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DEVIANT DREAMS: *EXTREME ASSOCIATES* AND THE CASE FOR PORN¹

Sienna Baskin*

*There's a difference between watching entertainment and feeling hey, that's not my, you know, cup of tea. I could do without seeing that for the next [thirty] years of my life, and saying, "You know what? The person who made that should go to prison."*²

*[A] person's inclinations and fantasies are his own and beyond the reach of government.*³

INTRODUCTION: THE FIRST BATTLE IN THE WAR ON PORN

"I guess this means we've won the war on terror," responded one frustrated FBI agent when he learned of the government's new priority for investigations and prosecutions: obscene pornography.⁴ Attorney General Gonzales has announced his intention to resurrect the federal obscenity statutes, which have lain virtually unused for a decade, to prosecute purveyors of pornography whose products violate community standards.⁵ His public statements on the subject make clear that the campaign will target obscenity

¹ The term pornography and its abbreviation will be used interchangeably in this essay. "Pornography" comes from the Greek *pornographos*, a synthesis of the word for prostitute (*porne*) and the word for write (*graphein*). MERRIAM-WEBSTER COLLEGIATE DICTIONARY 966 (11th ed. 2003). Pornography is "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement." *Id.*

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² Interview by Bob Garfield with Rob Black, Co-Owner of Extreme Associates, in New York, N.Y. (Apr. 23, 2004), http://www.onthemedias.org/transcripts/transcripts_042304_crackdown.html. Rob Zicari, aka Rob Black, co-owns Extreme Associates, Inc. with his wife Janet Romano, aka Lizzie Borden.

³ *Stanley v. Georgia*, 394 U.S. 557, 565–66 (1969).

⁴ Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21. Pornography is not "low value speech" just by virtue of its references to, or portrayals of, sex. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985). Sexual speech is fully protected under the First Amendment, unless and until a jury finds it to be obscene. Only obscenity can be criminalized. The "dim and uncertain line" between fully protected speech and a prison sentence is a troubling area of First Amendment jurisprudence. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

⁵ Alberto R. Gonzales, U.S. Att'y Gen., Prepared Remarks for U.S. Attorney's Conference (Apr. 21, 2005), <http://www.usdoj.gov/ag/speeches/2005/042105usattonysconference.htm>.

made, bought, and viewed by consenting adults.⁶ The Bush Administration has set aside funding for a special FBI anti-obscenity squad and, at the Department of Justice, an Obscenity Prosecution Task Force.⁷ Richard Green, Deputy Chief of Obscenity, will head the Task Force with Bruce Taylor, a veteran of Reagan-era obscenity prosecutions.⁸ Gonzales and the Department of Justice have been the target of both praise⁹ and criticism¹⁰ for their newfound zeal. Some news sources speculate that the anti-porn fervor must be the result of pressure from Bush's Christian supporters.¹¹

The criminal indictment of Extreme Associates,¹² a hardcore¹³ Internet pornography website, was intended to be the first victory in the new so-called war on porn.¹⁴ While still in preparation, the case was described as a warning shot for the industry.¹⁵ Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania, said the focus was on pornographers who produced "the worst material, the largest quantity of material, [for] the large-

⁶ Gonzales, *supra* note 5 ("I want you to remember that this Department has an obligation to protect not only our children, but all citizens, from obscenity.").

⁷ Garfield, *supra* note 2 ("President Bush's 2005 budget proposes four million dollars in new funds for obscenity prosecutions.").

⁸ Julie Kay, *U.S. Attorney's Porn Fight Gets Bad Reviews*, DAILY BUS. REV., Aug. 29, 2005, at A1, available at <http://www.law.com/jsp/article.jsp?id=1125318960389>.

⁹ Gellman, *supra* note 4 ("Christian conservatives . . . greeted the pornography initiative with what the Family Research Council called 'a growing sense of confidence in our new attorney general.'").

¹⁰ Kay, *supra* note 8 ("The agents were stunned to learn that a top prosecutorial priority of Acosta and the Department of Justice was . . . obscenity. Not pornography involving children, but pornographic material featuring consenting adults.").

¹¹ *Id.*

¹² *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 579 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹³ "Extremely graphic or explicit." THE AMERICAN HERITAGE DICTIONARY 799 (4th ed. 1994). "Hard-core" and "soft-core" are terms adopted by producers and consumers of pornography to differentiate between materials that depict actual sexual acts or aroused genitalia and materials that only show nudity or simulated sex. The hard-core/soft-core distinction was also once thought to mark the line between obscenity and protected speech. Jeffrey Rosen, *The End of Obscenity*, 2004 NEW ATLANTIS 75, 80. Since the U.S. Supreme Court established a standard that allows producers of hard-core films to escape prosecution if their materials have "serious literary, artistic, political, or scientific value," the distinction has lost its legal significance, although it retains a rhetorical one. *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁴ William Triplett, *Moral Majority: House, Bush on Indecency Crusade*, VARIETY, Feb. 17, 2005, at 14, available at http://www.variety.com/index.asp?layout=print_story&articleid=VR1117918112&categoryid=18.

¹⁵ *60 Minutes: Porn in the U.S.A.* (CBS television broadcast Sept. 5, 2004) (transcript on file with the New York City Law Review). See *Porn in the U.S.A.*, Steve Kroft Reports on a \$10 Billion Industry - CBS News, <http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml>.

est area of distribution”¹⁶ and that the defendants, Rob Black and Lizzie Borden, were selected for their especial outrageousness in flouting obscenity laws.¹⁷ If convicted on all charges, the defendants would face fifty years in prison.¹⁸

Extreme Associates moved to dismiss, but instead of using a traditional First Amendment argument,¹⁹ they wove an ingenious Due Process Clause²⁰ claim out of two doctrinal sources: *Stanley v. Georgia*²¹ and *Lawrence v. Texas*.²² The District Court for the Western District of Pennsylvania agreed with the defendants and found that the statutes, as applied to them, violated the Due Process Clause of the Fifth Amendment.²³ The case garnered immediate attention and was variously denigrated as the height of judicial activism,²⁴ lauded as a victory for liberty on the scale of *Roe v. Wade*,²⁵

¹⁶ *Id.*

¹⁷ *Id.* See *infra* Part IV. A typical profile of Lizzie Borden reads, “[D]uring her five-year career as an actress/director, Borden has emerged as a porn powerhouse who manages to offend, disgust and/or alienate not just feminists, politicians and most Americans with a conscience, but a great percentage of the unshockable pornography industry as well In fact, Borden’s films are so repugnant and evil that it’s difficult to justify their existence, let alone comprehend why anyone—especially a woman—would want to make this kind of garbage in the first place.” Janelle Brown, *Porn Provocateur*, SALON, June 20, 2002, http://archive.salon.com/mwt/feature/2002/06/20/lizzy_borden/index.html.

¹⁸ See Garfield, *supra* note 2.

¹⁹ U.S. CONST. amend. I. “The Government shall make no law abridging the freedom of speech” The traditional argument used by producers of pornography is that the government infringes upon their freedom of speech when it sanctions speech that is not obscene and, therefore, should be protected. See, e.g., *Tipp-It v. Conboy*, 596 N.W.2d 304 (Neb. 1999); *State v. Midwest Pride IV, Inc.*, 721 N.E.2d 458 (Ohio Ct. App. 1998); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

²⁰ U.S. CONST. amend. V; U.S. CONST. amend. XIV (“[n]or shall any person] be deprived of life, liberty, or property, without due process of law”). Substantive due process—whereby government is restrained from depriving an individual of rights interpreted as life, liberty, or property interests—has been developed primarily under the Fourteenth Amendment, which applies to the states. See, e.g., *Roe v. Wade*, 410 U.S. 113, 166 (1973). The Supreme Court has incorporated the substantive due process restraint to the federal government through the Fifth Amendment’s Due Process Clause. See, e.g., *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

²¹ 394 U.S. 557 (1969).

²² 539 U.S. 558 (2003).

²³ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 593 (W.D. Pa. 2005), *rev’d*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

²⁴ Karl Rove, Deputy Chief of Staff, White House, The Federalist Society Speech: Against Judicial Imperialism (Nov. 10, 2005), <http://www.opinionjournal.com/extra/?id=11007537>.

²⁵ See Clyde DeWitt, *What Will Happen to Obscenity Prosecutions? The Extreme Associates Argument and Decisions—and the Supreme Court on Federal Sentencing*, AVN (Mar. 1, 2005), http://www.avn.com/index.php?Primary_Navigation=legal&Action=View_Article&Content_ID=221408.

and thought to signal the end of obscenity law as we know it.²⁶ In December 2005, the Third Circuit reversed the district court, admonishing it for departing from the well-trod path of First Amendment jurisprudence and remanded the case for consideration under that doctrine.²⁷ After being denied a rehearing en banc, defendants' attorneys Louis Sirkin and Jennifer Kinsley petitioned the Supreme Court for certiorari and were denied in May 2006.²⁸

Extreme Associates represents the battles we can expect if obscenity prosecutions are revived. The obscenity doctrine authorizes the most conservative communities in the United States, guided by prosecutors, to decide whose sexuality is healthy and whose is criminally deviant.²⁹ Rob Black and Lizzie Borden, the owners of Extreme Associates, were the perfect defendants to prosecute under this standard: The loudest and crassest of pornographers, their films challenge even the norms of the sex industry. Still, the district court recognized their products as part of the consensual, adult, and private sex lives of their consumers and therefore as protected from government intrusion.³⁰ This surprising ruling must be understood as a product of a post-*Lawrence v. Texas* legal world, and it reflects the recognition and acceptance of sexual diversity *Lawrence* represented. It also must be understood in the context of a world transformed by the Internet, where a universe of pornography is accessible to the most isolated farmer with a computer, making an absurdity of the community-standards approach to First Amendment doctrine. No matter how fervently

²⁶ See Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography and the End of Obscenity Law As We Know It*, 34 SW. U. L. REV. 427 (2005).

²⁷ *United States v. Extreme Assocs.*, 431 F.3d 150, 151 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

²⁸ *Id.* H. Louis Sirkin, the defendants' attorney, was originally optimistic about the case's chances at the Supreme Court: "They said we had the right to bring the issue, and that puts us way ahead of the game. The important thing is having won it in the district court, because we can now go forward with our appeals . . . without having exposed our client to the danger of what potentially could happen in a trial." Mark Kernes, *Black Back Under Attack: Extreme Charges Reinstated*, AVN (Jan. 1, 2006), http://www.avn.com/index.php?Primary_Navigation=legal&Action=View_Article&Content_ID=253686.

²⁹ As will be explored at length, the standard for obscenity is

(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 (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

³⁰ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 592–93 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

conservative forces wish it, a doctrine that jails people for private sexual expression is repulsive to our current appreciation for sexual autonomy.³¹ Although *Extreme Associates* is lost, the Supreme Court must face these inexorable changes and devise a new interface between sexual expression and the law. The doctrine of substantive due process—which protects the individual right to personal autonomy through the Fifth and Fourteenth Amendments—is a good place to start.

This Article begins with a short review of the obscenity doctrine under the First Amendment and the privacy doctrine under substantive due process. Parts II and III present the district court and Third Circuit opinions, respectively. Part IV tests the strength of the district court opinion by revisiting the holdings of *Lawrence* and *Stanley*. Part V argues that the Third Circuit, in reversing the district court, both misapplied stare decisis principles and missed an opportunity to address the failings of the obscenity doctrine. Part VI explores why this doctrine no longer makes sense for our time. Part VII encourages pornography producers and consumers called before the courts³² to argue for a substantive due process analysis grounded in the personal autonomy interests actually at stake in their prosecutions. The article concludes by imagining what might develop if the obscenity doctrine were dismantled and porn performers were allowed a say in how the law impacts their lives.

I. TWO DOCTRINES, ONE RIGHT?

Extreme Associates employed two doctrines—the obscenity doctrine under the First Amendment and the privacy doctrine under the Fifth Amendment’s Due Process Clause—to argue that its customers are entitled to its products.³³ This section will provide a brief introduction to these two doctrines and to the contro-

³¹ Calvert & Richards, *supra* note 26, at 434 (suggesting that the mainstreaming of pornography led to the district court’s decision in *Extreme Associates*).

³² In May 2005, there were twenty obscenity prosecutions pending across the United States. Calvert & Richards, *supra* note 26, at 448. Syracuse University’s Transactional Records Access Clearinghouse (TRAC) is an independent, non-partisan organization that compiles reports about federal enforcement, staffing, and spending. According to a TRAC report, despite increased agency staffing, federal prosecutions have dropped across-the-board—*except* in the area of pornography. Pornography prosecutions have experienced an eight-fold increase in the past ten years. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, 2006 TRAC FBI REPORT (2006), *available at* <http://trac.syr.edu/tracfbi/newfindings/current/> (last visited Dec. 5, 2006).

³³ 352 F. Supp. 2d at 586.

versial U.S. Supreme Court cases relied upon by Extreme Associates in the district court case.

