

Pleasureboating on the River Rubicon: Why the Moralizers Can't Win

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For the Adult Freedom Foundation's online web site.

The American people form the largest single market for explicit, sexually-oriented entertainment in the world. As I write these words, millions of Americans are accessing pay websites, choosing pay per view on their home cable connection, selecting in-room hotel movies, and renting adult DVD's and videotapes. In theory, someone could count all of this commerce and study the demographics which seem to point to the conclusion that adult, erotic productions now experience such widespread acceptance that they can be called commonplace. Recreational erotica seems to cut across all strata of our society with a democratic disregard of race, creed, education, income, and generation. Beyond those trackable events, vast numbers of Americans are seeking free erotica on "thumbnail gallery posts" on the internet, in the newsgroups, in peer-to-peer file sharing networks. Of course, untold numbers will be replaying DVD's and tapes they have already purchased and video clips they have previously downloaded. Americans have taken the availability of all of this for granted.

But, in the high corridors of power, there is a storm brewing against all of this. There are those who want to marshal all of the force, power, and might of the United States government against explicit erotica and put a permanent end to explicit adult entertainment.

The most recent energies of the moralizers show a dramatic increase in the tempo and pace of their censorial agenda. The following chronology paints the picture:

1. January 6, 2005 . Alberto Gonzales [nomination hearing](#), Senate Judiciary Committee: Mr. Gonzales stated six particular goals. Number six was "Obscenity"; The AG-to be explained, "I think obscenity is something else that very much concerns me. I've got two young sons, and it really bothers me about how easy it is to have access to pornography".

2. Fourteen days later, on **January 20**, US District Judge Gary Lancaster declared the federal obscenity statutes to be unconstitutional - at least as applied to the activities of Extreme Associates, Inc., Robert Zicari, and Janet Romano in shipping obscene material by mail-order and in selling access to a pay web site containing material that was conceded by the defense to

be obscene for the purposes of the motion. His [decision](#) rested strongly on the right to Privacy as articulated in *Lawrence v. Texas* , 539 U.S. 558 (2003) and *Stanley v. Georgia* , 394 U.S. 557, 564-6 (1969).

3. On **February 14, 2005** , Alberto Gonzales was sworn in as the eightieth Attorney General of the United States. He faced an immediate and urgent decision as to whether the government should appeal from the decision in *Extreme Associates*. **One year, to the day, earlier** , Bruce Taylor's appointment as Senior Counsel to the chief of the DOJ Criminal Division had been quietly announced in the LA Times.

4. Two days later, on **February 16**, the Justice Department filed its notice of appeal from Judge Lancaster's dismissal of the Indictment. "The Department of Justice places a premium on the First Amendment right to free speech, but certain activities do not fall within those protections, such as selling or distributing obscene materials," Attorney General Alberto Gonzales proclaimed in a [written statement](#) : "The Department of Justice remains strongly committed to the investigation and prosecution of adult obscenity cases."

5. Twelve days later, on **February 28, 2005**, the Attorney General [spoke](#) at the Hoover Institute and laid out a vision of his term: "Another area where I will continue to advance the cause of justice and human dignity is in the **aggressive prosecution of purveyors of obscene materials**. I am strongly committed to ensuring the right of free speech; the right of ordinary citizens and of the press to speak out and to express their views and ideas is one of the greatest strengths of our form of government, but obscene materials are not protected by the First Amendment, and I am committed to prosecuting these crimes aggressively."

6. Very quietly, **a short time later** , a publication named [DOJ Obscenity Prosecution News](#) made its appearance on the US DOJ Criminal Division web page, ominously describing itself as "**Spring 2005, Volume I, Issue 1** " of a new periodical edited by Bruce Taylor and apparently dedicated to **chronicling a new wave of adult obscenity prosecution** . AVN's Mark Kernes wrote an article detailing the newsletter, attributing the tip to XXXLAW. It may be found where it is discretely hosted on the DOJ *Criminal Division* page, at <http://www.usdoj.gov/criminal/obs032604.pdf> as well as on this site.

