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OBSCENITY PROSECUTION AND THE CONSTITUTION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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OBSCENITY PROSECUTION AND THE CONSTITUTION

WEDNESDAY, MARCH 16, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 3:04 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback, Chairman of the Subcommittee, presiding.

Present: Senators Brownback and Feingold.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. I will call the hearing to order. I want to welcome everybody to this first meeting of the Subcommittee on the Constitution, Civil Rights and Property Rights of the U.S. Senate Committee on Judiciary in this session of Congress. I hope to be holding a number of different hearings on various topics, but this is the first one that we are kicking off with and I do appreciate all of you joining us.

And I would note that my colleague, the ranking member, Senator Feingold, I believe his amendment is actually up on the floor, is what I have been told, so he may be late, coming back and forth for this. Now, that situation may change, and if we hear differently, we will adjust. We may have to break into some of your testimony if he comes here at a particular time and he has to get back to the floor and I will try to accommodate any opening statement that he would make.

The editor and publisher of Adult Video News, a journal of the pornography trade, stated recently that, quote, "It is scary how much money is made on porn," end of quote, and this, there can be little debate. The porn industry has grown rapidly in the last decade. Part of the reason for this growth is that the nature of and access to sexually explicit material in the marketplace has been radically transformed and expanded. According to many legal scholars, another reason for the industry's growth is a legal regime that has undermined the whole notion that illegal obscenity can be prosecuted.

Indeed, just last month, Federal Judge Gary Lancaster of the Western District of Pennsylvania threw out a ten-count Justice Department indictment against *Extreme Associates*, purveyors of the most vile sort of pornography. The defendants were in the business of producing films that, according to one report, quote, "even porn

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veterans find disturbing," end of quote. A co-owner of *Extreme Associates* even boasted that the films, which depict rape, torture, and murder, represent, quote, "the depths of human depravity."

He also proudly admitted that the films covered by the indictment met the legal definition of obscenity. Judge Lancaster not only dismissed the indictment, but also took the case as an opportunity to rule all Federal statutes regulating obscenity unconstitutional as applied to these admittedly infringing defendants. In order to achieve this result, Judge Lancaster cobbled together hand-picked strands of 14th Amendment substantive due process, decisions from *Roe, Lawrence,* and others, and ruled that the statutes at issue violated an unwritten constitutional right to sexual privacy. Amazingly, even if such a right existed, it would not apply to the defendants, since they were producers and not consumers of the material.

There was a reason why Judge Lancaster had to bypass First Amendment jurisprudence in reaching the results he wanted. Numerous First Amendment precedents distinguish between protected speech and illegal obscenity. For example, the Supreme Court held almost a half a century ago that, quote, "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

Thirty years ago, the Court rejected the notion that, quote, "obscene, pornographic films acquire constitutional immunity from State regulation simply because they are exhibited for consenting adults only." Rather, the Court specifically held that there are legitimate State interests at stake in stemming the tide of commercialized obscenity. It also has held that it to be categorically settled that obscene material is unprotected by the First Amendment.

If the *Extreme Associates* decision stands, we will have gone from the flat statement of former Justice William Brennan, who advocated perhaps the most expansive vision of constitutional liberty of any Justice in Supreme Court history, that obscenity, quote, "was outside the protection intended for speech and press," and we will be going to the notion that obscenity cannot constitutionally be prosecuted at all.

Many constitutional scholars believe that blatant judicial activism, as exemplified in the *Extreme Associates* decision, has been responsible in large part for creating a climate in which the porn industry has flourished. I was pleased to learn that the Department of Justice is appealing Judge Lancaster's ruling since the ruling effectively would gut decades of precedent.

I also have been encouraged by recent statements by Attorney General Gonzales that he would make it a top priority to vigorously prosecute those who violate Federal obscenity statutes. In a recent speech to the Hoover Institute, the Attorney General stated, "Another area where I will continue to advance the cause of justice and human dignity is in the aggressive prosecution of purveyors of obscene materials."

This renewed effort is particularly important since mainstream American companies seem increasingly willing to associate themselves with pornography, even hard-core pornography. Over half of all pay-per-view movies in hotels across the country are now pornographic. According to recent reports, Adelphia Communications, re-

versing a longstanding policy, just became the first leading cable operator to operate the most explicit category of hard-core porn. The Los Angeles Times writes that, quote, "Adelphia joins a marketplace already teeming with ways to procure hard-core sexual content."

The Internet has become a carnalcopia with graphic images, videos, and cartoons. EchoStar Communications Corporation, the nation's second-ranking satellite TV provider, has offered triple-X programming for several years on its DISH Network. Satellite leader Direct TV Group, Incorporated, peddles fare that falls just shy of triple-X.

The explosion of sexually explicit material is not a problem that exists in a vacuum of constitutional theory. Government has a compelling and real life interest in the matter because of porn's adverse effects on individuals, families, and communities in the forms of criminality and addiction and family breakup.

Several months ago, I chaired a hearing where scientists and psychologists testified about the growing problem of addiction to sexually explicit material, which is destroying individuals and their families, adversely affecting productivity at work and negatively impacting healthy child development. Four years ago, a scientific survey found that six percent of respondents met the criteria for a full-fledged pornography addiction. Other estimates of the percentage of the population suffering from an addiction to porn are considerably higher.

Seventy-two million Internet users visit pornographic websites per year. One expert in cyber addiction asserts that 15 percent of online porn addicts develop sexual behavior that disrupts their lives. She writes that, quote, "The Internet is the crack cocaine of sexual addiction."

The expanded reach and pervasiveness of pornography also affects our families and our children. According to recent reports, one in five children ages ten to 17 have received a sexual solicitation over the Internet, and nine out of ten children ages eight to 16 who have Internet access have viewed porn websites, usually in the course of looking up information for homework.

There is strong evidence that marriages are also adversely affected by addiction to pornography. At a recent meeting of the American Academy of Matrimonial Lawyers, two-thirds of the divorce lawyers who attended said that excessive interest in online pornography played a significant role in divorces in the past year. Pornography by itself, not as part of an accusation of adultery, has begun to arise with alarming frequency in divorce and custody proceedings, according to divorce experts. Pornography had an almost non-existent role in divorce just seven or eight years ago. Roughly 65 percent of the people who visit the Center for Online Addiction do so because of martial problems created by pornography, according to the founder of the Center.

And now just recently, we have out of Southern California examples of human trafficking of individuals trafficked into the porn industry for use by the porn industry.

These and others demonstrating effects provide an important real-life backdrop for this hearing, which will emphasize two well-established legal principles. First is that the Supreme Court has

clearly and repeatedly held that obscenity does not merit First Amendment protection. The second is that the government has a legitimate and constitutionally valid interest in regulating obscenity through, among other things, enforcement of relevant Federal and State statutes. We also will hear the opposing view, that the First, and for the first time, 14th Amendment protections apply to obscene material that has traditionally been seen as falling outside of those protections.

We have a distinguished panel to speak today. First is Professor Robert Destro of Catholic University of America's Columbus School of Law. Professor Destro is Co-Director and founder of the Interdisciplinary Program in Law and Religion and he previously served as Commissioner on the U.S. Commission on Civil Rights.

Second is Patrick Trueman, Senior Legal Counsel at Family Research Council. Mr. Trueman previously has served as the Chief of the Child Exploitation and Obscenity Section of the Criminal Division at the U.S. Department of Justice.

And our final panelist is Professor Frederick Schauer of Harvard University's Kennedy School of Government. Professor Schauer is a former Professor of Law at the University of Michigan, Chair of the Section on Constitutional Law of the Association of American Law Schools, and Vice President of the American Society for Political and Legal Philosophy.

It is an excellent panel on a current and tough topic. Gentlemen, thank you very much for being here today. As I mentioned, if Senator Feingold comes in, we may have to break into your testimony to hear his opening statement. We will just play that as it goes along.

We will run the time clock at seven minutes. You are entitled to—if you need to go a little longer, that is fine. We just have the one panel here today. And if you want to put your full statement in the record and then just summarize, that is acceptable, as well, and your full statements will be placed in the record.

Professor Destro, thank you for joining us.

STATEMENT OF ROBERT A. DESTRO, PROFESSOR OF LAW, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. DESTRO. Thank you, Senator. Thank you for having me today, and I would, with your permission, put my statement in the record.

Chairman BROWNBACK. Without objection.

Mr. DESTRO. All right. Let me—I am just going to do a little bit of summarizing of the testimony. I think there is nothing more boring than just reading it into the record. Let me start out with something that—I am going to use a kind of a common name, but the importance of the name-calling in constitutional law. And in this area, when you are talking about the regulation of the sex industry, if you call it "pornography," it is not protected. But if you call it "speech," it is protected.

Now, in constitutional law, we have a name for that name calling. It is called characterization. In constitutional law, he or she who controls the initial characterization usually wins the case. And what my testimony is about today is the perspective with which I

think this Committee should look at the issue of regulation of this topic.

You can start by looking at this as a question of market regulation and focus on the pornography industry. That has certain advantages to it in that what you are really talking about is business transactions and lots of money and lots of illegal behavior. And if you focus on it from that perspective, you never really even get to the First Amendment unless you are of the view that Justice Douglas was, that sex acts between consenting adults were a form of free speech. He talked about that in *Griswald* v. *Connecticut*. But setting that aside, nobody else really takes that view.

Or you can look at it as a perspective of we are going to be regulating content. That, then, gets you into the content and the perspective of speech and really almost an endless morass of First Amendment analysis where you get into the question of how much redeeming social value is there in this particular movie or videotape or website or virtual reality, and you get into kind of almost unanswerable questions about just how much, under the Court's decisions, does this really appeal to someone's prurient interests? I suppose the easy answer to the question is that if they are willing to pay for it, it must appeal to them.

And so that is why I think that a case like *Extreme Associates* is such an interesting case, because it quite properly, in my view, ignores the First Amendment. The judge, I think, took great pains not to mention the First Amendment. The problem is that as he did so, he ignored the rest of the Constitution at the same time. He forgot John Marshall's oft-quoted comment that if the Constitution were expounding, and he focused only on the right side and not on the regulatory pieces of this puzzle.

He creates a right to privacy that, if taken to its logical conclusion, would legalize prostitution, because if indeed you have a right to sexually explicit material that is made by others out in Hollywood or wherever they make it, I suppose you could make the same argument that under *Griswald* and *Lawrence* you would have a right to have it made right in your living room, at least under the judge's reading of those 14th Amendment cases. The Congress's power to regulate the economy and the industry just drops out of the equation altogether.

So what I would like to suggest is an initial question, which is as this Committee opens its deliberation, whether its goal is to score easy symbolic points, which brings me back to that question of whether or not you are going to be in this to do some finger pointing or name calling, or whether or not you want to regulate certain very specific behaviors that are both easily defined and not constitutionally protected.

So let me give you some examples. The sale of sex as a commodity is against the law in almost all the States. A few years ago, our Law Review published an interview that a couple of law professors had done with Larry Flynt, and as many of you know, Larry Flynt has always been held up as the paragon of the defenders of First Amendment values. The article, I didn't think, was very good. The writing around Larry Flynt's interview was not very good, but Larry Flynt's interview was actually quite fascinating because they asked him about the First Amendment.

He says, "Well, no, that wasn't really the point." He said that his goal really was to open up, and I am putting words in his mouth but this is the rough equivalent—he wanted to have a chain of sex stores, that in the end, he thought that there should be a freedom to kind of buy and sell sex just like you did any other commodity. And I thought, well, finally, he is actually kind of—when you get the Larry Flynt unvarnished, he is a salesman.

