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00:00

Hello, I'm Lawrence Walters, and welcome to this LexVid presentation on the constitutional restrictions on erotic speech under the First Amendment. I'll be your presenter today. And LexVid asked me to present this content seminar to you, as a result of our involvement in concentrating on first amendment law, and in representation of the adult entertainment industry. If you'll go to slide two, this introduction slide talks about some of the goals that I have in this presentation and gives you some background on our firm. I've been representing first amendment interests of both the adult entertainment industry and others for over 20 years. And we've handled cases at all levels, including trial court, and appellate court levels and a few cases that the United States Supreme Court as well. So I hope to give you some perspective, at least my take on the erotic entertainment issues and on how society has evolved and how the legal issues have evolved in this particular practice field. This presentation will involve a frank discussion of issues of a sexual nature. So if you are easily offended by such issues, this is not the right presentation for you. With that disclaimer done, let me get into some of the goals that I have for this presentation. And what I hope that you'll be able to take away when we're done. Initially, we'll discuss some of the general first amendment issues kind of the overarching first amendment principles that relates to adult entertainment and restrictions on erotic speech. We also hope that you'll be able to tell the difference between what kind of porn is legal, and what kind of porn is illegal. Sometimes it can be a little difficult to tell the difference. And we'll get into what kind of expressive activity is actually protected under the First Amendment? Is it just words is it movies, books, video games, we'll talk about those issues. And we'll also discuss how the internet in particular has impacted the evolution of the legal issues. And on the legal climate. Pertaining to erotic media. There have been some fairly dramatic impacts generated by digital entertainment and the advent of the Internet. And we'll discuss those. I'll tell you about some of the recent obscenity prosecutions, including a few that we've handled in this firm in particular, and we'll get into issues involving

children, minors, under age content, protection of minors from material that is deemed to be harmful to minors. Then we'll wrap up with a discussion of censorship, and the evils and difficulties with censorship particularly in a free society, and make some recommendations as to how the country and the democracy that we live in should address issues with erotic entertainment going forward. Unfortunately, we won't be able to take any questions during this presentation since it's pre recorded. But if anything that we discussed here, sparks your interest, or if you have any questions about any of the cases that we discussed and that I discussed here, please feel free to contact me through my website, which is first amendment calm. If you turn to slide three, go to slide three. I'm often asked how did you get into this field? How did you end up representing adult webmasters and first amendment interests? And the the answer involves a phenomenon known as the video store wars. This occurred in the 1980s and was essentially a crackdown on Adult video stores, Mom and Pop small video stores that were popping up all over the nation that had a back room, where adult video tapes were then available for the first time to many consumers. The advent of the VCR and videotape changed everything in terms of the availability of adult content. In the past, somebody had to go to a movie theater, usually some rundown, back alley movie theater or buy some eight millimeter films in order to be able to view content of a sexually explicit nature. With the advent of the Internet, people could for the first time usually watch an adult film in the privacy of their own home very inexpensively. The production costs and the distribution costs associated with erotic material also was dramatically reduced. So the content became widespread available and more readily available to the average consumer. And at the same time more of it was being produced given the drop in production costs.

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So how does that involve me as a lawyer in Daytona Beach, Florida. I was practicing in fairly mainstream areas of the law, banking insurance etc. But we had a state attorney who decided to declare war on porn and clean up the adult entertainment that was available in the city of Daytona Beach in the 1980s, late 80s. So he decided to start arresting the mom and pop video store owners and parade them out in front of the 11 O'Clock News in handcuffs for selling or renting adult videotapes. He also hand delivered letters to all the video stores, through the sheriff, Sheriff deputies demanding that certain material certain films be removed from circulation. This didn't sound right to me as a lawyer, although I didn't have any expertise in first amendment issues. So I offered my services to the people who were being prosecuted, I believed to be unfairly on a pro bono basis. And I represented a few of these folks in these trials. So my first jury trial and an obscenity issue was in the late 80s, early 90s. And it involved cases where the films that were being prosecuted were things like deep throat behind the green door, the double and Miss Jones movies that at that time had been around for 1520 years already. And we're a fairly well established and fairly well accepted in the distribution chains. But at that time, the producers of those films were very concerned that somebody was now prosecuting video stores for distributing

