THE MYTH OF OBSOLETE OBSCENITY♦

JENNIFER M. KINSLEY*

* Associate Professor of Law, Northern Kentucky University Salmon P. Chase College of Law. J.D., Duke University. I owe the existence of this article to my long-time law partner H. Louis Sirkin, with whom I tried more than a dozen state and federal obscenity cases across the country, including many of the cases summarized and reported in this Article. In addition, I would be remiss without thanking my wonderful research assistants, in particular Erica Solosky, who endured the nitty-gritty, down-and-dirty details and made significant contributions to this paper, as well as Charles Rogers and Charles Rust for their diligence and creativity. I also owe a deep debt of gratitude to Prof. Geoffrey Stone, University of Chicago Law School, for the spirited ongoing dialogue that prompted me to commit my thoughts and experiences to paper.

In the spirit of full disclosure, the author notes that she was counsel for the defense in the following cases referenced in this Article and the accompanying appendices: United States v. Extreme Associates, Inc.; United States v. Paul Little; United States v. John Stagliano; United States v. Five Star Video LLC; State of Louisiana v. Daniel Birman; State of Ohio v. Jennifer Dute; and Ex Parte Dave. The author was also an advisor to defense counsel in United States v. Karen Fletcher; United States v. Barry Goldman; and State of Florida v. Clinton McCowan (a.k.a. Ray Guhn).

"If the First Amendment will protect a scumbag like me,
it will protect all of you."
-- Larry Flynt, *The People vs. Larry Flynt*[1]

INTRODUCTION

To a person, First Amendment scholars have argued of late that obscenity law is obsolete, outdated, unused, and therefore has little ongoing impact on the status of free expression in this country. Contending that the proliferation of pornography on the Internet has proven to be too sweeping a change for government to effectively police and target, scholars cite declining numbers of federal prosecutions and reduced federal funding for specialized investigations as evidence of obscenity law's modern irrelevance. For example, one author pronounced that "[i]n the escalating war against pornography, pornography has already won."[2] Given its limited utility, yet another author has suggested that First Amendment obscenity law should be scrapped wholesale and replaced with environmental pollution and nuisance principles.[3] Even congressional officials have lamented the almost non-existent enforcement of federal obscenity laws, observing that "a 'hiatus in federal prosecution of obscenity has brought forth the courage in the adult industry to produce . . . extreme sexually explicit product[s].'"[4] These developments have led one scholar to decisively declare: "Today, pornography is ubiquitous and essentially legal."[5]

However, these scholars tell an incomplete story of the current state of obscenity law. Relying solely on federal statistical data and political explanations, the current literature on obscenity law overlooks the importance of state-based obscenity prosecutions in assessing the current state of affairs. To be sure, even in the wake of less frequent (or equally frequent but qualitatively different) federal prosecutions, state and local prosecutors have continued to pursue obscenity charges as a mechanism of targeting brick-and-mortar retailers, in-home party consultants, and other distributors and consumers of sexually explicit entertainment. In addition, scholars have all too often minimized the

[1] THE PEOPLE VS. LARRY FLYNT (Phoenix Pictures 1996), http://www.imdb.com/title/tt0117318/quotes (last visited Jan. 28, 2015).

[2] Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 695 (2007).

[3] John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939 (2011). Nagle argues that the Internet is akin to public property and that obscene materials can and should be regulated in a similar manner as pollution.

[4] Sen. Orrin G. Hatch, *Fighting the Pornification of America by Enforcing Obscenity Laws*, 23 STAN. L. & POL'Y REV. 1, 131 (2012) (citing Testimony of Steve Takeshita, Los Angeles Police Department).

[5] Brian L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 236 (2012).

impact of federal obscenity prosecutions by over-emphasizing statistical data, and downplaying the legal and societal impacts of recent, well-publicized federal cases. Although there have been few federal obscenity cases filed in recent years, the cases that have been brought have spawned important developments in the manner in which obscenity law is applied to online content. Given the significance of these cases, their shrinking number is not necessarily indicative of their relative and normative value. In other words, to argue that obscenity law is a thing of the past is short-sighted and, in many respects, incorrect.

This Article will address the full range of recent obscenity prosecutions in the United States on both the state and federal levels. Part I of the Article will provide a background on criminal obscenity laws and the relevant First Amendment case law defining the contours of what constitutes obscenity. Part I will also examine the existing literature on the meaning of obscenity law and how it has been applied in modern times, focusing extensively on the current school of thought that obscenity prosecutions are obsolete and rare. In an effort to cast doubt on these assertions, Part II will provide statistical and anecdotal information on federal and state obscenity prosecutions from 2000 to present, and will also include a discussion of the political and societal forces that cause the popularity of obscenity charges to ebb and flow. Part III will then make observations about the existing state of obscenity law, including the differences between state and federal cases, the significance of the Internet in compelling new obscenity standards, and open questions regarding the future of obscenity in First Amendment doctrine. The Article concludes that the current state of obscenity prosecutions, in which certain sexually explicit speech is criminalized and punished in an almost randomized manner while other erotic speech multiplies and spreads unfettered, presents grave danger to the First Amendment right of free speech.

I. BACKGROUND

A. *Federal Obscenity Laws*

The distribution, transportation, importation, and production for sale of obscene material using the mail or other mode of interstate commerce violates federal criminal law.[6] So, too, is the transfer of obscene material to minors a federal crime.[7] These original federal obscenity statutes were adopted in 1948 and have remained on the

[6] *See* 18 U.S.C. §§ 1460–63, 1465–66 (2015).
[7] 18 U.S.C. § 1470 (1998).

books, virtually unaltered, ever since.[8] Violation of the federal obscenity statutes is a felony punishable by a minimum of 6 months in prison for base-level offenses and by significantly more prison time for those offenders who experience pecuniary gain, make use of a computer, or transact sado-masochistic material.[9]

While the illegality of transacting obscenity is created by statute, the test for what constitutes obscene material has been created by the judiciary. Originating with *Roth v. United States*,[10] which distinguished the common law definition of obscenity inherited from British law,[11] the Supreme Court has made clear that "sex and obscenity are not synonymous."[12] Rather, consistent with the broad First Amendment protection afforded to even offensive or immoral communication, only a small subset of sexually explicit expression may be found obscene.[13] Three cases delineate the Court's test for determining obscenity: *Miller v. California*, *Smith v. California*, and *Pope v. Illinois*.

1. *Miller v. California*[14]

Building on the Court's observation in *Roth* that not all sexually explicit expression is obscene, the Court in *Miller* developed a three-part test for obscenity that remains authoritative law today. Under the first prong, the trier of fact applies contemporary community standards to determine whether "the work taken as a whole, appeals to the prurient interest."[15] Second, the trier of fact applies contemporary community standards to determine whether the work depicts sexual conduct in a patently offensive manner.[16] Lastly, the judge or jury must determine whether the material, taken as a whole, lacks serious artistic, literary, scientific, or political value.[17] Only when each of the three prongs of the test is satisfied may the material be declared obscene.[18]

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[8] *See* 62 ch. 645 Stat. 769 (June 25, 1948); Pub. L. 91-375, § 6(j)(13) (Aug. 12, 1970).

[9] Applying these enhancements, sentences for federal obscenity offenses can exceed 5 years, even for first-time offenders. *See* USSG Sentencing Table, USSG § 2G3.1 (2014).

[10] 354 U.S. 476 (1957).

[11] *Id.* at 488–89 (citing Regina v. Hicklin, L.R. 3 Q.B. 360 (1868)).

[12] *Id.* at 487.

[13] *Id.*

[14] 413 U.S. 15 (1973).

[15] *Id.* at 24.

[16] *Id.*

[17] *Id.*

[18] Much more can be said about the clumsiness, vagueness, and unworkability of the *Miller* test, and indeed scholars on both sides of the speech debate have pontificated on the subject for decades. *See, e.g.*, Richard N. Coglianese, *Sex, Bytes, and Community Entrapment: The Need for a New Obscenity Standard for the Twenty-First Century*, 24 CAP. U. L. REV. 385 (1995); Scot A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75 (Spring 1992); Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255 (Fall/Winter 1987/88). A protracted criticism of the *Miller* test, however, is beyond the scope of this Article, but on the author's research agenda for future work.

2. *Smith v. California*[19]

In *Smith v. California*, decided before *Miller*, the Court invalidated an obscenity ordinance because it contained no scienter element. Noting that a "strict liability feature [in obscenity laws] would tend seriously to have the effect [of] penalizing booksellers, even though they had not the slightest notice of the character of the books they sold," the Court in *Smith* suggested that obscenity convictions which are not supported by evidence of actual knowledge of the material's obscenity improperly burden the First Amendment.[20] Thus, obscenity is not a strict liability offense, but instead requires some degree knowledge or understanding of the character of the material. *Smith* therefore provides an additional *mens rea* element to the *Miller* obscenity test.

3. *Pope v. Illinois*[21]

The Court slightly tweaked the third prong of the *Miller* test in *Pope v. Illinois*. At issue was whether the "serious value" component was to be judged by an objective test, by contemporary community standards, or by some other reference point.[22] Pointing to language in *Miller* suggesting that the "serious value" prong was intended to protect works of significance that may be underappreciated in particularly prudish communities, the Court refined the test to ensure that the value of an allegedly obscene work is determined by a reasonable person standard and not by the standards of any particular person in the community.[23] Decided in 1987, *Pope* was the last time the Supreme Court altered the law surrounding what constitutes obscenity.

B. *State Obscenity Laws and Local Ordinances*

Similar to the federal prohibitions against distributing obscenity, the laws in almost every state criminalize the sale of unlawful pornography.[24] The intersection of state and federal obscenity laws is important in two different respects. First, in *Miller*, the Supreme Court expressly recognized the role of the states in defining and punishing obscenity when it created the legal test for obscenity.[25] Under the first

[19] 361 U.S. 147 (1959).
[20] *Id.* at 152.
[21] 481 U.S. 497 (1987).
[22] *Id.* at 498–89.
[23] *Id.* at 500–01.
[24] The obscenity statutes in Oregon and Georgia have been declared unconstitutional. In *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1987), the Oregon Supreme Court held that the state's obscenity law violated the free speech protections guaranteed by the Oregon Constitution. In *This That and The Other Gift & Tobacco, Inc. v. Cobb County, Ga.*, 439 F.3d 1275 (11th Cir. 2006), the Eleventh Circuit struck down a provision in the Georgia obscenity law that banned advertising obscene material and devices, but did not sever that provision from the remainder of the law. Thus, in practical terms, Georgia has no enforceable obscenity statute on its books.
[25] Miller v. California, 413 U.S. 15 (1973).

prong of the *Miller* test, states remain free to define "sexual conduct," and therefore control the type and character of the material subject to obscenity prosecution.[26] Although not all states include masturbation and the lewd or lascivious depiction of the genitals as "sexual conduct," there is general consensus that depictions of intercourse, cunnilingus, and fellatio contain sufficient sexual content to be covered by the obscenity statutes.[27] State laws vary, however, on whether obscenity offenses are misdemeanors or felonies, and how seriously they are punished, including whether they are eligible for sex offender registration designations.[28]

Second, and perhaps more importantly, the Supreme Court has acknowledged that the lack of state obscenity enforcement in a particular area informs the contemporary community standards of that region.[29] In *Smith v. United States*, the Court held that the Iowa obscenity statute, which did not preclude distribution of obscene materials to adults, was direct evidence of community standards and tolerance in a federal obscenity case.[30] In so doing, the Court observed that "the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law."[31] Thus, state law directly informs a determination of what constitutes contemporary community standards in a specific geographic region.

However, a mere survey of state obscenity statutes does not end the inquiry. While state laws on obscenity typically preempt local ordinances,[32] many municipalities have nevertheless attempted to regulate the distribution of potentially obscene materials in their communities through burdensome adult-business licensing and zoning ordinances.[33] Although these ordinances do not separately criminalize and punish the transaction of obscenity, they do serve to limit the outlets by which materials that are possibly obscene are available in particular

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[26] *Id.* at 24.

[27] *See, e.g.*, La. Rev. Stat. 14:106(A)(2)(b) (defining "hard core sexual content").

[28] *See, e.g.*, Ark. Code § 5-68-203(c)(1) (designating the exhibition, distribution, and sale of obscenity as a Class D felony); Ky. Stat. § 531.020(2) (designating distributing obscenity as a Class B misdemeanor); Ohio Rev. Code 2950.01(A)(1) (including pandering obscenity within the definition of "sexually oriented offense" in sex offender registration law).

[29] Smith v. United States, 431 U.S. 291 (1977).

[30] *Id.* at 294, 307–08.

[31] *Id.* at 307–08.

[32] *See, e.g.*, O'Connell v. City of Stockton, 41 Cal.4th 1061 (Cal. 2007) (finding local ordinance permitting seizure of vehicles used in prostitution and drug trafficking to be preempted by state criminal law).

[33] For examples of local ordinances that have been upheld against First Amendment challenge, *see* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) ("municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech.") (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)). *See generally* MUNICODE, www.municode.com (last visited July 18, 2015), for the adult business ordinances of various American cities.

communities. While specific data on the percentage of municipalities with adult-business ordinances on their books is unavailable, commentators have noted that many or most cities throughout the United States have reportedly enacted regulations regarding sexually explicit expression.[34]

C. *Current Scholarship on Obscenity Prosecutions*

The general consensus among the legal academy is that, while obscenity laws remain on federal and state registers, they are little-used and ineffective at stemming the spread of pornography. For example, Prof. John Copeland Nagle observed in his recent article "Pornography as Pollution," that "Legal scholars say the law has failed to control Internet pornography. It is hard to argue with them."[35] So, too, have Profs. Amy Adler and Andrew Koppelman argued that obscenity law is a poor tool for ridding the Internet and other channels of communication of obscene expression.[36] Yet other scholars, primary among them Drs. Mark Huppin and Neil Malamuth, take note of the politicization of obscenity prosecutions on the federal level, arguing that obscenity enforcement has become something of a token campaign promise and the resulting prosecutions mere lip service to the Republican religious right.[37] Prof. Brian Frye has been even more aggressive in his characterization of waning obscenity cases, dating their demise to the post-*Miller* decades of the 1970s and 1980s.[38] Only Profs. Robert Richards and Clay Calvert, in a series of articles describing in detail the federal government's Bush-era obscenity prosecutions, and Prof. Geoffrey Stone, in his writings on the history of obscene literature in Britain, have indirectly contended that obscenity is still relevant to a discussion of First Amendment doctrine.[39]

The prevailing view among scholars, that obscenity is dead, is

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[34] *See, e.g.*, Matthew L. McGinnis, *Sex, but not the City: Adult Entertainment-Zoning, the First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625 (2005); Ashley C. Philips, *A Matter of Arithmetic: Using Supply and Demand to Determine the Constitutionality of Adult Entertainment Zoning Ordinances*, 51 EMORY L.J. 319, 324 (Winter 2002) (noting that there has been a "proliferation of zoning ordinances that limit the locations in which adult entertainment establishments may operate.").

[35] Nagle, *supra* note 3, at 940.

[36] *See* Adler, *supra* note 2, at 703; Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1639 (2005) (describing the "inevitable clumsiness" of First Amendment jurisprudence related to pornography).

[37] Mark Huppin, J.D., Ph.D. & Neil Malamuth, Ph.D., *The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency*, 23 STAN. L. & POL'Y REV. 31, 98–99 (2012); *see also* Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 324–25 (2008).

[38] Frye, *supra* note 5, at 235–36 ("After Miller, obscenity prosecutions gradually slowed to a trickle.").