And that is what I would suggest that we are looking at here, is that we are looking at the sale of sex as a commodity. We are looking at sex slavery and trafficking, which is a serious problem not only here in the United States but around the world. In the case of *Extreme Associates*, you are looking at exploitation, at battery, and at all kinds of other behaviors that certainly can be regulated under the criminal law.

And it seems to me that if you were—even if you take Professor Schauer's view that the primary focus should be on the regulation of child pornography, that is simply another example of exploitation and I would say, yes, let us go ahead, and we have already started with that. We all have broad agreement on that. Now let us look at the other kinds of exploitation that need to be regulated, as well.

So my suggestion to the Committee is that you, too, like the judge in Pennsylvania, Judge Lancaster, you, too, can avoid the First Amendment and you can do it if you are clear and if you focus on the commercial aspects of what is going on. Thank you.

Chairman BROWNBACK. Thank you very much.

[The prepared statement of Mr. Destro appears as a submission for the record.]

Chairman BROWNBACK. Mr. Trueman?

STATEMENT OF PATRICK A. TRUEMAN, SENIOR LEGAL COUNSEL, FAMILY RESEARCH COUNCIL, AND FORMER CHIEF, CHILD EXPLOITATION AND OBSCENITY SECTION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. TRUEMAN. Thank you very much, Chairman Brownback, and thank you for your leadership on this issue of obscenity.

I, as you mentioned, served as the Chief of the Child Exploitation and Obscenity Section at the U.S. Department of Justice at the end of the Reagan administration through the entire administration of President George Herbert Walker Bush. I worked under three Attorneys General and they had—those three Attorneys General, Meese, Thornburg, and Barr—had a very active effort underway to prosecute producers and distributors of obscenity. We brought many cases all across the country.

The nature of obscenity with respect to its constitutional status had been clear for decades before this, but the Justice Department prior to the term of Attorney General Meese for 20 years had not prosecuted obscenity hardly at all. Then the Justice Department reversed course because of the Attorney General's Commission on Pornography. When it issued its findings, it called for a strike force or a task force of attorneys at the Justice Department to lead the effort against the producers and distributors of obscenity. That is something that Mr. Meese established. It later was called the Child Exploitation and Obscenity Section in the Criminal Division.

It goes without saying that the leadership of the Attorney General, the nation's chief law enforcement official, is critical in defeating crime, and that was certainly the case with General Meese and his two successors in the Bush administration, General Thornburg and General Barr. Each took a strong hand in making sure that U.S. Attorneys across the country, as well as Federal investigative agencies, pursued obscenity cases.

During my several years at CEOS, we found that obscenity law was quite workable, and moreover, well understood by jurors who had to make decisions on the guilt or innocence of fellow citizens.

To those who argue that the prosecution of obscenity crimes is a waste of time or an unwise use of resources, I would like to point out that during the time that I was Chief of CEOS, we received more than $24 million in fines and forfeitures as a result of our aggressive prosecution efforts. That is more than the budget of CEOS during those years.

I would point out that the public expects the Justice Department to enforce the law. Some want to say that if you enforce obscenity laws, you will necessarily reduce the number of prosecutions of child exploitation laws. However, I don't believe that is true, that one can be pitted against the other. Sure, there are finite resources, but I think when the public looks at the lack of enforcement on obscenity, they may say, why is the Justice Department spending tens of thousands of dollars prosecuting Martha Stewart and incarcerating here whereas the pornographer who is spamming illegal pornography into my son's e-mail account goes free?

There were two large-scale obscenity prosecution projects undertaken by the Department of Justice when I worked for CEOS. One was Project Postporn, which targeted mail order distributors of illegal pornography, obscenity, who advertised their materials by buying up mailing lists indiscriminately of people across the country, including children, and would send sexually explicit advertisements. The advertisements themselves were found to be obscene in many of our cases. In that case, Project Postporn, we had 24 individual—excuse me, 50 individual or corporate convictions in 24 cases spread across 20 Federal districts, U.S. Attorney districts. That prosecution effort effectively ended the practice of sending pornographic advertisements through the mail by these companies.

For the second large scale prosecution project, we targeted the major producers and suppliers of obscene material in the United States. With the cooperation of the Los Angeles Police Department Vice Squad, we assembled a list of the top violators of Federal obscenity laws, which was about 50 companies at the time. Most of them were located in the Los Angeles area. We brought then all the United States Attorneys who had an interest in prosecuting obscenity together at a Los Angeles conference, outlined who these distributors were and these producers, with the help of the Los Angeles Police Department, and divided up the cases in about 30 United States Attorneys' districts, and then we vigorously prosecuted these companies, about 20 of which were convicted. I think there were at the time, probably of those 20 companies, something in the neighborhood of 75 to 100 individual convictions.

Our prosecution strategy in this project was ultimately to bring cases against all the major producers and distributors and against

a wide variety of material. We didn't just select the hardest of the hard core material. We wanted juries to decide what they found to be obscene in their district, and that is the nature of what *Miller* v. *California*, the seminal obscenity case by the Supreme Court, allows. We believed it was important to let juries decide what was obscene, and we found that juries, looking at a variety of material, from the hardest to the most mild of what we considered to be obscene, regularly said that the material was obscene and were willing to convict.

I have done several grand juries myself where we asked the people in the jury to decide whether material is obscene, and my own experience has been that people who regularly watch movies that are obscene will ask questions in the grand jury, saying they didn't know it was obscene, are they doing something illegal, but yet those people, when told that, yes, in fact, it may be obscene, will also vote for an indictment on obscenity against a pornographer.

By the end of the administration of President Bush, we were successful not only in gaining convictions throughout the country, but in actually changing the nature of hard core material that was produced in the United States. Themes of rape, incest, bestiality, pseudo-child pornography, all common themes prior to our prosecution efforts, disappeared from store shelves in many cities and were no longer produced at all by the major producers of obscene material. Many of the distributors of hard core pornography that had not been prosecuted refused to ship products into States where we brought prosecutions.

I will end here just by saying that I am encouraged by the Attorney General's recent statements that he will vigorously prosecute obscenity. I think that he will find that he has the public support in doing so and that the juries across America will convict. I encourage the Department to prosecute on a wide variety of material. Don't be afraid to prosecute anywhere in the country. We got convictions in Las Vegas, so-called "Sin City," in Los Angeles, Minneapolis, Florida. Wherever we brought cases, we got convictions.

I would ask, Mr. Chairman, that my full statement be introduced into the record. Thank you.

Chairman BROWNBACK. Without objection. Thank you very much, and I know you are getting over the flu, so thanks for hanging in there. And if he starts to move, either of you witnesses, I would move, too, if I were you.

[Laughter.]

Chairman BROWNBACK. But thanks for making it.

[The prepared statement of Mr. Trueman appears as a submission for the record.]

Chairman BROWNBACK. Professor Schauer?

STATEMENT OF FREDERICK SCHAUER, FRANK STANTON PROFESSOR OF THE FIRST AMENDMENT, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS

Mr. SCHAUER. Thank you, and I would like to enter my statement in the record, and in addition, before I start, I would like to thank you for starting this hearing somewhat later than hearings

normally start in this city. This was done as an accommodation to me because of my class schedule, and I very much appreciate it.

I should mention at the outset, I have been writing about the law of obscenity for about 30 years now, including a book entitled The Law of Obscenity. I also served in 1985 and 1986 as a Commissioner of the Attorney General's Commission on Pornography. I was the principal draftsman of the Commission's findings and recommendations.

But I should say that although there are many people who believe that obscenity law as it now exists is unconstitutional and violates the First Amendment, I am not one of them. I have long believed that obscenity as strictly defined by the 1973 case of *Miller* v. *California* lies outside of the coverage of the First Amendment. I still believe that.

But obscenity prosecutions, as defined according to *Miller* v. *California* and the seven other cases decided on that day and a number of cases decided thereafter, remains constitutionally permissible under the First Amendment, that does not, as you know, end the inquiry. The inquiry then moves to the question of under what circumstances would the constitutionally permissible under the First Amendment prosecution of obscenity be desirable?

And in addressing that question, I ask the Committee and I ask you to at least take into account three considerations. The first of those considerations is guided, Mr. Chairman, by your own statement in the article you wrote with Senator Hatch about the *Extreme Associates* case that judges should not ignore the law in favor of their own agenda. I 100 percent agree with that. I also believe, however, and I would hope that you would agree, that ignoring the law in favor of their own agenda is not only a judicial vice, but is also potentially a prosecutorial vice. I raise this issue because I believe the same applies to prosecutors, and I raise the issue against the background of two specific and possibly some number of other examples.

I am troubled by Professor Destro's statement in his written statement that obscenity law is a mess and that we need legislative redefinition and legislative resuscitation along different lines in light of the fact that obscenity law is now a mess.

Somewhat more troubling to me are the continuing statements from 1986 until the present, and most recently last spring at an event at which I was present, by Mr. Bruce Taylor, now Senior Counsel of the Department of Justice and with principal responsibility for obscenity prosecution, that there ought to be a per se rule about what is or is not obscene and that, and here I quote from him, "penetration clearly visible be an important component of the standard for determining what is or what is not obscene."

These and other efforts to move or change or adjust or modify the existing and, in my view, constitutionally permissible *Miller* v. *California* standard from 1973, are a cause of some concern to me, and I would ask you, Mr. Chairman, in investigating this issue to seek assurance on behalf of the Committee that prosecution will be in accordance with the *Miller* standard strictly defined rather than be used as a way of modifying, expanding, changing, redefining, resuscitating, or in some other way changing the existing, and as I

said, in my view, constitutionally permissible under the First Amendment law of obscenity.

I also believe that priorities are a genuine issue. I agree with Mr. Trueman that one cannot say that there is one thing that is top priority and everything else ought to be eliminated simultaneously. No sensible policy analyst, and I am now surrounded by many of them at my institution, would believe that.

Nevertheless, as long as we divide up the prosecution, as long as we divide up the agenda, as long as we divide up the structure of the Department of Justice the way we do, that unless there is a substantial infusion of new funds, there is a high risk that an increase in obscenity prosecutions will be at the expense in the short term and the intermediate term of child pornography prosecutions. To do so, to substitute obscenity prosecutions for child pornography prosecutions, would, in my view, be an unfortunate reallocation of scarce governmental resources away from what, in the view of myself and many others, is the most pressing issue.

Finally, if I may make reference back to the report of the Attorney General's Commission on Pornography. It has been mentioned a number of times in this hearing. I don't want to claim too much pride of place here. It can be read by everybody. Nevertheless, if we are to go back to the report and draw guidance from that report, in my view, one of its central features was that it divided the category of *Miller*-defined legal obscenity into the categories of material that endorsed and promoted explicitly violence against women, material that endorsed and promoted explicitly the degradation of women, and material that was neither endorsing of violence against women nor that was endorsing a degrading of women.

In light of those three categories, the Attorney General's Commission recommended prosecution of legal obscenity in the first category and in the second category, but as to the third category, the Commission made no recommendation. I am troubled here in part by the attempt to use the report of the Commission as endorsement for the prosecution of legally obscene materials that neither promote nor endorse explicitly the violence against women, but I am much more concerned, Mr. Chairman, by the fact that the issues of violence against women, the issues of degradation of women, the issues that frame the report of the Attorney General's Commission on Pornography seem to have so significantly dropped off the agenda of these hearings.

The agenda, the issues have been dramatically transformed from the issues as they were understood by the Attorney General's Commission and I would very much hope in thinking about what to prosecute or whether to prosecute, the enormously pressing issue of violence against women and what might foster it and the evidence about that not be removed from center stage. Thank you.

Chairman BROWNBACK. Thank you.

