Karma Police: Strategic Behavior in Obscenity Prosecutions

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On September 26, 2006, Karen Fletcher, 54, of Donora, Pennsylvania was indicted on six counts of Transportation of Obscene Material in violation of federal law. Fletcher, under the nom de plume Red Rose, operated a website that contained fictional stories involving the rape, torture, and murder of young children. Excerpts of the stories were available for free, and roughly 29 people had paid a $10.00 monthly fee to access the stories in their entirety. The site contained no pictures or other visual depictions, making it the first obscenity prosecution in the United States in several decades to be based entirely upon written text (Cato 2006). U.S. Attorney Mary Beth Buchanan, who also recently brought a high-profile obscenity indictment against the video company Extreme Associates, commented that “use of the Internet to distribute obscene stories like these not only violates federal law, but also emboldens sex offenders who would target children” (Department of Justice 2006). Fletcher faces a possible maximum sentence of thirty years in prison and a fine of $1.5 million dollars (Ibid.).

Why did U.S. Attorney Buchanan focus her resources upon the prosecution of Fletcher, rather than a drug dealer or white collar criminal? Anyone with a passing familiarity of modern American politics likely would attribute Buchanan's actions to the fact that she was appointed by a conservative president with strong ties to the evangelical base of his party. This answer also would explain why Attorney General Gonzales recently created a new task force within the Department of Justice's Criminal Division designed to focus exclusively on the investigation and prosecution of federal obscenity crimes (Department of Justice 2005). While there may be truth in this viewpoint, it begs another question: If conservative groups have become more politically powerful over the
past twenty years, why are there not far more obscenity prosecutions than the modest number that presently exist?

Social scientists and legal scholars have used obscenity as a case study to inform the more general inquiry about the allocation of power, and political decisionmaking, in the United States. Songer and Haire (1992) use obscenity cases to study judicial decisionmaking, as do McGuire and Calderia (1993). Other scholars have studied how organizational interests affected by obscenity prosecutions—adult entertainment industry groups, as well as groups such as the American Civil Liberties Union and the American Library Association—structure their litigation strategies at the appellate court level (Epstein 1985; Kobylka 1991; Kobylka 1987). Still others have studied the strategies employed by conservative and feminist policy advocates in drafting and implementing antipornography ordinances (Brest and Vandenberg 1987; Downs 1989; Strossen 1993). Such scholarship, while valuable, is incomplete. Laws as written are useful largely to the extent they are enforced, and analysis of judicial and litigant behavior in courts of appeal ignores the question of how these cases arose in the first place. In short, the literature has ignored the prosecutors who decide whether to bring obscenity charges.

Federal prosecutors and, to a lesser extent, their state and local counterparts, enjoy enormous discretion in choosing which types of criminal behavior to pursue. Scholars for decades have engaged in both an empirical debate as to how much discretion prosecutors in the United States actually enjoy, and in a normative debate as to how much they should possess. They have examined what motivates prosecutors to bring the cases that they do (Boylan 2005; Eisenstein 1978; Lochner 2002), and also how prosecutors
differ in both their conceptions of the tasks they perform and the strategies they employ to perform them (Carter 1974; Davis 1969; Hawkins 2002; Johnson 1998).

This paper attempts to expand upon our knowledge of prosecutorial decisionmaking, and the effect of these decisions, by studying federal, state, and local obscenity indictments. It advances two arguments. First, and unsurprisingly, prosecutors bring obscenity indictments either proactively or reactively in response to constituent demands. Second, prosecutorial discretion, coupled with the ambiguity inherent in obscenity case law, creates a situation in which it is difficult for prosecutors to signal their legitimate expectations to potential defendants.

This paper proceeds as follows. Part One provides a brief summary of scholarly views on prosecutorial decisionmaking. Part Two describes the legal and political context of obscenity prosecutions. Part Three discusses my methodology. Part Four analyzes prosecutorial decisionmaking in the filing of obscenity indictments. Part Five describes two types of prosecutors--regulators and prohibitionists--and explains how legal ambiguity and differences in prosecutorial strategies render obscenity prosecutions normatively and functionally problematic. Part Six offers concluding thoughts.

I. Prosecutorial Decisionmaking in the United States

American prosecutors operate in a highly decentralized institutional environment, comparatively free of hierarchical oversight and judicial review. Although every U.S. attorney's office or local district attorney's office will have both a leader and line staff, hierarchical controls over American prosecutors are far less rigorous than those seen in countries such as France or Japan (Frase 1990; Johnson 1998). Partially this is due to the American federal structure—the U.S. attorney general has no authority to fire a local
district attorney in Oregon—partially it is due to cultural and professional norms. American political culture eschews centralized bureaucratic control, which explains both the relatively large degree of autonomy vested in U.S. attorneys' offices (Eisenstein 1978) and the ubiquity of popularly-elected state and local prosecutors (Davis 1969). Additionally, the professional norms inculcated in American law schools incline prosecutors to reject the very notion that their decisionmaking could be subjected to robust oversight (Carter 1974; Johnson 1998).

Not only are bureaucratic controls over American prosecutors weak, their decisionmaking largely is unchecked by other political actors. They are not subject to extensive statutory regulation of their charging decisions, as is the case with Germany's Rule of Compulsory Prosecution (Langbein 1979). If anything, the recent trend towards mandatory minimum sentences and statutory sentencing guidelines at both the state and federal levels served only to enhance prosecutorial power. Such laws constrain or limit a judge’s ability to engage in indeterminate sentencing, consequently shifting charge bargaining power to prosecutors (Stuntz 2001). Finally, the exercise of prosecutorial discretion largely is unreviewable by courts except under very limited instances such as allegations of malicious prosecution based on the race or religion of the suspect.¹ The decision of a prosecutor not to charge a potential defendant absolutely is unreviewable.

This is not to suggest that prosecutors enjoy carte blanche in all matters. Highly politicized prosecutions may invite a fire-alarm strategy of congressional scrutiny, as was the case with the first Bush administration's record on environmental criminal enforcement (U.S. House of Representatives 1993). Additionally, state and local

¹ See, e.g., Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).
prosecutors must stand for reelection, though research suggests that most voters have an extremely limited knowledge of prosecutorial decisionmaking and will focus on very blunt criteria such as overall conviction rates (Gordon and Huber 2002). Such control, however, is the exception rather than the rule. This has become especially true over the past thirty years as legislators respond to constituent pressure by criminalizing more and more behavior—consider recent federal prohibitions on carjacking and failure to pay child support—thus providing prosecutors a wider array of criminal conduct from which to choose what to prosecute (Stacy and Dayton 1997; Stuntz 2001).

The importance of prosecutorial decisionmaking in the United States cannot be overestimated. As Stuntz (2001) has argued, criminal law, indeed the Rule of Law itself, is predicated on the assumption that law abiding citizens theoretically should be able to examine the legislative code and, with reasonable assurance, learn how to act so as to not be imprisoned. Today, however, the breadth and depth of criminal law ensure that almost all of us are potential felons; what separates those who go to jail from those who do not is not the statutory law itself, but rather the discretionary decisionmaking of police and prosecutors. The empirical question of how political power is allocated in society, as well as the normative question of how society promotes justice through its courts, compel one to understand why prosecutors make the choices they do.