A. *The Due Process Clause and Sexual Privacy*

Although it is articulated nowhere in the Constitution, privacy has been recognized by the Supreme Court as a constitutional right for two reasons. First, it is a fundamental right, older than the constitution, that the court should uphold as a part of liberty.³⁴ Second, privacy is necessary to give effect to rights articulated in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments; therefore, the Court finds it is rooted in the penumbras of those Amendments.³⁵ The Court has held the right to privacy to be a fundamental right under the liberty protected by the Fifth and Fourteenth Amendments' Due Process Clauses,³⁶ which state that "[no person shall] be deprived of life, liberty, or property, without due process of law."³⁷ When a right is asserted under the Fifth Amendment, the court first determines whether it is fundamental, by asking if it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."³⁸ If the court answers these questions in the affirmative, the right is fundamental, and any infringement must pass strict scrutiny analysis.³⁹ If the court answers in the negative, the right is not fundamental, and its infringement must only be rationally related to a legitimate government interest.⁴⁰ Through this analysis, a fundamental right to privacy has been found within certain relationships, such as marriage and family; in certain acts, such as child-rearing and procreation; and in certain places, such as the home.⁴¹

In *Griswold v. Connecticut*, the Court first addressed privacy

³⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

³⁵ *Id.* at 484. See *Roe v. Wade*, 410 U.S. 113, 129 (1973) (citing *Griswold's* concept of penumbras). *Griswold* is an oft-cited source for the proposition that privacy is part of the penumbra of liberty. Yet, *Griswold* cites Douglas's dissent in *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting), which in turn cites *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), for the idea that other rights emanated from and gave effect to the guarantee of liberty in the Due Process clause.

³⁶ *Roe*, 410 U.S. at 153.

³⁷ U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1.

³⁸ *Washington v. Glucksburg*, 521 U.S. 702, 703, 721 (1997).

³⁹ *Id.* at 721.

⁴⁰ *Id.* at 728.

⁴¹ See, e.g., *Roe*, 410 U.S. at 154; see generally *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

rights in relation to sexual activity, finding that married couples had a right to use contraceptives.⁴² The Court overturned a statute prohibiting the distribution of contraceptives, holding that both the marriage relationship and the marriage bed are protected, private realms.⁴³ In *Eisenstadt v. Baird*, the Court expanded *Griswold*'s right to use contraceptives, reasoning that the Equal Protection Clause mandated that it include non-married persons.⁴⁴ And in *Roe v. Wade*, the Court recognized the limited but fundamental right of a woman to make the decision to end her pregnancy.⁴⁵

Lawrence v. Texas, the Court's most recent treatment of sexual privacy, held that a statute criminalizing sodomy violated the defendants' rights under the Fourteenth Amendment's Due Process Clause.⁴⁶ This opinion began with a re-telling of the history of the privacy doctrine, paying special attention to those cases laying the foundation for sexual privacy.⁴⁷ The Court then reconsidered *Bowers v. Hardwick*,⁴⁸ which had upheld a similar sodomy statute seventeen years earlier. According to the Court, *Bowers* had framed the issue too narrowly, ignoring the important role sexuality plays in relationships and the devastating impact such a statute could have on the lives of homosexuals.⁴⁹ The Court found that its previous decision had overlooked the central issue: Private consensual sexual conduct was criminalized by this statute.⁵⁰ *Bowers* was also based on a fictionalized history of such sodomy statutes⁵¹ and an imagined consensus among the states⁵²—and Western civilization as a whole⁵³—that homosexual conduct is wrong and can be

⁴² *Griswold*, 381 U.S. at 485.

⁴³ *Id.*

⁴⁴ *Eisenstadt*, 405 U.S. at 454.

⁴⁵ *Roe*, 410 U.S. at 164–65.

⁴⁶ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

⁴⁷ *Id.* at 564–65.

⁴⁸ 478 U.S. 186 (1986).

⁴⁹ *Lawrence*, 539 U.S. at 567 (“The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.”).

⁵⁰ *Id.*

⁵¹ *Id.* at 567–70 (“‘Proscriptions against that conduct have ancient roots.’ . . . [I]t should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”) (quoting *Bowers*, 478 U.S. at 192)).

⁵² *Id.* at 570–71 (“It was not until the 1970[]s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.”).

⁵³ *Id.* at 571–73 (“‘Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.’ . . . [S]cholarship casts some doubt on the sweeping nature of the statement . . . as it

criminalized. The Court emphasized that, while it may be true that "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . [t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."⁵⁴ The Court in *Lawrence* decided that the state could not justify this criminal statute prohibiting private consensual conduct based solely on enforcement of a moral code,⁵⁵ thereby overruling *Bowers*.⁵⁶

Justice Kennedy's sweeping language about the scope of liberty and the dignity of homosexual persons at first energized the gay rights movement.⁵⁷ Sadly, *Lawrence* proved to be more bark than bite; plaintiffs have had trouble using it to expand the rights of sexual minorities⁵⁸ or even to invalidate other sodomy statutes.⁵⁹ *Williams v. Alabama*, an Eleventh Circuit case upholding convictions under obscenity laws for the sale of sex toys, is an example of *Lawrence*'s limits.⁶⁰ The court looked not at *Lawrence*'s rhetoric, but at which substantive due process analysis it actually applied.⁶¹ In substantive due process jurisprudence, there are two different standards to which a court can hold the statute in question: rational basis review if the statute does not infringe a fundamental right, and strict scrutiny if it does.⁶² The Eleventh Circuit found that the Supreme Court did not use strict scrutiny to analyze the infringement of the right in *Lawrence* and therefore held that *Lawrence* could not have established a broad right to sexual privacy.⁶³ The

pertains to private homosexual conduct between consenting adults.") (quoting *Bowers*, 478 U.S. at 196).

⁵⁴ *Id.* at 571.

⁵⁵ *Id.* ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

⁵⁶ *Id.* at 577-78.

⁵⁷ John G. Culhane, "Lawrence-ium": *The Densest Known Substance?* 11 WIDENER L. REV. 259, 259-60 (2005).

⁵⁸ See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (holding that *Lawrence* does not expand the right of homosexuals to adopt children); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (holding that *Lawrence* does not make the Defense of Marriage Act unconstitutional). But see *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (using *Lawrence* to hold that excluding same-sex couples from the institution of marriage is unconstitutional).

⁵⁹ See *Tjan v. Commonwealth*, 621 S.E.2d 669, 703 (Va. App. 2005) (holding that defendant did not have standing to challenge a "Crimes Against Nature" statute that criminalized private consensual sodomy as facially unconstitutional because he had engaged in public sex).

⁶⁰ *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004).

⁶¹ *Id.* at 1236.

⁶² *Id.*

⁶³ *Id.* Which substantive due process analysis *Lawrence* applied is thought by many to answer whether it found a fundamental right in that liberty. Because *Lawrence*

court held that the narrower right to use sex toys is neither “deeply rooted” nor “implicit in the concept of ordered liberty” and remanded the case to the lower court to decide whether the prohibition survives rational basis scrutiny.⁶⁴ The dissent argued that a right to sexual privacy pre-existed and was affirmed by *Lawrence*, citing language that makes clear the *Lawrence* Court’s placement of intimate relationships within the scope of liberty.⁶⁵ *Williams* illustrates the confusing hand that *Lawrence* has dealt both advocates and opponents of sexual liberty.

In *Extreme Associates*, the district court takes up this hand and plays it well: On substantive due process grounds, the court found the obscenity statute unconstitutional as applied to the defendants, even though comparable statutes have been upheld for decades almost exclusively under the First Amendment.⁶⁶ The following section will briefly summarize the doctrine dealing with obscene pornography under the First Amendment.

B. *The First Amendment and Obscenity*

The text of the First Amendment unequivocally protects an individual’s right to speak without fear of government sanction by stating “Congress shall make no law . . . abridging the freedom of speech.”⁶⁷ Unsurprisingly, 200 years of Supreme Court jurisprudence have narrowed, qualified, and categorized speech, making that text only a starting point for deciding what protections from governmental intrusion particular instances of speech are afforded. In *Chaplinsky v. New Hampshire*, the Court remarked that certain categories of speech, including “the lewd and [the] ob-

never calls the right at issue “fundamental,” while at the same time eulogizing the essential importance of the right to liberty and autonomy, this determination is difficult, and this weakness is often noted. See *Lofton*, 358 F.3d at 816 (“We are particularly hesitant to infer a new fundamental liberty interest from [*Lawrence*], whose language and reasoning are inconsistent with standard fundamental-rights analysis.”). But see Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1116–17 (2004). Hunter argues that the lack of fundamental-rights analysis resulted from the opinion’s “decisional structure,” which entailed first asking whether the government had succeeded in justifying the law with even a legitimate state interest. *Id.* at 1117. Since the government failed to meet this minimum threshold, the Court did not need to reach the question of whether the right was fundamental; the law could not pass even rational-basis scrutiny. *Id.* at 1116. Hunter also points out that the Court’s pervasive characterization of the right at stake as equal in importance to other liberty interests makes this question largely technical. *Id.* at 1117.

⁶⁴ *Williams*, 378 F.3d at 1238 n.9.

⁶⁵ *Id.* at 1254 (Barkett, J., dissenting).

⁶⁶ See *infra* notes 70–71, 75, 77.

⁶⁷ U.S. CONST. amend. I.

scene," have so little social value that their prohibition or regulation does not even trigger First Amendment analysis.⁶⁸ Although *Chaplinsky* did not concern obscenity, the Court seized on this phrase of dicta in a subsequent case, *Roth v. United States*.⁶⁹ In *Roth*, the Court created a new categorical exclusion from First Amendment protection⁷⁰ and spawned an obscenity doctrine it has since called "somewhat tortured."⁷¹

The Court has struggled to define the parameters of obscenity. *Roth* vaguely delineated obscenity as material that appeals to the "prurient interest" in sex and that goes beyond "customary limits" in describing sexual activity, giving the state broad powers to regulate without constitutional review.⁷² A decade later, in *Memoirs v. Massachusetts*, a plurality held that the First Amendment *should* apply to materials that appeal to the prurient interest in sex, unless the material is "utterly without redeeming social value."⁷³ After that opinion, the weight of the Court was against finding materials obscene and for protecting pornography as speech.⁷⁴

Soon after *Memoirs*, the Supreme Court decided *Stanley v. Georgia*, invalidating a statute that criminalized an individual's private possession of obscenity.⁷⁵ The Court conceded that the materials involved were obscene, but held that First Amendment protection should nevertheless apply.⁷⁶ The government's interest in preventing public distribution of obscenity, implicated by the distributors and producers in *Roth*,⁷⁷ was inapplicable to a case of private possession.⁷⁸ The Court held that the First Amendment right to receive information, regardless of its social worth, was "fundamental

⁶⁸ 315 U.S. 568, 571–72 (1942).

⁶⁹ 354 U.S. 476 (1957).

⁷⁰ *Id.* at 485.

⁷¹ *Miller v. California*, 413 U.S. 15, 20 (1973) (plurality opinion).

⁷² See *Roth*, 354 U.S. at 488 n.20.

⁷³ 383 U.S. 413, 418 (1966) (plurality opinion). The plurality articulates the following standard: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*

⁷⁴ See *Miller*, 413 U.S. at 22 n.3, for a review of these cases.

⁷⁵ 394 U.S. 557 (1969).

⁷⁶ *Id.* at 568.

⁷⁷ *Id.* at 560–61.

⁷⁸ *Id.* at 563–64. One scholar notes that *Roth's* exclusion of obscenity from First Amendment protection was actually based on that material's lack of social worth, not on its public availability. Therefore, *Stanley's* distinction between the right to publish and the right to receive information "arguably cut *Roth* loose from its moorings." Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 23 (2005).

to our free society," and this right was buttressed here by the "also fundamental" Fourteenth Amendment right to privacy in one's own home.⁷⁹ The Court found that the government's justifications for the obscenity statutes could not outweigh the plaintiff's rights under the First and Fourteenth Amendments.⁸⁰

Stanley's significance was doomed to pale, and the Court narrowed its holding in three subsequent cases, holding that *Stanley* could never apply to obscenity found outside of the home.⁸¹ The Court then refocused on defining obscenity in *Miller v. California*.⁸² Returning to the logic of *Roth*, it held that speech can be constitutionally regulated, prohibited, or criminalized if it is obscene.⁸³ *Miller* made the issue of whether material is obscene a question for the jury, who should ask:

(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 (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁸⁴

Although this standard resembles the one established in *Memoirs*, there are sharp distinctions. By making the definition of obscenity an issue of fact, the Court eliminated the judicial subjectivity that it saw plaguing obscenity decisions.⁸⁵ By making the third prong more rigid, the Court effectively established a presumption against obscenity having social value. This standard and method remain the law today.⁸⁶

Although the *Miller* test is a potent weapon against obscenity, prosecutors and courts do not always choose to wield it. In fact,

⁷⁹ *Stanley*, 394 U.S. at 564.

⁸⁰ *Id.* at 565.

