

***Wolves at the Door - The Coming Assault on Erotic Free Speech***

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**I see a bad moon rising  
I see trouble on the way  
I see earthquakes and lightnin'  
I see some bad times today.**

***J.C. Fogerty, "Bad Moon Rising", Copyright 1969 Jondora Music***

**I saw a newborn baby with wild wolves all around it, . . .**

**I saw ten thousand talkers whose tongues were all broken . . .**

**I heard the sound of a thunder, it roared out a warnin'  
Heard the roar of a wave that could drown the whole world  
Heard one hundred drummers whose hands were a blazin'  
Heard ten thousand whispurin' and nobody listenin' . . .**

**I'm a goin' back out 'fore the rain starts a fallin'  
I'll walk to the depths of the deepest black forest . . .**

**And I'll tell it and think it and speak it and breathe it  
And reflect it from the mountain so all souls can see it  
Then I'll stand on the ocean until I start sinkin'  
But I'll know my song well before I start singin'  
And it's a hard, it's a hard, it's a hard, it's a hard  
It's a hard rain's a gonna fall.**

***Bob Dylan, "Hard Rain", Copyright © 1963; renewed 1991 Special Rider Music***

The civil liberties protected by the American Constitution have weathered a great many storms in our national history, from the Alien and Sedition Act under President Adams through the suspension of Habeas Corpus by Lincoln and the internment of Japanese Americans by Roosevelt. In the last analysis, those protections have endured because their values - the spirit of the Revolution - the spirit of Liberty - has lived in the hearts and minds of the American People as a critical expectation of public government in this country. Whether much of that value endures in the present time is a serious issue.

With the enactment of the Patriot Act and the Homeland Security Act and through the wholesale abandonment by public officials of traditional notions of fundamentally fair due process and

privacy, and without precedent in American history, those civil liberties have been interminably shelved and indefinitely tabled for the articulated purpose of protecting national safety against shadowy, relatively uncertain and shifting enemies, in a conflict that most likely will never know a positive and definitive conclusion. The President and the Attorney General have advocated and acted for a legal and political climate in which a United States citizen may by their fiat be declared an enemy combatant and be held secretly without bail and without the protections of a right to a speedy trial. The current administration angles to increase its power by pandering fear and terror to the American people. They have largely succeeded. The coming American generation is far better educated in computer operating systems and mp3 file sharing techniques than it is in the notions of individual liberty. American education and American families have largely failed in transmitting to the children entrusted to them the American tradition of respect to individual rights of privacy and freedom from government interference. The word, "Liberty", once the centerpiece of our way of life, once proudly impressed into every coin issued by our government, has become such an irrelevancy in our era that a proposition to replace that word with the expression, "United We Stand" would undoubtedly garner a fair measure of support. The era in which we live is one in which graphic artists have depicted the Statue of Liberty brandishing an M16 in place of the torch of Liberty without noticeable public objection. To the extent that the terrorists responsible for the atrocities of September 11, 2001 may care about the freedoms of our society as the President then claimed, to the extent that their motives were antipathetic to those freedoms as he told us that night when he emerged from his bombshelter, those terrorists have succeeded because significant parts of that freedom are now a matter of history.

To a generation of Americans who have been raised with the expectation that every technological development should be implemented if it can be implemented, to a generation of Americans which has not been educated to understand that freedom and Liberty are expensive commodities purchased for them by brave patriots who fought on numerous anonymous battlegrounds in many wars - and who went to their deaths believing that they were dying for the preservation of a free society and who created a veritable ocean of their blood in the process - to such a generation, giving to law enforcement the power to use every technological means available to it without serious regard to issues of privacy and individual autonomy may not be a difficult decision. Whenever technology has advanced, at each step, law enforcement has pressed for the right to use the new means against the privacy of citizens. The erosion of traditional notions of privacy in our homes and our electronic communications during the past three decades has been written in cases which could be conveniently subtitled, "The War of Drugs". Before then, the government's excesses were best seen in its investigation into the civil rights movement and the antiwar movement. The "War on Terrorism" is now seen as a sufficient justification for every power against personal freedom that government has lusted for in the recent era.