[39] *See, e.g.*, Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview with Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56, 79–80 (2010); Geoffrey R. Stone, *The History of Obscenity, The British Novel, and The First Amendment*, in SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL (Oxford University Press 2013).

wrong. As the statistics, anecdotes, and analysis discussed in this Article demonstrate, obscenity prosecutions are still very much occurring on both the federal and state levels. These prosecutions teach us much about current community standards, the legal risks inherent in creating sexually explicit content, and the current status of the First Amendment in protecting even offensive and allegedly immoral expression. Given the proliferation of sexually explicit material online, these prosecutions also call into question the utility of obscenity prosecutions, even when they are pursued aggressively at all levels of law enforcement.

II. OBSCENITY PROSECUTIONS FROM 2000 TO PRESENT

Given the ambiguities in the oft-criticized *Miller* test for obscenity—Justice Stewart infamously proclaimed "I know it when I see it" without further explanation[40]—obscenity law can best be conceptualized as a trial-and-error dialogue between prosecutors, juries, and those who avail themselves of the right to produce and distribute sexually-oriented expression. As each subsequent work is prosecuted and tried, and as each sitting jury makes its determination as to whether the material is obscene, a fuller understanding of what constitutes obscenity begins to emerge.[41] In this system, each subsequent prosecution serves to further flesh out the *Miller* criteria in a way the law itself has not: by signifying the precise threshold of First Amendment protection when it comes to unlawful, potentially obscene communication. For this reason, it is important to take note of each and every obscenity prosecution in order to more fully understand what constitutes obscenity in today's modern society.

A. *Federal Prosecutions*

To the extent the legal academy has studied recent obscenity prosecutions, it has done so by focusing on a small number of highly-publicized federal cases. United States v. Extreme Associates, Inc.,[42] for example, has been the subject of widespread commentary by students, scholars, and others; but more so for its novel substantive due process arguments than its significance to First Amendment obscenity law.[43] So, too, was United States v. Paul Little[44] (aka Max Hardcore)

40 Jaccobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
41 Miller v. California, 413 U.S. 15 (1973).
42 431 F.3d 150 (3d Cir. 2005).
43 *See, e.g.*, Jennie G. Arnold, *United States v. Extreme Associates, Inc.: The Substantive Due Process Death of Obscenity Law*, 74 U. CIN. L. REV. 607 (2005); Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography, & the End of Obscenity Law as We Know It*, 34 SW. U. L. REV. 427 (2005); Jennifer M. Kinsley, *Sexual Privacy in the Internet Age: How Substantive Due Process Protects Online Obscenity*, 16 VAND. J. ENT. & TECH. L. 103 (2013).

referenced in various law review articles and other publications for the harshness of its outcome: Paul Little was sentenced to 48 months in federal prison after being convicted for distributing obscene material.[45] But there are other cases of interest that have gone largely ignored by legal scholars and the general public alike. Examining these cases and their myriad of outcomes can generate a broader understanding of the modern First Amendment landscape.

Set forth below are summaries of selected federal obscenity prosecutions from 2003 to the present, including details about the defendants, the material charged, the manner of distribution, the outcome of the case, and the sentence where applicable. For the sake of organization, the cases are listed in loose chronological order based upon the date of indictment and the date of disposition.[46] Appendix A is a table of recent obscenity cases, including both the federal cases discussed in this section, as well as the state-based prosecutions discussed in Section II.B.[47] In addition, Appendix B contains statistics on annual federal obscenity prosecutions[48] from 1994 to 2012, the last year for which the Department of Justice has published charge-specific numerical data.[49] As a close examination of the data reveals, federal obscenity prosecutions have not, in fact, diminished in number in recent

44 365 Fed.Appx. 159 (11th Cir. 2010).

45 *See, e.g.*, Robert D. Richards & Clay Calvert, *The 2008 Obscenity Prosecution of Paul Little and What It Reveals about Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543 (2009).

46 In order to make observations about the role of political elections on the enforcement of obscenity law, it is helpful to note which presidential administration initiated the prosecutions and which presidential administration resolved them.

47 Appendix A contains additional cases beyond those addressed in summary form in this Article. In addition to this Appendix, attorney J.D. Obenberger has prepared an impressive catalog of obscenity cases and outcomes. *See* J.D. Obenberger, *The Future of Obscenity Prosecutions*, (Apr. 2013), *available at* http://www.xxxlaw.com/articles/future.html (last visited Feb. 13, 2015).

48 Although prosecution data for obscenity charges, broken down by statute, is available dating back to 1994 through the Bureau of Justice Statistics, data prior to this time is either unavailable or unreliable. See DEPT. OF JUSTICE, EXECUTIVE OFFICE FOR U.S. ATT'Y, REVIEW OF CHILD PORNOGRAPHY AND OBSCENITY CRIMES, Rep. No. 1-2001–07, t.3 (2001), available at http://www.justice.gov/oig/reports/plus/e0107/results.htm (last visited Jan. 30, 2015); *see also* BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/fjsrc/tsec.cfm. In response to a 2001 study commissioned by Congressman Frank Wolf, requesting data on pornography prosecutions dating back to 1980, the Executive Office for the United States Attorneys (EOUSA) advised, via the Office of the Inspector General (OIG), that data prior to 1992 is not consistent with data obtained after that time. *See* DEPT. OF JUSTICE, EXECUTIVE OFFICE FOR U.S. ATT'Y, *supra*. The reason for this inconsistency was the conversion of the EOUSA's case management system, and the methodology by which the 94 United States Attorneys' Offices (USAO) entered case information into the system. *Id*. Prior to 1992, the USAOs only entered lead charges into the database; since 1992, all charges for each case are entered. *Id*. In order to obtain historical statistical prosecution data under each statute before the conversion, a cumbersome and costly review of each case would have to be performed, a task that is well beyond the scope of this Article.

49 *See* BUREAU OF JUSTICE STATISTICS, *Federal Criminal Case Processing Statistics*, http://bjs.ojp.usdoj.gov/fjsrc/ (last visited Jan. 29, 2015).

times.[50] To the contrary, while the priority appears to have shifted from distribution of obscenity to adults to distribution of obscenity to minors, the total number of obscenity prosecutions is still fairly high.[51]

1. The Bush Administration Prosecutions: Cases Initiated and Concluded from 2003 to 2008

a. Extreme Associates

No discussion of modern obscenity law would be complete without mention of *United States v. Extreme Associates, Inc.*[52] The 2003 indictment of Extreme Associates and two individuals affiliated with the company, Robert Zicari a.k.a. Rob Black and Janet Romano a.k.a. Lizzie Borden, represented the first significant federal obscenity prosecution in more than ten years.[53] The government alleged that Extreme Associates shipped a number of fetish films—which included simulated rape scenes, the ingestion of vomit and bodily fluids by female actresses, and graphic sex scenes involving Jesus Christ and Osama Bin Laden—to an undercover postal inspector in Pittsburgh, Pennsylvania.[54] Extreme Associates was also accused of posting similarly vulgar video clips to the members-only portion of its website, which were then accessed by undercover federal agents in the Western District of Pennsylvania.[55]

The United States District Court for the Western District of Pennsylvania initially dismissed the charges against Extreme Associates, finding that they violated the substantive due process right of privacy, but the Third Circuit reversed that decision.[56] After the case was remanded to the trial court, the corporation and the two individual defendants reached a plea bargain with federal prosecutors.[57] All three defendants pleaded guilty to nine counts of obscenity in exchange for

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[50] Comparing the statistical data with the corresponding presidential administrations is instructive. It is clear that the George W. Bush administration pursued more obscenity charges than the Clinton administration, but the number of prosecutions pursued by the Obama administration remained relatively constant when taking into account obscenity charges involving distribution to minors. *See* Appendix B.

[51] *See* Appendix B.

[52] 431 F.3d 150 (3d Cir. 2005).

[53] *Obscenity Indictment Start of Justice Department Crackdown*, CNSNEWS.COM, http://cnsnews.com/news/article/obscenity-indictment-start-justice-department-crackdown (last visited Feb. 6, 2015).

[54] *See* Indictment, United States v. Extreme Associates, Inc., No. 03-cr-0203 (W.D. Pa. 2003) (on file with author).

[55] Indictment, United States v. Extreme Associates, Inc., No. 03-cr-0203 (W.D. Pa. 2003).

[56] United States v. Extreme Associates, Inc., 352 F.Supp.2d 578 (W.D. Pa. 2005); United States v. Extreme Associates, Inc., 431 F.3d 150 (3d Cir. 2005).

[57] *Extreme Associates and its Owners, Robert Zicari and Janet Romano, Sentenced for Violating Federal Obscenity Laws*, PR NEWSWIRE, http://www.prnewswire.com/news-releases/extreme-associates-and-its-owners-robert-zicari-and-janet-romano-sentenced-for-violating-federal-obscenity-laws-62099612.html (last visited Feb. 7, 2015).

the government's agreement not to calculate corporate profits as part of sentencing.[58] Extreme Associates, which was basically defunct by the time of the plea in 2009, agreed to forfeit its domain names to the government. Robert Zicari and Janet Romano were each sentenced to a year and a day in federal prison.[59]

b. The Ragsdales

The criminal investigation of husband and wife Garry and Tamara Ragsdale began in 1998 under the Clinton Administration.[60] Acting on an anonymous complaint about a website that contained rape simulations and other violent videos, the Dallas Police Department traced the site to Mr. Ragsdale, himself a Dallas police officer at the time.[61] Shortly thereafter, the FBI executed a search warrant at the Ragsdale's home.[62] They were charged with state obscenity crimes, but the charges were later dropped.[63]

Five years later, in 2003, the Ragsdales were federally indicted for distributing obscene material, including two violent foreign films entitled "Brutally Raped 5" and "Real Rape 1."[64] After only five hours of deliberation, a jury in the Northern District of Texas convicted the couple on all counts.[65] Garry Ragsdale was sentenced to 33 months in prison, three years of supervised release, and a $300 special assessment.[66] His wife Tamara was sentenced to 30 months in prison and the same supervised release and special assessment.[67] Their appeal was unsuccessful.[68]

c. Patrick J. O'Malley

Patrick J. O'Malley was the elected County Recorder of Cuyahoga County, Ohio when he was suspected of federal computer crimes. The FBI's investigation began in 2004, "when authorities found images of bestiality, bondage and other sexually deviant acts on a computer taken from" O'Malley's home.[69] Federal authorities were looking for images

[58] *Porn Sellers Plead Guilty in Obscenity Case*, THE DAILY ITEM, http://www.dailyitem.com/porn-sellers-plead-guilty-in-obscenity-case/article_fd149d6a-2ddf-5891-a0d1-3a9f37d32d0a.html?mode=jqm (last visited Feb. 7, 2015).
[59] *See* Sentencing Entry, United States v. Extreme Associates, Inc., No. 03-cr-0203 (W.D. Pa. 2009) (on file with author).
[60] United States v. Ragsdale, 426 F.3d 765, 768–69 (5th Cir. 2005).
[61] *Id*.
[62] *Id*. at 769.
[63] *Id*.
[64] *Id*. at 769–70.
[65] *Id*. at 770.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 786.
[69] Mike Tobin, *Federal Obscenity Charge Drives O'Malley from Office*, CLEVELAND PLAIN DEALER (Oct. 3, 2008), http://blog.cleveland.com/metro/2008/05/federal_obscenity_ charge_

of child pornography on O'Malley's computers because, when investigating O'Malley on an unrelated matter, they found images of child pornography on one of two computers that had been taken from O'Malley's home by his estranged wife, Vicki O'Malley.[70] Additionally, several floppy disks removed from O'Malley's home also contained child pornography. Then, in a later search, "FBI agents raided O'Malley's Chagrin Falls home and seized two personal computers" after "nearly four years of speculation."[71] These computers did not contain images of child pornography, but the computer taken from O'Malley's bedroom contained images of sexually deviant acts:

Because the computer and disks containing the child porn had been accessible to Vicki O'Malley, her attorney and their private investigator, federal prosecutors felt it would have been difficult to prove a criminal case of child pornography against O'Malley. Instead, prosecutors opted for the rarely-filed obscenity charge, which they believed to be a more provable offense.[72]

Ultimately, Patrick O'Malley pleaded guilty to one count of obscenity after accepting a deal with federal prosecutors.[73] The charge carried a maximum penalty of up to five years in prison and a $250,000 fine.[74] O'Malley would eventually be sentenced to fifteen months in prison.[75]

d. Jeffrey Kilbride and James Schaffer

Jeffrey Kilbride and his business partner, James Schaffer, operated an unsolicited bulk email company, Ganymeade Advertising, which used a series of offshore servers and corporations.[76] The advertisements contained in Ganymeade's "spam" emails included sexually explicit images and other adult themes.[77] In August 2005, Kilbride and Shaffer were indicted in federal district court in Arizona for various violations of federal law, including email fraud, conspiracy to commit money laundering, and the transportation of obscenity.[78] They were convicted by a jury of all counts.[79] Kilbride was sentenced to 78 months in prison,

drive.html.

[70] *Id*.

[71] Mike Tobin, *O'Malley Pleads Guilty*, CLEVELAND PLAIN DEALER (May 16, 2008), http://blog.cleveland.com/metro/2008/05/omalley_pleads_guilty.html.

[72] Tobin, *Federal Obscenity*, *supra* note 69.

[73] *Id*.

[74] Press Release, Department of Justice, *County Recorder in Ohio Pleads Guilty to Importation and Transportation of Obscene Material* (May 15, 2008), http://www.legistorm.com/stormfeed/view_rss/124240/organization/69384.html.

[75] Tobin, *O'Malley Pleads Guilty*, *supra* note 71.

[76] United States v. Kilbride, 584 F.3d 1240, 1244 (9th Cir. 2009).

[77] *Id*.

[78] *Id*. at 1245.

[79] *Id*.

and Schaffer was sentenced to 63 months.[80]

On appeal, the Ninth Circuit affirmed the convictions for both defendants, but reached an important holding regarding the application of the *Miller* test to obscenity that is transacted via the Internet.[81] "To 'avoid[ ] the need to examine the serious First Amendment problem that would otherwise exist,' [the court] construe[d] obscenity . . . as defined by reference to a national community standard when disseminated via the Internet."[82] Although the ruling has not been followed by other federal courts, the Kilbride case is notable because it expanded the concept of contemporary community standards to the online national community rather than a geographically restricted one.[83]

e. Karen Fletcher

Karen Fletcher, whose pen name is "Red Rose," owned and operated a public Web site that distributed text stories.[84] Her case is unique because it involved the distribution of written material, rather than visual depictions. On her website, Fletcher posted story excerpts that described the sexual molestation and violent abuse of children.[85] Individuals could buy memberships to additional areas of the site where full stories, describing the sexual abuse, rape, torture, and murder of newborn to teenage children, were available.[86] Further, Fletcher "wrote and offered the majority of the stories herself."[87] Additionally, "[s]ome of the stories were also available as video files."[88] Fletcher charged $10 for people to view the fictional stories.[89]

She was indicted in September 2006, with six counts of using an interactive computer service to distribute obscene materials; she then plead guilty to all six counts in August 2008.[90] U.S. District Judge Joy Flowers Conti sentenced Fletcher to five years probation, the first six months of which would be served under home detention, and a $1,000

80 *Id.*

81 *Id.* at 1262, 1252–55.

82 *Id.* at 1254 (citing Ashcroft v. Amer. Civil Liberties Union, 535 U.S. 564, 590 (2002) (Breyer, J., concurring in part and concurring in the judgment)).

83 United States v. Adams, 337 Fed.Appx. 336, 339–40 (4th Cir. 2010); United States v. Little, 365 Fed.Appx. 159, 164 (11th Cir. 2010); United States v. Stagliano, 693 F.Supp.2d 25, 31 n.8 (D.D.C. 2010).

