UNITED STATES V. EXTREME ASSOCIATES, INC.: THE SUBSTANTIVE DUE PROCESS DEATH OF OBSCENITY LAW

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I. INTRODUCTION

In January 2005, a federal district court invalidated the application of four federal obscenity statutes, ruling the statutes unconstitutional as they were applied.[1] Federal obscenity statutes have long been used to prosecute those accused of distributing or transporting obscene materials, but the recent decision of *United States v. Extreme Associates, Inc.* uprooted the norm of obscenity law.[2] The *Extreme Associates* court accepted arguments that privacy and substantive due process rights prevent the federal government from enforcing obscenity laws.[3] This new development marks an important shift in the law and demonstrates that obscenity defense must not always be based on First Amendment arguments.[4] The district court's *Extreme Associates* decision was overturned in December 2005.[5] Nonetheless, this Casenote's examination of the district court decision is important for two reasons. First, the appellate court did not deny that recent Supreme Court decisions have undercut the foundational premises of obscenity law. Further, more substantive due process attacks on obscenity law can be expected and have strong potential to succeed.[6]

Obscenity has long clouded First Amendment jurisprudence.[7] Obscenity has historically been analyzed under the First Amendment, and obscenity defense teams have generally rebutted attempts to stifle obscene "speech" with First Amendment arguments.[8] After repeated

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1. 352 F. Supp. 2d 578 (W.D. Pa.), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. United States v. Extreme Associates, Inc., 431 F.3d 150 (3d Cir. 2005).

6. This Casenote focuses only on the district court decision.

7. In *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), Justice Potter Stewart noted that obscenity "may be indefinable," writing "I know it when I see it." This represented the vagueness of the law of obscenity prior to *Miller v. California*, 413 U.S. 15 (1973), being indefinite and subject to the perception of the Supreme Court.

8. *See, e.g.*, *id.*; Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre v. Slaton, 413

attempts to defend obscenity charges in this manner across the country, many of which failed, the defense team in *Extreme Associates* tried a different approach.[9] Rather than staying simply within the bounds of First Amendment free speech, the defense argued that admittedly obscene images should be protected not only under the right to speech, but also under deeply rooted rights to privacy, liberty, and speech combined.[10]

The new arguments against obscenity were based in Fifth and Fourteenth Amendment substantive due process rights.[11] On its motion to dismiss the indictments, the defense convinced Judge Gary L. Lancaster in the Western District of Pennsylvania that four statutes regulating obscenity were unconstitutionally applied.[12] This finding in *Extreme Associates* caused uproar in Washington, D.C., leading Senators Orrin Hatch and Sam Brownback to call the decision "a Frankenstein's monster of judicial activism."[13] This was followed by a Senate Judiciary Committee Meeting hosted by Senator Brownback to discuss the adult industry and obscenity law.[14] These reactions could be expected, but the *Extreme Associates* decision was not one of judicial activism.[15] Rather, it was based on the foundational principles of firm constitutional norms rooted in substantive due process.[16] In fact, the U.S. Supreme Court had never considered the constitutionality of federal obscenity statutes attacked on substantive due process grounds rather than a First Amendment basis, nor had the U.S. Court of Appeals for the Third Circuit prior to the *Extreme Associates* appeal.[17] An innovative

U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957).

9. *Extreme Associates*, 352 F. Supp. 2d at 585. The defense team was headed by First Amendment attorney H. Louis Sirkin. *Id.* at 578.

10. *Id.* at 585. The images were admitted to be obscene only for purposes of the motion to dismiss.

11. *Id.*

12. *Id.* at 580.

13. Orrin Hatch & Sam Brownback, *Extreme Judicial Activism*, WASH. TIMES, Feb. 10, 2005., at A19.

14. Transcript of Hearing of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Property Rights (March 16, 2003).

15. The reasoning and case law applied throughout *Extreme Associates*, 352 F. Supp. 2d 578, indicates that the decision was based on sound principles.

16. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding that substantive due process allows a married couple the right to access birth control); Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding that substantive due process allows an unmarried couple the right to access birth control); Stanley v. Georgia, 394 U.S. 557 (1969) (finding that one has a right to own obscenity within the home); Roe v. Wade, 410 U.S. 113 (1973) (finding a privacy right to personal autonomy regarding childbearing); Lawrence v. Texas, 539 U.S. 558 (2003) (finding that the government cannot criminalize a portion of the population based on a moral code).

17. *Extreme Associates*, 352 F. Supp. 2d at 590. Because the appellate courts had never

legal argument was presented in this case, which holds new possibilities for the recognition of personal rights.

The *Extreme Associates* case indicates a step toward a trend to value personal rights over the moral legislation of the masses.[18] It is the first step in moving obscenity law outside the First Amendment, and into the Fourth, Fifth, and Fourteenth Amendments. While the First Amendment's effect on obscenity laws has been the basis of many scholarly articles, the constitutionality of federal obscenity laws under substantive due process standards of privacy and liberty has been less thoroughly examined. Based on the fact that First Amendment arguments have continually failed in obscenity cases, this Casenote proposes that the new substantive due process approach is the best option for preventing and defending obscenity prosecutions and affirming the personal liberty rights of individuals. This Casenote will consider the value of this new method of fighting obscenity law and prosecutions, and will analyze this through the scope of the recent district court decision in *United States v. Extreme Associates, Inc.*[19] The case is important to examine because the finding that four federal obscenity statutes are unconstitutional as applied indicates a large shift in the law of obscenity and privacy. Similar litigation can be expected across the country, indicating that this issue still deserves full exploration.[20] Until the full potential of substantive due process attacks on obscenity law has been explored, this matter will be at the forefront of the volatile legal climate surrounding obscenity.

This examination of *United States v. Extreme Associates, Inc.* is divided into six parts. The facts of *Extreme Associates* will be reviewed in Part II, followed by a discussion of relevant precedent in Part III. This leads to a full exploration of the district court's opinion in Part IV. Part V explains why current obscenity law is outdated, and why a new approach to obscenity law is warranted. Part V considers why looking at obscenity through the lenses of Fourth Amendment search and seizure and the Fifth and Fourteenth Amendments' Substantive Due Process Clause, rather than the First Amendment's Free Speech Clause, is an important development. Part VI concludes that the district court

considered the issue as presented in *Extreme Associates*, it is difficult to argue that this was an activist decision. The decision was not in conflict with relevant precedent, because none of the legal precedent on obscenity law considered a substantive due process attack.

18. *See supra* note 15.

19. 352 F. Supp. 2d 578.

20. This case gained national media attention, particularly among publications that specialize in First Amendment and adult industry issues. Therefore, the attorneys who argue adult industry cases are likely to know of the success of the new arguments presented in *Extreme Associates.* This information creates a reasonable expectation that similar arguments will appear in litigation across the nation.

correctly decided *Extreme Associates*, and that this case should be viewed favorably by other courts and other obscenity defense teams.

II. THE FACTUAL BEGINNINGS OF *UNITED STATES V. EXTREME ASSOCIATES, INC.*

In *Extreme Associates*, the government levied nine obscenity charges against the defendants.[21] The named defendants in the case were

21. *Extreme Associates*, 352 F. Supp. 2d at 579. None of the materials at issue in *Extreme Associates* involved child pornography, nor was that material available on the Extreme Associates website. Most proponents of the adult industry, such as the Free Speech Coalition and the Adult Freedom Foundation, are vehemently opposed to child pornography. None of the arguments within this Casenote should be construed to confuse child pornography with the general body of obscenity. Pedastery and incest are criminal because there is a victim. The public policy interest in preventing victimization is strong, but the link between obscenity and victimization is far too tenuous to infringe on an individual's right to speech and privacy. Arguments based in public policy or history will never allow for an interpretation that there is a fundamental right for an adult to engage in sexual activity with a child. For discussion on this and related topics of victimization, see Peter Brandon Bayer, *Rationality—And the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 45–46 n.127 (1988) ("[T]he right to privacy can accommodate consensual sexual acts between adults without protecting rape, incest and other acts perpetuated against either unwilling others or those too young to make an informed choice to engage in sexual conduct."); Melody Torbati, *The Right of Intimate Sexual Relations: Normative and Social Bases According It "Fundamental Right" Status*, 70 S. CAL. L. REV. 1805, 1812–13 (1997) ("[T]he right to engage in intimate sexual relations is meant to cover primarily those relations that are not substantially harmful to third parties," and although there is a constitutionally protected right of intimate sexual relations, adultery is excluded on the ground that is causes mental and emotional pain); Jennifer Ann Drobac, *Sex and the Workplace: 'Consenting' Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 500 (2004) ("Because we have historically deemed children incapable of giving informed consent, the law pertaining to children differs from that concerning adults in everything from contract formation to fundamental civil rights."); Phyllis Coleman, *Who's Been Sleeping In My Bed? You and Me, and the State Makes Three*, 24 IND. L. REV. 399 (1991). Coleman explains that incest typically involves sexual activity with a child and is abusive. The policy for preventing this conduct is strong enough to compel the proscription against adult incest as well. A law against incest would undoubtedly survive strict scrutiny analysis, for there is a compelling interest to protect children and prevent the societal impacts of incest. Further, prohibition of the conduct is narrowly tailored to prevent the feared societal harms. *Id.*