Economists, political scientists, and legal scholars have studied the various forces that influence prosecutorial decisionmaking. Boylan (2005), Lochner (2002) and Weaver (1977) argue that decisionmaking is influenced by the prosecutor's future career.

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2 Stuntz recounts the prosecution *U.S. v. Frost*, 125 F.3d 346 (6th Cir. 1997), in which a University of Tennessee engineering professor was convicted of mail fraud for knowingly accepting sloppy and sometimes plagiarized papers from students.
objectives. Prosecutors take cases that increase their human capital and facilitate a segue into the higher paying private sector. Perry (1999) and Eisenstein (1978) find that many U.S. attorneys wish to pursue a political career, and align priorities accordingly. Such reasoning also would apply to local district attorneys and state attorneys general, who must win election and appeal to the broader public in order to stay in office. Stuntz (2001) suggests that careerist prosecutors may take cases they simply find enjoyable to prosecute. Finally, many prosecutors view their tasks in moral terms. Hawkins' analysis of British prosecutors notes that "the legal process is a morality play" involving the government official's "moral connection with shared social values" (2002: 444).

To the extent that prosecutors conceptualize their task orientation in moral terms, or consider the political and professional ramifications of their choices before acting, obscenity prosecutions provide a useful case study not only in evaluating why prosecutors behave the way they do, but also what effect such behavior may have in an area of criminal prosecution marked by extraordinary legal ambiguity.

II. The Legal and Political Context of Obscenity Prosecutions

As Justice Potter Stewart famously opined about hard-core pornography, "I know it when I see it."³ "Pornography", however, is a cultural or political, rather than a legal distinction. Several decades of Supreme Court case law have established three legal categories of sexually-explicit material: the indecent, the obscene, and child pornography. The broadest category, indecency, concerns material that, while suitable for consenting adults, may be regulated as to the time, place, and manner of its distribution. A radio station may play George Carlin's "Seven Dirty Words" monologue,

but not during hours when children are likely to hear it.\textsuperscript{4} Bookstores may sell indecent sexual materials, subject to city zoning ordinances.\textsuperscript{5} Congress cannot constitutionally prohibit adult access to indecent commercial telephone messages (phone sex).\textsuperscript{6}

In contrast to indecent material, the manufacture, sale, and distribution of obscene material can be criminalized outright, although its mere possession cannot.\textsuperscript{7} From the 1950s until the 1970s, the Court struggled to differentiate obscenity and indecency, ultimately to arrive at the presently-accepted distinction articulated in \textit{Miller v. California}.\textsuperscript{8} Obscene material is that which, when judged by contemporary community standards, appeals to the prurient interest, depicts patently offensive sexual content specifically prescribed by law, and when taken as a whole lacks significant literary, artistic, scientific, or political value (the "LAPS" test). What constitutes obscenity therefore will vary by jurisdiction; what is obscene in Provo can be very different from what would be considered obscene in New York or San Francisco.

Finally, the Supreme Court ruled in \textit{New York v. Ferber} that the manufacture, sale, and distribution of child pornography may be criminalized,\textsuperscript{9} and extended this analysis in \textit{Osborne v. Ohio} to hold that possession of child pornography also may be

\begin{itemize}
\item \textsuperscript{4} \textit{FCC v. Pacifica Foundation}, 438 U.S. 726 (1978).
\item \textsuperscript{5} \textit{City of Renton v. Playtime Theatres}, 475 U.S. 41 (1986).
\item \textsuperscript{6} \textit{Sable Communications, Inc. v. FCC}, 492 U.S. 115 (1989).
\item \textsuperscript{7} \textit{Stanley v. Georgia}, 394 U.S. 557 (1969).
\item \textsuperscript{8} 413 U.S. 15 (1973).
\item \textsuperscript{9} 458 U.S. 747 (1982).
\end{itemize}
constitutionally prohibited.\textsuperscript{10} \textit{Ashcroft v. The Free Speech Coalition} made clear that prosecution under child pornography statutes requires there to be actual child pornography, rather than completely computer-generated images or adults pretending to be children (these examples of "fake" child pornography potentially may be prosecuted as obscene).\textsuperscript{11} This three-tiered distinction between the indecent, the obscene, and child pornography persists today, though several recent attempts to regulate internet pornography such as the Communications Decency Act and the Child Online Protection Act have muddled the discourse by attempting to prohibit a classification of material considered "obscene for children"—a classification that for legal purposes is synonymous with indecency.\textsuperscript{12}

Not everyone agrees with the Court's three-tiered approach, however. For some people, including many conservative Christians and some feminists, sexually explicit material of any kind constitutes a grave social harm. Under the Reagan Administration, antipornography activism began in earnest with the 1986 Meese Commission on Pornography (Strossen 1993). This focus was extended by groups such as Morality in Media, the American Family Association, Concerned Women for America, and Focus on the Family, all of which place antipornography efforts near the top of their political agendas.\textsuperscript{13} Although the Department of Justice has long had a division devoted to

\textsuperscript{10} 495 U.S. 103 (1990).

\textsuperscript{11} 535 U.S. 234 (2002).


\textsuperscript{13} Morality in Media is a "nonprofit, interfaith organization founded in New York City in 1962 to combat obscenity and uphold standards of decency in the media."
obscenity and child pornography (the Child Exploitation and Obscenity Section),
Attorney General Gonzales in 2005 announced the creation of a second task force within
the Criminal Division of the Department of Justice designed to focus exclusively on
obscenity violations; that is, adult, rather than child pornography (Gellman 2005).

Antipornography groups increasingly justify their priorities not on the basis of
abstract moral harm, but rather on the argument that pornography causes demonstrable
harm to women and children (see Brest and Vandenberg 1987; Downs 1989; Strossen
1993). Attorney General Gonzales may have spoken about the Department's obligation
"to protect not only our children, but all citizens, from obscenity," yet Acting Assistant
Attorney General John Richter repeated those remarks at a Department of Justice summit
entitled "Obscenity Enforcement, Corporate Participation, and Violence Against Women
and Children" (Richter 2005). Concerned Women for America, which includes the fight
against pornography as one of its six core mission values, maintains that the consumption
of adult pornography leads to consumption of child pornography and consequently
pedophilia. As recounted above, U.S. Attorney Buchanan justified her prosecution of
the text-only Red Rose site largely on the theory that such stories embolden pedophiles.

The underlying empirical merit of their claims aside, antipornography advocates
employ a variety of strategies to advance their political views. Some adopt a legislative
strategy, as did Catherine MacKinnon and Andrea Dworkin when they encouraged city

http://www.moralityinmedia.org. During the 2000 campaign, the American Family
Association convinced President George W. Bush to agree in writing to promise to
prioritize the enforcement of obscenity laws (Beato 2004).