⁸¹ *United States v. Reidel*, 402 U.S. 351, 355 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971); *United States v. Orito* 413 U.S. 139, 143 (1973).

⁸² *Miller v. California*, 413 U.S. 15 (1973).

⁸³ Loewy, *supra* note 78, at 24.

⁸⁴ *Miller*, 413 U.S. at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

⁸⁵ *Id.* at 22 n.3 (arguing that the Court had been "in the role of an unreviewable board of censorship for the 50 States"). However, some argue that foisting the decision off on juries only compounds the law's vagueness and increases the danger of subjectivity by assuming that obscenity is as "recognizable among other speech as poison ivy is among plants." Loewy, *supra* note 78, at 24 (noting *Roth v. United States*, 354 U.S. 476, 497 (1957) (Harlan, J., dissenting)).

⁸⁶ Loewy, *supra* note 78, at 24.

until Alberto Gonzales became Attorney General,⁸⁷ obscenity had been “out of style” as a subject for federal prosecution since the Reagan era.⁸⁸ It was virtually untouched in the 1990s, as the Executive Branch focused its powers elsewhere.⁸⁹ The Clinton Administration declined to prosecute obscenity, and even conservative Attorney General John Ashcroft had other priorities after September 11th.⁹⁰ The adult-entertainment industry took this apathy as opportunity, flowering into a multi-billion dollar enterprise⁹¹ whose profiteers include General Motors, ComCast, Rupert Murdoch, Time Warner, and most large hotel chains.⁹² Help from new technologies like the VCR and the Internet has made pornography a more accepted part of our private lives and popular culture.⁹³ Since the standards for obscenity are so vague and subjective, the threat of obscenity prosecutions hangs over all members of this formidable enterprise.⁹⁴ Extreme Associates’ success in the district

⁸⁷ President Bush swore in Alberto Gonzales as the eightieth Attorney General of the United States on February 14, 2005. Press Release, Office of the Press Secretary, President Thanks Attorney General Gonzales at Swearing-In Ceremony (Feb. 14, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050214-2.html>.

⁸⁸ Gellman, *supra* note 4.

⁸⁹ See Loewy, *supra* note 78, at 26.

⁹⁰ Kay, *supra* note 8. While obscenity prosecutions lay dormant, Washington made efforts to regulate porn on other fronts, notably through the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, S. 151, 108th Cong. § 1 (2003), which restricted judges to minimum prison sentences in obscenity convictions, and through 18 U.S.C. § 2257 (2000), which targets “child pornography” by requiring producers to list their addresses and be ready to furnish proof of their models’ ages. The Children’s Online Privacy Protection Act, which attempted to restrict Internet content to that suitable for children, was introduced in 1998 and passed in December 2006. 15 U.S.C.A. § 6501–6505 (West 2006).

⁹¹ *60 Minutes*, *supra* note 15. (“It is estimated that Americans now spend somewhere around \$10 billion a year on adult entertainment The porn world now has all the trappings of a legitimate industry with considerable economic clout.”).

⁹² Catherine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT’L L. 993, 995 n.9 (2005). See also Timothy Egan, *Technology Sent Wall Street into Market for Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1. Egan also cites AT&T, EchoStar, Liberty Media, Marriott International, Hilton, On Command, and the News Corporation as stakeholders in the pornography industry through their rarely mentioned but enormously profitable pay-per-view businesses. “The General Motors Corporation, the world’s largest company, now sells more graphic sex films every year [through its subsidiary DirecTV] than does Larry Flynt, owner of the Hustler empire.” *Id.* Egan profiled one small-town video-store owner who succeeded in being acquitted for obscenity by arguing that enormous sales by legitimate corporations mean that pornography is not as deviant as we think. *Id.*

⁹³ *60 Minutes*, *supra* note 15.

⁹⁴ The fear of a new round of prosecutions began when President Bush was first elected. Paul Cambria, a prominent lawyer for members of the porn industry, circulated a list of what to omit from films and film jackets in order to avoid prosecution and conviction. See The Cambria List, available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html>. See also *Frontline: American Porn*

court, then, was not just a victory for Rob Black and Lizzie Borden.

II. THE WARNING SHOT IS BLOCKED

On the district court level, the defendants were indicted before a grand jury for violations of 18 U.S.C. §§ 1461, 1462, and 1465, which proscribe the use of the Internet for the transportation or delivery of obscene materials.⁹⁵ The defendants filed a motion to dismiss, claiming that the statutes were unconstitutional as applied to them. They conceded that their videos were obscene by *Miller's* "community standards,"⁹⁶ but claimed that the statutes violated the Due Process Clause of the Fifth Amendment.⁹⁷

Judge Lancaster's opinion granting defendants' motion began with a detailed description of the Internet, its history, and its current scope.⁹⁸ The court then turned to the uncontested facts about Extreme Associates' website.⁹⁹ To access video clips and images on the site, visitors must provide their name, address, and credit card, which is billed monthly for membership or separately for each video ordered.¹⁰⁰ As part of the prosecution, an investigator went through this process, viewing clips involving urination, double penetration, and gang bangs; and ordering three videos through the mail.¹⁰¹

The district court affirmed that the defendants validly asserted third-party standing on behalf of their clients, citing a line of landmark privacy cases for the proposition that a vendor purveying

(PBS television broadcast Feb. 7, 2002), <http://www.pbs.org/wbgh/pages/frontline/shows/porn/etc/script.html>. Sexuality-rights activists condemned the list as an attempt to distance the "legitimate" pornography industry from the illegitimate one. See Tristan Taormino, *Panic in Pornville*, VILLAGE VOICE, Feb. 14, 2001, at 146; Mark Cromer, *Porn's Compassionate Conservatism*, NATION, Feb. 26, 2001, at 25.

⁹⁵ United States v. Extreme Assocs., 352 F. Supp. 2d 578, 584 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

⁹⁶ *Id.* at 585.

⁹⁷ *Id.* at 586.

⁹⁸ *Id.* at 580 ("The Internet is a decentralized, global medium of communication that links people, institutions, corporations, and governments around the world.").

⁹⁹ *Id.* at 581. By extolling the achievements of the Internet in affording low-cost global communication and then turning to how carefully these porn producers protected audiences from stumbling across their materials, the court effectively distinguished this context from the context in which the *Miller* standard was born. This approach also follows in the tradition of *Reno v. ACLU*, an obscenity-related Supreme Court case where Justice Stevens described the Internet's history at length from its birth as a military prototype to the chatrooms, search engines, and cyber-communities of today, concluding that "the content on the Internet is as diverse as human thought." 521 U.S. 844, 850–53 (1997).

¹⁰⁰ *Extreme Assocs.*, 352 F. Supp. 2d at 581.

¹⁰¹ *Id.* at 584.

goods that the buyer has a fundamental right to possess can assert third-party standing on behalf of that buyer.¹⁰² The court then maintained that, although there is no First Amendment right to obscene speech, *Stanley* established a fundamental right to *receive* information regardless of its social worth.¹⁰³ According to the district court, this *Stanley* right to view or receive obscenity in one's own home rested both in the First Amendment and in the Fourteenth Amendment.¹⁰⁴ The court recalled that subsequent cases asserting a right to distribute obscenity based on *Stanley* failed, but those had been First Amendment challenges.¹⁰⁵ No controlling case had been argued exclusively on the due process right to privacy.¹⁰⁶ The district court then analyzed *Lawrence v. Texas*, finding that, while it did not create a broad right to sexual privacy, it did hold that the government cannot justify a criminal law impacting sexual privacy by asserting that the acts it prohibits are immoral.¹⁰⁷

The district court applied these doctrinal elements to the obscenity statutes and to Extreme Associates' website, reaffirming that Extreme Associates clients have a right to view obscenity under the Due Process Clause.¹⁰⁸ Because this fundamental right was denied by the outright ban in the federal obscenity statutes, the Court reasoned that strict scrutiny should apply. Under strict scrutiny, the government must assert a compelling interest to which the statutes curtailing fundamental rights are narrowly tailored.¹⁰⁹ The government offered two possible interests: the protection of unwitting adults and the protection of minors.¹¹⁰ Although these interests

¹⁰² *Id.* at 587 (citing *Craig v. Boren*, 429 U.S. 190, 192–97 (1976); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682–84 (1977); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1234 n.3 (11th Cir. 2004); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965)). Interestingly, the government did not contest the issue of third-party standing, *id.*, although it would prove pivotal in the case. Had the First Amendment cases after *Stanley* been argued on third-party standing, the courts may have resolved the issue raised by the defendants in *Extreme Associates* much sooner.

¹⁰³ *Extreme Assocs.*, 352 F. Supp. 2d at 588.

¹⁰⁴ *Id.* at 589.

¹⁰⁵ *Id.* at 589–90.

¹⁰⁶ *Id.* at 590. The Third Circuit took particular issue with this statement, asserting that *Stanley's* progeny, particularly *Orito* and *Paris Adult Theater*, contain examples of the Court addressing the concept of privacy in relation to defendants' First Amendment Claims. *United States v. Extreme Assocs.*, 431 F.3d 150, 157–58 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁰⁷ *Extreme Assocs.*, 352 F. Supp. 2d at 590.

¹⁰⁸ *Id.* at 592.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The court noted that the government requested and was granted time to file an additional brief asserting a compelling interest that was narrowly tailored, but failed to do so. *Id.* In all of its briefs, the government argued that rational-basis review should apply. *Id.*

were certainly compelling to the court, the statutes were not narrowly tailored to achieving them. They over-included the very website at issue, which did not pose any risk to unwitting adults or children. The website's screening mechanisms already effectively guarded children from the material; these identical mechanisms had been proffered by agency regulations as effective means of screening.¹¹¹ In addition, the court observed, courts have held that bans on material not suitable for children must provide exemptions to adults in order to be constitutional.¹¹² The court found that the website protected unwitting adults from exposure to its content by requiring that they pay and consent to see the material.¹¹³ According to the court, the obvious failure of the statutes to be narrowly tailored to these interests belied a truth about obscenity laws: A complete ban, first and foremost, restricts adults *who want to see pornography* from seeing it. A law criminalizing adult, consensual, private sexual conduct could only have been enacted in the interest of morality,¹¹⁴ and after *Lawrence*, morality is not a legitimate—let alone compelling—interest.¹¹⁵ In a rare acknowledgment of sexual autonomy, the district court held that the statutes as applied were unconstitutional.

III. THE DEVIANT COURT IS CHASTISED

In a unanimous three-judge panel, the Third Circuit reversed the district court,¹¹⁶ holding that it should have upheld the ob-

¹¹¹ *Id.* at 595. The court cited the Federal Communications Commission's regulation dealing specifically with the transmission of "obscene" materials, saying that requiring a credit card ensures that only adults enter the site. 47 C.F.R. § 64.201(a)(2) (2006).

¹¹² *Extreme Assocs.*, 352 F. Supp. 2d at 594–95 (citing, paradoxically, *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), a case that upheld a rigid restriction on sexual or nude material being available in public libraries, for the proposition that a restriction is constitutional if it can be lifted by adults at their request).

¹¹³ *Id.* at 593. Extreme Associates' website includes an extensive warning page, including such statements of affirmation that it is the viewers' right as adults to view sexually explicit material and the models' and producers' right to produce it. It demands that viewers enter their birth date and electronic signature, under penalty of perjury, in an effort to comply with the Child Online Protection Act. It also includes the company's address and real names of the owners, in an effort to comply with 18 U.S.C. § 2257.

¹¹⁴ *See id.* at 592–93 ("It cannot be seriously disputed that, historically, the government's purpose in completely banning the distribution of sexually explicit obscene material, including to consenting adults, was to uphold the community sense of morality.").

¹¹⁵ *Id.* at 593.

¹¹⁶ *United States v. Extreme Assocs.*, 431 F.3d 150, 151 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

scenity statutes against attack, and its failure to do so was a violation of *stare decisis*.¹¹⁷ The Third Circuit first briefly described Extreme Associates' operations, leaving out inflammatory descriptions of their films, as the facts would prove to be only marginally relevant.¹¹⁸ The opinion then reviewed the district court reasoning: "[T]he District Court opined that [*Stanley*] 'represents a unique intersection between the substantive due process clause's protection of personal liberty and privacy and the First Amendment's protection of an individual's right to receive, and consider, [sic] information and ideas.'"¹¹⁹ According to the Third Circuit, the district court used *Lawrence* to undermine obscenity law, arguing that it invalidated "the principal rationale undergirding the federal statutes and the line of Supreme Court decisions upholding them[:]" morality.¹²⁰

After disparaging the district court's understanding of *Lawrence* and *Stanley*, the Third Circuit framed the issue squarely on the government's terms: How can the district court overturn statutes that have been upheld for so long against constitutional attack?¹²¹ While the district court had disregarded this question, the Third Circuit found substance for it in the *Agostini* doctrine.¹²² According to the Third Circuit, the Supreme Court in *Agostini v. Felton*¹²³ and its predecessor *Rodriguez De Quijas v. Shearson/American Express, Inc.*¹²⁴ articulated a principle to guide lower courts when they are confronted by conflicting Supreme Court precedent. This principle recognizes that at times a Supreme Court case will contradict a prior case without directly overruling it.¹²⁵ In such cases, plaintiffs may argue that the more recent case implies a shift in the reasoning of the Court, and lower courts are within their rights to discuss this argument, preserving it for appeal.¹²⁶ Lower courts, however, do not have the authority to declare one Supreme Court case overruled by another if the Supreme Court has not expressly declared so itself. According to the Third Circuit, *Agostini* decreed that lower courts "should follow the case which directly controls, leav-

¹¹⁷ *Id.* at 162.