those films. So after, you know long story short, after litigating these cases, and winning some acquittals and getting the rest of the charges dismissed by actively litigating against the the prosecutors who are bringing these charges, we ended up creating a grassroots anti censorship campaign in the city of Daytona Beach, very effective one, whereby the and just about every other car in the city had a no censorship bumper sticker. This was not unnoticed by the producers of adult films who again, were very concerned that a conviction for something like deep throat in the late 80s would be extremely problematic, because the kind of content that was being produced at that time in Hollywood and Los Angeles was much more extreme, much more hardcore, so to speak, than what had been produced in the 70s, like deep throat or behind the green door. So they watched those cases and ultimately saw how effective we were in beating the prosecution back and creating the grassroots anti censorship campaign. and thereafter was asked to do more work with the producers from Los Angeles. Now, as a result of the widespread availability of erotic content, the prosecutors at the state and federal levels became very concerned that the adult entertainment industry was becoming extremely profitable, extremely well managed, very corporate, and they felt they had to get control over the widespread distribution of erotica in the late 80s and early 90s. So they began crackdowns on the video store operators as well as the distributors such as Adam and Eve, and some of the producers out in Los Angeles. So if you turn to slide four, this slide gets into some of the the general principles, the overarching first amendment principles that we'll be discussing when we talk about restrictions on erotic entertainment. What does the government use as a basis for restricting erotic speech or adult content when they want to put somebody in jail for making a film or selling a videotape? Well, we start with the the overall concept that sexually explicit speech is presumed to be protected by the First Amendment. That means that standard fare pornography enjoys first amendment protection, as does any other film, book, movie, magazine, etc.

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There are a couple of categories of what's called unprotected speech, or the courts would say it's not speech at all. It's something else that's outside the realm of First Amendment protection. Those two categories are number one obscenity, and we'll talk about that and how do you determine if something is obscene? And number two, child pornography under age materials involving people under the age of 18. Now, again, adult pornography is presumed to be protected. The Supreme Court has said as much in several cases, including Ashcroft, the ACLU, FCC vs. Pacifica, etc. So that's a fairly well established concept. However, if you display or sell or distribute material to a minor, that's yet another category of unprotected or restricted speech, in that there are many statutes that prohibit the distribute distribution of material that is deemed to be harmful to minors to minors. In other words, hardcore pornography falls in the category usually of something that is harmful to minors and therefore cannot be legally sold, distributed and rented, etc. to a minor that we'll see, this gets very complicated when it comes to trying to restrict adult websites from offering adult content to a widespread audience of varying different ages, when

there's no effective way to identify how old these people are, that are accessing the website, but for now, it's, for our purposes, there's these two categories of unprotected speech, obscenity, and child pornography. We get into again, and decency laws when it comes to harmful to minors. And we'll talk a little bit about violence, whether or not that can result in a loss of First Amendment protection. Alright, so some of the specifics. Now, when we talk about presumption of protection, turning to slide five, the presumption exists with all content, even sexually explicit content. And exceptions are again, obscenity and pornography. But there's some issues with possession of both obscenity and pornography that we should discuss, because it's not as simple as saying that this content is illegal under all circumstances. So for example, obscenity, illegal to sell it illegal to distribute it, illegal to rent it, illegal to transport it, but not illegal to possess it in your own home. Under Stanley versus Georgia. United States Supreme Court case from 1969, it was established that individuals have a privacy right under the right of privacy found in the Constitution, to possess obscene materials, even obscene materials in the privacy of their own home. So the government is not allowed to obtain a search warrant, for example, to try to search for obscene materials in someone's home, because you have a constitutional right to possess those materials. Now, how do you get the material there if you can't transport it? If you can't buy it, if you can't sell it, etc? That's another question. I suppose maybe you can make it in your own home. But if you get it there without getting caught, that means that you then have constitutional right to possess it.

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Now, similar issues with underage material child pornography, can you possess it? Well, no, you cannot under state and federal law, primarily state law when it comes to possession, you cannot possess even child pornography. However, there are issues as to what constitutes possession, particularly in the digital age, where files can reside on a computer that you've never seen. files can be downloaded in bulk, such as zip files, some of which you've never seen. But yet, it ends up on your computer, sometimes viruses, deposit files onto computers that were never asked for were never known, never requested. And thus, we have issues with what constitutes possession when it comes to child pornography. Some states, and there is a split in decisions on this issue. But some states have held that mere possession or mere residence of a file on a computer, without the individual defendant knowing that the content is there is not possession, this concept of constructive possession, it's on your computer. So you should know it's there. That doesn't necessarily apply to child pornography in some states. However, other states have found other courts have found that if the material is there, and it's your computer, and you exercise control over that piece of property, you're stuck with whatever is there, potentially an unfair assessment, but also found to be necessary by the courts because of the difficulty in proving whether or not an individual defendant knew a particular file was there. As you can imagine, many defendants in child pornography cases will claim I didn't know it was there. So proving that an individual actually solicited asked for knew about a file residing on a computer can be a challenge for the prosecution. And so cases have gone both ways on that issue.