Rather than phrasing this as an issue of victimization, scholars have argued that it is an issue of coercive versus non-coercive sex. This analysis concludes that fundamental rights are involved when consensual, non-coercive sex is present. *See* Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. LAW J. 1059, 1064 (2004) (arguing that this method of analysis might lead to the result that first cousins could be allowed to marry, for if both parties were of marriageable age and there was no coercion present, this would be a fundamental right). Sunstein's analysis, however, ignores the analysis of victimization or third party harm. Prohibitions on incest exist to prevent the third-party harms to offspring and society. There still remains a fundamental right to non-commercial, non-coercive, victimless sex. Still, this would not satisfy the standards of Catharine A. MacKinnon, who demands that all pornography is exploitative and violative of women and children, and therefore should not be legal. *See* Catherine A. MacKinnon, *Sex Equality in* Lawrence, 65 OHIO ST. LAW J. 1081, 1093–93 (2004). Lino A. Graglia argues that the concept of "harm" should not be determined without considering the actual effects on a particular community at a particular time. Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis For Law*, 65 OHIO ST. LAW J. 1139, 1146 (2004).

Extreme Associates, Inc., Robert Zicari, and Janet Romano.[22] Zicari and Romano were co-owners of Extreme Associates, Inc., a producer and distributor of sexually explicit films and images.[23] The charges included conspiracy to commit an offense or to defraud the United States,[24] mailing obscene or crime-inciting matter,[25] importing or transporting obscene matters,[26] and transporting obscene matters for sale or distribution.[27]

Extreme Associates operated a website, which was divided into two portions.[28] One portion was available free of charge to anyone who accessed the site.[29] The other portion was available only to members, who were required to pay a sizeable access fee.[30] Members could only join the website after providing their name, address, and credit card

22. *Extreme Associates*, 352 F. Supp. 2d at 579.

23. *PBS Frontline Interviews*, *at* www.pbs.org/wgbh/pages/frontline/shows/porn/interviews. Robert Zicari and Janet Romano are married, and they co-own Extreme Associates, Inc, which produces and distributes "sex videos that are considered extreme in their depictions of sex and violence." Within the pornography industry, Robert Zicari is known as "Rob Black," and Janet Romano is known as "Lizzy Borden." Zicari is particularly critical of the adult industry's avoidance of topics on the "Cambria List," which is a list assembled by First Amendment attorney Paul Cambria that noted the favorite topics of prosecutors in obscenity prosecutions. Topics on the list include, e.g.: "No shots with appearance of pain of [sic] degradation," "No spitting or saliva mouth to mouth," "No transsexuals." *Cambria List*, included in a letter from Paul Cambria to a client, February 23, 2001, available on file with author.

24. 18 U.S.C. § 371 (1994) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . each shall be fined under this title or imprisoned not more than five years, or both.").

25. *Id*. §1461 ("Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . ; —[i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing [of such materials] . . . shall be fined under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter. The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination.").

26. *Id*. § 1462 (1996) ("Whoever brings into the United States . . . (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; . . . [s]hall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.").

27. *Id.* § 1465 ("Whoever knowingly transports . . . any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription . . . or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.").

28. United States v. Extreme Associates, Inc., 352 F. Supp. 2d 578 (W.D. Pa.), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

29. *Id*.

30. *Id*. The access fee was $89.95 for a three month period.

billing information.[31] Members could access short video clips on the site, and full-length videos produced by Extreme Associates were available for sale on another page of the website.[32]

As part of the investigation of this case, a United States Postal Inspector (Inspector) registered to become a member of the Extreme Associates website.[33] In order to register, the Inspector had to provide his name, address, and credit card information, and then twice select a button indicating that registration was "OK."[34] The address that the Inspector provided was in the Western District of Pennsylvania.[35] The Inspector and his team accessed six video clips on the website, which were included in the indictment against Extreme Associates.[36]

In August 2003, a ten-count indictment charged Extreme Associates, Inc., Robert Zicari and Janet Romano with felony charges of violating federal obscenity statutes that proscribed the use of the mail, express delivery service, or interactive computer service to transport obscene material.[37] The punishment for violation of these statutes included fines and five- to ten-year prison terms.[38] Three counts of the indictment related to shipment of three video tapes to the undercover Inspector in Pittsburgh; six counts related to the delivery of six video clips over the Internet; the final count was a conspiracy charge relating to the shipment of the videos.[39] The video clips included in the indictment were those requested by the Inspector when accessing the members-only portion of the Extreme Associates website.[40]

Following indictment, the defense filed a motion to dismiss on the grounds that the obscenity statutes infringed "the constitutional guarantees of liberty and privacy secured by the due process clause."[41] This was monumental because the defense did not attempt to argue the First Amendment merit of the disputed videos, but instead argued that the charges should be dismissed on other constitutional grounds.

31. *Id*.

32. *Id.* at 582.

33. *Id.*

34. *Id.* at 582–83.

35. *Id.* at 582.

36. *Id.* at 584. The videos ranged in length from thirty-seven seconds to two minutes and fifty-four seconds.

37. *Id*.

38. *Id.* at 584–85.

39. *Id*.

40. *Id.* at 585.

41. *Id.*

III. RELATED CASE LAW AND HISTORICAL BACKGROUND OF OBSCENITY PROSECUTIONS

In order to understand the district court's reasoning in *Extreme Associates*, it is necessary to first understand the basic legal developments of obscenity, privacy, and substantive due process jurisprudence, as illustrated by the discussion of several relevant cases. Following those explanations, the two cases discussed in length in *Extreme Associates*, *Stanley v. Georgia*[42] and *Lawrence v. Texas*,[43] are discussed. These cases demonstrate that obscenity is not only a First Amendment issue of free speech, but is also an issue of privacy and liberty.

A. General Development of Obscenity Law

The development of obscenity law has been slow and convoluted.[44] Although prosecutions for obscenity are not a new conception, obscenity was first implicitly recognized as an exception to the First Amendment in 1942.[45] However, obscenity law is inherently a content-based form of speech restriction, and therefore is in conflict with numerous Supreme Court decisions.[46] The Supreme Court has found that "[c]ontent-based regulations are presumptively invalid."[47] In 1973, Justice Douglas explained his belief that an "obscenity" exception to the First Amendment was a judicial and legislative creation, and that no system

42. 394 U.S. 557 (1969).

43. 539 U.S. 558 (2003).

44. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 87 (1973) (Brennan, J., dissenting) (explaining that citizens could not have fair notice of what obscenity was because the Supreme Court was unclear on the issue); Ginzburg v. United States, 383 U.S. 463, 480–81 (1966) (Black, J., dissenting) (arguing that because of varying standards of obscenity, no one, no matter how well versed in the matter of obscenity, would be capable of determining whether the matter at issue in his case was actually obscene).

45. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (finding that profanity, obscenity, and threats were disorderly words that could be prohibited by law).

46. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (finding that flag burning was expressive conduct protected by the First Amendment); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (holding that financial burdens cannot be extended to a person based on his or her speech); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) (holding that public utility companies cannot be prevented from distributing printed material based on its content); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that statute cannot prevent picketing based on the content of that action). *See also* Julie Hilden, *A Federal Judge Dismisses an Obscenity Prosecution on Privacy Grounds*, FindLaw's Legal Commentary, Jan. 31, 2005, http://writ.news.findlaw.com/hilden/20050131.html ("Corollary to the concept that speech must be free, is the concept that speech cannot be punished based on its content.").

47. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (finding that a hate crime statute was facially invalid because it expressed disapproval of the content of ideas).

of censorship and punishment should continue to exist without a constitutional amendment.[48] The obscenity exception was based on unverifiable, although strongly held, assumptions about human behavior, morality, sex, and religion.[49]

Modern obscenity cases nearly always contain references to two foundational cases, *Roth v. United States*[50] and *Miller v. California*,[51] which developed the law of obscenity as it currently exists. *Paris Adult Theatres v. Slaton*[52] is particularly relevant to *Extreme Associates* because both cases deal with obscenity in a commercial context. Therefore, these cases provide a context in which to understand the shift in jurisprudence signaled by *Extreme Associates*.

The basic holding of *Roth v. United States* is that obscene speech is not protected by the First Amendment: "obscenity is not within the area of constitutionally protected speech or press."[53] The Court found that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[54] Because a prurient interest is one that is considered unwholesome, or arousing an unusual desire in sex, a work that only aroused wholesome or normal desires for sex would not be considered obscene.[55] The *Roth* Court reasoned that "the unconditional phrasing of the First Amendment was not intended to protect every utterance,"[56] but noted that sex and obscenity were not synonymous.[57]

48. *Paris Adult Theatre*, 413 U.S. at 70–71 (Douglas, J., dissenting).

49. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963).

50. 354 U.S. 476 (1957).

51. 413 U.S. 15 (1973).

52. 413 U.S. 49.

53. *Roth*, 354 U.S. at 485. *Cf. id.* at 504–05 (Harlan, J., dissenting) (arguing that the federal government did not have the power to suppress speech, and that any power to do so was at the discretion of states: "Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear direct responsibility for the protection of the local moral fabric. . . . [T]he dangers of federal censorship in this field are far greater than anything the States may do.").

54. *Id.* at 489.

55. *See* Merriam-Webster Online Dictionary, http://www.webster.com (last visited Jan. 29, 2006) (defining prurient as "marked by or arousing an immoderate or unwholesome interest or desire; *especially* **:** marked by, arousing, or appealing to unusual sexual desire").

56. *Roth*, 354 U.S. at 483. *See also id*. at 483–84 (explaining that there was existing libel law at the time the First Amendment was drafted, illustrating that the First Amendment's protection of speech was not limitless, and that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance").

57. *Id.* at 487.

A later opinion discussing *Roth* explained that "[t]he essence of our problem in the obscenity area is that we have been unable to provide 'sensitive tools' to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter."[58] Following *Roth*, by 1967, the Supreme Court was factionalized regarding how to determine what constituted obscenity.[59] Different members of the Court interpreted *Roth* differently, and therefore used different standards and tests to determine obscenity.[60]

In hopes of resolving the post-*Roth* confusion, the Court created a three-part test for determining obscenity in *Miller v. California.*[61] The new test stated that the guidelines should be:

> (a) [W]hether '"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.[62]

The *Miller* Court noted that it was not the role of the Supreme Court to tell states how to regulate obscenity, but nonetheless gave descriptions and examples of statutes that would be specific enough to pass the second prong of the *Miller* test.[63] *Miller* was the Supreme Court's first majority agreement on a standard "to isolate 'hard core' pornography from expression protected by the First Amendment."[64] The Court hoped to allow some flexibility so that different localities could determine what was considered obscene in their areas.[65] A national standard was seen as undesirable, as it would limit what was

58. *Paris Adult Theatre*, 413 U.S. at 79–80 (Brennan, J., dissenting).

59. *Id*. at 80. This was also represented in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), discussed at *supra* note 1.

60. *Paris Adult Theatre*, 413 U.S. at 81–84 (Brennan, J., dissenting) (discussing the various cases of per curiam reversals of obscenity convictions, and the vagueness surrounding the law of obscenity and the First Amendment).

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

62. *Id.* at 24–25 (quoting *Roth*, 354 U.S. at 489). This test was similar to a standard promulgated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but the standard received the support of only a three-person plurality in that case.

63. *Miller*, 413 U.S. at 25. The Supreme Court gave examples of how statutes could define material to be regulated. Examples of language sufficient to satisfy the second prong of the *Miller* test include "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated[;]" [or] "(b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.*

64. *Id.* at 29.

65. *Id.* at 34.

available in liberal areas rather than expand what was available in more conservative regions.[66] But the geographically based standard caused uncertainty, as the determination was left to the local jury or trier of fact.[67]

In *Paris Adult Theatre v. Slaton*, decided on the same day as *Miller v. California*, an injunction was sought to prevent Georgia film presenters from showing films that allegedly violated a Georgia obscenity statute.[68] The Court found that although nothing outside the theater fully indicated the subject matter of the films shown within, and despite clear indications that no one was allowed to enter the theater if under twenty-one years of age, the presentation of the films deserved no First Amendment protection.[69] Because the films were found to be obscene, they were considered outside the protection of the Constitution.[70]

Because *Paris Adult Theatre* was decided on the same day as *Miller v. California*, *Miller* obviously was not standing law at the time that *Paris Adult Theatre* was briefed and argued. The *Miller* test was not employed in deciding whether the films at issue were obscene, but the Supreme Court rejected the theory "that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[71] *Paris Adult Theatre* held that the ideas of privacy rights were not coextensive with any right to public access.[72] Further, "[c]ommercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment."[73] Any commercial trade dealing in obscenity was found to have no First Amendment protection at all.[74]

B. General Development of Privacy Law

Courts have rarely discussed privacy rights and the law of obscenity in tandem. However, the opinion of *United States v. Extreme Associates, Inc.* does just that. Privacy rights have been held to

66. *Id.*
67. *Id.* at 31.
68. 413 U.S. 49, 52 (1973).
69. *Id.* at 53.
70. *Id.*
71. *Id.* at 57.
72. *Id.* at 67.
73. *Id.* at 68–69.
74. *Id.* at 69.

encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing.[75] The recent trends in this jurisprudence are most strongly rooted in *Griswold v. Connecticut*, where the Court found that several constitutional guarantees prevent the government from invading a marital relationship.[76] The Court held that a state could not interfere with a married couple's right to access birth control.[77] Specific guarantees enumerated in the Bill of Rights have penumbras, "formed by emanations from those guarantees that help give them life and substance," showing that the Constitution does not only protect the narrow list of rights contained within.[78] Rights beyond those enumerated in the Constitution or the Bill of Rights certainly existed, the *Griswold* Court found, and those rights were rightly supported by the Ninth Amendment provision that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people."[79]

The force of *Griswold* was soon expanded in *Eisenstadt v. Baird*.[80] The *Eisenstadt* Court found that single persons possessed the same right to access birth control that married persons did. *Eisenstadt* was the first sexual privacy case to disengage sex from marriage.[81] In both *Griswold* and *Eisenstadt*, the Court acknowledged the existence of sexual privacy, as well as the notion that the right to possess encompasses a correlative right to acquire. At minimum, the sale of contraceptives has to take place outside the home, indicating that personal sexual rights can extend to actions outside the home.

The Supreme Court solidified the *Griswold* and *Eisenstadt* decisions in *Roe v. Wade*, which reaffirmed that a right to privacy involved actions outside the home.[82] The *Roe* majority found a fundamental, constitutional right to abortion based on the right of privacy.[83] The Supreme Court acknowledged that privacy rights have been found to

75. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

76. *Griswold*, 381 U.S. at 485.

77. *Id.*

78. *Id.* at 484.

79. *Id.* (quoting U.S. CONST. amend IX).

80. *Eisenstadt*, 405 U.S. 438.

81. Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J.L. & FEMINISM 1, 29 (2004).

82. 410 U.S. 113 (1973).

83. *Id.*

exist in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as in the penumbra of the Bill of Rights.[84] For the purposes of the *Roe* decision, the Court found the Fourteenth Amendment right to substantive due process prevented states from regulating the intimate matter of choosing an abortion.[85] The *Roe* Court implicitly acknowledged that some private things take place outside the home, for no one gets a legal abortion in her own living room. This illustrated that for a meaningful right of privacy to exist, some acts could occur outside one's home.