[The prepared statement of Mr. Schauer appears as a submission for the record.]

Chairman BROWNBACK. This is an excellent discussion, for me a great tutorial following on the hearing we had last fall about the addictiveness of pornography and the impact on families to get the

factual basis of what we are having and then the legal arguments taking place here. It is very useful to put those side by side.

I want to enter into the record an article from the Los Angeles Times dated March 5 of this year about a probe into human trafficking to the sex slave trade, and I want to draw your attention to this, if I could, particularly, I think, Professor Schauer on this one, if I could.

I met with the City Councilman just yesterday, Councilman Cardenas, about this topic. I don't know, have you seen this article?

Mr. SCHAUER. I have not seen it.

Chairman BROWNBACK. Okay.

Mr. SCHAUER. I am familiar with the issue.

Chairman BROWNBACK. What we are finding, when I worked with Senator Wellstone and his wife on sex trafficking before their untimely death, and it is a topic that—it is one of the lead slavery issues in the world today. And what we are finding in this, apparently, we are seeing people trafficked into the pornography industry for porn. This is just a quote here from the article. Quote, "A lot of people are promised jobs once they come here, but when they get here, they are forced into labor or the sex trade." This is a lawyer with the Department of Health and Human Services. And apparently, this is a lucrative business to move people into.

I take it from your statement, Professor Schauer, this would clearly fall in the category of what you think we should be prosecuting because it is violence against women.

Mr. SCHAUER. I think there is an issue here that we need to address that distinguishes obscenity from child pornography. I have absolutely no doubt that the underlying conduct that you have just described ought to be prosecuted with the greatest vigor that the law has available. The underlying conduct is conduct that undeniably exists. It existed in 1985 and 1986. It is recounted in great detail in the report of the Attorney General's Commission.

However, it is an existing and pretty well settled across the spectrum of the First Amendment and across the spectrum of First Amendment authorities that the fact that the underlying conduct is itself illegal and appropriately prosecutable does not necessarily mean that photographs of it, films of it, or descriptions of it can themselves be prosecuted.

Child pornography is a notable exception to that, and when the Supreme Court in *New York* v. *Ferber* in 1982 allowed the prosecution of child pornography on the theory that the underlying conduct was illegal and exploitative, it made clear to reaffirm that this was a principle that applied to child pornography and that it was not at the time changing its underlying views about whether that principle applied to obscenity. On the existing state of the law, the illegality or appalling exploitation of the underlying conduct justifies drying up the market for photographs and films of that conduct. For child pornography, yes, but on the existing state of the law for adult obscenity, no.

That is to some extent consistent with a wider range of cases, including the Pentagon Papers case, *Landmark Communications* v. *Virginia*, *Bartnicki* v. *Vopper*, and others in which the illegality of the underlying conduct does not affect the question of First Amendment protection. Unless obscenity is moved into the child—

Chairman BROWNBACK. Let me sharpen my question for you on that, then—

Mr. SCHAUER. Sure.

Chairman BROWNBACK.—because I have been working on this for some period of time and this is really an awful trade. I have met with girls that have been trafficked in Nepal and Israel and—

Mr. SCHAUER. I agree.

Chairman BROWNBACK.—Thailand and America, and that is where this is taking place. And we are even finding reports—we haven't verified this—of people doing the pornography filming in a foreign country, developing country, and then shooting it in here, because then you don't have to traffick somebody in and you have just trafficked the film in. But if you don't address that marketplace basket here, aren't you just continuing to ask for more of that?

As I understand, you are saying, prosecute the crime that is being conducted, but don't prosecute the distribution of the material. And yet if this is then okay overseas, then we start seeing this being brought in or people going over to film someplace in Central Asia and shooting it in, aren't you going to have to get at the product to be able to truly address this?

Mr. SCHAUER. All I am suggesting is that in order to get at the product, existing law would have to be changed dramatically. I don't deny the economics of the fact that if one dries up the product, one makes it harder to engage in the underlying conduct. That is what the Supreme Court said in *Ferber*. The economics of that relationship exist.

I am here in part, consistent with the earlier things that I have said, to warn against, for pragmatic reasons as well as constitutional ones, of pressing too hard against existing and well-settled law, and in this area, the law is pretty well settled. I would enthusiastically support redoubled prosecution of the underlying conduct, and the fact that the underlying conduct is itself aimed at potentially being part of a film is no First Amendment defense whatsoever. I would agree with you entirely, the underlying conduct is something we should deal with. I would like to deal with it within the boundaries of existing law because attempts to change the existing law are always fraught with danger.

Chairman BROWNBACK. Professor Destro, you talked about regulating on this. What about regulating the filming of somebody that is trafficked into here, or let me draw the example I did earlier about overseas, the filming of this by individuals and then the movement of the product into this marketplace. How would you regulate or deal with that?

Mr. DESTRO. Well, I agree with Professor Schauer that the reason that I say that the law is a mess is that if you are trying to get at it in terms of what is the effect of the film on the viewer, then you are going to run into all the well-settled law that he describes, and I don't disagree with his description of that at all.

My suggestion is that what you do is that you focus on the underlying behavior that is going on here. What you have is trafficking in—I mean, these people are accessories to prostitution. You are going to have to, just like you do in trying to interdict the drug

trade, to figure out where the important pressure points are going to be.

So you could easily prosecute someone for the, not so much under a pornography theory but under an accessory to prostitution theory—

Chairman BROWNBACK. Overseas? Overseas? Let us say this filming takes place somewhere overseas in a developing country.

Mr. DESTRO. Well, you could make the importation of that kind of material, focusing on the underlying behavior, illegal, too. Congress does control the borders and it can do it, but if you are an accessory to prostitution in another country and you are bringing in your wares, whether they are the people or they are the products of their labors in those countries, I think if you keep the focus on that behavior, you are going to be on much stronger grounds.

Chairman BROWNBACK. Mr. Trueman, if the *Extreme Associates* case is allowed to stand upheld, will we be able to prosecute any obscenity cases in the future?

Mr. TRUEMAN. No, I can't imagine that you would. I think that *Extreme Associates*, the ruling itself is so extreme that obscenity prosecutions would go by the wayside.

Mr. TRUEMAN. Could I add something about something that was said here? May I just quickly?

Chairman BROWNBACK. Yes.

Mr. TRUEMAN. I just want to take issue with something that Professor Schauer said here, with due respect to him. He mentions that the Attorney General's Commission divided up the nature of pornography and material that is violent or, in the second category, degrading to women, should be prosecuted. Other pornography, the Commission didn't form an opinion on. And I think he is arguing that just those two categories should be prosecuted.

I think there is a real danger in the Justice Department drawing these lines. Communities should draw the lines. The Supreme Court has outlined what may be found to be obscene. Now, at the Justice Department when I was there, we would bring prosecutions with a variety of material. We wouldn't just go after a pornographer and pick the worst film, which we would likely get a conviction on, because then the community standard becomes that that material in that worst film meets the community—is out of bounds for that community.

But if you bring a prosecution across the range of material that the pornographer is selling or distributing into the community and the jury convicts on all of it as obscene, then you have established a community standard and pornographers are thinking, we have got to stay out of that State or that community because a variety of material has been found to be obscene. I think that is wise, letting the community decide rather than the Justice Department.

Chairman BROWNBACK. This is just as a layman question, and as somebody that runs for public office and then meets people all the time. The people are just fed up with getting hit with this stuff in their face all the time and their kids on the Internet and at the grocery store when they exit, or on a billboard. It wasn't that long ago it wasn't this way, and this industry is a very large industry now, I don't know how many billions. I have seen different numbers on it. But it is a substantial business. Is it because of the lack

of prosecution that we see the pervasiveness of pornographic material in America today?

Mr. TRUEMAN. Yes, I certainly think it is, and by the way, we had a witness who turned in one of our biggest cases, a prominent man who told us that there is as much money under the table in the pornography industry as there is above, and we certainly think that is true, or did at the time at the Justice Department.

But if there is a lack of prosecution, then the people don't have a voice. The prosecutor substitutes his judgment for the judgment of the people and juries who would decide these questions. If the prosecutor ignores the law and refuses to prosecute, as we are seeing across the country, and then the pornographers have free rein of the community.

You are also seeing as a result of this lack of prosecution mainstream companies, as you pointed out in your opening statement, thinking, what is the downside? Now, you mentioned the Adelphia Communications, a cable company, just one of the cable companies that is distributing potentially obscene material. There is also many hotel chains that are distributing potentially obscene material.

And by the way, we opened an investigation of hotel chain distribution of obscenity when I was at the Justice Department. Apparently, that was closed in the next administration. But these corporations would not venture into this area if they knew the Justice Department was serious about enforcing obscenity law.

When I was at the Justice Department, we prosecuted what was at the time the only satellite distributor of obscene material. I mentioned it in my testimony. That company was distributing material via a GTE satellite, and we prosecuted them in Utah, where we had a complaint. The GTE send Brendan Sullivan, prominent Washington attorney, to Utah to tell the U.S. Attorney's Office that GTE didn't realize until the grand jury began that they could be indicted for distributing obscenity even though they were only a conduit for the obscenity. They cut that company off and refused to allow it again. I think things have changed now.

So what I am saying is if you begin prosecuting these mainstream companies, Dow-traded or NASDAQ-traded companies are not going to continue distributing obscene material for fear of losing shareholder value.

Chairman BROWNBACK. Thank you.

We have just gotten a vote called, and so I am going to turn to Senator Feingold for any statement he might want to make before we have to go over and vote.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I want to apologize. In fact, the vote is on the Feingold amendment and that is the reason why I wasn't here. I certainly would not have chosen this time to offer my pay-go amendment, but I was not given a choice, so I do want to apologize to you, Mr. Chairman, for not being here, but also to thank you.

You wanted to hold this hearing a few weeks ago, and because of not getting certain testimony at that time, you were kind enough

to postpone the hearing, and I really appreciate that and look forward to working with you as the Chairman of this Committee.

I will simply put my statement in the record, and I want to thank the witnesses for coming. I also will review the record and perhaps submit some questions in writing, if that would be acceptable.

Chairman BROWNBACK. Absolutely.

Senator FEINGOLD. I would just ask that. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you.

If I could, Mr. Trueman, looking further at this, I have had some attorneys say to me that they would prosecute these form of cases, but they are local prosecutors and they will come up against national lawyers on the other side of the case and they need information and assistance. They don't know how to prosecute on a local basis or a State basis an obscenity case. Do you offer any—is there any help for them in prosecuting these cases?

Mr. TRUEMAN. Well, the pornography defense bar is very small. There are about nine or ten attorneys who defend these cases when they come up around the country, whether it is a Federal prosecution or a local prosecution. A local county prosecutor will be overwhelmed with pretrial motions and find that their office is spending a huge percentage of their budget on one obscenity prosecution, and win or lose, they usually don't bring a second one. That is the intent, I think, of the pornography industry.

Reuben Sturman, when he was alive and identified, by the way, by the Attorney General's Commission on Pornography as the top pornographer, offered to provide defense counsel to any pornography shop carrying his material.

So local prosecutors have a difficult time, I will acknowledge that. They can get help from the Justice Department in terms of pretrial motions. Bruce Taylor at the Justice Department, who was mentioned here earlier, has participated in more cases than anyone. He has got a brief bank that is, I think, available to anyone. The Justice Department also has that.

But this is the reason why I always advocated when I was at the Justice Department, and still do, that prosecutions should primarily be done by the U.S. Department of Justice because they can match shot for shot the defense bar in these cases. The Justice Department won't be overwhelmed. They won't stop doing a case just because it has been drawn out and expensive to do. So I think it is vital that the Justice Department gets back to a point of vigorously prosecuting.