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Okay, turning to slide six. This is entitled more than words, and the concept here is that the First Amendment protects more than words. It protects clearly books, which consist of words but also movies, which may or may not contain words. It protects expressive activity, such as flag burning, new dancing, both of which have been specifically found to enjoy first amendment protection even though there's no words exchange. The concept of burning a flag can be very expressive, and a message a clear message can often be delivered by the person burning the flag to the surrounding individuals watching. Same with new dancing, the courts have found that a message of eroticism is conveyed between the new dance And the audience and therefore the content, the conduct enjoys first amendment protection, just as would a book or a movie or a magazine. Now, there are other forms of activity that have been found not to be expressive. So for example, gambling, gambling the actions of gambling even though a gambling machine, or gambling game may convey some information like whether or not you got a straight flush in a video poker or whether you got three cherries on a slot machine, that's certainly some information being conveyed by the gambling game to you. That information can be quite exhilarating, sometimes and quite depressing. Other times. However, the courts have found that gambling games do not involve a message, at least one that can be protected by the First Amendment. As you can imagine, the courts have struggled with this concept. When the First Amendment reads, Congress shall make no law pertaining to the freedom of speech. Well, if no law means no law, then there should be no law restricting free speech activities. However, the courts have played an intellectual game, essentially with how to treat activity or content that they do not want to afford first amendment protection to such as child pornography. Clearly, child pornography, in the form of a movie or a book or a magazine, is the same kind of media as content that depicts adults engaging in sexual activity. However, the courts have declared that this content is not protected speech. Okay, well, it looks like speech, but for societal reasons, we've decided that we're not going to afford first amendment protection to child pornography, to gambling machines, and other forms of speech that the government doesn't like, essentially, there haven't have not been any new categories of unprotected speech created since the child pornography decisions of the early 1980s. We'll talk a little bit about that. But the this current Supreme Court is very reluctant to create any new categories of unprotected speech. So at this point, we're stuck with things like obscenity, defamation, child pornography, national security threats, verbal acts, such as assault, solicitation of prostitution, which is a form of verbal act or communication of a message. But the courts again, have decided we're not going to give you first amendment protection if you engage in these types of verbal expressive activities.

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Now, what about production of erotic material? Is that a form of protected activity? Are you allowed to claim first amendment protection? If the government comes in and says, Hey, wait, you're paying this individual to engage in sexual activity for money that looks and sounds like

prostitution to me, or solicitation to commit prostitution? That's been a very difficult question for the adult entertainment industry, and for some courts. However, the two cases that have directly confronted that issue, one in California and one in New Hampshire, have both held that the first amendment would prohibit the imposition of criminal liability based on a prostitution statute for production of erotica. So the producers of adult films in California cannot be prosecuted for prostitution related offenses, based on how the courts have interpreted the California prostitution statute and the related first amendment concerns. Essentially, the courts have said, this would be an end run around first amendment protection. If you try to impose prostitution liability on producers of adult entertainment. You can't get around the First Amendment protection afforded to adult entertainment or rock media by simply labeling its production as prostitution. This gets very difficult in cases where the production is itself produced. And what if you simply go to a bad part of town and turn on your cell phone and film yourself engaging in the hiring of somebody for sex for money, and commit an act of prostitution, but happen to have your cell phone recording it at the same time? Is that production of erotic material considered to be protected by the First Amendment? can you avoid a prostitution conviction by doing that? Well, the answer is probably no. We don't know for sure the the courts haven't really addressed that specific issue. But it appears that the courts will afford first amendment protection to legitimate media production of adult entertainment. But perhaps the rules could be different to the outcome could be different if, if the content is produced in a less formalized way. As of now, again, we only have two states that legalize the production specifically legalized production of erotic content California and New Hampshire. The reason that the adult entertainment industry kind of grew in California originally was as a result of this first decision people versus Freeman, where the court found that cannot use the prostitution laws to prohibit adult entertainment production. And thus the the industry fleuriste flourished in California as a result of that decision. Later, much later, a decision similar to that came out in New Hampshire. As far as I know, there isn't a big adult entertainment production industry in New Hampshire, but there are some and we believe that constitutional lawyers that handle first amendment cases believe that the cases would come out the same in other jurisdictions, if the issue was forced. Now, one of the reasons that you don't see a lot of these cases is prosecutors are hesitant to bring up the issue of production of adult entertainment and forced litigation of that issue in the criminal courts out of concern of opening up the next state for clear legalized production of adult entertainment. If you litigate that issue, and the courts are forced to decide, well, you know, the state of Florida or Ohio is now open field for adult entertainment. That could be problematic politically for for prosecutors, but we believe the outcome would be the same. Now, as far as the scope of constitutional protection, we know it applies to verbal acts such such as flag burning for expressive activity, such as New dancing, it applies to media. However, obscenity laws have been applied successfully to even written words, even books, or websites containing nothing but text or cartoons, such as comic books. So the concept of what is obscene is very broad and can apply even to what would otherwise be clearly expressive media. And we'll talk a little bit more about that. Turning to slide seven. This is kind of a footnote on the issue of violent speech. Can violence ever result in the loss of First Amendment