14 http://www.cwfa.org/articledisplay.asp?id=12351&department=LEGAL&
categoryid=pornography
councils in Indianapolis and Minneapolis to enact strict zoning ordinances and create a right to initiate civil suits based on the premise that pornography violates women's civil rights (Brest and Vandenberg 1987). Others employ a litigation strategy to lessen the amount of sexually explicit material in their communities, including prosecutions aimed at garden-variety zoning violations, child pornography, the sale of indecent material to minors, and prostitution and pimping. Workers at sexually-oriented businesses such as strip clubs may be charged with lewd and lascivious conduct. A comprehensive analysis of the law and politics of pornography would examine all of these strategies; this paper focuses exclusively on obscenity prosecutions as a means of understanding prosecutorial behavior. Such focus is justified not only due to renewed Department of Justice efforts in this area, but also to the perception of many antipornography groups that vigorous obscenity prosecutions are the best way to stop pornography (Beato 2004).  

III. Methodology

I employed a two-part methodology in order to study decisionmaking and litigation strategies in the context of obscenity prosecutions. First, I created a dataset of federal, state, and local obscenity indictments using Westlaw. Second, I conducted several personal interviews of law enforcement officials and adult entertainment industry representatives in the greater Los Angeles area.

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15 For example, Morality in Media attributes the results of a Kaiser Family Foundation study suggesting that 70% of teenagers age 15-17 had come across pornography on the internet to the fact that prosecutors refuse to enforce obscenity laws. http://www.moralityinmedia.org/index.htm?obscenityEnforcement/kaiserff.htm. See also http://www.cwfa.org/articles/12412/MEDIA/misc/index.htm where the Concerned Women for America recently berated federal prosecutors for refusing to aggressively prosecute obscenity laws.
When studying obscenity prosecutions, it is insufficient to examine published judicial opinions. Most obscenity cases, like most criminal cases, will result in plea bargains; consequently there will be few published judicial opinions. This especially is true given that the *Miller* standard for obscenity prosecutions has not changed over time, and litigants rarely advance arguments that require courts to revisit issues of law.\(^{16}\)

Instead, I used Westlaw's "allnews" database to search for newspaper accounts of indictments brought by federal, state, or local law enforcement officials between January 1, 1990 and June 30, 2006. The original search query brought up 5,237 articles.\(^{17}\) From these, I excluded the following:

--redundant articles. Most indictments, especially high-profile cases such as the *Extreme Associates* prosecution, had multiple news articles.

--indictments for child pornography. The vast majority of indictments retrieved by the original query concerned child pornography. These are excluded from the analysis given that one reasonably may expect prosecutorial decisionmaking to differ between cases involving adult pornography and those involving child pornography, if for no other reason than that the former often enjoys some measure of legal protection whereas the latter does not. This approach is consistent with previous research on obscenity.

\(^{16}\) There are rare instances when courts reconsider the constitutionality of state or federal obscenity statutes. In *United States v. Extreme Associates*, 352 F.Supp.2d 578 (W.D.Pa. Jan 20, 2005), federal district judge Gary Lancaster employed the right to privacy rationale articulated in *Lawrence v. Texas* to declare the federal obscenity statute unconstitutional. Judge Lancaster subsequently was overturned on appeal by the Third Circuit (431 F.3d 150 (3d Cir. 2005)).

\(^{17}\) The query was:  `indict! /p obscen! pornograph! % "child pornography" & da(aft 1/1/2000 & bef 6/30/2006)`

--indictments for "obscene acts." These misdemeanors, usually known as "lewd and lascivious acts" involve behavior such as overly-aggressive lap dances, fully-nude stripping (where prohibited by law), and prostitution.

--indictments for zoning violations, unless the reason for the violation concerns the distribution of obscenity.

--indictments for pandering obscenity to a minor. These cases usually do not involve allegations of obscenity per se, but rather the claim that merely indecent material (a.k.a. "material obscene to minors") was sold to someone under age eighteen.

These decision rules yielded a dataset of 103 cases, involving 221 defendants, which were coded for such factors as year of indictment, state in which the indictment was brought, type of prosecutor bringing the indictment, type of defendant, nature of contested material, nature of charge, and case disposition.18 Two additional cases that involve what I term "hyperindictment" were excluded from the dataset as outliers and will be discussed separately. Appendix One provides a description of the coding scheme.

In addition to gathering statistical information, I conducted interviews with seven individuals in the greater Los Angeles area: one law enforcement official who specializes in antipornography investigations, one prosecutor who specializes in antipornography prosecutions, one director/producer of adult movies, three defense attorneys to the

18 Newspapers reported case disposition in only half of the matters studied. I attempted to code for gender and party affiliation of the prosecutor, but such data usually were unavailable.
industry, and one observer associated with the industry trade journal. The greater Los Angeles area was chosen because most of the adult entertainment production and distribution companies in the United States are located in the San Fernando valley. Each interview lasted roughly one hour. I randomly reattribute genders to interviewees so as to protect confidentiality.

IV. Prosecutorial Decisionmaking in Obscenity Cases

A. The Decision to Bring an Obscenity Indictment

Unsurprisingly, law enforcement officials with whom I spoke differed somewhat from the members of the adult entertainment industry in their perception of how obscenity cases are initiated. All interviewees agreed that these prosecutions are political insofar as they respond to the demands of conservative constituencies, but the law enforcement officials believed that investigators and prosecutors played a reactive political role, whereas the defense attorneys and industry members I talked to believed that law enforcement played a proactive political role.

The prosecutor with whom I spoke noted that public outcry often leads to investigations, particularly when someone goes into a video store "to rent a porn movie, and sees something shocking to the conscience." She found it true that "you have more support for obscenity prosecutions in more conservative and more religious communities," as well as in "small communities, where everyone knows what everyone else does." The investigator suggested that the increasing number of adult book stores, coupled with the increasingly extreme nature of adult material, created citizen activism
to which prosecutors respond "because politicians want to make their constituents happy." He agreed that this trend especially was prevalent in the Bible Belt for two reasons: "first, citizens are more likely to issue complaints; second, religious views affect the community standards." In this view, law enforcement officials react to complaints generated by conservative community members not because investigator or prosecutor themselves find pornographic material objectionable (though both the prosecutor and the investigator believed that some types of pornography may lead to violence against women and children). Rather, if there is a shared moral value displayed by the prosecutorial decision, it is less a moral objection to obscenity itself and more a moral interest in enforcing the law. Good law enforcement officials are those that do not turn a blind eye to illegal behavior.

Members of the adult entertainment industry, as well as their defense attorneys, agreed that conservative Christian groups were the audience for obscenity prosecutions, but argued that some prosecutors were proactive in initiating these suits. When asked why prosecutors bring obscenity cases, one adult entertainment industry observer commented, "to make political hay. Local prosecutors are elected, and they want to be able to say 'I closed down an adult bookstore.'" The South and the Midwest were mentioned as examples of places where local prosecutors were most likely to try and appeal to "crazy religious people."

