
GAY PORNOGRAPHY AND THE FIRST AMENDMENT: UNIQUE, FIRST-PERSON PERSPECTIVES ON FREE EXPRESSION, SEXUAL CENSORSHIP, AND CULTURAL IMAGES

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INTRODUCTION

Much ink is spilled in major newspapers today about the mainstreaming and increasing popularity of adult entertainment, with attention often focused either on the enormous amounts of money generated by sexually explicit content¹ or on adult actors like Jenna Jameson and Ron Jeremy who have embedded themselves in the public consciousness.²

Far less attention, however, is paid to gay pornography,³ although one

1. See, e.g., Douglas Brown, *Sex's New Rock-star Status: Is it Changing Main Street, USA? PORNOPOLIS*, DENV. POST, July 9, 2006, at L01 (providing a feature devoted to the mainstreaming of adult entertainment marked by the rise of Jenna Jameson as an "iconic business personality" and the decline of traditional outlets like Playboy); Dawn C. Chmielewski & Claire Hoffman, *Porn Industry Again at the Tech Forefront*, L.A. TIMES, Apr. 19, 2006, at A1 (discussing the influence and growth of "Southern California's multibillion-dollar adult entertainment industry," and writing that "the porn industry's main trade publication, *Adult Video News*, estimated global 2005 sales at \$12.6 billion"); Arshad Mohammed, *Google Refuses Demand for Search Information*, WASH. POST, Jan. 20, 2006, at A01 (writing that "Americans have turned to the Web in growing numbers to view pornography and, according to one industry publication, spent \$2.5 billion on online adult entertainment last year"); Mike Musgrove, *Technology's Seamier Side: Fates of Pornography and Internet Businesses Are Often Intertwined*, WASH. POST, Jan. 21, 2006, at D01 (describing how online pornography "spurred the Internet to such prodigious growth," and writing that "[o]nline pornography, a \$2.5 billion business and growing rapidly, pioneered such now-commonplace practices as streaming video, trading files and making online purchases"); Lola Ogunnaiké, *Sex, Lawsuits and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, at Style 1 (noting how "the \$10 billion-a-year pornography industry is increasingly mainstream," and discussing the increasing popularity of home-made celebrity sex tapes).

2. Cf. Don Aucoin, *The Pornification of America*, BOSTON GLOBE, Jan. 24, 2006, at C1 (describing Jameson as the author of *How to Make Love Like a Porn Star*, her "best-selling 2004 memoir"); Shannon Behnken & Mary Shedden, *Adult Show at Convention Center Rejected*, TAMPA TRIB., Aug. 2, 2006, at 1 (describing "adult film icons Jenna Jameson and Ron Jeremy" as promoters of a national convention showcasing adult films, sex toys, and DVDs); Brown, *supra* note 1, at L01 (describing Jameson as "becoming a mainstream 'brand,' complete with books, television shows, movie appearances, and a flourishing media schedule"); Valerie Gibson, *Public Exposure: Adult Movie Stars are in the Spotlight Now for Something Besides Film Exploits*, TORONTO SUN, Apr. 9, 2006, at 48 (describing Jameson as "the biggest star in the history of adult movies," noting that she is "world famous and has had a meteoric career," and adding that she "has a bestselling autobiography in general release"); Joanne Kelley, *Sex in the City on Display at Weekend Convention: Denver's First 'Sexpo' Offers Wares, Advice for Igniting Passion*, ROCKY MTN. NEWS (Den., Colo.), Feb. 24, 2006, at 6B (describing Jameson as having "been credited with bringing XXX-rated material to the mainstream," and identifying Jeremy as "a star of adult cinema who has appeared in more than 1,600 films"); Keith Reed, *Not So Strange Bedfellows: Timing of Electronics, Porn Conventions Underscores Ties Between Two Industries*, BOSTON GLOBE, Jan. 7, 2006, at C9 (describing Jeremy as "a short, fat, mustached porn star who in recent years has attained a measure of pop culture celebrity," and quoting Jeremy for the proposition that pornography is now "more mainstream, more accepted. It's big business").

3. For purposes of this Article, the term "gay pornography" is synonymous with gay adult erotica and it refers to sexually explicit male-male content largely targeting a gay male audience, in contrast to "lesbian pornography." For an aging but excellent article on the topic of lesbian pornography, see Tamara Packard & Melissa Schraubman, *Lesbian Pornography: Escaping the Bonds of Sexual Stereotypes and Strengthening Our Ties to One Another*, 4 UCLA WOMEN'S L.J. 299, 302-03 (1994).

mainstream newspaper in November 2006 finally confronted reality and identified it as “the fastest-growing segment of adult entertainment.”⁴ More troubling, is that very few scholarly law journal articles are devoted exclusively to gay pornography and, when they are, they rarely focus on legal issues in the United States, such as obscenity law, censorship, and the First Amendment freedom of speech.⁵ Instead, the articles typically address topics such as identity politics and the alleged utility, benefits, and/or harms from viewing and consuming gay pornography.⁶

(defining lesbian pornography “as sexually explicit material made by and for women who have erotic interest in other women,” and contrasting it with “pornography made by men or for a male audience depicting women having sex with each other”).

4. Richard Mullins, *Gay-Themed Pornography Finds Increasing Acceptance*, TAMPA TRIB., Nov. 10, 2006, at 6, available at http://www.redorbit.com/news/technology/726925/gaythemed_pornography_finds_increasing_acceptance/index.html.

5. Although not devoted exclusively to legal issues in the United States surrounding gay male pornography, two recent student-written notes have touched on legal issues related to health and safety regulatory practices surrounding condom usage in the gay pornography industry. See Maria de Cesare, Note, *RXXX: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 705 (2006) (describing how “condom use has been the norm for over two decades” in “homosexual male pornographic films” and noting that “the majority of gay-pornography production companies have suffered no significant losses from their condom-only policies”); Christina Jordan, Note, *The XXX-Files: CAL/OSHA’s Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421, 440-41 (2005) (writing that “[u]nlike the straight porn industry, the standard practice in the gay porn industry is to use condoms during filmmaking,” and adding that “the decentralized nature of the gay porn industry and the financial incentives for distributing films depicting condom use promote condom use in gay porn rather than HIV testing to prevent HIV transmission”).

6. See Bridget J. Crawford, *Gay Does Not Necessarily Mean Good: A Critique of Jeffrey Sherman’s “Love Speech: The Social Utility of Pornography,”* 5 AM. U. J. GENDER & L. 9, 19 (1996) (addressing harms allegedly created by gay pornography and contending that “[p]ornography is not ‘bad’ or ‘good’ simply because one group member declares that his or her fellow members are helped or harmed by it. Entire categories of pornography cannot be shielded from scrutiny. Instead, we must continue to ask what harm pornography perpetuates”); Christopher N. Kendell, *Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse*, 49 MCGILL L.J. 877, 908-09 (2004) (arguing that gay male pornography “glorifies those in our society who have always had the most power and who have always benefited from dominance and social inequality—white, able-bodied, middle-class, straight men,” and contending that “it requires considerable self-denial for gay men to argue that gay pornography is not harmful in much the same way that other forms of pornography are harmful”); Christopher N. Kendall, *Gay Male Pornography After Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality*, 12 WIS. WOMEN’S L.J. 21, 57 (1997) (contending that “[g]ay male pornography does what the homophobe has done quite successfully for some time now. Specifically, it works to maintain gender roles by encouraging gay men to adopt an identity that valorizes male dominance and by stating unequivocally that those who choose not to adopt this identity have no value and no power”); Michael Lucas, *On Gay Porn*, 18 YALE J.L. & FEMINISM 299, 299 (2006) (contending that “gay porn can act to liberate as well as educate a historically closeted segment of society,” and arguing that it “can validate homosexuality and create community. It can be an outlet, perhaps the only outlet, for one’s desires—desires that are generally suppressed if not condemned by society as a whole”); Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 702-03 (1995) (arguing that “gay male pornography is a necessary tool in gay men’s

Now is an opportune, if not critical, time to rectify the dearth of scholarly literature on legal issues in the United States affecting gay pornography, such as obscenity law, censorship, and, more generally, the importance of the First Amendment freedom of speech as it protects this controversial form of sexual content. Gay pornography is immensely popular today. In fact, "gay porn accounts for a much larger proportion of the porn market than the percentage of gay men would warrant."⁷ The *Adult Video News* trade publication now has a separate Web site called GAYVN.com that covers news about the gay pornography industry.⁸ GAYVN even hosted an inaugural three-day summit for the industry in San Francisco in February 2007, described by organizers as a "first annual gay adult entertainment summit" and "a new strategic conference developed with a specific focus on business and technology. The Summit will provide a quality environment for sharp-minded business people to foster relationships and make valuable connections."⁹

But at the same time that the gay adult entertainment industry booms and professionalizes, the U.S. Department of Justice is in the midst of two high-profile obscenity prosecutions of adult entertainment companies,¹⁰ ramping

struggle to attain sexual integrity," and asserting that "[t]he relative importance of pornography in the gay male imagination results from the suppression of other forms of gay expression: not only artistic expression but lived interpersonal expression").

7. Alan Helms, *Reflections on Gay Male Porn*, GAY & LESBIAN REV., July-Aug. 2003, at 27-28.

8. GAYVN, <http://www.gayvn.com> (last visited Mar. 25, 2007).

9. GAYVN Summit, <http://www.gayvnsummit.com/attendees/index.php> (last visited Mar. 25, 2007). During the summit, GAYVN presented its "GAYVN Awards," considered "the Oscars of the genre" for the gay adult entertainment industry. See Wyatt Buchanan, *Hub of All That's Hot*, S.F. CHRON., Feb. 23, 2007, at E1.

10. One case, *United States v. Extreme Associates, Inc.*, is pending trial in federal district court in Pittsburgh, Pennsylvania, having already worked its way up the appellate court system after U.S. District Court Judge Gary L. Lancaster in early 2005 threw out, in a controversial decision that was later reversed by the U.S. Court of Appeals for the Third Circuit, the entire obscenity indictment against Extreme Associates and its proprietors Robert Zicari and Janet Romano. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006). See generally Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography & the End of Obscenity Law as We Know It*, 34 SW. U. L. REV. 427, 431 (2005) (arguing, prior to the appellate court decision in *Extreme Associates*, that the district court's decision "may well represent the end of obscenity enforcement actions as we know them"). In late November 2006, Judge Lancaster granted an extension in the case "to continue pretrial filings for three months" until Feb. 1, 2007. Rhett Pardon, *U.S. Judge Grants Extension in Extreme Associates Case*, FREE SPEECH COALITION, Nov. 26, 2006, <http://www.freespeechcoalition.com/FSCView.asp?action=preview&coid=989>.

The other case, *United States v. Five Star Video, L.C.*, was launched in 2006 in Arizona against a Southern California-based producer of adult videos called Jeff Mike Productions, Inc., and an Arizona retailer and distributor called Five Star Video, L.C., as well as against the proprietors of those business entities. Press Release, U.S. Dep't of Justice, *Federal Grand Jury Charges Arizona and California Companies and Their Owners with Obscenity Violations* (June 1, 2006), available at <http://www.usdoj.gov>

up prosecutorial efforts following a paucity of obscenity cases filed against adult companies under the administration of former President Bill Clinton.¹¹ Thus, it may just be a matter of time before the Bush administration comes after the gay pornography industry with a vengeance, perhaps in a desperate wedge-issue attempt to pander to and win back the support of Republican religious conservatives after the November 2006 elections or to buttress its anti-same-sex marriage position.¹² In addition to U.S. Attorney General Alberto Gonzales's statement in 2005 that the Department of Justice is "strongly committed to the investigation and prosecution of adult obscenity cases,"¹³ President Bush has demonstrated a "willingness to nominate men with anti-gay records to lifetime terms on the federal bench."¹⁴ This coupling of prosecutorial zeal with anti-gay judges is a potentially lethal combination for the gay pornography industry and its many consumers.

What is more, gay pornography is likely to become an even bigger prosecutorial target, as coverage of it grows more visible in the mainstream news media. *New York Magazine's* feature in late 2006 on one gay-adult-film company, Lucas Entertainment, and its founder, Michael Lucas, provides one such example.¹⁵ Beyond this, it simply is clear that gay pornography is still controversial in legal circles and among many lawyers.

/opa/pr/2006/June/06_crm_343.html.

11. See Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 22 n.7 (2005) ("Several commentators have noted that the Clinton Administration in general, and Attorney General Janet Reno in particular, made it a policy to limit obscenity prosecutions in order to focus the Department of Justice's resources on other threats that they judged to be more pressing or dangerous."); Luiza Chwialkowska, *Crackdown on Pornography Is Being Launched by Bush*, N.Y. SUN, Sept. 15, 2003, at 1 (describing how federal obscenity laws "were largely ignored under the Clinton administration"); Luiza C. Savage, *Anti-Obscenity Groups Worry About Priorities of Gonzales*, N.Y. SUN, Mar. 8, 2005, at National 5 (noting that rather than prosecuting obscenity cases, "the Clinton administration turned the focus almost exclusively onto child pornography and exploitation," and writing that "[t]he Justice Department says it obtained 38 convictions during Mr. Bush's first term. It touts the number as an 850% increase over the four convictions obtained in eight years under President Clinton").