protection in media? is a violent video game or a violent book or film

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sufficiently violent to lose first amendment protection? The answer is clearly no. Under existing first amendment jurisprudence, there have been a couple of recent cases that I referenced in slide seven, Brown versus entertainment Merchants Association and us versus Stevens Brown, involving adult and sorry, brown involving violent video games, and Stephens involving animal cruelty videos. In both cases, the United States Supreme Court has ruled that violence is not sufficient to trigger the loss of First Amendment protection. We had the opportunity to submit amicus briefs in both of those cases on behalf of the First Amendment Lawyers Association, and argued in those briefs that the court should not create a new category of unprotected speech triggered by violence, that violence has never been, throughout our history, a basis for criminalizing media, stories, movies, etc. Now, whether that's right or wrong, one can debate to the ends of the earth. There is now currently a basis for losing first amendment protection. For for erotic speech, people engaging in lovemaking activity can result in a movie or a book being deemed obscene, whereas people slicing each other to bits could never result in the loss of First Amendment protection. Again, from a societal perspective, one can debate whether or not that's the right result, but it is currently the status of First Amendment law in that area. There's, I suppose a related question as to whether or not violence mixed with sexual activity is problematic is illegal, etc. Now important to note that when we talk about obscenity and we'll get to the details in a second, but no one particular act could ever be deemed to be obscene. So in other words, tying somebody up and engaging in sexual activity cannot on its own trigger, a finding of obscenity. obscenity has to be deemed and and evaluated based on all the surrounding circumstances and the value of the work etc. So, nearly mixing violence with sexual activity would not automatically result in the content being deemed illegal or obscene. However, under the federal sentencing guidelines, mixing violence with sexual activity, resulting in any expressions of pain or discomfort in the material can result in a fairly significant sentencing enhancement. If you are found guilty of obscenity, so on its own violence cannot result in media being declared illegal. However, if you happen to be prosecuted and successfully convicted of obscenity, then you're in trouble if you have material that involves violence mixed with sexual activity, because you can end up getting a more harsh sentence

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are turning to slide eight. This is where we're going to get into kind of the details of the obscenity analysis. So obscenity is governed by the Miller test. Of course, you know, everybody's fall back when they talk about obscenity is I know it when I see it. That's not the test clearly. And in fact, the full comment is, I know it when I see it. But this is not it. And that's often overlooked in these and the reference to that particular quote, by United States Supreme Court Justice. obscenity is

actually determined by a fairly complex test known as the Miller test, three prong test, and I have set them forth on slide eight. And basically what you're talking about whether the average person applying contemporary community standards talked about that in a second, would find the work taken as a whole appeals to the prurient interest in sex, nudity or excretion, whether the work depicts or describes in a patently offensive manner, material that is specifically defined by state law, meaning essentially sexual conduct. And then finally, whether the work taken as a whole lacks literary, political, artistic or scientific value, so called lapse value. And that's that last prong is kind of a savings prong. In other words, you can meet the first two parts of the test and still be saved if the work is sufficiently valuable. If it has sufficient political, artistic, literary or scientific value, then it doesn't matter if it's patently offensive. It doesn't matter if it appeals to the prurient interest. Now, what are these things mean in the first place? What is prurient interest? What is patently offensive? Those issues have been litigated over and over again, in numerous cases, arguments have been made by many defendants in obscenity cases that this is a nonsensical test. This is absurd. nobody uses words like prurient patently offensive when trying to determine whether media is legal or not. How can any lawyer advise a client? How can any person who just simply wants to know whether they can purchase or renter or sell adult content? How would they know whether the material is present or patently offensive or has serious value? those terms are not sufficiently clear and discreet, to be able to separate legal from illegal erotica. those arguments have been roundly rejected over and over by the courts. Frankly, they're they're absolutely true. They're absolutely accurate. And in any other context, the statute or the test or the law would be struck down. But given the political sensitivity, and societal sensitivity to sex, our kind of underlying prudish streak that we have in the United States of America, we allow the first amendment to be compromised. In the obscenity arena, we allow a test to exist, that would never exist in any other context. What we're left with is a test that is difficult for defendants to deal with, but equally difficult often for prosecutors to apply. It is a vague test. It's one that can be argued many different ways. And that can be good from a defendants perspective, if someone is charged with an obscenity crime, because it gives them all kinds of different avenues to argue whether or not a work has value, whether or not the the work appeals to a pre an interest whether or not the jury even understands whether what prurient means and what patently offensive means. In a number of cases, we've submitted polls and survey results, indicating that most people in the community can't even define the word prurient, let alone use it in the sentence correctly, we've showed that there is no such thing as a community standard in a particular geographic jurisdiction. And we'll talk about that in some of the cases that we we get to but the The bottom line is the Miller test is the law. It resulted from a case in 1973. Miller versus California that set forth what the law would be henceforward for determining whether material is legal or illegal. Turning to slide nine, I set forth here some of the recent federal obscenity cases that have gone on in the last decade or so the first of which is United States versus extreme associates. This is a case involving a federal prosecution of a husband and wife for creating material that mixed horror movie elements with sexual activity. So you know, think of a slasher film with an adult entertainment film mixed together, the government didn't like it. There were a number of of