One defense attorney with an exclusive practice in first amendment law suggested that "prosecutors are political animals. If it helps their careers, they will bring these suits. If it doesn't, they won't. You will see [obscenity cases] more where the area is

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19 Note that this interviewee used the term politician to refer to local prosecutors.
conservative Christian, like Oklahoma City, Memphis, and Tallahassee." He later qualified this position, noting that "every once in a while you will get a personal zealot, someone who will prosecute these cases simply because of personal moral belief." Another prominent defense attorney suggested that "prosecutions arise only when there is both ideological commitment and political payoff . . . without political benefit, even those ideologically disposed to bring these cases won't prosecute." He disputed the claim that citizens initiate obscenity investigations, suggesting that "public outcry, or the belief of prosecutors that they can create public outrage, is necessary to incentivize prosecutions. But they rarely come from public outcry first."

Given these opinions, one would expect there to be a difference between the number of obscenity prosecutions brought by the Department of Justice under a Republican rather than Democratic administration. The data confirm this hypothesis. Table One examines which types of prosecutors bring obscenity indictments, aggregating data from 1990 until the first half of 2006.

Federal prosecutors brought almost 37% of all cases, but accounted for 51% of the defendants indicted. This differential is due to the fact that federal prosecutors in the early 1990s were likely to seek large multi-defendant indictments against adult entertainment manufacturers and distributors. Local prosecutors, conversely, brought just

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20 There is no empirically reliable way to discern whether law enforcement officials are reactive or proactive in relationship to constituent interests, as police and prosecutors who were proactive could always claim that their undercover efforts initially were motivated by citizen complaint. Anecdotal evidence discussed below, however, suggest that some prosecutors likely are reactive, whereas other prosecutors appear to be proactive in bringing obscenity indictments.
over 56% of the cases, but accounted for only 38.9% of all defendants. State attorneys general accounted for about 3% of the cases and defendants. Kansas is unusual in that its law allows citizen groups to empanel their own grand juries; these citizen-initiated grand jury indictments accounted for 2.9% of the cases, and 5.4% of the defendants studied.

Focusing attention on federal prosecutors, the differences between the Clinton administration on the one hand, and the administrations of both Presidents Bush on the other are striking.

[INSERT TABLE TWO]

The Department of Justice under the first President Bush averaged six obscenity cases and 19.3 defendants per year. Present George W. Bush's administration averaged 2.4 obscenity cases and 8.6 defendants per year. The Clinton administration, however, averaged only 0.9 cases and 1.3 defendants per year. Indeed, one 1993 indictment involving four defendants stemmed from an ongoing investigation that had begun many years prior to the Clinton administration; excluding this case, the Clinton administration averaged only 0.8 cases and 0.9 defendants per year.

Next I examined regional variation in obscenity indictments. Though the social science literature is mixed as to the degree of politically relevant cultural differences between geographic regions in the United States (Fiorina et. al. 2005; White 2003), it nonetheless is true that individuals in the South and Midwest are more likely to than are individuals in the East and West to consider religion as "very important" to them.21 Additionally, the percentage of individuals voicing support for laws that would ban the

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21 A November 2006 Gallup poll asked respondents whether religious was "very important" to them. The percentage of respondents agreeing with this statement was 71%
distribution of all pornography in society is somewhat higher in the South (44%) and the Midwest (38%) than in the Northeast (35%) and the West (30%) (Sourcebook 2003: 182-83). If prosecutors respond to the political demands of their constituencies, one would expect that obscenity prosecutions are more likely to occur in the South and Midwest. Table Three aggregates obscenity indictments by census region, coding federal indictments by reference to the U.S. attorney's office that initiated the case.

[INSERT TABLE THREE]

Between 1990 and the first half of 2006, 63% of all obscenity indictments were brought in Southern states. The South's prominence in obscenity prosecutions would be even greater were one to consider two instances of "hyperindictment" on the part of Alabama prosecutors excluded from the primary dataset that will be discussed separately below. Just over 21% were brought in the Midwest (Ohio, in particular, where cities such as Cincinnati have long-running feuds with Larry Flynt, the owner of Hustler magazine), The Northeast and the West both accounted for just under 8% of all obscenity cases. Furthermore, of the eight cases initiated in the Northeast, six were federal indictments, as were seven of the eight indictments initiated in the West. If one is being indicted for obscenity, one probably either is being indicted in the South or the Midwest, or is facing federal charges brought by a Republican-controlled Department of Justice.22

for the South, 60% for the Midwest, 51% for the East, and 48% for the West.
http://www.galluppoll.com/content/default.aspx?ci=25585

22 Two high-profile obscenity indictments brought by California law enforcement were not included in my dataset. The Office of the Los Angeles City Attorney brought charges against director Max Hardcore for producing movies in which an adult actress represented that she was underage. That indictment was excluded from the dataset because the indictment included charges of child pornography (the indictment was made prior to the Court's ruling in FSC v. Ashcroft). Another two-count indictment, involving
One could argue that obscenity suits are more likely to be brought in the South and the Midwest than in the Northeast and the West because there is a greater amount of obscene material in the former regions. This explanation is tautological insofar as the definition of obscenity is dependent on community standards. If anything, material that runs a high risk of being deemed obscene in most communities—bestiality was the commonly mentioned example—is less likely to be shipped to Midwestern and Southern communities. The investigator with whom I spoke noted that some adult distribution companies have "no ship" zones defined by the zip codes of conservative communities likely to challenge the material.

Although constituent servicing was the primary explanation given as to why prosecutors bring obscenity indictments, there are two alternative explanations. First, prosecutors may bring an obscenity indictment in order to charge stack a defendant. Charge stacking occurs when prosecutors threaten prosecution on a large number of criminal violations in order to encourage the defendant to plea bargain or to lengthen terms of imprisonment (Stuntz 2001). In 2005, Glen Marcus was indicted in New York on charges of civil rights violations, sex trafficking, forced labor, and distributing obscene material (the only New York obscenity indictment since 1991). Prosecutors allege that Marcus sexually enslaved women for long periods of time, tortured them, and then set up a pay-per-view site where he displayed the pictures (Haberman 2005). Although possible that prosecutors primarily were concerned with stopping the distribution of obscene material, they likely brought this prosecution because Marcus allegedly systematically tortured women for long periods of time against their will. The

Adam Glasser's (a.k.a. "Seymore Butts") release of a movie involving fisting also was not
obscenity charge merely provided a means of lengthening Marcus' prison term. There were approximately eight cases involving probable charge stacking in the dataset: the Marcus case, a case in which a man stalked his ex-girlfriend and attempted to extort her by threatening to release a videotape the two made when dating, one case involving failure to register as a sex offender, and a handful of cases in which defendants were charged with crimes such as sexual solicitation of a minor, possession or distribution of child pornography, or rape.23

A second alternative reason to bring obscenity charges involves the rare necessity of a pretextual prosecution. As Richman and Stuntz note, pretextual prosecutions are those in which "prosecutors target defendants based on suspicion of one crime but prosecute them for another, lesser crime" (2005: 583). The prosecutor with whom I spoke stated that "obscenity prosecutions can be used as a tool in child pornography cases, but only as a last resort. You might use them in a close case where you cannot determine the age of the child." That is, if a prosecutor believes that images or video involve a minor who is close to the age of majority, such as a sixteen or seventeen year-old, she theoretically might prosecute the material as being obscene so as to not have to

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23 One could hypothesize that obscenity charges would be routinely stacked on child pornography charges given that child pornography is almost in every instance legally obscene. Although my dataset search parameters were designed to exclude the latter category of offenses, many of the initial Westlaw hits did involve child pornography prosecutions. Very few of these cases that ultimately were excluded from the final dataset exhibited obscenity charge stacking. The prosecutor with whom I spoke also did not believe this to be a frequently employed strategy. The lack of obscenity charge stacking in child pornography cases likely is due to the fact that the draconian sentences associated with child pornography at both the federal and state levels render charge stacking unnecessary.
prove the age of the individuals depicted. The more likely result, the prosecutor observed, would be to decline the case unless the material was truly "outrageous."