¹¹⁸ *Id.* at 151.

¹¹⁹ *Id.* at 153 (quoting *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 589 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006)).

¹²⁰ *Id.* at 154.

¹²¹ *Id.* at 155.

¹²² *Id.* at 156.

¹²³ 521 U.S. 203, 237 (1997).

¹²⁴ 490 U.S. 477, 484 (1989).

¹²⁵ *Extreme Assocs.*, 431 F.3d at 156 (citing *Agostini*, 521 U.S. at 238).

¹²⁶ *Id.* at 156 (citing *Agostini*, 521 U.S. at 237-38).

ing to [the Supreme] Court the prerogative of overruling its own decisions.”¹²⁷

The Third Circuit reasoned that the district court violated this principle by not deciding the case under the First Amendment. If the line of First Amendment cases limiting *Stanley* controlled the outcome, then the district court should have applied them, instead of arguing that they are based on interests which are no longer valid under *Lawrence*. The issue, then, was whether these post-*Stanley* cases should have “directly controlled” *Extreme Associates*, or whether there was some basis for distinguishing them.¹²⁸

The district court distinguished *Stanley*’s progeny both on the facts and on the use of law; the Third Circuit addressed each of these distinctions in turn. First, the Third Circuit recalled that Supreme Court cases immediately following *Stanley*—*Reidel*,¹²⁹ *Thirty-Seven Photographs*,¹³⁰ *Orito*,¹³¹ and *Twelve 200-Ft. Reels*¹³²—all upheld federal obscenity statutes by saying that there is no “correlative right” to distribute pornography based on *Stanley*’s right to own.¹³³ The Third Circuit found no reason why this broad First Amendment principle should not apply here.¹³⁴ Even if *Stanley* articulated a separate substantive due process right to possess obscenity, the Third Circuit reasoned that post-*Stanley* cases limited that right. They mentioned privacy and ruled against the plaintiffs anyway, because that right was not triggered.¹³⁵ Specifically, *Orito* held that “no constitutionally protected privacy is involved” in the transport of obscene material,¹³⁶ and *Paris Adult Theater* defined the privacy right in *Stanley* as “restricted to a place, the home.”¹³⁷ The other doctrinal distinction—that these cases involved defendants asserting their First Amendment right to distribute or transport obscenity, not defendants asserting their clients’ Fifth Amendment right to privately own obscene material—did not trouble the Third Circuit.¹³⁸ The district court should have applied the standard First

¹²⁷ *Id.* at 155 (quoting *Rodriguez de Quijas*, 490 U.S. at 484).

¹²⁸ *Id.* at 156.

¹²⁹ 402 U.S. 351 (1971).

¹³⁰ 402 U.S. 363 (1971) (plurality opinion).

¹³¹ 413 U.S. 139 (1973).

¹³² 413 U.S. 123 (1973).

¹³³ *United States v. Extreme Assocs.*, 431 F.3d 150, 156 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹³⁴ *Id.* at 156–57.

¹³⁵ *Id.* at 157.

¹³⁶ *Id.* at 158 (quoting *Orito*, 413 U.S. at 143).

¹³⁷ *Id.* (quoting *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 n.13 (1973)).

¹³⁸ *Id.* at 159.

Amendment analysis because these distinctions did not “negate the binding precedential value of the [post-*Stanley*] cases.”¹³⁹

The Third Circuit asserted that at least one post-*Stanley* case was not even factually distinguishable.¹⁴⁰ *Extreme Associates* argued that *Twelve 200-Ft Reels* and *Thirty-Seven Photographs* were based on the government’s heightened interest in regulation at the border. The Third Circuit conceded that this might have been the case, but *Orito* could still provide binding precedent.¹⁴¹ *Extreme Associates* argued that *Orito*, the only post-*Stanley* case treating interstate commerce in obscenity, was decided before the Internet fundamentally transformed how that commerce takes place.¹⁴² The Third Circuit was “satisfied,” however, that the change was not so profound since the Supreme Court had never recognized it; as long as Internet commerce was still commerce, it could still be constitutionally regulated by the federal government.¹⁴³

The circuit court concluded that *Extreme Associates* should have been controlled by the post-*Stanley* cases, rather than by *Stanley* itself.¹⁴⁴ By using *Lawrence* to fashion a due process right to receive obscenity, the district court impermissibly implied that *Lawrence* overruled these obscenity cases. The Third Circuit ended its analysis without considering the implications that *Lawrence* and the Internet may have for obscenity laws. It left that privilege to the Supreme Court.¹⁴⁵

IV. AN ALLIANCE OF OUTLIERS

*There’s a certain kind of “pro-wrestling” way of advertising yourself, where you get up, and you have the chest-pounding, and the, “I’m gonna get in the ring! You’re going down!” I think Extreme Associates took that chest-pounding and applied it to porn, and then applied it to television, and suddenly they were fucked. Suddenly everyone was taking them seriously who actually has the power to come in and shut us down.*¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ *United States v. Extreme Assocs.*, 431 F.3d 150, 160-61 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁴¹ *Id.* at 160.

¹⁴² *Id.*

¹⁴³ *Id.* at 161.

¹⁴⁴ *Id.* at 160-61. “*Extreme Associates* correctly quotes dicta from *Reno v. ACLU*, indicating that the Internet is ‘a unique and wholly new medium of worldwide communication.’” *Id.* at 160. However, “the Court thus far has not suggested that obscenity law does not apply to the Internet or even that a new analytical path is necessary in Internet cases.” *Id.* at 160-61.

¹⁴⁵ *Id.* at 162.

¹⁴⁶ Interview with Lena Ramon, porn performer, in Pittsburgh, Pa. (Mar. 12, 2006)

Extreme Associates made their name—and ultimately sealed their fate—by being extreme.¹⁴⁷ Their videos contain—as conservative pundits and journalists never fail to point out—simulated rape, suffocation, urination, anal penetration, women having sex with many men in sequence, and adults pretending to be children.¹⁴⁸ Their products may be outside even the porn industry's community standards. Scholars Clay Calvert and Robert D. Richards quote Paul Cambria, a renowned obscenity defense lawyer, as saying "I don't think that guys like Rob Black and Extreme Associates are the ones that should be fighting the battle of free speech in the adult fields"¹⁴⁹ Cambria would probably prefer companies like Vivid Video, which last year garnered a billion dollars in sales and has been described as the "porn industry equivalent of Paramount," to lead the fight to establish pornography's legitimacy.¹⁵⁰

However, as Calvert and Richards argue, it often takes an extremist to enlarge the boundaries of liberty for everyone.¹⁵¹ Extreme Associates has aligned itself with two other marginalized extremists, the cases of *Stanley* and *Lawrence*. Both of these cases promised to expand protected liberty to include sexual expression, and both have been so limited by subsequent cases that their foot-

(on file with the Author). Lena Ramon has been in over 800 pornography films during her career and has performed with Extreme Associates in over fourteen of them. "I loved working for Extreme," Ramon said. "I had a scene at Extreme the evening a *Nightline* episode profiling Extreme aired, and the guy from their office came running in and said, 'Oh my god, in the half-hour after it aired, we got 75,000 hits on the website!' It was great advertising—too bad they're going to jail because it worked so well." *Id.*

¹⁴⁷ See, e.g., Garfield, *supra* note 2.

¹⁴⁸ See, e.g., Rove, *supra* note 24.

¹⁴⁹ Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 158 (2004).

¹⁵⁰ 60 Minutes, *supra* note 15. Lena Ramon had a different perspective on the insider/outlier structure of the porn industry:

I think of it like this: There is the Metropolis, the "hard-core" of mainstream porn who hire only the very beautiful, very young, blond and Asian women. Then there's all the rest of us, out here in the suburbs. Plotting revolution; engaging in anarchy. Once you get out here—I'm not even sure where to start because it is so diverse. There are people of every race, every body type, every sexuality and gender orientation, as you would know if you are familiar with Internet porn. I have worked with people with Ph.D.s; people have all sorts of reasons for being in it. What makes it so fabulous is that you can do anything you want, and you can find people who, not only will they not condemn you, but they'll say, "Yeah, let's do it! That's a great idea!"

Ramon, *supra* note 146.

¹⁵¹ Calvert & Richards, *supra* note 26, at 437.

ing is precarious.¹⁵² Still, neither has been overruled. Putting aside for a moment the Third Circuit's *stare decisis* argument, it is crucial to understand how the district court uses *Lawrence* and *Stanley* and whether a fair reading of each supports such use.

A. *The District Court's Use of Stanley*

The district court in *Extreme Associates* quotes compelling language from *Stanley*: Allowing the government to criminalize possession of obscenity would lead to the dangerous conclusion that "the State has the right to control the moral content of a person's thoughts."¹⁵³ However, the district court use of *Stanley* is narrower. *Stanley* recognized a fundamental right to receive speech in the privacy of one's home, regardless of its social worth.¹⁵⁴ This right is constitutionally supported by the First Amendment—because it is about expression and ideas—and by the Due Process Clause—because it is about personal privacy. The district court only uses *Stanley* for its framing of the right to possess obscenity as a substantive due process right.¹⁵⁵

However, *Stanley* itself warned future plaintiffs that, although they may have the right to possess obscenity, the government retained the power to prosecute purveyors of obscenity.¹⁵⁶ In *United States v. Reidel*, a purveyor of obscenity tried to use *Stanley* to defend against an indictment.¹⁵⁷ The Court held that the plaintiff could not "extrapolate" a right to sell and mail obscenity from *Stanley*'s right to private possession.¹⁵⁸ The Third Circuit held that this was exactly what *Extreme Associates* attempted to do, but there is a crucial difference.¹⁵⁹ *Reidel* stood "squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process,"¹⁶⁰ whereas *Extreme Associates* asserted the privacy

¹⁵² Although this may be a harder assertion to make for *Lawrence* given its recentness, it is clear that the case has not lived up to the potential envisioned by LGBT activists. See *supra* notes 58–65.

¹⁵³ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 589 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁵⁴ *Id.* at 592 (citing *Stanley v. Georgia*, 394 U.S. 557, 568 (1969)).

¹⁵⁵ *Id.* at 586 ("Because we find that the federal obscenity statutes place a burden on the exercise of the fundamental rights of liberty, privacy and speech recognized by the Supreme Court in *Stanley v. Georgia*, we have applied the strict scrutiny test.").

¹⁵⁶ 394 U.S. at 568.

¹⁵⁷ 402 U.S. 351, 354–55 (1971).

¹⁵⁸ *Id.* at 355.

¹⁵⁹ *United States v. Extreme Assocs.*, 431 F.3d 150, 153 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁶⁰ 402 U.S. at 356.

rights of its clients as a third party.¹⁶¹ The district court carefully articulated that the requirements of third-party standing were met in *Extreme Associates*, although the parties did not include this discussion in their briefs.¹⁶² The court cited *Craig v. Boren*¹⁶³ and *Carey v. Population Services International*,¹⁶⁴ both decided after *Reidel*, for the proposition that purveyors of a product that consumers have a constitutional right to possess can challenge a statute that regulates distribution of that product.¹⁶⁵ The court also cleverly cited the recent *Williams v. Attorney General of Alabama* decision, where the Eleventh Circuit did not contest third-party standing, although it denied a very similar motion to dismiss an obscenity charge based on a different reading of *Lawrence*.¹⁶⁶ The court effectively distinguished its holding from cases such as *Reidel*.

However, *Stanley* has been limited in other ways. In *United States v. Thirty-Seven Photographs*, the Court held that obscene materials discovered at a port of entry in a routine customs baggage check may be confiscated even if they are intended for private use.¹⁶⁷ In *United States v. Orito*, the Court found similarly that transportation of obscene materials intended for private use can be prohibited, "negat[ing] the idea that some zone of constitutionally protected privacy follows such material when it is moved outside the home area."¹⁶⁸ Justice Stewart dissented from the *Thirty-Seven Photographs* plurality, claiming that this conclusion cannot be arrived at without overruling *Stanley*¹⁶⁹ because *Stanley* framed the privacy interest as one an individual has in her own thoughts and feelings,¹⁷⁰ which obviously travel with her. However, as the doctrine now stands, as soon as obscenity travels outside the home, it loses the protections of *Stanley*.¹⁷¹

The district court asserted that these cases were not control-

¹⁶¹ *Extreme Assocs.*, 431 F. 3d at 153.