84 Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES (Sept. 28, 2007), http://www.nytimes.com/2007/09/28/us/28obscene.html?pagewanted=all&_r=0.

85 *Id.*

86 Press Release, Department of Justice, *Pennsylvania Woman Pleads Guilty and is Sentenced on Obscenity Charges* (Aug. 7, 2008), http://www.justice.gov/archive/opa/pr/2008/August/08-crm-699.html.

87 *Id.*

88 *Id.*

89 Paula Reed Ward, *Woman Charged over 'Vile' Web Stories*, PITTSBURGH POST-GAZETTE (Sept. 28, 2006), http://www.post-gazette.com/local/washington/2006/09/28/Woman-charged-over-vile-Web-stories/stories/200609280324.

90 *See* Press Release, Department of Justice, *supra* note 86.

fine.[91] Fletcher's computer equipment was also forfeited to the government.[92]

f. Adult DVD Empire

Right Ascension Inc. is a DVD distribution company known as Adult DVD Empire.[93] According to the corporation's attorney, "[t]he company screens each movie it receives from a studio and refuses to ship anything it identifies as obscene."[94] However, in 2007, the company "mistakenly shipped" allegedly obscene content to Erie, Pennsylvania.[95] According to an attorney for the Justice Department's Obscenity Task Force, the four mistakenly-shipped DVDs "contained pornography that included sadomasochistic violence that exceeds contemporary community standards."[96] Those four DVDs were identified as "A Bounty of Pain," "Shattering Krystal," "Extreme Tit Torture 18," and "Pussy Torture 8."[97] Ultimately, in August 2010, the CEO "agreed to have [the] company plead guilty to a federal charge of mailing obscene material."[98] As a result, no individual was subject to a prison sentence, but "U.S. District Judge Joy Flowers Conti fined the company $75,000 and placed it on probation for two years."[99]

g. The Harb Cousins

Sami and Michael Harb operated the Cleveland, Ohio-based Internet business, Movies by Mail.[100] Doing business as "Movies by Mail," the two men were indicted on June 28, 2007, and charged with three counts of violating 18 U.S.C. § 1461 (Using the United States Mail to Transport Obscene Matter in Interstate Commerce) and three counts of violating 18 U.S.C. § 1466 (Engaging in a Business of Selling or Transferring Obscene Matter). The charges include a maximum penalty of five years in prison on each count.[101] During an undercover

91 *Id*.
92 *Id*.
93 Paula Reed Ward, *Distributor Pleads Guilty to Obscenity but Says it was an Accident*, PITTSBURGH POST-GAZETTE (Aug. 27, 2010), http://www.post-gazette.com/business/businessnews/2010/08/27/Distributor-pleads-guilty-to-obscenity-but-says-it-was-an-accident/stories/201008270213.
94 Brian Bowling, *Marshall DVD Firm Fined for Mailing Obscene Material*, PITTSBURGH TRIBUNE REVIEW (Aug. 27, 2010), http://triblive.com/x/pittsburghtrib/news/pittsburgh/s_696716.html#axzz3RTYKa29d.
95 *Id*.
96 *Id*.
97 Plea Agreement at 6, United States v. Right Ascension, Inc., No. 10-143, (3rd Cir. June 11, 2010) (on file with author).
98 *See* Bowling, *supra* note 94.
99 *Id*.
100 Grant Gross, *Web-based Business Charged with Distributing Obscenity*, WASH. POST (June 15, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501297.html.
101 Press Release, Department of Justice, *Federal Grand Jury In Salt Lake City Charges*

FBI investigation, authorities ordered three films from a Web site operated by the Harbs.[102] Those films were titled "MaxHardcore, Pure Max 18," "Maxhardcore, Extreme 12," and "Extreme Associates, Cocktails 5." [103] Evidently, one of the films included footage showing sexual acts with women dressed to look underage.[104] Notably, two of the films were produced by director Paul Little, known as Max Hardcore, himself also a defendant in a federal obscenity prosecution.[105] The Harbs mailed the three films to an address in Salt Lake City, and the case was tried there.[106] In addition, "Movies By Mail" shipped 683 packages to Utah between Jan. 3, 2006, and Dec. 11, 2006, according to the U.S. Postal Service. The complaint says 149 of those packages were shipped directly to Salt Lake City."[107]

Each defendant pleaded guilty to one count of selling obscene material.[108] The two men, who are cousins, received matching sentences of one year and one day in federal prison, plus three years of supervised release.[109] Federal prosecutors dropped the other charges pursuant to a plea agreement.[110] Additionally, the Harbs "agreed to forfeit interests in the films, along with assets gained from sales and distribution."[111]

h. Loren Jay Adams

In May 2008, a federal grand jury in the Northern District of West Virginia indicted Loren Adams for three counts of mailing obscene matter in violation of 18 U.S.C. § 1461 and three counts of transporting and using a facility or means of interstate commerce, in and affecting commerce, for the purpose of selling and distributing obscene matter, in violation of 18 U.S.C. § 1465.[112] Adams was alleged to have distributed films depicting bestiality, fisting, and other fetish sex acts.[113] After a

Cleveland Men with Obscenity Violations, (June 28, 2007), http://www.justice.gov/archive/opa/pr/2007/June/07_crm_471.html.

102 *Id.*

103 *Id.*

104 *See* Gross, *supra* note 100.

105 *Id.*

106 *Id.*

107 *Id.*

108 Emiley Morgan, *Men Ordered to Prison for Selling Obscene Films*, DESERET NEWS (Nov. 21, 2009), http://www.deseretnews.com/article/705345750/Men-ordered-to-prison-for-selling-obscene-films.html?pg=all.

109 *Id.*

110 *Id.*

111 *Id.*

112 Brief for the United States, United States v. Adams, No. 08–5261, 2009 WL 980097, at *1 (4th Cir. Apr. 13, 2009).

113 As described by the investigating officer in the case, representative portions of "Doggie3Some" and "Anal Doggie and Horse" depicted women engaging in sexual acts with dogs and a horse, and the representative portion of "Fisting 1," depicted women being penetrated by large objects. United States v. Adams, 337 Fed.Appx. 336, 338 (4th Cir. 2009).

one-day jury trial on September 30, 2008, the jury convicted Adams on all six counts.[114] On December 12, 2008, the district court sentenced Adams to 33 months of imprisonment, to be followed by supervised release, and ordered that he forfeit the obscene materials and the gross profits from the sale of those materials.[115] The Fourth Circuit upheld Adams' convictions on appeal, rejecting the argument that there was insufficient evidence to support the jury's finding that the materials were obscene under *Miller*.[116]

i. Paul Little

Paul Little and his corporation, Max World Entertainment Inc., were separately indicted on ten counts of violating federal obscenity law.[117] Specifically, a grand jury convened in the U.S. District Court for the Middle District of Florida charged Paul Little and Max World Entertainment, Inc., with five counts of violating 18 U.S.C. § 1465 (Production and transportation of obscene matters for sale or distribution), and five counts under 18 U.S.C. § 1461 (Mailing obscene or crime-inciting matter).[118] The indictment also alleged forfeitures under 18 U.S.C. § 1467.[119]

The Department of Justice began the investigation against Paul Little and his company, Max World Entertainment, Inc., by capturing and copying film trailers for films being offered for sale on the Max Hardcore website.[120] In addition to collecting the film trailers on Little's website, the U.S. Postal Inspection Service office in Tampa ordered five DVD videos from Little's website (the actual ordering and shipping was done by an independent company).[121]

Little and Max World Entertainment, Inc., were each convicted by a jury on all ten counts of violating federal obscenity statutes.[122] Little was sentenced to a total of forty-six months in prison, a $7,500 fine, a $1,000 special assessment, and supervised release for three years.[123] Max World was sentenced to thirty-six months' probation and a $75,000 fine.[124] In its opinion issued on February 2, 2010, the U.S. Court of Appeals for the Eleventh Circuit affirmed the convictions, but remanded to adjust the fines assessed by the trial court on the basis that

114 Brief for the United States, *Adams*, 2009 WL 980097, at *1.
115 *Id.*
116 *Adams*, 337 Fed.Appx. at 336.
117 Indictment, United States v. Little, No. 8:07-cr-170-T24 MSS, 2007 WL 4401063 (M.D. Fla. May 17, 2007).
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 United States v. Little, 365 Fed.Appx. 159 (11th Cir. 2010).
123 *Id.*
124 *Id.*

Max World had not sufficiently profited from sale of the material to warrant large fines.[125]

1. The Obama Administration Prosecutions: Cases Concluded from 2008 to Present

a. Frank McCoy

Frank McCoy is a fiction writer from Minnesota.[126] On June 13, 2007, he was charged in the Middle District of Georgia with transporting obscene matters.[127] Additionally, McCoy was charged with aiding and abetting the distribution of obscenity under 18 U.S.C. § 2.[128] According to the indictment, McCoy wrote fiction pieces that were fantasy stories describing in explicit and graphic detail the sexual abuse, rape, and murder of children.[129] Federal authorities discovered McCoy's writings during the course of an unrelated child pornography prosecution, and in 2005 and 2006, an undercover federal agent from the Middle District of Georgia began investigating McCoy.[130] Specifically, the undercover agent "engaged in email correspondence with [McCoy]," and McCoy "provided links to websites on which his writings could be obtained."[131] The agent then accessed and downloaded numerous stories that were attributed to McCoy.[132] One of the websites, www.youngstuff.com, was hosted in the Southern District of Texas; another website, ftp.asstr.org, was hosted in the Northern District of California.[133]

After a bench trial, McCoy was found guilty.[134] The court sentenced him to eighteen months of imprisonment, two-years supervised released, and a $100 mandatory assessment fee.[135]

b. John Stagliano

John Stagliano is an adult video producer based in Van Nuys, California, and one of the pornography industry's more mainstream and recognizable producers and distributors.[136] Stagliano has appeared in

125 *Id.*
126 Ryen Rasmus, *The Auto-Authentication of the Page: Purely Written Speech and the Doctrine of Obscenity*, 20 WM. & MARY BILL RTS. J. 253, 262 (2011).
127 United States v. McCoy, 937 F. Supp. 2d 1374, 1375 (M.D. Ga. 2013).
128 *Id.*
129 United States v. McCoy, 678 F.Supp.2d 1336, 1340 (M.D. Ga. 2009) (citing the indictment).
130 *Id.* at 1340.
131 *Id.*
132 *Id.*
133 *Id.*
134 United States v. McCoy, 937 F. Supp. 2d 1374, 1382 (M.D. Ga. 2013).
135 United States v. McCoy, No. 1:07–CR–18 (WLS), 2013 WL 4874024, at *1 (M.D. Ga. Sept. 11, 2013).
136 Spencer S. Hsu, *U.S. District Judge Drops Porn Charges against Video Producer John A. Stagliano*, WASH. POST (July 17, 2010), http://www.washingtonpost.com/wp-dyn/content/

some of his films under his nickname, "Buttman," and "is known for pushing the edge of industry standards in his depiction of fetishes."[137] John Stagliano, individually, and two affiliated corporations, John Stagliano, Inc. and Evil Angel Productions, Inc., were indicted on April 8, 2008 in the District of Columbia on federal obscenity charges.[138] The indictments centered around two motion-picture films, entitled "Milk Nymphos" and "Storm Squirters 2 'Target Practice,'" and one motion-picture trailer, identified as "Fetish Fanatic Chapter 5."[139] The material was distributed when federal law enforcement agents ordered and received through the mail the two motion-picture films on DVD.[140] Additionally, the same films were available for instant download on numerous websites registered to Stagliano. Federal authorities downloaded the motion-picture film trailer from the website, www.evilangel.com. The indictment also included forfeiture and aiding and abetting charges.[141]

On July 17, 2010, United States District Court Judge Richard Leon dismissed the case and acquitted Stagliano, Stagliano Inc., and Evil Angel Productions Inc.[142] In fact, Judge Leon rebuked federal prosecutors, saying that he hoped "the government will learn a lesson from its experience" after concluding that the evidence presented by the Justice Department was "'woefully insufficient' to link defendants to the production and distribution of two DVD videos at the heart of the case."[143] Stagliano's case was the first federal obscenity prosecution brought in Washington, D.C. in a quarter-century.[144]

c. Barry Goldman

Barry Goldman operated the "Torture Portal," a retail website for adult-oriented material.[145] Goldman distributed the DVDs at issue in the case through the mail throughout 2006 and 2007.[146] The DVDs at issue in the indictment were "Porn Store Girl," "Punishment of Crista,"

article/2010/07/16/AR2010071605750.html.

137 *Id.*

138 United States v. Stagliano, 693 F.Supp.2d 25 (D.D.C. 2010); Press Release, Department of Justice, *Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity Violations*, (Apr. 8, 2008), http://www.justice.gov/archive/opa/pr/2008/April/08-crm-280.html.

139 Press Release, Department of Justice, *Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity Violations* (Apr. 8, 2008), http://www.justice.gov/archive/opa/pr/2008/April/08-crm-280.html.

140 *Id*.

141 *Id.*

142 Hsu, *supra* note 136.

143 *Id.*

144 *Id.*

145 Josh Gerstein, *Porn Prosecution Fuels Debate*, POLITICO (July 31, 2009), http://www.politico.com/news/stories/0709/25622.html.

146 Rhett Pardon, *Plea Deal Reached in Torture Portal Obscenity Case*, XBIZ.COM (July 13, 2010), http://newswire.xbiz.com/view.php?id=122757.

"Pregnant and Willing," "Bondage Model #1," "Bondage Model #2," "Breaking of Crista," "Defiant Crista," "Torture of a Porn Store Girl," and "Defiant Crista Submits."[147] Goldman was indicted in the District of Montana in 2008 for violation of both 18 U.S.C. § 1461 (Mailing obscene or crime-inciting matter) and 18 U.S.C. § 1467 (criminal forfeiture). Specifically, the indictment alleged eight counts of using the mails to deliver DVDs containing allegedly obscene films from New Jersey to addresses in Montana and Virginia.[148] The Montana district court later transferred the case to federal court in Virginia, a move to which prosecutors agreed after initially challenging the judge's ruling.[149] Goldman's case came to a close when he entered into a plea deal with federal prosecutors.[150] He was sentenced to three years of probation and six months of electronic monitoring.[151]

d. Ira Isaacs

Of all the cases that began under the Bush Administration and ended during the Obama Administration, Ira Isaacs' prosecution resulted in the harshest outcome. Isaacs, who describes himself as a shock artist, began producing and distributing films about fetishes because he "wanted to do something extreme."[152] The films depicted, as Isaacs admits, bestiality and sexual activity involving feces and urine.[153]

The investigation resulted in Isaacs' office being "raided by FBI agents who bought his videos online with undercover credit cards."[154] As a result, Isaacs was indicted in Los Angeles under federal obscenity charges, both individually and under his businesses, Stolen Car Films and LA Media.[155] Specifically, Isaacs was charged with four counts of violating 18 U.S.C. § 1465 (Importation or Transportation of Obscene Material for Sale or Distribution), and two counts of violating 18 U.S.C. § 1462(a) (Importation or Transportation of Obscene Material). Accompanying the obscenity charges: two counts for violation of 18 U.S.C. § 2257(f)(4) (Improper Record Keeping for Material Depicting Sexual Activity), and 18 U.S.C. § 1467 (Forfeiture Allegation).[156] The

147 *Id.*; *see also* Indictment, United States v. Goldman, No. CR-08-98-BLG-RFC (D. Mont. 2008), *available a*t http://www.mainjustice.com/files/2009/07/porn-indictment.pdf.
148 Indictment, *Goldman*, No. CR-08-98-BLG-RFC (D. Mont. 2008).
149 Gerstein, *supra* note 145.
150 *Id.*
151 Amy Kotlarz, *Stamping Out Porn*, CATHOLIC COURIER (June 1, 2011), http://www.catholiccourier.com/news/local-news/stamping-out-porn/.
152 Linda Deutsch, *L.A. Obscenity Case Offends Some Potential Jurors* (June 11, 2008), USA TODAY, http://usatoday30.usatoday.com/news/nation/2008-06-10-obscenecase_N.htm.
153 *Id.*
154 *Id.*
155 United States v. Isaacs, 565 Fed.Appx. 637, 639 (9th Cir. 2014).
156 *Id*.

allegations against Isaacs centered around obscene pictures and films, namely movies and DVDs with the following titles: "Gang Bang Horse Pony Sex Game," "Mako's First Time Scat," "Hollywood Scat Amateurs No. 7," and "Bae 20."[157] The indictment also alleged that two movies, "Hollywood Scat Amateurs No. 7" and "Laurie's Toilet Show," violated federal age-verification laws.[158] The material at issue was allegedly distributed through interactive computer service, express company, or common carrier, and was intended for shipment in interstate commerce.[159]

Isaacs' case first came to trial in 2008, but a mistrial was granted when the government discovered that Judge Alex Kozinski of the Ninth Circuit, who was presiding over the case by designation, was in possession of sexually explicit material on his personal computer.[160] Another mistrial was granted in March 2012 when jurors were unable to reach a unanimous verdict, voting 10 to 2 in favor of conviction.[161] Later in 2012, Isaacs was ultimately found guilty on one count of engaging in the business of producing and selling obscene videos and four counts of distributing obscene videos.[162] He was sentenced to 48 months in prison, three years of supervised released, and assessed a $10,000 fine.[163] The Ninth Circuit affirmed Isaacs' conviction and sentence.[164]

B. *State Obscenity Prosecutions*

While the federal obscenity prosecutions from 2003 to present appear to be attached to the political agendas of differing presidential administrations, recent state-based obscenity cases cannot be so easily categorized. Below are selected state obscenity case descriptions from Alabama, Kansas, Louisiana, Missouri and Texas.