7. On **March 16**, Senator Brownback's Subcommittee on the Constitution, Civil Rights and Property Rights of the U.S. Senate Committee on Judiciary held a [hearing](#) in reaction to the decision in *Extreme Associates*. Senator Brownback first ridiculed the reasoning of Judge Lancaster's decision by observing: "Judge Lancaster cobbled together hand-picked strands of 14th Amendment substantive due process, decisions from *Roe*, *Lawrence* and others and ruled that the statutes at issue violated an unwritten constitutional right to sexual privacy."

8. On **May 3, 2005** , Attorney General Gonzales [spoke](#) to a group of prosecutors and law enforcement officers at a conference in Gaitlinburg, Tennessee and significantly addressed adult obscenity, listing the prosecution of obscenity second among his goals as Attorney General:

From street corners to web sites, **obscenity** and child pornography **rip at the heart of our moral values and too easily corrupt our communities. I've made it clear that I intend to aggressively combat the purveyors of obscene materials. . . Enforcement is absolutely necessary if we are going to protect citizens and children from exposure to obscene materials. . .** I have directed Department officials to carefully review federal laws to determine how we can further strengthen our hand in prosecuting obscenity. **Our goal is to assess all the law enforcement methods we use** -and identify the tools we may still need-to more effectively investigate and prosecute these crimes.

9. Two days later, on **May 5** , the Chief of the DOJ Criminal Division **announced the formation of an obscenity prosecution task force composed of CEOS trial attorneys and dedicated exclusively to the prosecution of adult obscenity** . Counsel to the task force is Bruce Taylor; The task force will obtain assistance from the Organized Crime, Computer Crime, and the Assets Forfeiture units. In the DOJ Criminal Division [press release](#) , Chief Wray explained that the global traffic in obscenity required a specialized response in the computer age. He pledged to enforce " **the laws on the books** " .

10. Twelve days later, **May 17, 2005**, the Attorney General signed an order **approving revised regulations implementing 18 USC Section 2257**.

11. On **May 21, 2005**, the Associated Press reported that an AP-Ipsos poll of 1,028 adults determined that 78% of Americans want the US Senate to play an "assertive" roll in assessing judicial appointments, across the board, whether or not the respondents desired conservative or liberal appointments.

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The American people sense that we live in times that are particularly scary for the survival of [Liberty](#) and Americans of every political stripe feel it. Some in the incumbent Administration feel that their 51% majority last November has given them a mandate to broadly apply a repressive moral agenda. In coming to this conclusion, they have confused the vote of the majority during a time of armed hostility for an affirmation of the fringe views of one of their swing voting blocks. This very misunderstanding may be the greatest blind spot of some in the Administration.

The moralizers imagine the customers of the adult internet to be a small number of thrill seekers and a larger number of pitifully addicted perverts. So they said at Senator Brownback's hearing. Such an assessment of the situation belies the numbers: More than fifty percent of pay per view in American hotels is hardcore. The cable TV services in every important American market provide hardcore erotica. It is rather a *pitiful few troubled cranks who stand on the sidewalk to protest the erotic, expressive products of adult bookstores*. The reality that some in power refuse to accept is that mainstream American moral values about candor in the depiction of sex have changed beyond their power to imagine.

There are those of us who think that personal Liberty is a moral value, too. In fact, our ancestors chose to put the word [Liberty](#)" on all American coins. They might have chosen "Decency" or "Moral Order" or "Law and Order" or even "United We Stand", but they chose [Liberty](#). The immigrants arriving by ship in New York harbor did not look up to the Statue of Decency; They saw the Statue of Liberty, and if co-existing with some perceived indecency was the price of breathing their own free air, it was a choice they were generally delighted to elect because the price of freedom includes tolerance of the freedom of others.