Chairman BROWNBACK. I have to say, gentlemen, I am very pleased with your testimony and information on this. This is a very troubling topic to me today and our society. I have said at hearings I have held previously on this, its impact on families, the expansion taking place, trafficking now into an extremely lucrative business, and it is something that spans the political spectrum. This is something that—the Councilman I am working with in Southern California is Democratic. Remember Paul Wellstone and I worked on the trafficking issue. It is really hurting the society today.

I am hopeful that we can get some vigor in constitutionally prosecuting cases of this nature because of its impact on the overall so-

ciety and culture, and it must be done constitutionally and it must be done wisely in us moving forward. But I also believe it must be done, and that if you don't do these sort of issues, your society continues to further and further engage and to allow, and you just continue to, as Senator Moynihan would say, define deviancy downward. He, whom I got to work with on cultural issues before and I considered him a great tutor before he left the Senate and passed away, would always view culture as one of the central issues, and in many cases more important than government.

But here, you have government kind of allowing a culture to move in a way that is not there in the law. But if you don't enforce it, nothing in particular happens.

I would appreciate any further thoughts any of you might have on this, because if we are looking at an increased prosecution in this area, it needs to be, must be done constitutionally, must be done wisely, and hopefully, effectively so that what is constitutional is allowed. What isn't, isn't, and we don't further harm our families. I get more complaints from people than anything about, look, I just don't want the culture to attack my family anymore. I would rather have a culture that buttresses and builds it up. And then when cases come along where you effectively eliminate all prosecution of obscenities, if they are moving forward, I can hear those same families saying to me, "Now what do I do?" in the society. So I do hope you can help us as we move forward on this.

I am appreciative of the panel, of your work. Many of you have worked a great deal of your professional lives on this particular topic.

I will keep the record open for seven days should other members wish to submit their statements or other materials for the record.

Thank you very much. The hearing is adjourned.

[Whereupon, at 3:58 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS

"Obscenity Prosecution and the Constitution"
Wednesday, March 16, 2005

Prepared Statement of Robert A. Destro**

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present testimony this afternoon. It is an honor for me to be here, and to be given the opportunity to speak to the important public policy issues that concern us today.

Please let me begin by making my perspective on these issues clear. By training and experience I am a civil rights advocate who litigates and studies cases that arise at the boundary the First and Fourteenth Amendments create between legitimate regulation in the public interest and the protected space that the Constitution reserves for religious freedom, speech, press, peaceable assembly, and petition for redress of grievances. It is precisely *because* I am an advocate for the freedoms we associate with the First and Fourteenth Amendment that I am appearing before the Committee today.

If there is one thing that I have learned as an advocate for religious freedom in all its forms – equal protection, speech, press, exercise, non-establishment, assembly, and petition – is that *reliable* protection for constitutional rights exists only within a well-crafted *statutory* framework. Unlike many First Amendment advocates, I do not place my trust in the courts. My clients and I have learned the hard way that, when left to their own devices, the courts do not always live up to their reputations as reliable defenders of liberty, equality, or the common good.[1] Meaningful protection comes from the hard-fought legislation forged by our elected representatives – the members of this Congress and representatives at the state and local levels – who bear primary responsibility for the protection of our civil and human rights.[2]

OBSCENITY, THE CONSTITUTION, AND *Extreme Associates v. United States*

The decision in *United States v. Extreme Associates*[3] is a classic example of the way in which a rights-based analysis will, without careful analysis, expand to the limits of its logic[4] and produce

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[1] *See* Robert A. Destro, *Federalism, Human Rights, and the* Realpolitik *of Footnote Four*, 12 WIDENER LAW REVIEW 373 (2003) (noting that real progress in civil rights has come only through legislative intervention).

[2] *See* U.S. Const., art. IV §4 (Guaranty Clause); amends. I, IX, X, XIII §2; XIV §5; XV §2; XIX §2.

[3] 352 F.Supp.2d 578 (W.D. Pa. 2005).

[4] *See Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). In *McCarter*, Justice Holmes stated:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Id. at 355.

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absurd results. But the fault is not Judge Lancaster's alone. Congress, the courts, and the legal academy all share part of the blame for a case in which the law has gone so badly awry.

It is well settled that obscenity is not protected by the First Amendment. Almost half a century ago, in *Roth v. United States*, 354 U.S. 476 (1957), Justice William Brennan – whose vision of civil liberties, and of the Court's role in protecting them, was perhaps the most expansive of any Justice in Supreme Court history – stated flatly that at the time of the adoption of the First Amendment, obscenity "was outside the protection intended for speech and press." *Id.* at 483. That position was affirmed in *Miller v. California*, 413 U.S. 15 (1973), in which the Court stated that it was "*categorically settled* . . . that obscene material is unprotected by the First Amendment."

The *Miller* Court established a three-part test for discerning obscenity that federal judges still apply in obscenity cases.

> (a) whether the 'average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> ( ) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24.

Under *Miller*, "prurient interest" is defined by community standards, *id.* at 30, and in *Haling v. United States*, 418 U.S. 87, 106 (1974), the Court held that "[t]he result of the *Miller* cases … is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S. at 105. As a result, "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." 418 U.S. at 106

Even though broadband communication links make direct producer to consumer distribution possible, the Court has not retreated. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 877-78 (1997), the Court stated that "the community standards criterion, as applied to the internet, means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."

Hence, it is no surprise that Judge Lancaster did not deem it necessary to discuss the Supreme Court's obscenity jurisprudence. Because the First Amendment does not protect "obscenity," and a jury determines whether the challenged materials are "obscene," the only way that the defendants in *Extreme Associates* could avoid a jury trial on the merits was the formulation of a new constitutional standard that would mandate the dismissal of the indictment.

Enter *Lawrence v. Texas*, 539 U.S. 558 (2003). In Judge Lancaster's view, an individual has a "fundamental right to possess and view what he pleases in his own home." By the simple expedient of reading the Court's holding in *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" together with its holding in *Lawrence v. Texas* that the state may not criminalize consensual sodomy

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that occurs in the privacy of the home he reaches the rather extraordinary conclusion that *Extreme Associates* "[constitutional] challenge is not precluded by *Roth, Reidel, Thirty-Seven Photographs, Orito*, and *200-Ft. Reels*, but is instead guided by cases such as *Stanley, Griswold v. Connecticut, Roe v. Wade*, and *Lawrence v. Texas*."

Judge Lancaster has committed of the most basic errors in constitutional law: "forget[ting] that it is a constitution we are expounding."[5] The Supreme Court has stated repeatedly that "[t]he First and Fourteenth Amendments have never been treated as absolutes," *Miller v. California*, 413 U.S. at 23. It has categorically rejected the proposition that "obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only." *Paris Adult Theater v. Slaton*, 413 U.S. 49, 57 (1973), and it has specifically held that "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby." *Id.* Even the most generous reading of *Stanley, Griswold, Roe v. Wade, and Lawrence* does not support the proposition that there must be a "free market" in pornography.

ENFORCING OBSCENITY LAWS: DOES THE CONSTITUTION PROTECT THE "SEX TRADE"?

The answer to this question is an emphatic "no." I will leave to others the task of describing the individual and community devastation (including slavery, brutality, and murder) caused by those engaged in the sex trade, but I do want to take this opportunity to describe why this Committee needs to view the "pornography issue" in a more global context.

The production and distribution of pornography is part and parcel of a global sex trade that employs "sex workers"[6], film and video producers, distributors like Extreme Associates, IT experts, and the financiers who provide the capital to bring these "productions" to market. Broadband and cable providers provide the final link in a worldwide distribution chain that allows willing consumers to watch as "sex workers" around the globe ply their trade.

Unlike Judge Lancaster, I am unwilling to ignore either the commercial aspects of the global sex trade in which Extreme Associates is engaged, or the devastation that the global sex trade wreaks in the lives of individuals and communities. The United States finds itself in the unenviable position of defending laws against the assertion that they violate the *consumer's* constitutional right to privacy because the courts are unwilling to address the real question: Do the *producers* have any right to make create a market in which graphic sex is bought and sold like any other commodity?

The answer to this question is an emphatic "No," but the fact that it needs to be asked shows just how confused (and confusing) the law of obscenity has become. The current definition of "obscenity" and of "lewd" or "lascivious" behaviors depends on an entirely *subjective* analysis of the degree to which they would appeal to the "prurient interest" of the hypothetical "reasonable observer." (This is the "I know it when I see it test."[7])

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[5] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding").

[6] *See, e.g.*, Sex Workers Outreach Project, http://www.swop-usa.org/ ; International Union of Sex Workers, http://www.iusw.org/.

[7] *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964):

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of "hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

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Prepared Statement of Robert A. Destro
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When a jury finds that materials are *not* "obscene," it is easy to assume, even though the Court has never so held, that the commercial aspects of the *behaviors* depicted in these materials is protected. It is not. Judge Lancaster's opinion makes precisely that assumption. In his view, the fact that the Court has held that individuals have a constitutionally protected right to engage in consensual sexual behavior in the privacy of their own homes, and that they may not be prosecuted for mere possession of pornography depicting "adult" sexual behavior, means that the government's right to regulate the *commercial* aspects of the sex trade must be defended under a multifactor balancing analysis (the "compelling state interest" test) that the United States Supreme Court *itself* has held to be unconstitutionally vague[8]. This, I respectfully submit, makes no sense at all.

Such a standard, *as applied by the courts*, does not provide our elected representatives the guidance they need to legislate in the public interest.[9] The legal academy provides no better guidance. In its view, the idea that the First Amendment does not permit the imposition of any "moral code" (other than its own version of political correctness) is one of those "fundamental assumptions [that] appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them."[10] Judge Lancaster's opinion in *Extreme Associates* demonstrates why the law of obscenity developed by the courts is such a mess.

Existing pornography laws are clearly enforceable. I strongly believe that the states and the Department of Justice should enforce them, but it should not be surprising that civil libertarians would oppose aggressive enforcement. Unless and until this Congress comes to grips with the fact that pornography is no more about "sex" than rape is, the confusion will continue.

Pornography is about *money*, and those who sell it traffic in materials that are an affront to the human dignity of the men and women who, for whatever reason, engage in sex-for-hire. The Commerce Clause gives Congress ample power to regulate the multi-billion dollar global sex trade, and Judge Lancaster's calculated omission of any discussion of the obscenity cases demonstrates beyond a reasonable doubt why the First Amendment is utterly irrelevant to the questions before the Committee today.

IS THE DECISION IN *Extreme Associates* AN EXAMPLE OF JUDICIAL ACTIVISM?

The short answer to this question is "yes," but a few words of explanation are in order before developing the idea further.

Defining "Judicial Activism"

The meaning of the phrase "judicial activism" varies widely from person to person and from left to right on the political spectrum. Professor Mark Tushnet[11] provides a useful typology when he notes that there are at least *six* meanings of the term "activist:"

(1) When courts decide issues not actually before them,

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[8] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[9] In *Boerne*, the Court required that the language of the statute be crafted in a manner that provides some "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 508 (1997).

[10] Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978).

[11] Mark V. Tushnet, Comment, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 147, 147-53 (1987).

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(2) When courts readily disregard precedent without first having determined that actual "problems have[] arisen in the administration of the [prior] rule,"

(3) When courts make decisions that "substitute[] the judgment of unelected judges for those of elected decision makers,"

(4) When courts engage in certain uses and abuses of "the jurisprudence of 'original intention,'"

(5) When courts accept the principle that "an activist court is an arm of an activist government," and

(0) When used as a word of "praise" or "blame."

