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A War Over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law

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**A WAR OVER WORDS:
AN INSIDE ANALYSIS AND EXAMINATION
OF THE PROSECUTION OF THE RED ROSE
STORIES & OBSCENITY LAW**

*By Clay Calvert & Robert D. Richards**

INTRODUCTION

When major newspapers across the country in early 2007 confirmed, via the text of internal government e-mails and other sources, that at least two of the nine United States Attorneys fired by former U.S. Attorney General Alberto Gonzales were dismissed, in part, because of their unwillingness to bring

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** Portions of the interview with Lawrence G. Walters displayed later in this article have been omitted. For access to the omitted portions, including but not limited to a discussion of how Mr. Walters first became involved in representing Karen Fletcher, his readiness and willingness to fight the case on appeal if necessary and his more general observations about both the divide among adult industry companies (mainstream companies versus “newer, higher risk takers”) and the best aspects of being a First Amendment defense attorney, and one of a very few attorneys that represents adult industry companies, please visit http://www.brooklaw.edu/students/journals/bjlp/pdf/Omitted_Walters_Material.pdf.

obscenity¹ prosecutions,² it was yet another indicator of the Bush Administration's resolute commitment to fighting obscene expression.³ As the *Los Angeles Times* reported in an illuminating

¹ Obscenity is not protected by the First Amendment's guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (writing that "obscenity is not within the area of constitutionally protected speech or press."). The current test for obscenity, which was established by the United States Supreme Court more than three decades ago, focuses on whether the material at issue: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). In addition to obscenity, there are other exceptions to the First Amendment protection of free speech. See *infra* note 104 (identifying these exceptions).

² See Eric Lipton & David Johnston, *Gonzales's Critics See Lasting, Improper Ties to White House*, N.Y. TIMES, Mar. 15, 2007, at A24 (reporting that "[f]ormer prosecutors said Mr. Gonzales, relying on advisers who were less experienced prosecutors than their predecessors, took a doctrinaire approach on policy matters, giving front-line lawyers much less discretion on death penalty, gun crime, immigration and even *obscenity* cases.") (emphasis added); Richard A. Serrano & Richard B. Schmitt, *Justice Dept. Attempted to Curb Fallout*, L.A. TIMES, Mar. 20, 2007, at A1 (reporting that Justice Department officials "were upset with Daniel G. Bogden in Las Vegas for not bringing enough obscenity prosecutions.").

As of August 2007, the total number of U.S. Attorneys that had been identified as having been removed by Gonzales in 2006 stood at nine. See Amy Goldstein & Carrie Johnson, *U.S. Attorney Became Target After Rebuffing Justice Dept.*, WASH. POST, Aug. 1, 2007, at A1 (noting "the removal of nine U.S. attorneys last year.").

Gonzales, facing mounting criticism, announced his resignation from the position of attorney general on August 27, 2007, and he officially stepped down from the job in September 2007. See Dan Eggen, *Gonzales Ready to Leave the Stage*, WASH. POST, Sept. 14, 2007, at A11 (describing the departure of Gonzales "[a]fter nine months of noisy controversy over his troubled tenure" and noting that he announced "his resignation on Aug. 27.").

³ Indicative of this commitment, former U.S. Attorney General Alberto Gonzales stated that "[t]he Department of Justice remains strongly committed to the investigation and prosecution of adult obscenity cases." Press Release, U.S. Dep't of Justice, *Justice Department To Appeal District Court Ruling Dismissing Obscenity Charges In The Extreme Associates Case* (Feb. 15, 2005), available at http://www.usdoj.gov/criminal/pr/press_releases/2005/02/

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article about the firings of U.S. Attorneys Paul Charlton of Arizona and Daniel G. Bogden of Nevada:

In September, Brent Ward, head of the Justice Department's obscenity task force, complained to Sampson⁴ about Charlton and Bogden.

"We have two U.S. attorneys who are unwilling to take good cases we have presented to them," Ward told Sampson. "This is urgent." Ward added that he found this

2005_3815_crm-obscenityCharges021605.pdf.

Similarly, in testimony to the U.S. Senate Committee on the Judiciary, John G. Malcolm, the Deputy Assistant Attorney General of the Criminal Division at the U.S. Department of Justice, stated that "the Department of Justice will do everything within its power to curb the proliferation of obscene material in our society." *Indecent Exposure: Oversight of DOJ's Efforts to Protect Pornography's Victims: Hearing Before the Senate Committee on the Judiciary*, 108th Cong. (2003) (statement of John G. Malcolm, Deputy Assistant of Att'y Gen., Criminal Division, U.S. Dep't of Justice), available at http://judiciary.senate.gov/testimony.cfm?id=961&wit_id=2559.

More recently, Laura H. Parksy, the Deputy Assistant Attorney General of the Criminal Division at the U.S. Department of Justice, testified before the U.S. Senate Committee on Commerce, Science and Transportation about what she called "this Administration's firm commitment to enforce the Nation's obscenity laws." *Protecting Children on the Internet: Hearing Before the Senate Comm. on Commerce, Science & Transportation*, 109th Cong. (2006) (statement of Laura H. Parksy, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice), available at <http://www.usdoj.gov/criminal/ceos/DAAG%20Testimony%201192006.pdf>.

⁴ This is a reference to D. Kyle Sampson, who was "appointed Deputy Chief of Staff and Counselor to the Attorney General" and who previously "served in the White House as Associate Counsel to the President and as Special Assistant to the President and Associate Director for Presidential Personnel. From 1999 to 2001, Sampson served as Counsel to Senator Orrin G. Hatch on the Senate Judiciary Committee." Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Announces Appointment of Three Senior Department of Justice Staff (Feb. 15, 2005), available at http://www.usdoj.gov/opa/pr/2005/February/05_ag_064.htm.

Sampson "resigned as Gonzales' chief of staff March 12, the day before the release of e-mails between the Justice Department and the White House detailing a two-year effort to remove U.S. attorneys who had fallen out of favor." Richard B. Schmitt & Richard Simon, *Witness to Defend Attorney Firings*, L.A. TIMES, Mar. 29, 2007, at A1.

particularly troubling “in light of the AG’s [Gonzales’] comment . . . to ‘kick butt and take names’ ” in prosecuting obscenity cases.⁵

If filing obscenity prosecutions is a latent criterion in retaining one’s job as a United States Attorney under President George W. Bush, then one person who appears to be in no jeopardy of losing her position is Mary Beth Buchanan. In particular, Buchanan, the U.S. Attorney for the Western District of Pennsylvania since September 2001,⁶ brought “the first major federal obscenity prosecution in more than a decade”⁷ with *United States v. Extreme Associates, Inc.*⁸ This ongoing,⁹ high-profile case¹⁰ against southern

⁵ Richard A. Serrano, *Ouster Of U.S. Attorneys: Memos Raise Questions; E-mails Detail Goals in Firing U.S. Attorneys*, L.A. TIMES, Mar. 14, 2007, at A1.

⁶ See Mary Beth Buchanan Biography, U.S. Dept. of Justice Website, <http://www.usdoj.gov/usao/paw/bio.html> (last visited May 25, 2007) (providing biographical information on Buchanan).

In June 2007, Gonzales issued a press release lauding the work of Buchanan. See Press Release, U.S. Dep’t of Justice, Statement from Attorney General Alberto Gonzales on Mary Beth Buchanan (June 28, 2007), available at http://www.usdoj.gov/opa/pr/2007/June/07_ag_468.html (quoting Gonzales for the proposition that Buchanan “continues to have my full confidence and support as the U.S. Attorney in the Western District of Pennsylvania” and lauding her for “her willingness to step in and effectively run the Office on Violence Against Women and the good work she is doing in that important office. I look forward to her continued service at the Department of Justice.”).

⁷ Jason Cato, *Buchanan’s Rise Puts Her on Hot Seat*, PITT. TRIB.-REV., Apr. 23, 2007. A September 2007 *New York Times* article observed that Buchanan “is regarded by many people in the pornography industry and by outside analysts as the government’s most aggressive opponent of the spread of pornography in the nation.” Neil A. Lewis, *A Prosecution Tests the Limits of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27.

⁸ 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev’d*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

⁹ In December 2006, U.S. District Court Judge Gary L. Lancaster addressed potential vagueness issues affecting jury instructions in the case. *United States v. Extreme Assocs., Inc.*, No. 03-0203, 2006 U.S. Dist. LEXIS 91545 at **1–2 (W.D. Pa. Dec. 18, 2006).

¹⁰ See Andrew Koppelman, *Reading Lolita at Guantanamo or, This Page Cannot be Displayed*, 57 SYRACUSE L. REV. 209, 209–10 (2007) (writing that “[t]he obscenity case, *United States v. Extreme Associates*, is the first high-

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California-based Extreme Associates, Inc., and its proprietors, Robert Zicari and Janet Romano, has been described as “a major test of the Bush administration’s campaign against pornography”¹¹ that “originated from public and political pressure to prosecute pornography dating back to the Clinton administration.”¹² Indeed, when the indictment was first unveiled in August 2003, law enforcement authorities considered Buchanan’s case “the beginning of a crackdown on obscene material sold throughout the United States.”¹³

Buchanan’s reputation as a zealous opponent of sexually explicit expression has been cemented by mainstream news media coverage in her local district. For instance, the *Pittsburgh Post-Gazette* reported in March 2007:

[w]hen Mary Beth Buchanan became U.S. Attorney for the Western District of Pennsylvania, the Bush administration had already laid out its priorities for federal prosecutions: drugs, *obscenity* and public corruption. In the more than five years she’s been in

profile federal obscenity prosecution in years” and adding that the case against Extreme Associates is “the centerpiece of Attorney General John Ashcroft’s effort to reinvigorate obscenity prosecutions, an effort that Alberto Gonzales is continuing.”).

¹¹ Eric Lichtblau, *Justice Dept. Fights Ruling on Obscenity*, N.Y. TIMES, Feb. 17, 2005, at A25.

¹² William Triplett, *Moral Majority: House, Bush in Indecency Crusade*, DAILY VARIETY, Feb. 17, 2005, at 1.

¹³ Torsten Ove, *Indictments Signal Wider U.S. Attack On Porn*, PITT. POST-GAZETTE, Aug. 8, 2003, at A1.

Since the filing of the case against Extreme Associates, the federal government has continued to bring obscenity cases targeting adult movie producers and distributors, including a May 2007 indictment in Florida against Paul F. Little, better known as Max Hardcore. See Press Release, U.S. Dep’t of Justice, *Producer Paul Little Indicted on Obscenity Charges (May 31, 2007)*, available at http://www.usdoj.gov/opa/pr/2007/May/07_crm_393.html.