¹⁶² *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁶³ 429 U.S. 190 (1976).

¹⁶⁴ 431 U.S. 678 (1977).

¹⁶⁵ *Extreme Assocs.*, 352 F. Supp. 2d at 587.

¹⁶⁶ *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1234 n.3 (11th Cir. 2004).

¹⁶⁷ 402 U.S. 363, 376 (1971) (plurality opinion).

¹⁶⁸ 413 U.S. 139, 141-42 (1973).

¹⁶⁹ *Thirty-Seven Photographs*, 402 U.S. at 379 (Stewart, J., concurring).

¹⁷⁰ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

¹⁷¹ *Thirty-Seven Photographs*, 402 U.S. at 379 (Stewart, J., concurring). Justice Black predicted this eventuality when he quipped "perhaps in the future [*Stanley*] will be recognized as good law only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room." *Id.* at 382 (Black, J., dissenting).

ling because they were brought on First Amendment grounds, implying that they limit *Stanley* as to the First Amendment but not as to the Fifth.¹⁷² This distinction reinforces an ever-present theme in the opinion of absolute separation between the First and Fifth Amendment doctrines. But the court also offered an alternative argument, reasoning that the cases are distinguishable: *Thirty-Seven Photographs* because it is about the government's right of access under customs law and *Orito* because it may be overruled by *Lawrence*.¹⁷³

One scholar claimed that the district court executed an "end-run" around these post-*Stanley* cases and predicted correctly that it would be overturned for its audacity.¹⁷⁴ However, all of these 1970s cases are arguably distinguishable on their facts as they do not contemplate instantaneous and private transmission of materials over the Internet. In the world in which *Orito* and *Thirty-Seven Photographs* were decided, the distinction between outside and inside the home was rational: Materials found outside were in commerce, which Congress has power to regulate, and materials found inside the home, which is protected against intrusion, were in private possession. The materials that Extreme Associates claims its clients have the right to possess will not be confiscated at a border or found in the trunk of a car on their way from producer to consumer. They go from the possession of the purveyor to the possession of the consumer in a second, over an inscrutable path. The question becomes whether this kind of commerce arouses the same interest in "protecting the public commercial environment" that justifies older regulations.¹⁷⁵

¹⁷² *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 589–90 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁷³ *Id.* Presumably, if the appellate court does not believe that the doctrines should be kept separate when applying *Stanley*, then this importation of Fifth Amendment into First is valid.

¹⁷⁴ Loewy, *supra* note 78, at 26.

¹⁷⁵ "If obscenity law is to continue in new media, the standard involved must be defined." Mark Cenite, *Federalizing or Eliminating Online Obscenity Law As an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 70 (2004). Many critiques of community standards take as their starting point the fact that the Internet has fundamentally changed the way obscenity impacts the public sphere. See, e.g., Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-evaluation of Community Standards*, 10 NEXUS 59, 63 (2005) (arguing that the Internet has not been subject to the same level of government regulation generally because it is "not as intrusive on the viewer or listener as is radio or television"). The Supreme Court edged toward recognition of this fact in *Reno*: "[C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident." *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

Even if the Government can assert this interest in the context of the Internet, it may not be valid after *Lawrence*.¹⁷⁶ The *Orito* Court justified government regulation of obscenity through the government's interest in morality, citing a host of seminal Commerce Clause cases where the government based its regulation of drugs, prostitution, lotteries, and obscenity on preventing the "spread of any evil," among other intangibles.¹⁷⁷ The legitimacy of this interest was unquestioned in that era, but *Lawrence* arguably debunks it. District Judge Lancaster only mentions this possibility before turning to the due process analysis,¹⁷⁸ but it is clear that the advent of the Internet and *Lawrence* have possibly eroded obscenity law under the First Amendment as well.

B. The District Court's Use of Lawrence

Although the defendants encouraged the court to find that *Lawrence* stands for a fundamental right to sexual privacy, the district court declined to do so; indeed, it did not need to do so.¹⁷⁹ The substantive due process analysis rested on the fundamental right articulated in *Stanley*, not that in *Lawrence*.¹⁸⁰ The district court used *Lawrence* only for the proposition that morality is "not even a legitimate state interest that can justify infringing one's liberty interest to engage in consensual sexual conduct in private."¹⁸¹ The court also did not assert that morality is invalidated as a legitimate interest *in general*, but only in relation to an intrusion on private, consensual, adult sexual expression, which includes the behavior of watching obscene pornography.¹⁸² By reading *Lawrence* this narrowly, the district court sidestepped the pitfalls that usually accompany *Lawrence* while staying true to its vision of valuing the sexual autonomy interests at stake.

A comparison to *Williams v. Attorney General of Alabama* shows how the district court used *Lawrence* differently from other courts narrowing the precedent.¹⁸³ The defendants in *Williams* also brought a substantive due process challenge to an obscenity law, but one contending that *Lawrence* established a fundamental right

¹⁷⁶ *Extreme Assocs.*, 352 F. Supp. 2d at 589.

¹⁷⁷ *United States v. Orito*, 413 U.S. 139, 144 n.6 (1973).

¹⁷⁸ *Extreme Assocs.*, 352 F. Supp. 2d at 589–90.

¹⁷⁹ *Id.* at 589.

¹⁸⁰ *Id.* at 591.

¹⁸¹ *Id.* at 593.

¹⁸² *Id.* at 591.

¹⁸³ *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004).

to sexual privacy.¹⁸⁴ Only the dissent in *Williams* raised the alternative claim that morality is not a legitimate interest for regulating even non-fundamental rights.¹⁸⁵ The Eleventh Circuit dismissed this contention in a footnote, finding it difficult to believe that “such a traditional and significant jurisprudential principle has been jettisoned wholesale.”¹⁸⁶

Scholars and even Supreme Court justices have argued that this is exactly what *Lawrence* has done. Justice Scalia’s dissent in *Lawrence* lambasted the majority for holding that morality is not a legitimate state interest, and, in so doing, he outlined the potential breadth of this holding.¹⁸⁷ His parade of laws “called into question” included adultery laws, obscenity laws, and the exclusion of gays from the military; as well as laws against bestiality, incest, and bigamy.¹⁸⁸ Scholars saw the jettisoning of some morals-based legislation as a fortunate and logical consequence of *Lawrence*,¹⁸⁹ but viewed Justice Scalia’s fire-and-brimstone language as not supported by *Lawrence* or the cases he cited.¹⁹⁰ Most of these laws exist to protect against more concrete harms, such as those to an animal who cannot consent, to an injured spouse, or to the so-called unity of the armed forces. However, the district court did not go as far as Justice Scalia, or even as far as his critics, in its interpretation of *Lawrence*. It did not claim that morality could no longer be a legitimate interest for all laws, but only for those that criminalize private consensual adult sexual expression.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1259 (Barkett, J., dissenting).

¹⁸⁶ *Id.* at 1238 n.8.

¹⁸⁷ *Lawrence v. Texas*, 539 U.S. 558, 589–90 (2003) (Scalia, J., dissenting). Justice Scalia chastized the Court for disrupting the lower courts’ reliance on *Bowers* as precedent to uphold laws that prohibited certain sexual acts for no other reason than public morality. *Id.* Notably, one case Justice Scalia cited was an earlier version of *Williams*. *Id.* at 589 (citing *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001)). In his dissent to *Williams*, Judge Barkett cited Justice Scalia for the proposition that *Lawrence* really did eliminate the government interest driving the sex toy laws, and therefore that a different result was required. *Williams*, 378 F.3d at 1259 (Barkett, J., dissenting).

¹⁸⁸ *Lawrence*, 539 U.S. at 589–90.

¹⁸⁹ See, e.g., Lawrence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

¹⁹⁰ Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 145–48 (2003). Allison argues that the *Lawrence* opinion may at least change the outcome in the cases of sex toys and nude dancing if the government does not present any interests other than protecting morality. *Id.* at 147. Both are cases of obscenity prosecutions, but according to Justice Scalia, the danger of *Lawrence* is that it eliminates morality as a legitimate government interest across the constitutional board. See *Lawrence*, 539 U.S. at 589–90 (Scalia, J., dissenting).

V. STARE DECISIS OR *COUP D'ÉTAT*?

Instead of addressing the merits of the substantive due process arguments made in district court, the Third Circuit focused on whether the district court could rule on those arguments at all. The Third Circuit employed an emphatic statement of the most basic principle in our common law system—*stare decisis*¹⁹¹—to argue that the district court had no business agreeing with the defendants' creative arguments, even if they were right.¹⁹² A principle just as fundamental to the common law, however, is change.¹⁹³ It is imperative, then, to decide whether the district court actually stepped outside of its authority, or whether the Third Circuit failed to comprehend that the legal and factual circumstances before it were truly new and untested. This Part will explore this question and ask why the Third Circuit, with its famously pro-First Amendment bench,¹⁹⁴ may have avoided addressing the merits of the arguments.

The Third Circuit invoked *Agostini*¹⁹⁵ and *Rodriguez de Quijas*¹⁹⁶ as cases that govern how lower courts should deal with precedent that seems to have been “implicitly overruled” by subsequent precedent of the same weight.¹⁹⁷ Circuit courts have often applied

¹⁹¹ “[L]ike cases should be decided alike in order to maintain stability and continuity in the law.” 20 AM. JUR. 2D. *Courts* § 129 (2005).

¹⁹² See *United States v. Extreme Assocs.*, 431 F.3d 150, 156 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

¹⁹³ One famous Justice set out the argument for change:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *quoted in* *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

¹⁹⁴ The Third Circuit garnered its reputation as friendly to free-speech plaintiffs through cases like *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *vacated*, 126 S.Ct. 1297 (2006) (holding that law schools had the First Amendment right to deny access to military recruiters who violated their anti-discrimination policies). It has also acknowledged the difficulties Internet providers face in conforming to 1970s obscenity doctrine and ruled on behalf of the rights of pornographers in the extensive litigation around the Child Online Protection Act. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *vacated*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004). Some speculated that the Attorney General's strategy to try Extreme Associates in the conservative city of Pittsburgh would backfire if the case was appealed to the Third Circuit. Calvert & Richards, *supra* note 26, at 444. Since the Supreme Court denied certiorari, the Attorney General will have a chance to use that conservative jury after all.

¹⁹⁵ *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁹⁶ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

¹⁹⁷ *Extreme Assocs.*, 431 F.3d at 156.

these cases in reversing district court opinions for overstepping their authority and engaging in speculation about the reasoning of higher courts.¹⁹⁸ However, these cases usually involve a party directly claiming that a binding, precedential case should not apply because its reasoning has been eroded by subsequent cases.¹⁹⁹ In *Extreme Associates*, the district court's central holding was not that *Lawrence* overruled *Miller*—although many scholars would agree with that statement—instead it was that the First Amendment analysis simply does not apply to this substantive due process claim.

The fundamental gap, then, between the Third Circuit and district court is their differing views of the relationship between the First and Fifth Amendments. The district court treated the substantive due process claim before it and saw no reason to “reach” into the First Amendment for precedent, even though that was where cases dealing with obscenity had usually been decided.²⁰⁰ The district court acknowledgment of the post-*Stanley* line of First Amendment cases was secondary to its holding. The Third Circuit saw the defendants’ motion to overturn an obscenity indictment and treated it under the obscenity doctrine, thereby not “reaching” into a doctrine that was supposedly unrelated to obscenity.²⁰¹ If one regards the First and Fifth Amendments as wholly separate except in the unique case of *Stanley*, then the district court opinion is a strict application of *stare decisis*.²⁰² Under substantive due process, the defendants asserted the fundamental right established in *Stanley* and questioned what interest would be served by infringing that right after *Lawrence*. The obscenity cases were not applicable

¹⁹⁸ *United States v. Greer*, 440 F.3d 1267, 1275–76 (11th Cir. 2006); *United States v. Logan*, 419 F.3d 172, 181 (2d Cir. 2005).

¹⁹⁹ *See, e.g.,* *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005) (“Bach does not distinguish *Presser*. Rather, he contends that *Presser* is ‘outdated’ and ‘do[es] not reflect the Court’s modern view.’”); *United States v. Rodriguez*, 406 F.3d 1261, 1277 (11th Cir. 2005) (“Judge Barkett’s theory for disregarding the direct application of *Jones* is that it was implicitly overruled by the later decision in *Dominguez Benitez*, a premise based on her belief that *Jones* rests on reasons rejected in *Dominguez Benitez*.”); *United States v. Singletary*, 268 F.3d 196, 199 (3d Cir. 2001) (“Singletary contends that the Supreme Court’s recent Commerce Clause jurisprudence renders 18 U.S.C. § 922(g)(1), the felon-in-possession statute, unconstitutional, and therefore, his conviction invalid.”).

²⁰⁰ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 590 (W.D. Pa. 2005), *rev’d*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006) (“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 . . .”).