Professor Stephen F. Smith of the University of Virginia provides a useful reality check concerning the use of the term "judicial activism." When used in the "praise" or "blame" sense identified by Tushnet, Professor Smith notes that "[t]he term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging."[12]

For present purposes, I am using the term "judicial activism", not as a "put down," but as a way to describe a decision in which:

- A court obviously and "readily disregard[s] precedent without first having determined that actual "problems have[] arisen in the administration of the [prior] rule."

In *Extreme Associates*, Judge Lancaster makes it very clear that "after *Stanley* established the right to privately possess obscenity in one's home, the Supreme Court repeatedly refused to recognize a correlative First Amendment right to distribute such material."[13] He also makes it clear that in *United States v. Orito* "the Court engaged in a rational basis analysis and held that the obscenity statutes could be justified as a method of protecting the public morality."[14] He nevertheless ignores *both* lines of authority, and oversteps the bounds of the role assigned to him as a United States District Judge.

- A court makes a decision that "substitutes the judgment of unelected judges for those of elected decision makers."

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[12] Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1077 (2002) (citations omitted). For a recent sampling of articles on the topic, see, for example., John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today's World*, 25 CHI. B. REC (October 16, 2002); Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Ernest A. Young, *Judical Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002). *See also* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198, 210 (1985) (referring to judicial activism as courts "acting contrary to the will of the other branches of government" and thereby "taking power from th[ose] other branches"); Glendon Schubert, *A Functional Interpretation, in* THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (David F. Forte ed., 1972) (noting that a court "is activist when[ever] its [policies are in] conflict with those of other major decision-makers").

[13] *Extreme Associates*, 352 F. Supp. 2d at 589, citing *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971) (holding that there is no First Amendment right to distribute obscene material); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (holding that there is no "First Amendment right to do business in obscenity and use the mails in the process"); *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) (same); *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973) (holding that *Stanley's* right to private possession of obscene material does not give rise to an independent First Amendment right to transport such materials in interstate commerce).

[14] *Extreme Associates*, 352 F. Supp. 2d at 589, citing *Orito*, 413 U.S. at 143-44, 93 S.Ct. 2674 (obscenity laws are a way to prevent the spreading of "evil" of a "moral nature")

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Judge Lancaster is entitled to his opinion that there is no real distinction between the privacy of the home and the creation and maintenance of a worldwide sex market, but Article III does not authorize him to substitute that judgment for that of either the United States Supreme Court – which has not had occasion to address the question – or for that of this Congress, which is explicitly granted the authority and discretion to create, maintain, regulate, and destroy interstate and international markets in goods and services. This Congress can, and I am quite sure, will weigh in on the question of whether there should be an interstate and international market where sex is bought and sold like any other commodity, and where voyeurs need not go to a house of prostitution to enjoy a peep show.

- When courts accept the principle that "an activist court is an arm of an activist government."

Perhaps the most telling evidence that *Extreme Associates* is an example of "judicial activism" is Judge Lancaster's almost laughable justification for extending the substantive due process reasoning of *Lawrence v. Texas*. In his view, *Lawrence v. Texas* requires the judicial imposition of a regime of *laissez-faire* in the sex trade because

> [Current law is] based on the settled rule established in Roth that obscenity is not protected speech under the First Amendment. The motion in this case, however, does not raise a First Amendment challenge to the federal obscenity statutes; it raises a substantive due process challenge. The fact that the obscenity statutes have been upheld under one constitutional provision does not mean that they are immune from all constitutional attack. *See e.g. Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (statute did not violate the Equal Protection Clause, but did violate the First Amendment); *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 383-84, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (finding that the fact that obscenity is not protected speech under the First Amendment does not mean that it is "entirely invisible to the Constitution").
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> ***
>
> Neither the Supreme Court nor the Court of Appeals for the Third Circuit has considered a substantive due process challenge to the federal obscenity statutes by a vendor arguing that the laws place an unconstitutional burden, in the form of a complete ban on distribution, on an individual's fundamental right to possess and view what he pleases in his own home, as established in *Stanley.* Therefore, contrary to the government's position, defendants' challenge is not precluded by *Roth, Reidel, Thirty-Seven Photographs, Orito,* and *200-Ft. Reels,* but is instead guided by cases such as *Stanley, Griswold v. Connecticut, Roe v. Wade,* and *Lawrence v. Texas.*

The problem with this reasoning is – or should be – obvious. It is not possible, either realistically or theoretically, to draw such a distinction. In the present case, where the Bill of Rights is directly applicable to the Congress, Judge Lancaster's opinion would make no sense at all unless it rested the "privacy" interests that control the outcome on foundation of First Amendment "principles" described at a very high level of generality. As applied to the States, the fallacy would be

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crystal clear: the Incorporation Doctrine is *itself* a pristine example of substantive due process in action[15].

Is Congress Partially to Blame?

The answer to this question is also "yes." The United States Supreme Court has made it clear that it is uncomfortable with the concept of "obscenity," both on its face and as applied. A slim majority of the Rehnquist Court and most of the legal academy is also uncomfortable with traditional moral views concerning the propriety of sex and sex-related issues like abortion and same-sex "marriage." The voting public, however, is not.

It is time for Congress to get down to the hard work of defining – with some degree of precision – what kinds of behavior are permissible in the interstate and international markets and which are not? Viewed as an economic transaction, the sale of an explicit sex or violence video is simply the sale of a commodity (a disk or videotape) or a service (sex-for-hire). If Congress wants to get serious about regulating the burgeoning market in the sex trade, it has both the power and the resources to get the job done. Sex-for-hire has a name: prostitution. Hiring someone to have sex so that others can watch is pandering. Hawking the wares of prostitutes also has a name: pimping.

In short, perhaps it is time to call Judge Lancaster's bluff. Legislating against "obscenity" makes for good press, but leaves the heavy lifting to the courts. Calling things by their proper names places the burden right where it belongs: here in the Congress.

THE USE – AND ABUSE – OF THE "COMPELLING STATE INTEREST" TEST

The "compelling state interest" test is a staple of Constitutional Law 101. Judge Lancaster's opinion gets it exactly right:

> … a statute withstands a substantive due process challenge only if the state identifies a compelling state interest that is advanced by a statute that is narrowly drawn to serve that interest in the least restrictive way possible.

Law students learn the "compelling state interest" test like a mantra, and dutifully memorize the "steps" in a variety of analyses that basically do the same thing: "balance" the legislature's views of the limits of its authority against the judge's views that they have exceed it.

The reality, however, is far different. The "compelling state interest" test is only used when the judges have decided, in advance, that the state's interest is *illegitimate*. In cases where the state *wins*, the "compelling state interest" test is rarely – if ever – used. In fact, the "compelling state interest" *analysis* works in reverse: (1) when the interest is clearly legitimate, and (2) the means is narrowly tailored to achieving that interest, the state will win, and the term "compelling" is never used.

Explaining how all this works in the time allotted here is far beyond the scope of the task assigned to me by the Chairman, but the bottom line is this: If the courts really believe that there is no *legitimate* interest in regulating the interstate and international sex market, this Congress should

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[15] The Incorporation Doctrine was an enormous *expansion* of federal judicial power during a period where the conventional wisdom has it that the Court had *withdrawn* from its previously "activist" role. *See generally*, Robert A. Destro, *Federalism, Human Rights, and the* Realpolitik *of Footnote Four*, 12 WIDENER LAW REVIEW 373 (2003); Robert A. Destro, *"By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion,"* 29 IND. L. REV. 1, 13 (1995).

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write legislation that forces them to say so explicitly. If there is such an interest, Judge Lancaster's opinion should be reversed. It's that simple. The First Amendment has nothing to do with it.

Thank you for your attention.

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STATEMENT OF PROFESSOR FREDERICK SCHAUER

HEARING ON OBSCENITY PROSECUTION AND THE CONSTITUTION
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
March 16, 2005

My name is Frederick Schauer, and I am the Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University. I also regularly teach courses in the First Amendment and in Evidence at the Harvard Law School.[1] I am a member of the Massachusetts Bar, and have previously been Professor of Law at the University of Michigan, Cutler Professor of Law at the College of William and Mary, Visiting Professor of Law at the University of Chicago, and Ewald Distinguished Visiting Professor of Law at the University of Virginia. In 1985-1986 I served as a Commissioner of the Attorney General's Commission on Pornography, and was the principal drafter of the Commission's analysis and recommendations. Among my publications are The Law of Obscenity (BNA, 1976), Free Speech: A Philosophical Enquiry (Cambridge, 1982), articles specifically on obscenity and pornography law in the American Bar Foundation Research Journal, the Georgetown Law Journal, the North Carolina Law Review, the Supreme Court Review, and the West Virginia Law Review, and more than fifty articles on First Amendment doctrine in publications such as the Harvard Law Review, the Columbia Law Review, the California Law Review, the Northwestern Law Review, and the Texas Law Review.

I appear before the Subcommittee by invitation of the Subcommittee and not on behalf of or in any way connected with any individual, organization, or group of any kind. I should note in this connection that my political affiliation is independent, and that I have not registered as a member of a political party in almost thirty years. Moreover, I have no political, financial, organizational, or fiduciary connections with anyone who might be helped or hurt by any legislation or government action that might originate in this committee. Indeed, consistent with my longstanding practice, and consistent with my views about academic independence, I do not represent clients, directly or indirectly, nor do I draft or sign legal briefs, nor do I enter into any consulting relationships to provide legal services or legal advice.

* * *

[1] I am, of course, speaking at this hearing only for myself, and not on behalf of the Kennedy School of Government, the Harvard Law School, or Harvard University.

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The sale and distribution of obscene materials has been unlawful in most of the American states since the early 1800s, and has been prohibited by federal law since 1873. In the face of occasional suggestions that obscenity law was inconsistent with the First Amendment, the Supreme Court casually affirmed the constitutionality of prohibitions on obscenity several times in the late 19th and first half of the 20th centuries, but not until 1957, in the case of Roth v. United States, 354 U.S. 476 (1957), did the Supreme Court squarely address the issue, concluding that obscene material lay outside the coverage of the First Amendment. From 1957 until 1973 the Court struggled with various approaches to defining the material that remained beyond the First Amendment, but in 1973 it both reaffirmed the basic holding of Roth (Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)), and settled on a test (Miller v. California, 413 U.S. 15 (1973)) for the determination of obscenity. In the face of a widespread but mistaken belief that the Miller test left the determination of obscenity to local community standards, the Supreme Court in 1974, with then Associate Justice Rehnquist writing for a unanimous Supreme Court in Jenkins v. Georgia, 418 U.S. 153 (1974), made clear that the definition of obscenity was a matter of federal constitutional law, and that the role of local standards was minimal and interstitial. Although there have been occasional Supreme Court obscenity cases in the ensuing thirty years,[2] none have challenged the basic conclusions of the 1973 cases – that material that is legally obscene according to the Miller definition of "hard-core"[3] material may be subject to civil and criminal penalties, but that material that is not legally obscene, unless it is child pornography,[4] or unless the restrictions relate to non-prohibitory zoning[5] or broadcasting,[6] remains fully protected by the First Amendment.[7]

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[2]See, e.g., Pope v. Illinois, 481 U.S. 497 (1987); Smith v. United States, 431 U.S. 291 (1977). And in Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783 (2004), the Supreme Court made clear that even with respect to material targeted at or available to children, the legal test remained the Miller test for obscenity (although one that might take account in its application of the actual age of the audience, Ginsberg v. New York, 390 U.S. 629 (1968)), and could rely on a different "harmful to minors" standard.

[3]This is the term used by the Supreme Court in Miller to emphasize its understanding of the expected application of the Miller test.

