to write for us and expound on some issue that affects our members.

I'm going to add a third publication to the list. It's going to be a short, monthly newsletter. I'm planning to title it, *Memo to Members.* It will be just a memo that brings them up to date on what we're really doing around here.

I've also been working on ad copy. We've got some ads in catalogs now that we never had. We're going to be working on our trade-show booth and developing that aspect. But the members don't always see the behind-the-scenes work. So even though it's kind of pedestrian, if the members understand the flow of the work through here, it will reassure people greatly that their money is actually being quite well spent.

D. *Secondary Effects and the Regulation of Sexually Oriented Businesses*

The hot topic among members of the Los Angeles City Council in November 2003 was not the fires that had just ravished southern California, took more than a dozen lives and destroyed thousands of homes.[91] No, it was, instead, lap dancing and, more specifically, "a 'no touch' rule barring customers from tipping in G-strings or receiving lap dances."[92] Early that month "a coalition of adult business owners had gathered enough signatures to force the Los Angeles City Council to put a referendum on the up-close form of entertainment on the ballot."[93] The City Council, in turn, was left to "decide whether to rescind the ordinance or include it in the next city election in 2005."[94] The council chose the former op-

---

[91] *See generally* J. Madeleine Nash, *A State in Flames; How a Combustible Mix of Drought, Development and Fierce Desert Winds Sparked One of California's Worst Natural Disasters*, TIME, Nov. 10, 2003, at 54 (describing the fires).

[92] David Zahniser, *Costly Ballot Measures May be Delayed*, COPLEY NEWS SERVICE, Nov. 5, 2003, at California Wire.

[93] Jessica Garrison, *Lap Dancing Referendum Qualifies for City Ballot; Adult Business Owners Gather Needed Signatures to Force a Vote on New Rules Passed by Council*, L.A. TIMES, Nov. 4, 2003, Metro, at 4. *See 1Down Takes Lead Roll in Saving our Strip Clubs from Lap Dance Ordinance*, ADULT INDUSTRY NEWS (Oct. 2, 2003) (describing the petition effort), *at* http://www.ainews.com/story/5635/.

[94] Jessica Garrison, *L.A. Delays on 3 Ballot Measures; The Council Must Decide Whether to Put Before Voters Questions on Lap Dancing, Tax Hikes and Use of Port Funds*, L.A. TIMES, Nov. 6, 2003, Metro, at 4.

tion on November 18, 2003, when it beat a "hasty retreat"[95] and voted to "allow near-naked women to keep gyrating in men's laps."[96]

Whether it's a major city like Los Angeles, California or Midwestern outposts like Miami County, Ohio[97] and Pinckneyville, Illinois,[98] the regulation of sexually oriented businesses was on the agenda of municipalities across the country in 2003.[99] These municipalities rely on a doctrine called secondary effects to support those ordinances[100] when facing judicial challenges that affect so-called SOBs.[101] That doctrine is highly favorable to those towns, cities and counties seeking to control SOBs because, as one federal appellate court observed in 2003, it gives them "wide latitude to design and implement solutions to problems caused by adult entertainment without compiling an extensive evidentiary record."[102]

The secondary effects doctrine provides "a means by which the government may, in certain circumstances, sanitize a facially content-based action"[103] and, in so doing, have it subjected to the relaxed intermediate scrutiny[104] standard of judicial review utilized for content-neutral regulations rather than the strict scrutiny stan-

---

95 Jessica Garrison, *L.A. Council Retreating on Lap-Dance Ban*, L.A. TIMES, Nov. 19, 2003, at 1.

96 *Id.*

97 *See* Nancy Bowman, *Miami Discusses Sexually Oriented Businesses*, DAYTON DAILY NEWS, Oct. 31, 2003, at B3 (describing how county commissioners are reviewing proposed changes to zoning laws affecting sexually oriented businesses).

98 *See* William Lamb, *Bar is Called Out of Step with Town*, ST. LOUIS POST-DISPATCH, Sept. 28, 2003, Metro, at D1 (describing the struggles of Pinckneyville, Illinois – a town known as "the 'Friendly Little City' of 5,500 some 72 miles southeast of St. Louis" and situated "in Illinois' sleepy Perry County" – to regulate a topless bar called Shirk's that happens to be owned by the local mayor).

99 *See, e.g.*, Ron Browning, *First Amendment Challenge; Indiana Cities and Towns Challenging Sexually Oriented Businesses*, IND. LAW., Sept. 10, 2003, at 1 (describing efforts across the state of Indiana to regulated sexually oriented businesses); Tracey Bruce, *Bookstore Owner's Dilemma: Rights vs. Staying in Business*, ST. LOUIS POST-DISPATCH, Aug. 4, 2003, Jefferson County Post, at 6; Julie Anderson, *Board Seeks to Control X-rated Business*, OMAHA WORLD HERALD, July 31, 2003, at 3b (describing how Pottawattamie County, Iowa, "approved a new ordinance regulating sexually oriented businesses, replacing an earlier ordinance that was declared unconstitutional in 1997.").

100 *See supra* notes 19-32 and accompanying text.

101 *See, e.g.*, Kim Canon, *Modeling Studio Attracts Eyes of Community Leaders*, HOUSTON CHRON., May 8, 2003, This Week, at 1 (using the acronym "SOB" to refer to a sexually oriented business).

102 Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1268 (11th Cir. 2003).

103 Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 605 (2003).

104 *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 916 n.212 (2002) ("The requirements for content-based speech regulation are far more exacting than those for content-neutral regulations of speech, which draw only 'intermediate scrutiny'.").

dard to which content-based laws are subjected.[105]

In *City of Renton v. Playtime Theatres, Inc.*,[106] the United States Supreme Court held that "zoning ordinances designed to combat the undesirable secondary effects of such [adult] businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations."[107] The Court, in turn, has defined secondary effects as "the impacts on public health, safety, and welfare" that adult businesses carry, in contrast to the primary effects of speech such as "the impacts on the audience of watching nude erotic dancing."[108] Secondary effects of nude dancing and adult motion pictures, which are treated by the Court as "of the same character,"[109] include such things as "crime rates, property values, and the quality of the city's neighborhoods."[110] In particular, they may relate to "higher rates of prostitution,"[111] among other vices.

In applying the secondary effects doctrine, the Court has been highly deferential to evidence of secondary effects presented by the municipalities trying to restrict sexually oriented businesses. Most recently, when considering an ordinance that prohibits the establishment of more than one adult business in the same building in *City of Los Angeles v. Alameda Books, Inc.*,[112] the Supreme Court held that "our cases require only that municipalities rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address."[113] The Court added in that case that "[t]he municipality's evidence must fairly support the municipality's rationale for the ordinance."[114] Justice Sandra Day O'Connor, writing a plurality opinion in *Alameda Books*, reasoned that:

> While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent

---

105 *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (writing that "a content-based speech restriction" is constitutional "only if it satisfies strict scrutiny," and defining this test to mean that a statute "must be narrowly tailored to promote a compelling Government interest.").

106 475 U.S. 41 (1986).

107 *Id.* at 49.

108 City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000).

109 *Id.* at 296.

110 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002).

111 Shiffrin, *supra* note 28, at 1150.

112 535 U.S. 425 (2002).

113 *Id.* at 442.

114 *Id.* at 438.

with its own.[115]

Justice Anthony Kennedy concurred with Justice O'Connor's plurality opinion in *Alameda Books*. His opinion has been held by appellate courts to be controlling because it "is the narrowest opinion joining the judgment of the Court."[116] Justice Kennedy's concurrence was even more deferential than the opinion of Justice O'Connor on the evidentiary question for secondary effects. In particular, he wrote that the Court has "consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."[117] More importantly, Kennedy added that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners"[118] and that if a municipality's "inferences appear reasonable, we should not say there is no basis for its conclusion."[119]

In this section, Kat Sunlove discusses the secondary effects doctrine and the Free Speech Coalition's efforts to combat it. She also addresses some of the motivations behind the legislative efforts to crackdown on sexually oriented businesses.