In June 2007, the Justice Department obtained an indictment in Utah against two men from Cleveland, Ohio that operated a company called Movies by Mail that distributed and sold allegedly obscene adult movies. Press Release, U.S. Dep’t of Justice, *Federal Grand Jury In Salt Lake City Charges Cleveland Men with Obscenity Violations (June 28, 2007)*, available at http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html.

office, Ms. Buchanan has followed that charge with diligence.¹⁴

A rival newspaper, the *Pittsburgh Tribune-Review*, concurred with that sentiment a month later, noting that “[w]hen federal prosecutors in California passed on cases involving glass bongos and hard-core sex movies, Pittsburgh-based U.S. Attorney Mary Beth Buchanan swooped in and stole the show.”¹⁵

The content at issue in the *Extreme Associates* case, which is based on a ten-count indictment charging the defendants with “distributing, either through the mail or over the Internet, certain motion pictures that are allegedly obscene,”¹⁶ is clearly graphic; as a U.S. Department of Justice press release alleges, “Extreme Associates produced pornographic videos depicting rape and murder.”¹⁷ This is slightly misleading, however, as the video clips in question “depict real sex, but the violence, including women having their throats slit after being raped, is simulated.”¹⁸ Regardless of the fact that the rapes and murders are not real but instead are simulated, the material is explicit, and even leading players within the adult movie industry have been hesitant to come to the company’s defense.¹⁹

¹⁴ Paula Reed Ward, *No Trouble for Buchanan to Stay in Line: Amid Battle Over Firing of 8 Other U.S. Attorneys, She’s a Model Appointee*, PITT. POST-GAZETTE, Mar. 18, 2007, at A1 (emphasis added).

¹⁵ Cato, *supra* note 7.

¹⁶ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 584 (W.D. Pa. 2005), *rev’d*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

¹⁷ Press Release, U.S. Attorneys Office Western District of Pennsylvania, Third Circuit Court Of Appeals Reverses Lower Court’s Dismissal of Obscenity Case: Jury Will Decide *US v. Extreme Associates* (Dec. 8, 2005), available at http://www.usdoj.gov/usao/paw/pr/2005_december/2005_12_08_1.html.

Although the press release makes it sound as if real rape and murder is portrayed, it must be noted that what actually is being portrayed are “fictional rapes and murders.” Richard B. Schmitt, *U.S. Anti-Porn Effort Is Found Wanting*, L.A. TIMES, Nov. 23, 2003, at A34 (emphasis added).

¹⁸ Torsten Ove, *Porn Dealer Scoffs at Feds*, PITT. POST-GAZETTE, Nov. 2, 2004, at A9.

¹⁹ See G. Beato, *Xtreme Measures*, REASON, May 2004, at 24, 33 (writing that “to help finance his case, Zicari has reached out to some of his better-funded

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Setting aside the prosecution of Extreme Associates and its owners, Buchanan might just have intruded too far into the realm of First Amendment-protected speech²⁰ during the course of her fervent assault on sexual content when, in September 2006, she brought a second, lesser-known obscenity case called *United States v. Fletcher*.²¹ What makes this obscenity prosecution so unusual and rare—and, indeed, so different from that in *United States v. Extreme Associates, Inc.*—is that the allegedly obscene content in *Fletcher* consists solely of written words and involves absolutely no images, movies, photos, pictures or drawings of any kind.²² Specifically, Buchanan and the federal government contend that Karen Fletcher, a 54-year-old woman from Donora, Pennsylvania:

owned a publicly accessible website www.red-rose-stories.com. The website included areas and content available to the public, consisting primarily of excerpts from extremely explicit and graphic stories describing the sexual abuse, rape, torture and murder of children. The website advertised that additional areas and content were available for those who purchased a membership to the website and became a “member” of www.red-rose-stories.com.²³

peers in the porn business, including Larry Flynt. So far, he hasn’t gotten much response.”).

²⁰ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²¹ Indictment, *United States v. Fletcher*, No. 06-329 (W.D. Pa. Sept. 26, 2006).

²² *See Paula Reed Ward, ‘Rare’ Obscenity Case Targets Writings*, PITT. POST-GAZETTE, Oct. 28, 2006, at A9 (writing that “[o]bscenity charges in the United States are relatively rare these days, and in cases involving the written word, they’re extraordinarily so. But just last week, a Donora woman was arraigned in federal court on six counts of distributing obscenity over the Internet.”).

²³ Press Release, United States Attorney’s Office Western District of Pennsylvania, Donora Woman Charged With Distributing Obscene Matter on

An obscenity prosecution based solely on words harkens back to a bygone era that featured the multiple prosecutions in the early 1960s of the late comedian Lenny Bruce for allegedly obscene comedic routines that were also limited to words.²⁴ For instance, Bruce was convicted in Illinois for words uttered during a comedy performance that supposedly were used in an obscene fashion.²⁵ Today, however, comedians commonly use words to paint visual pictures of sexual acts, either for purposes of humor, social commentary or a combination of both. Consider, for example, the movie *The Aristocrats*,²⁶ it includes no video, photographs or other

the Internet (Sept. 27, 2006), available at http://www.usdoj.gov/criminal/ceos/Press%20Releases/WDPa%20Fletcher%20indict%20PR_092706.pdf.

²⁴ Bruce was prosecuted for obscene comedic routines multiple times, including for performances in both Los Angeles and San Francisco, California, as well as in Chicago, Illinois, and Greenwich Village, New York. See generally RONALD K.L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON* (2002) (providing a comprehensive biography of Bruce's life, including his legal battles with obscenity cases in California, Illinois and New York).

²⁵ Bruce was convicted by a jury in Cook County, Illinois, of giving an obscene performance that, as the Supreme Court of Illinois wrote in tossing out the conviction, centered on:

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

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

²⁶ The movie *The Aristocrats* is a comedy-documentary by magician Penn Jillette and comedian Paul Provenza in which some very well known comics like Bob Saget and Gilbert Gottfried give their own nasty takes on the dirtiest joke ever told involving a father, mother, son, daughter and a dog. As A.O. Scott wrote in reviewing *The Aristocrats* for the *New York Times*, the movie is:

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

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visual images of sex, but features 100 comedians telling a words-only joke that involves sex acts and children. Claudia Puig of *USA Today* describes the joke this way:

A father, a mother and a couple of kids (and sometimes Grandma and the family dog, depending on how elaborate the comic gets) have a family act. The dad approaches a talent agent and promises that the act will wow him. Though the specifics vary with each comedian's telling, the family performs a series of unspeakable acts, each more outlandishly perverted, along with a barrage of scatological behavior. When the agent asks the father what the act is called, he responds, with a proud swagger: "The Aristocrats."²⁷

Given the word-only descriptions of child sexual abuse and rape in *The Aristocrats*, the movie would seem to be, in line with Buchanan's willingness to prosecute Karen Fletcher's writings about the exact same topics,²⁸ an inviting next object for a Buchanan-sought indictment.

Buchanan's attempt to bring a federal case targeting a series of six short stories—collectively referred to here as the Red Rose stories—posted on a password-protected, members-only website that was subscribed to by fewer than thirty people²⁹ has already drawn ridicule in her home city. Columnist Dimitri Vassilaros of

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

²⁷ Claudia Puig, 'Aristocrats' Lets You in on the Crude Joke, USA TODAY, July 29, 2005, at 5E. See also Colin Covert, *Naughty But Nice*, STAR TRIB. (Minneapolis, Minn.), Aug. 12, 2005, at 11E (describing *The Aristocrats* as featuring a "depraved catalog of misbehavior that breaches every psychological danger zone, every tenet of good taste and every rule of civilized behavior" and calling it "a study in naughty themes and obscene variations as old-school comics and young up-and-comers compete to tell the ultimate, vilest, most disgusting version of the story.").

²⁸ See Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23 and accompanying text (describing the content in the stories posted by Karen Fletcher).

²⁹ See Paula Reed Ward, *Woman Charged Over 'Vile' Web Stories*, PITT. POST-GAZETTE, Sept. 28, 2006, at B2 (reporting that "[i]n a February 2005 interview with the FBI, Ms. Fletcher said she had 29 members to her site" and writing that Fletcher "has told authorities that the stories were fiction.").

the *Pittsburgh Tribune-Review* called the prosecution of Karen Fletcher “a jihad against fantasy,”³⁰ adding that Buchanan “confuses fact with fiction and freedom of speech as an excuse to prosecute.”³¹ Vassilaros points out that “[t]here is not even a hint that the accused [Karen Fletcher] molested children. But to Buchanan, and no doubt many supporters (the guess here is most of them reside in red states), fact and fiction are one.”³²

For Mary Beth Buchanan, this criticism and the fictional nature of the stories make no difference. As she told a reporter for the *Pittsburgh Post-Gazette*, “Whatever the genesis of the stories are is irrelevant to the federal violation This material rises to the level of obscenity, and it is dangerous. Material of this type is the kind that emboldens individuals who have an interest in sexually exploiting children.”³³

On this last contention about the alleged danger of the material inciting pedophiles to exploit children, Buchanan’s case seems to fly in the face of very recent precedent prohibiting the prosecution of such thought crimes. In particular, the United States Supreme Court in *Ashcroft v. Free Speech Coalition*³⁴ struck down portions of a law targeting virtual child pornography—“sexually explicit images that appear to depict minors but were produced without using any real children”³⁵—and wrote that “First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”³⁶

More importantly, with regard to Buchanan’s argument that fictional stories are “dangerous”³⁷ because they might lead to the exploitation of children, Justice Anthony Kennedy wrote for the

³⁰ Dimitri Vassilaros, *Make-Believe Free Speech*, PITT. TRIB.-REV., Oct. 1, 2006.

³¹ *Id.*

³² *Id.* (emphasis omitted).

³³ Ward, *supra* note 29, at B2.

³⁴ 535 U.S. 234 (2002).

³⁵ *Id.* at 239.

³⁶ *Id.* at 253.

³⁷ Ward, *supra* note 29, at B2.

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majority in *Free Speech Coalition*:

[t]he Government submits . . . that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.³⁸

Kennedy later added:

[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.³⁹

This line of reasoning seems to completely gut and undermine Buchanan's allegation that Karen Fletcher's stories should be prosecuted because they constitute dangerous material "that emboldens individuals who have an interest in sexually exploiting children."⁴⁰

But Buchanan's public statements about the case suggest she also harbors an alternative rationale—one different from the dangerousness argument—for prosecuting Fletcher. Quite simply, she doesn't like the stories because they offend her personal sense of taste and, supposedly by extension, the tastes of citizens in the Western District of Pennsylvania. Specifically, Buchanan has stated that she "can't imagine why anyone would want to write or read stories involving the rape and torture of children."⁴¹ Similarly, she has called the Red Rose stories "the most disturbing, disgusting and vile material that I've ever viewed."⁴² She has, in turn, expressed the viewpoint that "[w]hatever the current cultural standards might be, I don't believe the citizens of Western Pennsylvania will permit the distribution of stories containing the

³⁸ *Ashcroft*, 535 U.S. at 253.

³⁹ *Id.* at 253–54.

⁴⁰ Ward, *supra* note 29, at B2.

⁴¹ Ward, *supra* note 29, at B2.

⁴² Ward, *supra* note 29, at B2.

depiction of the rape, torture and killing of infants.”⁴³ In brief, Buchanan finds the articles offensive to her sense of taste in literature.

A bad-taste/offensiveness argument for censorship is not unusual in the realm of First Amendment jurisprudence.⁴⁴ As the late University of Chicago Professor Harry Kalven, Jr.⁴⁵ observed, “the desire to elevate public taste and to eliminate the tawdry, the vulgar, the worthless”⁴⁶ constitutes “an appealing objective, indeed a seductive one.”⁴⁷ But, as Kalven pointed out, “[t]he question is whether we are to make the state a literary critic.”⁴⁸ Given that the prosecution of Karen Fletcher involves stories (i.e., literature), Kalven’s query seems particularly relevant when questioning the merits of Buchanan’s decision to aim her attention at the Red Rose stories. Buchanan, in a very real sense, has become a literary critic for the federal government by choosing to target Fletcher’s fictional short stories for prosecution.