12. Bush stated repeatedly in the run-up to the November 2006 elections that marriage is "a union between a man and a woman and should be defended." Jim Rutenberg, *Bush Lends a Hand to G.O.P. Congresswoman in a Tight Race*, N.Y. TIMES, at National 34; see also Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006, at A1 (quoting Bush during one campaign rally in Iowa as stating that marriage is "a union between a man and a woman" and "I believe it's a sacred institution that is critical to the health of our society and the well-being of families, and it must be defended").

13. William Triplett, *Moral Majority: House, Bush on Indecency Crusade*, DAILY VARIETY, Feb. 17, 2005, at 1.

14. Richard Goldstein, *What Gay-Friendly Republicans?*, VILLAGE VOICE (N.Y., N.Y.), June 10, 2003, at 43.

15. William Van Meter, *The Lion of Chelsea: Michael Lucas has built an erotic empire for himself but it's not always easy being on top*, N.Y. MAG., Oct. 30, 2006.

For instance, the Atlanta-based law firm of Powell Goldstein recently terminated the employment of a permanent staff attorney who, many years before, had appeared in eight all-male adult films.¹⁶

For the first time ever in any law journal, the thoughts and opinions of two leading players in today's gay pornography industry—one an attorney for a renowned, leading gay adult video company, and the other the co-founder and chief executive officer of the most successful gay video-on-demand and streaming Web site—are set forth and analyzed on the topics of free speech, censorship, obscenity law, and the political and social forces that impact gay pornography today. This Article also describes their views about the values and functions of gay pornography, as well as the business and economic aspects of the industry.

Specifically, this Article pivots on the content of two exclusive, in-depth interviews conducted in person by the authors in San Francisco in September 2006. One interview is with attorney Stephen P. Modde, a member of the State Bar of California and the vice president and general counsel for Conwest Resources, Inc., the company that operates and runs Falcon Studios,¹⁷ identified by the *San Francisco Chronicle* in 2000 as “the world's biggest gay adult video company”¹⁸ and labeled two years later by that same newspaper as an “adult film and Internet empire that services gay men.”¹⁹ Its founder was Chuck Holmes, “a national figure in gay politics” who died in 2000 at age fifty-five.²⁰ Falcon, now more than three decades old, describes itself on its Web site as “a multimedia entertainment company and the leading creator of gay adult content within the framework of five key brands,” featuring “the most stunning exclusive models in spectacular settings with the highest production quality and aesthetic values,” all of which help to place Falcon Studios “at the forefront of the gay erotic industry.”²¹

The other interview is with Tim Valenti, the co-founder and head of NakedSword.com, which describes itself as:

The industry leader in gay adult streaming video since 1997. Its innovative membership model allows users unlimited access to its 3,500 online video library, featuring full-length titles from over 100 studios

16. Rich Merritt, *Keeping Secrets*, CAL. LAW., Dec. 2006, at 64.

17. Falcon Studios, <http://www.falconstudios.com> (last visited Feb. 23, 2007).

18. Dan Levy, *Chuck Holmes*, S.F. CHRON., Sept. 14, 2000, at C10.

19. Lord Martine, *Falcon Studios President Gives Us the Dirt on Dirty Movies*, S.F. CHRON., June 28, 2002, at 3.

20. Dave Hogan, *Democratic Contributor Linked To Gay Porn*, OREGONIAN, June 26, 2002, at A01.

21. About Falcon Entertainment, <http://www.falconstudios.com/shop/ContentRequest.do?contentPage=companyProfile.jsp&groupName=CompanyProfile§ionName=AboutFalcon&websiteName=falconstudios> (last visited Feb. 23, 2007).

including Falcon, Rascal, COLT, Titan Media, Hot House, Lucas Entertainment, All Worlds Video, Jet Set and Raging Stallion.²²

The authors readily recognize and acknowledge that interviews with two key players in the gay adult entertainment industry cannot possibly capture all of the viewpoints within the industry about the important issues described in this article. Nonetheless, it is critical for legal scholars and academics, who too often seem to operate in the realm of theory, far removed from the reality of adult entertainment, to begin to understand and confront the viewpoints of those whose lives and livelihoods are impacted on a daily basis by both the First Amendment and efforts at censorship. Surely legal theorists and scholars who grapple with the topic of pornography in classrooms and the metaphorical ivory towers of academia can benefit from understanding the viewpoints and opinions of people who defend (Modde) or lead (Valenti) the companies that distribute the contentious content that is the subject of that scholarly debate. This Article strives to facilitate this process in its own small way.

Importantly, to add more context and greater depth to this discussion, the authors also include excerpts from another exclusive interview, this one conducted in Cincinnati, Ohio, in October 2006 with attorney Louis Sirkin.²³ Sirkin, perhaps best known for successfully arguing *Ashcroft v. Free Speech Coalition*²⁴ before the U.S. Supreme Court,²⁵ represents defendants in both of the two major federal obscenity prosecutions taking place today.²⁶ Sirkin adds his insights about defending gay content in court and the importance, when it comes to protecting sexually explicit content, of the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*²⁷ striking down Texas's anti-sodomy statute and protecting the right of gay men to engage privately in consensual sexual activity. It is also very important, given the subject matter of this Article, to note that in 1990 Sirkin successfully defended the Contemporary Arts Center in Cincinnati against

22. Press Release, NakedSword.com, Club Jenna, Nakedsword.com Unveil 'Club Thrust' Jenna-branded Gay Site Converts Gay, Straight Traffic (Aug. 8, 2005), available at <http://www.nakedsword.com/press/080805.aspx>.

23. Interview with Louis Sirkin, Member, Sirkin, Pinales & Schwartz LLP, in Cincinnati, Ohio (Oct. 2006) (on file with author).

24. 535 U.S. 234, 258 (2002) (declaring unconstitutional, on overbreadth grounds, portions of the Child Pornography Prevention Act of 1996 that criminalized so-called virtual child pornography—images that appear to be of minors engaged in sexual conduct but that are produced without using real children).

25. See Linda Greenhouse, *Justices Weigh Law Barring Virtual Child Pornography*, N.Y. TIMES, Oct. 31, 2001, at A13 (describing and quoting portions of Sirkin's oral argument before the U.S. Supreme Court, and noting how Sirkin was representing the Free Speech Coalition, "an adult entertainment trade association that brought the constitutional challenge").

26. See *supra* note 10 and accompanying text (discussing these prosecutions).

27. 539 U.S. 558, 578 (2003).

obscenity charges for displaying homoerotic photographs taken by Robert Mapplethorpe.²⁸

With this in mind, Part I describes the settings for the trio of interviews, the procedures used by the authors for both taping and transcription, and the steps taken to preserve editorial objectivity and autonomy. Part II then provides the content and substance of the relevant portions of the interviews, including four separate sections, each devoted to a different topic or theme; each section is prefaced with introductory material, before providing a question-and-response format for the remarks of Modde, Valenti, and Sirkin. Finally, Part III provides a brief analysis of their comments; this Part of the Article is kept intentionally short because one of the primary goals of the authors is not to deconstruct their words in typical academic fashion, but rather to let the comments of Modde, Valenti, and Sirkin stand on their own, leaving the ultimate job of interpretation and dissection to those legal scholars who make their living criticizing and critiquing pornography.

I. THE INTERVIEW SETTINGS AND PROCESSES

The authors interviewed Stephen Modde on Friday, September 22, 2006, at the headquarters of Falcon Studios in the offices of its parent company, Conwest Resources, Inc., located at 1177 Harrison Street in San Francisco, California. The interview with Tim Valenti took place on Saturday, September 23, 2006, over lunch at a Thai restaurant called Koh Samui & the Monkey, located at 415 Brannan Street in San Francisco. The restaurant is less than a quarter-mile away from the third-floor home of NakedSword.com at 360 Ritch Street; perhaps somehow fittingly, the building was once a gay bathhouse. The authors interviewed Louis Sirkin on Friday, October 20, 2006, in his office, located in the ninth-floor suite of Sirkin, Pinales and Schwartz LLP in the Fourth & Race Tower at 105 West Fourth Street in downtown Cincinnati, Ohio.

All three interviews were recorded on audiotape with a table-top microphone, and the tapes were later transcribed by the authors and reviewed for accuracy. The authors made some minor changes in syntax but did not alter the substantive content or meaning of any of the interview subjects. Some responses were then reordered to reflect the themes and sections of this Article, while other portions of the interviews were deleted

28. See Marisa Guthrie, *Television Review: Interview Scenes Blur Focus of Showtime's 'Dirty Pictures'*, BOSTON HERALD, May 27, 2000, at 28 (explaining that the exhibit "included Mapplethorpe's impeccably composed flower pictures juxtaposed with photographs of men engaged in sadomasochistic acts, as well as two portraits of children with their genitals exposed"); Isabel Wilkerson, *Trouble Right Here in Cincinnati: Furor Over Mapplethorpe Exhibit*, N.Y. TIMES, Mar. 29, 1990, at A1 (describing the controversy and calling Sirkin "a lawyer for the museum").

as extraneous or redundant. Footnotes have been added in places where relevant to explain, identify, or elaborate on points, terms, or comments made by the interviewees. The authors retain the original audio recordings and the printed transcripts of the interviews.

For purposes of full disclosure and the preservation of objectivity, it should be emphasized that neither of the authors had met in person any of the three men—Modde, Valenti, or Sirkin—prior to the interviews. In addition, the interviewees did not have an advance look at the specific questions they would be posed, thus allowing for greater spontaneity of responses. Moreover, the interview subjects did not review the raw transcript or any drafts of this Article.

II. THE INTERVIEWS

This Part of the Article is divided into four distinct theme-based sections, each prefaced with a brief heading introducing and providing background on the theme in question. In particular, Section A focuses on the First Amendment protection of free speech and, more specifically, on why that constitutional guarantee should extend to cover and safeguard gay pornography. It also addresses the forces of censorship, as they relate to gay pornography, that collide with both the First Amendment protection of free expression and the lobbying efforts of the adult entertainment industry's leading trade association, the Free Speech Coalition.

Next, Section B concentrates on obscenity law as it relates to gay pornography, as well as on the political threats to this controversial form of sexual expression. Not only does this section cover the *Miller v. California*²⁹ test for obscenity as it affects gay content, but also the federal statutory age verification and record keeping requirements imposed on the adult entertainment industry and secondary producers of adult content³⁰ that are being challenged in court by the industry in *Free Speech Coalition v. Gonzales*.³¹

Section C then shifts gears from the legal realm to concentrate on the opinions of Stephen Modde and Tim Valenti—both openly gay men—about the values and functions served by gay pornography. Finally, Section D turns its attention to some of the more important business and economic issues facing the gay pornography industry today, from its relationship with the straight adult entertainment industry to the use of

29. 413 U.S. 15 (1973).

30. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2257 (2006) (setting forth the record keeping and age verification requirements that are commonly known in the adult industry simply as 2257 requirements).

31. 406 F. Supp. 2d 1196 (D. Colo. 2005) (granting a preliminary injunction preventing the enforcement of 18 U.S.C. § 2257 against the plaintiffs in the case).

condoms in sexually explicit, gay adult videos.

The interviews are set forth in question-and-answer format. The respondent or respondents who answer a particular question are readily identified. In some instances, there may be an answer from only one person to a particular question, as the question may not have been asked of the other interviewees. The authors chose to devote substantially more space in this article to the comments of Modde and Valenti, given their direct connections to the gay adult entertainment industry. The answers of Sirkin, on the other hand, are confined to questions that directly relate to either the prosecution of gay content or to the case of *Lawrence v. Texas*. With this in mind, the article turns to the first theme-based section.

A. The First Amendment and the Protection of Gay Pornography

The First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”³² Unquestionably, this premier constitutional provision is at the forefront of debate surrounding the protection of adult entertainment; it also, however, carries a hefty price. Adult industry publisher Larry Flynt once estimated that he spent “roughly \$50 million” defending himself in cases that involved the precise scope of that protection.³³

In this Section, Stephen Modde and Tim Valenti discuss generally the impact of the First Amendment on discourse in this country and, more specifically, the extent to which this constitutional doctrine embraces the product of their craft—gay pornography. Both Modde and Valenti make clear that sexual expression, like other forms of expression, merits protection. Furthermore, they see no need for legal differentiation between heterosexual materials and same-sex products, all of which, according to the gay adult industry pair, fall under the ambit of protected expression.

Both men also talk about the importance of the industry’s leading trade association and lobbying arm, the Free Speech Coalition.³⁴ Valenti, in fact, serves on that organization’s board of directors.³⁵ The Free Speech

32. U.S. CONST. amend. I; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the Free Speech and Free Press Clauses to state and local government entities and officials through the Fourteenth Amendment Due Process Clause).

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

34. Free Speech Coalition, <http://www.freespeechcoalition.com/FSCview.asp?coid=87#mission> (last visited Feb. 26, 2007) (setting forth its vision as “a national association that helps limit the legal risks of being an adult business, increases the profitability of its members, promotes the acceptance of the industry in America’s business community, and supports greater public tolerance for freedom of sexual speech”).

35. Free Speech Coalition, Contact Information, <http://www.freespeechcoalition.com/FSCview.asp?coid=86> (last visited Feb. 26, 2007).

Coalition made its mark on constitutional law in 2002 when it emerged victorious before the Supreme Court in *Ashcroft v. Free Speech Coalition*,³⁶ which struck down as overbroad a federal law criminalizing virtual child pornography.³⁷ The decision caused a hail of controversy at the time, including predictions that “[i]t’s going to cause complete havoc.”³⁸ Supporters of the decision, on the other hand, agreed with Justice Anthony Kennedy’s opinion, characterizing the law as a “potential threat to art and literature’s fascination with the young.”³⁹

While this litigation gave the Free Speech Coalition its public face, it is the behind-the-scenes lobbying effort that continues to move the adult industry toward parity with other legitimate businesses, particularly in California where much of the industry is headquartered.⁴⁰ Modde and Valenti praise highly the Coalition’s presence in legislative circles and its work to better the image of the adult entertainment industry.