1. Select Case Summaries

a. Alabama

On January 15, 2005, the City of Hoover, Alabama, filed a civil action against the store operator of "Love Stuff," alleging the store

157 Deutsch, *supra* note 152.
158 The Associated Press, *Adult Film Producer Convicted in Obscenity Trial*, N.Y. DAILY NEWS (Apr. 27, 2012), http://www.nydailynews.com/news/national/adult-film-producer-convicted-obscenity-trial-article-1.1068971.
159 *Isaacs*, 565 Fed.Appx. at 639.
160 The Associated Press, *Adult Film Producer*, *supra* note 158.
161 *Id.*
162 *Id.*
163 Press Release, FEDERAL BUREAU OF INVESTIGATION, *Ira Isaacs Sentenced in Adult Obscenity Case*, (Jan. 16, 2013), http://www.fbi.gov/losangeles/press-releases/2013/ira-isaacs-sentenced-in-adult-obscenity-case.
164 *Isaacs*, 565 Fed.Appx. at 637.

violated a municipal-code provision restricting location of "adult-only enterprises."[165] The Hoover municipal code incorporated a portion of the Alabama Anti-Obscenity Enforcement Act that prohibited the sale and distribution of obscene material, including sexual aid devices such as dildos.[166] In response, Love Stuff filed a counterclaim, alleging in part that the statutory ban on sale of sexual devices was unconstitutional because it violated the right of privacy.[167] After a series of interlocutory appeals, the Alabama Supreme Court ultimately upheld the constitutionality of the ban on obscene devices.[168]

b. Kansas

In 2004, a grand jury indicted Lion's Den, an adult business located in Abilene, Kansas.[169] In an ensuing bench trial, the judge dismissed all charges against Lion's Den.[170]

In 2007, a Johnson County grand jury indicted four businesses on misdemeanor obscenity charges for various acts in Olathe, Kansas.[171] This was the first grand jury convened in Johnson County in eighteen years and was in response to a petition filed by a citizens group calling for investigations into businesses allegedly "promoting obscenity."[172] The Johnson County grand jury was accompanied by a second grand jury in Wyandotte County.[173] This grand jury first indicted Spirit Halloween on four counts of promoting obscenity to minors.[174] The indictment was based on Halloween costumes.[175] In October 2007, the Johnson County Court dismissed all four counts against Spirit Halloween.[176] The District Attorney later moved to dismiss all counts against Spirit Halloween after it agreed to move the costumes to an area of the store where minors could not see them.[177]

Hollywood at Home Movies and Magazines was the second

165 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So.3d 319, 321 (Ala. 2010).
166 *Id.*
167 *Id.*
168 *Id.* at 319.
169 Jill Barton, *Runaway Grand Jury: Activists Attempt to Redefine Obscenity Law in Kansas*, 77 UMKC L. REV. 249, 253 (2008).
170 *Id.* at 253.
171 *Id.*; *see also* The Associated Press, *Obscenity Charges Dropped after Halloween Store Moves Costumes*, LJWORLD.COM (Oct. 12, 2007), http://www2.ljworld.com/news/2007/oct/12/obscenity_charges_dropped_after_halloween_store_mo/.
172 The Associated Press, *Obscenity Charges Dropped*, *supra* note 171.
173 *Id.*
174 *3 Johnson County Shops Indicted Amid Obscenity Allegations*, WIBW.com (Sept. 28, 2007), http://www.wibw.com/home/headlines/10107191.html.
175 The costumes allegedly in question were "Country Lovin," "Snake Charmer," "Tricky Dick," and "Wet T-shirt." *See* Tony Rizzo, *JoCo Grand Jury Issues Obscenity Indictment*, CRIME SCENE KC (Sept. 28, 2007), http://blogs.kansascity.com/crime_scene/2007/09/joco-grand-jury.html.
176 *See* Entry of Dismissal, State v. Spirit Halloween, Case No. 07CR2488 (Oct. 11, 2007), *available at* http://www.jococourts.org/crDispo.aspx?which=07CR02488
177 *Id.*; Barton, *supra* note 169, at 253.

business indicted on charges of promoting obscenity by the Johnson County grand jury.[178] Specifically, Hollywood at Home was accused of renting four pornographic videos.[179] Hollywood at Home pleaded not guilty; the charges were eventually dropped.[180] Third, Gringo Loco, a convenience store, was charged with promoting obscenity,[181] but the charge was dropped when the store agreed to stop selling a DVD called "Babysitter #18."[182] Priscilla's store was the fourth and final business indicted by the grand jury for promoting obscenity.[183] Like Hollywood at Home, Priscilla's pleaded not guilty to the charge of selling an obscene DVD and sex toys, and the charges were ultimately dismissed.[184]

Kansas is one of six states with a law allowing citizens to convene a grand jury by "collect[ing] signatures from slightly more than two percent of voters in a county."[185] While federal grand juries are convened regularly in Kansas, grand juries at the local level are rare.[186] The grand jury convened over these four cases was the result of a citizens group that "filed a petition calling for grand juries to investigate businesses believed to be promoting obscenity."[187] Their efforts were unsuccessful when the charges were not pursued by the prosecutor.

c. Louisiana

In 2003, Dan Sasha Birman was charged with violating state obscenity laws, a felony in Louisiana.[188] Birman owned and operated Fantasy Video in Ruston, Louisiana.[189] In April of that year, Birman sold sexually explicit material to undercover state troopers.[190] Although a jury convicted Birman of violating state obscenity laws, he avoided jail time by agreeing to immediately close his business and stay out of the pornography industry.[191]

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178 Barton, *supra* note 169, at 253.
179 *Id*.
180 *See* Entry of Dismissal, State v. Hollywood at Home, Case No. 07CR2489 (Sept. 29, 2007), *available at* http://www.jococourts.org/crDispo.aspx?which=07CR02489 (last viewed Feb. 9, 2015).
181 *See* State v. Gringo Loco, Case No. 07CR2456, *available at* http://www.jococourts.org/crDispo.aspx?which=07CR02456 (last viewed Feb. 9, 2015).
182 Barton, *supra* note 169, at 253.
183 *Id.*
184 The Associated Press, *Obscenity Charges Dropped after Halloween*, *supra* note 172.
185 Barton, *supra* note 169, at 253.
186 The Associated Press, *Obscenity Charges Dropped after Halloween*, *supra* note 172.
187 *Id.*
188 La. Rev. Stat. 14:106(A)(2)(b).
189 Nathan Stubbs, *Out of Sight*, THE INDEPENDENT MEDIA GROUP (Jan. 12, 2005), http://www.theind.com/cover-story/168.
190 Christina Chua, *Porn Shop Owner Found Guilty, To Be Sentenced for Obscenity*, THE TECH TALK ONLINE (Nov. 6, 2003), http://www.latech.edu/techtalk/archives/11_06_03/current/porn.php.
191 Stubbs, *supra* note 189.

Ryan Hargroder and Erika Bordelon share a similar experience to that of Dan Sasha Birman. In Lafayette, Louisiana, District Attorney Mike Harson charged Hargroder and Bordelon with violating state and city obscenity laws.[192] As husband and wife, the two co-owned The Bad Kitty, a shop that sold sex toys and pornographic DVDs.[193] As a result, city police entered Hargroder and Bordelon's store and confiscated roughly 200 DVDs, worth $2,000.[194] The District Attorney indicated that he would not pursue charges on the condition that The Bad Kitty no longer sell pornographic videos.[195]

A third situation unfolded in Louisiana for Emmette Jacob Jr., who was charged with three counts of violating state obscenity law.[196] The charges "assert[ed] that an agent of [Jacob's] sold, rented, or otherwise distributed two allegedly obscene videotapes and one allegedly obscene magazine."[197] Jacob owned Le Video Store, Inc., which was also charged with three counts of obscenity.[198] Jacob and his business, Le Video Store, Inc., moved to quash the charges in the trial court.[199] The trial court denied the motion, and the Louisiana Court of Appeal affirmed the trial court's disposition of the motion to quash.[200] The Louisiana Supreme Court and the United States Supreme Court both denied review.[201] The outcome of the case is presently unknown.

d. Missouri

Robert Crump, Jr. owned a store called Midnight Video in McDonald County, Missouri, that sold adult movies, magazines, books, toys, and novelties.[202] All of the movies sold at Midnight Video were "sexually themed."[203] Crump often worked at the store himself, and also had several employees who worked at Midnight Video.[204] A deputy sheriff in McDonald County coordinated a series of controlled buys at Crump's store, and purchased adult movies entitled as follows: "Different Strokes," "Bi Group Club Sex," and "Ragtime Red."[205] Crump, Jr., was convicted by a jury in the Circuit Court of McDonald

192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 Jacob v. Louisiana, No. 06-198, 2006 WL 2285773 (Aug. 3, 2006) (petition for writ of certiorari to the United States Supreme Court). The request for certiorari was ultimately denied. *See* Jacob v. Louisiana, 549 U.S. 954 (2006).
197 *Jacob*, 2006 WL 2285773, at *3.
198 *Id.*
199 *Id.*
200 *Id.*
201 State v. Le Video Store, Inc., 927 So.2d 324 (La. 2006); *Jacob*, 549 U.S. 954.
202 State v. Crump, 223 S.W.3d 915, 915 (Mo. Ct. App. 2007).
203 *Id.*
204 *Id.*
205 *Id.*

County, Missouri, on three counts of the class A misdemeanor of promoting obscenity in the second degree.[206] The trial court sentenced him to one year in jail on each count with the execution of sentence suspended, and with Crump being placed on unsupervised probation.[207] The trial court also fined Crump $1,000 for each count.[208] Interestingly, the Missouri Court of Appeals, Southern District, Division Two, reversed and remanded the case, and the State conceded the trial court erred in overruling Crump's Motion to Dismiss.[209] The State joined Crump in requesting reversal of his conviction and remand for a new trial because the State failed to state facts supporting a finding of probable cause to believe a crime was committed because it failed to state any facts describing the contents of the videos.[210]

e. Texas

In *Ex parte Dave*, Valeria Joyce Dave was charged with two counts of promoting obscenity in violation of a Texas misdemeanor statute that prohibited the sale or dissemination of obscenity.[211] Dave was an employee at Dreamer's, a sexually-oriented business in Kennedale, Texas.[212] Dreamer's did not permit anyone under the age of 18 to enter the premises, and it did not offer on-premises entertainment.[213] Rather, customers could purchase videotapes and DVDs for off-premises viewing.[214] While working at the store, Dave sold two allegedly obscene videotapes to two different undercover police officers, and was then charged with two counts of promoting obscenity.[215] The trial court denied Dave's request for habeas relief on the ground the statute was facially constitutional.[216] The Court of Criminal Appeals of Texas affirmed the trial court's decision, holding that the state law prohibiting the sale of obscene material passed rational basis review.[217]

In *Villarreal v. State*, a Corpus Christi police officer was working undercover when he went to Friends 4 Ever to investigate whether the business was selling obscene sexual devices.[218] Beatrice Villarreal

206 *Id.*
207 *Id.*
208 *Id.*
209 *Id.* at 916.
210 *Id.* at 915.
211 *Ex Parte* Dave, 220 S.W.3d 154, 155 (Tex. App. 2007) (specifying the misdemeanor obscenity statute as Texas Penal Code § 43.23).
212 *Id.* at 155.
213 *Id.*
214 *Id.* For an additional description of Dreamer's retail business, *see* H and A Land Corp., Inc.. v. City of Kennedale, 480 F.3d 336, 338 (5th Cir. 2007).
215 *Ex Parte* Dave, 220 S.W.3d at 155.
216 *Id.*
217 *Id.*
218 *See* Villarreal v. State, 267 S.W.3d 204, 206 (Tex. App. 2008).

worked at the store as a cashier and sales clerk and sold a vibrator to the undercover officer.[219] Specifically, the vibrator was called "Lick It Lover," and resembled the male sexual organ.[220] Within hours of the purchase, police officers arrived at the business, executed a search warrant, and arrested Villarreal.[221] Villarreal was charged in county court with violating the state penal code.[222] Additionally, Villarreal was charged with committing offenses in violation of the Corpus Christi Ordinance and the penal code by conducting a sexually-oriented business without a permit.[223] Villarreal was convicted by a jury of the sale of obscene devices and operation of a sexually oriented business without a permit.[224] The trial court imposed a $500 fine and a six-month term of imprisonment in county jail for the sale of obscene devices conviction.[225] Additionally, the trial court imposed a $1,000 fine and a consecutive, six-month term of imprisonment in county jail for operating a sexually-oriented business without a permit.[226] On appeal, the Court of Appeals of Texas affirmed the trial court's findings and imposition of punishment.[227]

As a result of undercover police work in El Paso, Texas, Thomas Varkonyi was charged with promotion of or possession with intent to produce obscene material.[228] Texas authorities went undercover to solicit Varkonyi's skills in creating a website, while initially not telling him they wanted to make pornographic films.[229] Yet when the topic came up, Varkonyi showed the undercover officers a video on his computer depicting bestiality, and later transmitted this video to an undercover officer in an email video attachment.[230] Varkonyi showed

219 *Id*.

220 *Id*. Villarreal's case is unique in that it represents one of the few times that obscenity law has been applied to criminalize sexual devices and not expressive visual or written material. Shortly prior to Villarreal's appeal, the Fifth Circuit invalidated Texas's obscene devices statute on substantive due process grounds, a ruling which the Texas Court of Appeals declined to follow in her case. *See* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

221 *Villarreal*, 267 S.W.3d at 206.