Buchanan thus seems to object to the Red Rose stories because they are, in her mind, both simultaneously dangerous and

⁴³ Ward, *supra* note 22.

⁴⁴ The notion that obscenity falls outside the scope of First Amendment protection because it offends taste, as opposed to being dangerous and causing harm, was recently affirmed by a federal appellate court. *See Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574–75 (7th Cir. 2001) (writing that “[t]he main worry about obscenity, the main reason for its proscription, is not that it is harmful . . . but that it is offensive. A work is classified as obscene not upon proof that it is likely to affect anyone’s conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity,” and adding that when it comes to obscenity, “[o]ffensiveness is the offense.”).

⁴⁵ Kalven was so well respected in the realm of First Amendment law that Professor Frederick Schauer once wrote that Kalven “is best thought of not as a commentator *on* the free speech tradition in the United States, but as part *of* that tradition.” Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398 (1989) (emphasis in original).

⁴⁶ HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 13 (1988).

⁴⁷ *Id.*

⁴⁸ *Id.*

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tasteless.⁴⁹ Not surprisingly, none of this makes sense for the attorneys representing Karen Fletcher. In a massive, 81-page motion to dismiss the case against Fletcher, her attorneys assert, among other things, that:

The case against Fletcher “represents an attempt by the United States of America to criminalize the pure written word—something that has never been expressly affirmed by the United States Supreme Court, and something that strikes at the very heart of the right to Freedom of Speech guaranteed by the First Amendment to the United States Constitution.”⁵⁰

Since the United States Supreme Court’s 1973 decision in *Miller v. California*⁵¹—the decision that created the current standard for divining when speech is obscene—and the companion case of *Kaplan v. California*⁵² that involved a text-only book, “the

⁴⁹ These twin rationales, Harry Kalven, Jr., observed, are among “the possible evils of obscenity,” including the notion that the speech in question “will move the audience to anti-social sexual action”—in the case of the Red Rose stories, apparently to move readers to molest children—and that it “will offend the sensibilities of many in the audience.” *Id.* at 33.

⁵⁰ Defendant Fletcher’s Memorandum in Support of Motion to Declare Obscenity Statute Unconstitutional as Applied to Text or, in the Alternative, to Dismiss Indictment for Failure to Allege a Crime at 11, *United States v. Fletcher*, No. 2:06-cr-00329-JFC (W.D. Pa. Apr. 27, 2007) [hereinafter Motion to Dismiss].

⁵¹ 413 U.S. 15 (1973).

⁵² 413 U.S. 115 (1973). *Kaplan* was a text-only obscenity case that involved the prosecution of the proprietor of the Peek-A-Boo bookstore in Los Angeles, California, for selling a book entitled *Suite 69* that, as the Supreme Court described it:

has a plain cover and contains no pictures. It is made up entirely of repetitive descriptions of physical, sexual conduct, “clinically” explicit and offensive to the point of being nauseous; there is only the most tenuous “plot.” Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.

Id. at 116–17. The high court in *Kaplan* suggested that words standing alone can be the basis for an obscenity case, when it wrote that “[o]bscenity can, of course, manifest itself in conduct, in the pictorial representation of conduct, or in

Government has never sought to prosecute speech composed exclusively from ‘the written word,’ i.e., non-pictorial works—

the *written and oral description of conduct.*” *Id.* at 119 (emphasis added).

Prior to the 1973 decisions in *Miller* and *Kaplan*, obscenity prosecutions for text-only works were not uncommon. For instance, John Cleland’s eighteenth-century book *Memoirs of a Woman of Pleasure* was the target of a Massachusetts obscenity prosecution in the early 1960s, with the U.S. Supreme Court ultimately declaring the book not obscene under a pre-*Miller* obscenity standard. *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.*, 383 U.S. 413 (1966).

Perhaps most famously, New York state brought obscenity charges targeting James Joyce’s *Ulysses*, which U.S. District Court Judge John M. Woolsey declared in 1933 was not obscene. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182 (S.D.N.Y. 1933). Woolsey defined obscenity as content “[t]ending to stir the sex impulses or to lead to sexually impure and lustful thoughts.” *Id.* at 184. Rather than finding *Ulysses* to be obscene under this definition, the judge instead opined that *Ulysses* is:

brilliant and dull, intelligible and obscure, by turns. In many places it seems to me to be disgusting, but although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt’s sake. Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers.

Id. He concluded by calling the book “sincere and serious attempt to devise a new literary method for the observation and description of mankind.” *Id.* at 185.

Another well-known, text-only book that frequently was targeted for obscenity prior to *Miller* was Henry Miller’s *Tropic of Cancer*. See *Zeitlin v. Arnebergh*, 383 P.2d 152, 154 (Cal. 1963) (holding that the book is “not hardcore pornography.”). In declaring *Tropic of Cancer* not to be obscene, the Supreme Court observed in a footnote the many other jurisdictions that had also addressed the issue on this same book, writing:

The book has been held not obscene in *Attorney General v. Book Named “Tropic of Cancer”* (1962) 344 Mass. 11 [184 N.E.2d 328]; *McCauley v. Tropic of Cancer* (1963) 20 Wis.2d 134 [121 N.W.2d 545]; *People v. Fritch* (1963) 38 Misc.2d 333 [236 N.Y.S.2d 706]; and *Haiman v. Morris* (1962, No. 61 S 19718, Superior Ct. of Cook County, Ill.). The book has been held obscene in *Besig v. United States* (9th Cir. 1953) 208 F.2d 142; *State v. Huntington* (1962, No. 24657, Superior Ct. Hartford County, Conn.); and *Commonwealth v. Robin* (1962, No. 3177, Ct. of Common Pleas, County of Philadelphia, Pa.).

Id. at 154 n.1.

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until now”⁵³ and that “[t]he absence of any post-1973 prosecutions under the federal obscenity statutes involving non-pictorial works reflects a sea-change in the manner in which American society, and its representative Government, views obscenity in a non-visual context.”⁵⁴

Words and images are processed very differently by humans such that “the time has come to excise the pure written word from the purview of obscenity laws”⁵⁵ and that the proper test for considering and analyzing whether or not writings like those of Karen Fletcher should be suppressed is the modern-day version of the clear-and-present danger standard⁵⁶ established in 1969 in *Brandenburg v. Ohio*,⁵⁷ with this test serving as “the sole arbitrator of whether written materials lose their presumptive First Amendment protection. Such a standard is sufficient to address any concerns that obscene expression endangers American society’s moral fabric.”⁵⁸

Buchanan’s entire case is based “upon a fear for unusual and, at times, fantastic ideas being expressed in Ms. Fletcher’s stories”⁵⁹ and that such fears do not justify censorship because, in part,

⁵³ Motion to Dismiss, *supra* note 50, at 12.

⁵⁴ Motion to Dismiss, *supra* note 50, at 12.

⁵⁵ Motion to Dismiss, *supra* note 50, at 33.

⁵⁶ The original clear-and-present danger standard was first articulated by the nation’s high court in *Schenck v. United States*, when Justice Oliver Wendell Holmes wrote that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” 249 U.S. 47, 52 (1919) (emphasis added).

⁵⁷ 395 U.S. 444 (1969). Under the high court’s ruling in *Brandenburg*, the government cannot “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.” *Id.* at 447. See also DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 2007/2008 61 (2007) (explaining the *Brandenburg* test “represents the current and modern version of Justice Holmes’ older clear-and-present-danger standard.”).

⁵⁸ Motion to Dismiss, *supra* note 50, at 36.

⁵⁹ Motion to Dismiss, *supra* note 50, at 80.

“[t]olerance of what is perhaps noxious speech is a principle embodied within the very fabric of the First Amendment.”⁶⁰

Given these arguments in the April 2007 motion to dismiss, as well as the sheer rarity of prosecutions over the past three decades for the written word, the case of Karen Fletcher and her Red Rose stories raises serious questions about obscenity law today in the United States, including:

- *Should words, standing alone and without any accompanying visual images, today ever be considered obscene, despite the U.S. Supreme Court’s statement in dicta more than 30 years ago that “[o]bscenity can manifest itself in . . . the written and oral description of conduct”?*⁶¹

- *Do written stories, no matter how sexually graphic and explicit they may be, inherently have serious literary value such that they should be protected under the Supreme Court’s current test for obscenity?*⁶²

- *Is there any real harm or injury created by fictional short stories such as those posted by Fletcher that is sufficient to justify their suppression and censorship?*

This article provides a unique and decidedly inside analysis of these questions from the perspective of one of the lead attorneys who, on a *pro bono* basis, is representing and defending Karen Fletcher.⁶³ In particular, this article pivots on an exclusive in-person, in-depth interview conducted by the authors in May 2007 with Lawrence G. Walters.⁶⁴ Walters, the managing partner of

⁶⁰ Motion to Dismiss, *supra* note 50, at 80.

⁶¹ Kaplan v. California, 413 U.S. 115, 119 (1973).

⁶² Roth v. United States, 354 U.S. 476 (1957) (setting forth the three-part test for obscenity).

⁶³ See Michael Hayes, *Red Rose Pleads Not Guilty to Obscenity Charges*, XBIZ.COM, Nov. 2, 2006, http://www.xbiz.com/news_piece.php?id=17937 (writing that “Warner Mariani will serve as local counsel for Fletcher’s pro bono defense team, which includes Lawrence Walters, John Weston, Jerry Mooney and Derek Brett, as well as several other prominent First Amendment attorneys.”).

⁶⁴ See Weston, Garrou, DeWitt & Walters, Attorney Profile for Lawrence G. Walters, <http://www.firstamendment.com/qualifications.php3> (last visited May 26, 2007).

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Weston, Garrou, DeWitt & Walters in Altamonte Springs, Florida, is a First Amendment attorney who has appeared as a guest on national programs ranging from CNN's *Paula Zahn Now*⁶⁵ to *The O'Reilly Factor*.⁶⁶ Walters also is well known for his defense work in Internet-based obscenity cases, as he defended Tammy Robinson in the late 1990s in what was "the first obscenity prosecution against content on the Internet."⁶⁷ More recently, he represented Christopher Wilson in another Internet-based obscenity case.⁶⁸

Part I of this article briefly describes the methodology for conducting the interview with Lawrence Walters, including details about the date, time and locations of the interview, as well as the recording and transcription processes used by the authors.⁶⁹ Part II then moves to the heart of the article, setting forth the comments, opinions and remarks of Walters on three distinct subjects: 1) the ongoing case of *United States v. Fletcher*; 2) the general state of obscenity law in the United States; and 3) the purpose and meaning of the First Amendment protection of free speech and why, in particular, it should safeguard sexually explicit expression.⁷⁰

⁶⁵ See *Paula Zahn Now* (CNN broadcast Mar. 26, 2004) (including an interview with Walters regarding the use of vulgar and offensive language by fans at sporting events).

⁶⁶ See *The O'Reilly Factor* (Fox News Network broadcast June 13, 2003) (including an interview by Bill O'Reilly with Walters regarding child pornography on the World Wide Web).

⁶⁷ See *Fox Files: Adult Web Sites* (Fox News Network broadcast Aug. 17, 1999) (quoting Walters for this assertion). See also Keith Morelli, *Woman Raises Cash Online for Nude Web Site Fight*, TAMPA TRIB., May 8, 1999, at Florida/Metro 1 (reporting that "[a]uthorities say the arrest was one of the first in the area, and possibly the nation, in a crackdown on Internet pornography."). See generally Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507, 516–24 (2001) (describing and analyzing the obscenity case against Tammy Robinson).