QUESTION: What, in your opinion, is the primary purpose or goal of free expression as it is protected under the First Amendment to the United States Constitution?

MODDE: It’s to allow the expression of ideas free from the oppression of the government—to allow people’s ideas and thoughts to circulate because, in a democracy, the best way for things to work is to allow ideas to come out and, theoretically, the best idea will win.⁴¹ This allows people to grow on a lot of levels, without oppression of the government.

It’s unlimited protection unless the speech incites violence, which is the test that we have now.⁴² You cannot falsely shout fire in a crowded theater

36. 535 U.S. 234 (2002).

37. *Id.*; see Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(B) (2002).

38. Bob Egelko, *Top Court Overturns Child Porn Law Banning Fake Images of Minors: ‘Virtual’ Productions Entitled to Free Speech Protections*, S.F. CHRON., Apr. 17, 2002, at A1 (quoting a Mills College professor who was writing a book about child pornography at the time of the decision).

39. Joan Biskupic, *‘Virtual’ Porn Ruling Hinged on Threat to Art*, USA TODAY, Apr. 17, 2002, at 3A.

40. See, e.g., Martin Cooper, *Time to Develop a Business Attraction Program*, SAN FERN. V. BUS. J., May 22, 2006 (noting that California’s San Fernando Valley is considered the “porn capital of the world” because of the numerous adult entertainment companies doing business there).

41. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992); see, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (developing the marketplace of ideas theory by stating that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”). The theory is premised on the idea that “free and fair competition of ideas” will lead to the discovery of the truth “or, at the very least, conceptions of the truth will be tested and challenged.” DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 49 (2007).

42. The legal test for incitement is set forth in the U.S. Supreme Court’s opinion in

and be protected because people would be injured.⁴³

In terms of protection, I don't know if gay porn can be separated out from porn generally. The First Amendment should protect the display of human sexuality because it is such a fundamental part of the human spirit. When we look back over drawings from caveman times, we see people drawing pictures of people engaged in sexual activity. We see it in some of the stuff that comes from the Asian art world. It's one of those things that you can't stop and it certainly can't be stopped with today's technology. It was a little easier to stop in the 1930s and 1940s when such materials were transported mainly through the U.S. mail. Now, with the advent of the Internet and these new modes of transmission, it's impossible to stop. That's not a reason to say we should let it occur. The reason is that it's a drive, a natural drive, that doesn't necessarily cause harm to people.

There are limits,⁴⁴ but the limits should be way out there because what I enjoy and what you enjoy might be very different things. The First Amendment should not protect violence to other people. That's a hard line to draw in porn because there is a sexual play, particularly in the S & M thing.⁴⁵ If you're going to do that, you must draw it into a story line. If

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (“The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

43. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (writing that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force”).

44. The U.S. Supreme Court has articulated a few well-defined categories of speech that fall outside the scope of First Amendment protection. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (writing that “[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”).

45. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1036 (1983) (defining sadomasochism, which is sometimes abbreviated as S & M or S/M, as “the derivation of pleasure from the infliction of physical or mental pain either on others or on oneself”); see also Connie Shortes, *Representations of S/M in the Gay Community: The Radical 1970s*, in PORN 101: EROTICISM, PORNOGRAPHY AND THE FIRST AMENDMENT 492, 492, 494, 497-98 (James Elias et al. eds., 1999) (analyzing how the gay S/M films, such as *Black and Blue* and *Born to Raise Hell*, culturally and politically influenced the historical context of the gay community); Lundy Langston, *No Penetration—and It's Still Rape*, 26 PEPP. L. REV. 1, 26 (1998) (writing that “sadomasochism (S/M) is usually portrayed as a violent, dangerous activity, and most people do not think that there is a great deal of difference between a rapist and a bondage enthusiast,” and contending that “[s]adomasochism is not a form of sexual assault; it is “consensual activity that involves polarized roles and intense sensations”); Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 80-81 (2001) (suggesting that, since sadomasochism is sex, it only should be considered a crime if the sex was nonconsensual, and proposing that the legislature legalize consensual sadomasochism so long as it does not cause grievous bodily injury or death).

you're going to have a capturing scene, then you must make it clear that this person is not being taken against his will and being forced into doing something he doesn't want to do.

VALENTI: I think that it gives us the right to express ourselves, especially when we feel oppressed.⁴⁶ There are different levels of oppression and, obviously, the First Amendment was written in times of political oppression. We're taking it to another subject—we're talking about sexuality versus politics—but where is the line that you draw?⁴⁷ Can someone dance naked on a stage or can they not?⁴⁸ We live in a society of laws, and if it is an open society you can dance naked on stage but we compromise and you can only do it here.

The First Amendment should protect free expression; gay adult erotica is like straight adult erotica. It is an expression. It's not a political statement—we're certainly not producing this content to throw it [in] anybody's face and say, "Hey, we're gay and we can have any kind of sex we want"—that's hardly the impetus. There should be no distinction made between gay and straight porn. Why should there be a distinction? There shouldn't be any distinction about who can get a civil union or not.

QUESTION: How do you respond to people who would say the founding fathers never intended for the First Amendment to protect gay porn?

MODDE: I would say that the founding fathers, when they drafted the Bill of Rights, could not anticipate what would come down the road. What they could anticipate is that the government's reach into the American's right of freedom of expression was a threat. By putting the First Amendment in black and white—a provision that says, "Government, hands off"—the founders knew what they were doing. These original

46. This response taps in to the self-fulfillment function of free speech—that speech should be protected not because it serves some larger societal good like attainment of the truth, but because "[i]t feels good to express yourself" and allows "expression of your core individuality." PAUL SIEGEL, *COMMUNICATION LAW IN AMERICA* 61 (2002); see *PEMBER & CALVERT*, *supra* note 41, at 50 (stating that speech thus "can be inherently valuable to a person regardless of its effects on others—it can be an end in itself").

47. Valenti's point here reflects the U.S. Supreme Court's recognition that the First Amendment is not narrowly limited to protecting only political speech. See *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (writing that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee").

48. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 294 (2000) (holding that erotic nude dancing "is expressive conduct, although we think that it falls "within the outer ambit of the First Amendment's protection," and concluding that a requirement that dancers must "perform wearing pasties and G-strings" does not violate the First Amendment right to free speech, as the impact of such clothing requirements "on the overall expression is *de minimis*").

intent arguments don't work because how do we know what the founders would have thought about the Internet?⁴⁹ How do we know if they would have thought that the whole idea was a bit too much? We don't, but we do know that they said, "We fear the government more than the freedom of the people. That's why we need to put these certain protections into the Bill of Rights." To deny gay people the right to sexually express themselves is something we fought a long and hard journey to get to—through the medical establishment, through criminal sanctions, and now we're there with the straight community as far as our right to do it with sexually explicit activity. The founding fathers wanted the government to keep their hands off. Now the Supreme Court's job is, at times, to look at things and determine how far out government's hands should stay.

VALENTI: Well, did the founding fathers mean to protect the Internet? There are a lot of things that the founding fathers didn't have access to or experience, but I think the basic principles are there. People should be free to express themselves as long as they are not physically, violently hurting somebody. I think that most reasonable people will say, "Okay, maybe this free expression isn't for everyone, so we put some parameters around it." The parameters are not to say that you can't do it, but that's why we have zoning laws and packaging laws.⁵⁰ All of that stuff, if put together by reasonable people, can work.

I'm living in a new world and a new paradigm. All of my business has to do with broadcasting things; I'm not packaging products and putting them out there, so it is a completely different world.

QUESTION: Why are certain segments of society in the United States so driven to prosecute or squelch sexually explicit material, whether it is straight porn or gay porn? What, in other words, are the forces and motives of censorship?

MODDE: There is—and it's very sad overall with the direction of the

49. This is a problem noted by Supreme Court Justice Antonin Scalia, who wrote nearly a decade ago: "Sometimes (though not very often) there will be disagreement regarding the original meaning; and sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomenon. How, for example, does the First Amendment guarantee of 'the freedom of speech' apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air television?" ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 45 (1997).

50. The U.S. Supreme Court allows communities to zone adult entertainment establishments and sexually-oriented businesses if certain conditions are satisfied. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding, against First Amendment concerns, a zoning ordinance that prohibited adult movie theaters from being located within 1,000 feet of residential property, churches, parks, or schools).

country—a morality that says, “My way is right. My God is right and God does not like this, so it has to be stamped out.” It’s the same fundamentalism that we see in Iraq and Iran. It’s exactly the same that is happening here. It comes from a president who says, “I know what I do is blessed by God. God says this is the way it’s supposed to be.” It’s a simplistic way of looking at life: “I don’t like it. It’s wrong. It needs to be stamped out” rather than say, “I don’t like it. It’s wrong, so I’m not going to partake in it.” They say, “I want to be sure that you don’t partake in it either.”

Some of the furor comes from this repressed sexuality. A lot of it comes from these right-wing people who’ve repressed their sexuality,⁵¹ and they get angry when they see other people freely expressing their sexuality.

VALENTI: I think it is all very personal.

Right now, in this period, the Republicans vote in lock step no matter what. So you could have somebody who would be considered a moderate Republican, but follows the game plan for the party.⁵²

QUESTION: Given the political fallout that surrounds this subject matter, how closely does the gay porn industry work with the Free Speech Coalition—arguably the adult industry’s strongest lobbying force?

MODDE: We support them fully. We’re members of that organization, along with the Associated Sites Advocating Child Protection.⁵³ Those

51. This would seem to be the case for former U.S. Congressman Mark Foley (R. – Fla.), who lived a “deceitful life for more than 15 years—during which he portrayed himself as a heterosexual politician,” before being forced to resign for sending sexually suggestive e-mail messages to boys. Michelangelo Signorile, *Media Should’ve Outed Foley*, L.A. TIMES, Oct. 13, 2006, at B13. His situation indicated, according to radio talk show host Michelangelo Signorile, that “repressed sexuality—whether it’s repressed homosexuality or repressed heterosexuality—certainly can be harmful when the dam bursts.” *Id.*

52. This comment, of course, was made before the November 2006 elections in which clearly anti-gay Republicans like Senator Rick Santorum (Pa.) were soundly defeated. See Leonard Pitts, Jr., *No Room for Gays Under the GOP Tent*, BALTIMORE SUN, Oct. 22, 2006, at 27A. Santorum “has compared homosexuality to bestiality.” *Id.* After the Democrats gained control of both the U.S. Senate and House of Representatives, it may be that some moderate Republicans will break away from this pack mentality when it comes to gay-related issues. For instance, a *New York Times* article about a Nov. 30, 2006, meeting of New York Republican leaders observed that the leaders “noted that [N.Y.] Gov.-elect Eliot Spitzer, a Democrat, favored gay marriage and more state spending on select priorities—two areas where Republicans could appeal to independents and centrist Democrats who are opposed to those things.” Patrick Healy, *New York Republicans Gather to Survey Damage and Elect a New Party Chairman*, N.Y. TIMES, Dec. 1, 2006, at B3.

53. Association of Sites Advocating Child Protection Homepage, <http://www.asacp.org> (last visited Feb. 23, 2007) (promoting the non-profit organization’s mission of “eliminating child pornography from the Internet” through the use of a reporting hotline and “by organizing the efforts of the online adult industry to combat the heinous crime of child sexual abuse”). “ASACP also works to help parents prevent children from viewing age-inappropriate material online.” *Id.*

organizations are needed to band us together. We're grateful that they are there.

It's very important to have a seat at the table of legislative politics. We've always been generous in supporting candidates that will be favorable to us, but it's hard. Sometimes information gets misreported, like an article in a Philadelphia newspaper that said an individual took money from Falcon Studios that practices unsafe sex, which is a lie.⁵⁴

Luckily, in San Francisco, we have people that realize we're a political force to be reckoned with. Chuck's [Holmes] name is on the Gay and Lesbian Center on Market Street. We were an important part of funding that facility.⁵⁵ We try to have a very humanitarian approach and put back into the community rather than just take.

VALENTI: The [Free Speech Coalition] board has grown tremendously in the last two years with regard to what it looks out for. I think it was primarily made up to protect distributors in brick-and-mortar and mailing, but the Internet obviously has taken on a bigger and more important role. We're obviously addressing those issues now and trying to get more of a voice in the online community and trying to get more people from the online community into the organization and on the board.

I think it is tremendously valuable, particularly because of the legal minds that are associated with it. They truly are free speech advocates. That's who you really want to talk to about what the First Amendment means, and they'll dissect it for you. It's fascinating for me to sit there and listen to Reed Lee⁵⁶ or Jeffrey Douglas⁵⁷—the passion that they have, backed up by the surgical understanding of the law and really being able to do it.

It's also an organization that has really strived to put out best business practices and to say, "This is how you do business in a legitimate, good, upstanding and transparent way. And this will help you, particularly in this

54. Modde did not specify the name of the newspaper in which this article appeared, and after extensive online research in May 2007 through the indexes of several Philadelphia-based newspapers, the authors were unable to locate this article.

55. See Martine, *supra* note 19, at 3 (noting that Falcon Studios, a gay adult film and Internet empire, donated \$1 million to the San Francisco Lesbian, Gay, Bisexual, and Transgender Community Center through the Charles M. Holmes Foundation).