QUESTION: Let's talk a little bit about the regulation of sexually oriented businesses around the country. It seems that adult entertainment establishments – gentlemen's clubs and so forth – are under growing attack from cities and towns across the country. Do you find that to be case?

SUNLOVE: I found it more to be the case six or eight years ago. I think now there's something else going on. We've had some good decisions that made reckless, wild-eyed zoning and licensing difficult. Now, you've got to get a prompt judicial review on these things. Thankfully, you can't just put people on hold when it's speech under discussion. Those things have actually aided the opening of businesses in a more reasonable way.

We don't have a problem with being zoned. We just have a problem being zoned out to the cow pastures where our customers are inconvenienced. It's not only our First Amendment rights at

---

115 *Id.* at 437.

116 *See, e.g.*, Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 722 (11th Cir. 2003) (citing the Supreme Court's opinion in *Marks v. United States*, 430 U.S. 188 (1977), for supporting the proposition that the most narrow opinion that joins a plurality becomes the controlling opinion).

117 *Alameda Books, Inc.*, 535 U.S. at 451 (Kennedy, J., concurring).

118 *Id.* (Kennedy, J., concurring).

119 *Id.* at 452 (Kennedy, J., concurring).

issue, but it's those people's rights as well. They have a right to our legal material.

I've had a few interviews recently where newspapers call and say, "We just are having an inflow of all these new adult businesses opening up. What's going on?"

That's the other side of the coin. They are, in fact, managing to open up, despite the sense that there are some very restrictive zoning efforts going on, too. Even these recent Supreme Court cases, like the *Alameda Books* case, were just wonderful. Justice Kennedy's language in the opinion basically said, "Let's face it here. These are not content-neutral laws." That's a big thing – it's what we've been screaming in the wilderness out here for years. How can you say, when the law is focused on the content being sold of this protected material, that that's not the purpose of the law? So that's a big one.

QUESTION: Municipalities usually come back with the secondary effects doctrine. What is the Free Speech Coalition's position on that?

SUNLOVE: We've had some very good movement in that area as well. You're probably familiar with *Flanigan's v. Fulton County.*[120] It's a Georgia case, and I think it is really symptomatic of what has happened and what's moving in our direction. Fulton County officials wanted an adult zoning ordinance, and so they picked up these antiquated, out-dated, poorly conducted studies. Then, they decided to do their own study. They had the police look at crime statistics and property values. They compared an alcohol-serving, non-adult club and an alcohol-serving adult club.

Guess what? It didn't turn out like they wanted. Things were much worse at the non-adult club than at the adult club.

Then, they just said, "All right, never mind that. We'll just pass our ordinance anyway." The clubs, of course, challenged this and when it got to court, the judge said, "Hey, give me a break. You did your own study. You can't ignore it. Where's the government's compelling interest?"

The more we do studies, the more those results are going to favor us. I'll tell you why. It's in line with something that Jeffrey Douglas said in terms of the maturing of this industry.

That's what I've seen in twenty-four years. We've grown up, largely through the influence of professionals like me who have come from other parts of the world into this industry. Attorneys

---

[120] Flanigan's Enters. of Georgia v. Fulton County, Georgia, 242 F.3d 976 (11th Cir. 2001).

and other people who had real jobs have dragged some of our compatriots along with us saying, "You've got to do this better. You've got to step up to the plate and run your business like you really ought to."

Now that so many businesses are running gentlemen's clubs – these superstore retailers that are glass and chrome and pretty and smell good when you walk inside – this transforms the whole question. Talk to me about secondary effects.

One poorly run convenience store that allows drug dealing in its parking lot doesn't taint the whole industry. What are you going to do, close down all the 7-11's? I don't think so. Are you going to zone them out? No. You're going to deal with the law being broken right there. We have laws against drug dealing. Go arrest them. It's not the business's fault. The point is that those negative secondary effects are irrespective of the content of the business. That's where I come from on that subject, and I welcome more secondary effects studies.

QUESTION: Would you like to see the courts require studies conducted in the community at issue rather than rely on studies conducted elsewhere?

SUNLOVE: Absolutely. It only makes sense. You've got to compare apples and apples here.

QUESTION: A quick follow up to that. Is there anything that the Free Speech Coalition is doing to help these adult businesses out there that are faced with this? Do you have a packet of a [sic] legal defense packet that you send to them?

SUNLOVE: No, but it's a good idea. I think I'll put that on my list of things to do.

We do provide referrals to First Amendment attorneys around the country. We urge people not to look to their local corporate attorney to save their butt because it's not a good way to approach it. They really need somebody who has already done this type of work. We provide that kind of service.

We also provide a lobbying training course packet that we developed some four years ago. We've got a "road show," and we'll take this to our state chapters and train them how to have a political advocacy model in their chapter and how to deal with local public officials. We emphasize things like how to testify before the city council and how to stand up for their own rights.

I come from a grass-roots perspective on these things. I want to empower my members so that they are not dependent on me to come and bail them out. I can't do it – there's too much of it around the country. We do have members who wish that we were

in a position, financially, to fund their local battle with their city council, but obviously there are just too many out there.

QUESTION: What motivates legislative bodies to target sexually oriented businesses, such as the recent lap-dance ordinance in Los Angeles? Is it all a political game or are there other motivations?

SUNLOVE: I think it's a combination of some grumbles from constituents that make their way to a district office or maybe all the way to the legislator and a political suspicion that it could be beneficial to move on this area of relatively unpopular speech. Other than that, sometimes it's a personal thing. Some of these local folks are just on a crusade and then you have these groups, Ohio Citizens for Community Values and the like, pushing the issue.

QUESTION: It seems like their side comes prepared saying, "Here's how you want to do it. Here's how you draft it." They're very well organized, aren't they?

SUNLOVE: They are very well organized because they have such an easy organizing focus – the churches. It's so quick to get in touch with 600 or more people. I sometimes think those folks on the other side just have too much time on their hands. They need to get a job or something.

QUESTION: Did the response in Los Angeles, in terms of the number of signatures gathered, basically force the city council, as I understand it, to scrap the idea for the ordinance? Is that further evidence of the mainstreaming of adult material?

SUNLOVE: I'd say so. I wish I had been down here then to be involved in that name gathering. I think it was the nightclub folks who were being attacked directly. Had I been here in this position at the time, we'd have been more involved in it. I think it was a great move that they made.

E. *Politics and Prosecutions: Life Under Ashcroft*

It is safe to say that obscenity prosecutions were not a top priority during the Clinton Administration, which "effectively disbanded an obscenity taskforce that had ruled the roost in the U.S. Justice Department during the Reagan-Bush era."[121] When Attorney General John Ashcroft took office in 2001, however, he promised to take up the fight against pornography after a decade-long respite – a gauntlet that had been not only dropped during the previous administration, but also dumped into the ashcan of irrele-

[121] Stephen Romei, *U.S. Finds Its Erogenous Zone*, THE AUSTRALIAN, Oct. 30, 2003, at B22 (crediting the doubling in size of the U.S. pornography industry on two factors: "the tech boom" and "Bill 'Well, it depends what you mean by the words received fellatio from an intern' Clinton.").

vancy.[122] After terrorists struck on September 11, 2001, the Justice Department shifted its focus, but now the Bush Administration's once promised anti-pornography crusade is occupying the Attorney General's attention, with nearly fifty filmmakers and distributors under investigation and "indictments expected in the coming months."[123] As John Malcolm, the deputy assistant attorney general for the criminal division, proclaimed in late 2003, the Justice Department is "going back" to enforcing federal obscenity laws.[124] And then, in February 2004, the *Los Angeles Times* broke the story that "the Justice Department has quietly installed an outspoken anti-pornography advocate [Bruce Taylor] in a senior position in its criminal division, as part of an effort to jump-start obscenity prosecutions."[125]

The first wave of those threatened prosecutions already is underway. In August 2003, a federal grand jury handed down a ten-count indictment against Robert Zicari – better known as Rob Black – and his wife, Janet Romano, of Extreme Associates, located in the adult entertainment capital of California's San Fernando Valley.[126] Attorney General Ashcroft, in announcing the case against Zicari and Romano, said, "Today's indictment marks an important step in the Department of Justice's strategy for attacking the proliferation of adult obscenity."[127]

In this section, Sunlove and Douglas talk about Attorney General Ashcroft's increasing efforts to launch obscenity prosecutions against the adult entertainment industry. Douglas also discusses the case against Rob Black and Extreme Associates, as well as the prosecution of Max Hardcore.