Time will tell whether this society will carry the torch of Liberty that was passed on to it at so dear a price. Time will tell whether, like Germany and Rome, it will be talked out of its inheritance of Liberty with a promise of security. Time will tell whether the American Republic will endure or whether it will morph into The American Empire. Time will tell whether the society that emerges as a result of such erosion of basic rights will be a society worth living in at all, safely or otherwise.

Time will tell whether a generation in uproar about the word, "God" in the pledge of allegiance will care as much about "Liberty and Justice for All.". It is my hunch that the first flashpoint establishing whether personal privacy and expressive rights count for much will be the public reaction when the Justice Department starts prosecuting erotica again.

It is my suspicion that the early heroes of the ongoing spirit of the American Revolution in the early part of this century will be representatives of the adult entertainment industry. It is my belief that some among them will be called upon to defend their expression in federal criminal prosecutions. Whether they prevail in defense of freedom of expression or are trampled by the boot of governmental authority without significant public concern is yet to be determined.

## **DOJ Officials at the National Cybercrime Law Conference in Chicago: Major Online Initiative Against Adult Obscenity Imminent**

In the first week of May, 2002, I attended the National Cybercrime Law Conference at John Marshall Law School in Chicago, a three-day seminar, promoted on its Website as follows: "Hear the experts who are involved discuss where we have been, where we are, and what the future may hold. Speakers include practicing experts from government and industry who are making and enforcing the law today." That turned out not to be much of an exaggeration. A significant number of policy-forming officials from the highest ranks of the U.S. Department of Justice spoke at the event together with representatives of the Federal Trade Commission and the offices of several state attorneys general along with various experts who do contract work for prosecutors at the national level. The attendance was overpoweringly dominated by FBI agents, Assistant U.S. Attorneys, and other prosecutorial and law enforcement personnel. It would be inaccurate to say that no defense lawyers spoke, because two did, nor that there were no defense lawyers in the audience, because there was at least a scattering of them. However, the prosecution spirit was prevalent enough and defense representation was scant enough that in the main, it simply would not be unfair to call the event a prosecution seminar even though it was conducted by a law school and open to lawyers in general. And, as a defense lawyer at the forward edge of the battle area defending materials destined for online publication, I surprisingly found myself in the midst of the anti-porn camp as they at least indirectly discussed their order of battle in open discussion, and more directly in smaller gatherings.

I had the opportunity to hear and speak with DOJ officials from the highest levels, persons quite close to both Attorney General John Ashcroft and to the Child Exploitation and Obscenity Section (CEOS), a Justice Department body charged with enforcement and policy direction regarding the prosecution of federal obscenity laws, though its head was not in attendance. I was told that there was a "major online initiative" that was about to commence against adult obscenity and that an obscenity symposium, bringing together prosecutors from around the nation to plan strategy, would be held in the end of the first week in June at the National Advocacy Center, a Justice Department training center. I also had a brief conversation about Section 2257, about the poor fit its implementing regulations have with the Internet, and about the very real risks that the existing Section 2257 notice regulations pose to the safety and well being of small content providers and camgirls. It will suffice to summarize the icy tenor and demeanor of a Justice Department representative's response to say that he really did not care whatsoever about their fate as he professed an affirmative disinterest in any revisions to those regulations.

When the National Cybercrime Law Conference ended, I searched the Web and the Website of the National Advocacy Center to find information which would tend to confirm what I had been told about a national prosecutors' obscenity symposium, I found nothing in early May. The only clue I could find that tended to confirm that something was in the air was contained in a new revision to the Obscenity Page of Justice's Child Exploitation and Obscenity Section, announcing that its ["... resources are well suited for the prosecution of Internet related obscenity cases."](#)

But it did not take long for solid evidence to emerge confirming that the Symposium did take place just as I was told in Chicago, that John Ashcroft himself attended the event, and that he addressed the gathering with remarks that show present and serious intention to begin a new round of prosecutions against erotic expression on

the Internet using obscenity laws.