56. Lee is the president of the First Amendment Lawyers Association, and "has represented defendants in about a dozen obscenity cases . . . six of those were tried before juries and he's never had a conviction." Paula Reed Ward, 'Rare' Obscenity Case Targets Writings, PITT. POST-GAZETTE, Oct. 28, 2006, at A-9.

57. Jeffrey Douglas is a member the State Bar of California and the chair of the Free Speech Coalition's board of directors. See generally Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247 (2004) (setting forth an interview with Douglas and Free Speech Coalition executive director and lobbyist Kat Sunlove).

climate. But even when this climate is gone, don't give up best business practices."

The goals for moving forward—particularly with the new executive director—are to enhance the communication even more so and particularly with the online community, and to make stronger the effort in Washington to lobby and to make lawmakers understand the industry better. That is key, obviously—for them to understand the industry. It is very important and not just because of this climate. I think, moving forward in general, as it becomes more and more mainstream, they [politicians] have to understand it because the majority of their constituents are going to be using the industry's services. They have to understand how to regulate it in a fair and balanced way; everything gets regulated in this country, and it's too big to not regulate.

I think you have to work through organizations like the Free Speech Coalition or advocates for safe sex and healthy sexuality—those types of organizations. I think, in general, the gay adult community is extremely supportive of social causes that have to do with the AIDS crisis, with gay men's health, and they are very active in the communities with parties that are always benefits for organizations that want to take care of the community. I think we do a fantastic job, actually, of supporting our needs and supporting the members of our community. I think that, sometimes, we don't want to recognize some of the things that are happening, particularly to the youth with regard to drug use or condomless sex. But generally we come around, we recognize it and we try to support it however we can and to take care of it. It's a very supportive community.

*B. Obscenity Law, Age Verification & Political Threats to Gay
Pornography*

Although the prohibition against government impingement on speech indisputably is powerful, obscenity is one category of expression that loses First Amendment protection if the material in question meets the strictures set forth by the United States Supreme Court in *Miller v. California*.⁵⁸

The line dividing material that is obscene under the Supreme Court's definition from speech that, although sexually explicit in nature, is wholly protected by the First Amendment, is murky.⁵⁹ Moreover, the question of

58. 413 U.S. 15, 24 (1973) (developing a three-prong test for obscenity that focuses on whether the material, when taken as a whole and as judged by contemporary community standards: (1) appeals to a contemporary average person's prurient interest in sex, (2) depicts or describes sexual conduct in a patently offensive way as defined by the applicable state law, and (3) lacks serious literary, artistic, political, or scientific value).

59. 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 (2003) (criticizing the prongs of the *Miller* test as

whether the depiction of sexually explicit acts between members of the same sex permeates unprotected First Amendment territory arguably requires an additional layer of analysis. In particular, it forces the trier of fact to consider, and essentially transcend, any particularized, subjective prejudice toward homosexuality and appropriately apply the perspective of the average member of the community⁶⁰—an abstract concept at best.

The notion of an unsanctioned, yet subconsciously applied, standard for addressing sexually explicit expression involving same-sex individuals is not lost on the gay community. Both Stephen Modde and Tim Valenti comment on the characteristics they believe an ideal juror in an obscenity case should possess. For both men, the ideal jury would be culled from individuals who likely would be libertarian in spirit and who can put their prejudices aside and ascertain the facts. Attorney Lou Sirkin also recognizes that a double standard indeed exists with respect to gay pornography “because we—from a lawyers’ standpoint—were uncomfortable with it because it was something different.”⁶¹ For that reason, Sirkin observes that the police would purchase gay material and hope to prosecute based on its unfamiliarity to lawyers and the general population.

Ironically, Sirkin also points out that the federal government’s continuing prosecution of Rob Black and Extreme Associates diverted attention from gay porn producers who might otherwise be the object of prosecutorial ire.⁶² He notes, however, that the government might be sensitive to claims of selective and discriminatory prosecution should its focus turn toward same-sex materials.

While potential obscenity prosecutions unquestionably occupy the attention of the gay pornography industry, the matter of age verification of performers, as required by federal law,⁶³ is high on its list of concerns.

“completely ambiguous, open-ended, and subject to interpretation”).

60. See *Miller*, 413 U.S. at 30.

61. See *infra* notes 79-81 and accompanying text.

62. See Calvert & Richards, *supra* note 10, at 447-48 (asserting that the pending prosecution of Extreme Associates might prevent future government lawsuits against pornography Web sites because, as secure access and credit-card verification technologies improve, children will be unable to view the content, foreclosing the government’s best “compelling interest arguments”). See generally *United States v. Extreme Assoc., Inc.*, 352 F. Supp. 2d 578, 594-95 (W.D. Pa. 2005) (finding that the federal obscenity statute at issue did not survive strict scrutiny because the government’s interest in protecting minors was met by the defendants’ credit card restriction and by the availability of software restricting minors’ access to sexually explicit material).

63. See Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2257(a)(2), 2257(b)(1) (2006) (mandating the record-keeping requirements for producers of sexually explicit conduct in “any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image,” and requiring them to “ascertain, by examination of an identification document containing such information, the

Modde calls this requirement the “overall industry fear” and Valenti describes the precision with which his company pays attention to the details required by the law.⁶⁴

Finally, Lou Sirkin discusses the importance of the Supreme Court’s decision in *Lawrence v. Texas*⁶⁵ in terms of gay pornography. That case overturned a Texas statute which made “it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”⁶⁶ According to Sirkin, the case stands for the proposition that the concept of morality cannot serve as a basis for creating laws.

With this background in mind, this Section now turns to the questions and answers from the interviews.

QUESTION: What is your opinion of the test for obscenity that was carved out by the United States Supreme Court in *Miller v. California* more than three decades ago? Does it present any special obstacles when the sexually explicit material in question involves gay pornography? Can you talk about the notions of community standards and artistic value embodied in *Miller* as they might apply to gay pornography?

MODDE: Well, *Miller* made perfect sense to me in law school, but it doesn’t make perfect sense to me now. It’s one of those things in life that I understand why you have to have some limits. There are limits to free speech and we try to define them. Trying to define them when it comes to sexual expression is really hard to do. So *Miller* asks what is the community standard⁶⁷ and does it have any redeeming value. I think you can argue that no matter how extreme the porn is, it has educational and socially redeeming value. So that prong is pretty easy. When we ask whether it offends the community standard, then we’re getting into individual rights. Should individuals be inhibited by what everybody that goes to the mall thinks? If you have it in the privacy of your own home and you’re not showing it to the community, then what’s the problem?

performer’s name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations,” and to “create and maintain individually identifiable records pertaining to every performer portrayed”).

64. See *infra* note 88 and accompanying text.

65. 539 U.S. 558 (2003).

66. *Id.* at 562.

67. The Court in *Miller* made it clear there is *not* a national community standard, writing that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.” *Miller v. California*, 413 U.S. 15, 30 (1973). The Court later added that “children are not to be included for these purposes as part of the ‘community.’” *Pinkus v. United States*, 436 U.S. 293, 297 (1978). It also wrote that the community, for purposes of obscenity law, includes “all adults who constitute it,” including “sensitive” and “insensitive” people. *Id.* at 300.

I'm not the kind of person that's going to say, "We've got to do away with all obscenity law" because it's the same thing with speech. I suppose my limit would be when people are harmed in the activity that's being captured. I think that would be the test, but even then it's hard to tell.

It is more difficult for the gay segment of the industry because we don't fit into practically any community. I've lived all over this country and there are very few states where you can be gay and feel like you're part of the community. You're an outcast just by being who you are. And it would be hard to make jurors put themselves in the place of a gay community member.

The concept of community is very difficult. Because sexuality is such a base thing, I understand why people get nauseated when they think of homosexuality. When I was coming up and people were talking about heterosexuality, the concept of sleeping with a woman didn't make me feel very good. But I'm smart enough to realize what I like and that's the way it is.

Look at the way the Bush Administration has taken the gay rights issue to be re-elected at the last election [2004]—gay marriage and the way they pointed the finger at San Francisco and [Mayor] Gavin Newsom.⁶⁸ He's marrying people on the steps of City Hall.⁶⁹ So we're their whipping boy.

Having said all that, gay porn certainly is art. When I see the guys here and all the guys at the reputable gay studios and the pride they take in their work and the professionalism, I know it's art. I watch so much porn here. Some people might say you must get a hard-on every day, but I'm really looking for the beauty of the filming, the lighting, the positioning, and all of that stuff. You're filming this most intimate act and it's a piece of art. As for scientific value, I don't know how I would argue that.

As for the educational function, it teaches us to be comfortable in our skin and teaches us how to engage in sexual activities. We are proud to be a safe-sex studio, so we teach people that condoms are part of a sexual experience. Those things are invaluable and there's no other place a gay person can learn that. You're certainly not going to learn it in schools and most libraries aren't going to have *The Joy of Gay Sex* sitting on their

68. Cf. Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-elect Bush?*, S.F. CHRON., Nov. 4, 2004, at A1 (writing that "San Francisco did not vote for President Bush, but the pictures of wedded gay and lesbian couples streaming from its City Hall last February may have helped return him to the White House").

69. See Herbert A. Sample, *S.F. Mayor Quickly Stirs Things Up*, SACRAMENTO BEE, Feb. 17, 2004, at A3 (describing how Gavin Newsom engaged in a "controversial move" in February 2004 when "he instructed the county clerk to issue same-sex marriage licenses," all of which resulted in "[h]undreds of gay couples [lining] up in City Hall to obtain the licenses and conduct ceremonies, while gay-marriage foes sought to block the action in court").

shelves.⁷⁰ If they did, the local Baptist church would make them take it out.

VALENTI: There very much is artistic value to a lot of the content, although not all of it. Again, that separates the production houses—Falcons, Rascals, Chi Chi [LaRue], Channel One, Titan, Colt, Buckshot. Those are all studios that produce content that, if they really have their finger on the pulse, they know is appropriate, what’s hot and what guys want to see, whether it’s in the category of jocks, hairy men, bears,⁷¹ or rough sex. They produce productions of value—good production values, the best models, and the best scenarios. I wouldn’t say that gay porn is really known for its great story lines, but it’s getting better.

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

QUESTION: Does the shipping of sexually explicit gay material pose any legal risks for your company under obscenity laws?

MODDE: We don’t ship to communities where we have encountered the wrath of the law.

It’s amazing, but we won’t ship our product—a certain product, which now we’re not making—to Los Angeles County. It was our fisting product. We were brought up on obscenity charges in 1998, and I’ve made some legal decisions here that have not been popular because I want to be safe. I don’t want to be a vanguard right now with the current administration. I have to admit, I have kind of backed down a bit to say, “Let’s wait a couple of years and hopefully we can get back to where the Justice Department spends their time going after child pornography, where

70. CHARLES SILVERSTEIN & EDMUND WHITE, *THE JOY OF GAY SEX* (1977); see also George Whitmore, *Men and Men*, WASH. POST, Jan. 8, 1978, at E4 (calling the 1977 illustrated sex manual, *THE JOY OF GAY SEX*, “[a] really joyous book, witty and authoritative”). A Toronto District Court judge declared the book not to be obscene under Canadian law in 1987. See *Homosexual Sex Book Ruled Not Obscene*, TORONTO STAR, Mar. 21, 1987, at B7 (describing how the book was seized by Canadian customs officials and then went before a judge to determine if it was obscene).

71. See Wikipedia, *Bear Community*, available at http://en.wikipedia.org/wiki/Bear_community (last visited May 2, 2007) (writing that bears “are usually mature gay or bisexual men with hairy bodies and facial hair; some are heavy-set, but that is not a requirement. Bears often exhibit an outwardly masculine appearance,” but adding that there is “debate in the gay community as to the definition of a bear: some say anyone who identifies himself as a bear is one, while others argue that bears must have certain physical characteristics – such as a hairy chest and face – and a certain mode of dress and behavior”).

there is a harm, and lays off ‘Girls Gone Wild.’” The only bright spot in that prosecution was that he [Joe Francis] could have gotten five years in prison for [the] Section 2257 violations.⁷² At least they didn’t throw him in prison.⁷³ I put my name on every product that goes out this door, and I don’t want to go to jail.

We don’t ship to Tennessee and that goes back to an obscenity case in 1973.⁷⁴ We don’t ship to Mississippi. We don’t ship to Salt Lake City. We used to not ship to Texas, but we are shipping there now. I have real difficulty. I asked Greg Piccionelli⁷⁵ and I’ve talked with other attorneys in the industry, asking “What’s this list?” Some companies have these huge lists that say we don’t ship here, here, and here. Our list is basically based on if we have encountered the law there. If we have, then we don’t ship.

VALENTI: We don’t ship anything, so we don’t have that issue.

QUESTION: In any obscenity case, the material in question would be presented to a jury selected from the community in which the prosecution takes place. What type of person would be an ideal juror in an obscenity case involving gay pornography?