222 Specifically, Villarreal, "knowing the content and character of a certain device, to-wit: a dildo and vibrator, knowingly promote[d] or possess[ed] with intent to promote said device, which was obscene." *Id*. at 206; *see also* Tex. Penal Code Ann. § 43.23(c)(1) (West 2014) ("A person commits an offense if, knowing its content and character, he . . . promotes or possesses with intent to promote any obscene material or obscene device.").

223 See *Villarreal*, 267 S.W.3d at 206 ("[A]ppellant was alleged to have 'unlawfully intentionally and knowingly conduct[ed] a business as a sexually oriented business within the city of Corpus Christi, Texas, without having secured a permit issued by the Corpus Christi Chief of Police to conduct such a business'" (citing Corpus Christi, Tex., Code of Ordinances ch. 48, art. I, § 48–18(b))).

224 *Id*. at 205.

225 *Id*. at 206.

226 *Id*.

227 *Id*. at 215.

228 Varkonyi v. State, 276 S.W.3d 27, 30–31 (Tex. App. 2008).

229 *Id*.

230 *Id*. at 31.

undercover officers various images on his home computer, including a video depicting a woman being sexually penetrated by a pony.[231] He then later transmitted the videos to an undercover officer as an e-mail attachment.[232] As a result, Varkonyi was convicted in a bench trial, and the court assessed a punishment of confinement at the El Paso County Jail for a twenty-day term.[233] The Court of Appeals of Texas affirmed the lower court's decision.[234]

2. State Obscenity Charges Tied to Other Crimes

State obscenity charges are often used as a bargaining tool for prosecutors. Accordingly, obscenity convictions will result from a plea deal with prosecutors in order to avoid jail time or receive a lesser sentence. The following cases examine the various ways in which obscenity charges have been levied by prosecutors in various states for the purpose of obtaining a positional advantage. Separating these cases by state of origination yields an interesting observation: states which do not routinely enforce their traditional obscenity laws—Massachusetts and Minnesota, for example, are more willing to do so when the charges are combined with another offense or result from a plea bargain involving additional allegations.

a. Alabama

In *Melton v. State*, Corey Melton took his computer to Geek Squad[235] at a Best Buy in Alabama because he was having trouble connecting to the Internet.[236] While running the initial diagnostic tests and hard drive repairs, the Geek Squad repair agent found explicit file names that suggested the presence of child pornography on Melton's computer.[237] After notifying the police department, two law enforcement authorities arrived at the store and viewed a video on Melton's computer hard drive of an adult male, an adult female, and an apparently underage female engaged in sexual activity.[238] Although "the State presented evidence that indicated that Melton knew about the existence of the child pornography on the computer," the State did not charge Melton with possession of child pornography.[239] Arguably, the evidence possessed by authorities was not sufficient to indict Melton on

231 *Id.*
232 *Id.*
233 *Id.* at 30.
234 *Id.* at 30, 39.
235 According to its website, "Geek Squad is the first national 24-hour task force dedicated to solving the world's technology challenges." *See* http://www.geeksquad.com/about-us/ (last visited Feb. 11, 2014).
236 Melton v. State, 69 So.3d 916, 917 (Ala. Crim. App. 2010).
237 *Id.* at 917.
238 *Id.* at 918.
239 *Id.* at 927.

child pornography charges, but the State did indict him on charges of knowingly possessing obscene matter containing visual reproduction of a person under the age of 17 years engaged in sexual acts.[240] Melton was convicted of possession of obscene matter, a violation of Alabama law,[241] and the trial court sentenced him to serve a ten-year term in prison.[242] The Alabama Court of Criminal Appeals affirmed this sentence

b. Florida

In 2006, Clinton Raymond McCowan, also known as Ray Guhn, was charged with violating the Florida state obscenity statutes, as well as committing prostitution and racketeering offenses.[243] One year later, McCowan was also charged with money laundering stemming from the same course of conduct.[244] While the charges were initially filed in Escambia County, the government dismissed the original indictment and later filed the same charges in more conservative-leaning Santa Rosa County.[245] The activity occurred over a seven-year period and stemmed from using local models, actors, and actresses in Pensacola to produce sexually explicit movies.[246] The movies were then uploaded to a website known as "Ray Guhn."[247] In exchange for a plea agreement, the State of Florida dismissed the obscenity and prostitution charges and permitted McCowan to plead simply to "unlawful financial transactions," as less serious offense than the racketeering charges he initially faced.[248] McCowan was eventually sentenced to 48 months in prison.[249]

In *State v. Greaves*, Phillip R. Greaves was charged with violating Florida's obscenity law, which is a third-degree felony.[250] Greaves was a 47-year-old retired nurse's aide who lives in Pueblo, Colorado, yet

240 *Id.* at 931.
241 *See* Ala. Code § 13A-12-192(b) (1975).
242 *Melton*, 69 So.3d at 917.
243 Anne Winter, *Ray Guhn Charged With Money Laundering*, XBIZ.com (June 9, 2007), http://www.xbiz.com/news/81696.
244 *Id.*
245 *Id.* ("'I can only imagine that the prosecutors are trying to obtain an advantage by moving to another county to get a more favorable jury or judge,' [defense attorney Larry] Walters said.").
246 Jim Jenkins, *Ray Guhn "Obscenity" Prosecution in Pensacola*, FLORIDA CRIMINAL LAW BLOG (June 30, 2008), http://www.floridacriminallawblog.com/2008/06/ray_guhn_prosecution_in_pensac.html.
247 *Id.*
248 *Behind the Ray Guhn Plea*, AVN.COM (June 25, 2008), http://business.avn.com/articles/legal/Behind-The-Ray-Guhn-Plea-53407.html
249 Kris Wernowsky, *Sentencing Today in Local Porn Case*, PENSACOLA NEWS JOURNAL (Aug. 11, 2008), http://archive.pnj.com/article/20080811/NEWS01/80811010/Sentencing-today-local-porn-case.
250 Joshua Rhett Miller, *Florida Sheriff Defends Arrest of 'Pedophile Guide' Author*, FOXNEWS.COM (Dec. 21, 2010), http://www.foxnews.com/politics/2010/12/21/florida-sheriff-defends-arrest-pedophile-guide-author/.

was arrested by sheriff's deputies from Polk County, Florida.[251] The charges stemmed from an investigation conducted by undercover deputies in Lakeland, Florida.[252] Greaves wrote a book entitled, "The Pedophile's Guide to Love and Pleasure: a Child-Lover's Code of Conduct," and then sold and mailed an autographed copy of his book directly to undercover authorities at an address in Lakeland, Florida, after receiving fifty dollars.[253] The book was also briefly available for purchase on Amazon.com.[254] Greaves pleaded no contest to distributing obscene material depicting minors engaged in harmful conduct and was sentenced to 2 years' probation.[255] Additionally, Greaves was not required to register as a sex offender.[256]

c. Louisiana

Brian H. Downing was charged with sexual battery after exposing his genitals and performing a simulated sexual act on an unconscious man at a restaurant on New Orleans' Bourbon Street in front of a crowd of football fans after the 2012 BCS championship game between Louisiana State University and the University of Alabama.[257] The video of Downing performing the act went viral on the Internet and was seen around the country.[258] Browning pleaded guilty to two counts of obscenity, and in return, New Orleans prosecutors agreed to drop the sexual battery charge.[259] Additionally, the terms of the plea deal also kept Downing from being required to register as a sex offender.[260] Orleans Parish Criminal District Judge Karen Herman also indicated that she would recommend that Downing participate in a prison boot camp program.[261] The Orleans Parish Criminal Court sentenced Downing to two years in prison for this conviction.[262]

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[251] *Id.*

[252] *Id.*

[253] *Id.*; *see also* Aletse Mellado, *Author of Pedophilia Book Pleads No Contest, Gets Probation*, CNN JUSTICE (Apr. 8, 2011), http://www.cnn.com/2011/CRIME/04/07/florida.obscenity.arrest/ (describing how Greaves autographed the copy he sent to undercover authorities).

[254] Miller, *supra* note 250. The book was available on Amazon.com's Kindle Store and sold nearly 300 copies in 24 hours prior to its removal from the site. *Id.* Greaves personally received more than 3,000 complaints about the $4.79 e-book. *Id.*

[255] *Phillip Greaves, Author of Pedophilia Book, Gets Probation in Florida*, HUFFPOST DENVER (Apr. 6, 2011), http://www.huffingtonpost.com/2011/04/06/phillip-greaves-author-of_0_n_845795.html.

[256] *Id.*

[257] *Alabama Fan Guilty of Nasty Act at BCS Championship*, USA TODAY (Oct. 2, 2012), http://www.usatoday.com/story/sports/ncaaf/2012/10/02/ala–man–pleads–guilty–in–bcs–obscene–video–case/1608529/.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] Michael Kunzelman, *Brian H. Downing, Alabama Football Fan, Gets 2 Years In Jail For*

d. Massachusetts

In *Commonwealth v. Rollins*, Rollins dropped from his car pages torn from a magazine containing what a witness described as "pornographic" material.[263] Rollins also threw from his car a second set of pages torn from a magazine appearing to be pornographic material in front of someone's house.[264] Additionally, a "pornographic" videocassette box with Rollins' fingerprints was found on a nearby road (but there were no charges brought in connection with this evidence).[265] Finally, Rollins dropped sexually explicit papers from his car behind a school bus.[266] As a result, Rollins was charged with three counts of dissemination or possession of obscene.[267] In addition to the obscenity charges, Rollins was also charged with one count of disseminating harmful matter to minors, three counts of littering, three counts of disorderly conduct, and three counts of annoying or accosting a person of the opposite sex.[268] After a bench trial, Rollins was convicted of all charges.[269] The Massachusetts Court of Appeals affirmed this conviction.[270]

Often, obscenity crimes accompany crimes against children. Such was the case in *Commonwealth v. Dodgson*, in which Sean K. Dodgson was charged with one count of dissemination of obscene matter within the meaning of Massachusetts state law.[271] In addition, Dodgson was charged with three counts of attempted dissemination of matter harmful to a minor within the meaning of Mass. Gen. Law c. 272, §§ 28 and 31 and two counts of enticement of a child under the age of sixteen within the meaning of Mass. Gen. Law c. 265, § 26C.[272] These charges resulted from Dodgson sending a picture of his naked, erect penis to what he thought was an eighth-grader.[273] Dodgson sent the photograph in a private instant message through a Yahoo! Massachusetts-based adult romance "chat room."[274] A Superior Court jury convicted Dodgson of all charges, and the Massachusetts Court of Appeals affirmed the judgments for dissemination of obscene matter and

Viral BCS Title Game Video, HUFFPOST COLLEGE (Nov. 29, 2012), http://www.huffingtonpost.com/2012/11/29/brian–h–downing–alabama–f_n_2215163.html.

263 Commonwealth v. Rollins, 799 N.E.2d 1287, 1288 (Mass. App. Ct. 2003).

264 *Id.* at 1288–89.

265 *Id.* at 1289.

266 *Id.* at 1287–88.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.* at 1292.

271 Commonwealth v. Dodgson, 952 N.E.2d 961 (Mass. App. Ct. 2011); *see also* Mass. G.L. c. 272, § 29.

272 *Dodgson*, 952 N.E.2d at 964.

273 *Id.*

274 *Id.*

enticement of a child.[275] However, the Massachusetts Court of Appeals reversed the judgments for attempted dissemination of matter harmful to a minor, set aside those verdicts, and entered judgment for Dodgson on those counts.[276]

e. Minnesota

Although not a traditional obscenity case, *State v. Kakosso*[277] is significant because it reinforces the proposition that the public viewing of erotic material can still be criminally prosecuted even though the material is not necessarily obscene. Here, Kabika Fiston Kakosso viewed a photograph of a penis from the Internet on a computer at a public library.[278] He was then charged with indecent exposure in violation of Minnesota state law, as well as with disorderly conduct for viewing nudity-oriented material in public.[279] The state dismissed the disorderly conduct charge, but the district court found Kakosso guilty of indecent exposure.[280] As a result, Kakosso was sentenced to 51 days in jail and imposed a $50 fine.[281] The Court of Appeals of Minnesota affirmed this decision.[282]

f. North Carolina

As another example, Douglas Rayfield "was charged with four counts of indecent liberties with a child . . . , one count of crime against nature, one count of first-degree statutory sex offense, and one count of first-degree statutory rape."[283] Accompanying these charges was one count of disseminating obscene material.[284] Disseminating obscenity is a Class 1 Felony in North Carolina.[285] Rayfield was convicted of all charges, and he was sentenced to imprisonment for no less than 640 months and no more than 788 months.[286] Additionally, the trial court admitted evidence of Rayfield's possession of "adult pornography found in his home" as evidence tending to show his "motive, intent, and common plan or scheme with respect to the alleged crimes."[287] The North Carolina Court of Appeals affirmed the trial court's denial of

275 *Id.*
276 *Id.*
277 State v. Kakosso, No. A12-0401, 2012 WL 6652598 (Minn. Ct. App. Dec. 24, 2012).
278 *Id.* at *1.
279 *Id.*
280 *Id.*
281 *Id.*
282 *Id.* at *6.
283 State v. Rayfield, 752 S.E.2d 745, 750 (N.C. Ct. App. 2014).
284 *Id.*; *see also* N.C. Gen. Stat. Ann. § 14-190.1(a) (West 2014) ("It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity.").
285 *See* N.C. Gen. Stat. Ann. § 14-190.1(g) (West 2014) ("Violation of this section is a Class 1 felony.").
286 *Rayfield*, 752 S.E.2d at 750.
287 *Id.* at 760.

Rayfield's motion to exclude this evidence, finding that its probative value outweighed the danger of unfair prejudice.[288] As such, even non-obscene, constitutionally protected pornography has been used as evidence of an obscenity offense.

g. Pennsylvania

Defendant Ty M. Levy was charged with two counts of Sexual Abuse of Children, five counts of Unlawful Contact with Minor, two counts of Corruption of Minors, one count of Indecent Exposure, and one count of Open Lewdness based on computer communications he had with a fifteen-year-old girl.[289] Accompanying these charges was one count of Obscene and Other Sexual Materials.[290] Specifically, Levy was charged with one count under subsection (c) of Pennsylvania's Obscene and Other Sexual Materials, which prohibits disseminating sexually explicit materials to a minor.[291] Violation of subsection (c) is a first-degree felony in Pennsylvania.[292] Ultimately, Levy was sentenced to six years of probation, which included sixteen months of incarceration.[293]

III. CURRENT TRENDS IN OBSCENITY PROSECUTIONS

An examination of the case summaries set forth above and the additional data contained in Appendices A and B reveals numerous interesting observations about the state of modern obscenity law and challenges the current consensus that obscenity law is a relic of the past. As an initial matter, the sheer volume of obscenity prosecutions that have taken place since 2000 on both the state and federal levels undercuts the notion that obscenity prosecutions have gone by the wayside. Even to this day, prosecutors in certain states continue to pursue obscenity charges against individuals transacting allegedly obscene materials in their jurisdictions. And while the federal government appears for the moment not to be prosecuting the sale or distribution of consensual adult online pornography, the number of cases instituted against those who distribute obscenity to minors is on

288 *See id.* at 761 ("It was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.").
289 Commonwealth v. Levy, No. CP–41–CR–988–2011, 2013 WL 6843076, at *1 (Pa. Super. Ct. Dec. 30, 2013).
290 *Id.* at *1.
291 *See* 18 Pa. Cons. Stat. Ann. § 5903(c) (West 2014) ("No person shall knowingly disseminate by sale, loan or otherwise sexually explicit materials to a minor.").
292 *See* 18 Pa. Cons. Stat. Ann. § 5903(h) (West 2014) ("Any person who violates subsection (c) . . . is guilty of a felony of the third degree."). Conversely, a violation of subsection (a), which prohibits a person from distributing obscene materials to any person over 18 years of age, is a first-degree misdemeanor. *Id.*
293 *Comm. v. Levy*, 2013 WL 6843076 at *1.

the rise.[294] Thus, obscenity continues to be a relevant topic in the modern landscape of First Amendment free speech law.