⁶⁸ See Dana Willhoit, *Wilson Will Avoid Jail in Plea Deal*, LEDGER (Lakeland, Fla.), Jan. 14, 2006, at A1 (describing Walters as "the First Amendment lawyer who has been representing Wilson").

⁶⁹ See *infra* note 72 and accompanying text.

⁷⁰ See *infra* notes 73–118 and accompanying text.

Finally, Part III analyzes and synthesizes Walters' viewpoints and remarks, and concludes by calling for Mary Beth Buchanan to drop the charges against Karen Fletcher or, in the alternative, for the case to be dismissed by the federal courts.⁷¹

I. METHODOLOGY AND PROCEDURES

The interview between the authors of this article and Lawrence G. Walters took place at 3:30 p.m. on Monday, May 21, 2007, in a conference room at the law offices of Walters' firm, Weston, Garrou, DeWitt & Walters, located at 781 Douglas Avenue in Altamonte Springs, Florida.⁷² The interview was recorded with broadcast-quality recording equipment on an audiotape using a tabletop microphone. Later that same month, the tape was transcribed by the authors in State College, Pennsylvania, and then reviewed for accuracy. The authors made a few very minor changes for syntax in some places but did not alter the substantive content or material meaning of any of Lawrence Walters' responses. Some responses were reordered and reorganized to reflect the various themes of this article set forth below in Part II, and other portions of the interview were omitted as extraneous, redundant or beyond the scope of the purpose of this article. The authors retain possession of the original audio recording of their interview with Lawrence Walters, as well as the printed transcript of the interview.

For purposes of full disclosure and the preservation of objectivity, it should be noted that the authors had never previously met Lawrence Walters before the interview. The interview was arranged via e-mail and telephone correspondence. Lawrence Walters did *not* have an advance opportunity to review or preview any of the questions he was asked, thus allowing for greater spontaneity and immediacy of responses. Prior to the questions being asked, Walters was only informed that the authors

⁷¹ See *infra* notes 119–39 and accompanying text.

⁷² See Contact Us, Weston, Garrou, DeWitt & Walters Website, <http://www.firstamendment.com/contactus.php3> (last visited May 26, 2007) (setting for the address of the “Metro Orlando” office of the firm).

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wanted to interview him about obscenity law, the First Amendment and the *Fletcher* case.

Furthermore, Lawrence Walters did *not* at any time review either the raw transcript of the interview or any of the drafts of this article before it was submitted for publication. Finally, the authors of this article have never worked for or been employed by Walters and/or his law firm in any capacity, and they did not receive any payment or compensation from Walters and/or his firm for writing this article.

II. THE INTERVIEW

This part of the article sets forth the comments and remarks of Lawrence Walters in a question-and-answer format. His views and opinions are organized around three specific themes. In particular, Section A centers on the case of *United States v. Fletcher*, while Section B focuses more generally on obscenity law, including the many problems that Walters identifies with the standard for obscenity articulated in *Miller v. California*. Finally, Section C includes Walters' comments to a series of questions about the purpose and meaning of the First Amendment protection of free speech. Each of these sections includes a brief introduction. The authors have inserted footnotes, where relevant, to help to explain or to elaborate on cases, concepts, terms and/or issues raised by Lawrence Walters in his remarks.

A. *United States v. Fletcher*

In the official government press release announcing the six-count indictment against Karen Fletcher in September 2006, U.S. Attorney Mary Beth Buchanan identified what she termed were six "obscene stories,"⁷³ each "pertaining to adults having sex with children."⁷⁴ One story, for instance, was portrayed in the press

⁷³ See Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23.

⁷⁴ Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23.

release as “a text description of the torture and sexual molestation of two-year-old ‘Mina,’ and the sexual molestation and murder of four-year-old ‘Cindy,’”⁷⁵ while another story was described as “a text description of the torture and sexual molestation of five-year-old ‘Katey’ and the sexual molestation of a six-year-old girl.”⁷⁶ All stories, including these two, were identified as “text descriptions,” and there was no reference to any visual images, photographs or drawings accompanying the textual descriptions.⁷⁷

The text-only nature of the content at issue quickly caught the attention of attorneys associated with the adult entertainment industry. Reed Lee, a Chicago-based attorney recently described by adult entertainment industry news magazine *XBIZ Video* as “a leading contributor in 2006 to several major battles fought on behalf of the adult entertainment industry,”⁷⁸ wrote that “[i]t is fair to say that obscenity prosecutions involving such material have been quite rare in recent years.”⁷⁹ Lee openly questioned whether words—as opposed to visual images—could ever be obscene today, writing:

With respect to pure text, though, it really is difficult to see how it can offend the unwilling. An image is seen and understood essentially instantaneously. Text, on the other hand, must be read; and one can simply stop reading before being offended in any remotely serious way. In our contemporary society, we are bombarded with sexual images that fall far short of legal obscenity. It is entirely possible that, in this environment, text has simply lost its ability to shock and offend the unwilling. Contemporary community standards may thus have evolved to the point

⁷⁵ Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23. (emphasis added).

⁷⁶ Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23. (emphasis added).

⁷⁷ Donora Woman Charged With Distributing Obscene Matter on the Internet, *supra* note 23.

⁷⁸ *The Top 50 Adult Industry Newsmakers of 2006*, XBIZ VIDEO, Jan. 2007, at 56, 58.

⁷⁹ Reed Lee, *A Red Rose Retrospective*, XBIZ.COM, Dec. 29, 2006, <http://www.xbiz.com/articles/18810>.

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where pure text is just not legally obscene anymore.⁸⁰

Another adult industry attorney, Jeffrey Douglas,⁸¹ expressed the sentiment that “this indictment reflects an effort to return to the 1920s,”⁸² adding that “[i]n that era, the Justice Department attempted to chill the notion that ideas should be explored, and that there is a difference between ideas and conduct.”⁸³

In this part of the article, Lawrence Walters initially offers his own description of the stories at issue in *United States v. Fletcher*, and he explains the very revealing and personal reasons why his client chose to engage in such writings. Walters then details the multiple steps that were necessary to fully access the stories on Karen Fletcher’s Web site. Following this background, he addresses the legal issues surrounding the case, including its uniqueness as the only federal obscenity prosecution based solely on the written word since 1973. In the course of answering questions about the case, he also describes the corresponding and significant potential for a chilling effect⁸⁴ on expression.

⁸⁰ *Id.*

⁸¹ Douglas is “a lawyer who specializes in First Amendment issues and has represented the adult industry since the early 1980s.” Mark Cromer, *Porn’s Compassionate Conservatism*, NATION, Feb. 26, 2001, at 25. In January 2007, *XBIZ Video* magazine, a publication covering the adult movie industry, named Douglas as one of the “Top 50 Adult Industry Newsmakers of 2006,” writing that:

Industry attorney and Free Speech Coalition Board Chair Jeffrey Douglas remained one of the adult industry’s main sources of information and legal counsel regarding 2257 litigation. Fighting many important legal battles on behalf of the adult industry, Douglas also supervised the FSC’s lawsuit against the Utah Child Protection Registry, one of the most important legal battles for the adult industry and Internet commerce as a whole.

The Top 50 Adult Industry Newsmakers of 2006, XBIZ VIDEO, Jan. 2007, at 56.

⁸² Mark Kernes, *U.S. v. Karen Fletcher: Text of the Indictment*, AVN.COM, Sept. 27, 2007, http://avn.com/index_cache.php?Primary_Navigation=Articles&Action=View_Article&Content_ID=276804.

⁸³ *Id.*

⁸⁴ See ROBERT TRAGER ET AL., THE LAW OF JOURNALISM & MASS COMMUNICATION 519 (2007) (defining the term “chilling effect” as “an effect

With this background in mind, the article now turns in question-and-answer format, to these issues and Lawrence Walters' comments.

QUESTION: In *United States v. Fletcher*,⁸⁵ the federal government is charging your client, Karen Fletcher, with obscenity on the basis of six written stories depicting violent and sexually explicit behavior—no pictorial or audio content whatsoever. Has the government attempted to prosecute someone for obscenity *solely* on the basis of the written word since the U.S. Supreme Court's 1973 decision in *Miller v. California*?⁸⁶ If the answer is no, then why start now?

WALTERS: The answer is no—not that we could find in a published decision. Why start now? It seems absurd to me to start now in a society where the media focusing on adult entertainment and eroticism have become very graphic—much more so than twenty or thirty years ago when *Miller* was created. To decide now that we should prosecute writings on subjects that have been written about since the Greco-Roman times seems to be an odd step in the absolute wrong direction, if there is a right direction on obscenity prosecution. If there is, I would suggest it isn't to prosecute written material on topics that have been, frankly, a mainstay of literature for thousands of years.

QUESTION: Can you describe, in your own words, what Karen Fletcher's stories are about?

WALTERS: The stories deal with issues that Karen Fletcher had been dealing with her whole life. She was abused as a child, kicked out of her family home and forced to live on the street. She dealt with all forms of abusers, primarily men, throughout her life. Her stories generally deal with a victim and an abuser in sexual situations. They deal with terror, fear and heinous human behavior. They deal with how people cope with those issues, if they are confronted with them. They deal with a lack of resolution. The perpetrator almost always gets away, and the victim is left to suffer. They deal with hard issues—issues that make a lot of people cringe. They may make a lot of people question their basic understanding of human nature. Isn't that what writing is supposed to do? That's what they do.

QUESTION: So part of this writing provides some therapeutic value for her,

brought about by any practice that discourages the exercise of a constitutional right. In First Amendment law, a measure that deters freedom of expression may be said to have a chilling effect.”).

⁸⁵ Indictment, *United States v. Fletcher*, No. 06-329 (W.D. Pa. Sept. 26, 2006).

⁸⁶ 413 U.S. 15 (1973).

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is that correct?

WALTERS: The stories were written largely out of the instructions by her therapist to put her stories down on paper in order to make them more real, to be able to deal with them, and to be able to think back to them. A lot of this stuff deals with things that happened to her. They're not works of non-fiction that describe specific events or people in her life, but they are describing similar situations to what happened to her. It gave her a unique perspective to be able to write such stories. For better or worse, they are written from a very unique perspective—one that requires a person to have gone through very terrible things in order to be able to write.

Now, I wouldn't wish that ability on my worst enemy, but she has it. There are very few people who do. As our expert testified in his affidavit, that kind of material is tremendously valuable to the therapist community. There are very few people who are able to communicate that way who have taken the time and effort to get their issues down on paper, tell their story and give that unique insight into the workings of the mind of a victim like that, which can help treat others in her situation and identify the characteristics of a perpetrator.

Some people can't talk about these things at all when they occur. Yet, Ms. Fletcher was able to very eloquently write these issues down and tell stories that very few people in this world are able to tell from that perspective. They have that type of unique value to the mental health industry. If you look elsewhere for this kind of material, you won't find it.

QUESTION: When did she start publishing these stories online?

WALTERS: About a year before her arrest, I believe.

QUESTION: Could you please talk about the steps that are taken on her Website with respect to disclaimers and age verification—all of the things that would alert someone about what's coming?

WALTERS: One of the problems in my answering that question specifically is that the government, in raiding Ms. Fletcher's house, took the Website offline, essentially. They took all of her computers and made it technologically impossible to continue to operate. The URL doesn't exist anymore. The government was able to accomplish what they likely wanted to accomplish from the first day that her material was seized. She has been censored. That's over and done. She frankly has no intention to take this risk again and go back online, even if she could. They've gotten their pound of flesh. Why they continue to prosecute her is beyond me.