QUESTION: Apparently, there were no federal obscenity prosecutions during the Clinton Administration. Today, under President Bush and Attorney General John Ashcroft, we are seeing a few

122 *See* Linda Winer, *Uncle Sam Looks at Porn*, NEWSDAY (N.Y.), Sept. 21, 2003, at D4 (recalling that "Ashcroft promised when he came into office in 2001 that porn would be a priority.").

123 *Id.*

124 Luiza Chwialkowska, *Crackdown on Pornography is Being Launched by Bush*, N.Y. SUN, Sept. 15, 2003, at 1.

125 Richard B. Schmitt, *U.S. Plans to Escalate Porn Fight*, L.A. TIMES, Feb. 14, 2004, at A1.

126 *See* P.J. Huffstutter, *U.S. Indicts Porn Sellers, Vowing Extensive Attack*, L.A. TIMES, Aug. 8, 2003, at 1 (describing an investigation by U.S. Postal Inspectors who set up a sting operation in Pennsylvania and found "the defendants sold allegedly obscene material over the Internet and distributed videotapes and DVDs across state lines through the postal system . . . .").

127 *Id.*

new prosecutions, such as the current one involving Rob Black. Is this signaling something new?

DOUGLAS: Everyone assumed that, with the appointment of Bush as President by the Court, there was going to be a radical shift in direction.

My theory is that obscenity prosecutions are complicated – uniquely so when compared to anything else. You don't know that it's a crime until the jury tells you whether it is. Accordingly, obscenity prosecutions don't occur unless there is a convergence of an ideological commitment and a political payoff. Without these things converging, it just doesn't happen. Here we have a President with an Attorney General who has the ideological commitment and – politically speaking – these prosecutions are the very things that Bush can do without Congressional support that will galvanize his base. Signing presidential decrees about the environment is not going to get out the conservative right when Election Day rolls around.

Another problem with this type of prosecution is that there's no supervision. There's certainly a substantial portion of Congress that encourages prosecutions of obscenity and child pornography. So, we kept assuming that it was going to happen aggressively and have been waiting for the other shoe to drop. Now, obviously, there were a variety of external factors that made that difficult. One of the internal factors apparently is we don't really know if the Justice Department is all that eager to be the "obscenity czar." It's sort of a career ender.

SUNLOVE: They lose so many cases.

DOUGLAS: The last federal prosecution began in 1990 and it ended in 1992 or 1993. It was pre-Clinton really, so we were seeing it grind to a halt. That means that at least one – and, realistically, two – generations of adult industry people came in at a time when, to them, obscenity prosecutions were as relevant as the French and Indian Wars. It's ancient history. When they would discover someone who had done prison time, it just didn't register.

Without a realistic threat of prosecution, a lot of people did things that were very foolish and risky. Here we were, this voice in the wilderness, saying, "You're taking too many risks." We expected it to happen.

The significance of Extreme Associates is not what one would initially think it is. Unlike every other major federal attack on the industry, the government is charging one company. In the preceding three federal efforts, the government has always targeted in the magnitude of thirty companies.

Extreme Associates positioned itself, appropriately for its name, to be as extreme as it could possibly be. The company literally marketed itself as that. If they felt that somebody was coming closer to them, they would say, "Well, we're much worse than so and so."

So, the principal of the organization kind of invited it. He made very inflammatory statements in the media and at public events where law enforcement was seated five feet away from him. He essentially said, "Come on, I dare you."[128] In that sense, the indictment, in and of itself, is neither surprising nor significant.

But a component of the indictment is very telling and quite significant. The government not only filed charges regarding specific full-length films that were ordered by FBI agents to be shipped to the western district of Pennsylvania, but also filed charges regarding downloadable segments from Extreme Associates' Web site. These are sixty-second, 180-second segments. In fact, I think the longest segment runs three minutes.

QUESTION: Are these the free teaser ones or are they the ones that you pay for?

DOUGLAS: Oh, people pay for them. They are trying to do an end-run around the obscenity requirement that material be taken as whole. Obviously, sixty seconds of a movie – even though it is accessible as a downloadable unit – is not how the film was created, so it substantially undermines the notion of taking it as a whole. The reason that it's only sixty seconds is, primarily, just a technological limitation.

QUESTION: Sure.

DOUGLAS: You can't download forty-minute segments – or realistically even a fifteen-minute segment. Most of those movies had fifteen-minute vignettes. That's one significant part of the prosecution.

The other part is that there has only been one prosecution of an adult Web site for obscenity in the United States. It was a local prosecution by the Redondo Beach city prosecutor's office, and the only reason they did it is they had no idea what they were getting into. They were misled by the Los Angeles Police Department,

---

128 *See* Torsten Ove, *Indictments Signal Wider U.S. Attack on Porn*, PITTSBURGH POST-GAZETTE, Aug. 8, 2003, at A-1 (quoting Rob Black as stating during a PBS *Frontline* documentary, in response to an interviewer's question about a raid by the Los Angeles Police Department on a rival pornography company, "We've got tons of stuff they technically could arrest us for. And when this happened, I [went] on our Web site – I made a big speech: 'I welcome the LAPD to come on down.' I said, 'Come and get me.'").

which was their advisor, telling them, "We do Web sites all the time."

QUESTION: That prosecution was against whom?

DOUGLAS: It was a small, free adult Web site run by a local Redondo Beach businessman and political gadfly. He's always successfully suing Redondo Beach. This was his payback.

This was not even a side business because it generated no income whatsoever. It was just a labor of love. He liked writing adult stories with the accompanying pictures. The misdemeanor took five years to come to trial, which is some kind of astounding record. He was very proud of that.

So, anyway, two different judges made very poor, difficult-to-defend decisions based on the practical problem of allowing the jury to look only at the thirty-two photographs the prosecution had picked out of the 3700 that existed on the Web site. In such a case, the jury's not going to convict. The dilution factor became an overwhelming obstacle, so the jury said no. The prosecution can't pick and choose whatever it wants. From the Web site, of all of the 3700 photographs available, it chose these thirty-two photos. So, it was easy to argue that, to take the work as a whole, you must see all of the images, along with the written material, just as you would with a magazine.

QUESTION: Right.

DOUGLAS: In Georgia, *Penthouse* was prosecuted, and the prosecutors said they ought to be able just to take this one pictorial, without the text or any other part of the magazine, because it's a separable unit. They can't do that.

So, by selecting just the downloads from the Extreme Associates Web site, the government in that case is trying to accomplish that exact thing, which is to avoid taking the Web site as a whole.

The problem initially arose when a prosecutor successfully argued to a jury in Massachusetts that Joyce's *Ulysses* was obscene.[129] He was pointing out passages to the jury, saying, "If you read this word, it's talking about sex right here." It appeared that the requirement that a work be taken as a whole was designed to avoid that problem, and now the government is trying to do that again with Extreme's Web site.