**B. Why Don't We See More Obscenity Indictments?**

If there are powerful constituencies favoring obscenity prosecutions, why are they comparatively rare—especially given the dramatic expansion of extreme pornography available via the internet? Five explanations were offered by interviewees: the use of other criminal or civil remedies to decrease pornography, lack of prosecutorial expertise, jurisdictional concerns, risk of popular backlash, and a "crowd-out" effect caused by the rise in child pornography. Each is discussed in turn.

Perhaps obscenity prosecutions are rare because antipornography advocates have been so successful using other laws, such as zoning ordinances, to regulate or prohibit pornography in their communities. One defense attorney noted that citizens often object to the physical presence of adult bookstores in their communities, and that "as zoning began to work, there was less pressure to bring obscenity prosecutions." Both the investigator and prosecutor disagreed with this characterization, however, noting that it is the content of the material, not the medium of transmission—bookstore, mail-order, or internet download—that determines whether material is obscene. As the prosecutor noted, "people may be less likely to be outraged about what people do in their own homes, but it begs the question of how you got the material into your home."24 She stated that she was no less likely to bring an obscenity suit simply because the material was not found on the shelves of a local store.

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24 By the same token, however, it also begs the question of how law enforcement officials came to know of the internet distribution in the first place.
A second explanation given as to the infrequent use of obscenity prosecutions relates to prosecutorial expertise. One interviewee, the police investigator, noted that many district attorneys' offices do not try obscenity cases because their staff believed that they lacked the expertise necessary to secure a conviction. "But how," he queried, "do you get this expertise if you don't try the cases?" When later asked whether one would prefer to target a small producer making clearly extreme material (such as defecation videos) or a larger producer making less extreme, but potentially obscene material, the investigator responded: "That depends whether I'm an investigator or a prosecutor. If I'm an investigator, I would take the borderline obscenity case, because if we win we move the yardsticks—the threshold of what obscenity is. If I'm a prosecutor, I'm more interested in making sure I win, and would take the more extreme case." The prosecutor with whom I spoke agreed as to the importance of case winnability: "I prefer clear-cut cases. If I don't think I can secure a conviction, I won't prosecute. We have an ethical duty not to file a claim without a strong likelihood of victory."

Whether due to ethical or professional concerns—most likely both—the argument that fear of loss disinclines prosecutors to litigate a case finds strong support in academic literature. In his work on British prosecutors, Hawkins notes that a "conviction tends to be routinely expected, while failure to convict is noteworthy," continuing that "to lose a case risks impugning the inspector's competence and credibility within the organization" (2002: 316). For American federal prosecutors, Eisenstein notes that "the need to win cases constitutes the strongest incentive in the work environment" (1978: 152). That it is difficult for attorneys to predict how a given jury may interpret contemporary community standards under the *Miller* test makes case winnability all the more difficult to discern.
A third reason why prosecutors may not bring obscenity prosecutions is jurisdictional. The investigator with whom I spoke noted that many of the most extreme websites involving bestiality, urination, and gratuitous violence are not located in the United States, but in countries such as Germany or the Netherlands. One could target the banks that transact membership fees for these sites, but such an investigation and prosecution is beyond the capacity of all but the largest law enforcement organizations.

Fourth, prosecutors may fear that focusing on obscenity prosecutions could engender a public backlash. Some constituents may have normative objections to obscenity prosecutions. One defense attorney suggested that "prosecutors want to appeal to the masses, and if they perceive a liberal or moderate base in their districts, obscenity prosecutions could create fallout." The investigator with whom I spoke suggested that political moderates might not intrinsically object to obscenity prosecutions, but instead might feel that these prosecutions divert resources from the prosecution of other more important crimes. He suggested that "on a scale of one to ten, most head prosecutors would rank [obscenity prosecutions] a three. They have to worry about other felonies like murders. They have to allocate their resources." Indeed, the investigator noted that he himself faced similar pressures: "If we try a case and lose to a jury, I will have to explain it to my boss and justify my resources. Losing one case is OK, but losing a number of the same types of prosecutions is not." Obscenity prosecutions may be highly salient for some constituents, but many crimes, such as drug dealing, rape, homicide, and bank robberies are salient for almost everyone.

The fifth, and most intriguing explanation as to why one does not see more obscenity prosecutions relates to the increased presence of child pornography. The
spread of inexpensive digital cameras and the internet greatly facilitated the ability of potential child pornographers to manufacture and distribute such content clandestinely.25 One interviewee suggested that the growth in child pornography encouraged antipornography legislation more generally. The defense attorney said, "child pornography is a political football. Legislators will lump child pornography with adult pornography and wrap us together." This position is reasonable, especially when one considers recent federal anti-indecency laws such as the Child Online Protection Act and the P.R.O.T.E.C.T. Act. The presence of child pornography can be used to highlight the ostensible link between adult pornography and harm to children, and thus make restrictions on the adult pornography more politically palatable.

The present issue, however, is not what legislators enact, but rather who prosecutors choose to indict. It is here that the framing device employed by antipornography advocates may prove counterproductive. Arguments advanced by antipornography advocates often conflate adult and child pornography, and may yield law enforcement institutions with dual jurisdiction over both—witness the Child Exploitation and Obscenity Section (CEOS) of the Department. Every interviewee with whom I spoke agreed that if forced to choose between prosecuting obscenity and prosecuting child pornography, prosecutors always will choose the latter. The prosecutor noted that "child pornography is a more serious offense. When we receive these matters, they get prioritization because we rush to identify the children." The growth in child pornography thus crowds out investigative and prosecutorial attention to obscenity. The investigator noted that when law enforcement efforts against obscenity and child pornography are

combined, as they are with the CEOS, "it's hard to prioritize obscenity over child pornography. They need separate resources, or else, understandably, obscenity will not be the priority." This hypothesis requires further study, but it does explain why Attorney General Gonzales created a new task force to focus solely on adult pornography when such prosecutions already were within the jurisdiction of the CEOS. It also raises interesting questions about the utility of framing antipornography efforts as a means of protecting children—this consequentialist reasoning ultimately may prove self-defeating.