The steps, as I understand them, are that there was an initial splash warning page identifying the nature of the site. There was some teaser

language identifying the first couple of lines of the different stories to provide some type of free tour for individuals that were interested in purchasing a membership to the site, which a grand total of about twenty-nine people did. There was the Pay Pal payment membership page where someone could sign up specifically after he knew the type of site it was and went past the warning page.

Then, once you became a member, the stories were organized and grouped by topic and writer. The more explicit material—especially those involving sexual activity with children—were very closely and clearly identified as such with additional warnings. People were able to get access to the final content by going through that last set of warnings.

QUESTION: In short, there was no way that, before you read a story, you would not know what it is about?

WALTERS: Frankly, there are very few people who have an interest in this kind of thing. I would suspect it would be other people who went through similar things as Ms. Fletcher. Most of the other people who were members of the site were also contributors; they wrote for the site. People knew exactly what they were getting. I'm not aware of any complaint by any individual who claimed that they didn't know what was on the site or that they were offended that they thought it was going to be a bedtime story or something. This is not a site that could have been mistaken for anything other than what it was.

QUESTION: In a sense, the Fletcher prosecution is reminiscent of the obscenity cases against Lenny Bruce in the 1960s. In their book, *The Trials of Lenny Bruce*, Ronald Collins and David Skover wrote, "Words were his power, his incomparable gift, his way into the unexplored realms of life and law from which there is seldom safe return."⁸⁷ Lenny Bruce was punished for his words, although this was prior to *Miller* and he was pardoned, albeit posthumously for his New York conviction.⁸⁸ Do you fear the government is attempting to turn back the clock in the area of obscenity?

WALTERS: I hope that the Red Rose-Karen Fletcher case is an aberration that has come about as a result of a confluence of events and personalities that will not readily be replicated in the near future. I tend to think that this is not a concerted policy shift or new effort on behalf

⁸⁷ COLLINS & SKOVER, *supra* note 24, at 3.

⁸⁸ See Libby Copeland, *Lenny Bruce Pardoned for His Language*, WASH. POST, Dec. 24, 2003, at C01 (noting that the comedian was pardoned by New York Governor George Pataki "decades after he was convicted of obscenity, died of a heroin overdose and became a martyr to the First Amendment cause.").

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of Washington. I think this is an odd situation where somebody at Pay Pal read something that they thought qualified as child pornography that didn't. They alerted the government. The government spent some resources investigating it and decided that they needed to justify their investigation after they concluded that it wasn't child pornography.

What else is left? Then, Mary Beth Buchanan, who is very aggressive toward obscenity—probably the most aggressive prosecutor in the nation based on her public statements—looked at this case, decided, “It looks like obscenity to me” and obtained an indictment. I certainly hope this is not a new policy shift in the U.S. government out of Washington, but it is affecting this grandmother who is now in fear for her life and going to jail for years for something that she wrote as the result of some therapeutic efforts. It really is a shame that she has to deal with this odd series of events and be made the victim, but that's where we stand.

QUESTION: If the *Fletcher* case is permitted to go forward, what impact will it have on creative works in this country?

WALTERS: Every obscenity prosecution impacts the free flow of expressive works in this country. Those that are closer to the types of works involved experience a worse chilling effect. To the extent that we've never had an obscenity prosecution involving the written word, authors have become pretty confident out there. They've written on subjects that only the mind can limit. Now, to the extent that we have a successful obscenity prosecution, or even a prosecution at all, authors now must think twice as to whether or not their material is of a similar nature and character as Karen Fletcher's material so as to be prosecuted. That is not something that authors have had to deal with for decades.

There have been comic book prosecutions in Florida after years of no comic book prosecutions.⁸⁹ Now, all of a sudden, comic book writers have to be worried. Anytime a new form of media is attacked, the people who do that type of work are increasingly worried. I just think we now have opened up what had been seen before as the sacred cow—the untouched realm—of the written word. With this case, all writers now have to be concerned.

QUESTION: So the very fact that Mary Beth Buchanan, a U.S. prosecutor in a major city, is bringing this case has the potential of having a chilling

⁸⁹ See, e.g., Craig Pittman, *Cartoonist Exits Jail, Enters New Life*, ST. PETERSBURG TIMES, Apr. 30, 2000, at 4F (describing how “[t]he jury took 90 minutes to find [Michael] Diana guilty. County Judge Walter Fullerton sent him to jail for the weekend, making Diana the first cartoonist in U.S. history to be jailed on obscenity charges.”).

effect on writers, regardless of where it goes?

WALTERS: Absolutely. Even if Ms. Fletcher is acquitted, people are going to see that she had her house searched and was in fear of losing everything. She still hasn't gotten tax documentation back and that has caused just tremendous upheaval in her life and severe psychological injury. Regardless of whether a jury comes back and says, "Well, now we think that this was not obscene," that's little consolation after having gone through a year of federal prosecution and being in fear of going to a federal penitentiary for a series of years.

She was fortunate to have found a group of lawyers who are willing to take on this case *pro bono* because she doesn't have any money either. To the extent that she was looking for competent representation in the First Amendment field with no money, it would have been very difficult for her if she hadn't come across the right people. She probably would have taken a plea and done some jail time because that's just the way that federal crimes come out these days.

We are all very hopeful—for her, for the case and for the area of First Amendment rights in general—that a judge will see this for what it is: A sad political attempt to milk the idea of obscenity and adult material for political gain.⁹⁰ We hope to get it tossed as quickly as possible.

QUESTION: Is that what you meant, in the April 27 memorandum, by the term "myopic governmental effort"?⁹¹

WALTERS: Basically, yes.

QUESTION: In 2005, the movie *The Aristocrats* was released in theaters and subsequently on DVD. Ray Richmond wrote in the *Hollywood*

⁹⁰ That politics and political gain play a role in attacking sexual expression has been recognized by others who have studied or practiced in the area. See HARRY KALVEN, JR., *supra* note 46, at 34 (writing that "[t]he justifications for obscenity regulation may be faint, but the political passions invested in the issue are fierce."); 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, 153 (2004) (quoting Paul Cambria, general counsel for Larry Flynt's publishing empire, LFP, Inc., for the proposition that the motivations for obscenity prosecutions typically are "simply a matter of *politics* or religion" and that "as long as *politics* exist, and as long as church groups and others are calling the D.A. and the police chief and the sheriff, there are going to be prosecutions.") (emphasis added).

⁹¹ Motion to Dismiss, *supra* note 50, at 49 (writing that "[t]his *myopic governmental effort* is predicated upon an erroneous reading of the parameters of state power under the First Amendment.") (emphasis added).

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Reporter, the movie “has no sex or violence but serves up graphic descriptions of incest, bestiality, urination, defecation, vomiting, brutal rape, child sexual abuse and every depraved, unspeakable and vile act imaginable. This is, perhaps without question, the singularly most profane film ever made. And it’s hilarious.”⁹² If the government is able to prosecute solely on the basis of words, do movies like *The Aristocrats*—though critically acclaimed—have to fear criminal sanctions?

WALTERS: Most definitely. The bar is being set so low with a text-only prosecution that anything beyond that, including any graphic representations, is even more at risk. I would hate to see the standard be set at textual works because it is a level to which we have not stooped in the past in terms of obscenity law. It would sound the dawning of a new era and a new age of fear for writers throughout the land.

QUESTION: What about just the spoken word? For instance, a comedian working in a nightclub, would it have the same negative chilling effect?

WALTERS: Yes. If you look at obscenity laws, both at the federal and state levels, they all apply to depicting or describing obscene acts.⁹³

⁹² Ray Richmond, *The Aristocrats*, HOLLYWOOD REPORTER.COM, Aug. 9, 2005.

⁹³ See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the binding precedent on how obscenity must be defined at both the federal and state level, and providing, in the second prong of the three-pronged definition of obscenity, that the finder of fact must determine if “the work *depicts or describes*, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”) (emphasis added); CAL. PENAL CODE § 311(a) (Deering 2007) (providing, in relevant part, that obscene matter “means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, *depicts or describes* sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (emphasis added); N.Y. PENAL LAW § 235.00(1) (Consol. 2007) (providing that material can be deemed obscene if, in addition to satisfying other requirements, it “*depicts or describes* in a patently offensive manner, actual or simulated: sexual intercourse, criminal sexual act, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals.”) (emphasis added). *But cf.* 18 U.S.C. § 1465 (2007) (failing to use the term “depicts or describes” but specifically prohibiting the production and transportation of obscene matters for sale or distribution that are set forth in the form of a “book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of

Descriptions can be verbal or written. Certainly, a comedian or a writer, as long as the other elements of the statute are met, could be wrapped up in an obscenity prosecution. The breadth of these statutes is awe inspiring and disconcerting.

QUESTION: In your motion to dismiss in the *Fletcher* case, you make reference to the popular Comedy Central television program, *South Park*.⁹⁴ Specifically, you point to episodes in which the animated characters of the young boys around which the show revolves are visually depicted in sexually explicit acts.⁹⁵ Of course, as you point out, this show wins awards, not the ire of federal prosecutors. Should the creators of *South Park* fear government reprisal? Or do you believe that the Justice Department will selectively go after smaller “fish” like Website operators rather than mainstream Hollywood?

WALTERS: The Justice Department is smart. Officials there pick their battles. They have the ability to have complete discretion over whom they prosecute and whom they don’t. They’re not required to prosecute all those who are violating the law and they are not required to prosecute those who are similarly situated to other defendants. That makes for an ad hoc determination when it comes to obscenity prosecutions. You don’t know who is going to get prosecuted and who’s not. Lawyers can’t tell their clients who’s going to get prosecuted and who’s not.

Unfortunately, we tend to see that the federal government often focuses on larger defendants and on money. Inevitably, they file a forfeiture count with their obscenity indictments in an effort to take the money from the business that’s generating it. We do see those motivating factors. We haven’t seen that cross over into mainstream Hollywood.

producing sound.”).

⁹⁴ Motion to Dismiss, *supra* note 50, at 54–55.

⁹⁵ Motion to Dismiss, *supra* note 50, at 54–55. The motion contends, in relevant part, that:

“South Park” provides this Court with a popularly-accepted [sic] example of a visual medium wherein young, animated children are placed into various situations involving sex. The sex often involves children portrayed between five to nine years old. The situations are oftentimes portrayed as, at least to certain segments of the South Park community, normal. Further, unlike non-visual works, such as the indicted Red Rose stories, “South Park” provides for the actual, visual depiction of the sexual actions. In the episode, “Cartman Sucks,” the penises of nine year old boys [sic] being inserted in each other’s mouths is depicted openly.

Motion to Dismiss, *supra* note 50, at 55.

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They know that there would be tremendous political ramifications if mainstream Hollywood were prosecuted for obscenity. They know that all the lawyers would crawl out from under every rock to defend the producers.

They may have underestimated the zeal with which lawyers are defending the Karen Fletcher case. I suspect they thought this would be a quick plea, and they would be able to put another notch in the belt. I don't think they expected a group of First Amendment lawyers to rally behind Ms. Fletcher. I don't think they saw the text-only hook as an attraction for the case. That said, I don't think *South Park* is a likely target. I don't think that anything that is in the mainstream of Hollywood would be identified.