²⁰¹ *Extreme Assocs.*, 431 F.3d at 156 (“[I]n the broadest and most obvious sense, the Supreme Court has explicitly and repeatedly, in decisions rendered post-*Stanley*, upheld the constitutionality of federal statutes regulating the distribution of obscenity.”).

²⁰² *Extreme Assocs.*, 352 F. Supp. 2d at 589.

because privacy rights were not asserted in those cases.²⁰³ However, if one sees the two doctrines as interwoven—at least after *Stanley*—then these cases were directly applicable, and the court's refusal to apply them was an attack on the obscenity doctrine bolstered by *Lawrence*.²⁰⁴

Even if the Third Circuit's understanding of the relationship between the First and Fifth Amendments is more compelling, it underestimated the singularity of this case. As the Third Circuit acknowledged, factual distinctions alone could have made the prior obscenity cases inapplicable and freed the district court to hear a creative argument tying unique facts to the only relevant law.²⁰⁵ None of the post-*Stanley* Supreme Court cases involved defendants claiming third-party standing on behalf of their clients' right to privacy.²⁰⁶ The fact that the privacy right in *Stanley* was not properly asserted by any of these defendants does not mean that it was not properly asserted in *Extreme Associates*. The district court was defending the right of the individual to view obscene materials on her computer in her home.²⁰⁷ If *Stanley* is still good law, it may be the only case that directly governs these facts. By not applying *Stanley*, the Third Circuit engaged in the same impermissible reasoning of which it accuses the district court: implying that a Supreme Court decision has been virtually overruled by subsequent cases when the Supreme Court has never explicitly said as much.

By asserting the *Agostini* principle, the Third Circuit avoids speaking its mind on the questions that it considers central: Whether *Lawrence* overrules the obscenity doctrine by implication, and whether the Internet has created a need for new law. It could have used the opportunity differently, construed *Lawrence* as narrowly as other courts have,²⁰⁸ or come to conclusions about the

²⁰³ *Id.*

²⁰⁴ *Extreme Assocs.*, 431 F.3d at 154.

²⁰⁵ *Id.* at 159.

²⁰⁶ *United States v. Reidel*, 402 U.S. 351, 355 (1971) (holding that there is no First Amendment right to distribute obscenity); *United States v. Twelve 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 128 (1973) (holding that there is no First Amendment right to transport obscenity); *United States v. Orito*, 413 U.S. 139, 143 (1973).

²⁰⁷ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 596 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006) ("We find that the federal obscenity statutes burden an individual's fundamental right to possess, read, observe and think about what he chooses in the privacy of his own home by completely banning the distribution of obscene materials."). In fact, none of the post-*Stanley*, pre-Internet cases could have raised this claim in quite the same way as *Extreme Associates*. Only in the Internet age can one reference a hypothetical third-party consumer for whom obscene materials magically appear in the privacy of his home.

²⁰⁸ See *supra* text accompanying note 63.

Internet that foreclosed such arguments for future plaintiffs. Perhaps the Third Circuit intended to analogize this case to the situation in *Agostini*, wherein the Supreme Court—while asserting the limits of lower courts' power—admitted that to adhere to its own precedent in this case “would work a ‘manifest injustice.’”²⁰⁹ *Agostini* is cited most often by federal courts for the principle that stare decisis is “not an inexorable command.”²¹⁰ The Third Circuit also cited itself in a case where it credited the lower court's reasoning, even though it felt the obligation to reverse.²¹¹ It is possible that the Third Circuit considered the district court's position here similarly worthy. By not considering the merits, the Third Circuit may have shown a lack of courage, but it also pointed out issues with which the Supreme Court will eventually have to contend. The following section will argue that *Lawrence* expresses—and the Internet has wrought—societal changes that reveal the obscenity doctrine as oppressive, illogical, and, finally, obsolete.

VI. A TYRANNY OF YOUR PEERS

A. “Prurient Interests” After *Lawrence*

*The tragedy is that we are producing a product that is almost universally consumed, and almost nobody is willing to stand up and support us. I don't know why the majority of people feel like they have to put on some moral act. You know they're on the websites just like everybody else, on their computers in the dark.*²¹²

The district court opinion in *Extreme Associates* uses *Lawrence* twice. In the main, it uses the principle that morality cannot be a legitimate, let alone a compelling, interest in defending a law prohibiting private consensual sexual activity against a Due Process

²⁰⁹ *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

²¹⁰ Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 754 n.241 (2004); Julie E. Payne, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 975 (2004); Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 519 (2003).

²¹¹ *United States v. Extreme Assocs.*, 431 F.3d 150, 156 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006) (citing *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001)) (holding that the court's previous decision—that felon-in-possession statutes were constitutional exercises of Congress' commerce power—need not be reconsidered in light of *United States v. Morrison*, 529 U.S. 598 (2000), which plaintiffs contended undermined the court's reasoning).

²¹² Ramon, *supra* note 146.

Clause claim.²¹³ It also mentions that by invalidating morality as a government interest, *Lawrence* may undermine obscenity doctrine “where it lives” in the First Amendment.²¹⁴ The Third Circuit views this second contention as the more central—and impermissible—use of *Lawrence*. Treatments of *Lawrence* by constitutional scholars, however, consistently support the idea that *Lawrence*, read narrowly or broadly, at least “point[s] toward elimination of obscenity law.”²¹⁵ This section will argue that the *Miller* standard is rooted in the very morality interests invalidated in *Lawrence* and it will discuss the idea of preventing “moral harm” and why that idea unsettles activists on both sides of the obscenity debate—as well as the Supreme Court itself.

Miller asks a jury to apply the standards of its local community and decide whether the material before it appeals to the “prurient interest,” meaning a “shameful or morbid interest,” in sex.²¹⁶ It next asks whether the material is “patently offensive” to those community standards. Finally, it asks the jury to determine whether a reasonable person could find serious value in the material, despite its shameful appeal and patent offensiveness.²¹⁷ The jury is never given a legal definition of what might be “shameful” or “offensive” or what might have “value.” The distinction between obscenity and mere pornography, on which might hang a fifty-year jail sentence, is made through the instinctual and unguided reaction of twelve people representing a local community. The only possible description of the jury’s role is as moral arbiter.

Professor Andrew Koppelman explains the important distinction between moral and tangible harms.²¹⁸ The *Miller* standard, as justified in *Paris Adult Theater*, rests on the principle that “good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character” while “obscene books

²¹³ *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 593 (W.D. Pa. 2005), *rev’d*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 U.S. 2048 (2006).

²¹⁴ *Id.* at 590.

²¹⁵ Cenite, *supra* note 175, at 25. See also Tribe, *supra* note 189, at 1945 (“[T]he Court’s holding in *Lawrence* is hard to reconcile with retaining the state’s authority to ban the distribution to adults of sexually explicit materials”); Gregory P. Magarian, *Substantive Due Process As a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 307 (2005) (“[I]n light of *Lawrence*, the Supreme Court’s obscenity doctrine is untenable.”).

²¹⁶ *Miller v. California*, 413 U.S. 15, 24 (1973); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497 (1985).

²¹⁷ *Miller*, 413 U.S. at 24.

²¹⁸ Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005).

... have a tendency to exert a corrupting and debasing impact."²¹⁹ Obscenity laws are not reliant on the government interest in preventing tangible harms that supposedly flow from obscenity, such as violence to women, or supposedly inhere in its making, such as the spread of sexually transmitted diseases. This explains why the doctrine has not been successfully dismantled by critics who show that obscenity does not actually result in these tangible harms.²²⁰ Koppelman argues that the government's interest actually is in preventing moral harm, defined as harm to a viewer's morals, regardless of consequences to her behavior and the outside world.

The history of the obscenity doctrine demonstrates its roots in, and commitment to, preventing this kind of internal moral harm. In the nineteenth century, courts used the English common law "bad tendency" test, defining obscenity as material tending "to deprave and corrupt those whose minds are open to such immoral influences"²²¹ Judge Learned Hand first advocated a "community standards" approach, where "the word 'obscene' [would] indicate the present critical point in the compromise between candor and shame;" the consensus of the community as to what will cause moral harm.²²² The Supreme Court in *Roth* and *Miller* made Judge Hand's "community standards" approach the law of the land.²²³ While the approach was arguably adopted as a flexible test for obscenity that would be allowed to change with the times—rather like the standard for negligence—its acknowledged purpose is to prevent viewers from being moved, for better or worse, by works that have the public's disapproval.

Of each of the elements of the *Miller* test, only "prurient interest" has been defined more specifically. Under this prong, the jury must decide whether the material provokes a "good, old fashioned, healthy" interest in sex or an abnormal one.²²⁴ If the material is outlandish enough, the court may need to call expert witnesses to explain the inclinations of whichever deviant sexual group for which the material was made.²²⁵

²¹⁹ *Id.* at 1640–41 (quoting *Paris Adult Theater*, 413 U.S. at 63).

²²⁰ *Id.* at 1636.

²²¹ *Cenite*, *supra* note 175, at 30 (quoting *Regina v. Hicklin*, 3 Q.B. 360 (1868)).

²²² *Id.* at 31 (quoting *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913)).

²²³ *Id.* at 31–32.

²²⁴ *Id.* at 37 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985)).

²²⁵ The Court affirmed the wisdom of calling expert witnesses only "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

Lawrence's argument that the right to make private sexual decisions is an integral safeguard of human liberty and dignity has obvious bearing here.²²⁶ The obscenity doctrine requires the jury to judge not only the material, but also its own responses to it and the projected responses of others.²²⁷ The jury members are asked if the material appeals to that wrong part of themselves and their neighbors. They are allowed, alternatively, to distance themselves from the portrayal of "aberrant sexual activities" by deciding that, although they would never find such filth stimulating, some deviant sexual group may.²²⁸ Obscenity prosecutions allow the government to attach criminal penalties to materials that cater to abnormal desires, while protecting "good, old-fashioned, healthy" pornography as free speech. The moral distinction between good sexual desire and deviant sexual desire, especially made in a context where all desires on the table are those of consenting adults, begins to look startlingly like the moral distinction between homosexual desire and heterosexual desire that *Lawrence* holds cannot be the basis for criminal laws. The state must justify its laws on tangible harms, not moral discrimination.²²⁹

Before *Lawrence*, the Supreme Court had expressed its discomfort in justifying a prohibition on sexual speech solely on morality in the famously confounding nude-dancing cases.²³⁰ The plurality in *Barnes v. Glen Theater* upheld a prohibition on nude dancing

²²⁶ Tribe, *supra* note 189, at 1945 ("[T]he Court's holding in *Lawrence* is hard to reconcile with retaining the state's authority to ban the distribution to adults of sexually explicit materials identified by, among other things, their supposed appeal to what those in power regard as 'unhealthy' lust" (quoting *Brockett*, 472 U.S. at 504)).

²²⁷ "The focus of prurient appeal analysis is less on whether content has sexual appeal than on whether that appeal is 'appropriate.' . . . [O]nly 'shameful' responses could be targeted for prosecution." Cenite, *supra* note 175, at 36–37.

²²⁸ *Id.* (citing *Pinkus v. United States*, 436 U.S. 293, 303 (1978)).

²²⁹ *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003). The most well-known statement of this principle predates *Lawrence* by more than a century:

[T]he only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise.

JOHN STUART MILL, *ON LIBERTY* 13 (Stefan Collini ed., Cambridge University Press 1989) (1859).

²³⁰ See Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (arguing that the confusing decisions on nude dancing

based on the governmental interest in morality.²³¹ Souter, in a concurring opinion, held that the prohibition should be upheld “not on the possible sufficiency of society’s moral views,” but on the “secondary effects” which result: promotion of prostitution, spread of sexually transmitted disease, and decline in property values.²³² Nine years later, the Court reversed *Barnes* with another plurality opinion in *City of Erie v. Pap’s A.M.*²³³ This time, the slim majority adopted Souter’s “secondary effects” logic, downplaying the purely moral interests.²³⁴ After *Lawrence*, the Supreme Court’s rejection of morality as a government interest is clear, and the Court must reckon with what this means for the obscenity doctrine generally.

Andrew Koppelman argues that even if preventing moral harm was a compelling goal, the *Miller* standard reflects the “inevitable clumsiness” of any legal attempt to address such a subtle and complex issue.²³⁵ All literature influences moral development by promoting a certain understanding of the way the world is or should be.²³⁶ For example, some pornography may promote self-centeredness and objectification of others.²³⁷ However, any condemnation of this moral effect is complicated. Self-centeredness and objectification may be a natural, even healthy part of the sexual experience.²³⁸ These attitudes are obviously not promoted only by pornography, but by many aspects of our economy and culture.²³⁹ However, obscenity laws only prohibit materials that are sexual in nature.²⁴⁰ Moreover, which sexual materials are banned and which are left alone reveal, in some cases at least, an interest not in preventing objectification but promoting it. *Playboy* can

are a result of the Supreme Court’s Freudian anxiety when confronted with the naked female form).

²³¹ 501 U.S. 560, 569 (1991) (plurality opinion).

²³² *Id.* at 586.

²³³ 529 U.S. 277 (2000) (plurality opinion).