[4]New York v. Ferber, 458 U.S. 747 (1982). See also Osborne v. Ohio, 495 U.S. 103 (1990).

[5]Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). See also Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1976).

[6]FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[7]This is the principle supporting the Supreme Court's invalidation of, inter alia, the Child Online Protection Act, Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2783 (2004), the Child Pornography Act of 1996, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and the

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Although the exclusion of Miller-defined obscenity from the coverage of the First Amendment has been subject to extensive academic and political criticism, I continue to believe that such exclusion is consistent with the core principles of First Amendment law, and that Miller-defined obscenity is sufficiently far removed from the central concerns of the First Amendment that the basic structure of the Supreme Court's approach is defensible.[8] I thus agree that prosecution of legally obscene materials using a faithful application of the Miller test does not violate the principles of the First Amendment.

* * *

It as, of course, a basic principle of constitutional law, and one that is drummed into the heads of law students from the first day of a constitutional law class, that not government action which is constitutionally permissible is necessarily desirable as public policy. As a matter of constitutional law Congress could eliminate speed limits on interstate highways, prohibit the growing of numerous crops, double the marginal income tax rate, and re-institute military conscription, but few people believe that the constitutional permissibility of these and countless other actions is an argument for their desirability. So too with obscenity prosecutions, and the correct conclusion that obscenity prosecutions are permissible under the First Amendment merely shifts the inquiry to the question of whether it is desirable that they take place, and, if so, to what extent. And as Congress considers that question, three issues seem particularly important.

1. The first issue to be considered is the extent to which obscenity prosecutions are being or would be used as a way of attacking and undercutting the existing and well-settled definition of obscenity. When the Attorney General's Commission on Pornography conducted its hearings and invited submissions in 1985 and 1986, a number of representatives of the federal law enforcement community urged that the Commission recommend rejecting the Miller standard and replacing it with a per se test of obscenity that would make obscenity prosecutions easier. And by replacing Miller with a per se test, or by redefining the Miller standard in per se terms, this proposed strategy would have made the prosecution of obscenity more efficient and at the same time made the extent of First Amendment protection narrower. The Commission rejected this approach. Shortly thereafter, however, a law review article urging just that approach was published by Mr. Bruce Taylor, [9] then with the Citizens for Decency Through Law and now, since

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Communications Decency Act, Reno v. American Civil Liberties Union, 52 U.S. 844 (1997).

[8]See, most recently, Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765 (2004).

[9]Bruce A. Taylor, Hard-Core Pornography: A Proposal for a Per Se Standard, 21 U. Mich. J.L. Ref. 255 (1987-88).

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2004, Senior Counsel to the Assistant Attorney General in the Department of Justice, and with principal responsibilities in obscenity enforcement. In both 2003[10] and 2004[11] Mr. Taylor again urged that obscenity be defined and understood so that the key feature of the definition be something easily identifiable, such as "penetration clearly visible." Because Mr. Taylor is now the principal individual managing obscenity prosecution at the Department of Justice, and because such a "per se" approach would be inconsistent with Miller, inconsistent with thirty-one years of obscenity law since Miller, and inconsistent with a proper understanding of the First Amendment, any move to increase the level and scope of federal obscenity prosecution in 2005 must be evaluated against the declared motivations of the official principally responsible for such prosecutions to attack the existing and well-settled state of the law, an attack supported by witnesses at this hearing, and to move obscenity law in a direction that has no grounding in any part of existing or historically identifiable First Amendment doctrine. Until and unless there is far better assurance than has existed to date that such pressure to expand or modify or re-interpret the long-settled definition of obscenity will be abandoned, and that prosecutors will not "ignore the law in favor of their own agenda,"[12] there remains a substantial risk that what is described as an effort to enforce existing obscenity law will be, at least in part, a mask for what is in fact an effort to change existing obscenity law.

2. Apart from the risk that renewed prosecutorial efforts will be aimed largely at the goal of changing the well-settled law, there remain questions about the appropriate allocation of scarce prosecutorial resources. Because the production of child pornography by definition involves the abuse of real children, and because dealing with such child abuse should remain at the highest level of priority, there is a risk that increasing the quantity of obscenity prosecutions in a world of limited prosecutorial resources -- both financial and human -- will be at the expense of child pornography prosecutions. Such a reallocation of prosecutorial efforts away from child pornography would be inconsistent with wise policy, inconsistent with the recommendations of the Attorney General's Commission on Pornography, and, most importantly, inconsistent with the welfare of children.

Such a reallocation would not be necessary, of course, were new funds to be granted for obscenity prosecutions.[13] But any decision by the Congress to spend additional money on

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[10]Hearings of the Committee on the Judiciary, United States Senate, October 15, 2003.

[11]Conference sponsored by the Harvard Journal of Law and Technology, Harvard Law School, Cambridge, Massachusetts, March 19, 2004.

[12]See Orrin Hatch and Sam Brownback, "'Extreme' Judicial Activism," Washington Times, February 5, 2005, p. A19.

[13]Indeed, even if new funds were to be made available, there remains the question of whether those funds should be used for obscenity prosecutions rather than for efforts to control

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obscenity prosecution should be based on a calculation of the benefits of such expenditure compared to the costs. And here the Miller standard once again becomes relevant. Under any conceivable understanding of the harms of obscenity as obscenity, the Miller definition, and any other definition that might be imagined, is extremely under-inclusive. Whether the harms be understood as environmental, or moral, or anything else, the vast majority of sexually-oriented or sexually-explicit material that would produce those harms is and will remain for the conceivable future fully protected by the First Amendment. Sexually explicit but non-obscene material pervades the society, and in virtually every domain except broadcasting does so under the well-entrenched protection of the First Amendment, as well as under the social protection of a society that is increasingly accepting of such material. In the face of a constitutional terrain that makes obscenity prosecution destined at best to involve a large expenditure of new funds to deal with only a minuscule slice of whatever the larger problem may be, the case for increased obscenity prosecution is a very difficult one to maintain.

Even the best case for such increased prosecution, however, would have to be premised on a congressional determination of what the harms of obscenity actually were. To repeat, the constitutional non-protection of Miller-tested obscenity says nothing whatsoever about it harmfulness, and on that issue, subject to what I have to say in the following section, there is virtually no evidence. Apart from scientifically-unsupportable claims about so-called "pornography addiction" and such, there exists no evidence that sexual explicitness as sexual explicitness produces sexual violence or any other consequence with which government can or should deal. This was the conclusion of the Attorney General's Commission two decades ago,[14] and this conclusion, hardly the product of a group of libertines or sympathizers with the industry of sexually explicit material, remains consistent with all of the scientifically serious research that has been produced since the Commission issued its report.

3. The significant exception to what is in the previous paragraph is the relationship between material endorsing or promoting sexual violence or violence against women and the incidence of sexual violence or violence against women in the society. Although there

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child pornography. Every dollar spent on an obscenity prosecution is a dollar not spent on child pornography prosecution, and only under circumstances in which it can be said that no more can be done about child pornography would this tradeoff fail to exist..

[14]"Although the social science evidence is far from conclusive, we are on the current state of the evidence persuaded that [material that does nor endorse violence against women and that does not depict the degradation of women] does not bear a causal relationship to rape and other acts of sexual violence." Final Report, Attorney General's Commission on Pornography, July 1986, p. 337. For my own roughly contemporaneous description and explanation of the Commissions's conclusions, see Frederick Schauer, Causation Theory and the Causes of Sexual Violence, 1987 Am. Bar Foundation Res. J. 737.

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was at the time of Report of the Attorney General's Commission on Pornography no evidence that sexual explicitness as explicitness bears a causal relationship to the incidence sexual violence, and although there is still no such evidence, there was then, and apparently is still now, evidence that endorsing portrayals of violence against women – most commonly some variation on the rape fantasy in which many men erroneously believe that women enjoy being raped or enjoy being the victims of sexual violence – do bear a causal relationship to the incidence of sexual violence in the society, an effect that is independent of the degree of sexual explicitness. Endorsements of sexual violence, false portrayals of women as enjoying being victims of sexual violence, and various related images and messages do indeed, according to most of the existing serious research, bear a causal relationship to the overall level of sexual violence, and it was the conclusion of the Attorney General's Commission in 1986 that prosecution of legally obscene (under Miller) material that also contained such endorsements or glorifications of violence against women might be prosecuted, even though the category of such material was vastly under-inclusive vis-a-vis the full universe of written, printed, and visual material endorsing or glorifying violence against women. The Commission reached this conclusion in part because of the symbolic effect that such prosecution might have, but it was a symbolic effect that existed precisely because of the conclusion that endorsing depictions of violence against women were a contributing factor in a genuine and serious social problem.

Unfortunately, this concern for violence against women has largely dropped out of the most recent efforts to increase the level of federal obscenity prosecutions. Although a concern about violence against women is occasionally mentioned these days, such mention is rare and decidedly secondary, and there is little indication that prosecutions are to be restricted to the subset of the set of legally obscene materials that explicitly endorse or glorify such violence. Moreover, there are repeated references in the current discussions to bestiality and other practices whose depiction might offend most people, but which are not in any of the serious research shown to be related to violence against women or sexual violence in general. Indeed, there even seems to be some pressure from some groups to have the government conclude that violence against women is not the problem with respect to obscene material, and to conclude that the allegedly harmful effects of highly sexually explicit material are independent of its depiction of violence against or degradation of women. Unlike the evidence on the relationship of endorsing images of sexual violence to the level of sexual violence, however, and unlike the evidence of the relationship of endorsing images of violence in general to the level of violence, there exists still no serious research supporting the view that sexual explicitness as explicitness bears a causal relationship to the levels of violence, whether sexual or otherwise. That the current pressure to increase the level of obscenity prosecution is based on issues of sexual morality, or on the supposed evils of pornography addiction, or on undocumented harmful effects on children, but virtually not at all on the real and scientifically supportable issue of violence against women, is inconsistent with the evidence, inconsistent with the conclusions of the Report of the Attorney General's Commission on Pornography, and inconsistent with the wise allocation of scarce prosecutorial resources into areas where the problems are real, documented, and genuine.

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STATEMENT OF PATRICK A. TRUEMAN

HEARING ON OBSCENITY PROSECUTION
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS
COMMITTEE ON JUDICIARY
UNITED STATES SENATE
March 16, 2005

My name is Patrick Trueman. I currently serve as senior legal counsel for the Family Research Council in Washington, D.C. I also serve as a consultant and law enforcement coordinator to Capital City Partners on its contract from the U.S. Department of Health and Human Services Rescue and Restore Campaign on Human Trafficking. For the Rescue and Restore Campaign, I work with and train federal, state, and local law enforcement officers on human trafficking. Also, I serve as counsel to the Paul and Lisa Program of Connecticut, a leading child advocacy organization which helps child and adult prostitutes get off the streets and to reclaim their human dignity. While I am not testifying today on behalf of Capital City Partners nor the Paul and Lisa Program, I mention my work with these groups because it is my observation, after nearly twenty years of working against pornography, that pornography is closely linked to an increase in prostitution, child prostitution, and human trafficking. I dare say that the belief that pornography is a powerful factor in creating the demand for illicit sex is a near universal observation of those involved in assisting the victims of prostitution and human trafficking...

From the end of the Administration of President Ronald Reagan in 1988 to the end of the Administration of President George H. W. Bush, I also served in the United States Department of Justice as Chief of the Child Exploitation and Obscenity Section (CEOS) in the Criminal Division. For the year prior to this, I served as the deputy in CEOS. CEOS prosecuted federal child sexual exploitation and abuse, child pornography, and obscenity crimes and coordinated the investigation and prosecution of these crimes nationally. During those years, under three Attorneys General, the Department of Justice had a very active and successful prosecution effort under way against the major producers and distributors of obscene material in the United States. The effort involved numerous nationwide federal obscenity prosecutions with indictments returned in many federal districts.