But mainstream Hollywood certainly is a target for the chilling effect. The government likes to get these convictions, then wave them around in the background and use them in negotiations, backroom deals, and FCC discussions by saying, "This could be obscene, so you better be careful." That's where the insidiousness of obscenity prosecutions really comes in because, for every conviction and prosecution, there are hundreds, if not thousands, of uncreated works or works that end up in the trash bin out of the fear of prosecution and its chilling effect. That's where the real value would come for the government with a conviction in the *Fletcher* case.

QUESTION: In a case that focuses on the written word, rather than video or photographic content, the only images related to the writing occur in the reader's mind. Does that mean that the federal government, in this instance, is seeking to prosecute a thought crime?

WALTERS: It seems to be that way to me. We've talked a lot about this with our experts⁹⁶ and internally with other lawyers. We all have come to a consensus that the written word is simply different from any other form of media. One of the ways it is different is that the reader has unique control over the written word that is not present with other forms of media. Readers can stop reading in sufficient time, ordinarily, to not get into visual areas that they don't want to see in their minds. A reader can stop reading before the vision is created, so to speak. It's not the same as a movie where you see it, it's indelibly printed on your brain and you can't get it out. That's a physical way in which the brain processes reading versus visual media, as testified to by our expert.

There are real distinctions there. I would suggest that an appropriate

⁹⁶ See Motion to Dismiss, *supra* note 50, at 13 (identifying Dr. Marty Klein as an expert for the defendant on this issue).

line could be drawn in First Amendment jurisprudence exempting out written media from the purview of obscenity laws because of the way in which the written word is processed by the mind and because of the distinctions between written media and visual media, in terms of the unwary individual becoming offended.

That, supposedly, is one of the justifications for obscenity laws in general. Theoretically, we want to prevent obscene materials from being seen by people who didn't want to see them and from kids. It's unlikely that any child could get access to the material on Fletcher's site because of the credit card requirements and Pay Pal. In terms of the unwary, you have the ability to stop reading, and there's warning after warning after warning about the type of story that you're about to encounter on the Fletcher site. It indicates what it is, the subject matter and so forth. The underlying policies behind obscenity law are not being fulfilled by prosecuting Fletcher or, frankly, by prosecuting any written word.

QUESTION: In *Ashcroft v. Free Speech Coalition*,⁹⁷ Justice Anthony Kennedy eloquently stated that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."⁹⁸ Does the case against Karen Fletcher present that danger?

WALTERS: It does. Unlike the other forms of media, the written word causes the reader to have to create his own imagery in his mind. The only thing that exists when you're talking about a prosecution like this is the words on paper and the images that are created in one's mind. The words themselves are not obscene. I don't know that anybody could legitimately contend that they are. What you are left with is a prosecution against the images that are created by the words in one's mind. If that's not the thought police, I don't know what is.

In the *Free Speech Coalition* case that you reference, there was a clear distinction between actual abuse of children that's being recorded—child pornography—versus virtual child pornography where the government is trying to control a thought—a category of media based on the images created in one's mind. We draw that line in American jurisprudence. We punish actual abuse and we allow thought.

It is the same thing with the pandering prohibition that was recently considered by the Eleventh Circuit under the PROTECT Act,⁹⁹ in

⁹⁷ 535 U.S. 234 (2002).

⁹⁸ *Id.* at 253.

⁹⁹ *United States v. Williams*, 444 F.3d 1286, 1309 (11th Cir. 2006) (finding "the PROTECT Act pandering provision, 18 U.S.C. §

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which something is presented as child pornography when it really isn't. That's not enough to make it child pornography because all you are left with there is the thought in somebody's mind that it is child pornography when it really isn't. That thought isn't enough to criminalize. Each time we address this issue, the courts come down in favor of thought and against the thought police. We're hoping that, in this case given the similarity in arguments, the result will be the same.

QUESTION: Do you fear that, after the shootings at Virginia Tech and the subsequent discovery that the shooter, Seung-Hui Cho, had written violent, graphic stories,¹⁰⁰ prosecutors will say, "Look, we can't ignore these types of writings"?

WALTERS: When I hear these stories, I always wonder whether the shooter or rapist or child molester read the newspaper that morning. Why aren't we blaming the newspaper for all their misdeeds, if they did? *Before* does not equal *because*. That's where they make the fatal error in analysis because they try to allege that because something was read or viewed before the violent act occurred, it must be because of that thing.

You would find a lot of Bibles in these people's houses as well, and nobody tries to claim that the Bible was responsible because it legitimately isn't, just like adult media is not responsible either. People who commit violent acts and heinous activities have difficulties in their own lives, minds and character that cause them to do these things. These character defects can be tripped by any number of things, including somebody looking the wrong way at the wrongdoer while passing them on the street. It's just a simple error in analysis when people try to claim this connection, but it sells newspapers and makes a point for people who are trying to eliminate adult material or violent video games—whatever the flavor of the day is for the censors. That's why they do it, but it has no basis in science.

QUESTION: Can you talk a bit about the relevance of the clear and present

2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional.”).

¹⁰⁰ See generally Shaila Dewan & Marc Santora, *Officials Knew Troubled State of Killer in '05*, N.Y. TIMES, Apr. 19, 2007, at A1 (reporting that Cho “submitted two plays to Prof. Edward C. Falco’s class that had so much profanity and violent imagery that the other students refused to read and analyze his work.”); Jim Papa, *Criminalizing the Creative: We Must Not Expect Teachers to Identify Future Killers Based on Poems or Plays. To Do So Would Stymie the Art.*, NEWSDAY (N.Y.), Apr. 29, 2007, at A56 (noting that the creative writing assignments of Virginia Tech shooter Seung-Hui Cho “are filled with violent scenes.”).

danger test¹⁰¹ to the *Fletcher* case? Does that test provide the boundary for protected speech?

WALTERS: I think there always was a boundary in First Amendment jurisprudence at clear and present danger, and it will continue to endure no matter what happens with the obscenity test. I think that's important for the courts to understand and for society to understand. We're not advocating that people can write anything they want, no matter what, with impunity. There is a line at which the government has a right to become interested and potentially prohibit or even criminalize certain writings to the extent they can show that national security is at risk—troop movements, obviously, and the like—but I put those things in a category of written acts as opposed to simply writings or media.

We're not talking about something that is written to entertain, create an image in somebody's mind, or cause a person to have a certain thought for enjoyment. We're talking about things that will result in other people losing their lives or national security being breached, which ultimately will result in the same thing. I don't think there is any reason to lose that notion. There's nothing in the arguments in the *Fletcher* case to suggest that the clear and present danger test be changed. It's a test that probably should endure and remain despite the fact that obscenity doesn't apply to the written word.

QUESTION: What is the harm that the government is asserting in the *Fletcher* case that deserves to be stopped?

WALTERS: That's what I would like to know. That's really the basis of one of the motions I filed in the case—the strict scrutiny motion—and that is that I don't believe there has ever been a showing of any harm from exposure to obscene materials, let alone sexually explicit materials. There has not been, to my knowledge, a single study or set of statistics or other writings that legitimately ties viewing and exposure of obscene materials to any sort of anti-social activity. We have expert testimony demonstrating that as well. That means that we have, for all these years, simply assumed that obscenity is bad and that it legitimately can be carved out from First Amendment protection. I don't buy that notion, and I don't understand why the courts have not looked more closely at that issue.

¹⁰¹ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (setting forth the test as follows: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”).

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We clearly have a very strict test that statutes must pass if they proscribe speech—the strict scrutiny test¹⁰²—but it’s never been applied to the obscenity theory. Under that test, the government has to show evidence of harm. It has to show a compelling interest in order to be able to criminalize this form of speech and expression. I suggest the government will not be able to do it in the *Fletcher* case, particularly because we’re dealing with writings. I don’t think the government can do it in any case dealing with adults being exposed to sexually explicit material.

But I invite it. I think that’s where this all needs to go eventually. We need to have a reasoned, intelligent, non-emotional discussion about the actual harm caused by obscene materials. If a group of respected scientists can prove, in any given case, that such harm exists and that it will be addressed appropriately by obscenity prosecutions—another open question is whether there’s a fit between the goals and the statute—then I’m prepared to accept that obscenity laws need to be there and meet the constitutional test. Until that happens, it’s an open question and it’s one that I’m just tremendously surprised that has never been raised, that the courts have not ruled on, that the courts have not required of the government in all these years. It’s just one of these things that we all just assume that obscenity is the kind of thing that can be regulated and proscribed. It just fits into one of these categories of exempted speech.

QUESTION: As you know, the third prong of *Miller*¹⁰³ exempts from prosecution works that have serious literary value. Can it be argued that any creative work of fiction derived solely from words carries with it a particular literary value?

WALTERS: That’s one of the arguments that our team made in the *Fletcher* motion. Derek Brett, Jerry Mooney and John Weston all participated. One of our arguments is that all written works, especially novels and entertainment media, have inherent literary value by virtue of the fact that they are writings and they are understood to tell a story. Now, I suppose we can argue over how serious the literary value is, but we also have been able to show that Fletcher’s stories used very common, recognized literary devices. Our expert attests to that point.

¹⁰² See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that a “content-based speech restriction” is permissible “only if it satisfies strict scrutiny,” which requires that the law in question “be narrowly tailored to promote a compelling Government interest.”).

¹⁰³ See *Miller v. California*, 413 U.S. 15, 24 (1973) (requiring a determination by the fact finder of whether the work in question has serious literary, artistic, political or scientific value).

I don't know how one could argue that any story does not have literary value. What does the word literary mean? If it communicates a message to the reader, it has to have some literary value. It's communicating something. If you have a recipe for making C-4, I don't know how that would have literary value. It's not telling any kind of story; it's identifying a means to kill people.

Here, we're dealing with a much different situation. Any type of fictional work—and even some works of nonfiction—would have literary value, and the government is going to be hard pressed to show otherwise. Frankly, when I'm doing the research and writing the motions, it seems as though the obscenity test—the way courts interpret it—was only ever intended to apply to forms of media other than the written word. Why else would they use this term literary value? They're almost assuming there is some other component to the work—some visual or pictorial component. In other words, if there is enough of a written part, maybe it's saved from an obscenity determination. What if it's all written? What's the obscene part? The government is approaching it from the reverse angle here and attacking something that has the kind of inherent value that the work would need to have not to be declared obscene.

B. Obscenity Law in the United States

In this section, Lawrence Walters turns his attention away from the specific details of the prosecution of Karen Fletcher to the general state of the law of obscenity in the United States. In particular, there are only a few categories of expression that fall outside the scope of First Amendment protection,¹⁰⁴ and obscene speech is one of them. The current test for obscenity, created by the United States Supreme Court in *Miller v. California*¹⁰⁵ back in 1973, was adopted long before the advent of the Internet made possible the dissemination of the Red Rose stories by Karen Fletcher. Under the three-part *Miller* test, it must be determined:

¹⁰⁴ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (providing that “[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, *obscenity*, and pornography produced with real children.”) (emphasis added).

¹⁰⁵ *Miller*, 413 U.S. at 24.

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(a) whether the average person, applying contemporary community standards and taking the work as a whole, would conclude that it appeals to a prurient interest; (b) whether the work depicts or describes, in a patently offensive manner, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰⁶

The aging standard has been criticized by many people, stretching from *Hustler* magazine publisher Larry Flynt¹⁰⁷ to ACLU President Nadine Strossen.¹⁰⁸ Lawrence Walters too has criticized the *Miller* test in the past.¹⁰⁹ In this section Walters critiques the *Miller* test and offers his views on obscenity law in general.