---

[129] The book *Ulysses* by James Joyce has been the subject of several obscenity prosecutions. *See, e.g.*, United States v. One Book Entitled *Ulysses* By James Joyce, 72 F.2d 705 (2d Cir. 1934) (ruling in favor of the book, the court held that while it found some parts of the book obscene, the book was not obscene when "taken as a whole." The court wrote that "*Ulysses* is a book of originality and sincerity of treatment and that it has not the effect of promoting lust.").

QUESTION: Is there a lot of concern now among people who try these types of cases that the Extreme Associates case actually could change the law significantly, or are the people on the outside just saying, "Well, this is Extreme. We don't have to worry about it."

DOUGLAS: I don't have an answer to that question. There definitely are some of us who see the significance in the Extreme prosecution, primarily in the area that I just described. There are others that see it as being sort of the camel's nose under the tent, and the rest say, "Oh, it's just Extreme."

In previous sting operations, I've seen the pattern of denial that always occurs. Everyone's trying to find a principled reason why this company was prosecuted compared to themselves, even though they are – for all intents and purposes – identical. They come up with all sorts of reasons: "He wears red ties. He drives a fancy car." In fact, sometimes, it's just random. No one wants to live with the facts that they are facing imprisonment, the loss of everything they have worked for, and being tarred as a sex offender for the rest of their lives. It's very difficult to live with that kind of uncertainty, so everyone's always trying to find some justification or pattern. As I said, Extreme Associates did a very good job of positioning itself.

QUESTION: In essence, Black was looking to challenge the government. He put himself out there.

DOUGLAS: Absolutely. Basically, he thumbed his nose and said, "Come and get me."[130]

QUESTION: Are they doing this case in western Pennsylvania because the community standards aspect – Pennsylvania instead of California – is going to make it easier to prosecute?

DOUGLAS: Well, my guess, it was a hats-off to former Pennsylvania Governor and U.S. Attorney General Dick Thornburgh. The U.S. attorney in the western district is a protégé of Thornburgh. Thornburgh's entire political career was based on no abortion and no sex.

QUESTION: Max Hardcore was prosecuted here in Los Angeles, right?

DOUGLAS: Yes. In fact, I'm representing him.

QUESTION: What's happening in that case?

DOUGLAS: The jury hung up. It's a very routine movie – four vignettes – and in one vignette a character says, "Fuck my twelve-

130 *See supra* note 128 (noting where Black asserts such a challenge during a *Frontline* interview).

and-a-half-year-old ass." And it's not in the script. Initially, the joke was the actress was dyslexic because it was supposed to be, "Fuck my 21-year-old ass." That is what was in the script. No one could explain where the half came from.

QUESTION: Just creative license.

DOUGLAS: The funny thing is there is no aspect of her appearance that looks young.

QUESTION: In the film itself?

DOUGLAS: In the film, exactly. Then the same character starts talking, they start having sex and she engages in this fantasy.

The authorities filed it as child pornography. The California statute cannot support it. No judge was willing to take it, and they kept telling the prosecutor, "You can't win. You're just completely wrong."

Then, after *Ashcroft v. Free Speech Coalition*, they dismissed that allegation. So, they went to trial on obscenity[131] and offering to sell obscenity. The judge dismissed the offering-to-sell count. The jury hung up six to six on the obscenity charge, and we're rescheduled for some time next year.

QUESTION: This is L.A. County Superior Court, is that right?

DOUGLAS: It's the L.A. County Court.

QUESTION: When a case comes along, like the one with Extreme Associates, does the Free Speech Coalition believe this is good that someone is pushing the envelope? Or are you looking at this as a massive headache for the industry that could result in a setback?

DOUGLAS: I don't think there is an organizational answer to that question, but, personally, the answer to your question is yes – I like to push the envelope. In fact, that's the odd thing about working for the trade association and trying to take an industry view versus my extreme First Amendment views.

I'm on the ACLU Southern California Foundation Board, for instance, and sometimes we are in conflict because what is best for the First Amendment may be bad for the industry and vice versa. If Congress were to come up with a list that says obscenity means sex with animals, incest depictions, whatever – a list of seven deadly sins that you cannot depict – it would be terrible for the First Amendment, but great for the industry.

---

131 *See* CAL. PEN. CODE § 311 (Deering 2004) (setting forth the California penal code section on obscenity).

F. *Adult Entertainment: Mainstreaming and the State of the Industry*

After a year during which legendary pornographer Larry Flynt finished seventh – one spot behind respected former baseball commissioner Peter V. Ueberroth[132] – in a field of 135 candidates vying to become governor of California,[133] it is difficult to argue that the adult entertainment industry remains tucked away at the fringes of American culture. Flynt's top-ten showing in the race, however, is not the only recent evidence that pornography has become a much more acceptable and mainstream force in modern society. Two cable giants – HBO and Showtime – are putting efforts behind series that showcase the adult industry. HBO will launch "a six-episode documentary, 'Pornicopia: Going Down in the Valley,' about the $10-billion porno industry in Southern California," while Showtime has ordered a second run for "Family Business," a "domestic reality series about porn makers,"[134] creating the impression that pornography has moved from the unmentionables drawer to the prime-time lineup.

As this article earlier discussed, the adult industry generates more revenue than professional football, basketball and baseball combined.[135] This healthy and impressive financial picture demonstrates that consumers like to buy the product, and now they can do so at increasingly posh locales, such as the chain of Hustler Hollywood stores, described by owner Larry Flynt as "a very sophisticated, high-end erotic boutique."[136] Ironically, the more mundane businesses surrounding Flynt's latest venture in downtown San Diego hope to cash in on the Hustler store's popularity with the increased "foot traffic . . . on the quiet block."[137] When Flynt himself showed up to inspect the property before moving in, "[p]eople started gravitating to him. One shook his hand. Another asked for his autograph."[138]

---

132 Ueberroth was Commissioner of Major League Baseball from 1984 to 1989. He also helped to organize the 1984 Los Angeles Olympics, "which turned a $215 million-dollar profit by exploiting corporate sponsorships and media contracts." *See Peter Ueberroth,* BASEBALLLIBRARY.COM (last visited Sept. 13, 2004), *at* http://www.baseballlibrary.com/baseballlibrary/ballplayers/U/Ueberroth_Peter.stm.

133 *The Recall Election,* L.A. TIMES, Oct. 9, 2003, at 27 (providing the voting results from the statewide recall election held earlier that week).

134 Winer, *supra* note 122, at D4 (suggesting there has not been "a time when pornography seemed less controversial or more mainstream.").

135 *See supra* note 38 and accompanying text.

136 Jonathan Heller, *'Erotic Boutique' to be Neighbor of the Gaslamp,* SAN DIEGO UNION-TRIB., Feb. 5, 2002, at B-1 (describing the opening of Hustler Hollywood San Diego, which joins sister stores in West Hollywood and Ohio, along with planned operations "in San Francisco, New Orleans, Kentucky and Las Vegas").

137 *Id.*

138 *Id.*

In this section, Sunlove discusses the mainstreaming of adult entertainment and the growing acceptance of this content. She also addresses questions regarding attacks on this content, despite its mainstreaming, from both the feminist left and the religious right.

QUESTION: What do you think might be some of the forces driving the mainstreaming of adult entertainment?

SUNLOVE: The product is popular. I think that, in the last twenty or twenty-five years, the industry has grown up. Folks who were growing up became nonchalant about it.

My son is a good example – he's thirty-one years old, and it's like, "Porn? Who cares? Take it or leave it. Whatever." In his teen years, he was aware of it.

My background is in the S & M world, and I know that when it started to kind of peak out from the closet, suddenly in Macy's there were leather-studded bracelets.

When Madonna put out her book *Sex*, with all those fetish images in it, we in the community were just ecstatic. We were like, "Oh my God. You go girl. How could she do that and we can't do that?"