biographies made of this individual and frontline for example, did a lot On piece on his production methods and his view on first amendment rights and so forth, during which he essentially challenged the government to try to come after him and was willing to take on a First Amendment fight. Unfortunately, for him, and his wife, he lost that fight in the Western District of Pennsylvania, when he was prosecuted, he was actually taken extradited from California and taken to Pennsylvania for prosecution as a result of his mailing various pieces of material into that district and making a website available to people in that district. And that's an important point in some of these obscenity cases, the government can essentially pick their venue and decide which community they want to apply community standards based on perhaps the conservative nature of a particular community, or based on a religious bent in a particular community. It's an It's a unique facet of the federal government, in obscenity cases that they're allowed to the prosecutors are allowed to pick whatever venue they want, so long as they can convince somebody to maybe send a videotape or mail a videotape to that location. And in some cases, argue that even making the website content available in a particular location is sufficient basis for venue in a chosen jurisdiction.

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that occurred

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here. The venue was Western District of Pennsylvania, Pittsburgh, Pennsylvania, husband and wife were extradited there. They were prosecuted. The defendants litigated the fact that the current obscenity test is unworkable, unintelligible vague, and a violation of due process. The Trial Court rejected those findings, those arguments after some lengthy motions, and back and forth on appeals and so forth. The argument that the the trial court ultimately used to reject those those claims was the fact that the trial court is stuck with the law as it is. The Miller test is the law, whether we like it or not, because the Supreme Court said it is, and the trial courts can't change the law and reject the Miller test just because society has evolved just because the Internet has come about, or just because we've grown up. Now, we have to wait for the Supreme Court to act. And by all indications, they're not going to act. And they're perfectly happy with the existing Miller test for determining whether a material is obscene. So ultimately, the husband and wife were sentenced to prison in that case for a period of time. And then you came up with the next case, nine states versus little max hardcore is his stage name prosecuted in Florida, in the Tampa, Florida area, went to a jury trial convicted and the type of material was essentially fetish, humiliation type material, males, humiliating females, in particular, Paul Liddell acting in the movies as well as being the producer and the defendant. So you had a situation where the jury would see the defendant sitting in the defendants seat, and then seeing him up acting in the movie and seeing him do things on camera that they didn't like perhaps, and that ultimately

resulted in his conviction and a sentence two years in prison. Ultimately, he was led out and is believed back in the adult entertainment industry, but served his time and learned a valuable lesson that obscenity cases still exist. People are still putting cages for making movies involving adults that adults want to see. The next case was United States versus Stagliano. This is another federal obscenity prosecution in the District of Columbia, Washington DC. This could be the last federal obscenity prosecution. It may not be but they're by all indications it doesn't look like the government is interested in prosecuting obscenity anymore, at least the federal government, Mr. Stagliano made a series of adult entertainment tapes and DVDs and websites. Again, sort of fetish oriented but not very hardcore. They were the the individual was prosecuted. He hired a skilled defense team. And they litigated The case went to trial and ultimately the court dismissed all the charges. It was a tremendously embarrassing loss for the Department of Justice. And that combined with the advent of the Internet, and with the evolution of societal mores, as to adult entertainment, it looks like the government has had their fill of obscenity prosecutions. They have since disbanded the obscenity prosecution Task Force and are no longer devoting time, effort or energy to prosecuting any known federal obscenity cases. This has partially resulted in various websites And magazines declaring the end of the war on porn. We shall see, there are still state level cases going on here and there. But from a federal prosecution standpoint, it looks like