QUESTION: In a March 2006 article published in the *Anchorage Daily News*, you were quoted for the proposition that “nobody knows what

¹⁰⁶ *Id.*

¹⁰⁷ See Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 169–70 (2001) (setting forth Larry Flynt’s viewpoints about the *Miller* test). Alan Isaacman, Flynt’s former attorney and the person who successfully argued to the United States Supreme Court the case of *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), also has criticized the *Miller* test for obscenity. See Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt’s Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001) (calling *Miller* “an unworkable test. I think it’s one that ought to be thrown out, and I think there ought to be either a different standard or no standard adopted in the areas that *Miller* is brought to bear.”).

¹⁰⁸ 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) (noting that the prongs of the *Miller* test are “completely ambiguous, open-ended, and subject to interpretation.”).

¹⁰⁹ See Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 60 (2005) (contending that “[a]lthough a complete reassessment of the local community standards requirement of the *Miller* test is certainly justifiable with respect to all forms of erotic media, the most timely place for such recognition to evolve is in relation to Internet content, which does not exist in any geographic space, and which cannot be blocked from receipt by any particular, local community.”).

obscenity is.”¹¹⁰ Can you explain what you mean by that?

WALTERS: The obscenity test—the *Miller* test—was a political decision, much like the abortion decision.¹¹¹ It was a way to deal with a very difficult topic—the regulation of sexually explicit media. A lot of other tests had been tried in the past and they were equally difficult to apply because, frankly, unless you just take the approach that all sexually explicit media is OK, as long as it involves consenting adults over the age of eighteen, you try to categorize and come up with these nuances. It becomes more and more difficult, the more and more you look at it.

Justice Brennan gave up on the whole damn obscenity thing after decades of being the proponent of obscenity tests because there really is no way to distinguish the obscene from the non-obscene.¹¹² The *Miller* test is one of the most complex and difficult-to-apply tests that the United States Supreme Court has ever come up with. Not only does it involve these three bizarre prongs using terminology that most people don’t use and don’t understand, but it’s based on some incoherent concept of local community standards that simply don’t exist anymore given the advent of the Internet and the homogenization of society.

We are stuck with this test, for thirty-plus years, that separates free speech from contraband and that can result in somebody’s loss of liberty. It’s based on a concept that nobody really understands, nobody knows how to apply and just results in an ad hoc determination by the jury you happen to get on any particular day.

QUESTION: In an article that appeared in June 2006 in the online version of the adult industry news publication *XBIZ*, you stated that “obscenity is an outdated concept—an antiquated way to try to regulate media and human affairs that doesn’t make sense any longer.”¹¹³ Do you still

¹¹⁰ Rindi White, *Obscenity Law Review is Planned for Palmer*, ANCHORAGE DAILY NEWS, Mar. 11, 2006, at B1.

¹¹¹ *Roe v. Wade*, 410 U.S. 113, 154 (1973) (concluding “that the right of personal privacy includes the abortion decision,” thereby legalizing a woman’s right to terminate a pregnancy).

¹¹² See ROBERT D. RICHARDS, UNINHIBITED, ROBUST, AND WIDE OPEN: MR. JUSTICE BRENNAN’S LEGACY TO THE FIRST AMENDMENT 61 (1994) (quoting an internal Supreme Court memo from Justice Brennan during the consideration of *Miller v. California* in which he wrote: “With all respect, the Chief Justice’s proposed solution to the obscenity quagmire will, in my view, worsen an already intolerable mess. I’ve been thinking for some time that only a drastic change in applicable constitutional principles promises a way out.”).

¹¹³ Joanne Cachapero, *Hardcore Content: 1*, XBIZ.Com, June 22, 2006, http://www.xbiz.com/article_piece.php?cat=36&id=15635.

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believe that and, if so, can you please tell us in what ways it is antiquated?

WALTERS: It's antiquated in a couple of ways. The contemporary community standards aspect to the test is outdated. We don't live in a society anymore that, in my view, can literally claim there are these isolated geographic areas that have unique standards that can be divined and applied by a jury to determine a person's freedom. We live in a society that is becoming increasingly generalized and the same across the United States. I do a lot of traveling, and in every city I go to, and back and forth from the airport to the hotel, you see the same chain restaurants and the same malls and the same everything, to the extent where I would be surprised if any community in the United States could claim that it is much different than any other.

We also tend to experience the same things at the same time these days. If Britney Spears has a melt down, within a couple of hours, whether we're getting our input from Fox News, our PDA, our iPod or whatever, we all know about it. We can all relate to the guy across the street that we have never met because we know that he or she knows about it as well. That didn't happen when the *Miller* test was created. There was no simultaneous experiential effect that existed back in 1973. The technology wasn't there at that time. Now we are living in a society that cannot claim to have these unique distinctions. There are some minor variations among certain communities, to be sure, but to try to claim that there is something so inherently different from one community to another that justifies different standards being applied to media doesn't seem to be realistic.

QUESTION: Does this simultaneous experiential effect mean that we should have a national standard, or does it mean that we should scrap the notion of community altogether?

WALTERS: Having that national standard would be, in essence, scrapping the concept of community under the current test. I don't know that there is any constitutional way to segregate media involving consenting adults as being legal or illegal. I believe it should all be legal. Other countries have developed that standard successfully. In fact, sex crimes have gone down in the Netherlands since they adopted their consenting adult test. I don't think there should be any categorization or criminalization of adult media.

To the extent that we're going to try to come up with a workable, divivable, and understandable test for juries, I think that it makes more sense to apply a national standard. Certainly, in the context of Internet cases, it makes sense because all Internet communications are immediately accessible in all places in the United States, as soon as they are posted on the Web. They cannot be blocked from certain

communities. That technology doesn't exist. To hold a Web publisher to the standards of a certain community doesn't seem to be constitutional, and courts have found that to be the case.

The majority of the sitting members of the United States Supreme Court have expressed concern over use of the local community standards test, at least with respect to Internet cases. I think the national standard makes more sense, although I don't think any standard makes much sense, frankly.

As for other ways in which it's antiquated, we use the term "prurient" to determine a person's guilt or innocence in 2007. The Florida Supreme Court, for example, in a case a few years ago, invalidated one of our statutes that prohibited an individual from keeping a house of ill fame.¹¹⁴ They realized that we have gotten to the point in society where that term has lost any meaning it may have once had and certainly should not be used to determine a person's criminal liability. Aren't we there with prurient? Who uses that term in casual conversation or any conversation? All of the tests and surveys we've done on people's understanding of that word have indicated that very few, if any, could properly define it. Of those who could, they couldn't use it properly in a sentence or vice versa. We're talking about doctors and professionals who just don't use or understand the word, and we're using that as a basis to determine a person's liberty and separate protected speech from unprotected speech, which is a very serious matter.

I don't think that the test is workable. At the same time, I would be very concerned about what the Supreme Court would replace that test with, if given the opportunity. I'm not sure that it's the best idea to give them that opportunity—to challenge the *Miller* test in such a way that courts or the Supreme Court would have the opportunity to say, "You know, it's not a very clear test, let's come up with something nice and clear. How about no penetration? Is that clear enough for you?" And I wouldn't put it past them. You have to be careful what you ask for because you might get it.

QUESTION: What would you advise a person who wants to set up an adult Web cam with respect to community standards?

WALTERS: You cannot tailor it to community standards because (A) there is no community and (B) there is no way to block any community if there were one. I can't get into what I would specifically advise a client

¹¹⁴ Warren v. Florida, 572 So. 2d 1376, 1377 (Fla. 1991) (finding the term "ill fame" impermissibly vague and noting that "[s]ince the legislature first adopted the ill-fame statute, both our society and our language have changed.").

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because it would be covered by privilege, but generally the concept is that you have to take a certain risk to be involved in the adult industry. You have to go into it knowing that there really is no way, 100 percent, to protect yourself from somebody deciding that your content is obscene. If there were, large companies would have come in a long time ago and taken over the whole industry. It's because there's this inherent, unavoidable risk that small Web entrepreneurs can come in and profit.

A young lady can set up a Web cam in her dorm room or her basement and make thousands of dollars a month. She's taking a risk that somebody is going to decide that her content is obscene.

You can certainly try to address the *Miller* test in certain ways. You can attempt to avoid bizarre, fetish-type behavior that is different from what most people conceive of when they conceive of treating each other with love and kindness. There are ways that you can try to build literary or artistic value into your material so that when we look at the *Miller* test, and when the material is taken as a whole, we can talk about the words that were spoken on the Web cam or the images that were shown that were built into the presentation. The comments that were generated on the Web page about the presentation and the humor that you are able to work in might help. There are ways to address the serious value portion of the *Miller* test so as to create a better chance.

But what I have to tell all people who are thinking about getting into the industry is that no lawyer can give you a clear sense of what is obscene and what is not. You are going to be taking some risks unless you stick with topless shots and, maybe even under that scenario, there are some U.S. attorneys that might think even that is potentially obscene. Unless you stick with something very tame, you're not going to be able to avoid the stray prosecutor on either the state or federal level who's looking for some votes and who's decided to make pornography the campaign issue of the day and claim that somebody's content is obscene.

QUESTION: In an interview that we conducted in July 2006 at his home in Altadena, California, adult producer Max Hardcore stated, "I think the real obscenity is not what is going on out in the San Fernando Valley, it is what's going on in Iraq, Afghanistan, and Israel – that's the real obscenity."¹¹⁵ Do you agree with that assessment?

WALTERS: That's a politically charged question. I'm not a big fan of the way the war is being conducted in Iraq. To the extent that we're

¹¹⁵ Interview with Max Hardcore, Owner, MaxHardcore.Com, in Altadena, Cal. (July 19, 2006).

weighing obscenity prosecutions versus our current foreign policy approach, the latter is worse. I can't imagine a country incarcerating its own citizens for expressing themselves in a form of media. It's foreign to the concept of an ordered freedom. Yet, we do it on a regular basis. There doesn't seem to be much objection to it when it occurs, and it seems as though people will tolerate others going to jail for this kind of thing—even participants in the adult industry.

Oddly, we hear others in the industry, when they learn of an obscenity case, saying, "Oh well, if they're doing that, then they deserve it." Instead, they should recognize that those producers on the outer fringe absolutely need to be protected in order for them to be comfortable in doing what they do. In the Red Rose case, *Extreme Associates*¹¹⁶ and the Max Hardcore case,¹¹⁷ there were countless individuals in the adult industry that said, "Well, they shouldn't have been doing that" or "I would never do that" or "They deserve it." That's a very dangerous approach to take, yet it's all too common in the industry right now.

C. *The First Amendment and the Meaning of Free Expression*

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."¹¹⁸ Unquestionably, this premier constitutional provision is at the forefront of debate surrounding the protection of adult entertainment. In this section,

¹¹⁶ See *supra* notes 7–13 and accompanying text (describing the case of *United States v. Extreme Associates, 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)).

¹¹⁷ See Clay Calvert & Robert D. Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247, 287–88 (2004) (discussing the prosecution of Max Hardcore in Los Angeles, California, for child pornography based on what Hardcore's attorney, Jeffrey Douglas, called "a very routine movie—four vignettes—and in one vignette a character says, 'Fuck my twelve-and-a-half-year-old ass.' And it's not in the script. Initially, the joke was the actress was dyslexic because it was supposed to be, 'Fuck my 21-year-old ass.' That is what was in the script.").