MODDE: I think I would want to get a libertarian spirit in the person. I might say I want a liberal or something, but then you get this feminist backlash. I was at a conference in Washington, D.C., and the topic of feminists against pornography came up. I said, “The next time you get into one of these discussions, get the gay side of the issue. Get me there to say, ‘You’re against pornography, but here’s my pornography and who’s being victimized here?’” Then it’s about sexual expression. With heterosexual pornography, you have a female and a male and it is easier to look at that

72. See Claire Hoffman, *Video Maker Pleads Guilty*, L.A. TIMES, Sept. 26, 2006, at C2 (writing that “Joe Francis, the founder and chief executive of the ‘Girls Gone Wild’ empire, pleaded guilty Monday to two felony counts of violating federal record-keeping laws by failing to document the ages of young women in his racy videos”). Francis “agreed to personally pay a \$500,000 fine to settle charges that he failed to keep records of the ages and identities of the women who appeared in his soft-core sex videos.” *Id.*

73. Subsequent to the authors’ interview with Modde and in a matter unrelated to the Section 2257 violations, Joe Francis was sentenced by a federal judge in Florida “to 35 days in prison and fined . . . \$5,000 after he pleaded guilty to a criminal contempt charge.” Richard Verrier, *‘Gone Wild’ Creator Gets Prison Sentence*, L.A. TIMES, Apr. 24, 2007, at C2. This sentence stemmed from a “civil lawsuit filed by seven young women who alleged that they were victimized by Francis’ film crews during filming in Florida in 2003.” *Id.*

74. See *Cambist Films, Inc. v. Tenn.*, 495 S.W.2d 812 (Tenn. 1973) (affirming the determination of the trial judge that the film “Cry Uncle,” which was shown at the Fox Theatre in Knox County, Tenn., was obscene).

75. Gregory Alexander Piccionelli, a member of the State Bar of California, recently was described by one major newspaper as “a Los Angeles-based attorney who is considered a national expert on the rights of adult businesses.” Mike Lewis, *Strip Club Proposal Raises Little Heat*, SEATTLE POST-INTELLIGENCER, July 29, 2005, at A1.

and say, “Well, obviously, the female is being dominated.” When you get two males, you can’t tell exactly who’s being victimized.

I would want a juror with a libertarian streak. I believe in less government and a hands-off policy. I would certainly want to keep off any member of the religious right. If I had any inkling that they belonged to some Baptist, right-wing church, I would want them off my jury.

I always think about this, and I would say, “You may not like homosexuality and you may not like what homosexuals do, but we exist in large numbers and it’s love and it’s natural. If you want to tell me that you don’t want to watch it or you find it offensive, then that’s your business. But it’s not obscene when it’s love.” That’s the argument I would make.

What we strive for in these films is getting chemistry between two guys who like each other—they’re having a good time together and enjoying their sexuality. Showing that on film is a work of art.

We have formula: We have foreplay and kissing, so it’s not just fucking. It shows two guys hooking up somewhere. It’s a fantasy thing.

VALENTI: No matter what the current Chief Justice⁷⁶ might say or no matter what the current administration might say, we have a justice system and your commitment, if you are a juror, is to put aside your prejudices and to listen to the facts. If you can’t do that, then you’re doing yourself and the country a disservice. Sure, it may be harder [with gay porn], but that’s all we have to count on—that’s it—so you’ve got to make sure that if you’re going to be in an obscenity case like that, hopefully you’ll be able to put together a team that will really put out the facts and make the argument. That’s what we have and that’s what we live with. I think that, over time, the best arguments always win, the most rational arguments always win. That’s where you have to have faith.

All of my straight buddies are like totally cool and would make good jurors. They are smart, they are intelligent, and they listen. A San Francisco man would be ideal.

QUESTION: How difficult would it be today to defend an obscenity case against a gay porn producer? Would it be more difficult to overcome what might be considered bias against homosexuality generally even before getting to the porn aspects of the case?

SIRKIN: It depends on where you are. Traditionally, the cops would buy the gay material because we—from the lawyers’ standpoint—were uncomfortable with it because it was something different. When we grew up, people didn’t talk about it. When I tried a case down in Chattanooga a

76. The current Chief Justice is John G. Roberts, Jr., who was nominated by President George W. Bush and took the judicial oath in September 2005.

number of years ago that involved a gay movie, I talked about the educational value—the use by people struggling with sexual identity or people who were curious—and the jury accepted that argument. They came back with a not-guilty verdict.⁷⁷

Then, in the Elyse Metcalf case,⁷⁸ one of the movies the police purchased was one that we had pled to in the [Larry] Flynt case,⁷⁹ so now we were going to have to try it in Elyse's case.⁸⁰ The jury had no problem at all with that. It was a Jeff Stryker⁸¹ movie that described the struggle of coming out. It showed all the bad things about adult bookstores—the glory holes, the peep arcade, a gay sex orgy, naked guys dancing together and kissing, standing up on a balcony jacking off. In the *Flynt* case, I told the other lawyers that the jury in Cincinnati was going to have a lot of trouble with this movie. When we showed it to the focus groups, in preparation for the *Flynt* case, as soon as they saw that movie, they said, "That crosses the line."

In Elyse's case, however, they had absolutely no difficulty at all with it. We had a very intelligent, well-educated jury. They had no problem with it because we were able to present the theme—this is a guy with a struggle, coming out, and it was reminiscent of the cultural and sexual revolution of the seventies when people became more open. I'm finding that theme is usable now, and you can sort of put guilt trip on for the jury. So, in some sense, it's a bit easier with a gay film.

77. See Van Henderson, *Jury Deadlocked In Obscenity Case*, CHATTANOOGA FREE PRESS, July 16, 1998, at B2 (describing how "Hamilton County Criminal Court Judge Doug Meyer declared a mistrial for sibling defendants David Lamar Franklin and Dexter Eugene Franklin" who, as owners of an adult bookstore, sold to undercover policemen a copy of a movie called "Peter Pepper, Vol. III" that "shows men engaged in various sex acts," and quoting Sirkin's argument to the jury that "[i]t is a matter of choice and certainly not sick or an unhealthy lifestyle").

78. See *State v. Dute*, 2003 Ohio 2774, 2003 Ohio App. LEXIS 2495, **23-24, n.6 (2003) (Winkler, J., dissenting) (citing the *Metcalf* case as *Ohio v. Metcalf*, Hamilton County Common Pleas No. B-0009955).

79. See Associated Press, *Deal Ends Obscenity Trial Of Hustler's Larry Flynt: Publisher Agrees To Stop Selling Hard-Core Videos At Cincinnati Store*, ST. LOUIS POST-DISPATCH, May 13, 1999, at A5 (describing Flynt's plea bargain, which included his agreement "to stop selling hard-core videos at his Cincinnati book store").

80. See *Jury Clears Porn Store Owner on Obscenity Charge*, ASSOC. PRESS. STATE & LOCAL WIRE, May 21, 2001, available at <https://web.lexis-nexis.com/universe> (describing Metcalf's acquittal on obscenity charges in Cincinnati, Ohio, in May 2001, after a jury comprised of six men and six women "watched three videos bought by undercover police at Elyse's Passion and deliberated for eight hours over two days before returning the verdict").

81. See Everett Evans, *Gay Theater Comes Out: Houston Theaters Now Routinely Dare to Speak Their Love's Name*, HOUSTON CHRON., Oct. 29, 2000, at 8 (describing Stryker as a "porn star" and quoting Vaughan Monroe Dampier, producer of the Ashland Street Theatre Company which put on a Jeff Stryker play called "Jeff Stryker Does Hard Time," for the proposition that "[Stryker's] the No. 1 gay male porn star in the world").

QUESTION: How might the current prosecution of Rob Black and Extreme Associates affect the prosecution of sexually explicit gay content?

MODDE: We do a lot of speculation. So far, most of the obscenity stuff has been extreme. Content that is extreme or on the edge, like the gay studio Sebastian Sloane⁸² in Pennsylvania, is the one that got hit.⁸³ But we're wondering, "Maybe they are going to go after us because we're established and people look up to us and respect it." So nobody is safe.

But I have pulled nine titles—and very good titles that will be re-released in edited versions—where I looked at the ID and thought, "Is this clear enough?" It looks like 1972, but I'm not going to take a chance and I'll pull it.

I have certain rules. They are so arbitrary that, all day, people are coming up to me saying, "Can I do this or that?" It's a case-by-case basis. It's so arbitrary and that's what makes obscenity so hard. I know it when I see it, but nobody knows what it is. I have certain standards: Anything that goes up the butt must be made to go up the butt. So it has to be a sex toy—no vegetables, no fire hydrants, no traffic cones. That stuff's out. Because fisting is hard, I have a three-finger rule: I'll allow three fingers, and sometimes I'll look the other way for a fourth, but when does it become fisting? When is it just butt play? No urination. We've had some interesting situations. A director who left, Kristofer Weston, who's now over at Colt, did a really interesting title called "The Dark Side," which looked at these fantasies—priest fantasies, necrophilia, and incest. He hit all these taboos. I thought he did an excellent job, but our distributor looked at it and said no. It wasn't sexual. It was just set-up dialogue. And the distributor said, "No. We won't touch that."

Generally speaking, my list of taboo subjects is mild.⁸⁴ Other studios in town tighten it. Personally, it's hard for me because I hate to be a censor. I don't like to capitulate to what I believe is unconstitutional behavior. At

82. Sebastian Sloane Productions, <http://sebastiansloaneproductions.com> (last visited Feb. 22, 2007).

83. See M.J. McMahon, *Sebastian Sloane Productions Target of Second Reported 2257 Investigation*, AVN.COM, July 28, 2006, available at http://www.avn.com/index.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=272592 (writing that "[a]mateur gay content producer Sebastian Sloane Productions was the target of the second reported 18 U.S.C. §2257 investigation" when federal agents went "through [owner J.J. Ruch's] model release documents, his computers, video cameras, masters and even searched his kitchen and living room").

84. In the straight porn world, the so-called "Cambria List" is used by some companies as a guide for what not to include in an adult movie or on a box cover. Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 163-65 (2004) (describing the origins and development).

the same time, what I tell people is that I look at this as a temporary move to get through this administration so that this company can continue surviving.

Our company founder, Chuck Holmes, liked fisting a lot. He had a personal thing for fisting, so every three or four films we did fisting. Considering we have been brought up on obscenity charges on fisting, I always think if I take this film and show it in Sioux Falls, South Dakota, and I show two fists going up a man's anus, am I going to be able to tell that jury that it's not shocking to their conscience? I say no. Now, I like to watch fisting. Another studio just put something out for the Folsom Street Fair⁸⁵ and someone said, "They're aiming for an obscenity case."

We [Falcon] stopped doing it and we pulled everything. We stopped filming fisting about two years ago—maybe it's been three—and we made the decision to stop selling it earlier this year. We've edited those scenes out of the films that we're previously made.

VALENTI: There's not a prevalence of Extreme's kind of content in the gay category. A lot of what you would consider bondage or the kinky stuff—it's not to the extreme where you're ripping people open or you're actually seeing certain liquids that are coming out of people.

In a way, gay is a lot more vanilla than a lot of the straight stuff.

I think that as society matures and the adult product becomes more mainstream, people learn to distinguish—they are not totally stupid. If you pick up something, you can see and recognize right away whether or not it is something you can tolerate, and most people don't want to tolerate that.

I'm not saying there isn't a category for it if it replicated in the right way, in more of a fantasy way. A lot of the content that would be deemed more kinkyish—dominating, domineering—it's all fantasy. The sex is good because the guys are really in to it, but there certainly is not—and I know this for a fact because I've been on many, many sets of that sort of content—real harm. Not at all. I'd be freaked out.

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

QUESTION: Besides the general concern over obscenity prosecutions, there seems to be a constant churn in the straight adult industry over the 2257 requirements. Is the same true for the gay segment of the industry?

85. The Folsom Street Fair was recently described by the *San Francisco Chronicle* as an "annual S&M celebration that draws hundreds of thousands of leather fetishists to Folsom Street between Seventh and 12th streets" in San Francisco, California. Carolyn Jones, *Hot Fun in the Autumn-Time*, S.F. CHRON., Sept. 24, 2006, at B1.

MODDE: What's made my job harder is the legal aspects of the Bush Administration with 2257. It's huge. I'm working with IT to get a more automated system. We'll probably look at spending \$75,000 to totally computerize it, so we can take our product and give it to X-vendor and type it into the computer so that the secondary producer will have the records. One of the problems, though, is privacy. All of a sudden you're sending these I.D.s out on these people who use a pseudonym to work in the industry and you're plopping them all over the place. It's my number one responsibility because a first offense is five years [in prison]. I was happy to see in the "Girls Gone Wild" case that there wasn't a prison term—at least it was just money—because I want to stay out of jail.⁸⁶

Under this Adam Walsh law,⁸⁷ where the Bush Administration said it's a child registry issue, they make these totally unconstitutional regulations making secondary producers responsible for the I.D.s of the primary producer. How in the world does that person know what the primary producer did? Why should they be responsible? Why can't they say, "We've licensed it from him. He has them"? The burden of record keeping is enormous.

VALENTI: With regard to 2257, we require that when companies send us video, all of the 2257 documents are with it. We review the documents and we review the film to make sure it all matches. We comply. Even though we are covered by the Free Speech Coalition's injunction in *Free Speech Coalition v. Gonzales*,⁸⁸ we decided at the beginning that we were going to do our best to comply. The way the law is written, it is almost impossible to comply with, but we do it and we have our 2257 room that is locked up, alarmed, and not connected to the Internet. It has a database with all of that information on it, and it is accessible if need be.

In the beginning, it took a lot of time because we took it so seriously. We repurposed a lot of our staff just to get it all done as much as we could, and that took a bunch of resources—repurposing people and not having them do what they normally did in the company.

86. See Hoffman, *supra* note 72, at C2 (describing how Joe Francis, the man behind the "Girls Gone Wild" series, "will serve no jail time" under a plea agreement related to his violations of federal law related to his record keeping for the series).

87. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (2006). See generally Mima Mohammed, *Sweep Rounds Up 10,700 Fugitives*, L.A. TIMES, Nov. 3, 2006, at A16 (describing the Adam Walsh Child Protection and Safety Act signed by President Bush in July 2006). The law, named after the murdered son of "America's Most Wanted" host John Walsh, makes it a federal offense to fail to register as a convicted sex offender. *Id.*

88. 406 F. Supp. 2d 1196, 1212 (D. Colo. 2005) (granting a preliminary injunction preventing the enforcement of 18 U.S.C. § 2257 against the plaintiffs in the case based on the likelihood of success on their free speech claim).

QUESTION: Is there a fear in the gay porn industry that the Bush Administration will now turn its obscenity prosecutorial attention to gay pornography?

MODDE: There's a huge fear of prosecution with 2257. They made these regulations so cumbersome and so far beyond the reach of the intent of the Congress, which was to stop underage actors. Now you have to cross-reference this and do that. We can use no foreign actors now. We're an international company, and we used to fly people in from London. We can't use them now unless they have a U.S. I.D. What's the intent of the law? To keep kids out. So I get a 45-year-old man, literally, that's coming over here to be in a movie, and they're saying he can't be in it because he doesn't have a U.S. I.D. That's far beyond the intent of 2257. Those kinds of things have really just . . . whew [indicating exasperation].

That's related to how I got into this industry. Before I came to Falcon, I was in a small firm here called Clarence & Dyer,⁸⁹ which catered to the adult industry, and the calls were just coming in, asking "What do we do? We need help."

The number one overall industry fear has been 2257 because that's where it really just came down black and white. Then, we have seen with obscenity cases, like Extreme Associates, that they're going to go after content. Well, Gonzales said, in his confirmation hearings, that he was going to get us.⁹⁰

VALENTI: I think their whole posturing and positioning is really all about fear, and it's not just with the gay community, it's anybody. If it doesn't fall into their categories, then it's, "You should be afraid because we may decide to do something to you." But I think that with good business practices, being transparent, and trying to stay within the regulations, then they cannot do too much to you.

I think that everybody sort of walks around with some fear—different volumes of it, depending on what they decide they are going to concentrate on each year—but I don't think anything, in terms of content development

89. Clarence & Dyer LLP, <http://www.clarencedyer.com> (last visited Feb. 22, 2007) (describing the law firm today as providing "effective and aggressive representation in criminal defense matters").

90. During his January 2005 confirmation hearings, Alberto Gonzales stated, "I think obscenity is something else that very much concerns me. I've got two young sons, and it really bothers me about how easy it is to have access to pornography. And so those are a few things that I would be focused on." *Panel I of a Hearing of the Senate Judiciary Committee Subject: The Nomination of Alberto Gonzales to be Attorney General*, 109th Cong. 23 (2005), available at <http://www.fnsg.com/transcripta.htm?id=20050106t4210&query=> (last visited Dec. 1, 2006); see also Eric Lichtblau, *Gonzales Lays Out His Priorities at Justice Dept.*, N.Y. TIMES, Mar. 1, 2005, at A14 (writing that Attorney General Alberto Gonzales, shortly after his confirmation, said "he expected the Justice Department to look for more aggressive ways to prosecute obscenity crimes").

or the creative [product] that is being produced, has been pushed back.

Of course it is political in the sense that it is in the interest of the majority of lawmakers, who come from a different part of society than gay producers or a lot of gay consumers, to certainly not support it because of the types of votes that they need to have and, in some occasions, to obviously oppose it and to fight against it. You see that particularly in Middle America where most of the growth of VOD is happening just for that reason.

From Clinton in to Bush, what affected the gay adult business was technology, not so much legislation or lack of it. I think that the gay adult industry and the gay adult consumers have just matured at the rate that they were going to mature; I don't think that just because Bush is in office that, all of a sudden, we're not going to produce something or we're not going to do this kind of a scene or someone's not going to watch something. He's not that powerful; they're not that strong. But what does affect it is technology and what you can produce going directly to streaming versus being produced and going directly to DVD and then being recycled into online. That's what affects the productions—the different things that you can produce.

QUESTION: Is there anything that the gay porn industry could do to help its image with the public at large or the government?

MODDE: I think the content is porn and you cannot surmount that obstacle. We do the best we can to make clear that we fund a number of organizations. We practice safe sex. We try to be a responsible corporation in the city of San Francisco and the state of California. We respect other states' laws, so if Tennessee doesn't want our product, then we're not going to ship to Tennessee. I try to set the parameters to fit the rules the best I can in the society we have today. It's not the best right now because of the current administration. We make good, wholesome gay porn, and I'm proud of our product. Anyone who's doing porn ought to be able to look at it and say, "This is OK." When I play our product, I think this is just fine, and there's nothing wrong with this.

VALENTI: The best thing that I think the industry can do is be very transparent, practice good business practices, put in all of the safeguards that are necessary, and monitor the kind of content that they'd like their brand to be known for.

You're not going to confuse NakedSword with Extreme Associates—you're just not. That's by choice.

QUESTION: Can you please explain the importance, in your mind, of the United States Supreme Court's decision in *Lawrence v. Texas* when it

comes to protecting the right of consenting adults to view sexually explicit content?

SIRKIN: I think the laws that ban the right to view sexually explicit content really have been based upon morality. I don't think there is anything other than anecdotal evidence that ever has shown a correlation with anti-social behaviors as a result of viewing sexually explicit material. When you go back and look at *Paris Adult Theatre v. Slaton*⁹¹ and what the Court talks about, the only justification is they just know it's not decent.

My analysis, going back to the historical development of obscenity law, is that the Supreme Court, back in 1957 in *Roth v. United States*,⁹² really and truthfully believed the concept, in the first prong, that the average male will look at this material, get an erection, and masturbate. And *Roth* was pre-Kinsey.⁹³ The overwhelming belief was that masturbation was sinful, shameful, and was going to make you blind. I really think that, if the Kinsey Report had been finished, the outcome might have been different. I think the only justifications are morality and decency, and I believe that *Lawrence* clearly discusses how morality and decency are evolving terms that change over time. That's the significance of that case.

We've come to a day when the clash that really seems to exist in this country today is individualism versus this collective idea that "we know what's best for you." When it comes to that, the sexual choices have evolved, starting with *Griswold v. Connecticut*.⁹⁴ Sex now is not looked at as something that's just for procreation. It's entertainment, it's enjoyable, it's fulfilling, and it creates intimacy. We've evolved to this point. *Lawrence* clearly says that morality is not justification for laws.⁹⁵

The other important point about *Lawrence* was the fact that the Court

91. See generally 413 U.S. 49, 69 (1973) (finding that the government has a "right . . . to maintain a decent society" and regulate obscene material).

92. See generally 354 U.S. 476 (1957).

93. This is in apparent reference to the work of Alfred Kinsey, who issued a number of different reports on sex and sexuality. The Kinsey Institute, Data from Alfred Kinsey's Studies, <http://www.kinseyinstitute.orgresearch/ak-data.html> (last visited Feb. 22, 2007).

94. 381 U.S. 479, 486 (1965) (recognizing, in the context of a state law that banned both the use of contraception and the counseling about its use, a "right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred"). The law, thus, violated "the notions of privacy surrounding the marriage relationship." *Id.*

95. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (quoting a portion of Justice John Paul Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), in which Stevens wrote that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," and writing that "Justice Stevens' [sic] analysis, in our view, should have been controlling in *Bowers* and should control here").

was so willing, within a twenty-year span, to revisit the issue after *Bowers v. Hardwick*.⁹⁶ I thought that was amazing to show the evolvement. It seems like we've had these conflicting things bombarding each other. The Court is really evolving while the Administration is going the other way. Now the concern is, although we still feel a little secure with a five-person majority on the Court, that [John Paul] Stevens isn't a kid anymore.⁹⁷ Hopefully, he can hang in there. The important Justice right now is [Stephen] Breyer for the future.⁹⁸ He has to be the swing vote.

C. The Uses, Values, and Functions of Gay Pornography: Why It Requires First Amendment Protection

In his book, *One-Handed Histories: The Eroto-Politics of Gay Male Video Pornography*,⁹⁹ John R. Burger writes that “[g]ay male porn represents gay men in those sites and occupations in which we have always been, but in which we have mostly been invisible.”¹⁰⁰ In bringing the invisible to full view, many gay men—Stephen Modde and Tim Valenti, included—find critical value in gay pornography. In this section, both men describe the experience of being young and coming to grips with their own sexual preference. Gay pornography provided affirmation that they were not alone; others out there experience the same thoughts and make them feel, as Valenti says, “less stigmatized and more normal.”

Indeed, the views expressed by Modde and Valenti are borne out in the literature discussing gay pornography. As Burger notes, “[v]ideo pornography works in two ways. First, it serves to validate and legitimate homosexuality to the viewer. Second, by documenting the sexual and erotic trends and practices of gay men, pornography serves as a form of

96. 478 U.S. 186, 188 (1986) (upholding a Georgia state anti-sodomy statute which provided, in relevant part, that “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”).

97. See generally David G. Savage, *Déjà Vu Once Again: Despite New Faces on the Supreme Court, Term's Ending is Familiar*, 92 A.B.A. J. 12, 12 (2006) (describing “[t]he 86-year-old Justice John Paul Stevens, the high court's last veteran of World War II”).

98. Today, Justice Anthony M. Kennedy is often considered the pivotal swing vote on the nation's high court. Savage, *supra* note 91, at 13 (writing that “this year [2006], with O'Connor's retirement, Kennedy stood alone in deciding the outcomes in the most divisive cases”); see also Eric Black, *4 Conservatives, 4 Liberals, and Justice Kennedy*, STAR TRIB. (Minneapolis, Minn.), Jan. 14, 2006, at 1A (arguing that Justice Anthony Kennedy is often considered the pivotal swing vote on the nation's high court, while Justice Stephen Breyer, along with Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg are “a fairly solid liberal bloc”).

99. JOHN R. BURGER, *ONE-HANDED HISTORIES: THE EROTO-POLITICS OF GAY MALE VIDEO PORNOGRAPHY* (1995).

100. *Id.* at 21.

historiography.”¹⁰¹

In this Section, both men also discuss the pornography consumption habits of gay men. Already consumed at a higher-than-population-proportional rate, pornography among gay individuals likely will continue to grow in popularity as the stigma attached to watching it dissipates over time. The rising comfort level with pornography experienced by gay men appears to be part of a trend that began more than two decades ago. As Professor Joe A. Thomas of Clarion University in Pennsylvania observed, “[i]t was not uncommon by the mid-1980s to hear gay men discussing a particularly sexy video at bars, parties, or even at work.”¹⁰² Modde suggests that the sex drive of gay men binds them together. Valenti, however, asserts that gays and straights, both men and women, increasingly socialize together because it is “kind of hip to hang out with a gay guy.”

Not everyone feels as warmly about the function of gay male pornography. Professor Christopher N. Kendall has been a sharp critic of gay porn as a media form that perpetuates the wrong message—namely, male dominance, and what he calls “the very essence of all that is anti-gay.”¹⁰³ In this Section, Modde and Valenti dismiss Kendall’s arguments as being out of touch with mainstream views toward gay pornography.

Finally, Modde and Valenti openly discuss misconceptions surrounding gay pornography and the gay community in general. They point out that gay porn businesses operate professionally and successfully within the same parameters as other businesses, such as following the law and paying taxes. They also believe that the media, over time, can help dispel negative stereotypes about homosexuality. Nonetheless, they are keenly aware of political forces that will try mightily to combat such mainstreaming efforts.

QUESTION: What are the values, functions, and benefits for gay men of protecting gay porn? Put differently, beyond masturbatory usefulness, what are the other functions of gay porn at both the individual level for gay men and at a larger cultural and social level?

MODDE: I can speak on a personal level because I remember when I saw my first porn magazine at about twenty-one. I grew up in a small rural town and I graduated high school in 1976. It was far removed from any thought of gay liberation and looking at gay porn affirmed that there were other guys like me, there were other men who enjoy that kind of activity. It

101. *Id.*

102. Joe A. Thomas, *Notes on the New Camp: Gay Video Pornography*, in PORN 101: EROTICISM, PORNOGRAPHY, AND THE FIRST AMENDMENT 468 (James Elias et al. eds., 1999).

103. CHRISTOPHER N. KENDALL, GAY MALE PORNOGRAPHY: AN ISSUE OF SEX DISCRIMINATION xix (2004).

was very affirming. I didn't feel so alone. It validated something that was so natural to me that to everybody else was just not natural. While others would say it was wrong, I would think, "Maybe I'm not so bad." I would think, "Look there are other people out there. I'm part of something."

It's especially important for people who aren't in metropolitan, urban areas; it allows them to feel not so alone. This has kind of dissipated now with the Internet. The Internet has just opened up the market and certainly brings us together.

VALENTI: Without question, it is the reality that all of us, including gay men, have sex and that we like to express ourselves through our fantasies, intimacies, and love. There is nothing wrong with two human beings doing that. If we can create erotica to a certain category—let's say the category is gay men—so that it makes it less stigmatized and more normal, then what's wrong with that?