On a more substantive level, the recent federal obscenity prosecutions appear to focus on web-based transactions in larger metropolitan areas against fringe and, in some cases mainstream, content producers, while the state-based cases tend to target brick and mortar retailers selling a wide range of products. The federal cases also appear subject to administration changes and shifting budget priorities, while the state prosecutions are more immune to obvious political shifts. The sections below address these observations and further question what the future of obscenity law holds in light of recent case developments.

A. *Federal Trends*

The most obvious observation among the recent federal obscenity cases is that they all arose under a Republican presidential administration. In fact, the establishment of a centralized Department of Justice obscenity task force under Pres. George W. Bush's tenure has been well-documented.[295] While Pres. Obama dismantled the task force upon taking office, the Department of Justice continued to pursue the cases initiated by the unit during the Bush Administration.[296] Thus, the notion that only Republican attorneys general pursue obscenity cases is only partially correct. The current Democratic administration has tried before juries at least five obscenity cases since 2009 when Barack Obama took office.[297]

More significant than the notion that obscenity indictments tend to occur more often during Republican administrations is the manner in which the Bush-era prosecutions arose. With the exception of the *Extreme Associates* case, which was initiated by the United States Attorney for the Western District of Pennsylvania, nearly all of the charges were prosecuted and tried by attorneys from the Department of Justice task force in Washington, DC, rather than by the local United States Attorney's Offices in the districts of prosecution.[298] Thus, the indictments that were filed during the Bush Administration appeared to be in pursuit of a centralized federal agenda and not as a result of local opposition or investigation.

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294 *See* Appendix B.

295 Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21; Alberto R. Gonzales, Prepared Remarks at the U.S. Attorney's Conference (April 21, 2005), *available at* http:// www.usdoj.gov/ag/speeches/2005/042105usattorneysconference.htm) ("I've made it clear that I intend to aggressively combat the purveyors of obscene materials.").

296 Josh Gerstein, *Eric Holder Accused of Neglecting Porn Fight*, POLITICO (Apr. 16, 2011), http://www.politico.com/news/stories/0411/53314.html.

297 See Appendix A.

298 Gerstein, *supra* note 296.

Also notable among the recent federal prosecutions is their geography: the federal cases have been filed in large metropolitan cities and not rural or less populated locations. Indeed, some of the nation's largest cities—Washington, DC, Phoenix, Tampa, Pittsburgh and even the home of the pornography production business, Los Angeles—have been host to the most important federal obscenity cases to occur in years.[299] Thus, federal prosecutors have not been wary of confronting the contemporary community standards of seemingly evolved and more tolerant cosmopolitan cities.

In terms of content, federal prosecutors have almost exclusively targeted online content or material that could be mail-ordered through the web, perhaps due to the federal focus on regulating interstate commerce. This aspect of the federal obscenity agenda has allowed prosecutors to forum-shop cases into virtually any federal district. In fact, in the Paul Little case, the location of a remote computer server was the basis upon which jurisdiction was established in the Middle District of Florida.[300] In addition, viewed in concert with recent Congressional enactments, the prioritization of online obscenity appears to be part of a broader effort at the federal level to sanitize and censor the Internet.[301]

The federal prosecutions also notably began with more extreme or fringe material, but then migrated to more mainstream content and content producers. For example, it is no accident that John Stagliano, whose work has won numerous direction and lifetime achievement awards and is by all accounts more mainstream than his fellow federal obscenity defendants', was only charged after the government secured pleas and convictions in the *Extreme Associates* and *Paul Little* cases.[302] Given this pattern, a reasonable conclusion can be drawn that federal prosecutors attempted to affix community standards progressively, by targeting more obviously offensive content first and then narrowing their focus to the more mainstream.

B. *State Trends*

When compared with federal obscenity prosecutions over the last

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[299] John Stagliano's prosecution was in the nation's capital, JM and Five Star were tried in Phoenix, Paul Little's case arose in Tampa, Extreme Associates' indictment was filed in Pittsburgh, and Ira Isaacs was tried in Los Angeles. *See* Appendix A.

[300] Kevin Graham, *Jurors Convict Adult Film Producer*, TAMPA BAY TIMES (June 5, 2008), http://www.tampabay.com/news/courts/criminal/jurors-convict-adult-film-producer/609794 ("Attorneys with the Justice Department's Child Exploitation and Obscenity Section prosecuted the case in Tampa because Little's Max Hardcore site was housed on computer servers downtown for at least three years.").

[301] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 658 (2004); Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

[302] For biographical information on John Stagliano, *see John Stagliano*, WIKIPEDIA, http://en.wikipedia.org/wiki/John_Stagliano (last viewed Feb. 9, 2015).

ten years, state and local obscenity prosecutions have been extremely active, and are unique in many respects. Importantly, obscenity prosecutions at the state and local levels generate from the bottom up, meaning they originate by municipalities enforcing ordinances against "brick and mortar" obscenity, connections to other crimes, and localized undercover law enforcement investigations.

Cases targeting "brick and mortar" establishments seem commonplace in the reality of state obscenity prosecutions, yet these prosecutions are without a federal counterpart. Typically, state and local authorities levy obscenity charges against retail businesses and their owners and not the producers or online distributors of pornography. Although the severity of the obscenity charges obviously ranges from jurisdiction to jurisdiction, they can also range in severity from zoning violations and civil lawsuits, to criminal felonies. As discussed previously in this Article, these local enforcement activities are uniquely tied to geography.[303] Southern "Bible Belt" states are much more likely to pursue obscenity charges outright, while states in the Northeast utilize obscenity charges more sparingly to encourage plea bargains in sex-related cases.

State prosecutions also appear less focused in their intent to target extreme or fringe content. In fact, in many cases, the material charged by state authorities appears to be only marginally eligible for obscenity classification.[304] As such, state authorities seem less motivated to eliminate overly graphic or offensive material from local distribution and instead more likely to bring charges for the distribution of even mainstream adult-oriented expression.

State obscenity cases are also unique in the consumer patterns they encourage. Frequently, state prosecutors have pursued obscenity charges to chill the existence of adult business retail outlets in their communities and on occasion have used convictions as leverage to force stores to close down entirely.[305] There is no evidence, however, that these cases have quelled the demand for sexually explicit materials in communities where obscenity charges are filed. In fact, even in the wake of ongoing state prosecutions, online pornography has flourished, both in quantity and profit.[306] Thus, a reasonable inference can be made that state obscenity prosecutions are driving consumer traffic away from

303 *See supra* Parts II.B.1&2.

304 *See, e.g.*, The Associated Press, *Obscenity Charges Dropped*, *supra* note 171.

305 *See, e.g.*, *supra* Part II.B.1.c (discussing State v. Birman prosecution in Louisiana, which resulted in the closure of Birman's retail store).

306 Christopher Jackson, *From ASCII to Streaming Video: How the Internet Created a Multi-Billion Dollar Porn Industry*, TNW NEWS (Oct. 7, 2012), http://thenextweb.com/insider/2012/10/07/cybersex-ascii-pinups-celebrity-fakes-how-the-internet-created-a-97-billion-porn-industry/ (estimating world-wide online pornography profits at $97 billion, with United States profits at $13 billion).

brick and mortar stores and onto the Internet.

C. *Future Trends*

This entire inquiry begs the question: where is obscenity law headed in the future? It could certainly be the case, as scholars have argued, that obscenity prosecutions are truly a thing of the past and that the criminalization of pornography is over.[307] As American society becomes more open, tolerant, and diverse, government officials may have less public and political pressure to enforce obscenity laws, particularly in the wake of budget crises and shifting national priorities. But the winds of change could equally blow in a different direction. The United Kingdom, for example, has recently banned the creation and transaction of certain types of pornography after many years of permitting sexually explicit communication to occur *laissez faire*.[308] Morality and pro-family organizations continue to vociferously criticize the lack of enforcement of federal obscenity prohibitions.[309] And the promise of a new presidential administration in a matter of months brings with it a question mark in terms of where obscenity ranks on the list of prosecutorial priorities.[310] Thus, the climate of obscenity enforcement remains uncertain, particularly when considered against the backdrop of ongoing federal and state prosecutions over the past decade.

Moreover, aside from careful study of existing cases, one other point bears mention in predicting the future of obscenity law: the Supreme Court has not accepted an obscenity case for review in nearly two decades.[311] Despite the split in circuit authority over whether the

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307 For a synopsis of scholarly literature on the subject, *see supra* Part I.B.

308 Heather Saul, *UK Porn Legislation: What is Now Banned under New Government Laws*, THE INDEPENDENT (Dec. 2, 2014), http://www.independent.co.uk/news/uk/home-news/uk-porn-legislation-what-is-now-banned-under-new-government-laws-9898541.html.

309 *See, e.g.*, Jacob Stevens, *AG Eric Holder Tops Morality in Media's 2014 'Dirty Dozen List*,' CHARISMA NEWS (Feb. 27, 2014), http://www.charismanews.com/us/42950-ag-eric-holder-tops-morality-in-media-s-2014-dirty-dozen-list ("'Once again Attorney General Eric Holder tops our Dirty Dozen List for his support of pornographers over children and families,' says Patrick A. Trueman, president of Morality in Media. 'As the pandemic of harm from pornography grows, Holder gives criminal pornographers the green light to proceed by stopping all enforcement of federal obscenity laws.'").

310 Huppin & Malamuth, *supra* note 37, at 98–99 ("While new obscenity prosecutions for nonviolent fetish fare have not occurred under the Obama Administration, one could imagine their reemergence under a different administration that, feeling free from legal restraint, might choose to reset the political agenda.").

311 In fact, the Supreme Court has been reluctant of late to accept certiorari in *any* case involving adult entertainment. The last time the Court reviewed the constitutionality of an adult business licensing or zoning ordinance was in 2004 when it decided *City of Littleton, Colo. V. ZJ Gifts D-4, LLC*, 541 U.S. 774 (2004). Further indicative of the Court's hesitation to confront the First Amendment issues created by the dissemination of adult-oriented expression are the recent cases addressing broadcast indecency. For example, rather than rule upon whether stiff fines levied by the Federal Communications Commission against Janet Jackson's infamous "wardrobe malfunction" during the Super Bowl halftime show violated the First Amendment, the Court

first the *Miller* test is to be judged by national or local contemporary community standards when the case involves the Internet, and despite the dismissal of at least one federal indictment on substantive due process grounds, the Supreme Court has declined to intervene.[312] The Court's silence creates some troubling concerns. First, is the Court's reluctance to address the subject of modern obscenity law an expression of its approval of ongoing enforcement activity? In other words, the Court could tacitly approve of patchwork obscenity prosecutions based on its refusal to intervene in even a single case. Moreover, how does the proliferation of Internet pornography and the rapidly changing technological landscape impact the Court's perspective on obscenity? Are the lower courts free to create new tests as societal norms evolve, as the Ninth Circuit did in *Kilbride*,[313] or is *Miller* still the law of the land? Until the government pursues and the Court agrees to review obscenity cases that squarely present these issues, the questions will remain unanswered. Yet, it is important to raise them, and to vigilantly watch the lower courts for ideological and technological shifts that impact First Amendment obscenity doctrine.

However, the Supreme Court's silence on obscenity in the face of ongoing obscenity prosecutions raises a deeper, and more perplexing, question. What is the real impact on speech of obscenity law when enforcement activity is randomized and inconsistent across jurisdictions? Scholars have attempted to answer this question by definitively arguing that sexually oriented speech has triumphed over censorship in a permanent and lasting way. Indeed, Prof. Adler's oft-cited quote summarizes the school of thought simply and poignantly: "[i]n the escalating war against pornography, pornography has already won."[314] But this view is an over-simplification. Pornography has not, in fact, "won" when individuals continue to serve steep prison sentences for the mere dissemination of speech online, speech that is readily available in both quality and quantity from other outlets with the click of a button no less.[315] Indeed, Robert Zicari, Janet Romano, Paul Little, Ira Isaacs, and countless other convicted obscenity defendants doubtfully felt they had "won" when they were incarcerated for their

instead denied certiorari and let stand a narrow Third Circuit ruling that rested on administrative rather than constitutional principles. *See* Fed. Communications Comm'n v. CBS Corp., 132 S.Ct. 2677 (2012); Fed. Communications Comm'n v. Fox Television Stations, Inc., 132 S.Ct. 2307 (2012). In *Fox*, the Court avoided the First Amendment question with regard to the FCC's fleeting expletives policy, resolving the case on due process grounds instead. *Fox Television Stations*, 132 S.Ct. 2307.

312 United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009); United States v. Extreme Associates, Inc., 352 F.Supp.2d 578 (W.D. Pa. 2005).

313 *Kilbride*, 584 F.3d at 1240.

314 Adler, *supra* note 2, at 695.

315 Mark Ward, *Web Porn: Just How Much Is There?*, BBC (June 30, 2013), http://www.bbc.com/news/technology-23030090.

speech.[316] Perhaps what Prof. Adler and others mean to say is that obscenity prosecutions no longer produce a chilling effect on the creation and dissemination of sexually explicit expression, given that the range of pornography available on the Internet has expanded exponentially over the past decade. But that is a different point than saying obscenity law no longer exists or is a historical legal relic, and one First Amendment scholars should make more clearly.

So what of the existing prosecutions? What do they mean in terms of First Amendment law generally? Several inferences can be made from the fact that prosecutors continue to target obscene speech, even if irregularly or arbitrarily. First, no sexually explicit speech is fully immune from being criminalized, punished, and censored as obscenity. As the last decade and a half have shown, prosecutors remain armed with obscenity laws and are willing on occasion to enforce them. Second, contemporary community standards are not as tolerant and open as scholars may believe them to be. Juries in large metropolitan areas will still convict certain content as obscene despite its mass availability on the World Wide Web.[317] Lastly, given the Supreme Court's refusal to intervene, obscenity law remains an important component of First Amendment jurisprudence, because it is one of only a handful of mechanisms by which speech—even speech that is consensual, available, and presented only to adults—can be criminalized. In light of the limited utility of obscenity prosecutions in today's Internet age, perhaps the time has come for the courts to rework or undo altogether the "intractable obscenity problem."[318]

CONCLUSION

Obscenity law is anything but dead. Over the past decade, obscenity cases have continued to be vigorously and aggressively prosecuted on both the state and federal levels. There is much the legal academy can discern from these cases, including the respective prosecutorial priorities of various government agencies and the wide range of community standards that exist in diverse metropolitan communities. But on a broader level, the plethora of obscenity cases that continue to be litigated raise more questions about the future of First Amendment free speech law than they answer. What role will the Internet play in shaping future obscenity charges? Will state and local prosecutors continue to drive consumers to online outlets by targeting brick and mortar stores? Will a new political administration at the

316 *See supra* Part II.A.

317 *See* United States v. Isaacs, 565 Fed.Appx. 637, 637 (9th Cir. 2014); United States v. Little, 365 Fed.Appx. 159, 169 (11th Cir. 2010).

318 Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

federal level bring with it a measurably different take on the enforcement of the criminal obscenity statutes? Only time will tell what the future holds for obscenity law. In the meantime, and in real time, scholars would be wise to study the full range of state and federal cases targeting sexually explicit speech before pronouncing obscenity law's untimely death.