¹¹⁸ U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

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Lawrence Walters gives his views and opinions on the purpose of freedom of speech and why, in particular, the First Amendment should protect sexually explicit adult content.

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

WALTERS: The goal is to form a building block for all the other rights and freedoms that we enjoy as a free democratic society. The First Amendment provides what has been called the breathing space for all of the other rights guaranteed under the Bill of Rights to the Constitution. To the extent that we are going to have a free society where we can debate, associate, criticize, and have the freedom to live unrestrained by governmental interference into our private lives, our sex lives, our child-rearing, etc., we need the First Amendment to be able to express those rights and to further the democratic ideals of freedom, prosperity and the pursuit of happiness.

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

WALTERS: It's one of the most commonly targeted and most controversial forms of expression. I've often said that you don't need the First Amendment if you're going to show *The Sound of Music*. You need it for the controversial, for the vile, for the offensive, and for the speech that most people, frankly, would object to. That's the idea here. The First Amendment does not just protect what the majority thinks is cool or right. The First Amendment protects what is discriminated against and more. To the extent that the First Amendment protects adult speech, then we can be confident that it will protect more mainstream forms of speech. It provides the outer edge—the envelope—for the rest of the protections for other forms of less controversial media.

QUESTION: Why do you think sexually explicit speech and adult entertainment make for such a huge target for politicians and legislators?

WALTERS: It's fairly simple. This is a vote-getting device. Adult speech is something that people in general—a lot of voters, frankly—can stand up and object to and say, "This is bad and should be under wraps." We have a schizophrenic viewpoint toward sexually explicit media in this country. We want it, and if anybody were to say, "We're going to take it away permanently," there would be a revolt because "Joe Six Pack" likes his *Hustler*. We also want our sexually explicit media to be just under the surface where you can't really see it. That's the beauty of the Internet. It's always readily available, but nobody really knows you're getting it. You don't have to go to a store to buy it. It can be obtained without any kind of embarrassment.

That also illustrates why this is a good political target because it gives people something to rally around, to judge and to condemn. Many people enjoy it, as long as it's not in public. This is a very easy way for politicians to generate political support and constituents. It's just like condemning other difficult and traditionally discriminated-against subjects. This is one that creates a rallying point and a method of generating votes and political power for people.

QUESTION: Do you ever see a time when that would change in the United States when eventually society would become less uptight about it? Do you think that is starting to change now?

WALTERS: It's a common question. My general response is that it's been so effective as a means to control people, to keep politicians in power and to get new ones in power, that I just don't see censorship and the discrimination against erotic speech going away any time soon. We see, in other countries that had been perceived to be progressive, that the puritans are starting to infiltrate there as well. Even in the Scandinavian countries where liberalized sexual approaches had been the norm for quite some time, politicians are moving in with their moralistic, puritanical and censorial approaches, and they're gaining power. If anything, I see this as something that is recognized as an even more effective tool in even more places.

Now, is that to say that the United States won't change? Well, maybe. Maybe we'll become more liberalized and the pendulum will go back and forth. We're seeing a more dangerous trend around the world that censorship is an effective, power-instilling tool. I fear that more and more politicians are going to latch on to that.

III. ANALYSIS AND CONCLUSION

At first blush, it seems puzzling why the federal government would engage in an obscenity battle against a 54-year-old grandmother whose text-only works appeared on a password-protected Website that attracted only twenty-nine, presumably like-minded, member-subscribers. But positioned against the backdrop of the Bush Administration's ramped-up commitment to vigorously pursue obscenity prosecutions—coupled with the fervor surrounding nine summarily dismissed federal prosecutors—U.S. Attorney Mary Beth Buchanan's targeting of what initially might be considered an easy mark, makes much pragmatic political sense. A quick guilty plea would have enabled Pennsylvania's Western District criminal division to post a victory that arguably

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could have helped stanch the criticism of some religious conservatives who have expected greater results in an area of law that offends them deeply.

But that guilty plea didn't materialize, and it is now questionable whether Buchanan and her colleagues at the Justice Department could have ever anticipated that this seemingly small case would have sounded the rallying call to some of the nation's leading First Amendment lawyers—all well schooled in the vagaries of this country's decades-old obscenity jurisprudence. Perhaps it was the subject matter of the Karen Fletcher's work—minors tangled up in sexual and violent acts—that rankled the veteran prosecutor. Indeed, the case caused Buchanan to wonder publicly “why anyone would want to write or read stories involving the rape and torture of children.”¹¹⁹ Despite the heinous nature of the content, this case is likely to boil down to a question of form rather than sexual substance.

The prosecution against Fletcher and her Red Rose stories resurrects the discomfiting notion of government censorship of the written word¹²⁰—no photographs, no drawings, no audio and no video. The only images related to these stories are the mental ones that occur in a reader's mind, and it is on that thought-provoking basis the federal government is banking on spending taxpayer dollar after taxpayer dollar to put this Pennsylvania woman behind bars. It's no longer just about censoring the Red Rose stories because, as Fletcher's attorney Lawrence Walters pointed out, “She frankly has no intention to take this risk again and go back online, even if she could.”¹²¹

As a result, the federal prosecution against Fletcher and the Red Rose stories stands to rest largely on the legal principle of whether text-only expression can meet the threshold set by the Supreme Court in *Miller v. California*¹²² and the broader issue of just how far the government is willing to take the fight against sexually explicit expression. Walters suggested that the *Fletcher* case signals

¹¹⁹ Ward, *supra* note 29, at B2.

¹²⁰ See *supra* note 52.

¹²¹ See *supra* Part II.A.

¹²² See *Miller v. California*, 413 U.S. 15, 24 (1973).

a worrisome path toward censorship of all forms of adult expression. He noted, “The bar is being set so low with a text-only prosecution that anything beyond that, including any graphic representations, is even more at risk.”¹²³ That may help to explain why several high-profile First Amendment attorneys¹²⁴ are devoting their time, *pro bono*, to the case. As Walters observed, “[W]e realized that this one was so important that, even if it put us out of business, we were going to have to do something.”¹²⁵

While Karen Fletcher’s future hinges on a federal court’s willingness to roll back decades’ worth of speech protections and return to proscribing sexually explicit words, the case also provides the lawyers a broader opportunity to challenge the very basis for obscenity law in this nation. As Walters discussed during the interview, most content-based restrictions on speech are required to pass strict scrutiny review.¹²⁶ In this area of law, however, “we have, for all these years, simply assumed that obscenity is bad and that it legitimately can be carved out from First Amendment protection.”¹²⁷ According to Walters, if strict scrutiny were applied, “the government has to show evidence of harm,” which would be difficult to do since “[t]here has not been . . . a single study or set of statistics or other writings that legitimately ties viewing and exposure to obscene materials to any sort of anti-social activity.”¹²⁸

If it were not the basis upon which people are sentenced to prison, the *Miller* test might be considered a quaint throwback to an earlier, simpler time when neighborhoods and communities formed unique bonds out of which arose a collective set of values. That is no longer the case and, as a result, Walters finds that “[t]he contemporary community standards aspect to the test is outdated.”¹²⁹ As he suggested, “we don’t live in a society anymore

¹²³ See *supra* Part II.A.

¹²⁴ See Hayes, *supra* note 63.

¹²⁵ See *supra* Part II.A.

¹²⁶ See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)

¹²⁷ See *supra* Part II.B.

¹²⁸ See *supra* Part II.B.

¹²⁹ See *supra* Part II.B.

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that, in my view, can literally claim there are these isolated geographic areas that have unique standards that can be divined and applied by a jury to determine a person's freedom."¹³⁰

Moreover, the very language of the obscenity test causes confusion among those asked to apply the standard. Walters suggests that the term "prurient" is devoid of any real meaning today. Walters noted: "All of the tests and surveys we've done on people's understanding of that word have indicated that very few, if any could properly define it."¹³¹

Even working within the confines of the *Miller* test, Fletcher's defense team can demonstrate that the Red Rose stories have value because they are the spawn of the creative process. As Walters noted, "One of our arguments is that all written works, especially novels and entertainment media have inherent literary value by virtue of the fact that they are writings and they are understood to tell a story."¹³² Indeed, lest the country return to the likes of prosecuting comedians like Lenny Bruce¹³³ and books like James Joyce's *Ulysses*,¹³⁴ it is time for courts to hold that words, standing alone, can never be deemed obscene.

Setting aside the myriad legal defenses Walters and his team can mount against this prosecution, it is useful to consider the larger question: *Why is U.S. Attorney Buchanan spending taxpayer dollars to go after this woman from Donora, Pennsylvania who shared her sexually explicit stories online with twenty-nine willing readers?* The core political considerations—an ambitious prosecutor operating within the ambit of a Justice Department poised to answer the call of its right-wing base—are fairly evident, but the evolving tastes of the American public that have led to the mainstreaming of adult content is one variable in the obscenity equation that no longer can go unnoticed.

Adult entertainment is popular in this country. Despite the

¹³⁰ See *supra* Part II.B.

¹³¹ See *supra* Part II.B.

¹³² See *supra* Part II.B.

¹³³ See *supra* notes 24–25 and accompanying text (describing the obscenity prosecutions over Bruce's comedic routines).

¹³⁴ See *supra* note 52 (describing obscenity prosecutions targeting several text-only books, including *Ulysses*).

best efforts of politicians who regularly try to put roadblocks in the way of the adult content producers, sales of the various forms of adult media continue to climb.

Industry estimates—though not precise due to the privately held nature of the companies involved—reveal annual revenue figures approaching \$13 billion (approximately \$12.92 billion in 2006 alone).¹³⁵ In 2006, wholesale distribution of adult content through the Internet by studios increased by 40 percent over the previous year.¹³⁶ Direct-to-consumer distribution through the Internet rose by 30 percent.¹³⁷ Internet pay-per-view and video-on-demand licensing was up by 13 percent.¹³⁸

Just this thumbnail glimpse of the growing market for adult entertainment raises serious questions as to why the government is shoring up efforts to prosecute producers of adult content. Is it simply pandering to a vocal, politically charged minority that refuses to recognize that more and more Americans use and enjoy this form of entertainment? Without question, the technological innovations used to distribute adult content—mostly developed subsequent to the *Miller* test—help to ensure that the material is received only by a willing consumer. Accordingly, the time-honored justifications for obscenity prosecutions—keeping the unwitting or underage recipient free from psychic bombardment of sexually explicit fare—are no longer relevant. Nevertheless, in light of the Fletcher prosecution in Pennsylvania’s Western District, it is evident prosecutors ignore the safeguards that have been developed. Buchanan’s crusade against Karen Fletcher, while politically pleasing to her bosses, is costly to the American public and serves no purpose other than to chill creative works in this country. Lawrence Walter’s sobering message about the “insidiousness of obscenity prosecutions” rings true: “[F]or every conviction and prosecution, there are hundred, if not thousands, of

¹³⁵ *State of the U.S. Adult Industry*, ADULT VIDEO NEWS, Mar. 2007, at 152, <http://www.avnmedianetwork.com/magazine/avn/pastissues/March2007.html>. (providing comparative revenue figures for the adult entertainment industry in the United States).

¹³⁶ *Id.* at 156.

¹³⁷ *Id.*

¹³⁸ *Id.*

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uncreated works or works that end up in the trash bin out of fear of prosecution and its chilling effect. That's where the real value would come for the government with a conviction in the *Fletcher* case."¹³⁹

¹³⁹ See *supra* Part II.A.