But that is the way it works – mainstream adopts fetish imagery, and then, slowly but surely, it becomes just another kind of image out there in the world. There have been a lot of these things.

There's the Jenna Jameson phenomenon.[139] She's so approachable and reachable by everybody. She seems like a nice girl. The next thing you know, she's on a billboard in Times Square.[140]

We actually did a billboard in the San Francisco Bay Area one year. When I was publisher of the *Spectator*, I had a crazy display ad manager who went out to some fundraiser and bought some billboard space. I said, "Paul, what have you done? What the hell are we going to do with a billboard?"

Well, I thought about it and thought about it. Finally, I came up with a way to use it. I took a picture of me with a pencil in my

---

139 *See* Bill Keveney, *Hollywood Gets in Bed with Porn*, USA TODAY, Oct. 17, 2003, at 1E (observing how adult actress Jenna Jameson "may come closest yet to crossing over to the mainstream. She appears on the cover of *New York Magazine* this week, and an *E! True Hollywood Story* profile in August ranks No. 3 in viewers for the year for the series.").

140 *See* Bob Baker, *Pushing Porn to the Fore*, L.A. TIMES, Nov. 23, 2003, Sunday Calendar, at E1 (describing "a three-story billboard of porn queen Jenna Jameson [that] looks down upon family-friendlier Times Square . . . .").

mouth and the line was, "Turn on . . . your brain. Read *Spectator* magazine."

We felt we had very intellectual and worthwhile news items for sexually active adults, as we called them. Those are the kinds of things that lead to mainstreaming. Suddenly there's a billboard advertising an adult news magazine, and who cares? Nobody made a big deal of it because there was no sexual content in it at all.

It's just an evolutionary process. As the product has gotten better and as the product has become more acceptable, it helps. Folks on the job end up whispering about the porn movie they watched last night and then they realize, "Oh, others are watching it, too. It must be not as bad as I had thought." That's what happens.

QUESTION: Do you think the Internet has some influence because it makes adult material so accessible to people who look at it? They've seen more types of content and they say, "That's not so bad."

SUNLOVE: Maybe. The Internet has certainly added a whole new wrinkle and it has many parts that are pretty extreme. I wish we could come up with a regulatory scheme that would not infringe on First Amendment rights but would somehow segregate the more intense material. I do think it is inappropriate for younger minds.

QUESTION: While many sexually explicit video producers can be considered mainstream in terms of the adult entertainment industry, there are some who still seek to carve out their niche on the fringes. Rob Zicari, who is also known as Rob Black, comes to mind. His company's films depict simulated rapes and murders and are certain to fall outside what the mainstream producers are doing. Is Rob Black setting back the industry in terms of its assimilation into the mainstream or do you consider him a crusader who is pushing the envelope in the same way as Larry Flynt and others did in the past?

SUNLOVE: Well, I don't consider him a crusader, but I have a pretty permissive view of adult material. Whether I like it or not, as long as it is fully consensual – everybody has informed consent – then I'm fine with it. No one is taken advantage of, everyone is over age, and nobody gets hurt – it's okay as long as those things are in place, and everybody's a willing participant. Then, it should be legal.

I don't have to like it. What Rob is doing is distasteful to me in a certain sense, but if we're talking rape and murder, look at

Hollywood films. Just because there's hardcore action, it puts it in this whole different category.

I don't like violence in movies at all. I'll get up and leave the room. I'm not going to spend my time looking at that negative stuff. That's the same way I feel about Rob's material – I'm not interested. For the *Frontline* crew to be so distraught by these images just says, "Come on guys, get a grip here." Is everybody over eighteen? Are they here willingly? Those are the right questions.

QUESTION: Are you referring to the PBS *Frontline* report on the adult industry?

SUNLOVE: Yes.

QUESTION: What was the impact of that program?

SUNLOVE: Pretty negative, I think. That's where the damage is done in terms of the public viewing Rob Black in action.

It's like I used to say about S & M. My partner, Layne, and I did a workshop on erotic dominance and submission – the first-ever serious workshops on it, as far as we know. We both have master degrees, and he used to teach social work at the graduate-school level. In fact, he taught people how to put on workshops, so he's an expert at this. Anyway, we had a very, very good erotic dominance workshop. People move into these things out of curiosity as much as anything else, but again, some have a skewed view just because of the topic.

QUESTION: What's your master's degree in?

SUNLOVE: Political science. I did a bachelor's at University of Texas at Austin. Then, it was the University of Hawaii for my master's.

QUESTION: Was the bachelor's also in political science?

SUNLOVE: Yes, they called it government then.

QUESTION: Do you think the days of the Andrea Dworkin[141] and the Catharine MacKinnon[142] feminist perspective has fallen by the wayside, given the mainstreaming that has taken place and the huge growth in the women's market for adult materials?[143]

SUNLOVE: You know, that's been an interesting process that I've been a big part of for many years. I was a member of NOW [the National Organization of Women] in the past, although not

---

141 *See supra* note 52 (citing a representative example of Dworkin's views that readers of this article are encouraged to review).

142 *See id.* and *infra* note 169 (citing representative examples of MacKinnon's views that readers of this article are encouraged to review).

143 *See generally* Mireya Navarro, *Women Tailor Sex Industry to Their Eyes*, N.Y. TIMES, Feb. 20, 2004, at A1 (describing the rapid growth of the female market for adult content and adult novelties, and noting, among other things, that "women account for more than a quarter of all visitors to sites with adult content . . . .").

now, but I had been for many years, especially during the 1980s when that whole contingent had a pretty powerful voice out there.

Many of us within the industry, led by my predecessor at *Spectator*, Micki Demorest, who was just a fireball, went to a NOW convention in New York. She organized a whole slew of us – about eighteen or twenty feminist porn women – to go to the convention. NOW was working on its platform, which was a real strong anti-porn and anti-sex worker platform. We said, "Wait just a minute. There are other women out here with different views on this." So, we went to New York as a contingent and we just had a hell of a time and we stopped that platform.

I think the Dworkin mentality has been blunted because she does not represent most women's views. Women like sex just like everybody else. Her book is shocking to me because she considers every act of intercourse an act of violence. It's like, "Boy, are you in need of some counseling, honey, or a good lay. Somebody hasn't treated you right, honey."

To answer your question, I think their day is past. I think that some things have happened in the adult industry, too, that have changed the playing field and one is that a lot of women who were once in front of the camera or on the stage are now behind the desk and behind the camera.

QUESTION: Bruce Taylor, a former Federal prosecutor who now heads the National Law Center for Children and Families, and is no friend to [sic] adult entertainment industry, argues that the mainstreaming could produce a backlash for the industry, especially as people grow tired of unseemly spam in their email boxes or finding ads for porn rentals in their hotel rooms. Do you think there's a danger for that kind of a backlash?

SUNLOVE: I think we're talking apples and oranges here. Spam is a plague. It's just a plague, and unsolicited adult spam is wrong. It should be stopped. We don't encourage it. We want our members to uphold professional standards.

QUESTION: Okay, so you're totally against those kind of ads that would come unsolicited across e-mail?

SUNLOVE: I'm totally opposed to any e-mail that has anything sexually explicit in it. I'm also opposed to hardcore images on a front page on the Internet. I think these are absolutely basic things that should be eliminated.

Back to Bruce Taylor, though, I don't think he's right. I don't think there will be a backlash. I think we are on a forward motion, and as long as we are putting out a good product that people want, then we're going to continue to move comfortably in the main-

stream of American life. I want my members to be good neighbors. I want them to be good and honorable business people. I want them to treat their employees and their talent right. If we do these things, there's not going to be a backlash on us. We offer products and services that people want.