The *Griswold*, *Eisenstadt*, and *Roe* decisions all acknowledged fundamental rights extending beyond procreative activities,[86] but the Supreme Court later retreated from the strength of these opinions. *Bowers v. Hardwick*, a 1986 Supreme Court case, diminished personal privacy rights by allowing states to regulate sexual conduct such as homosexual sodomy.[87] *Bowers* held there was no fundamental right to engage in homosexual sodomy, whether that activity took place in private or not.[88] The Court found that although there were multiple Supreme Court cases recognizing the rights to privacy in the context of child-rearing,[89] family relationships,[90] marriage,[91] procreation,[92] contraception,[93] and abortion,[94] there was no relationship between those rights and the right to engage in homosexual activity.[95] Under *Bowers*, the Supreme Court sent a signal that sexual privacy rights would only be

84. *Id.* at 152.

85. *Id*. The *Roe* holding did not find that an abortion must always be allowed, but did say that a woman had a right to an abortion during the first trimester of the pregnancy, at a minimum.

86. *See* Jeffrey A. Barker, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1275, 1331–32 (1993) (noting Supreme Court decisions had included non-procreative sexual activity as deserving the status of a fundamental right); Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? On What Grounds Should the Ban of Sexually Stimulating Devices Be Considered Unconstitutional?*, 9 AM. U. J. GENDER SOC. POL'Y & L. 395, 399 (2001) (arguing that the existing fundamental right of privacy should encompass the right to sexual privacy, including the right to obtain and use sexual devices); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (privacy analysis should look to what a law affirmatively brings about, rather than what it prohibits).

87. Bowers v. Hardwick, 478 U.S. 186 (1986).

88. *Id.*

89. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

90. Prince v. Massachusetts, 321 U.S. 158 (1944).

91. Loving v. Virginia, 388 U.S. 1 (1967).

92. Skinner v. Oklahoma, 316 U.S. 535 (1942).

93. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

94. Roe v. Wade, 410 U.S. 113 (1973).

95. Bowers v. Hardwick, 478 U.S. 186, 190–91.

valued if they conformed to traditional notions of sexual expression or activity.[96] *Bowers* was a step backward from the acknowledgment of personal privacy rights.

Seventeen years after the *Bowers* decision, however, the Supreme Court revisited the same issue in *Lawrence v. Texas.*[97] The *Lawrence* Court framed the issue differently, and jointly considered the right to engage in sodomy as applied to homosexual and heterosexual persons, as well as married or unmarried persons. Rather than relying on *Bowers*, the Court instead applied *Griswold v. Connecticut*, and found that liberty interests of the Due Process Clause of the Fourteenth Amendment prevent the criminalization of sodomy, directly overruling *Bowers v. Hardwick.*[98] The Supreme Court wrote that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places."[99] The Court found it improper to criminalize the exact behavior that defined the generalized identity and classification of homosexuals.[100] The opinion included substantial discussion about the stigma involved in a criminal prosecution, indicating that the Court found it undesirable to criminalize citizens without substantial reason.[101] The obligation of the government was to define the liberty of all, the Court noted, and not to impose on others by mandating a moral code.[102] After *Lawrence*, fundamental rights clearly include sexual activity that has no procreative potential. This is strengthened by the opinion being grounded not only in privacy, but rather in a mix of privacy, sexual autonomy, and individual rights.

C. Explanation of Substantive Due Process

Because substantive due process rights are a central tenet of privacy decisions, their origins deserve attention here. The Fifth Amendment provides that "[n]o person . . . shall be . . . deprived of life, liberty, or

96. *Id.* Prior to *Lawrence*, *Eisenstadt* was the main deviation from the mainstream of privacy cases which protected only traditional rights. *Eisenstadt* allowed sexual privacy for non-married couples, which could be seen as a threat to traditional marriage customs. 405 U.S. 438.

97. 539 U.S. 558 (2003).

98. *Id.* at 64–65 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy)); s*ee also Bowers*, 478 U.S. 186.

99. *Lawrence*, 539 U.S. at 562.

100. *Id.* at 576.

101. *Id.* at 575.

102. *Id.* at 571 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (finding that a woman has a right to choose abortion and that the state cannot impose an undue burden upon that option)).

property, without due process of law . . . ."[103] In its original formulation, the Bill of Rights did not directly apply to state legislation; therefore, the Fourteenth Amendment Due Process Clause was necessary to confirm that "[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[104] The major function of the Due Process Clause of the Fourteenth Amendment was to make the first eight constitutional amendments applicable to the states, rather than only the federal government. Today, almost all of the early amendments have been made applicable to the states. Generally, if a state denies fundamental rights enumerated in the Bill of Rights, then liberty or due process rights have been denied or violated.

The Fourteenth Amendment was adopted in 1868, and originally was seen as only procedural in nature, rather than substantive.[105] Gradually, the Due Process Clause developed an involvement with the substantive content of legislation.[106] Early substantive due process rights were generally applied to economic regulations and the liberty to contract.[107] However, in the final decades of the twentieth century, the Due Process Clause was applied to rights surrounding privacy, personhood, and family.[108] Substantive due process is closely associated with the "penumbras" of unenumerated rights first mentioned in *Griswold.* Moreover, substantive due process is probably most closely associated with the "liberty" rights guaranteed in the Fifth and Fourteenth Amendments.

Although it was an important step in personal liberties to create the Fourteenth Amendment, which recognized due process rights at the state level, it is equally important to recognize that the Fifth Amendment guarantees of due process apply to any actions involving the federal government.[109] The Fifth Amendment Due Process Clause certainly

103. U.S. CONST. amend. V.

104. U.S. CONST. amend. XIV, § 2.

105. *See* Den *ex dem*. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856).

106. EDWARD CORWIN, LIBERTY AGAINST GOVERNMENT 114 (1948); *see* Edward Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911); Edward Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

107. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (finding a New York statute regulating working conditions to be violation of the liberty to contract); Nebbia v. New York, 291 U.S. 502 (1934) (finding that the Fifth and Fourteenth Amendments did not prohibit governmental regulation for the betterment of public welfare).

108. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479; Eisenstadt v. Baird, 405 U.S. 438 (1972); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (finding that the Due Process Clause of the Fourteenth Amendment protects a woman's decision to terminate a pregnancy).

109. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.

includes substantive rights. The same analysis is used in considering the substantive due process guarantees of the Fifth and Fourteenth Amendments, but the amendments' reaches are not coextensive.[110] The Supreme Court has consistently "resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights."[111] This indicates that Fourteenth Amendment due process rights may extend further than Fifth Amendment substantive due process, but does not undermine the value of Fifth Amendment substantive due process in federal cases.

For example, assume that equivalent Illinois and federal laws outlawed the parental ability to home school a child. If an Illinois parent wished to challenge the legislation on substantive due process grounds,[112] the parent would argue that the state law violated Fourteenth Amendment substantive due process rights and would challenge the federal law on the grounds that it violated the Fifth Amendment substantive due process guarantees. The challenges would be nearly identical, but would merely apply different provisions of parallel constitutional guarantees.

D. Cases applied in Extreme Associates

In addition to the cases discussed above regarding obscenity and privacy law, other important precedent influenced the decision of *United States v. Extreme Associates, Inc.* Although most obscenity cases deal with the distribution of obscenity, the issue of *Stanley v. Georgia* was whether a person has a right to possess obscenity in the privacy of his own home.[113] The state argued that it had an interest in protecting the morality of the public by preventing the possession of obscenity.[114]

But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases.").

110. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

111. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

112. This hypothetical in no way assumes that there would not be multiple other grounds on which to contest such legislation. The discussion here is merely limited to substantive due process.

113. 394 U.S. 557 (1969). In *Bowers v. Hardwick*, 487 U.S. 186 (1986), the Supreme Court distinguished *Stanley* by saying that it was a First Amendment case that was not relevant to the proposed right to engage in homosexual sodomy. This contrasts with the proposition that *Stanley* was largely a Fourth Amendment case as well, but the resounding message of *Lawrence v. Texas*, 539 U.S. 558 (2003), was that *Bowers* was overruled. *Lawrence* used strong language denouncing the *Bowers* opinion, and therefore there is little value in the fact that *Bowers* evaluated *Stanley* as merely being a First Amendment case alone.

114. *Stanley*, 394 U.S at 566.