### **Ashcroft Convenes "National Obscenity Symposium" and Calls for Aggressive Federal Obscenity Prosecution**

On May 7, 2002, Attorney General John Ashcroft announced an Obscenity Law Enforcement Symposium to be held in early June at the National Advocacy Center, he invited all U.S. Attorneys to participate in and support this "initiative," and he invited a "partnership in launching and sustaining this important endeavor." Under his manual signature, the Attorney General wrote [the following memo](#) to all of the U.S. Attorneys:

*As I am sure you are aware, the proliferation of obscenity, both via the Internet as well as through more traditional channels, has become a pervasive and destructive element in our society. I am committed fully to dedicating the resources necessary to combat this burgeoning problem.*

*To that end, I am pleased to announce an initiative aimed at developing a national obscenity strategy for aggressive federal prosecutions of such cases. On June 6-7, 2002, at the Department's National Advocacy Center in Columbia, South Carolina, the Executive Office of U.S. Attorneys and the Criminal Division's Child Exploitation and Obscenity Section are sponsoring an Obscenity Law Enforcement Symposium. This symposium will provide a forum to discuss the current state of the sex industry, the legal challenges in investigating and prosecuting obscenity cases, and the policies and guidelines necessary to develop our strategies in a thoughtful and deliberate way.*

*I encourage you and your staff to support and participate in this initiative and the upcoming symposium. I look forward to our partnership in launching and sustaining this important endeavor.*

### **Ashcroft to Vindicate "The Right of the Nation to Maintain a Decent Society" Through Obscenity Prosecutions**

Ashcroft's fire in Columbia was **not** only directed at child pornography and the effects of adult pornography on children, but more broadly and generally he addressed himself to the material that he characterized as "obscene." The full text of Ashcroft's June 6th, 2002, prepared remarks to the nationwide gathering of prosecutors and law enforcement officials at the National Advocacy Center has now been posted online at [nationallawcenter.org/Remarks%20of%20Attorney%20General%20John%20Ashcroft.htm](http://nationallawcenter.org/Remarks%20of%20Attorney%20General%20John%20Ashcroft.htm).

The Attorney General described the Internet as "perhaps the most pernicious medium for obscenity" and "a conduit for child exploitation and obscenity that respects no boundaries and recognizes no jurisdictional lines." Citing the text of the 1973 United States Supreme Court Opinion in *Paris Adult Books v. Slaton* for support, authored by then-Chief Justice Warren Burger, a decision announced by the High Court on the same day that *Miller v. California* was announced, Ashcroft asserted the public's interest "in the quality of life," and the "right of the Nation [sic]

and of the States to maintain a decent society." Claiming that this industry has ties to organized crime (in the present tense, but offering no support for that proposition), and asserting that the availability of pornography has adverse societal consequences, Ashcroft observed that, "In addition to harming children directly, obscenity has tremendous consequences for our broader society. For instance, clinical and experimental evidence show a correlation between exposure to sexually violent materials and an increase in aggressive behavior directed towards women."

Ashcroft pledged that "[t]o prevent such debasement, the Department of Justice is committed unequivocally to the task of prosecuting obscenity."

He indicated two first steps in support of that commitment. At a cost of \$1 million, he has added two attorneys and five staff specialists to the CEOS office to work full-time "making prosecutions against child pornography and obscenity offenders using the Internet." Second, Ashcroft has directed that the "lockout" provisions of the U.S. Attorneys' Manual be revised to permit CEOS to investigate locally with only a notification to the U.S. Attorney in whose district the investigation is conducted, rather than with the consent of the local U.S. Attorney, as has been Justice Department policy to this point. This is done, he asserted, "to bring the full weight of the Department of Justice to the fight against child pornography and obscenity." (This may also reflect an understanding by Justice - as a result of the Supreme Court's various opinions and concurrences and dissent in *Free Speech Coalition v. Ashcroft* - that it looks very unlikely that local geographical community standards may be applied to judge the obscenity of materials distributed via the Internet. The main point of the earlier lockout provision was that a local U.S. Attorney was better poised to know than Washington what kinds of material were convictable obscenity under local standards and therefore what kinds of investigations would be a waste of time. Ashcroft's team may view the potential of "national standards" as a reason to justify more centralized control in the control of obscenity prosecution, a control which may decrease the influence of local U.S. Attorneys in charging decisions.)