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obscenity case prosecutions are over. There have been a few Florida obscenity cases. Again, for anybody who's interested in the details on some of these cases on slide 10,

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I'd be happy to talk to you about them. But in the interest of time, merely at this point mentioned that many of these cases arise from conservative jurisdictions such as Polk County, Florida, or Pensacola, Florida, where the prosecutors believe that their particular jurisdiction has a conservative viewpoint and conservative community standards when it comes to erotic material. And as a result, what might be considered fine in other parts of the country isn't considered fine here in Polk County, or Pensacola or the panhandle or these various rural jurisdictions. Now that can be problematic when it comes to website content. Because website operators in all the cases here that I referenced, these are all website operators on slide 10, you can't control necessarily who receives the material. You can't block every individual in a particular city or county and ensure that they don't get access to material once it's put on the worldwide web. That's why it's called the worldwide web is because everybody gets access to it. But if you let one small jurisdiction, like Polk County, Florida, dictate for the rest of the world, what is appropriate for the internet, that becomes problematic. It's known as a hecklers veto in the law, and is an extreme constitutional problem, because you are wiping out protected speech for the rest of the world based on one small community's decision that they don't like the speech. And on slide 11, I talk

more about the the impact of the internet on the evolution of some of these legal issues, the availability of adult entertainment erotic material on the internet, it has changed a lot when it comes to the obscenity analysis when it comes to the interest in prosecuting obscenity crimes. The widespread availability has resulted in juries being much less willing to convict in obscenity cases. Most jurors have been exposed to adult entertainment from the time that they were 18 if not before that, and many of them have frankly produced some of it themselves through sexting or sharing risque photos with with boyfriends, girlfriends, etc. So the concept of pornography being an evil, sinful, organized crime type activity has really gone by the wayside in recent times, largely as a result of the advent of the Internet.

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And the concept of adult entertainment has frankly gone mainstream. On slide 12, I mentioned a couple of the specific legal issues

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that have resulted from the advent of the Internet in the digital age. In particular, I mentioned that Attorney General Eric Holder has disbanded the obscenity task force as I mentioned, it used to exist for the purpose of prosecuting obscenity cases Well, it exists no longer and the department has chosen to focus on child pornography or underage content cases. There's also this difficulty I mentioned with applying the Miller test by the prosecutors, as difficult as it is for defense lawyers to understand and deal with and in litigate, it's equally difficult for the prosecutors and what the Stagliano case, that was the the significant loss for the government. It may be that they've lost her appetite for prosecuting obscenity cases as well. The concept of what a community is, is becoming very difficult, because there is no geographic tie anymore between people that happen to live in a particular neighborhood or city or county. This is a essentially a random assembly of people as opposed to people who have decided to live in a particular area for a particular reason and all know each other. And that concept is probably gone up with the 1950s. And at this point, there's a lot of transient communities. And many people have no idea who their neighbors are, but they know who their Facebook friends are. They know who their social media friends are much more so than they know the person next door or across the street. So the concept of of trying to claim that a particular geographic community has a well defined established viewpoint on adult entertainment is utter nonsense at this point. And the courts are starting to understand that at least one case of has found that when you're dealing with internet content, you cannot use the concept of a local community. You have to use nationwide standards, at least in order to fairly apply the Miller test that with donations to groups like morality and media that was banging the drum on obscenity prosecutions. The donations have been down significantly to groups like that. feminist organizations have taken a more educational approach as opposed to demanding that people be prosecuted, they've taken to educating people as to their point of view. So with all that,

the the war on porn, so to speak is diminishing if not dissolving. Slide 13 talks about child pornography under age material, very serious crime at both the state and federal levels. There are a number of statutes at the federal level and the United States Code that prohibit the receipt, transmission sale, distribution, production, etc. of child pornography. Now, again, mere possession of child pornography is not going to be illegal at the federal level. Because of the distinction between state and federal jurisdiction. There's no basis for criminalizing mere possession of child pornography. At the federal level, it has to involve some kind of interstate commerce, but just about any kind of downloading of underage material from the internet would involve interstate commerce. So people can be prosecuted for receiving child pornography. In most cases, if the material is found to be in their possession. What is and what is not child pornography can be a difficult determination in some cases. In some cases, it's fairly obvious fairly disturbing. In other cases, it's it's an unsettled question. So for example, in the context of nude modeling, a 16 year old models, fashion clothes and lingerie, in some cases is nude. Is that child pornography? Well, it's unclear. The determination of that question would be made on application what's called the doused factors, United States versus dowsed Southern District of California case in 1986. That set forth a number of factors to be considered. If a person is charged with child pornography, things like is the person clothed in in clothing that is unnatural for his or her age is the setting inappropriate for that person's age as the focal point on the genitals or pubic area of the individual is the individual giving sexually enticing or knowing appetite glances for the viewer is a she or he trying to entice the viewer with the pose those kinds of things can be considered under United States versus doused and determining whether or not a particular image or video is in fact, child pornography. Interestingly, even clothed pictures, or images or videos of underage individuals can be child pornography, if the focus is on the genitals or pubic area of the individual. And there have been some cases for example of pedophiles cruising waterparks, and taking pictures of girls going down slides and focusing on the bathing suit crotch area and labeling that as child pornography successfully. Now, do you have to know that the person is under age if you are prosecuted for child pornography? common question in the underage content cases?