However, the Supreme Court found that contention to be "wholly inconsistent with the philosophy of the First Amendment."[115] Georgia argued that possession of obscenity must be proscribed if it were to be able to effectively prosecute the dissemination of obscenity. But the Court wrote that it would not allow the state to rationalize its "infringement of the individual's right to read or observe what he pleases."[116] That right "is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."[117] The state then argued that it wanted to prevent the sexual violence that was caused by obscenity, but the Court found that connection to be without any empirical basis.[118] The *Stanley* Court required a stronger basis for obscenity regulation than a wish to control the moral thoughts of citizens.[119]

The *Stanley* majority found that the possession of obscene materials is protected by the First Amendment, and buttressed by the right of privacy, showing that there was more than simply the First Amendment at issue in the case.[120] This finding limited the holding of *Roth*—which had found obscenity to be without any First Amendment protection—by holding that obscenity was allowable within the confines of one's home.[121] Most of the *Stanley* opinion focused on the First and Fourteenth Amendments, but Fourth Amendment issues were present as well. The "first amendment right, coupled with the element of privacy, heightened the constitutional protection afforded the defendant."[122] Further, three concurring justices in the *Stanley* opinion found that there were Fourth Amendment grounds to invalidate the seizure of the obscene materials at issue.[123] This tempers the analysis of the case, for it was not just that a person had a right to privately possess obscenity, but the opinion contains an overarching theme that the privacy of a

115. *Id.*

116. *Id.* at 568.

117. *Id.*

118. *Id.* at 566. *Contra* MacKinnon, *supra* note 21, at 1089 (arguing that the home is the most violent place in society for women, and that to allow obscenity there only compounds the suffering of women).

119. Michael Kent Curtis, *Obscenity: The Justices' (Not So) New Robes*, 8 CAMPBELL L. REV. 387, 395 (1986).

120. *Stanley*, 394 U.S. 557.

121. *The Supreme Court 1968 Term—Freedom of Speech and Association*, 83 HARV. L. REV. 147, 148 (1969).

122. Mark John Kappelhoff, Bowers v. Hardwick*: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 498 (1988).

123. *Stanley*, 394 U.S. at 569–70.

home is sacrosanct.[124] The Constitution protects the right to receive information and ideas, and "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."[125]

The *Stanley* opinion was an interesting mesh of First Amendment and Fourth Amendment applications to the right to possess obscenity within one's home. The case illustrates that protections for obscenity do exist outside the First Amendment; therefore, it is not necessary to limit the defense of obscenity prosecutions to First Amendment grounds alone. *Stanley*, however, has not led to the conclusions that *Griswold* and *Eisenstadt* would suggest. *Griswold* and *Eisenstadt* found that couples' rights to make intimate decisions about child bearing and birth control inherently contain rights to *access* birth control. Conversely, though, the *Stanley* right to possess obscenity has not led to an acknowledged right to access it.

In addition to *Stanley v. Georgia*, the *Extreme Associates* opinion found *Lawrence v. Texas* to be important precedent. As discussed above, *Lawrence* affirmed a right to sexual privacy and liberty, whether the sexual conduct involved conformed to the traditional notions of societal expectations or not.[126]

E. Background of Federal Obscenity Prosecution and the Power of the Federal Government

The Constitution grants specific enumerated powers to Congress in Article I, Section 8 of the Constitution.[127] Among the eighteen enumerated powers are the power to regulate interstate commerce, the power to establish post offices and post roads, and to make all laws that are "necessary and proper" for the execution of the other listed powers.[128] It is arguable that the power to regulate interstate commerce or the regulation of the mail would allow Congress to legislate the shipment of obscenity, but the enumerated powers clearly do not include the right for Congress to create moral legislation.[129] Such legislation

124. This is supported by Fourth Amendment jurisprudence as a whole, indicating that privacy rights are always at their apex when inside the home.

125. *Stanley*, 394 U.S. at 564.

126. Lawrence v. Texas, 539 U.S. 558 (2003).

127. U.S. CONST. art. I, § 8.

128. *Id.*

129. The current legal climate places little emphasis on the doctrine of enumerated powers. This was confirmed in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), where the Court found that the federal government had the ability to regulate the use of medicinal marijuana via the commerce clause.

was intended to be left to the states.[130] Because the regulation of morality and obscenity is not within the purview of Congress, Justice Harlan, in his 1957 *Roth* dissent, questioned whether the federal government should have any power to regulate obscenity.[131]

Nonetheless, federal regulation over the moral issue of obscenity occurs regularly.[132] Harlan's fear was that this form of federal regulation and prosecution, with a blanket, national standard, would greatly endanger free thought and expression.[133] Although the propriety of such actions on behalf of the federal government was once questioned, today it seems to go without challenge. What the system creates, however, is a dangerous opportunity for the federal government to forum shop when choosing where to prosecute the violation of a federal obscenity statute.[134] According to 18 U.S.C. § 3237, venue is proper for an obscenity prosecution in any jurisdiction from which obscenity was shipped, through which it travels, or where it is received.[135] There is a danger of obscenity prosecution even if the allegedly obscene material is shipped from and to an area where contemporary community standards would not find the material obscene. For example, if an erotic video were shipped from New York City to Los Angeles, prosecution might still be a possibility in a rural Missouri jurisdiction through which the video traveled en route to California.

The possibilities of government forum shopping were realized in the prosecution of the owner of a catalog company that sold adult products.[136] The mail order company, Adam and Eve, was located in North Carolina.[137] A federal search warrant was executed there in 1986,

130. *See* U.S. CONST. amend. XI.

131. Roth v. United States, 354 U.S. 476, 507 (1957) (Harlan, J., dissenting). In contrast, some would argue that the technological innovations of the Internet compel that obscenity should be within the reach of the federal government. *See* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 25 (2004) (noting that the *Lawrence* decision and general First Amendment principles "point toward elimination of obscenity law entirely").

132. Although prosecution does regularly occur, the selection used in choosing defendants to prosecute makes this an issue of whim. *See* Sunstein, *supra* note 20, 1063 ("[W]hen a law is infrequently enforced, there is a serious risk of arbitrary or invidious exercise of discretion. . . . In fact, a law that has fallen into desuetude belongs in the same family as a law that is unconstitutionally vague, where fair notice and arbitrary exercise of discretion are the central problems.")

133. *Roth*, 354 U.S. at 506.

134. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (discouraging forum shopping and viewing the use of forum shopping as an evil within the legislative process).

135. 18. U.S.C. § 3237 (1984).

136. R.J. Comer, *Basic Freedoms and Fair Play are at Stake when the DOJ Pursues a Catalog Company*, L.A. LAW., May 2002, at 52.

137. *Id.*

leading to an obscenity trial in North Carolina.[138] The jury found that the seized materials were not obscene.[139] The owner of Adam and Eve sought an injunction in the United States District Court in the District of Columbia to prevent further obscenity prosecutions.[140] While the civil suit was still pending, the Department of Justice indicted Adam and Eve's owner in the conservative jurisdiction of Salt Lake City, Utah.[141] Eventually, it was found that the government could not continually prosecute multiple obscenity charges against the same defendant in multiple jurisdictions, but it was a slow battle in this case.[142] This illustrates how the federal power to prosecute obscenity can lead to forum shopping for a more conservative jury, and hence, a more probable success of prosecution.[143]

IV. *UNITED STATES V. EXTREME ASSOCIATES, INC.*

In deciding whether the *Extreme Associates* case should be dismissed, the first issue Judge Lancaster considered was whether strict scrutiny or rational basis scrutiny should be applied.[144] The government argued that no fundamental rights were at stake in the case.[145] Conversely, the defense urged the court to find that constitutional rights of liberty and privacy were at stake, and specifically asked the court to recognize a fundamental right to sexual privacy.[146] The court found that strict scrutiny should be applied because 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*."[147] After *Lawrence*, the Judge noted, the government could no longer rely on the advancement of a moral code to create a legitimate state interest for legislation.[148] In applying strict scrutiny, the court found that the federal statutes infringed upon a person's rights of liberty and privacy to watch the explicit videos in private.[149] Thus, the federal statutes were

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Julie Hilden, *A Federal Judge Dismisses an Obscenity Prosecution on Privacy Grounds*, FindLaw's Legal Commentary, Jan. 31, 2005, *at* http://writ.news.findlaw.com/hilden/20050131.html.
144. United States v. Extreme Associates, Inc., 352 F. Supp. 2d 578, 585 (W.D. Pa. 2005).
145. *Id.* at 586.
146. *Id.*
147. *Id.*
148. *Id.* at 587.
149. *Id.*

held unconstitutional as applied and the indictments were dismissed.[150]