Under existing American law, that which can be called criminally obscene must appeal to a "prurient" (shameful or morbid – diseased or loathsome) interest

in sex, nudity, or excretion and be patently offensive in its depiction or description of those matters. *Prurience and patent-offensiveness are each judged in the law according to contemporary community standards.*

We know that the Adult Industry serves the demand of millions of Americans every day - and that these customers form the large majority of those Americans who *do* have strong feelings about what our society accepts or tolerates. They *want* the products which are offered. Sermons by the moralizers will never or rarely be offered on cable pay per view, nor will they ever amount to 50% of in-room movies. No one is very likely to sign up for a \$29.95 per month (recurring) website with the offerings of the moralizers. There won't be much traffic in their sermons on peer-to-peer networks. I don't think we'll ever see the day of popular thumbnail gallery posts featuring what they have to offer. It doesn't seem likely that stores with their literature will remain profitably open twenty-four hours per day. "Community Standards", you see, encompasses materials which enormous numbers of Americans actually demand. Large numbers of Americans are willing to pay substantial sums for the offerings of the Adult Internet and few would pay much to hear the rants of the would-be censors. It is for that reason that the very large majority of the erotic fare available commercially in the American market is not obscene under our existing laws. On some level, the moralizers know that and fear it because it shakes their faulty belief systems. By persecuting the adult industry, they seek a validation of their own extreme and fringe dogmas in our courts. In time, they will learn that Liberty itself is the most enduring and universal American moral value.

The issues have been clouded by the spammers who assault unwilling viewers by jamming into their eyeballs potentially offensive material that the viewers don't want to see. They indiscriminately shill their wares in ways that expose both children and unwilling adults to it. Some few have used Internet domain names that mislead people to porn while they seek innocent information that is light-years away from the erotic. In so doing, they have generated untold animosity against an industry with which most Americans would have no controversy. Spam is not the issue, though the enemies of erotic expression seem to confuse the issue. Strong laws are now in place to avert this harm. Even the Attorney General, in his nomination hearings seems to have blurred the difference between Obscenity and illegal spam.

The moralizers cause a disturbance in the Force. While proclaiming "community standards", they not merely ignore the reality of what Americans accept, they *marginalize* what is now commonplace and normal. They work to turn back time to a more intolerant era. They aspire to wrest the notion of "community standards" away from a measure of what the people actually *accept and want* - perverting "community standards" into a measure of what **they** think righteous and God-fearing Americans **should** see. It troubles them that others see it differently. They desperately hope that by limiting supply, they will change the standards of American Society, which they now view as wicked and immoral.

Their trial strategy will be to confuse jurors about the difference between modesty and shame - and about the difference between what is fit for children and what is available for willing adults. They will claim to "protect the children" as they go after what adults can see.

Even should they fool some juries, *that they will fail* to change American tolerance and demand is inevitable: The American market's demand will be fulfilled, whether from an American industry or from sources elsewhere that are not affected by American obscenity laws. Though they believe that pornography is a bad thing for people - and causes people and families trouble - and "pollutes" our culture and communities - we think they are generally very wrong - their energies *will not make one whit of difference in the behavior of Americans* in the era of the global Internet. The would-be censors not only misunderstand the American people, they misunderstand what the Internet means to censorship.

The winds we now feel from the approaching storm portend a struggle broadly between tolerance and intolerance, between freedom and control, between Liberty and repression. The battle we will wage - and win - is not a narrow struggle about what is permissible in porn, but is rather about the range of the human soul to freely dream, express, and receive. And in this struggle, we defend not only the adult industry and its customers, but the Liberty of the American People to make their own decisions about what they view, read, and hear in private. As an advocate for clients involved in the adult industry, I know that as I defend them, it will be with both feet planted firmly in the traditions, constitution, laws, and history of a free people. Their narrow, fringe, dogmatic zealotry will be exposed for what it is. Come what may, we shall together assure that the people who came to these shores in the hope of freedom will remain free.

[Portions of the foregoing were extracted from an article by J. D. Obenberger that will appear exclusively in the July, 2005 issue of AVN Online, *True North and the Magnetic Declination in Alberto Gonzales's Moral Compass.*]

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