APPENDIX A:
FEDERAL AND STATE OBSCENITY PROSECUTIONS SINCE 2000

A. *Federal Cases*

1. *United States v. Stagliano*, 693 F. Supp. 2d 25 (D.D.C. 2010).

   Jurisdiction*:* United States District Court for the District of Columbia

   Defendants: John Stagliano; John Stagliano, Inc.; Evil Angel Productions, Inc.

   Obscenity Charges: 3 counts for violating 18 U.S.C. § 1465 and 2(a) (Aiding and Abetting, Transportation of Obscene Matters for Sale or Distribution); 2 counts for violating 18 U.S.C. § 1462 and 2(a) (Aiding and Abetting, Using a Common Carrier or Interactive Computer Service to Transport Obscene Matters); 1 count for violating 18 U.S.C. § 1466 (Engaging in the Business of Selling or Transferring Obscene Matter)

   Accompanying Charges: 18 U.S.C. § 2 (Aiding and Abetting); 18 U.S.C. § 1467 (Criminal Forfeiture); 47 U.S.C. § 223(d) (Sending or Displaying Offensive Material to Persons Under 18)

   Type of Material: 1 motion-picture film, entitled "Milk Nymphos"; 1 motion-picture film, entitled "Storm Squirters 2 'Target Practice'"; a motion-picture trailer identified as "Fetish Fanatic Chapter 5"

   Method of Distribution: 2 motion-picture film may be purchased on DVD or available via download on numerous websites registered to Stagliano; the movie trailer was downloaded from a website (www.evilangel.com)

   Outcome: Acquittal granted by U.S. District Court Judge Richard Leon

   Sentence: N/A

   Subsequent History: None

2. *United States v. Kilbride*, 507 F. Supp. 2d 1051 (D. Ariz. 2007).

Jurisdiction: United States District Court of Arizona

Defendants: Jeffrey A. Kilbride, and James R. Schaffer

Obscenity Charges: Counts 4-5: 18 U.S.C. § 1462 (Importation or Transportation of Obscene Matters) and § 2 (Aiding and Abetting); Counts 6-7: 18 U.S.C. § 1465 (Transportation of Obscene Matters for Sale or Distribution) and § 2 (Aiding and Abetting)

Accompanying Charges: Count 1: 18 U.S.C. § 371 (Conspiracy); Count 2: 18 U.S.C. §§ 1037(a)(3) (Fraud in Connection with Electronic Mail) and § 2 (Aiding and Abetting); Count 3: 18 U.S.C. §§ 1037(a)(4) (Fraud in Connection with Electronic Mail and § 2 (Aiding and Abetting); Count 8: 18 U.S.C. § 1956(h) (Laundering of Monetary Instruments); Count 9: 18 U.S.C. §§ 2257(f)(3) and (f)(4) (Record Keeping Requirements) and § 2; 18 U.S.C. §§ 982(a)(1), 1037(c), and 1467 (Forfeiture Allegations)

Type of Material: bulk unsolicited commercial electronic mail messages, commonly known as "spam messages," some embedded with pornographic images; A computer graphic image, "Fist Action!"; a computer graphic image, "Ass Munchers"

Method of Distribution: The Internet

Outcome: Defendant Kilbride: Jury found GUILTY on Counts 1–8; Defendant Schaffer: Jury found GUILTY on Counts 1–8;

Sentence: Jeffrey Kilbride ("Kilbride") was sentenced to 78 months and Robert Schaffer ("Schaffer") was sentenced to 63 months.

Subsequent History: AFFIRMED by the 9th Circuit: 584 F.3d 1240 (9th Cir. 2009)

3. *United States v. Clason*

Jurisdiction: United States District Court for the District of Arizona

Defendants: Jennifer Clason

Obscenity Charges: Counts 4-5: 18 U.S.C. § 1462 (Importation or Transportation of Obscene Matters) and § 2 (Aiding and Abetting);

Counts 6-7: 18 U.S.C. § 1465 (Transportation of Obscene Matters for Sale or Distribution) and § 2 (Aiding and Abetting)

Accompanying Charges: Count 1: 18 U.S.C. § 371 (Conspiracy); Count 2: 18 U.S.C. §§ 1037(a)(3) (Fraud in Connection with Electronic Mail) and § 2 (Aiding and Abetting); Count 3: 18 U.S.C. §§ 1037(a)(4) (Fraud in Connection with Electronic Mail and § 2 (Aiding and Abetting); Count 8: 18 U.S.C. § 1956(h) (Laundering of Monetary Instruments); Count 9: 18 U.S.C. §§ 2257(f)(3) and (f)(4) (Record Keeping Requirements) and § 2; 18 U.S.C. §§ 982(a)(1), 1037(c), and 1467 (Forfeiture Allegations)

Type of Material: Bulk unsolicited commercial electronic mail messages, commonly known as "spam messages," some embedded with pornographic images; A computer graphic image, "Fist Action!"; a computer graphic image, "Ass Munchers"

Method of Distribution: The Internet

Outcome: Pleaded guilty on March 6, 2006, to two spamming counts under the CAN-SPAM Act and one count of criminal conspiracy.
http://www.justice.gov/opa/pr/2006/March/06_crm_123.html

Sentence: Max 5 years in prison for each offense

Subsequent History: None

4. *United States v. Paul Little*, No. 8:07-cr-170-T-24-MSS, 2008 WL 2397602 (M.D. Fla. June 10, 2008).

Jurisdiction: United States District Court for the Middle District of Florida

Defendants: Paul F. Little aka Max Hardcore aka Max Steiner; Max World Entertainment, Inc.

Obscenity Charges: Five Counts under 18 U.S.C. § 1465 and § 2; Five counts under 18 U.S.C. § 1461 and § 2

Accompanying Charges: Forfeiture under 18 U.S.C. § 1467; 28 U.S.C. § 2461(c)

Type of Material: Video files located on the Max Hardcore website;

specific DVDs mailed to a post office box////an obscene matter, that is, a video file entitled "me20europromo.wmv," approximately 1:26 in length, through the website "www.maxhardcore.com"; a video file entitled "px19europromo.wmv," approximately 1:53 in length, through the website "www.maxhardcore.com"; a video file entitled "ggo7europromo.wmv," approximately 1:59 in length, through the website "www.maxhardcore.com"; a video file entitled "ffo4promo.wmv" approximately 2:38 in length, through the website "www.maxhardcore.com"; a video film entitled "pm16europromo001.wmv" approximately 1:32 in length, through the website "www.maxhardcore.com"; a DVD identified as "MAX HARDCORE EXTREME, Volume Number 20 - Euro Edition"; a DVD identified as "PURE MAX 19 - Euro Edition"; non-mailable obscene matter, that is, a DVD identified as "MAX HARDCORE Golden Guzzlers 7 - Euro Edition"; a DVD identified as "Fists of Fury 4 - Euro Edition"; a DVD identified as "PLANET MAX 16 - Euro Edition"

Method of Distribution: The Internet and U.S. Mail

Outcome: Jury found the defendant GUILTY on all ten counts

Sentence: October 2008: 46 months in a minimum-security federal prison and a $7,500 fine, as well as a $75,000 fine for his company, MaxWorld Entertainment.

Subsequent History: AFFIRMED, 365 Fed. App'x 159 (11th Cir. 2010); 2010 WL 357933

5. *United States v. Five Star Video*, L.C., CR-06-515-PHX-ROS (D. Ariz. 2007).

Jurisdiction: United States District Court for the District of Arizona

Defendants: "Five Star Video, L.C.; Five Star Video Outlet, L.C.; Christopher Warren Ankeny; Kenneth James Graham; Jeff Mike Productions, Inc.; Mike Leonard Norton"

Obscenity ChargesCounts 1-4: 18 U.S.C. - 1465 (Transportation of Obscene Matter); Count 5: 18 U.S.C. - 1461 (Mailing Obscene Matter); Counts 6-14: 18 U.S.C. - 1462 (Transportation of Obscene Material Using a Common Carrier); Counts 15-17: 18 U.S.C. - 1466 (Engaging in a Business of Selling or Transferring Obscene Material)

Accompanying Charges: Count 18: 18 U.S.C. - 1467 (Forfeiture Allegation)

Type of Material: obscene DVDs: "Gag Factor 18"; "Filthy Things 6"; "Gag Factor 15"; "American Bukkake 13"

Method of Distribution: Interactive computer service; United States Mail; express company or other common carrier

Outcome: Conviction on Count VII (knowingly using an express company or other common carrier for carriage in interstate commerce: Gag Factor 18) [*see* http://www.adultindustryupdate.com/archives/Lessons%20Learned.pdf]

6. *United States v. Isaacs*, No. CR 07-732-GHK, 2008 WL 4346780 (C.D. Cal. Sept. 19, 2008)

Jurisdiction: United States District Court, C.D. California

Defendants: Ira Isaacs, dba "Stolen Car Films," dba "La Media"

Obscenity Charges: Counts 1-4: 18 U.S.C. - 1465 (Importation or Transportation of Obscene Material for Sale or Distribution); Counts 5-6: 18 U.S.C. - 1462(a) (Importation or Transportation of Obscene Material)

Accompanying Charges: Counts 7-8: 18 U.S.C. - 2257(f)(4) (Improper Record Keeping for Material Depicting Sexual Activity); 18 U.S.C. - 1467 (Forfeiture Allegation)

Type of Material: obscene pictures and films, including movies; DVDs////obscene pictures and films, namely, movies with the following titles: "Gang Bang Horse 'Pony Sex Game'; "Mako's First Time Scat"; "Hollywood Scat Amateurs No. 7"; "Bae 20". Also, DVDs containing the movies with the following titles, which were intended for shipment in interstate commerce, which contained one or more visual depictions of actual sexually explicit conduct made after December 1991, and which were produced in whole or in part with materials which had been mailed or shipped in interstate or foreign commerce, and which did not have affixed thereto a statement describing where the required age documentation records for all performers depicted in the visual depictions of actual

sexually explicit conduct could be located: "Hollywood Scat Amateurs No. 7" and "Laurie's Toilet Show."

Method of Distribution: interactive computer service; express company; common carrier; intended for shipment in interstate commerce

Outcome: Found guilty on one count of engaging in the business of producing and selling obscene videos and four counts of distributing obscene videos

Sentence: 48 months in prison, three years of supervised release and a $10,000 fine (http://blogs.laweekly.com/informer/2013/01/ira_isaacs_porn_sentenced_48_months_obscene_los_angeles_federal.php)

Subsequent History: AFFIRMED, United States v. Isaacs, 359 F. App'x 875 (9th Cir. 2009); Cert. Denied, Isaacs v. United States, 130 S. Ct. 3519

7. *Ragsdale v. United States*, Nos. 3:07-CV-0325-D, 3:03-CR-0072-D (01), 2008 WL 2390172 (N.D. Tex. June 11, 2008).

Jurisdiction: United States District Court, Northern District of Texas"

Defendants: Garry Layne Ragsdale; Tamara Michelle Ragsdale

Obscenity Charges: 18 U.S.C. -- 1461 and 1462 (mailing obscene material)

Accompanying Charges: one count of conspiracy in violation of 18 U.S.C. - 371 (conspiracy to mail obscene material)

Type of Material: "videotapes depicting rape/// "Real Rape 1"; "Brutally Raped 5"; "www.forbiddenvideos.com" [cite to: http://www.adultindustryupdate.com/archives/Lessons%20Learned.pdf]

Method of Distribution: Internet; mail

Outcome: Found GUILTY on the obscenity chargesGarry Ragsdale: 33 months in prison;

Sentence: Tamara Ragsdale to 30 months in prison

Subsequent History: AFFIRMED, United States v. Ragsdale, 426 F.3d 765 (5th Cir. 2005)

8. *U.S. v. McDowell*, 498 F.3d 308 (5th Cir. 2007).

Jurisdiction: United States District Court for the Northern District of Texas

Defendants: Brent Alan McDowell; Clarence Thomas Gartman

Obscenity Charges: conspiring to violate federal obscenity laws (18 U.S.C. -- 371, 1461, and 1465); violating, and aiding and abetting the violation of 18 U.S.C. - 1465 (Two counts; knowingly using an interactive computer service to sell and distribute obscene material), and 18 U.S.C. - 1461 (knowingly using the United States mails to deliver obscene material)

Additional Charges: Aiding and Abetting

Type of Material: [1] 30 CDs containing a one-hour sadomasochistic movie confiscated at the Canadian border by Canadian customs officials; [2] a set of ten CD-ROM videos from the "Sexual Torture" category, including one titled "Torture Video 23", advertised as, among other things, "really hard S&M [sadistic and masochistic] action"

Method of Distribution: Internet/website; United Parcel Service (UPS); United States mail

Outcome: The Jury found McDowell guilty of aiding and abetting the use of the United States mails to deliver obscene material, but acquitted him on the remaining three counts. The jury found Gartman guilty of conspiring to violate federal obscenity laws and of mailing obscene matter, but acquitted him on his remaining charges.

Sentence: McDowell: 30 months in prison; Gartman: 34 months in prison

Subsequent History: McDowell appealed: The 5th Circuit VACATED McDowell's conviction under 18 U.S.C. - 1461 (knowingly using the United States mails to deliver obscene

material), United States v. McDowell, 498 F.3d 308 (5th Cir. 2007)

9. *United States v. Croce et al*, Case No.: 6-06-cr-00182-GAP-DAB (M.D. Fla. Aug. 29, 2007).

   Jurisdiction: United States District Court, Middle District of Florida Orlando Division

   Defendants: Danilo Simoes Croce (a Brazilian lawyer?)

   Obscenity Charges: Count I: conspiracy to mail obscene material in violation of 18 U.S.C. - 1461 and 371; Counts II, III, and IV:

   Type of Material: The videos depicted bukkake, fisting, and depictions of defecation, urination, and vomiting in conjunction with sex acts.(see justice.gov). "Toiletman 6"; "Bukkake 3"; "Scat Pleasures"; "Scat Fist Fucking 2" (see adultindustryupdate.com)

   Method of Distribution: hosted on web servers in Texas; Delivered to U.S. customers by mail and common carriers from a location in Orlando, Fla.

   Outcome: Entered Plea Agreement: Defendant plead guilty to Count I and the Government dismissed Counts II, III, and IV pursuant to Fed. R. Crim. P. 11(c)(1)(A). Defendant agreed to pay a fine of $2,000 and forfeit $98,000 in cash and agreed to forfeit to the gov't all equipment and materials connected with his business operations in Florida, call copies of certain obscene films in the company's possession, and all Internet domain names used by Lex Multimedia, which also conducted business as Lexus Multimedia, MFX, and Dragon Films (see justice.gov press release)

   Sentence: Incarcerated for almost a year during his prosecution and sentenced to "time served" and deported pursuant to his plea agreement

   Subsequent History: N/A

10. *United States v. Fletcher*, 2008.

    Jurisdiction: Western District of Pennsylvania

    Defendants: Karen Fletcher (pen name "Red Rose")

Charges: Charged in Sept. 2006 of six counts of distributing obscenity online

Method of Distribution: owned and operated a public Web site that distributed "text stories." On the site, Fletcher posted story excerpts that described the sexual molestation and violent abuse of children. Individuals could buy memberships to additional areas of the site where full stories, describing the sexual abuse, rape, torture, and murder of newborn to teenage children, were available (see Justice.gov).

Outcome: Pleaded guilty to six counts of using an interactive computer service to distribute obscene materials

Sentence: Sentenced to serve five years probation and ordered to forfeit computer equipment used to operate her Web site. Fletcher was also ordered to serve the first six months of her probation under home detention and pay a $1,000 fine.