In addition to the primary questions posed in *Extreme Associates*, there were several other issues for the court to weigh as well. Primarily, the court had to find that *Extreme Associates* had standing to challenge the obscenity statutes.[151] The court found that standing existed because a vendor may challenge a statute on behalf of customers when the statute interferes with the activity of the vendors.[152] The court then moved on to recognize substantive due process rights, the "right of personal privacy," and the "zone of privacy" as found in *Roe* and *Griswold*.[153]

After this brief consideration of substantive due process as a whole, the court considered the current law of obscenity. The court began with an analysis of *Stanley v. Georgia*, finding that *Stanley*'s holding supported the notion that the government cannot dictate what a person can read or see within one's own home.[154] *Stanley* represented an interesting intersection, the court wrote, of "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, information and ideas."[155] The court recognized that the post-*Stanley* case law has not correlated the right of access to obscenity with the right to possess it.[156] Judge Lancaster dismissed this point by noting that all of the post-*Stanley* cases objecting to the prosecution of the distribution of obscenity based their argument on First Amendment grounds, whereas in this case, the defense based its case on substantive due process grounds.[157] The court found that simply because *Roth* recognized obscenity as being outside the protection of the First Amendment did not mean that obscenity statutes were "immune from all constitutional attack."[158] Because a federal obscenity statute had never been challenged on substantive due process grounds rather than the First Amendment in the Supreme Court or the Third Circuit, the court found the standing obscenity law inapplicable and instead was swayed by relevant privacy law cases, including *Griswold*, *Roe*, and *Lawrence*.[159]

Using *Lawrence* as a stepping stone in its analysis, the court echoed

150. *Id.*

151. *Id.* at 587.

152. *Id.*

153. *Id.* at 588.

154. *Id.* at 589.

155. *Id.*

156. *Id.*

157. *Id.* at 589.

158. *Id.* (citing Boos v. Barry, 485 U.S. 312 (1988) (finding that a statute did not violate the Equal Protection Clause, but yet violated the First Amendment)).

159. *Id.* at 590.

Lawrence's finding that "liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[160] Judge Lancaster noted that because *Lawrence* considered consensual, private conduct that did not involve minors or prostitution, the state could not use any interest, even the enforcement of a moral code, as justification for an intrusion into the home.[161] Judge Lancaster focused not just upon the majority opinion of *Lawrence*, but on the dissenting opinion as well.[162] In the *Lawrence* dissent, Justice Scalia wrote that the *Lawrence* majority called into question the constitutionality of all obscenity laws.[163] Judge Lancaster explained that many constitutional scholars agreed that *Lawrence* invalidated proscriptions on obscenity,[164] and concluded that even without the strong affirmation of privacy law in *Lawrence*, a strict scrutiny analysis of the federal obscenity prosecutions would be necessary based on their infringement of the fundamental rights of speech and privacy of the viewer.[165]

The court rejected the government attempts to frame the issue of *Extreme Associates* as whether there was a "fundamental right to commercially distribute obscene material."[166] Instead, Judge Lancaster wrote that the issue was simply whether one has a right to read or view what one wishes in one's own home.[167] Under a strict scrutiny review, several government arguments failed to justify a rational basis for obscenity statutes.[168]

160. *Id.* (quoting Lawrence v. Texas, 539 U.S 558, 562 (2003)) (alteration to the original in the quoted text).

161. *Id.* at 590.

162. *Id*.

163. *Id*.

164. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945 (2004) ("[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, or the state's power to punish adults for enjoying such materials in private, whether alone or in the company of other adults."); James W. Paulsen, *The Significance of* Lawrence v. Texas, 41 HOUS. LAW. 32, 37 (2004) ("After *Lawrence*, any law that can be justified only because 'most people think that sort of thing is immoral' may be in constitutional trouble."); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny*, 6 U. PA. J. CONST. L. 945, 964–65 (2004) (predicting that if *Lawrence* shows that a moral code is not a justification for an infringement of an individual's liberty, obscenity laws will be void); Cenite, *supra* note 129, at 25 (noting that First Amendment principles and the *Lawrence* decision "point toward elimination of obscenity law entirely"); *see also* 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) (concluding that after *Lawrence*, laws against child pornography were the only obscenity laws that could survive).

165. *Extreme Associates*, 352 F. Supp. 2d at 591.

166. *Id.* at 592.

167. *Id*.

168. *Id*.

First, the court rejected the idea that obscenity statutes are necessary to prevent unwitting adults from encountering obscene material.[169] This was because of the difficult process involved in accessing Extreme Associates's material, which required a person to log onto the website, register as a member, provide credit card information, and download the material that they wished to view.[170] Second, the protection of minors was not a valid justification for the statute because of the measures Extreme Associates took to ensure that only adults were able to access the material.[171] In addition, the Federal Communications Commission has found the requirement of a current credit card number is a valid precaution for "dial-a-porn" services to ensure that minors are not using those services.[172] The federal obscenity statutes, therefore, had no compelling interest and the federal obscenity statutes were declared unconstitutional in their application to the defendants.[173]

V. DISCUSSION

There are many reasons to consider the continuing viability of obscenity law and prosecutions. As discussed above, there are strong constitutional arguments that the federal government should not have the ability to police obscenity at all, and that rather, it should be left to the states.[174] In *Extreme Associates,* the postal inspector operated in the same district where the case was tried, but that is not demanded in obscenity prosecutions. Aside from these jurisdictional concerns, substantive due process rights and Fourth Amendment protections against search and seizure should also be considerations when assessing the constitutionality of obscenity law.

In our modern society, obscenity law is simply outdated. Many continue to argue that obscenity laws are necessary to protect moral values, but *Texas v. Lawrence* indicates that morality is not a justification for legislation. Further, obscenity law is a remnant of a

169. *Id*.

170. *Id.* at 593.

171. *Id.* at 595.

172. *Id.* The court wrote that there is not a common practice of issuing credit cards to minors, and cited mastercard.com, usavisa.com, discover.com, and americanexpress.com. *Id.* at 595 n.3.

173. *Id.* at 595.

174. *See* Roth v. United States, 354 U.S. 476, 507 (1957) (Harlan, J., dissenting) (arguing that the doctrine of enumerated powers prevents the federal government from policing obscenity); *see also supra* note 22, discussing the constitutional manners in which commercial and coercive sex can be regulated. If non-consensual violence or coercive sex is captured on video, the initial crime should be prosecuted to the fullest extent of the law. Regardless, obscenity is a matter for the state governments, rather than the federal government.

bygone era, and many people today take part in the consumption of adult entertainment. If obscenity law could be successfully attacked through First Amendment means, that would be desirable, but the reality of that situation is plain: Those arguments fail. The Supreme Court long ago created a First Amendment exception that allowed the suppression of obscenity, and there is no indication that the Court will reevaluate the existence of that exception. Based on that fact, the new arguments to eliminate the demonization of pornography and obscenity are not only reasonable, but actually signal a creative approach to creating the correct, constitutional results.

A. Substantive Due Process Rights Should Be Recognized in Relation to Obscenity

There are two common arguments against the prosecution of obscenity, and they deserve brief mention here. First, as discussed above, the laws against obscenity are inherently content based and are therefore violative of the First Amendment. Second, the difficulty that courts have had in defining obscenity lends itself to prove that the laws of obscenity are unconstitutionally vague.[175] Courts are not convinced by these arguments, however, creating the current focus on due process rights to substantiate the right to obtain obscene material. The Fourteenth and Fifth Amendment substantive due process rights,[176] buttressed by the First, Fourth, Fifth, and Ninth Amendments, combine to show that simply because some people find material obscene, it is not entirely proscribable and cannot be banned from the homes of all Americans.

Stanley v. Georgia clearly shows that there is a right to possess obscenity within one's own home.[177] Ironically, however, the Court has

175. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 86 (1973) (Brennan, J., dissenting) ("[A] vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe."); *see also* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (finding that the Fourteenth Amendment Due Process Clause requires criminal statutes to provide fair notice of the behavior that might be outlawed); United States v. Harriss, 347 U.S. 612, 617 (1954) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). The law of obscenity has always been clouded with vagueness, but courts now have the opportunity to recognize that obscenity law is unconstitutionally vague and violates the due process of those accused of violating obscenity law.