My company was a Web development company before we got into the adult category and we did very well. We built a lot of corporate enterprise; I come from advertising, marketing, and the film industry. I certainly didn't think, twenty years ago, that I'd be running one of the leading gay VOD [Video on Demand] companies. Because I'm gay, and although the sex part of it was great, I had to start thinking, "Why am I doing this?" Because if I'm going to stick to this and I'm going to do it well, then I have to believe in it. It didn't take that long for me to recognize that what I was producing and what I was broadcasting was all very healthy for a certain group of people and even a cross-over audience. It is okay to be sexual as long as you know the boundaries. To me that boundary is hurting people. I actually think I'm providing a really good service.

One issue that I think that there is in the gay youth—in teenagers through their twenties—is that a lot of kids haven't experienced the death of people, their friends, and haven't seen firsthand the carnage. Because of the drugs that are available now, they think it is like a headache. I would advise differently, and that's why I've stuck to my guns [with condom only]. I've been at shows where some of these producers of bareback¹⁰⁴ are very upset that we won't show their content because we have such a big channel and our brand is a leading brand for VOD. I've had threats made against me, physical threats. People get stupid—they really do. But it's their money and they want to be on that distribution channel. If it was a certain category of bareback sex where I felt convinced that the players involved

104. Bareback sex is a slang term used to describe sexual intercourse without a condom. *DICTIONARY OF AMERICAN SLANG 20* (Harold Wentworth & Stuart Berg Flexner eds., 2d Supplemental ed. 1975) (defining the term "bareback" to mean "without a contraceptive; said of the male only, in ref. to the act of coitus," and explicating the term "bareback rider" as "a male who enters into sexual intercourse without using a contraceptive or prophylactic device").

were old enough, mature enough, and knew what they were doing, then I think that you could probably have a segment of it. But what I see is not that, it's just a lot of kids that don't know what they are getting in to.

QUESTION: We have read that the consumption of pornography by the gay community is greater relative to the population than the consumption by straight community. Is that the case?

MODDE: I don't know the statistics, but I would think that's very true. I think that comes because the average consumer of pornography is male. Females are not as visually stimulated. They're not into porn as much. So you take a heterosexual where you have the female saying I don't want my husband looking at that. Gay men are like, "Look away, honey, or look at this guy." It's not looked down upon. Sexuality is such a part of being gay. People say, "You gay people talk about sex all the time." Well, that's what binds us together—our sexual drive. That's what gives us our common bond, along with our pain of growing up gay, which is common with most gay men.

VALENTI: Completely, absolutely. And it will only get more so. As the youth grows up, the stigma is still there but it is not what it used to be. Most people growing up, even in this country and in this climate, don't really give a fuck. It's like, "Oh, I have gay friends." It's cool to have gay friends. You look at the way straight guys dress now or the way they take care of themselves better—that's all gay, and it's okay. It's kind of hip to hang out with a gay guy. You can go to any gay nightclub worth its weight and you will see straight guys and girls—it's just the place to be. It's great. I love it.

QUESTION: In a 2004 law journal article, Professor Christopher Kendall contends that "[i]t is the sexuality of male dominance that gay male pornography promotes and eroticizes, and the result is male dominance in action with all the harms, including rape, that flow from and sustain it."¹⁰⁵ He also writes in that same article that:

[G]ay male pornography promotes a sexuality that encourages gay males to covet a form of social power—one that fundamentally depends on the violent degradation of other—traditionally denied to them. By sexualizing degradation, gay male pornography—including the materials that gay rights advocates would have us defend as non-harmful—increases the probability that consumption of these materials will

105. Christopher N. Kendall, *Gay Male Pornography and Sexual Violence: A Sex Equality Perspective on Gay Male Rape and Partner Abuse*, 49 MCGILL L.J. 877, 910 (2004).

culminate in rape.¹⁰⁶

How do you respond to these criticisms launched against gay pornography by Kendall?

MODDE: I have never heard such a piece of utter crap and illogical bullshit in my life. It's so confusing—the sexuality of male dominance, what's that? It's one of those things that I don't even know how to respond to because it's just such ridiculous crap. When two men get together to have sex, there's no more male dominance than when a man and a woman get together to have sex. It's a sex drive that comes up when there's sexual arousal and people engage in what's a natural function. Now there is a certain segment in the gay pornography field—S & M—where there may be a slave-master and there's play where there is degradation, but the majority of gay porn is not that way. What he's referring to—I'm assuming he's a straight man or a severely messed-up, closeted gay man—is that the bottom is somehow being dominated by the top and that this domination is somehow harmful. It's ridiculous because both partners are enjoying it. I could say heterosexual sex is awful because the man dominates the woman and the woman is always dominated by the man, so heterosexual sex is just ugh [indicating revulsion].

These critics like to take pornography and say it leads to sexual violence. There is nothing anywhere in the scientific literature that will lead to this conclusion. It does not make any sense at all. If anything, it is a release of sexual tension.

VALENTI: I mean, come on. Whatever. Obviously the guy doesn't like to have sex. I don't know how to respond to that. I mean, he pulled that out of his right-wing ass.

QUESTION: In a 1994 essay on lesbian pornography, Tamara Packard and Melissa Schraubman write that “[b]ecause pornography is such a powerful tool in shaping sexuality, gender, and identity, lesbians can use it to reclaim and redefine lesbian sexuality both within the lesbian community and in dominant culture.”¹⁰⁷ Does the same hold true for gay porn and, if so, can you explain how this is the case?

MODDE: Basically, it's the same thing for gay men. It also allows the different facets of sexuality within the gay segment to find camaraderie. So you have the bears, you have the S & M people, and you have Falcon, which is good wholesome man-to-man sex. It allows people to feel a part of their little segment or their little niche within the segment. It gives even

106. *Id.* at 915-16.

107. Packard & Schraubman, *supra* note 3, at 303.

a little more self-identity to a person's individual self worth.

VALENTI: That makes sense, but what do they mean "reclaim"? It is our sexuality. I would prefer to say, "be comfortable with, be sane with, this is who I am." Visually you can see that, and if it makes you feel comfortable with it and that it's okay and this is who I am, I think that's great.

QUESTION: What does society at large need to know about the gay community—to perhaps clear up some misconceptions?

MODDE: Being gay is different because of our sexual drive. Gay pornography allows members of the gay community to express themselves about what makes them different and draws them together. It's such a cohesive and defining part of gay culture that to say it's degrading or that it leads to rape is so far beyond what it is.

Walk out on Castro Street in San Francisco and ask any of these gay guys, "What's Falcon?" They'll all know what Falcon is and they'll say, "I like so and so." They have their favorite stars. They know their story line. They have fond, positive memories—not things that drive people into the corners to rape somebody—and these films are expressions of joy and gay sexuality. It can't be repressed, no matter what the government does. They can throw us all in jail, and it's never going to go away.

Respect the studios like Falcon that treat our people right. They are responsible citizens—multi-million dollars businesses that pay taxes unlike these people that, if you push it underground, are going to produce it off the Internet and start making money on the sly. Because of the industry we're in, we're very cognizant of following the law—be it OSHA, worker's comp, paying out taxes. We don't want to step out of bounds. I would like people to know we're a responsible industry.

The staff—most of us are gay—takes great pride in our work.

It's just another business, but people want to say, "Wait a minute. No. No. This is just an awful thing." We produce content that people want. We have had a harder go at it to get to this point. With Falcon, it's an institutional pride we have with the legacy of Chuck Holmes. When Chuck started, he said "I'm tired of seeing dirty finger nails, long-haired, pimply boys having sex. I want to show some positive expressions of male sexuality." That's what he did from his garage in 1972 to the powerhouse it has become.

There is a perception, even within the gay community, that there's a lot of drug use and that this is kind of sleazy and we're taking advantage of guys—drugged them up and put them in a room and they have sex. Nothing could be further from the truth at Falcon Studios. It happens occasionally where someone will show up and they're on drugs or they're asking for drugs. We have zero tolerance. Basically, drugs, in the long

run, do not make for good sex. They just don't. These shoots can last all day. To us, this is a business. We're producing a product of fantasy.

A lot of people think, "You work at Falcon so you must get lots of sex," and that there's a lot of sex going on here. It is nice on a Wednesday when I walk into the bathroom and the guys are preparing and they come out . . . whew. It's a pretty sight for me. We have a great respect for our performers and it's not sleazy.

There's a misconception that there are lowlife people of whom we are taking advantage. We have lawyers. We have all kinds of models that come from all walks of life. For some of them, it's a fantasy to be in porn. They might be in one or two. Others make a career out of it. The ones that are sharp can really turn it around and make some money. A gay porn actor gets paid ten times more than a straight male porn actor. We have some exclusives that are under contract to us. In the straight industry, the guys get practically nothing. Their benefit is that they get to have sex. Here it doesn't matter if you're a top or bottom, if you're a good performer, we compensate relatively well—when you add up the hours worked and the amount paid, it's not too bad.

VALENTI: I grew up in a very interesting time. I turned twenty-one right when the AIDS crisis hit, and I was just sort of coming out and grappling with what it means to be gay. I certainly didn't think of myself as dirty or perverted or anything like that, but I remember older people telling me that when I go to San Francisco to the university to watch out for the older gay guys because they would drag me in. What does that mean? There may be that sort of stigma still, even though the younger kids growing up know what gay means a lot earlier because they have more access to it. Like TV with "Will and Grace"; there was no "Will and Grace" when I was growing up.¹⁰⁸

But I still think there could be a lot of people that just think there is some sort of taking advantage of youth. And I'm not saying child pornography; I think most people really, the way child pornography is prevalent in the media, know the difference between a pervert, child pornographer, and some gay guy who is going to lure in your hot looking son. Most parents

108. See Bill Carter, *The New Season/Television*, N.Y. TIMES, Sept. 13, 1998, at Section 2, 28 (describing, as it debuted, "Will and Grace" as "[t]his year's hot concept: girl (Debra Messing) breaks up with boyfriend on wedding day and moves in with best friend (Eric McCormack), a gay man. The gay angle is underplayed, at least for Will. NBC is emphasizing the friendship, rather than anybody's sexual orientation"); Matthew Gilbert, "Will" Brought Attitude. But More Important, It Changed Ours, BOSTON GLOBE, May 14, 2006, at N1 (writing that the series "will be remembered as a pioneer for using humor to address one of America's most incendiary issues. 'Will & Grace' mainstreamed a way to laugh about gay, lesbian, bisexual, and straight sexual politics from a place of pure affection, not fear and hatred," and adding that the program "was a social leader and not a follower").

are sophisticated enough to know that their kids look good—they've been through the college experience, they are Baby Boomers, everybody does everything once, get drunk once. When I was in college, I had more than enough sex with guys that are definitely straight and have families today. It really was more of like no big deal because I'm not going to tell. So that's maybe one thing—this whole luring people in.

I think that people are sexually more mature such that sex is sex. I'm sure, especially with straight men, that there's a whole scare about anal sex, and that if you're approached that way, you're going to take someone's manhood away. I think that's probably the only thing, sexually, that would bother straight people who just can't deal with it—anal sex.

QUESTION: Will there come a time when people will be more accepting of the gay lifestyle and do the media play any role in that evolution?

MODDE: Yes. The fact that we're in the media. Take "Will & Grace"—some people say it's watered down, but it's huge that we're out there and we're seen rather than totally pushed in the closet. It will shift and the amount of change that's happened in the last thirty years is just amazing. We have benefits in most of our Fortune 500 companies and we're protected under California law under employment rights. What's scary is how the country is moving to this fundamentalist approach. Not only pornography, but all of our rights are under attack. I'm hoping the pendulum will swing back, but I get discouraged when I see Bush's numbers in the latest L.A. Times-Bloomberg poll are up to forty-five percent again. My faith in human nature starts to drop.

VALENTI: It's really easy to criticize, but I loved "Will & Grace." I think that there is a tendency to stereotype a gay character. But you know what? There's a tendency to stereotype just about everything—a stupid person, a black person. You've got to really lighten up at some point.

Obviously there are bumps along the way. You're going to have a party that is in power, like it is now, that's really not even the party that it was twenty years ago—it's been hijacked by a certain group and there is this sense that their way is the only way. That's when you get in to trouble in life—when any group says its way is the only way. That's across the board.

D. The Business of Gay Pornography: From Relationships with the Straight Adult Entertainment Industry to the Use of Condoms in Gay Porn

"Gay material is not in the backroom anymore. Every single [adult] video store has it, every [adult] Web site, there's no stopping it."¹⁰⁹ Those

109. Mullins, *supra* note 4 (quoting Paul Allen, a Tampa, Florida-based publisher of

words of Paul Allen, publisher of the adult magazine *NightMoves*, illustrate the burgeoning popularity of gay pornography—“the fastest-growing segment of adult entertainment,”¹¹⁰ as noted earlier in this article. Both Modde and Valenti clearly are pleased to be part of this march toward business parity with the rest of the adult entertainment industry.

In this Section, Modde and Valenti describe how this newfound popularity has resulted in some lucrative partnering opportunities with the mainstream adult industry now that the gay porn industry is no longer, as Modde suggests, “this ugly little stepchild we used to be.” At the time of this interview, Valenti’s company, NakedSword, was finalizing a merger with the Adult Entertainment Broadcast Network¹¹¹—what he called “the largest streaming company in the world.” The company already is partnered with Club Jenna, a business venture started by adult film phenomenon Jenna Jameson, who recently closed a deal with Playboy.¹¹²

The accelerated economic movement within the gay porn industry, according to Valenti, has much to do with rapid advancements in technology, a development he sees as continuing to blossom. Modde is more conservative with his prediction, believing instead that “growth is somewhat limited because being gay—unlike what the religious right like to think—is not something one can catch or be converted to.” He does, however, recognize that more men could come out of the closet and potentially increase the market size.