It has long been clear to prosecutors and the public that obscenity lies outside First Amendment protection. The Supreme Court has said as much in a number of cases. *See, e.g., Roth v. United States* 354 U.S. 476 (1957). In *Miller v. California,* 413 U.S. 15, 34 (1973) (quoting *Breard v. Alexandria*, 341 U.S. 622, 645 (1951)), additionally, the Court held that "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment . . . . It is a 'misuse of the great guarantees of free speech and free press.'"

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Although the constitutional status of obscenity was clear, however, the Department prosecuted only a handful of cases in the twenty years prior to the establishment of CEOS. Because the Department was ignoring obscenity crimes, pornographers were emboldened, producing and distributing illegal products throughout the country, in stores, on cable/satellite television, and through the mail. Then the Department reversed course and began vigorously prosecuting obscenity. The impetus for the increased prosecution effort, starting in 1987, was the Attorney General's Commission on Pornography. That Commission, which began its work under Attorney General William French Smith, reported its findings in a "Final Report" delivered to Attorney General Edwin Meese III in 1986. Attorney General Meese followed a key recommendation of the Commission's Final Report and established a "strike force" (later called CEOS) in Washington D.C. to prosecute obscenity cases and to coordinate U.S. Attorneys in doing the same. General Meese, following the Commission's recommendations, also ordered his staff to draft key updates to the federal obscenity and child pornography laws and encouraged Congress to pass them. Congress did so in passing the Anti-Drug Abuse Act of 1988, PL 100-690, 102 Stat. 4489, Title VII, § 7521 (adding sections 1466 and 1469 to Title 18 of the U.S. Code), overwhelmingly in both the Senate and House.

It goes without saying that leadership from the Attorney General, the nation's chief law enforcement official, is critical in defeating crime. That certainly was the case with General Meese and his two successors in the Bush Administration, Richard Thornburgh and William Barr, who took a strong hand in making sure that U.S. Attorneys, as well as federal investigative agencies, pursued obscenity cases. That support and continued involvement of these Attorneys General was critical to our success.

During my several years at CEOS, we found obscenity law quite workable and, moreover, well understood by jurors who had to make decisions on the guilt or innocence of fellow citizens. To those who argue that the prosecution of obscenity crimes is a waste and an unwise use of resources, I would point out that during the time I was section chief of CEOS we received more than $24 million in fines and forfeitures as a result of our aggressive prosecution activities. This amount was in excess of the budget of CEOS during those years. Those opposing obscenity prosecutions often claim that such prosecutions take resources from child exploitation cases. However, we don't hear that bank fraud or tax evasion prosecutions take resources from child pornography cases. Pitting child pornography prosecutions against obscenity prosecutions makes no sense to a concerned parent who might ask: "Why is the government spending tens of thousands of dollars prosecuting and incarcerating Martha Stewart rather than the criminal who spams hardcore pornography to my children?" When I hear law enforcement authorities pit child pornography against obscenity, I see it as is an excuse for doing nothing on obscenity crimes.

There were two large obscenity prosecution projects undertaken by the Department while I worked at CEOS and I would like to mention each today. Under my predecessor, Robert Showers, CEOS and multiple U.S. Attorneys teamed with the U.S. Postal Inspection Service in "Project Postporn" targeting the major mail order distributors of obscenity. It targeted those who were widely distributing sexually oriented advertisements through the

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mail offering obscene material. Most often, the advertisements themselves were obscene, and many were prosecuted as such. The offending companies would often send these advertisements to children who happened to be on a purchased mailing list. Prosecutions were brought in districts from which citizen complaints emanated. "Postporn" resulted in 50 individual or corporate convictions in 24 cases in 20 federal jurisdictions and nearly every mail-order distributor of obscenity caught in its net. These convictions all but ended the practice of sending pornographic advertisements through the mail.

For the second large-scale prosecution project, we targeted the major producers and suppliers of obscene material in the U.S. With the cooperation of the Los Angeles Police Department Vice Squad, we assembled a list of the top violators of Federal obscenity laws, including about 50 companies. Most of them were located in the Los Angeles area and LAPD Vice already had in-depth investigative knowledge of them. After the list was established, we worked with FBI field offices and local law enforcement agencies throughout the country to learn which of the top suppliers were shipping products into cities across the country. This was done by surveying products on the shelves of pornography shops. Then, with the backing of the Attorney General, we called a meeting in Los Angeles of U. S. Attorneys, as well as interested federal, state, and local law enforcement agencies, to demonstrate that obscenity laws were being violated in the various jurisdictions of those present. From this meeting, our so-called "Los Angeles Project" was launched. U.S. Attorneys agreed to initiate investigations of those on our target list who were likely violators of obscenity laws. Because of the scarcity of federal investigative resources--a perennial problem--we relied heavily on police and sheriffs' offices for our investigations. Often, we would have them deputized as U.S. Marshals to provide them with federal authority and thus enable them to act outside the bounds of their normal jurisdiction. We found local law enforcement agencies quite willing to lend support to these investigations.

About 20 companies of the 50 or so on that list were convicted under this project. I want to emphasize that these were major producer/suppliers, so convictions against them made a significant difference in the amount of illegal products distributed in interstate commerce. We were beginning the second phase of this project when the Bush Administration ended and the next administration all but halted obscenity prosecutions.

Our prosecution strategy in this project was ultimately to bring cases against all the major producer/suppliers of obscenity, and to bring those cases in every state where such material was produced and distributed. We prosecuted cases from California to Florida; from Texas to Minnesota. The man that the Attorney General's Commission identified as the top distributor of illegal pornography, Reuben Sturman, was prosecuted in Las Vegas. It was my belief then, as it is today, that we could win federal obscenity cases in any state. It is difficult to imagine a part of America where citizen-jurors would assert that their community standards are so low as to embrace obscene materials. We also brought prosecutions on a wide variety of material that we believed to be obscene under *Miller*, rather than going after only the most extreme material. We did this because we believed it was important to let juries decide what material offended community standards. *Miller* outlined what may be found to be obscene, depending on community standards, *i.e.*,

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"erotic depictions of ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sado-masochistic sexual abuse." 413 U.S. at 25. Our experience demonstrated that juries were willing to convict on material across the spectrum of obscenity described by *Miller*.

In addition to the two prosecution projects mentioned above, the Department also prosecuted many local, large-scale pornographers owning multiple pornography shops in various cities. Examples include Ferris Alexander, who monopolized the illegal pornography industry in Minnesota for decades. The conviction was upheld on appeal. *See U.S. v. Alexander*, 509 U.S. 544 (1993). A similar fate befell Dennis and Barbara Pryba of Alexandria, Virginia. They were convicted in a jury trial of obscenity-based RICO charges and forfeited their 12 pornography stores and a warehouse. The only distributor of obscenity via satellite, Home Dish Only, pleaded guilty to obscenity charges in the Western District of New York and the District of Utah.

I believe that our prosecution strategy during the years I was at CEOS was a correct one and it is a shame that it was abandoned when President Bush left office. Though our efforts were cut short by a change of presidential administrations, we made a very substantial dent in the obscenity industry in the United States. I was pleased to hear Attorney General Gonzales recently indicate strong support for enforcement of obscenity laws.

By the end of the administration of President George H.W. Bush, we were successful not only in gaining convictions throughout the country, but in changing the nature of hardcore material produced. Themes of rape, incest, bestiality, pseudo-child pornography (in which adults dress and act like children while engaging in sex) -- all common themes prior to our prosecution efforts--disappeared from store shelves and were no longer produced by the major pornography companies. Some distributors of hardcore pornography refused even to ship products to those states where convictions were obtained.

The Department's numerous cases during that era gave ordinary people sitting on juries across America, applying the *Miller* standard for obscenity, the opportunity to decide whether it was right to have pornographers flood their town with hardcore pornography. Almost without exception they said, "No." People would do the same today, I believe, if given the chance. However, if the Department of Justice shrinks back from enforcing obscenity laws or prosecutes only the most extreme material, it deprives the people of their lawful opportunity to rid their communities of obscene material. People are tired of an "anything goes" community standard and want their community to be a decent place to live. Few prefer to live or work near a porn shop or even do their shopping near such a business. For these reasons, they do not want the Department of Justice to look the other way, especially today when the reach of pornographers is far greater than ever before because of cable and satellite TV and the Internet. It is my hope, judging from the Attorney General's recent comments, that the Department has heard this message. The Internet has now been in popular use for more than a dozen years. It is the primary means for distributing obscene material and it has touched the lives of countless children who

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unwittingly or willingly gain access to such material. The Supreme Court has recognized that obscenity and child pornography laws are still in effect, both for physical transfers and electronic transfers, noting in *Reno v. ACLU*, 521 U.S. 844, 877 n.44 (1997), that: "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles." The Department should vigorously prosecute Internet obscenity.

Over the last few years some have said we should adopt a "go slow approach" in order to stay within the legal boundaries set by the Court, which may otherwise loosen or jettison altogether the *Miller* community standards framework. But *Miller* has remained vital for over three decades, suggesting that vigorous enforcement of the obscenity laws is well within constitutional bounds. Moreover, vigorous prosecution could well promote the "community" aspect of community standards. Some believe that prosecutions must "start with the hardest material" such as bestiality or rape films because the public's attitude toward pornography has changed. Then, it is suggested, once a number of convictions have been secured involving the most extreme material, prosecutions can begin against less extreme material. Yet, public attitudes are more likely to change for the worse precisely *because* of this strategy. If pornographers know that only the most extreme obscene material will be prosecuted, they will believe they are safe in distributing virtually all obscenity into communities and on the Internet and cable/satellite TV. Hence, it should not be surprising that we have seen an explosion of hardcore pornography in our society, and that, correspondingly, our young people have become desensitized to ever-more brazen obscene material.

Some argue that there exists no evidence that obscene material harms, and thus there is no reason to enforce obscenity law. That is merely an argument for substituting the prosecutor's judgment for the judgment of the people, expressed through their elected representatives. It is also perhaps an argument for the need for more research. However, the common sense of the people, as reflected in the valid government interests identified by the Supreme Court, also has a place in the discussion. In *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 58 (1973), the Court stated that the interests which support the prohibition on obscenity include "the quality of life and total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Any vice cop in any city in America can tell you that pornography shops are magnets for crime, including prostitution, child prostitution, and the sale of illicit drugs.

I believe Attorney General Alberto Gonzales and federal prosecutors would have great public support if the Department vigorously prosecuted obscenity crimes. Indeed, a great segment of our society is clamoring for it to do so. A poll conducted by Wirthlin Worldwide in March of 2004 found that *eighty-two percent* of adult Americans surveyed said that the Federal laws against Internet obscenity should be vigorously enforced. Perhaps more telling is the number of complaints or reports of potential obscenity crimes by the public. The exact number is unknown but one indication of that figure comes from Morality in Media. That organization set up a very helpful tool for both the public and federal prosecutors. The tool is a Web site, www.obscenitycrimes.org where citizens who receive pornographic spam or find potentially obscene material on the Internet may file a

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report. The report of the incident is then forwarded to the Department of Justice in Washington as well as to the appropriate United States Attorney in the district from where the report originated. Since the inauguration of this unique effort, more that 50,000 reports or complaints have been registered with the Department of Justice. The attached summary from Morality in Media compiles the number of reports received by federal districts. Given the sound constitutional foundation of and strong public backing for our obscenity laws, I am hopeful that we will find the Department of Justice again to be a willing advocate for proper enforcement. A sound prosecution plan, should, in my judgment, include numerous prosecutions brought by multiple United States Attorneys, coordinated by CEOS, against the major producers and distributors of obscenity including publicly-traded companies that are now engaged in selling obscenity due to high profits. Prosecutions should be on a wide variety of material. Let the people decide!