176. *See* Stanley v. Georgia, 394 U.S. 557 (1969). *Stanley* allows the possession of obscenity in one's own home, and it was primarily a First Amendment case. Based on the history of excluding obscenity from First Amendment protection, since protection was found under the First Amendment, it is certainly reasonable to expect the same right of possession to be found under the more encompassing rights of the Substantive Due Process Clause, whether that be in the Fifth or Fourteenth Amendment.

177. *Id.*

not specifically acknowledged a corresponding right to allow the purchase or distribution of such material.[178] The disconnect in this reasoning and rationale is plainly apparent: How can it be okay to own something that it is not permissible to purchase or transport in the mail?[179] Although not addressed in *Stanley*, this line of reasoning nearly presumes that the obscene materials, which are allowable within one's home, must be created there. Otherwise, the only option is that the government is allowing an action that presumes a prior, illegal action. Unless obscenity was created in the home of the owner, the material was likely part of an illegal distribution.

Because one has a right to possess obscenity, the right to purchase the items must exist as well. For a court to find otherwise is in direct conflict with the substantive due process holdings of *Griswold v. Connecticut*[180] and *Eisenstadt v. Baird.*[181] In those cases about the access to birth control, the Court found that the rights to possess were meaningless without a corresponding right to purchase.[182] Even the *Paris Adult Theatre v. Slaton* decision, which contextualized the First Amendment in a very narrow manner, recognized that private actions may correlate with more public action.[183] For instance, the Court in *Paris Adult Theatre* stated that "[s]uch protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved."[184] In this context, the right to access obscenity is analogous, and therefore mandates that the right to access obscenity must exist.

These arguments should not be confused with the idea that a person is free to do whatever he chooses. That certainly is not the case, and the harm caused by a person's actions is an important consideration in allowing individual freedoms.[185] Without a direct connection between obscenity and its supposed "harm," there is little basis to criminalize the

178. United States v. Reidel, 402 U.S. 351, 355 (1971) (stating a person who is routinely transporting obscenity through the mail has no claim that the government is intruding into his home); United States v. Thirty-Seven Photos, 402 U.S. 363, 376 (1971) (finding that obscene materials can be confiscated from luggage when a person returns to the United States, even if the materials are intended for home use only).

179. *See The Supreme Court, 1970 Term—Mailing and Importation of Obscene Materials*, 85 HARV. L. REV. 229, 230 (1971).

180. 381 U.S. 479 (1965) (finding that substantive due process allows a married couple the right to access birth control).

181. 405 U.S. 438 (1972) (finding that substantive due process allows an unmarried couple the right to access birth control).

182. *Id.*

183. 413 U.S. 49, 67 n.13 (1973).

184. *Id.*

185. *See supra* note 24 (discussing harm and victimization in the context of obscenity).

expression.[186] The government often asserts that obscenity causes harm, but does so with little evidence. This is similar to the historic practice of couching arguments about homosexuality as arguments against the "harm" of homosexuality.[187] Arguments saying that gay relationships spread disease, "promote promiscuity[,] and cause the breakdown of families" should be recognized for what they are: homophobic bigotry based on stereotypes, and such bigotry cannot be allowed to justify government intrusion into the realm of personal privacy.[188] Similarly, outdated and outmoded stereotypes about obscenity should not be allowed to abrogate a person's individual, substantive due process rights.

B. Existing Obscenity Law Remains from a Bygone Era

In the middle of the twentieth century, Alfred C. Kinsey presented information about sex and human sexuality that revolutionized views and discussions of sexual topics. Kinsey's first publication on sex, *Sexual Behavior in the Human Male*,[189] was published in 1948. It was followed five years later by *Sexual Behavior in the Human Female.*[190] The National Research Council admitted in 1989 that sexual sciences can roughly be divided into a pre-Kinsey and post-Kinsey period.[191] Much of the public greeted the Kinsey books with open hostility, but mainstream media largely heralded Kinsey's books.[192] The books uprooted sexual norms by discussing sex outside the confines of marriage as well as masturbation, pornography, and adultery.[193] The books generated ideas that were significantly unsettling enough that the immediate reaction to the books was dismay, but later, there was

186. *See* Stanley v. Georgia, 394 U.S 557, 566 (1969) (stating that there is little empirical evidence that obscenity causes harm). *Contra* MacKinnon, *supra* note 20, at 1089 (arguing that the home is the most violent place in society for women, and that to allow obscenity there only compounds the suffering of women).

187. Louis Michael Seidman, *Out of Bounds*, 65 OHIO ST. L.J. 1329, 1334 (2004).

188. *Id.*

189. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

190. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

191. Judith A. Reisman, *Crafting Bi/Homosexual Youth*, 14 REGENT U. L. REV. 283, 310 (2002) (considering the Kinsey studies as a front for homosexual and pedophile activities, but nonetheless admitting their social importance). Dr. Reisman has served as a consultant to three U.S. Department of Justice administrations and is a critic of the adult industry.

192. *See id.* (asserting that *Life*, *Look*, and *Time* magazines proffered Kinsey's publications as "heroic scientific truth")

193. *See* Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKLEY WOMEN'S L.J. 98, 105–06 (1995) (discussing homosexual reactions and feelings among both men and women as reported in the Kinsey studies).

acceptance.[194]

The 1957 decision in *Roth v. United States*, excluding obscenity from any First Amendment protection, followed the 1948 publication of the first Kinsey studies. However, the *Roth* decision predated the societal acceptance of the facts presented in the Kinsey publications. Therefore, the *Roth* opinion reflected the conservative sexual views of the public, which were much more narrow than current views of the American public. At the time of *Roth*, sexual norms were vastly different than they are now.[195] Ideas about "prurient interests" were reflected in the reactionary *Roth* opinion. Prurient interests are those that are "unhealthy," and at the time that *Roth* was penned, much of human sexuality was considered unhealthy, although it is now generally accepted.

Roth was an important foundation for *Miller v. California*, decided in 1973, and much of the *Roth* holding survives via the vague *Miller* three-prong test to define obscenity.[196] Because of this, it is important to recognize that the *Roth/Miller* views about sexuality, sex, and obscenity are outdated and represent a different era. The gradual acceptance of the Kinsey studies marked a large value shift of norms and mores in our society,[197] which the law does not reflect.

Current data regarding the consumption of pornography also supports the theory of changing sexual norms, not just the data presented in the Kinsey studies. Pornographic websites are among the most popular sites on the internet.[198] In 1998, the online pornography industry was a one billion dollar industry.[199] From December 1999 to February 2001, the number of persons visiting internet porn sites jumped thirty percent to 28 million.[200] In 2000, approximately one in every four regular Internet

194. John H. Gagnon, *Sex Research and Social Change*, 4 ARCHIVES SEXUAL BEHAV. 111, 132 (1975) ("What Kinsey did was to provide numbers, words, and a series of conceptions which slowly penetrated the daily speech of people in the United States."); *see also* Reisman, *supra* note 189.

195. *See* ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 264 (1990) ("Kinsey's findings on the high incidence of homosexual behavior among American males were used to indicate the magnitude of the homosexual threat.").

196. *See* Miller v. California, 413 U.S. 15, 24–25 (1973).

197. Reisman, *supra* note 191, at 315 (arguing that the Kinsey studies "demot[ed] sex from its rarified, idealistic, marital pedestal and private expression into . . . public display, discourse and performance").

198. Timothy Egan, *Technology Sent Wall Street into Market for Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1.

199. Neil Irwin, *Purveyors of Internet Porn Look to the Next Frontier: Wireless*, WASH. POST, Nov. 23, 2000, at E5.

200. Juleka Dash, *Former Dot Com Workers Find Home at Porn Sites*, COMPUTER WORLD (June 11, 2001), *available at* http://www.computerworld.com/softwaretopics/software/appdev/story/0,10801,61275,00.html.

users visited a sexually oriented website once per month.[201] The adult industry today is estimated to make more than $10 billion to $14 billion per year.[202] In contrast, this is more than professional baseball, basketball, and football combined, and the Broadway theater business pulls in only $600 million per year.[203] Clearly, the adult industry is a huge industry: It is not hidden, and it is not limited to only a few people. The consumption of pornography, some of which is surely considered obscene, is big business.