Both men also provide reasons why the gay porn industry does not require its performers to undergo regular testing for sexually transmitted diseases, a practice insisted on in the straight adult segment of the industry. For each, the answer is simple: performers appearing in gay pornography produced by the major companies wear condoms, unlike in most mainstream straight adult productions. In fact, condom usage is so prevalent within the gay adult industry that it is commonplace to weave it into the story line or, as Valenti describes it, “build it in to the eroticism of it.”

QUESTION: Is there a working relationship between the straight and gay porn industries?

MODDE: Now that we are part of the industry rather than just this little

the adult magazine called *NightMoves*).

110. *Id.*

111. See Adult Entertainment Broadcast Network, <http://www.aebn.net> (last visited Feb. 13, 2007).

112. See Claire Hoffman, *Sex Star Hooks Up With Playboy*, L.A. TIMES, June 23, 2006, at C2 (reporting that in June 2006, Jenna Jameson sold Club Jenna Inc., her hardcore film production company, to Playboy).

ugly stepchild like we used to be, we are partnering with some major companies. Other companies realize that you can't just go out there with a camera, it takes more to get gay porn that works. There has to be chemistry between the actors. You can see the difference in the stuff that comes from eastern Europe where they have a lot of "gay for pay," where the boys are straight and doing it for the money. It loses its edge. They have their hard-ons and everything, but it's clear they're not into it.

VALENTI: There is now, although there really wasn't for the longest period of time. But I think that, with the emergence of VOD sites and streaming media—sites like NakedSword.com and Maleflicxx.tv,¹¹³ which is our biggest competitor, and their success—they see the margins in the gay marketplace. In particular, the company AEBN (the Adult Entertainment Broadcast Network¹¹⁴) is the largest streaming company in the world. It's huge. Our company is actually merging with it, and NakedSword will be the flagship office and will lead the charge for the gay marketplace.

Due to the success of sites like ours, they started to recognize that there is so much crossover with the traffic that they have to get involved with the gay [porn industry].

I'm privy to the numbers and it is staggering how well gay [porn] does, especially as pornography becomes more mainstream, which it has. And with [changing] sexual attitudes—particularly as people go on to watch it and discover that they do not necessarily have to be gay to be interested in watching something that may be more bi[sexual], or the curiosity level, because it is so available, is there—a lot of people are looking at it who wouldn't define themselves as gay but who are just curious, or [because] it excites them in some way.

Because of NakedSword and NakedSword's brand, we're working with all of the major straight players, actually. We're partners with Club Jenna,¹¹⁵ we're partners with Playboy, and we actually just finished building a Web site in Europe that is owned by Playboy. It is completely gay. It will be all of NakedSword's content and we'll be producing our own content for it. They wanted to enter that marketplace and, for the last few years, they'd actually been coming to us to help them, asking "How do we do it? What do we do? How do we position ourselves? What's the messaging? What kind of content?" Obviously, we're very interested.

NakedSword merging with AEBN is the biggest step that's probably

113. Maleflicxx.tv, <http://maleflicxx.tv> (last visited Feb. 13, 2007).

114. Adult Entertainment Broadcast Network, <http://www.aebn.net> (last visited Feb 13, 2007).

115. See Hoffman, *supra* note 112, at C2 (noting the production company owns eighteen Web sites in addition to many adult films).

going to be [seen as] this bridge of gay and straight coming together. That's the first big one. Obviously I'm very excited about it. I know, with the competitiveness in the gay marketplace, a lot [of competitors] will be positioned against us with, "Oh, selling out to the straight company." But that's complete crap. It's probably the best thing that could ever happen because here you have a really strong gay company that's going to have a lot of influence on a company that is twenty times bigger than any gay company will ever get. We'll have the influence within that business to drive the product, a lot of product development and distribution.

QUESTION: The straight segment of the adult film industry requires testing for sexually transmitted diseases of all its actors. Why doesn't the gay segment of the industry require such testing of its performers?

MODDE: Well, we don't test because, for one reason, we use condoms. The other reason is that testing—it may be getting better—is such that you can bring in a test that you had last week and you could have gotten fucked last night and now you're infected.

We don't fear that the state will step in and require it because we use condoms. That's why we're protected. I stay on top of that issue because I'm in the industry, but my position is that we're practicing safe sex.

VALENTI: A majority of the legitimate producers—setting aside the bareback producers—like Falcon, Colt, Titan and the real big brands in the industry were all aware of and part of the industry when the AIDS crisis hit in the early 1980s. They all took it very seriously, lived through it, and saw a lot of people die. They realized the consequence of that. To use condoms is not a big deal. So, very early on, the legitimate producers incorporated it [condom usage] into the creative part of what they were producing.

I've had this discussion with straight producers who are very adamant about not having condoms on male actors in straight movies because they believe it's [condom usage] going to take away from the eroticism of it. It's such crap. If you really know what you're doing, you build it into the eroticism. I think they are just protecting their market share.

It's not a war, but there are hard feelings toward Treasure Island Media¹¹⁶ and those types of people that just do whatever they want, and they are making a lot of money—it's a very popular category.

I think it is pretty well known that among the big players everything is all condom.

116. TreasureIslandMedia.com, <http://www.treasureislandmedia.com> (last visited Feb. 13, 2007).

QUESTION: It is often said today that adult content is mainstreaming into today's culture and becoming more acceptable among many people. Is that also the case with gay porn and, if so, what are the indicators of it?

MODDE: It's an analogy that really can't be made because it's gay, so it doesn't meld into mainstream society. It's out there beyond the consciousness of the average person. But it was always part of the gay culture from the beginning. Unlike straight porn, which was under the bed and hidden away, the gay community has always embraced its pornography and its performers. In the straight community, they look at girls and say she's a porn star, which can still have a taint. When a gay porn star walks into a room, everyone is like, "Wow." He's a celebrity.

VALENTI: I think that any mature industry—ours is mature in the sense that it's so mainstream, although it's not mature in the sense of the money that will be made on this and where it will go from here, as we're sort of in the beginning there—and anyone who wants to be a part of that legitimate industry is going to do whatever they can or whatever it takes to comply [with the laws] and to make sure that no one gets hurt.

The people that are successful and that run the best businesses most likely will have the kinds of principles to want to do that, not just because they're making tons of money. It takes a certain amount of ability, both creatively as well as intellectually, to build a Vivid,¹¹⁷ a Playboy, a NakedSword, or an AEBN. You're not talking about some guy on MySpace who decides he's going to be the king of porn—that isn't what this is about. This is a real industry.

QUESTION: Where do you see the gay pornography industry ten to fifteen years from now, in terms of its growth, popularity, and/or content in the United States?

MODDE: Its popularity will stay the same because the desire to watch sexually explicit materials like this has existed since the beginning of time. It's only suppressed when society is able to impose its moral judgment on people. We're too far out to go back in the closet. The amount of growth is somewhat limited because being gay, unlike what the religious right like to think, is not something one can catch or be converted to, although more closeted men may continue to come out and they are a potential market. There's only so far we can go and there have been so many more

117. See Dawn C. Chmielewski & Claire Hoffman, *Porn Industry Again at the Tech Forefront*, L.A. TIMES, Apr. 19, 2006, at A1 (describing "adult entertainment giant" Vivid Entertainment Group's exploration of technologically innovative internet distribution techniques to reach more consumers); Clint O'Connor, *Cleveland's X-Rated Connection*, PLAIN DEALER (Cleveland, Ohio), Jan. 4, 2004, at A1 (explaining that Vivid Entertainment Group "rivals major movie studios for output and profit margins" and is "the top producer of 'adult' films in the country").

competitors in the market. It started with just the three major ones—Matt Sterling, William Higgins, and Falcon. Now anyone can do it. I'm online all the time looking for pirated product. It's a big part of my job because it's so easy to steal product. As I go on these sites, I realize that people have these videocams in their bedroom and you can watch people having sex.

VALENTI: It will be awesome. You'll be able to click on anything and get the content you want—the Internet, iTV, Microsoft Media Center, iPods. It's all about the technology, and I do think the level of production and creative will increase as well. What's happening right now is there is a lot of saturation; everybody and their brother are producing something. In reality, there are really only so many categories you can produce in, so each category has to get better just by maturing. Plus, the kinds of technology available, whether its high definition or the way you can produce or the time in which you can produce it, is only going to get better and better.

SUMMARY & CONCLUSION

Far distanced from the detached analysis of the professoriate, the intensely personal and passionate perspectives from which Stephen Modde and Tim Valenti address and analyze issues of free speech, obscenity law, and censorship as they affect the gay adult entertainment industry are simultaneously insightful and refreshing. Neither man minces words or hides emotions; whether it is Modde unabashedly calling Professor Christopher Kendall's criticism of gay male pornography "utter crap and illogical bullshit," or Valenti's adamant commitment to stream condom-only content because so much of the gay youth "haven't experienced the death of people—their friends—and haven't seen firsthand the carnage" of AIDS, their answers were frank and honest.

When it comes to the reasons why the First Amendment should protect sexually explicit gay content, both Modde and Valenti unequivocally reject the notion that society and the legal system should be bound and controlled by original intent of the framers of the Bill of Rights. Modde asserts that "[t]he First Amendment should protect the display of human sexuality because it is such a fundamental part of the human spirit," adding that sexually explicit expression is "one of those things that you can't stop and it certainly can't be stopped with today's technology." He notes the educational function of gay porn—something that he would argue to a jury in an obscenity prosecution—as "it teaches us to be comfortable in our skin and teaches us how to engage in sexual activities. We are proud to be a safe-sex studio, so we teach people that condoms are part of a sexual experience." Valenti, drawing a parallel to the controversy over same-sex marriage and civil unions of gays, adds that when it comes to First

Amendment protection, “[t]here should be no distinction made between gay and straight porn. Why should there be a distinction? There shouldn’t be any distinction about who can get a civil union or not.” Modde echoes this sentiment, contending that “[i]n terms of protection, I don’t know if gay porn can be separated out from porn generally.”

Neither man, however, is a free speech absolutist.¹¹⁸ Modde asserts that “[t]he First Amendment should not protect violence to other people,” but notes that this is “a hard line to draw in porn because there is a sexual play, particularly in the S & M thing.” Similarly, Valenti asserts that “[p]eople should be free to express themselves as long as they are not physically, violently hurting somebody.” Valenti also states that zoning laws and packaging laws can work “if put together by reasonable people.”

Although the First Amendment would certainly seem to protect the display of condomless gay sex (at least in gay friendly communities) in the face of an obscenity prosecution, both men are proud to be affiliated with condom-only companies. This self-censorship, unlike Modde’s decision not to include full fisting and urination, is not a response to either the Bush administration or obscenity laws, but rather represents a desire to perform a service for the gay community by demonstrating, as Modde puts it, that condoms “are invaluable and there’s no other place a gay person can learn that.”

Both men are not pleased, to say the least, with the atmosphere created by the Bush administration as it could impact the gay adult video industry. As Valenti states, the administration’s “whole posturing and positioning is really all about fear—and it’s not just with the gay community, it’s anybody,” adding that in the industry “everybody sort of walks around with some fear—different volumes of it, depending on what they decide they are going to concentrate on each year.” But Valenti also makes it clear that he will not be intimidated, stating he does not “think that just because Bush is in office that, all of a sudden, we’re not going to produce something or we’re not going to do this kind of a scene or someone’s not going to watch something. He’s not that powerful; they’re not that strong.” Modde notes that when it comes to his own self-censorship about what not to include in Falcon products, “what I tell people is that I look at this as a temporary move to get through this administration so that this company can continue surviving.”

In terms of obscenity law, it is clear that the concept of community is troubling for Modde when it comes to gay content, noting that “it is more difficult for the gay segment of the industry because we don’t fit into practically any community. I’ve lived all over this country and there are

118. See SMOLLA, *supra* note 41, at 23 (1992) (a First Amendment absolutist “would treat freedom of speech as an utterly impregnable right”).

very few states where you can be gay and feel like you're part of the community." Yet both Modde and Valenti note the artistic value in gay content that might protect it under the *Miller* test; as Valenti states, "[t]here very much is artistic value to a lot of the content." Beyond artistic value, attorney Louis Sirkin even notes that he would argue, under the third-prong of the *Miller* test, that gay porn has serious educational value, noting that:

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

Modde suggests his own line of in-court argument, stating that he would tell a jury:

You may not like homosexuality and you may not like what homosexuals do, but we exist in large numbers and it's love and it's natural. If you want to tell me that you don't want to watch it or you find it offensive, then that's your business. But it's not obscene when it's love.

Whether this argument would work, of course, remains to be seen; its effectiveness, no doubt, would be influenced by the tolerance level of the local community for gays and lesbians and their sexual practices, as well as by the extent to which the community's (and jury's) heterosexual members are themselves gay-friendly. Perhaps it also will depend on the passage of time, as Valenti notes that most people growing up in the United States today "don't really give a fuck" about whether someone is gay—something, of course, that hasn't always been true in the past.

The authors leave further dissection and interpretation of the comments of Modde, Valenti and Sirkin to readers of this article. Additional firsthand research with other major players in the gay adult industry beyond Modde and Valenti will further understanding in academia about both the legal realities facing the gay porn industry and the reasons why this content must be protected under the First Amendment. Infusing academic scholarship with the perspectives of those who work in the world of gay pornography, either as an attorney like Stephen Modde or as the head of a business that streams gay content like Tim Valenti, surely will lead to much richer understandings and critiques.