The full text of that part of the US Attorney's Handbook which treats the prosecution of obscenity (including venue provisions for multidistrict investigations), as most recently amended, may be found online at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/75mcrm.htm#9-75.001](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/75mcrm.htm#9-75.001).

Ashcroft said that CEOS will not "alone" prosecute obscenity cases and called for co-operation from the local U.S. Attorneys. The obvious suggestion is that CEOS itself does have plans to bring obscenity prosecutions.

Ashcroft mentioned and thanked various individuals from outside the Justice Department who participated in the Symposium, from the Organized Crime and Vice Division of the Los Angeles Police Department, from the U.S. Postal Service, from The American Center for Law and Justice, and from the National Law Center for Children and Families. He praised them collectively as "tireless in their efforts to support the Justice Department's mission to combat the proliferation of obscenity in our society."

### **Pressure From the "Moral Right" and Ashcroft's Response**

All of this comes on the heels of several other developments. [The Long Island Citizens for Community Values April 2002 Newsletter](#) bears a photograph of the

CEOS chief, Drew Oosterbaan, his boss, Deputy Attorney General John Malcolm (who heads the Computer and Fraud Division of the Justice Department's Criminal Division, only one handshake away from Attorney General Ashcroft) and members of the Religious Alliance Against Pornography (RAAP) as they met together in Washington at the Justice Department last February 18. Ostensibly there to offer assistance to the newly appointed Chief of CEOS in his endeavors to prosecute child pornography and obscenity, the RAAP group, including the Commander of the Salvation Army, reiterated the points which were covered with Attorney General John Ashcroft in a prior hour-long meeting last year. They had requested that the Justice Department make obscenity prosecutions a priority. Dr. Kirk of RAAP also urged Ashcroft to return to the aggressive pursuit of violations of obscenity laws as demonstrated in the 1980s and early 1990s. According to that Website, Ashcroft had then promised "to do all in his power" to establish obscenity prosecution as a priority.

The National Obscenity Symposium and Ashcroft's remarks there put his May 1, 2002, [National Victims of Obscenity Awareness Month statement](#) into more readily understandable significance, a statement chiefly dealing with adult obscenity:

*Pornography and adult obscenity are more than demeaning pictures in magazines and on the Internet - they are steps down a path to the degradation and, too often, the real abuse of predominantly women and children.*

*The Department of Justice is dedicated to prosecuting those who illegally distribute adult obscenity materials and child pornography. These prosecutions are a priority for this Department, and the Criminal Division's Child Exploitation and Obscenity Section and the 94 United States Attorneys across this country stand committed to enforce the federal statutes in this area.*

*Over the past year, the Department has made significant progress toward reversing an almost decade-long absence of adult obscenity prosecutions. With the recommendation of the Attorney General's Advisory Committee, the so-called "lockout provision" of the United States Attorneys' Manual was eliminated. Now, for the first time in many years, prosecutors from the Child Exploitation and Obscenity Section of the Justice Department have increased flexibility to initiate cases across the country. Additionally, the Child Exploitation and Obscenity Strategy [sic] has been working with our United States Attorneys to put together a June 2002 symposium to devise a common and coordinated approach to the prosecution of obscenity providers.*

*This Department is dedicated to vigorously enforcing the laws of the United States, and those who illegally distribute obscene material will be prosecuted aggressively.*