With all of this, it is interesting to consider how the average person compares with the average juror. The evidence shows that many people are consuming pornography. Certainly, many of these consumers are "average" people who will serve on juries. Therefore, one might expect that the *Miller* test for obscenity, which considers whether the "average person" would find that a work appeals to prurient (or unhealthy) interests, would not be a good method for obtaining obscenity convictions.[204] Yet, in the current forum-shopping arena of federal obscenity prosecutions, a prosecutor can likely select a jurisdiction where members of the jury pool will find that a piece of pornography does not pass the *Miller* test and is obscene, unprotected speech. The standard, therefore, must change.[205]

C. Lawrence's *Warning Against Criminalizing the Population at Large*

As explained, the adult entertainment industry is big business. And lots of people are participating. There is an adage that mothers across the United States love to quote: "Just because everyone is doing it, that does not make it right." Conversely, the same argument holds true. Just because thousands of prosecutors have prosecuted obscenity does not mean that the Constitution supports it.[206] Judge Lancaster correctly found valueless the prosecution's argument that because the obscenity statutes have been attacked for years, his court lacked the authority to

201. Timothy Egan, *Porn, Inc*., PLAIN DEALER (Cleveland), October 27, 2000, at 1E.

202. Frank Rich, *Naked Capitalists: There's No Business Like Porn Business*, N.Y. TIMES MAG., May 20, 2001.

203. *Id.*

204. *See* Miller v. California, 413 U.S. 15, 24–25 (1973).

205. *See* Ronald Dworkin, *A Special Supplement: The Jurisprudence of Richard Nixon*, N.Y. REV. BOOKS, May 4, 1972, at 35. Dworkin argued that without a fused approach of moral theory and constitutional law, the Constitution would make no advances. Though his proposal was unlike that being made here, there are similarities, for it is important to apply morals in this context. The difference is that the Courts must apply the morals of today, rather than yesteryear. *Id.*

206. *See* Julie Hilden, *A Federal Judge Dismisses an Obscenity Prosecution on Privacy Grounds*, FindLaw's Legal Commentary, Jan. 31, 2005.

find them unconstitutional.[207] Viewing pornography and obscenity has become a commonplace occurrence, and few would expect this to make them a criminal.

The *Lawrence* Court plainly found that private sexual conduct occurring within the sphere of privacy rights cannot be used to criminalize a large segment of the population.[208] The Court wrote:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[209]

This demonstrates that the government should not be able to criminalize the everyday activity of such a large group of persons as those who consume pornography and obscenity. For many, this is a part of sexual activity and sexual identity, leaving the federal government without justification to continually criminalize the victimless behavior of many Americans. *Lawrence* was a broad opinion, and courts should realize the expanse of *Lawrence*'s impact.[210]

D. The Fourth Amendment Supports Limits on Obscenity Prosecutions

This Casenote does not argue that the Fourth Amendment creates a singular right to possess or purchase obscenity. However, the Fourth Amendment may bolster an argument against banning obscenity when the Fourth Amendment is argued in conjunction with other fundamental rights.[211] Justice Brandeis, dissenting in *Olmstead v. United States*, summarized the constitutional principles supporting the right to privacy: "The protection guaranteed by the [Fourth and Fifth] Amendments . . . .

207. United States v. Extreme Associates, Inc., 352 F. Supp. 2d 578, 585 (W.D. Pa. 2005).

208. Sunstein, *supra* note 20.

209. Lawrence v. Texas, 539 U.S 558, 578 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

210. *See* Sunstein, *supra* note 20.

211. Boyd v. United States, 116 U.S. 616, 630 (1886) (protecting against governmental invasions into "the sanctity of a man's home and the privacies of life"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (finding that the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people"). *See* Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212; Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960). The importance of *Stanley* must be considered as well. The Fourth Amendment issues in that case would not have alone secured the defense verdict, but they were important when considered in conjunction with First Amendment rights.

conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[212]

The Supreme Court case of *Plyler v. Doe* demonstrates that it is not necessary that one right, if argued alone, would establish the unconstitutionality of a statute.[213] Actually, a combination of rights may be asserted to show that legislation is unconstitutional. Although the Fourth Amendment may not be the deciding factor in an obscenity defense, stating that the Fourth Amendment creates a right to be free from government interference while within a private home will only bolster other arguments presented.

Fourth Amendment arguments were not important in *United States v. Extreme Associates, Inc*. Their usefulness, however, is apparent in light of successful Fourth Amendment defense arguments regarding an unconstitutional search and seizure in the obscenity case of *Stanley*. Using the Fourth Amendment as an obscenity defense originates in libertarian principles. The support for this Fourth Amendment use, therefore, is strengthened by *Lawrence*, which was based largely upon libertarian standards, indicating that the current Supreme Court is supportive of such ideals.[214] The support of the current Court indicates that now is the time to begin making Fourth Amendment arguments against obscenity prosecutions.

In closing, the reasoning of *Extreme Associates* demonstrates that the court came to the correct conclusion. On the Extreme Associates website, great efforts were required by an individual to access the obscene material, so access did not happen by accident. The *Extreme Associates* prosecutors brought the case in the conservative jurisdiction of Pittsburgh, Pennsylvania, illustrating how forum shopping and malicious prosecutions can happen. The materials at issue were short videos of an easily downloadable variety, much like the common pornography that exists on the Internet today. This was a case of a business owner carving a niche in the field of hard core pornography, and then being targeted by a conservative attack on the adult industry at large. Certainly it is no accident that the postal investigator, when operating his "sting" operation, targeted the conservative Western District of Pennsylvania rather than focusing on the more liberal Eastern District of Pennsylvania. The government invaded the constitutional

212. 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

213. Plyler v. Doe, 457 U.S. 202 (1982) (showing that multiple rights combined to establish that the state of Texas had no defensible interest in precluding non-citizen children from attending public schools).

214. *See* Graglia, *supra* note 20, at 1140 (explaining that Justice Kennedy was particularly candid about basing the *Lawrence* opinion on the political philosophy of libertarianism).

right of privacy by bringing an unexpected obscenity prosecution. Not only is this unfair to the defendants, but unpredictable prosecutorial methods lead to unconstitutional results. Because the First Amendment has not effectively rebutted these egregious prosecutions, the new methods discussed here and applied in *Extreme Associates* must be used to lead to constitutional results. As Justice Scalia predicted, the law of obscenity is dying.

The varied and various approaches to obscenity defense must now be argued in tandem, otherwise there is serious possibility that a defense attorney will allow a winning argument to slip away. Because mainstream approaches to obscenity defense have stagnated the law of obscenity, the new approach to include Fourth, Fifth, Ninth, and Fourteenth Amendment arguments should be used in the future.

VI. CONCLUSION

The penumbra of privacy rights grounded in the First, Fifth, Ninth, and Fourteenth Amendments, coupled with the Fourth Amendment notion that one's home is one's castle, indicates a right to possess sexually explicit material of one's choosing within the home. The Supreme Court made clear in *Griswold v. Connecticut* and *Eisenstadt v. Baird* that this right to own material means nothing without a right to purchase it. Therefore, the purchase and shipment of materials that have been deemed unworthy of First Amendment protection deserve protection under the Fourth, Fifth, Ninth, and Fourteenth Amendments.

This issue mandates a linear approach. If the First Amendment were effective to combat obscenity prosecutions, that would be best. Because that appears unlikely to happen, a substantive due process approach is the next step to show that there is a right of privacy and liberty creating the right to own and possess obscenity. Next, although the Fourth Amendment is not the most direct method of combating an obscenity prosecution, it certainly plays a part in this new and varied approach. The Fourth Amendment, in this context, will demonstrate that the government has little interest in controlling the victimless activities occurring within the home. Fundamental arguments about the privacy rights of the home should be included in these arguments as well.

This is not the exact approach proffered in *United States v. Extreme Associates, Inc.*, but *Extreme Associates* indicates that a shift in the law is imminent. *Extreme Associates* illustrates the correct application of *Lawrence*, in which the Court correctly decided that public morality is not a valid basis for broad legislation. Other courts across the country should consider this persuasive precedent, despite the Third Circuit's

decision. Courts must realize that privacy rights are greatly esteemed, and deeply rooted in the history of our nation and its courts. First Amendment attorneys have been banging their heads against a wall called "obscenity," but now must open the window, taking advantage of a new opportunity to argue fundamental rights.