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Prepared Testimony of
Professor William Wagner*
Director, Center for Ethics and Responsibility
Thomas M. Cooley Law School

Before the

U.S. Senate Judiciary Subcommittee on the Constitution

February 16, 2005

Mr. Chairman, Ranking Member, and Distinguished Members of the Committee, thank you for inviting me to testify today regarding obscenity prosecutions and the Constitution. Preliminarily, I wish to thank the Chair for holding this hearing and to express appreciation to you for your previous efforts to expose the dangers that obscene materials pose for our children and our nation.

That such material is linked to criminal, dangerous, and unhealthy conduct is now well-established. We now know how the material restricted by federal obscenity statutes harms children:[1]

> A child's sexual development occurs gradually throughout childhood. Exposure to pornography shapes children's sexual perspectives by providing them with information on sexual activity intended for adults. The type of information provided by pornography, however, does not provide children with a normal sexual perspective. Unlike learning provided in an educational or home setting, exposure to pornography is counterproductive to the goal of healthy and appropriate sexual development in children. . . .[2]

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* Professor Wagner served with distinction in all three branches of the United States government, including as a member of the federal judiciary where he served as United States Magistrate Judge (NDFL). Prior to his service on the federal bench, Wagner served as a senior United States prosecutor in the Department of Justice, where, among other things, he successfully prosecuted numerous child exploitation and obscenity cases. Before his service in the executive branch, he served as a legal counsel in the United States Senate. Wagner currently is a member of the full-time teaching faculty at Cooley Law School, where he teaches Constitutional Law and serves as Director of the Center for Ethics and Responsibility.

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Moreover, the danger of exposing children to material restricted by the federal obscenity statutes is serious:

> Pornography produces "permission-giving beliefs" for sexual pathology and sexual violence and that pornography produces distortions that change an individual's belief system. As a result, children exposed to pornography can become victims or victimizers, encouraged by the strong sexual images contained in pornography found on the World Wide Web.[3]

Congress has previously received compelling evidence of adults experiencing horrendous problems from their exposure to material proscribed by the federal obscenity statutes. The problems include unhealthy, harmful sexual addiction, suicide, rape, and other crimes of violence.[4] Moreover, according to the Federal Bureau of Investigation, the Internet and other on-line services are now "one of the most prevalent techniques by which pedophiles and other sexual predators" identify and recruit "children for sexually explicit relationships."[5] Additional danger to children comes from the distribution of obscenity over the internet:[6]

> ... Pornography, including obscene material, child pornography, and indecent material is available on the Internet. This material may be accessed directly and intentionally, or may turn up as the unintended product of a general Internet search . . . the aggressive tactics of commercial pornographers on the Internet expose children to random, and unintended exposure to sexually explicit material.[7]

How the exposure to pornography harms children and their development is, therefore, well documented.[8] Also well documented is the increase in incidents of pedophiles utilizing the Internet to lure and seduce children into illegal and abusive sexual activity.

Notwithstanding the documented dangers to society from this material, including the danger to our most vulnerable, federal courts, on a number of fronts, continue to

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impede such serious Congressional efforts to provide protection. This Committee, should therefore, take a close look at the interpretative process used by such Courts and then evaluate its options under the Constitution.

We should, moreover, encourage the Department of Justice to utilize existing federal obscenity statutes to vigorously prosecute those who pander what we now know to be very dangerous material. A number of years ago, the Department's vigorous prosecution of obscenity crimes successfully shut down the distribution of dangerous contraband – for awhile. During the 1990's, the serious commitment to prosecutions ceased, and the illegal conduct increased exponentially. In my view, one of the most effective things the Department can do is resume vigorous prosecution of those distributing obscene contraband.

The Federal Obscenity Statutes are Constitutional and Do Not Violate a Right to Privacy

A recent federal district court case, *U.S. v. Extreme Associates*, __ F. Supp. 2d ___, 2005 WL 121749 (W.D. Pa. Jan. 20, 2005), found that a right to privacy exists for defendants in federal obscenity prosecutions, applied strict scrutiny, and declared Federal obscenity statutes unconstitutional as applied to the facts of the case. The trial court's decision, however, failed to properly consider a long history of Supreme Court precedent upholding the Federal obscenity statutes against such arguments.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[9] Historically, material of the kind proscribed by Federal obscenity laws has never been included within the protection of the First Amendment.[10] Beginning with *Roth v. United States,* 354 U.S. 476, 482-485

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(1957), obscenity has never enjoyed any protection under the Constitution. In *Miller v. California*, the Supreme Court held States could proscribe obscene materials since obscenity is not protected speech under the First Amendment. 413 U.S. 15, 18-19 (1973). When the Court announced the constitutional test for unprotected obscenity in *Miller*, *id.* at 24-25, it also resolved several obscenity related issues and claims in some of its companion cases.

In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973), the Court specifically rejected the theory that obscene material and its dissemination acquire constitutional immunity, even if the distribution could be exclusively to consenting adults -- an ultimate fact the Court neither assumed, nor accepted:

> We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.

The Court repeated this principle in *Kaplan v. California*, 413 U.S. 115, 120 (1973):

> Today, this Court, in *Paris* . . . , reaffirms that commercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation.

In *Paris*, a state trial court dismissed civil complaints against defendants for showing two hard-core films, specifically since defendants took measures to ensure that minors did not enter the "adult theatre." The Georgia Supreme Court unanimously reversed and the Supreme Court agreed with the holding of the state's high court." *Paris*, 413 U.S. at 57.

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Legitimate Government Interests Exist in Prohibiting

Obscene Commerce and its Distribution

In *Paris*, the Court upheld several reasons and governmental interests for the validity and constitutionality of obscenity laws:

> Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see *Miller v. California, supra*, 413 U.S., at 18-20; *Stanley v. Georgia*, 394 U.S., at 567; *Redrup v. New York*, 386 U.S. 767, 769 (1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. See *United States v. Thirty-Seven Photographs, supra*, 402 U.S., at 376-377 (opinion of White, J.); *United States v. Reidel*, 402 U.S., at 354-356. Cf. *United States v. Thirty-Seven Photographs, supra*, 402 U.S., at 378 (Stewart, J., concurring). *Paris*, at 57-58
>
> Moreover, the *Paris* Court made it clear that preserving a decent and moral society provides a legitimate government interest for regulating obscene material; Indeed, the Court in *Paris* confirmed that a "right of the Nation and of the States to maintain a decent society . . . ." exists in connection with the regulation of obscene material 413 U.S. 60 citing *Jacobellis v. Ohio*, 378 U.S. at 199 (dissenting opinion); *Memoirs v. Massachusetts*, 383 U.S. at 457; *Beauharnais v. Illinois*, 343 U.S. at 256-57; and *Kovacs v. Cooper*, 336 U.S. at 86-88.

To be sure, the Court in *Stanley v. Georgia*, 394 U.S. 557 (1969) recognized an extremely limited right to privacy in holding that Congress could not criminalize mere possession of obscenity in an individual's own home. The Court in *Stanley* discussed the basic, fundamental right to privacy that the Court relied upon to protect the home from a criminal possession statute. *Id.* at 563-65. The Court did not state or hold, however, that a "right" to make, receive, or even possess "obscenity" exists.

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The *Stanley* Court recognized that:

> Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity.
> * * *
> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. *Id.*

The Court also found that criminalizing private possession of obscenity at home was not needed to support the enforceability of other admittedly valid obscenity "statutory schemes prohibiting distribution." *Id.* at 567. Finally, in reversing the individual's state conviction for possession of obscenity in his home, the Court carefully used narrow language in its holding:

> We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene materials a crime.[11] *Roth* and the cases following that decision are not impaired by today's holding.

The Court in *Stanley* could have recognized an absolute right to possess obscenity, or a right to obtain it, or have it provided or shipped to one's home. It did not do so. Instead, the Court merely held that a government cannot make a crime of the mere private possession of obscenity in one's own home. Such a legal distinction is important. The *Stanley* Court resolved the narrow issue by holding the state possession statute unconstitutional in its application to a defendant merely possessing obscenity in his own home. The Court created no further rights and adjudged no further restrictions on government.

As stated in *Thirty-Seven Photographs*, 402 U.S. at 376-77:

> That the private user under Stanley may not be prosecuted for possession of obscenity in his home *does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce.* ... Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to

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> the public, nor does it extend to one seeking to import obscene materials from abroad whether for private use or public distribution. As we held in *Roth* ... and reiterated today in *Reidel, supra*, obscenity is not within the scope of First Amendment protection. Hence Congress may declare it contraband and prohibit its importation, as it has elected in § 1305(a) to do.

Additionally, in *United States v. Reidel*, the court rejected a privacy right claim under *Stanley* when it upheld federal laws prohibiting use of the mails for disseminating obscene materials. 402 U.S. 351, 354-56 (1971). Significantly, in *Reidel* the defendant mailed obscenity to individuals under circumstances where there was no exposure to minors and no unwilling recipients existed. Moreover, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 365-66, 375, n. 3, 376-77 (1971), the Court upheld federal obscenity laws proscribing importation of obscenity for commercial purposes -- even for consenting adult customers.

In *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 126-30 (1973) the Court upheld federal obscenity laws prohibiting importation by private carriage of obscenity through customs for non-commercial, "private, personal use and possession only." *Id.* at 125.

Finally, in *Paris* the Court specifically held that:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko v. Connecticut* ...." *Roe v. Wade*, 410 U.S. 113, 152 .... This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. ... [413 U.S. 66] Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.
>
> If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of

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> the home," which was hardly more than a reaffirmation that "a man's home is his castle."

In all these cases, the Supreme Court held that obscenity laws prohibit the public and commercial distribution of obscene materials, including to consenting adults. Thus, Congress may prohibit the use of the mails and facilities of interstate commerce for carriage of obscene materials, including for use in the privacy of one's home. The Executive Branch, through the Department of Justice, should vigorously prosecute violations of these statutes. If the federal judiciary, in reviewing these statutes, attempts to strike them down by finding new rights hidden in the Constitution, it arguably uses an interpretive process that usurps the right of the American people to govern themselves. In such a situation this body has Constitutional options to restore any power, improperly usurped, to the more politically accountable branches of government.

Thank you for the opportunity to provide testimony today on the constitutionality of the Federal obscenity statutes.

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[1] H.R. Rep. No. 105-775, at 11 (1998).
[2] *Id.* (citing Brooks, Assistant Chief of Psychology Services, Department of Veterans Affairs, The Centerfold Syndrome (1996)).
[3] H.R. Rep. No. 105-775, at 11 (1998), citing testimony of Dr. Mary Anne Layden.
[4] *See* Hearings, 105th Cong. 55-57, 84 (1998)(statement of Dr. Mary Anne Layden).
[5] Hearings, 105th Cong. 26 (1998) (Statement of Stephen R. Wiley, Chief, Violent Crimes and Major Offenders Sections, Federal Bureau of Investigation).
[6] S. Rep. No. 106-141, at 1 (1999).
[7] *Id.* at 2.
[8] *Id.* at 3.
[9] U.S. Const. Amend. I.
[10] *See, e.g., Roth v. United States*, 354 U.S. 476, 482-485 (1957); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 23 (1972); *Ginsberg v. State of New York*, 390 U.S. 629, 635 (1968); *see also*, *Ashcroft v. A.C.L.U.*, 535 U.S. 564, 574 (2002).

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