²³⁴ As *Barnes* based its “morality interests” on *Bowers*, some scholars argue it would have been overruled by *Lawrence* had the Supreme Court not shifted its analysis. Bradley J. Shafer & Andrea E. Adams, *Jurisprudence of Doubt*, 84 MICH. B.J. 22, 25 n.9 (2005).

²³⁵ Koppelman, *supra* note 218, at 1678.

²³⁶ *Id.* at 1643–44.

²³⁷ *Id.* at 1648–49. But see Leonore Tiefer, *Some Harms to Women from Restrictions on Sexually Related Expression*, 38 N.Y.L. SCH. L. REV. 95, 99 (1993) (arguing that “you cannot understand pornography’s content or function on a literal level” because a person’s experience of a certain fantasy is coded in subconscious symbols, so that a fantasy of sexual subjugation may provide a feeling of, and actually be about, sexual empowerment).

²³⁸ Koppelman, *supra* note 218, at 1650–51.

²³⁹ See *id.* at 1652.

²⁴⁰ *Id.*

freely publish “soft-core” photographs of naked women of color, portraying them in the text as “exotic beauties,” and thus support a dangerously objectifying and racist sexual script.²⁴¹ As long as the photographs do not contain sex acts, this magazine cannot be prosecuted for obscenity.²⁴² Meanwhile, the *Cambria List* circulates the porn industry, advising companies against portraying inter-racial sex, female ejaculation, gay male sex, sado-masochism, and transsexuals if they want to avoid prosecution.²⁴³ There are arguments to be made that a film, even an explicit film, about any of these subjects could have an empowering effect, depending on the viewer, the context, and the story told. Intentionally omitting these subjects conveys a message that these acts and these people are perverse and deviant. By censoring sexual speech, the government fails at preventing moral harm and only succeeds in producing shame²⁴⁴—and shame is undoubtedly more to blame for “corrupting and debasing” the human personality than pleasure ever could be.²⁴⁵

²⁴¹ *Id.* at 1656–57. Lena Ramon’s experience exemplifies how subtle and literary those moral scripts can be and therefore how unsuited to broad generalizations in the law.

I generally won’t do a rape scene. If the sense of the scene is making me feel like “This is something bad that actually happens to women,” then I won’t do it. But usually all it requires is a slight change in the script or the attitudes of the people working together. Since I’m usually working with people I know and I have a very dominant personality when I’m working, I can make those changes. For example, I was doing this “home invasion” scene where my little white husband supposedly owed the big black man money for drugs, and I end up having sex with the drug-money guy. It started off as a weird, forced scene, but in the middle of it I suddenly said “Wow, it’s nice to have a real man around the house!” It was creepy and weird, but to me, it was creepy and weird to me in an okay, fantasy way. I’ve done abduction scenes that felt okay to me. If I’m being totally honest about it then I think you have to realize that, as a fantasy, it’s really hot for a lot of people. I’m not being hurt; I’m not being abducted; I’m not being raped. I’m working with people I know, and it’s all in good fun.

Ramon, *supra* note 146.

²⁴² Koppelman, *supra* note 218, at 1656–57.

²⁴³ See Taoromino, *supra* note 94; The *Cambria List*, *supra* note 94.

²⁴⁴ See Koppelman, *supra* note 218, at 1660–61. Professor Leonore Tiefer argues that, since sexual fantasies are an almost universal part of people’s psychological lives, “protecting” women from pornography only results in increasing the shame that women feel for having such fantasies. Tiefer, *supra* note 237, at 97–100.

²⁴⁵ See generally Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661 (1994–95) (arguing that at least gay male pornography provides a social good—helping gay men find “sexual integrity”—and that fighting for greater acceptance of pornography of this nature is part of the fight to end homophobia and misogyny).

B. "Community standards" in the Age of the Internet

*Actually, a lot of what people are willing to do is based on those amorphous community standards. Companies will refuse to sanction certain acts out of a fear of prosecution, like fisting, sex while in bondage, cutting or piercing. It's not because there's a law; it's not that the fisting police are going to come and arrest you. It's out of a fear of violating community standards. People who have artistic visions and want to do something that they find really groundbreaking are not doing it because they're afraid they're going to cross some obscenity line and go to jail.*²⁴⁶

Allowing juries to judge the "patent offensiveness" and "prurient appeal" of pornography by "community standards" has served two purposes in the past: It has allowed states and subdivisions of states to set the tone for the speech in their communities, while protecting the right of purveyors of pornography to find markets for their products without offending more conservative communities and risking prosecution.²⁴⁷ In 1973, this standard may have been a useful compromise that recognized "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept the public depiction of conduct found tolerable in Las Vegas, or New York City."²⁴⁸ Although there has been some lack of guidance as to the scope of the relevant community—and confusion emitting from the Supreme Court's decision to enforce national standards with regard to the law's third prong—the standard has persisted for thirty years without serious contention.²⁴⁹ Scholars now argue that the Internet poses an entirely new challenge that cannot be met by adjusting laws meant for mail distribution, public movie houses, or even television.²⁵⁰ It requires a complete overhaul, if not a rejection, of the obscenity doctrine.

The Internet has expanded the "community" to reach across

²⁴⁶ Ramon, *supra* note 146.

²⁴⁷ Walters & DeWitt, *supra* note 175, at 62. See also Cenite, *supra* note 175, at 33.

²⁴⁸ Miller v. California, 413 U.S. 15, 32 (1973).

²⁴⁹ Shafer & Adams, *supra* note 234, at 24. The Supreme Court leaves the scope of the relevant community to state law for the first two prongs and enforces national standards for the third. This means that in Michigan, for example, a jury will be instructed to answer whether the average American could find "serious value" in the material and whether the average Michigan resident would find it patently offensive and appealing to the prurient interests. *Id.* If the materials are being evaluated in reference to its suitability for minors, the jury will instead be instructed to ask whether the average resident of their county would find it suitable. *Id.* at 25 n.32.

²⁵⁰ Walters & DeWitt, *supra* note 175, at 60; Cenite, *supra* note 175, at 25; Shafer & Adams, *supra* note 234, at 24; J. Todd Metcalf, *Obscenity Prosecutions in Cyberspace: The Miller Test Cannot "Go Where No [Porn] Has Gone Before,"* 74 WASH. U. L.Q. 481, 514 (1996).

the globe; reduced it to the solitary individual in the privacy of her home;²⁵¹ and fostered specialized “communities” of like-minded people who are free to establish their own standards and revel in their own idiosyncrasies.²⁵² However this transition is portrayed, it is at least clear that the Internet “community” is not geographically bound.²⁵³ Even if they wanted to, Internet providers could hardly impose geographical limitations on who can access their materials. However, prosecutors can bring suit in any jurisdiction where obscenity is created or received, and juries will apply the standards of that community.²⁵⁴ Because residents of a sleepy town in Mississippi can now pay for and view the same pornography as New Yorkers, the threat of a prosecution under *Miller* may reduce all of the content available to that appropriate for the least tolerant community.²⁵⁵ Under the First Amendment, Internet providers can argue that this “lowest common denominator” effect chills speech that might be protected were it in any other medium.²⁵⁶

The Third Circuit and Supreme Court have begun to hint that a “community standards” approach may be unworkable for the Internet. In *Reno v. ACLU*, the Supreme Court considered the government’s first attempt to regulate content on the Internet, the Communications Decency Act (CDA), which attempted to reduce all Internet content to that appropriate for minors.²⁵⁷ The Court unanimously found the Act to be unconstitutional because it affected the non-obscene speech of adults and was not narrowly tailored to serve a compelling interest. It also found the analogies the government made to other obscenity laws unpersuasive because zoning and other time, place, and manner restrictions are neither

²⁵¹ As Rob Black said, “It’s not involving the community. It’s involving a private individual, who purchased these videos, and downloaded the images from the Internet into their home.” 60 Minutes, *supra* note 15.

²⁵² See Gyong Ho Kim & Anna R. Paddon, *Cybercommunity Versus Geographical Community Standard for Online Pornography: A Technological Hierarchy in Judging Cyberspace Obscenity*, 26 RUTGERS COMPUTER & TECH. L.J. 65 (arguing that the relevant community to judge whether material is obscene should be the cyber community who is exposed to the material); see also Walters & DeWitt, *supra* note 175, at 68–69.

²⁵³ Kim & Paddon, *supra* note 252, at 66.

²⁵⁴ *Ashcroft v. ACLU*, 535 U.S. 563, 602 (2002). In fact, *Extreme Associates* has been cited as an example of a strategic choice in venue—by prosecuting where community standards are most rigid. Walters & DeWitt, *supra* note 175, at 64–65.

²⁵⁵ Walters & DeWitt, *supra* note 175, at 65. The widespread availability of pornography is most marked in, but not limited to, the context of the Internet. Large hotel chains and satellite television also make pornography invisibly accessible to communities with the strictest standards, who, ironically enough, seem to buy it in higher numbers than urban residents. See Egan, *supra* note 94.

²⁵⁶ Walters & DeWitt, *supra* note 175, at 65.

²⁵⁷ *Reno v. ACLU*, 521 U.S. 844 (1997).

effective nor even desirable in the context of the Internet.²⁵⁸ The Third Circuit considered the government's revision of CDA, the Child Online Protection Act, and found its reliance on "community standards" to be wholly inappropriate to the Internet.²⁵⁹ The Supreme Court subsequently overturned the Third Circuit, holding that the use of "community standards" did not, by itself, invalidate the Act.²⁶⁰ However, Justice O'Connor took the opportunity to speculate that, "given Internet speakers' inability to control the geographic location of their audience," crafting a national standard may be the only way to constitutionally regulate the Internet.²⁶¹ The Supreme Court went on to uphold a preliminary injunction against the law—reengineered as COPA—on remand, and the battle over this statute continues.²⁶² Scholars have already proposed replacements to the community-standards approach.²⁶³ This simmering debate is a sign that the Internet challenges the basic assumptions behind this test. The Supreme Court must eventually resolve the insurmountable burden a community standard poses for speech on the Internet.

²⁵⁸ *Id.* at 867–68. ("According to the Government, the CDA is constitutional because it constitutes a sort of 'cyberzoning' on the Internet. But the CDA applies broadly to the entire universe of cyberspace.").

²⁵⁹ *ACLU v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000), *vacated sub nom.*, 535 U.S. 564 (2002). *See also* Cenite, *supra* note 175, at 45–46.

²⁶⁰ *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002). *See also* Cenite, *supra* note 175, at 47.

²⁶¹ *Ashcroft*, 535 U.S. at 587 (O'Connor, J., concurring).

²⁶² *Ashcroft v. ACLU*, 542 U.S. 656, 671–72 (2004) (remanding so that filtering technology, which may protect children effectively and still not restrain the speech of adults, could be researched as an alternative to COPA).

²⁶³ Lawrence Walters and Clyde Dewitt argue on behalf of national standards because of how the Internet has changed the meaning of "community" by being simultaneously more participatory, less regulated, and less intrusive than any other media. Walters & Dewitt, *supra* note 175, at 60, 63. Partly because of the Internet, we are more homogenous as a nation, and community is defined by interest rather than geography. *Id.* at 67, 69. The Internet has also rendered nationwide standards knowable; the government can easily monitor what people consume and therefore what is tolerable to them. *Id.* at 68. Walters and DeWitt imply that the standard for obscenity should track these consumer choices, which would undoubtedly bring the real variety and pervasiveness of porn use to light. In contrast, Mark Cenite argues that national standards, while solving some issues of overbreadth, would raise others. Cenite, *supra* note 175. The Court would have to choose between using a national average of all community standards, which would still impermissibly restrict speech, or only regulating material offensive to every community in the nation, which would likely result in no regulation at all. *Id.* at 60–61. Cenite sees the real problem as the categorical exclusion of sexual speech from protection and the real solution as the elimination of community standards altogether. *Id.*

VII. OUR SECRET GARDEN:²⁶⁴ A NEW SANCTUARY
FOR SEXUAL SPEECH

Thus far, this Article has discussed why the way sexual speech has been handled under the First Amendment—including how obscenity is distinguished from other pornography—no longer makes sense for our time. It has explored a case that brought pornography under the protection of the Due Process Clause and argued that its reasoning was doctrinally sound. This Part will explore why bringing pornography under the Due Process Clause is not only valid but also desirable for both pornographers and activists who work for sexuality rights.