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Generally the answer is no. But there is a United States Supreme Court case that I referenced here us vs excitement video that talks about the requirement of what's called scienter or knowledge of the under age character of the material. And essentially what the court did is look at the federal child pornography statute and read into it a knowledge requirement even though it's not there. The court said to be fair, and to comport with due process. And given the fact that child pornography laws separate constitutionally protected material from illegal material, we have to have some buffer some constitutional protections so that people are not inadvertently swept up in criminal prosecutions based on possession or other activities related to underage material. As a result, the federal statute has a knowing element read into it by the United States Supreme Court, in all cases, except for the original producer of child pornography. In that case, the original

producer can be prosecuted even if he or she did not know that they were creating child pornography. The reasoning being that that person that producer has the last opportunity to stop the creation of the child pornography and its subsequent distribution through potentially infinite channels. Looking at slide 14, the other concept that we addressed with content that is restricted, where the First Amendment is impacted in some ways with indecency in decency laws, content that is deemed to be harmful to minors. The material itself does not lose first amendment protection. However, its distribution to minors can be illegal in certain circumstances. The first attempt to do this on the internet was the communications decency act of 1996. Essentially, a law signed by President Clinton that said, any indecent material on the internet is automatically deemed to be illegal and a violation of federal law. A lot of material on the internet these days, the law was immediately challenged. A number of groups that were threatened with prosecution, such as sexual education websites or Breast Cancer Awareness websites took to the the courts to challenge this law, because, number one, it was impossible to tell what's decent versus indecent based on the descriptions and definitions used. And secondarily, the law was tremendously overbroad, and that its swept in to its regulatory field. All kinds of websites that were not intended to be labeled criminal or illegal. Again, the the sex education sites for example, yet the definitions are so difficult to create in any law that relates to indecent material that almost by definition, almost By default, the definitions are going to be overbroad, and the courts have essentially ruled that this case went up to the United States Supreme Court unanimous decision nine nothing determining in 1997 that the communications decency act and decency portion of it was illegal, and it was struck down. The next attempt to regulate harmful materials on the internet was the Coppa law 47 USC 231, a one which essentially made it a crime to operate an adult website without age verification, that's some form of identifying the age of the person that's receiving the material, such as use of a credit card, or some other electronic device that prohibits their children from accessing the site. Again, while I was challenged a lot of the same grounds a lot of the same reasons, overbroad, it's impossible to tell what's an adult website and what's not. But there's no way to identify what the ages of the individuals that are receiving the adult website material. And essentially, what you're doing is you're scaring everybody on the internet into publishing material that is only available for children that's only proper for children, you're reducing the level of discourse on the internet to that which is best for the playground or the sandbox, according to the courts. And as a result, the law was struck down. If you look at slide 16, you'll see, you know, the mess there of litigation, back and forth, back and forth, the United States Supreme Court to the Third Circuit to the Eastern District of Pennsylvania, the courts wrestled with this thing back and forth, heard lots of expert testimony about the inability to identify the age of individuals on the internet. And ultimately, Third Circuit concluded this law is doomed struck it down. And the United States Supreme Court declined to review the case. That means the law was struck down permanently. Slide 17. Here, we talked about some of the efforts to regulate adult material with regard to minors,