G. *Sexually Explicit Speech and Cyberspace*

The regulation of sexually explicit expression is not a new development in American law. From the very beginning of this country – "since colonial times when harsh laws monitored public morality"[144] – the government has sought "modes of protecting those perceived as vulnerable to the supposedly nefarious effects of such depictions."[145] From the mid-19th century until the mid-20th century, obscenity laws in the United States were firmly rooted in British legal doctrine, which looked at obscene materials from the perspective of the most susceptible person who might be corrupted by this type of expression.[146] Today's obscenity law, however, is guided by a three-decade-old pronouncement by the United States Supreme Court – articulated in *Miller v. California*[147] – known as the *Miller* test.[148] The *Miller* test is not without its critics,[149] but it does form the basis of criminal obscenity statutes throughout the country.

In the 1990s, as the Internet experienced extraordinary

---

144 DOUGLAS S. CAMPBELL, KATHLEEN K. OLSON & ROBERT D. RICHARDS, MASS COMMUNICATION LAW IN PENNSYLVANIA 111 (2d ed. 2003).

145 Gary D. Marts, Jr., Note, *Constitutional Law-First Amendment and Freedom of Speech—"It's OK—She's a Pixel, Not a Pixie": The First Amendment Protects Virtual Child Pornography.* Ashcroft v. Free Speech Coalition, *535 U.S. 234 (2002),* 25 U. ARK. LITTLE ROCK L. REV. 717 (2003).

146 *See* ROBERT D. RICHARDS, UNINHIBITED, ROBUST, AND WIDE OPEN: MR. JUSTICE BRENNAN'S LEGACY TO THE FIRST AMENDMENT 48 (1994) (quoting Lord Chief Justice Cockburn in *Regina v. Hicklin,* announcing what would become known as the *Hicklin* Rule: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.") (citations omitted).

147 413 U.S. 15 (1973). *See supra* note 64 and accompanying text.

148 Specifically, that test asks:

> whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. 15, 24 (1973) (citations omitted).

149 *See* Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member,* 13 GEO. MASON U. CIV. RTS. L.J. 185, 219 (the president of the ACLU noting that the test is "completely ambiguous, open-ended, and subject to interpretation."); *see also* Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney,* 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001) (media and entertainment law attorney calling the test "unworkable" and saying "it's one that ought to be thrown out . . . .").

growth in popularity, it also became a medium for disseminating sexually oriented materials – and one that is easily accessible to a wide audience with the "click of a mouse or the stroke of a key."[150] The government recognized that the *Miller* test alone would not be sufficient to handle the proliferation of sexually explicit speech in cyberspace, so Congress went to work on drafting new laws – specific to the Internet – that it hoped would harness the dissemination of these materials and keep them out of certain hands, namely minors.

The first attempt – the Communications Decency Act – was designed, among other things, to criminalize the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age.[151] But this effort by Congress failed, for the Supreme Court viewed the law as too vague with respect to the "indecent" classification and too broad with respect to its reach.[152] Still determined to protect children, Congress "explored other avenues for restricting minors' access to pornographic material on the Internet."[153] The result was the Child Online Protection Act,[154] known as COPA, which prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[155]

COPA still has not taken effect. Shortly after its passage, the American Civil Liberties Union successfully challenged the law and "blocked its enforcement on the ground that it would force Web publishers to give up some of their constitutional rights to communicate adult material to adults."[156] The case already has been to the Supreme Court once.[157] A divided court remanded the case to the United States Court of Appeals for the Third Circuit[158] which,

---

150 ROBERT D. RICHARDS, FREEDOM'S VOICE 80 (1998) (suggesting that "Congress recognized that the growth of this technology was outpacing any effort to contain the proliferation of pornography" on this medium).

151 47 U.S.C. § 223(a)(1)(B)(ii) (Supp. 1997).

152 *See* Reno v. ACLU, 521 U.S. 844 (1997).

153 Ashcroft v. ACLU, 535 U.S. 564, 569 (2002).

154 47 U.S.C. § 231 (Supp. V 1994).

155 *Id.* § 231(a)(1).

156 Charles Lane, *Court to Hear Case on Web Porn*, WASH. POST, Oct. 15, 2003, at A8.

157 *See supra* note 152.

158 The Third Circuit originally struck down the law saying the reference to "community standards" in the definition of "material that is harmful to minors" was overbroad. The Internet is not geographically bound, thus subjecting Internet publishers to "community standards" necessarily would require them to cater to the standards of the most conservative community. ACLU v. Reno, 217 F. 3d 162 (3d Cir. 2000).

in turn, struck down the law a second time.[159] The case will return to the Supreme Court in the 2003-04 term.[160]

Another issue involving sexually explicit speech and the Internet is the potential creation of an .xxx top-level domain on the Internet where sexually explicit materials could be housed. The Free Speech Coalition's former executive director, William Lyon, was steadfastly opposed to the creation of such a domain. He viewed it as a ghetto for adult materials and an invitation for government abuse.[161]

In this section, Kat Sunlove discusses the relationship between sexually explicit speech and the Internet and gives her views about congressional attempts to regulate adult materials on the Internet. She also addresses the .xxx top-level domain issue.

QUESTION: There seems to be a steady stream of legislation that flows out of Washington regarding the Internet and the World Wide Web. Why do you think Congress is so obsessed with regulating sexual expression on the Internet?

SUNLOVE: Because they get a lot of complaints from their constituents. People ask, "How do I get rid of this mess that's coming in? My kid gets to see all this." It is absolutely a real problem. So, Congress is trying to solve a problem.

There are also political motivations in it, of course. The other thing is that states like California are passing their own laws. We're going to have this mishmash of conflicting laws. The spam law that was passed in California this year was really extreme, and I didn't like it. I don't like lawsuits as a remedy. I don't want to turn people loose to go sue each other and solve their problems that way. If there's a violation, if there's some kind of a legal question, then I think the state – not individuals – needs to pursue it.

I believe that the feds are motivated to create a bill that would encompass all of these state laws and get rid of the confusion out there because, for a business person operating on the Internet,

---

159 ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).

160 Ashcroft v. ACLU, No. 03-218, 2003 U.S. LEXIS 7433, at *1 (S. Ct. Oct. 14, 2003). [Editor's Note: After the submission of this article for publication, the Supreme Court decided Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (*cert. granted*). Here, the Court upheld the Third Circuit grant of a preliminary injunction to prevent the enforcement of COPA, but remanded the case for a trial to decide whether COPA was the least restrictive alternative the government could impose to prevent minors from viewing "harmful material" on the Internet. *Id.* at 2795.]

161 Tom Hymes, *Free Speech Coalition Tackles "Monumental" .xxx Issue,* ADULT VIDEO NEWS ONLINE.COM, *at* http://www.avnonline.com/issues/200308/newsarchives/news_082203_1.shtml (last visited March 3, 2004).

clearly there are no borders. So, the community standard remains the issue with the Internet. I don't know if they're going to come down with some kind of nationwide standard. I can't imagine they could do that because the fact is a lot of the objectionable content comes from overseas – particularly in the European community.

I was speaking with Joan Irvine, who runs the Adult Sites Against Child Pornography group. They have an excellent website – ASACP.org.[162] She had just come back from Europe from a child-porn hotline conference or something close to it. I said, "My goodness. I didn't know there were that many to have a conference." But she told me that child porn is a major concern because, in Europe, they realized that the Scandinavian countries are originating a lot of the child porn, particularly a good deal of the extreme material that's on the Internet.

QUESTION: On the child pornography issue, do you think a lot of the material that proliferates today online is new, or do you think, or is it, material that was done a long time ago, and because of the Internet, it is now posted? Is it a bigger problem when the productions come from overseas rather than in the United States?

SUNLOVE: Boy, I just don't know. It is a totally underground world that, as far as I can see, has very little commercial component at all. It's a sick bunch of puppies out there. I wish we could find a way to help them, but I don't know much about it because we've never been able to find it.

QUESTION: Do you think it's important for the Free Speech Coalition to have a presence in Washington on Capitol Hill?