In working backwards to find a constitutional “home” for a vulnerable right, it is important to ask why pornography should be afforded protection in the first place. Leonore Tiefer, a professor of psychiatry and sex therapist, identifies five concrete harms that befall women when pornography is censored: a loss in empowerment that comes from being overprotected; an increase in the shame and stigmatization that women feel about their sexual fantasies; a loss of opportunity for women to learn about the variety of sexual expression; a loss in income and self-sufficiency for women who work in the sex industry; and the strengthening of the religious right.²⁶⁵ By extrapolation, one can argue that pornography serves the following positive interests: It expands the imagination and increases the empowerment of the viewer by offering the world of sexuality in all its variety to explore;²⁶⁶ it affirms the self-worth of the viewer by showing she is not alone in having a particular fantasy; it offers the only field of employment where women, gay men, and transgender women are paid twice to ten times more than white, heterosexual men;²⁶⁷ and it offers a mode of personal

²⁶⁴ This subtitle references the 1973 book *My Secret Garden*, a collection of real women's sexual fantasies sent to the author Nancy Friday in letters. The book was part of a cultural—and for many a personal—sexual revolution, as it presented a lush variety of fantasies—ranging from married sex, to bisexuality, to rape fantasies and bestiality—without judgment. NANCY FRIDAY, *MY SECRET GARDEN* (2d ed. 1998). The author republished the book in 1998, asking, “How could it be, you might ask, that women today, at the turn of the century, would still think they were the only Bad Girls with erotic thoughts? What kind of prison is this that women impose on themselves?” *Id.* at xvi.

²⁶⁵ Tiefer, *supra* note 237, at 96–100.

²⁶⁶ As Tiefer's essay responded to the radical feminist rejection of pornography, Tiefer framed her arguments in terms of the harm and value of pornography to women. This Article's opinion is that what harms and benefits women, harms and benefits society as a whole. Also, most of what Tiefer describes can be applied to those who are not women.

²⁶⁷ E-mail conversation between Lena Ramon and author (Oct. 1, 2006) (on file

resistance to political forces that seek to suppress sexual autonomy. Professor Jeffrey Sherman would add that, for gay men, pornography and the access it provides to depictions of gay male sexuality are an indispensable part of developing self-esteem and beginning to integrate one's sexuality into the rest of one's life.²⁶⁸ As a performer, Lena Ramon spoke of her interests in exploring pornography as an art form; a career that allowed her to pay her college tuition and buy a home; and the valuable relationships that she developed through performing and creating with the same colleagues over the years.²⁶⁹

While opponents of pornography decry its general effect on public morals, it seems that the goods derived from pornography by makers and viewers are more personal and centered in imagination, relationships, identity, expression, and ambition. Professor Greg Magarian summarizes these interests as the pursuit of "personal autonomy."²⁷⁰ He argues that certain kinds of speech are especially good at furthering personal autonomy, while others serve the goal of fostering political debate.²⁷¹ Speech has not been protected adequately under the First Amendment partially because these vastly different interests have complicated the doctrine.²⁷² He contends that political and nonpolitical speech would both be more effectively protected if they were analyzed under different constitutional rubrics.²⁷³ *Lawrence v. Texas*, by emphatically drawing a connection between sexuality and personal autonomy, opens a door to locate sexual and other non-political speech within the "liberty" protected by the Due Process Clause, leaving the First Amendment to better protect political discourse.²⁷⁴

Yet if sexual speech, including that which might be obscene, is protected as a fundamental right under the Due Process Clause, the question becomes what, if any, government regulation of such speech should be allowed. *Lawrence* also offers guidance here by

with the Author). "Gay" and "heterosexual" mean, in this context, those willing to perform as such on film.

²⁶⁸ See Sherman, *supra* note 245.

²⁶⁹ Ramon, *supra* note 146.

²⁷⁰ Magarian, *supra* note 215, at 273.

²⁷¹ *Id.* at 251-55.

²⁷² *Id.* at 254-55.

²⁷³ *Id.*

²⁷⁴ *Id.* at 249. Magarian maintains that the First Amendment should remain open to those parties whose speech advances political debate, even if that speech is sexual or artistic. He argues against the categorization of speech that has characterized First Amendment doctrine, whereby the obscene can be excluded out of hand. See also Hunter, *supra* note 63.

setting the standard regulations must meet in order to overcome individuals' interest in personal autonomy. The government must justify its regulations on more than enforcement of a moral code; it must prove that the speech causes tangible, concrete harms that its regulations are designed to prevent.²⁷⁵ Magarian advocates for a case-by-case analysis: When a producer is prosecuted for obscenity, she will have the opportunity to present evidence that her products contribute to both her customers' and her own personal autonomy.²⁷⁶ If she succeeds, the law that infringes on her right to make these materials will be presumed unconstitutional, unless the government proves that her materials cause concrete harms.²⁷⁷ The *Miller* standard,²⁷⁸ as it is based on moral harm and gives no value to personal autonomy interests, would be eliminated.²⁷⁹

What standard would take its place? In the 1980s, radical feminists Andrea Dworkin and Catherine MacKinnon wrote and passed an ordinance for the city of Indianapolis giving women a civil cause of action against purveyors of obscenity that was violent toward, or subordinate of, women.²⁸⁰ While this standard is unconstitutional under the First Amendment because it blatantly discriminated against pornography on the basis of its political content,²⁸¹ a substantive due process analysis provides such theories a new opening, as Magarian argues.²⁸² If governments imposed such a definition of obscenity, they could argue that the tangible harms to women—namely increased violence towards women and decreased equality in society—overbear pornography producers' and consumers' autonomy interests.

However, any blanket assertion that sexual speech causes tangible harms to women must be examined carefully. In Canada, a similar law was upheld and has become the standard for illegal sexual speech.²⁸³ As Mark Silver, who analyzed the Canadian opinion upholding this standard, observed, the analysis focused on the

²⁷⁵ Magarian, *supra* note 215, at 290–91.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 307.

²⁷⁸ See *Miller v. California*, 413 U.S. 15 (1973).

²⁷⁹ Magarian, *supra* note 215, at 307–08.

²⁸⁰ INDIANAPOLIS, IND. CITY COUNCIL GEN. ORDINANCE Ch.16, § 16-3(q) (1984). This statute was held unconstitutional by the Seventh Circuit in *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985). For a brief history of the ordinance, see Mark S. Silver, *Rethinking Harm and Pornography: Conflicting Personal and Community Views*, 23 WOMEN'S RTS. L. REP. 171, 180 n.114 (2002).

²⁸¹ *Hudnut*, 771 F.2d at 332.

²⁸² Magarian, *supra* note 215, at 309.

²⁸³ *Butler v. Her Majesty the Queen*, [1992] S.C.R. 452 (Can.).

harm to women and equality though it failed to consult the women affected and purportedly harmed.²⁸⁴ It is therefore not surprising that very little data exist to support the idea that obscenity actually causes these harms.²⁸⁵ Scientific studies show that short-term attitudinal changes in men as a result of being exposed to violent pornography are more often the result of the violent content than the sexual content, and there are even studies suggesting that an increase in the availability of pornography decreases aggressive behavior.²⁸⁶ The Canadian court acknowledged that the connection between violent pornography and tangible harms was difficult to prove, but it took a normative approach, guarding against a “reasoned apprehension of harm.”²⁸⁷ Silver concluded that the argument in support of a politically defined obscenity standard was ultimately “a moral argument in the guise of community standards.”²⁸⁸ This close examination of the reasons given to regulate pornography—weighed against a real acknowledgement of what good pornography might produce—is exactly why a substantive due process analysis is appropriate for sexual speech. It leads to the development of obscenity laws that, if they exist at all, are based in people’s actual experience.

Some jurists will object to this shift based on “the queasiness that reflexively greets any proposal to extend substantive due process.”²⁸⁹ *Lawrence*, however, in its final lines, offers a vision of the Due Process Clause that invites and encourages just this kind of extension:

²⁸⁴ Silver, *supra* note 280, at 184–85. Lena Ramon was especially offended by this particular theory. “It is so unconscionable to me that people from outside can come up with some half-baked theory and just screw up our lives. It’s downright insulting when it starts to be about what harms women because I’m a woman, and I work in this industry.” Ramon, *supra* note 146.

²⁸⁵ Koppelman, *supra* note 218, at 1664–67. Koppelman outlines the types of studies attempting to prove a link between men’s exposure to violent pornography and their tendency to commit violence against women. *Id.* at 1664. He claims that even the most suggestive of these studies either establish only short-term attitudinal changes that may have no relevance outside of a lab, or they show large-scale trends that fail to prove whether aggressive men tend to watch pornography or whether pornography causes aggression. *Id.* at 1665. The studies also fail to identify violent pornography over other pornography as a significant predictor of aggression toward women. *Id.* at 1665–66.

²⁸⁶ *Id.* at 1665.

²⁸⁷ *Butler*, [1992] S.C.R. at 504.

²⁸⁸ Silver, *supra* note 280, at 184–85.

²⁸⁹ Magarian, *supra* note 215, at 298 (“This argument rests on questionable premises—that any constitutional text provides more than a broad outline for a complex and sophisticated doctrine of rights, that personal freedom should be a stingy exception to the rule of government power, and that judicial innovation contradicts the constitutional design.”).

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²⁹⁰

CONCLUSION: MAKING LAW FOR PORN STARS

*I think it would actually be hard to pass a law if the law's purpose was to protect porn performers.*²⁹¹

Had *Extreme Associates* been upheld—and the *Miller* standard eradicated along with traditional obscenity laws—there would still be a place for law in the production of pornography. But what kind of law could develop within these new parameters? What tangible harms might government seek to ameliorate, and what public and personal goods might government foster through statute and regulation?²⁹² For Lena Ramon, there is an urgent need for the law to turn away from conjectural harms to public morals and address the condition of those actually involved in the industry.²⁹³ She proposes that the government could start by treating the porn industry like any other industry by imposing OSHA safety regulations, from clean sets to mandated condom use. “In an ideal world we would be able to legislate safe sex.”²⁹⁴ She says there is enormous resistance to this idea both from the market-driven mainstream of the industry, afraid no one will buy its products, and from porn-performer advocates, afraid that regulation would lead to an even more unsafe underground industry.²⁹⁵ Ramon suggested that these factors make this area ripe for government regulation because it would force consistency.²⁹⁶ “If tomorrow everything came coated in latex, that’s what the consumer would

²⁹⁰ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

²⁹¹ Ramon, *supra* note 146.

²⁹² The following suggested legal interventions are based on a hypothetical government that acknowledges the value of pornography and of pornographers and porn performers as citizens and artists. Regulation, in such a world, would raise new debates about how best to respect autonomy interests that are not fully fleshed out here.

²⁹³ Ramon, *supra* note 146.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

buy.”²⁹⁷

Other legal interventions could prevent harm and promote good for both performers and consumers by addressing the porn industry as a workplace and a creative laboratory. Ramon spoke of the unique brands of racism and sexism that have developed in the industry because of the way certain bodies are commodified.²⁹⁸ While there is a certain honesty to producing what consumers want, there may also be value in helping porn performers hold the industry to the same non-discrimination standards as other employers. Government, as a funding agency, could also sponsor artistic innovation in pornography or fund small businesses owned by pornographers who are women, people of color, gay, lesbian, and transgender. This kind of state action would advance the viability of speakers who want to use this medium to counter violent messages available in other pornography, while relieving of them of the generalized fear of prosecution under which the entire industry, particularly the innovators, now live.

In the year between Extreme Associates’ victory and its loss, the district court opinion was cited by owners of Internet sites;²⁹⁹ “adult entertainment establishments”³⁰⁰ or sex clubs; and adult video stores in challenging city zoning ordinances and obscenity laws.³⁰¹ It was even raised by the plaintiffs challenging Alabama’s anti-sex-toy laws in the ongoing *Williams* case.³⁰² No court other than the Western District of Pennsylvania accepted Extreme Associates’ line of argument, even before it was overturned.³⁰³ If the case had been upheld, it might have expanded the range of claims available to members of the sex industry. It also may have broadened the boundaries of liberty for all Americans. It was the first successful use of *Lawrence* that actually reached for the vista to which *Lawrence* points. Yet the facts only encompassed private consensual sexual speech to which the government sought to attach criminal penalties. When the Supreme Court foreclosed these arguments, it

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Brief of Plaintiff at 24–26, 30, 32, 75, *Retail Enter. v. King*, 2006 WL 1626997 (M.D. Fla. 2006) (No. 5:05-CV-129-OC-10GRJ).

³⁰⁰ Brief of Plaintiff at 4, *832 Corp., Inc. v. Gloucester Twp.*, 404 F. Supp. 2d 614 (D.N.J. 2005) (No. 04-1140 (JEI)).

³⁰¹ Complaint at 5, 12, *Belton Gifts v. City of Belton*, 2005 WL 1828045 (W.D. Mo. 2005) (No. 4:05-CV-00548).

³⁰² Brief and Cross-Motion of Defendant at 4, *Williams v. King*, 420 F. Supp. 2d 1224 (N.D. Ala. 2006) (No. CV 98-S-1938-NE).

³⁰³ See, e.g., *United States v. Coil*, 442 F.3d 912, 915 (5th Cir. 2006); *United States v. Ragsdale*, 426 F.3d 765, 785 (5th Cir. 2005).

signaled a turn for the worse for sexuality-rights advocates. As Ramon put it, "They're going after the most flamboyant fish now to set a precedent. Then they'll be able to start coming after the rest of us."³⁰⁴

³⁰⁴ Ramon, *supra* note 267.