### **ObscenityCrimes.org**

Finally, all of this coincides with the launching of a new Website by Morality in Media under the name [ObscenityCrimes.org](#), which provides a convenient form (including a

handy means to check off such content items as "Anal Sex" and "Lewd Exhibition of the Genitals") to submit reports of allegedly obscene online material to Morality in Media, where it will be screened, and if deemed prosecutable by that organization, forwarded to the reporter's local U.S. Attorney with a request for investigation under the reporter's name. This report form and this site are exclusively concerned with adult pornography, and those persons with information regarding child pornography are directed to another site. No tips are accepted at ObscenityCrimes.org without geographical information about the location of the reporter, which is a real clue as to what the site is all about. After (misleadingly) advising the reader that "[m]ost obscene materials consist of little (if anything) more than depiction after depiction of hardcore sexual conduct," the site alludes to its real aim, that of applying pressure to local U.S. Attorneys: "MIM does expect U.S. Attorneys to take reports of possible violations of obscenity laws seriously and to initiate prosecutions in appropriate cases.... MIM will periodically publish on this Web site the number of reports forwarded to each U.S. Attorney and the number of obscenity prosecutions initiated by each U.S. Attorney."

### **Signs of the Times**

From that, we do begin to see a faint glimmer of what is going on here. I have no doubt that Ashcroft himself means at least what he says in antipathy to pornography (and probably a great deal more that he doesn't express in public) and that the close circle that surrounds him is impatient for the adult Internet to be taken down under charges of criminal obscenity. I suspect that the Obscenity Symposium and other developments reported in this article have been a top-level response by the Ashcroft Justice Department to a lack of perceived enthusiasm by local U.S. Attorneys for the prosecution of run-of-the-mill adult pornography under the obscenity laws. Morality in Media is putting the Moral Right on the case of the U.S. Attorneys and keeping track of the numbers. Pressure will be applied by MIM and ultimately by DOJ in Washington; CEOS will get prosecutions jump-started on its own with or without the OK of the local U.S. Attorneys, now that Ashcroft is changing the U.S. Attorneys' Manual to empower CEOS to do this.

My strong hunch is that a significant number of Republican appointees in the Ashcroft Justice Department are well adjusted people with at least average tolerance or acceptance of erotic materials and that the large majority of them who are criminal prosecutors probably have a realistic and correct understanding that, with competent defense, graphic depictions of explicit sex, of the run-of-the-mill Internet variety, are unlikely to result in many convictions for obscenity, in view of where society now stands. They undoubtedly understand American society and its sexual attitudes better than their boss does. If Ashcroft were truly prudent, he would rely on the judgment of the prosecutors in the courtrooms across the country as to what is likely to lead to a conviction before the juries these men deal with daily instead of seeking to bypass that judgment from a Washington office. These men know their communities, and they know what will sell and what won't sell to their juries. A general lack of enthusiasm about such prosecutions during the last decade suggests something about the changing face of American society which perhaps the local U.S. Attorney offices understand.

### **You Don't Need a Weatherman to Know Which Way the Wind Blows**

All that having been said, as Bob Dylan once wrote, "You don't need a weatherman to know which way the wind blows." It is clear from every sign that adult obscenity

prosecutions on a measurable scale are about to begin in the imminent future. To borrow another expression, one coined by Robert Anton Wilson and Robert Shea in *Illuminatus!*, Aschcroft has imminentized the eschaton. Thus far, the adult Webmaster community at large has seen chiefly the upside, the economic benefits of this risky business. The downside, known so well to the videotape community in its memories of the Reagan/Bush years - the knock on the door, the seizure of capital assets and the means of production, the humiliation of arrest and bond court, the expense and anxiety of a criminal defense - are all matters that, in short order, will be learned by some among the Webmasters. And some lives will be destroyed no matter how the jury returns.

### **Practical Advice in Dangerous Times**

What is to be done by the adult entrepreneur?

There is no substitute for the guidance, advice, and review of your content and procedures with an attorney experienced in this area. If you bought your "terms and conditions" and 2257 disclosure statement for a two-digit price from an online form store or otherwise acquired it by copying from someone else's product that looked to you like it had a lawyer, you may learn that the office of the U.S. Attorney does not craft its affidavits in support of an application for a warrant in this manner. If your content came with a license written in cyrillics warranting that the models were all over the age of 18 and promising to defend you, you just may have the misfortune to discover that the warranty is of little practical value when you stand criminally accused. The vendor will not be substituted as a defendant in your place.

