Testimony of

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"Obscenity Prosecution and the Constitution"
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Mr. Chairman and Members of the Committee:
Thank you for the opportunity to present testimony this afternoon. It is an honor for me to be here, and to be given the opportunity to speak to the important public policy issues that concern us today.
Please let me begin by making my perspective on these issues clear. By training and experience I am a civil rights advocate who litigates and studies cases that arise at the boundary the First and Fourteenth Amendments create between legitimate regulation in the public interest and the protected space that the Constitution reserves for religious freedom, speech, press, peaceable assembly, and petition for redress of grievances. It is precisely because I am an advocate for the freedoms we associate with the First and Fourteenth Amendment that I am appearing before the Committee today.
If there is one thing that I have learned as an advocate for religious freedom in all its forms - equal protection, speech, press, exercise, non-establishment, assembly, and petition - is that reliable protection for constitutional rights exists only within a well-crafted statutory framework. Unlike many First Amendment advocates, I do not place my trust in the courts. My clients and I have learned the hard way that, when left to their own devices, the courts do not always live up to their reputations as reliable defenders of liberty, equality, or the common good. Meaningful protection comes from the hard-fought legislation forged by our elected representatives - the members of this Congress and representatives at the state and local levels - who bear primary responsibility for the protection of our civil and human rights.
OBSCENITY, THE CONSTITUTION, AND Extreme Associates v. United States
The decision in United States v. Extreme Associates is a classic example of the way in which a rights-based analysis will, without careful analysis, expand to the limits of its logic and produce absurd results. But the fault is not Judge Lancaster's alone. Congress, the courts, and the legal academy all share part of the blame for a case in which the law has gone so badly awry.
It is well settled that obscenity is not protected by the First Amendment. Almost half a century ago, in Roth v. United States, 354 U.S. 476 (1957), Justice William Brennan - whose vision of civil liberties, and of the Court's role in protecting them, was perhaps the most expansive of any Justice in Supreme Court history - stated flatly that at the time of the adoption of the First Amendment, obscenity "was outside the protection intended for speech and press." Id. at 483. That position was affirmed in Miller v. California, 413 U.S. 15 (1973), in which the Court stated that it was "categorically settled . . . that obscene material is unprotected by the First Amendment."
The Miller Court established a three-part test for discerning obscenity that federal judges still apply in obscenity cases.
(a) whether the 'average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24.
Under Miller, "prurient interest" is defined by community standards, id. at 30, and in Haling v. United States, 418 U.S. 87, 106 (1974), the Court held that "[t]he result of the Miller cases ... is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S. at 105. As a result, "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." 418 U.S. at 106
Even though broadband communication links make direct producer to consumer distribution possible, the Court has

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

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

Enter Lawrence v. Texas, 539 U.S. 558 (2003). In Judge Lancaster's view, an individual has a "fundamental right to possess and view what he pleases in his own home." By the simple expedient of reading the Court's holding in Stanley v. Georgia, 394 U.S. 557, 568 (1969) that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" together with its holding in Lawrence v. Texas that the state may not criminalize consensual sodomy that occurs in the privacy of the home he reaches the rather extraordinary conclusion that Extreme Associates "[constitutional] challenge is not precluded by Roth, Reidel, Thirty-Seven Photographs, Orito, and 200-Ft. Reels, but is instead guided by cases such as Stanley, Griswold v. Connecticut, Roe v. Wade, and Lawrence v. Texas."

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

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

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

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

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

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

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

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

demonstrates why the law of obscenity developed by the courts is such a mess.
Existing pornography laws are clearly enforceable. I strongly believe that the states and the Department of Justice should enforce them, but it should not be surprising that civil libertarians would oppose aggressive enforcement. Unless and until this Congress comes to grips with the fact that pornography is no more about "sex" than rape is, the confusion will continue.
Pornography is about money, and those who sell it traffic in materials that are an affront to the human dignity of the men and women who, for whatever reason, engage in sex-for-hire. The Commerce Clause gives Congress ample power to regulate the multi-billion dollar global sex trade, and Judge Lancaster's calculated omission of any discussion of the obscenity cases demonstrates beyond a reasonable doubt why the First Amendment is utterly irrelevant to the questions before the Committee today.
IS THE DECISION IN Extreme Associates AN EXAMPLE OF JUDICIAL ACTIVISM?
The short answer to this question is "yes," but a few words of explanation are in order before developing the idea further.
Defining "Judicial Activism"
The meaning of the phrase "judicial activism" varies widely from person to person and from left to right on the political spectrum. Professor Mark Tushnet provides a useful typology when he notes that there are at least six meanings of the term "activist:"
(1) When courts decide issues not actually before them,
(2) When courts readily disregard precedent without first having determined that actual "problems have[] arisen in the administration of the [prior] rule,"
(3) When courts make decisions that "substitute[] the judgment of unelected judges for those of elected decision makers,"
(4) When courts engage in certain uses and abuses of "the jurisprudence of 'original intention,'"
(5) When courts accept the principle that "an activist court is an arm of an activist government," and
(6) When used as a word of "praise" or "blame."
Professor Stephen F. Smith of the University of Virginia provides a useful reality check concerning the use of the term "judicial activism." When used in the "praise" or "blame" sense identified by Tushnet, Professor Smith notes that "[t]he term serves principally as the utmost judicial put-down, a polemical, if unenlightening, way of expressing strong opposition to a judicial decision or approach to judging."
For present purposes, I am using the term "judicial activism", not as a "put down," but as a way to describe a decision in which:
? A court obviously and "readily disregard[s] precedent without first having determined that actual "problems have[] arisen in the administration of the [prior] rule."
In Extreme Associates, Judge Lancaster makes it very clear that "after Stanley established the right to privately possess obscenity in one's home, the Supreme Court repeatedly refused to recognize a correlative First Amendment right to distribute such material." He also makes it clear that in United States v. Orito "the Court engaged in a rational basis analysis and held that the obscenity statutes could be justified as a method of protecting the public morality." He nevertheless ignores both lines of authority, and oversteps the bounds of the role assigned to him as a United States District Judge.
? A court makes a decision that "substitutes the judgment of unelected judges for those of elected decision makers."
Judge Lancaster is entitled to his opinion that there is no real distinction between the privacy of the home and the creation and maintenance of a worldwide sex market, but Article III does not authorize him to substitute that judgment for that of either the United States Supreme Court - which has not had occasion to address the question - or for that of this Congress, which is explicitly granted the authority and discretion to create, maintain, regulate, and destroy interstate and international markets in goods and services. This Congress can, and I am quite sure, will weigh in on the question of whether there should be an interstate and international market where sex is bought and sold like any other commodity, and where voyeurs need not go to a house of prostitution to enjoy a peep show.
? When courts accept the principle that "an activist court is an arm of an activist government."
Perhaps the most telling evidence that Extreme Associates is an example of "judicial activism" is Judge Lancaster's almost laughable justification for extending the substantive due process reasoning of Lawrence v. Texas. In his view, Lawrence v. Texas requires the judicial imposition of a regime of laissez-faire in the sex trade because
[Current law is] based on the settled rule established in Roth that obscenity is not protected speech under the First Amendment. The motion in this case, however, does not raise a First Amendment challenge to the federal obscenity statutes; it raises a substantive due process challenge. The fact that the obscenity statutes have been upheld under one constitutional provision does not mean that they are immune from all constitutional attack. See e.g. Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (statute did not violate the Equal Protection Clause, but did violate the First Amendment); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84, 112 S.Ct. 2538, 120