SUNLOVE: I do. My way of doing it probably will be to retain the services of a lobbyist that already works with First Amendment groups and then set up a retainer of some kind. The fact is, though, that because of my long political history, I have lots of acquaintances in D.C. I have worked with Maxine Waters and Howard Berman and Henry Waxman. I'm pretty confident that once I get back there and get into see some of these old folks that I've known, we'll have some contacts there that will pay off.

QUESTION: There has been some concern expressed, including from the Free Speech Coalition, that Attorney General John Ashcroft would target adult materials on the Internet. Has that turned out to be the case?

SUNLOVE: So far, Ashcroft really has not moved on anybody.

---

162 *See* ASACP, *at* http://www.asacp.org/ (last visited Sept. 13, 2004) (describing the organization as "helping the adult site industry make a difference in the battle against child pornography.").

The Rob Black prosecution is not representative. I wouldn't be surprised if the feds don't focus on the Internet. While it seems like a reasonable target, the difficulty, of course, is reaching those folks and finding them. People doing illegal things on the Internet can pick up their computer and move somewhere else.

QUESTION: Has the Free Speech Coalition made efforts to reach out to adult businesses on the Internet?

SUNLOVE: We are a little behind the curve on it. We have some members on our board of directors, notably Greg Dumas with GEC Media, Inc., and he's a big player in the Internet. I think that once I can focus a little more on our Web site and develop a plan, we'll be moving forward. These folks are a bit harder to recruit than my brick-and-mortar members because they don't always have a fixed location. Greg has mailing lists, and we'll be tailoring some of our material to the Internet.

For example, I think people who provide adult material on the Internet are extremely vulnerable is [sic] to 2257 issues.[163] They don't think it applies to them. The video producers are pretty good about it now, especially the big guys. They've got it down pat. For some years, we have provided 2257 compliance packages for our video members, but we want to expand that and adapt it to the Internet folks so that we can provide that service to help them get into compliance. If Ashcroft is going to go after the Internet, that's a piece of cake. The feds can simply say, "Show me your papers."

QUESTION: What does 2257 require?

SUNLOVE: It's very detailed. It's age, every name you've ever used – aliases, married names, stage names, everything – and two photo IDs are required. Every person along the chain of production must have access to those records, and you have to identify the location and the custodian of those records on your production. In fact, I think they are supposed to put it on the tape as well as on the box.

The video producers grumble, but they're doing it. They had a hard time with it, and it is really extreme, but we agreed with the purpose. We don't want kids in this industry.

Traci Lords cost people millions of dollars.[164] That doesn't do us any good at all. She only got in through fraud.

---

163 *See* 18 U.S.C. § 2257 (2004) (setting forth the federal record keeping requirements for those who produce books, magazines, periodicals, films, videotapes, or other material depicting sexually explicit conduct).

164 Lords is a "former under-age porn star." Bill Zwecker, *Traci Lords' Porn Past Feeds Tell-All Frenzy*, CHI. SUN-TIMES, Apr. 23, 2003, at 56. She also "was among the first major ex-adult film actresses to make the jump to the mainstream." *Id.*

Another bill that we've toyed with introducing would penalize youngsters for perpetrating such a fraud on otherwise perfectly legal businesses. These businesses are not trying to produce child pornography, but you look at a U.S. passport or a California driver's license and see a very mature looking woman. How could they tell she was fourteen years old?

QUESTION: Do you think it will be difficult to get the adult video producers and the Internet people to stand together as one unified voice?

SUNLOVE: No, I don't, because the [sic] most of the video people have an Internet presence. It's not one or the other. The Internet people mostly are buying content from the big guys. It's a symbiotic thing – we're all in this together. This has always been my song and dance.

QUESTION: Let's talk, for a moment, about the ".xxx" domain for adult material on the Internet. What are your thoughts on a special domain for this type of material?

SUNLOVE: It's just a personal choice. I think we probably made a bad decision in trying to debate this in a big way and put it out to our members. We had a general membership meeting on it. Right now, we are neutral on it.

I encourage people who think that it will work for them to do it, but we're not going to endorse it one way or the other. There are some potential hazards in all of us trying to migrate to this Internet location. It's not going to happen for one thing. People have invested a lot in their dot-com identity, so while there's nothing wrong with having a second one, no one should expect people to drop their first one.

QUESTION: One of the arguments against having a dedicated domain is that it could turn out to be a government trap – one area where the government could easily find targets to investigate. Another concern is that it would seem to be contrary to the position that adult material is more mainstream, if it is being housed in this special zone. Do either of these points concern you?

SUNLOVE: Yes, I do think it would be a ghettoizing of adult material. We would be saying, "We must all go over here because we're not respectful enough to operate out in the mainstream world."

I don't buy that. That's exactly contrary to the image of our industry that I want to put out – that we are, in fact, as mainstream as your local restaurant. It's just as much of interest to go out to have some good food as it is to have some good erotic entertainment. I don't want to see us ghettoized.

On the other hand, I want us to be responsible citizens, so you could argue that dot-xxx would make it easier for filters. I'm all for filters, and I think they are wonderful for the end user. You can pick and choose what you want coming in your computer and what you want your child to be able to get.

Nonetheless, it's extremely deceptive to think that by migrating to dot-xxx that we would be protecting children. It just wouldn't make any difference at all. Not for those who know how to get there anyway.

H. *The First Amendment and Free Expression: Why Protect Speech?*

The adult entertainment industry has come to rely upon the First Amendment as an important – and costly – tool in the way it conducts business. Adult industry publisher Larry Flynt once estimated that he spent "roughly $50 million" defending himself in First Amendment cases in just over a quarter of a century.[165] Despite the price tag, the First Amendment often is the first line of defense when government attacks the adult industry. That is why it seems fitting that the industry's leading trade association is called the Free Speech Coalition.

In the final section of the interview, Kat Sunlove talks about the need for safeguarding free speech in the United States, the purpose behind the First Amendment's protection of expression, and the proper role of the government when it comes to restricting sexually explicit speech. Her insights go a long way toward understanding the Free Speech Coalition's efforts and mission.

QUESTION: What does the First Amendment's protection of freedom of speech mean to you? Why is it important that speech be protected?

SUNLOVE: Well, it's just as simple as this: If you can't talk about it, you can't do it. You've got to have the freedom to speak.

The framers realized that you cannot curtail a free people's open dialogue in the marketplace of ideas.[166] I see us as another

---

165 Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 166 (2001).

166 The marketplace of ideas "is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). It "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). The metaphor is used frequently today, more than 80 years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See*

legitimate voice in the marketplace of ideas. If sex is not a valid topic for humanity to discuss, I simply can't imagine what could be more profoundly attached to our humanity. It's just really worthwhile.

When I got into this industry, I don't know if I had such a First Amendment vision. My political view was broader than that and had a lot to do with minority politics. It didn't take long, though, for me to realize just how the First Amendment applies across the board, especially because of our place in the marketplace of ideas. We are the frontrunner. We're the vanguard. We're always taking the hard bite because we're the first ones they come at. That makes us a really important cog in the wheel that keeps our freedoms in place.

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

SUNLOVE: Well, I am not really a First Amendment purist. There are certainly some materials that I don't like, but it's very hard for me to want to curtail somebody's right to speak on a subject that they find worthwhile. On the other hand, I don't want to see children in adult materials. I don't want to see children abused. I don't want to see real violence perpetrated. These are just abominations. I've got my limits.

QUESTION: What's the proper role of government in the regulation of sexually explicit speech, or is there a proper role for government?

SUNLOVE: Time, place and manner regulations.[167] That's not a problem as long as they are reasonable. But time, place, and manner doesn't extend indoors and to content. It extends to reasonable hours of operation, not cut off by church times. We have to look at what that local government is trying to do to determine whether it is reasonable. As long as it is reasonable and as long as it doesn't attack the content of the expression, then that's a perfectly reasonable role.