If you are targetted, if you are the subject of a search warrant, you will be charged with any and all criminal laws whose violation can be made out from what they find, including matters found in plain view that were not a part of the original investigation.

In every single case in which law enforcement becomes involved, it will aggressively and resolutely search for evidence of child pornography. Among other things, that item makes the prosecutorial burden much easier and simpler. Accordingly, the number one priority must be to positively ensure that you are never in possession of even a single image containing any underage person in any situation that is even remotely sexual. The necessary implication of this is that you cannot afford to possess any erotic image whose origin you cannot identify. If you browse the Internet, especially with javascript enabled, images will appear on your hard drive and will thereby come into your possession without any affirmative action on your part to save those images. Even when your operating system or browser clears your disc cache, those "deleted" files will remain on your computer until they are overwritten. The prevalent use of hard drives of gargantuan size, exceeding 60 gigabytes of storage, increases the odds that "deleted" files will remain un-overwritten and therefore forensically recoverable. Also, it is important to know that overwrites are made by assigned blocks and that portions of earlier "deleted" files may remain as "slack space" even when there has been a partial overwrite. I know of at least two persons who have faced criminal charges because of deleted-but-not-overwritten images found on hard drives. The obvious solution is to use Evidence Eliminator, Window Washer, or an equivalent to clean all traces of browsing activity whenever you do so. I must add that you cannot do so if you have cause to believe that you are under criminal investigation for a related matter, because in this case, it would amount to destruction of evidence and the possibility of obstruction of justice

charges.

You must make very, very sure that you have no technical violations of Section 2257 or its associated regulations. Each of them carries a maximum penalty of two years in prison. Compared to the massive undertaking of an obscenity prosecution, a 2257 prosecution would be a simple and straightforward matter. Do not make the task of putting you out of business an easy and straightforward assignment.

Finally, take a serious and thorough look at your site or your content inventory, and do everything in your power to ensure that it is not obscene. Consult a lawyer who knows the law of content. Yes, I know about the amorphous standards that apply in this area of law. I know about the uncertainties. I know that the exact nature of the community whose standards may apply is not yet clear in the law for the Internet. Regardless of the uncertainties you cannot control, if you chose to make your living on the adult Internet, aspire to give your site serious value and strive to make it a serious work. There are no magic bullets, amulets or robes of invisibility, there are no cookie-cutter solutions, and the advice to "put in some text" or to run a guide to esoteric sexual practices of the East or a penile enlargement lesson are less than satisfactory. There is a difference between a serious work and a pretext that will not be lost on judge, jury, or prosecutor. I wrote earlier about our First Amendment and how it makes our society different from others. One unchanging axiom that runs through all of the Supreme Court cases dealing with obscenity in the modern era is that no work can be proscribed and criminally outlawed if, taken as a whole, it has serious literary, artistic, or scientific value. Were it possible to ban speech with serious value, American society itself would become the victim of censorship through its loss of a work of serious value, and that is a result that the constitution cannot permit. A serious contemplation of this issue will offer both hope and challenge to the Webmaster.

Aspire to create a work whose overall theme is not an appeal to the morbid or unhealthy. It is the motorist who is passing all of the other cars that gets tagged every time. The extreme nature of some content can sometimes - but not always need be - a substitute for creativity, artistry, and vision. If you aspire to meet the needs of a narrow niche, pick one that offends broadly American sensibilities the least while attracting a customer base with inescapable magnetism. Be creative when you write, design, and integrate your site. This is a matter that is entirely within your control. You must choose, and you must continue to choose a path that will avoid the demons.

Finally, obtain the talents of a skilled legal navigator to help you past the reefs, shoals, and other obstructions to your safe transit of the perilous seas in which you now sail.

*This article is written to generally inform the public and does not provide legal advice nor does it establish an attorney-client relationship. If you have a legal issue or question, contact a lawyer. If you are arrested, make no statement, consent to nothing, but make no resistance, and contact a lawyer immediately.*

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