L.Ed.2d 305 (1992) (finding that the fact that obscenity is not protected speech under the First Amendment does not mean that it is "entirely invisible to the Constitution").
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Neither the Supreme Court nor the Court of Appeals for the Third Circuit has considered a substantive due process challenge to the federal obscenity statutes by a vendor arguing that the laws place an unconstitutional burden, in the form of a complete ban on distribution, on an individual's fundamental right to possess and view what he pleases in his own home, as established in Stanley. Therefore, contrary to the government's position, defendants' challenge is not precluded by Roth, Reidel, Thirty-Seven Photographs, Orito, and 200-Ft. Reels, but is instead guided by cases such as Stanley, Griswold v. Connecticut, Roe v. Wade, and Lawrence v. Texas.
The problem with this reasoning is - or should be - obvious. It is not possible, either realistically or theoretically, to draw such a distinction. In the present case, where the Bill of Rights is directly applicable to the Congress, Judge Lancaster's opinion would make no sense at all unless it rested the "privacy" interests that control the outcome on foundation of First Amendment "principles" described at a very high level of generality. As applied to the States, the fallacy would be crystal clear: the Incorporation Doctrine is itself a pristine example of substantive due process in action .
Is Congress Partially to Blame?
The answer to this question is also "yes." The United States Supreme Court has made it clear that it is uncomfortable with the concept of "obscenity," both on its face and as applied. A slim majority of the Rehnquist Court and most of the legal academy is also uncomfortable with traditional moral views concerning the propriety of sex and sex-related issues like abortion and same-sex "marriage." The voting public, however, is not.
It is time for Congress to get down to the hard work of defining - with some degree of precision - what kinds of behavior are permissible in the interstate and international markets and which are not? Viewed as an economic transaction, the sale of an explicit sex or violence video is simply the sale of a commodity (a disk or videotape) or a service (sex-for-hire). If Congress wants to get serious about regulating the burgeoning market in the sex trade, it has both the power and the resources to get the job done. Sex-for-hire has a name: prostitution. Hiring someone to have sex so that others can watch is pandering. Hawking the wares of prostitutes also has a name: pimping.
In short, perhaps it is time to call Judge Lancaster's bluff. Legislating against "obscenity" makes for good press, but leaves the heavy lifting to the courts. Calling things by their proper names places the burden right where it belongs: here in the Congress.
THE USE - AND ABUSE - OF THE "COMPELLING STATE INTEREST" TEST
The "compelling state interest" test is a staple of Constitutional Law 101. Judge Lancaster's opinion gets it exactly right:
... a statute withstands a substantive due process challenge only if the state identifies a compelling state interest that is advanced by a statute that is narrowly drawn to serve that interest in the least restrictive way possible.
Law students learn the "compelling state interest" test like a mantra, and dutifully memorize the "steps" in a variety of analyses that basically do the same thing: "balance" the legislature's views of the limits of its authority against the judge's views that they have exceed it.
The reality, however, is far different. The "compelling state interest" test is only used when the judges have decided, in advance, that the state's interest is illegitimate. In cases where the state wins, the "compelling state interest" test is rarely - if ever - used. In fact, the "compelling state interest" analysis works in reverse: (1) when the interest is clearly legitimate, and (2) the means is narrowly tailored to achieving that interest, the state will win, and the term "compelling" is never used.
Explaining how all this works in the time allotted here is far beyond the scope of the task assigned to me by the Chairman, but the bottom line is this: If the courts really believe that there is no legitimate interest in regulating the interstate and international sex market, this Congress should write legislation that forces them to say so explicitly. If there is such an interest, Judge Lancaster's opinion should be reversed. It's that simple. The First Amendment has nothing to do with it.
Thank you for your attention.