To summarize, data on federal obscenity prosecutions and the geographic dispersion of state and local obscenity prosecutions affirm the interviewees' unanimous belief that obscenity prosecutions usually are brought because of objections of conservative Christian groups to pornography. Law enforcement officials disagreed with defense attorneys and industry representatives as to whether the former proactively sought out these prosecutions, or whether police and prosecutors merely responded reactively to citizen complaints. A variety of factors explain why there are not far more obscenity prosecutions, the most important being concern on the prosecutor's part about losing these cases, fear that aggressive pursuit of obscenity cases may open prosecutors to claims that they are misprioritizing resources, and finally the fact that when law enforcement institutions have dual jurisdiction over both obscenity and child pornography, they always will prioritize the latter.

V. Prosecutorial Signaling in an Indeterminate Environment

A. Regulators and Prohibitionists

Although constituent demand helps to explain the prosecutorial decision to file an obscenity indictment, there is one stark difference between the law and the politics of
obscenity: *Miller* and subsequent case law make clear that not all pornography is obscene, but antipornography advocates rarely if ever make such a distinction. The antipornography groups described above do not claim that only obscene material harms women, children, and society at large, but rather that all pornography does.\(^{26}\) It consequently is useful to distinguish between two types of prosecutors. The first type, termed *regulators*, approach the adult entertainment industry as a perhaps distasteful yet legitimate enterprise in which only some businesses engage in illegality (i.e., obscene material). Their goal is to accurately signal to the industry the permissible bounds of adult material, with the understanding that some material is in fact legitimate. The second type, *prohibitionists*, attempt to signal that any adult material risks prosecution, with the goal of eradicating all pornography from their communities.

Regulators, including the prosecutor with whom I spoke, believe that the role of law enforcement is to send signals to the adult entertainment industry so as to facilitate self-policing on their part. She reiterated repeatedly that she was not interested in filing obscenity charges against all members of the adult industry, but rather against only particular types of content such as that involving bestiality, defecation, urination, fisting, and simulated rape. Her statement merits quotation at length:

> There is a perception that police and prosecutors are going out on wild raids—an assumption that these suits are politically generated. Politics may play some part of it, but it's not my job to legislate morality. I prosecute according to guidelines, and if the [adult entertainment] industry is so powerful, let them change the laws. I get people complaining about

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\(^{26}\) One cannot claim that the Court, in adopting the nebulous *Miller* community standards test, implicitly authorized conservative communities to make obscenity co-equal with indecency; such a position is rejected explicitly by the holdings in *Sable Communications*, *Pacificia*, *Reno v. ACLU* and *Ashcroft v. ACLU*. 

25
spray-paint nudity downtown.\textsuperscript{27} And I tell the people who are complaining that I won't prosecute that because it's not against the law.

She explained that she did not disseminate a written list of prohibited conduct to the industry per se, but rather that over time the industry had come to recognize what was likely to result in prosecution. In her estimation, about forty to sixty percent of the industry tried "to do the right thing," especially larger companies that viewed themselves as mature businesses. Amateur directors, producers, and manufacturers were more likely to violate the law, because "they don't have enough contact with law enforcement to know what the law is." The prosecutor suggested that for such amateurs, the Free Speech Coalition (the industry lobbying body) and Adult Video News (the industry trade journal) served as useful conduits of information.\textsuperscript{28} Without prompting, the police investigator with whom I spoke described exactly the same dynamic:

Q: Do you think obscenity prosecutions deter or chill other potential litigants?

A: Yes. If we successfully prosecute a defendant, the industry will take notice. The defense lawyers will tell the producers to avoid that material.

Q: What about producers who do not have lawyers?

A: If the person is aware of the industry at all, AVN would inform them of where the boundaries are. But amateurs tend to see the dollar signs, they are more risk-taking.

Both interviewees admitted that sometimes members of the industry will make a decision to challenge the articulated boundaries (usually because more extreme pornography can appeal to profitable niche markets), but they firmly believed that the industry could

\textsuperscript{27} This is a practice whereby a person uses washable spray paint to spray clothes on their otherwise nude bodies.

\textsuperscript{28} The prosecutor noted that she had a good working relationship with the Free Speech Coalition and the defense bar.
ascertain where the boundaries lay. In their eyes, crossing those lines constituted a purposeful decision to challenge the law.

If prohibitionists seek to send a signal, however, it is that all pornography is prohibited. To this end, they employ two unique strategies: multijurisdictional indictments and hyperindictments. The multijurisdictional indictment strategy is used exclusively by federal prosecutors, who have the ability to venue shop throughout the country in order to find locales with the most restrictive community standards.29 For example, adult video distributor Avram Freedberg agreed in 1991 to permanently close his business "after the Justice Department told him he'd be prosecuted in as many districts as necessary to obtain convictions" (Baltimore Sun 1991). Indeed, Attorney General Thornburgh acknowledged that his barrage of indictments in the early 1990s was designed to notify "large-scale producers of illegal hard-core pornography . . . [that] they will be pursued in every state in the nation" (Baltimore Sun 1990). The targets of these indictments included Adam & Eve, then the nation's largest mail order distributor, as well as many of the largest industry producers such as Vivid Pictures and Cal/Vista.

Supporters of this strategy argue that it is uncontroversial; the fact that a national distributor has shipped to one hundred cities in which material is not considered obscene does not mitigate the fact that it has shipped to several where the material is illegal. Department officials in written memoranda and public speeches did acknowledge, however, that multijurisdictional cases were designed to "keep defense attorneys busy and running around the country" (Casady 1991). Critics also respond that

29 This is not to suggest that all federal prosecutors are prohibitionists. The Clinton administration never employed a multijurisdictional strategy, and prosecutors for both Bush administrations only sometimes use it.
multijurisdictional prosecutions constitute improper forum shopping. In the 1991 federal prosecution of Cal Vista, a major manufacturer/distributor located in California, the F.B.I. set up a sham video store in Broken Arrow, Oklahoma in order to purchase Cal Vista's films. It was established at trial that the only videos Cal Vista shipped to Oklahoma were those ordered by the F.B.I. (Ibid).

A second prohibitionist strategy is what I term "hyperindictment," where a prosecutor files literally hundreds of counts of obscenity violations against a target in order to shut down the business. For example, in 1990 Alabama District Attorney Jimmy Evans, in response to parental complaints that children had obtained access to adult movies broadcast on the Home Dish satellite network, returned over 500 obscenity indictments against the Home Dish cable company, three affiliated companies, and ten owners (Newberry 1990).\(^\text{30}\) The indicted companies such as General Telephone and Electronics (GTE) that provided the satellite signals for Home Dish "pleaded ignorance" and cut off Home Dish service throughout the United States rather than face litigation. Home Dish was forced to cease business operations. Martin McCaffery, vice president of the Alabama American Civil Liberties Union, noted that "without proving that anything is obscene, Jimmy Evans has succeeded in bankrupting the company and keeping the rest of the country from seeing these movies" (Ibid.).