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it's very difficult, generally to identify, again, the age of the audience on the internet, but it's getting easier, it's getting better. We can for example, now we have GPS identification, where we know exactly where the person is, we have fingerprint scans on a lot of computers that can identify the fingerprint of the individual using the computer. If it's not an adult that's recognized by the fingerprint. That's that may be one way through these biometrics to identify who was actually using the computer, retina scans and all kinds of things, pictures of individuals that can be displayed before they actually use the website. All these are potential options in the future. They're not widespread. Available at this point. However, they're being used more and more to identify the age of individuals on the internet for lots of different age restricted purposes tobacco, gambling, alcohol and erotic material. The producers of erotic material are required to comply with a very specific age verification statute called section 2257. It's 18 USC 2257. And that law requires producers to identify the the ID of an individual look at it, make sure that individuals over the age of 18 maintain records in a very specific way by each performer. Make sure you keep a list of all the websites and URLs where that performance content is distributed on the internet, record all the stage names, all the fake names, all the real names of the person who is tied to that ID and make those records available for law enforcement for federal Attorney General agents at any time during your normal business hours. Some pretty stringent regulations on the adult entertainment industry when it comes to producing content. Many have argued that these laws are overly burdensome, violate the First Amendment etc. There are some problems particularly where a producer uses their home as their place of business. Should the government be able to kick in a door and demand to see papers and documents anytime just because you're making an adult film the scope of the law also probably applies, at least on its face to the production of amateur material, husband and wife create a movie of them lovemaking one night, all of a sudden, they're required to get a bunch of IDs and maintain records and open up their house to the government to look at the age records at any time. Problems with the law definitely being challenged by the free speech coalition, recent oral arguments and we're awaiting a decision on the legitimacy of Section 2257. The states have also tried to pass laws to protect minors, many of the states have tried and failed. You'll see on slide 18, a list of all the cases at the state level, where states have tried to pass essentially a version of the communications decency act to prohibit any indecent communication on the internet. It fails every time not only only because of the First Amendment concerns, but also because of the dormant commerce clause problem.

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And there I mean, that websites, if they're going to be regulated at all need to be regulated at the federal

level, not individual states. Why? Well, websites are available throughout the entire nation. In fact, throughout the entire world, each state cannot apply its own set of regulations to a website. In other words, you'd have a hodgepodge of individual state regulations that could be conflicting, could be difficult to understand could be problematic to be applied to websites that don't do business in certain states or block certain states. All kinds of problems with applying state level regulations to the internet. So the courts have said, the internet is a federal realm, you can only apply federal law in most cases to regulating the internet under the dormant commerce clause. There have been some exceptions. For example, state level spam laws, so long as they don't conflict with the federal law have been allowed to slip through under commerce clause challenges, but in general, only the federal government and the Congress can regulate the internet. Alright, a few final thoughts here on the final slides, slide 19. I mentioned the chilling effect. The real problem with with any law that prohibits or restricts erotic speech is that it scares off other creators of protected speech out of fear that they might be swept up into the realm of this law, known as the chilling effect. The mere existence of a law could prevent people from saying things could prevent people from making movies, making jokes, making magazines, websites, etc. And this is a significant first amendment concern. It results from laws like the 2257 law, the requirement that you get a bunch of IDs, if you're going to make an amateur home videotape may scare off people into not making those tapes. Well, we can debate whether they are good tapes or bad tapes, but they're first amendment protected media. And as a result, people should not be refrained and discouraged and intimidated from creating expressive works. Slide 20 talk about censorship internationally, we have a number of countries that ban erotic media or certain forms of it such as Iceland, based on feminist concerns, the EU, the UK, based on concerns with regard to exposing children, the UK passed a very restrictive law with regard to fetish type material that went into effect recently. And all of these laws would be likely unconstitutional in the United States, but other countries don't have a First Amendment. So they don't have the same level of protection. Yet websites are available in all countries, generally at the same time. So the ability of these other countries to impose their laws on us webmasters is going to be an issue for the future. But again, results in censorship and frankly, censorship has never worked, that generally only spurs interest in material as opposed to preventing people from accessing it. Slide 21 a couple of my favorite quotes on the evils of censorship, one from Ray Bradbury, one for pot from Potter Stewart, both kind of saying what the concerns are with censorship in general. And finally, to wrap up some conclusions on slide 22. The bottom line is that erotic material and adult entertainment have been ingrained in the mainstream of society. At this point, the usage of the internet is soaring on both PCs and now mobile tablets and smartphones. People are connected, they have access to information, they have access to erotic material, they see it they have become tolerant and accepting of it generally. And societal mores and attitudes have changed from this being a a sinful activity, an activity that should be prosecuted by the federal government in the state government to Oh yeah, that's there. We know it's there. Move on. It looks like federal obscenity prosecutions have come to a halt. Some have declared the war on

porn to be dead. Probably a good thing from the standpoint of misuse of tax dollars. But from a First Amendment standpoint, a free society should look at erotic material as something that individuals have a right to create a right to view or write to read or watch in the privacy of their own home. And producers have a right to produce to fulfill that need individuals that that don't want to see it don't want to view it or or watch it and should not do so and should exercise proper control over their children and minors in their care to prevent them from doing so if they so choose. Thank you for your attention during this LexVid presentation. And if anybody has any questions, please feel free to contact me through first amendment calm