Government needs to help us regulate our communities so there are not incompatible uses. Obviously we don't want the 7-11 right by the church. This is not a good mix.

In New York State, for example, there's been a zoning statute that prohibited an adult entertainment use within a mile of a resi-

---

W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a relatively recent review of the Court's use of the marketplace metaphor).

167 *See generally* PEMBER, *supra* note 12, at 98-102 (discussing time, place and manner regulations on speech).

dential area. Where are you going to find something in Manhattan that's not within a mile of a residential area? Give me a break.

QUESTION: What can people do to better educate themselves about the First Amendment and to preserve the protections therein?

SUNLOVE: There are lots of things to do. Write letters to the editor, talk to your neighbors, and be more open about our interest in sexuality and sexual entertainment. To have a really positive impact, you must go through the political channels because that's where these rules are made. That's what I learned in my eighth-grade civics class, and it has served me well.

QUESTION: Does the public have a healthy respect for the First Amendment?

SUNLOVE: It ebbs and flows with the current political climate. The Freedom Forum looked at speech after 9-11, and found that, for the public, it was like, "No First Amendment. We need security, so lock them all up."

There has been some movement back because of publicity about the Patriot Act and PROTECT Act and the broad reach of those laws. People have come on board a little bit more, realizing that these are core principles and that we must be very careful not to sacrifice them in the name of some presumed security. After all, we're not really much safer if we give up our First Amendment rights or any of our other basic rights. I don't think we're safer.

QUESTION: In the long run, then, are you confident that the public's trust in First Amendment principles will prevail over these governmental infringements?

SUNLOVE: Yes, I really do. I may be a Pollyanna here, but I do think that Americans are good-hearted people who are very tolerant. The loud constituency of Ashcroft and Bush is not representative of a very broad base. I think that may be partly why they have to speak so loud.

III. ANALYSIS & CONCLUSION

"We have truth on our side. All we have to do is tell it,"[168] says Kat Sunlove.

While anti-pornography feminist legal scholars have long been provided the opportunity in the pages of law journals to give their version of the truth and to tell their story,[169] this article represents

---

168 *See supra* Part II.B.

169 For instance, Catharine A. MacKinnon, a vehement anti-pornography legal scholar, has published multiple articles regarding her views on feminism and/or sexually explicit

the seminal effort to give the other side the chance to share its version of the truth.

Even with truth on its side, the Free Speech Coalition often faces an uphill battle simply getting people to listen to its message – as is evidenced by the extra effort the organization must make to mount a lobbying campaign on behalf of the adult entertainment industry. While most trade associations approach the legislative process full bore, proudly carrying the flag of their industries and eagerly spreading their word to any lawmaker in earshot, the Coalition is forced to be more circumspect. Its approach unquestionably is behind the scenes – far behind the scenes – ferreting out friendly lawmakers who can be convinced that what's good for the adult entertainment industry is good for business at large.

Executive Director Kat Sunlove is acutely aware of this painstaking political posture and works to provide lawmakers with the needed cover from being seen as "carrying that porn bill."[170] This delicate maneuvering is accomplished through coalition-building, which boils down essentially to finding other businesses that would be affected by the law and getting them to be the "face" on the issue. No doubt it is much easier for a legislator to cozy up to the Chamber of Commerce – a favorite Coalition target – rather than the adult industry, which Sunlove recognizes as the "danger zone" for lawmakers, should they get too close.[171] Once a coalition of more politically acceptable sponsors is formed, the Free Speech Coalition can quietly drop out of sight.

The Coalition's lobbying method is, at once, wholly understandable, yet somewhat anomalous, given the revenue generated by the adult entertainment industry.[172] The expectation might be that a high stakes, financially fit industry would have lawmakers courting it, but clearly the nature of the business dictates legislative prudence.

Despite this cautious approach to policymaking, adult entertainment is growing in popularity. As Sunlove made clear in her

---

speech in law journals over the course of the last twenty years. *See, e.g.*, Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. OF LEGAL EDUC. 199 (2003); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143 (1995).

170 *See supra* Part II.C.

171 *Id.*

172 *See supra* note 38 and accompanying text.

comments, the industry itself "has grown up."[173] The maturation of adult material can be seen in its subtle mainstreaming into the greater entertainment industry and society at large. Once relegated to windowless, nondescript edifices, the product can now be found in respectable establishments and even posh boutiques.[174] Moreover, the discussion of adult materials – in the past, a conversation held in hushed tones among kindred spirits – now occupies a spot in the primetime line-ups on HBO and Showtime.

Although the product is popular and people are accepting it now more than ever before, some municipalities refuse to bow to populist sentiment and instead prefer to lean toward outspoken conservative groups that seek to ostracize adult establishments. Armed with the secondary effects doctrine,[175] local lawmakers have an able weapon to carve out restrictive zoning of adult businesses, but the Free Speech Coalition is resolved to help its membership combat "reckless, wild-eyed zoning and licensing."[176] Sunlove is heartened by recent victories in which courts have required municipalities to collect more relevant data with respect to adverse secondary effects. As she sees it, "[t]he more studies we do, the more the results are going to favor us,"[177] given the general maturity of the adult industry. Adult businesses today are run like any other businesses, so declining property values and increasing crime statistics – often pointed to as prime evidence of secondary effects – are more a product of lore than fact.

Perhaps the greatest challenge that faces the adult entertainment industry and the Free Speech Coalition is separating fact from fiction – a task made even more deliberately difficult by detractors who will use rhetorical tactics to accomplish their goals. A favorite technique among industry opponents, as Jeffrey Douglas pointed out,[178] is to lump all adult entertainment materials together with child pornography, an understandably loathsome subset of obscenity law. The Coalition recognizes the tactic and expends considerable effort trying to reframe the issue in its communications to both lawmakers and the general public, arguing that child pornography is completely different from the kind of adult material it defends. That effort was made more difficult, however, when the Coalition became the named party in *Ashcroft v.*

---

173 *See supra* Part II.F.

174 *See supra* notes 136-137 and accompanying text.

175 *See supra* Part II.D.

176 *Id.*

177 *See supra* note 120 and accompanying text.

178 *See supra* Part II.B.

Free Speech Coalition.[179]

The organization brought the case not to protect child pornography, but to safeguard the use of fantasy in adult materials.[180] Under the broadly drafted law, scenes depicting adults as youngsters could be swept up under the provisions regulating what "appears to be a minor."[181] The Coalition's position was that harm occurred only when a child was used in the production of the material – anything short of that would be tantamount to regulating thought.[182]

It is an argument that convinced a majority of the Supreme Court, but perhaps not the general public. The Coalition now finds itself in the odd position of having its name on a case associated with child pornography, though the organization, in no way embraces that type of material. In fact, Sunlove pointed out during the interview that the public relations outgrowth of the case was mixed; First Amendment advocates heralded the decision as an important victory for free speech, while others – including some within the Coalition's membership ranks – failed to see the value in it.

Therein lies the dilemma – and odd juxtapositions – of the Free Speech Coalition. As a trade association for an industry that produces enormous revenue streams, it nonetheless has seen a decline in membership dues. While lobbying vigorously for the adult industry, the Coalition must remain in the shadows of the halls of power, seeking out other businesses to be the face on legislation, not yet able to shed that leper-like quality associated with adult material. Although the product has matured and grown in popularity – beating out, in terms of revenue, all major sports in this country – local governments remain committed to making life miserable and unprofitable for those who try to serve a willing public within their environs.

Through all this, Kat Sunlove, Jeffrey Douglas and a small cadre of other devotees who make up the Free Speech Coalition keep fighting for the adult entertainment industry and waiting for the day when their "truth" will be told.

---

179 535 U.S. 234 (2002).
180 *See supra* note 81.
181 *See supra* note 83 and accompanying text.
182 *Id.*