Evans subsequently was elected state Attorney General, where he once again employed a hyperindictment strategy, this time against local adult bookstores. He filed over 700 cases—all multi-count misdemeanor obscenity charges—against eleven businesses and fifty individuals (Visser 1996). Law enforcement personnel would go
into a local adult bookstore, rent an adult video, catalogue the transaction, and then charge the bookstore owner and the store clerk for distribution of obscene material. This strategy proved less successful than the Home Dish prosecutions, largely because the bookstores chose to litigate. Critics argued that the prosecutions were a political gimmick, and judges, who refused to impose the maximum allowable penalties of a $10,000 fine and one year in jail upon the store clerks, ultimately pressured prosecutors to settle the cases because they grew tired of having court dockets tied up with watching porn movies. Ultimately, all the cases were settled with an $80,000 fine (Ibid.).

Evans viewed obscenity prosecutions not as a regulatory device to signal differences between legal and illegal porn, but as a tool to end all pornography. Not all prohibitionists need employ a multijurisdictional or hyperindictment strategy, of course. Sometimes they simply choose to push the Miller test far beyond the boundaries of reasonable legal interpretation, such as cases involving the prosecution of a video store that stocked the John Water's movie Pink Flamingos (ignoring the fact that the movie is not designed to appeal to the prurient interest) (Levenson 1990a); prosecution of an adult bookstore for selling a magazine containing nonsexual adult nudity, under the theory that magazines that contain pictures of nudity, but not news articles, are by definition obscene (Levenson 1990b); prosecution of the curator of the Cincinnati Contemporary Arts Center for hosting a Robert Mapplethorpe exhibition (Salisbury 1990); and the prosecutions of parents for pandering obscenity who have taken nonsexual photos of their young children in situations such as blowing "raspberries" on their mother's breast or

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30 Evans justified the prosecution based on the fact that he "knew from experience that hard-core obscenity leads to the abuse of women and children."

29
taking a shower (Smith 2000). That these prosecutions rarely succeed often is beside the point, for as Feeley (1979) correctly notes, sometimes the process is the punishment. The mother who had taken the photo of her six-year old blowing a raspberry on her breast was acquitted at trial, but only after being forced to admit on stand that she had had an online affair. The county prosecutor responded to the acquittal by stating that he intended to try her again (Smith 2000).

B. The Problem with Prohibitionists

The difficulty for adult producers, distributors, and their defense attorneys is not only that it is difficult to determine ex ante what a jury will find to be obscene, but also that it is difficult to predict the type of prosecutor one will face. This creates two problems; one functional, one normative.

Members of the adult entertainment industry with whom I spoke, as well as their lawyers, suggested that while they could predict that communities in the South would have a more restrictive standard than those in New York, they still could not predict where those lines would be drawn. One attorney, when asked whether the industry picked up prosecutorial signals as to the permissible boundaries of adult content, suggested that "there is some probability, but it's still unclear. I don't know what prosecutors will choose to try. I was stunned by the Red Rose prosecution." Another defense attorney suggested that "the industry is lousy at getting signals from prosecutors. There is no Magic 8-Ball to determine what you will be prosecuted for. Some types of

31 Echoing Stuntz's cautionary note about the danger of prosecutorial discretion in an overcriminalized world, an attorney for the National Law Center for Children and Families responded to the prosecutions of the parents by replying "If you take nude pictures of children, you better be ready to defend yourself in front of any 12 people—anytime and anywhere—because that's what the law says" (Caniglia 2000).
content are more high risk, such as scat and bestiality, but the prosecutor might decide to set the bar lower." The industry representative disagreed with even this level of signaling, suggesting that "there are no objective standards. A movie may sit on a shelf for years, nothing will happen, then suddenly there is an indictment."

It is tempting to dismiss these views as strategically feigned ignorance—"Officer, I had no idea that bestiality videos were illegal!"—and for a narrow category of exceptionally extreme material, such skepticism may be justified. But as demonstrated above, prohibitionists are willing to prosecute far more than this narrow category of cases. Recognizing that trafficking in bestiality videos creates a comparatively high risk of an obscenity prosecution does not answer the question of whether other, far more prevalent types of content do so as well. Furthermore, a risk-averse strategy of "assume the worst" is not a viable option, because attempting to comply with the preferences of a prohibitionist prosecutor would be tantamount to ceasing business operations. One defense attorney simply concluded that "if the law were unambiguous, more people probably would follow it."

Hence, the functional problem is that prohibitionist strategy can undermine the signaling efforts of prosecutorial regulators. Prosecutorial signaling of acceptable adult material is made difficult given the inherently vague Miller test and the fact that definitions of obscenity necessarily will vary by jurisdiction. At least theoretically, likely the standards will vary over time, as well. All of the interviewees agreed that over the past thirty years, sexually-explicit material has become more socially tolerated. Some interviewees, such as the police inspector, argued that as pornography has saturated American culture, more people have come to believe that it is acceptable. Others pointed to technological advances, from digital cameras to the internet, to MySpace.com as driving social tolerance. Others point to the tendency of other areas of pop culture, such as the popularity of Paris Hilton and Ron Jeremy, as "mainstreaming" porn.
producers and distributors could attempt to conform to these geographic differences, presuming that prosecutors employed obscenity indictments as a means of articulating the standards. The behavior of prohibitionist prosecutors undermines the legitimate signaling efforts of the regulators, however, not only because the prohibitionist signal that "all pornography is obscene" mischaracterizes the law, but also because it risks reducing prosecutorial signaling to background noise. If one may face indictment for any type of adult material, why not market the most extreme types that often are the most profitable? This is particularly true given that many members of the adult entertainment industry tended to focus on the financial costs of obscenity prosecutions. One industry representatives said, "It doesn't matter if the prosecution wins, it's an issue of attorneys' fees. You may have to plea bargain because you can't afford to defend. The objective is not to put people in jail, but to make people spend money." The adult director with whom I spoke suggested that the goal of prosecutors "is to bankrupt you, not jail you." Consequently, he continued to market extreme content, partially out of moral conviction, but largely because it is most profitable to do so. To his mind, he could face indictment no matter what type of content he produced, so better to confront this possibility with a large cash reserve.

The normative problem with the prohibitionist strategy is that it raises the very concerns addressed by Stuntz, and cannot be dismissed simply as imprudent prosecutorial overreaching. The Rule of Law is undermined whenever law-abiding citizens cannot meaningfully conform to the law because they cannot reasonably predict what prosecutors will consider to be illegal. The decision by law enforcement to adopt a zero tolerance strategy in other areas, such as aggressively prosecuting individuals for simple
possession of marijuana, may be unwise and impractical, but it does not threaten the Rule of Law; the pot smoker reasonably could be expected to know that she was engaging in illegal behavior. Obscenity prosecutions are different, for whatever one's views as to the merits of pornography, the Court repeatedly has affirmed the first amendment rights of adults to view indecent material, just as it repeatedly has voiced concern that overly-restrictive laws will chill constitutionally-protected speech. Consequently, it is not an adequate response to suggest that law-abiding people can conform to the law by choosing never to produce, market, or purchase any pornographic material—that is tantamount to suggesting that people who wish to conform to the law must relinquish their first amendment rights in order to do so.

VI. Conclusion

Prosecutorial decisionmaking in obscenity cases reaffirms the scholarly view that prosecution is a political act not only in that it allocates values and resources, but also because prosecutors, when deciding what types of criminal behavior to indict, often will consider the political consequences of their decisions. Interviewees unanimously agreed that obscenity prosecutions respond to the demands of conservative groups, and an analysis of obscenity indictments demonstrates pronounced differences in the willingness of Democratic and Republican presidential administrations to bring such suits. Similarly, the local prosecutors in the South and Midwest were far more likely to bring these cases. The comparative infrequency of obscenity indictments is due to a variety of reasons, including prosecutors' fear of losing these cases, concern that aggressive pursuit of obscenity cases may open the prosecutors to claims that they are misprioritizing
resources, and finally the fact that when law enforcement institutions have dual
jurisdiction over both obscenity and child pornography, they always prioritize the latter.

Furthermore, the opinions of interviewees and content analysis of the dataset
suggest that there are two types of prosecutors: regulators, who use obscenity indictments
to signal meaningful distinctions between indecent and obscene material, and
prohibitionists, who seek to use obscenity indictment to eradicate all pornography in their
districts. The prohibitionist strategy raises both normative concerns about the Rule of
Law, as well as functional concerns about the potential of such efforts to reduce all
prosecutorial signaling to background noise.

Reconsider the Red Rose case, the sole text-only obscenity prosecution in over
thirty years. Ignore the question of whether the owner of a Barnes and Noble must now
remove from its shelves the Marquis de Sade, or any other arguably "artistic" or "literary"
author that depicts graphic rape and murder, lest the owner risk a decade in federal
prison. One must ask: In an area of law already marked by extreme legal ambiguity, and
an area of politics marked by powerful constituent demand, how is either deterrence or
due process served by reducing the predictability of an indictment to the probability of
being hit by a lightning strike?
References


______. (1990b) "Three Plead No Contest to Selling Sex Magazines," *Orlando Sentinel* 12 September.


## Table One: Obscenity Indictments, By Prosecutor

<table>
<thead>
<tr>
<th>Prosecutor</th>
<th>Cases (% Total)</th>
<th>Defendants (% Total)</th>
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<tbody>
<tr>
<td>Federal</td>
<td>38 (36.9%)</td>
<td>113 (51.1%)</td>
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<tr>
<td>State A.G.</td>
<td>3 (2.9%)</td>
<td>8 (3.6%)</td>
</tr>
<tr>
<td>Local Pros.</td>
<td>58 (56.3%)</td>
<td>86 (38.9%)</td>
</tr>
<tr>
<td>Citizen G.J.</td>
<td>3 (2.9%)</td>
<td>12 (5.4%)</td>
</tr>
<tr>
<td>CNBT</td>
<td>1 (1.0%)</td>
<td>2 (0.9%)</td>
</tr>
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<td><strong>TOTAL</strong></td>
<td><strong>103</strong></td>
<td><strong>221</strong></td>
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## Table Two: Federal Obscenity Prosecutions by Administration

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<th>Period</th>
<th>Cases (Ave. per year)</th>
<th>Defendants (Ave. per year)</th>
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<tbody>
<tr>
<td>1990-1992 (Bush)</td>
<td>18 (6.0)</td>
<td>58 (19.3)</td>
</tr>
<tr>
<td>1993-2001 (Clinton)</td>
<td>8 (0.9)</td>
<td>12 (1.3)</td>
</tr>
<tr>
<td>2002-2006 (Bush)</td>
<td>12 (2.4)</td>
<td>43 (8.6)</td>
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Table Three: Obscenity Indictments by Region

<table>
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<tr>
<th>Region</th>
<th># Cases</th>
<th># Defendants</th>
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<td></td>
</tr>
<tr>
<td>AL</td>
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<td>17*</td>
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<tr>
<td>FL</td>
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<td>20</td>
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<tr>
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<td>14</td>
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<td><strong>Subtotal</strong></td>
<td>65 (63.1%)</td>
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<td>1</td>
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<td>10</td>
</tr>
<tr>
<td>PA</td>
<td>2</td>
<td>11</td>
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<tr>
<td><strong>Subtotal</strong></td>
<td>8 (7.8%)</td>
<td>23 (10.4%)</td>
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<tr>
<td><strong>Midwest</strong></td>
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<td>6</td>
</tr>
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<td>2</td>
</tr>
<tr>
<td>OH</td>
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<td>21</td>
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<tr>
<td><strong>Subtotal</strong></td>
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<td>42 (19.0%)</td>
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<td>NV</td>
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</tr>
<tr>
<td>UT</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>8 (7.8%)</td>
<td>19 (8.6%)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>103</td>
<td>221</td>
</tr>
</tbody>
</table>

*Two cases of hyperindictment have been excluded from Alabama totals.*
Appendix One: Coding Scheme

X1 = Matter Number
   (Code individual defendants separately within each matter.)

X2 = Defendant Name
   (If a corporate defendant, name corporation rather than corporate officers.
   If officers indicted, name separately.)

X3 = Defendant Type, where
   1 = Corporate Producer/Distributor/Director
   2 = Individual Producer/Distributor/Director
   3 = Bookstore/Club Owner
   4 = Bookstore/Club Employee (includes clerks, strippers)

X4 = State

X5 = City

X6 = Date of Indictment, by Year

X7 = Prosecutor Type, where
   1 = Federal
   2 = State Attorney General
   3 = Local District Attorney
   4 = Federal-Local Joint Task Force
   5 = Other

X8 = Gender of Prosecutor, where
   1 = Male
   2 = Female
   3 = Could Not be Determined

X9 = Party of Prosecutor, where
   1 = Republican
   2 = Democrat
   3 = Other
   4 = Could Not Be Determined

X10 = Number of Charges
X11 = Lead Charge, where
1 = Distribution
2 = Possession
3 = Conspiracy
4 = Advertising
5 = Manufacture
6 = Zoning/Lewd Acts

NOTE: If involves the internet, add "a": e.g., 1a.

X12 = Additional Charges, where
0 = None
1 = Child Pornography
2 = Lewd and Lascivious Conduct
3 = Zoning Violation
4 = Distribution to Minors
5 = Solicitation to Prostitution
6 = Alcohol Violation
7 = Other

X13 = Nature of Material, where
1 = Book/Magazine
2 = DVD/VHS
3 = Web-based media
4 = Device
5 = Child Pornography
6 = Live Performance
7 = Other
8 = Could Not Be Determined

X14 = Disposition, where
0 = Could Not Be Determined
1 = Charges Dropped
2 = Plea Bargain, Fine
3 = Plea Bargain, Jail
4 = Trial, Not Guilty
5 = Trial, Guilty and Fine
6 = Trial, Guilty and Jail