11. Ronny Justin Myers (Feb. 15, 2013)

Jurisdiction: Joplin, Missouri - U.S. District Court for the Western District of Missouri

Charges: Charged with sending obscene material over the Internet to a minor

Type of Material: Four obscene/pornographic images (cannot find the details)

Method of Distribution: Defendant tried to communicate with a 14-year-old girl through private Facebook messaging (sent the four obscene images to the minor) and made plans to meet her at a mall during his lunch break.

12. *United States v. McCoy*, 678 F. Supp. 2d 1336 (M.D. Ga. 2009).

Jurisdiction: U.S. District Court for the Middle District of Georgia, Albany Division

Defendants: Frank Russell McCoy

Obscenity Charges: Violation of 18 U.S.C. 1462 (Importation or Transportation of Obscene Matters) and § 2 (Aiding and Abetting)

Type of Material: Written stories depicting the sexual abuse, rape, and murder of children

Method of Distribution: The Internet

Outcome: Guilty as Charged

Sentence: Eighteen months of imprisonment, two-years supervised release, and a $100.00 mandatory assessment fee

13. *United States v. Extreme Assoc., Inc.*,

Defendants: Robert Zicari and Janet Romano

14. *United States of America v. Loren Jay Adams*

Jurisdiction: United States District Court for the Northern District of West Virginia

Defendants: Loren Jay Adams

Obscenity Charges: Counts 1-3 Violation of 18 U.S.C. § 1461 (transportation of obscene matter by United States mail), Counts 4-6 Violation of 18 U.S.C. § 1465 (transportation of obscene matter for sale or distribution)

Accompanying Charges: None Known

Type of Material: Films "Doggie3Some" and "Anal Doggie and Horse" depicted women engaging in sexual acts with dogs and a horse, and the representative portion of the third film, "Fisting 1," depicted women being penetrated by large objects.

Method of Distribution: United States Mail

Outcome: Convicted of all counts

Sentence: Thirty-three months' imprisonment

Subsequent History: Affirmed 2009 WL 2196796 (4th Cir., July 24, 2009).

15. *United States v. Adult DVD Empire*

Jurisdiction: U.S. District Court, Western District of Pennsylvania

Defendants: Adult DVD Empire aka Right Ascension, Inc.

Obscenity Charges: Violation of 18 U.S.C. § 1461 (transportation of obscene matter by United States mail)

Type of Material: Four DVDs entitled, "A Bounty of Pain," "Shattering Krystal" both from Dan Hawke Productions, "Extreme Tit Torture 18" from Galaxy Productions and "Pussy Torture 8" also from Galaxy and directed by Rick Savage

Method of Distribution: United States Mail

Outcome: Plea Bargain

Sentence: Three years of probation, and a fine of $75,000

16. *United States v. O'Malley*

Jurisdiction: United States District Court, Northern District of Ohio

Defendants: Patrick J. O'Malley

Obscenity Charges: Violation of 18 U.S.C. 1462(a) (Transportation and Importation of Obscene Matters)

Type of Material: Files on a personal computer depicting "child porn" and sexually deviant acts

Outcome: Defendant plead guilty

Sentence: 15 months federal prison

17. *United States v. Harb*

Jurisdiction: United States District Court, District of Utah, Central Division

Defendants: Sami Harb, Michael Harb, Dba Movies by Mail

Obscenity Charges: Violation of 18 U.S.C. § 1461 (Using the

United States Mail to Transport Obscene Matter in Interstate Commerce) and violation of 18 U.S.C. § 1466 (Engaging in a Business of Selling or Transferring Obscene Matter)

Type of Material: Pornographic DVDs

Method of Distribution: Internet website "moviesbymail.com" and United States Mail

Outcome: A plea agreement was reached, and each Defendant pleaded guilty to one count of selling obscene material

Sentence: Each Defendant received 366 days in Federal Prison

18. *United States v. Fletcher*

Jurisdiction: U.S. District Court for the Western District of Pennsylvania

Defendants: Karen Fletcher

Obscenity Charges: Violation of 18 U.S.C. 1462 (Importation or Transportation of Obscene Matters) and § 2 (Aiding and Abetting)

Type of Material: Written stories depicting molestation of children, and stories describing the sexual abuse, rape, torture, and murder of newborn to teenage children

Method of Distribution: The Internet

Outcome: Plea bargain, pleaded guilty to all counts

Sentence: Five years' probation, a $1,000 fine, and the forfeiture of all computer equipment used for the web site

19. *United States v. Goldman*, CR-08-98-BLG-RFC (D. Mont., March 30, 2009).

Jurisdiction: United States District Court for the District of Montana, Billings Division

Defendants: Barry Goldman, d/b/a 'Torture Portal', 'Masters of Pain', and 'Bacchus Studio'

Obscenity Charges: Violation of 18 U.S.C. § 1461 (Mailing obscene or crime-inciting matter) and § 1467 (criminal forfeiture)

Type of Material: Pornographic films Punishment of Crista; Porn Store Girl; Bondage Model #1; Bondage Model #2; Breaking of Crista; and Defiant Crista

Method of Distribution: United States Mail

Outcome: Plea bargain, pleaded guilty

B. *State Cases*

1. Brian H. Downing

Jurisdiction: Louisiana– Orleans Parish Criminal Court

Defendants: Brian H. Downing

Obscenity Charges: two state charges of obscenity

Accompanying Charges: sexual battery

Type of Material: Downing exposed his genitals and performed a simulated sex act on an unconscious man at a restaurant on Bourbon Street in front of a crowd of other Alabama fans after the BCS championship game

Method of Distribution: A video that went viral on the Internet

Outcome: The Defendant pleaded guilty to two counts of obscenity and Prosecutors agreed to drop a charge of sexual battery.

Sentence: 2 years in prison

2. *State v. Greaves*

Jurisdiction: Florida– Polk County

Defendants: Phillip R. Greaves

Obscenity Charges: charged with Distribution of Obscene Material Depicting Minors Engaged in Conduct Harmful to Minors (Florida Statute 847.011(1)(C)). The offense is a 3rd degree felony

Accompanying Charges: None.

Type of Material: Book: "The Pedophile's Guide to Love and Pleasure: a Child-Lover's Code of Conduct"

Method of Distribution: Greaves sold and mailed the book directly to undercover deputies at an address in Lakeland, Fla., for $50.00. The book was also available on Amazon for purchase.

Outcome: Greaves plead no contest.

Sentence: 2 years' probation

Subsequent History: None

3. Dan Sasha Birman

Jurisdiction: Ruston, Louisiana– Lincoln Parish"

Defendants: Dan Sasha Birman

Obscenity Charges: Charged with violating state obscenity laws (a state felony)

Accompanying Charges: None

Type of Material: Owned/operated Fantasy Video

Method of Distribution: Selling sexually explicit material to undercover state troopers in April 2003

Outcome: A jury found Birman guilty of violating state obscenity laws; he was convicted of selling sexually explicit material to undercover state troopers in April 2003

Sentence: Avoided jail time by agreeing to immediately close his business and agree to stay out of the porn business

4. *State v. McCowen*

Jurisdiction: Florida–Santa Rosa Circuit Court

Defendants: Clinton Raymond McCowen aka Ray Guhn; Keven

Patrick Stevens

Obscenity Charges: State court charges of RICO (Racketeer Influenced and Corrupt Organization), Florida Statute 895.03 (floridacriminallawblog.com) // Obscenity (Tampa Bay Article)

Accompanying Charges: Soliciting and engaging in prostitution; racketeering (Tampa Bay Article); conspiracy (Florida criminal law blog)

Type of Material: Occurred over a seven year period and stemmed from using local "models" or actors and actresses in Pensacola as performers in sexually explicit movies (floridacriminallawblog.com)

Method of Distribution: The movies were uploaded to a website known in cyberspace as "Ray Guhn"//at its peak the website had 5,000 subscribers and there was a $30/month access fee (floridacriminallawblog.com)"

Outcome: In exchange for a plea agreement the State dropped some of the charges against the defendants and agreed to a range of imprisonment of two to four years for the General Manager and 3 to five years for the website's owner (floridacriminallawblog.com)

Sentence: Plea agreement resulting in 48 months incarceration (Lessons Learned PDF)

5. *State v. Craft*, 2006 CF 004976 A; 2006 CF 003151 A

Jurisdiction: Florida– Pensacola

Defendants: Andrew "Jim Manley" Craft

Obscenity Charges: 2 counts of Public Order Crimes – Racketeering violation

Accompanying Charges: 1 count of destroying evidence

Type of Material: General Manager for CashTitans, an affiliate program run by Ray Guhn; using local ""models"" or actors and actresses in Pensacola as performers in sexually explicit movies "

Outcome: NOLLE PROSEQUI on all counts (Escambia clerk of

courts)

6. Ryan Hargroder and Erika Bordelon

   Jurisdiction: Louisiana – Lafayette

   Defendants: Ryan Hargroder; Erika Bordelon

   Obscenity Charges: Obscenity charges for violating state and city obscenity laws, filed by District Attorney Mike Harson///an obscenity charge is levied against the owner of a business and punishable by a fine of $1,000 to $2,500 coupled with six months to three years imprisonment

   Accompanying Charges: None known

   Type of Material: Owners of "The Bad Kitty," a shop selling sex toys and pornographic DVDs

   Method of Distribution: pornographic DVD's for sale in the owners' shop

   Outcome: The DA indicated that he would not press charges on the condition that the Bad Kitty no longer try to sell videos. Officials have said the confiscated DVDs will be burned.City police entered The Bad Kitty and confiscated roughly 200 DVD's worth $2,000, one month after the store opened.

7. Edward Burleigh

   Type of Material: owner of "Video Place" in Louisiana

8. *Jacob v. Louisiana*

   Jurisdiction: Sixteenth Judicial District Court – Louisiana

   Defendants: Emmette Jacob Jr. (attorney is Joseph Obenberger); Le Video Store, Inc.

   Obscenity Charges: Three counts of Obscenity, asserting that an agent of the Petitioners sold, rented, or otherwise distributed two allegedly obscene videotapes and one allegedly obscene magazine

   Accompanying Charges: None known

Type of Material: Owner of "Le Video" in Louisiana

Method of Distribution: Two allegedly obscene videotapes and one allegedly obscene magazine, sold in the Defendant's shop

Outcome: The Louisiana Court of Appeal, Third Circuit, opinion and judgment affirmed in part and reversed in part (directed the trial court to consider Defendants' overbreadth challenge to Louisiana's obscenity statute) the ruling of the Sixteenth Judicial District Court denying the motion by the Petitioners, the Defendants in the trial court, to dismiss the charging instruments which the State of Louisiana has lodged against them.

Subsequent History: Louisiana Supreme Court denied review. United States Supreme Court denied review.

9. *Commonwealth v. Rollins*, 799 N.E.2d 1287, 60 Mass. App. Ct. 153 (Mass. App. Ct. 2003).

Jurisdiction: District Court Department, North Adams Division, Berkshire County

Defendants: Mark A. Rollins

Obscenity Charges: Three counts charging violations of M.G.L.A. 272 § 29: Dissemination or possession of obscene matter

Accompanying Charges: One count charging a violation of M.G.L.A. 272 § 28: Matter harmful to minors, dissemination; possession; three counts of littering; three counts of disorderly conduct; three counts of annoying or accosting a person of the opposite sex

Type of Material: [1] Defendant dropped from his car pages torn from a magazine containing what a witness described as "[p]ornographic" material; [2]Defendant threw from his car in front of someone's house a second set of pages torn from a magazine appearing to be pornographic material; [3] a "pornographic" videocassette box with Defendant's fingerprints found in a road (no charges brought in connection with this evidence); [4] Defendant dropped sexually explicit papers from his car behind a school bus

Method of Distribution: The Defendant dropped the "pornographic"

material from his car out of the window around the neighborhood on three separate occasions.

Outcome: Defendant was convicted after bench trial of disseminating obscene matter and disseminating matter harmful to a minor. Also convicted on the three counts of littering; three counts of disorderly conduct; three counts of annoying or accosting a person of the opposite sex

Subsequent History: Massachusetts Appeals Court, Berkshire, AFFIRMED the judgments on the 3 counts of Dissemination or possession of obscene matter; REVERSED the judgment on one count of dissemination or possession of Matter harmful to minors."

10. *Varkonyi v. State*, 276 S.W.3d 27 (Tex. App. El Paso 2008).

Jurisdiction: Texas – County Court at Law No. 7, El Paso County

Defendants: Thomas Varkonyi

Obscenity Charges: Promotion of or possession with intent to promote obscene material

Additional Charges: None known

Type of Material: Defendant showed undercover officers various images on his computer, including a video depicting a woman being sexually penetrated by a pony;

Method of Distribution: Defendant showed the video to undercover officers in his home and then later transmitted to an undercover officer the video as an e-mail attachmentDefendant was convicted in a bench trial of promotion of or possession with intent to promote obscene material

Outcome: The court assessed punishment at confinement in the El Paso County Jail for a term of twenty days.

Subsequent History: Court of Appeals of Texas, El Paso, AFFIRMED the lower court.

11. Kyle Landon Sheets

Jurisdiction: Kentucky – Kenton County

Defendants: Kyle Landon Sheets arrested on 1/4/13

12. *State of Ohio v. Jennifer Dute*

Jurisdiction: Ohio – Hamilton County Court

Defendants: Jennifer Dute; A&J Specialties added as Defendant to Count II (J. Dute removed as Defendant to count II)

Obscenity Charges: 2 counts of pandering obscenity (misdemeanors)

Accompanying Charges:None

Type of Material:Videotapes of her sexual encounters

Method of Distribution: The Defendant personally sold the tapes

Outcome: Plead guilty to both counts of pandering obscenity

Sentence: Sentenced to six months in jail

Subsequent History: In May 2003, the Ohio 1st District Court of Appeals threw out Dute's original conviction on four charges of felony pandering obscenity for selling the videos in the early months of 2002. She has served eight months of a year-long sentence on the charges. (see enquirer.com article)

13. *State v. Lion's Den, LLC*

Jurisdiction: Kansas, Dickinson County District Court

Defendants: Lion's Den, LLC

Obscenity Charges: Violation of K.S.A. § 68-2255 (Obscenity Statute) – Disseminating Obscene Devices

Type of Material: "Enhancement devices" including dildos and artificial vaginas

Method of Distribution: In-store

Outcome: Charges Dismissed – Court Ruled Kansas' Obscenity

Statute "unconstitutional as written"

14. *State v. Spirit Halloween*

Jurisdiction: The District Court of Johnson County, Kansas

Defendants: Spirit Halloween, LLC

Obscenity Charges: Violation of K.S.A. § 68-2255 (Obscenity Statute)

Type of Material: Halloween Costumes, "Country Lovin," "Snake Charmer," "Tricky Dick," and "Wet T-shirt," which were visible to minors

Method of Distribution: In-store

Outcome: Charges dropped after the costumes were moved to a less accessible location

15. *State v. Hollywood at Home*

Jurisdiction: The District Court of Johnson County, Kansas

Defendants: Hollywood at Home

Obscenity Charges: Counts 1-4 Violation of K.S.A. 21-4301 and K.S.A. 21-4502(1)(a). (Promoting obscenity)

Type of Material: DVDs "Don't Kiss Me I'm Straight," "Hellcats 12," "Anal Machines," and "Real Female Masturbation"

Method of Distribution: In-store

Outcome: Charges dropped

16. *State v. Priscilla's*

Jurisdiction: The District Court of Johnson County, Kansas

Defendants: Priscilla's

Obscenity Charges: Violations of K.S.A. 21-4301 and K.S.A. 21-4502(1)(a). (promoting obscenity)

Type of Material: "a Radiant Gems fuchsia Doc Johnson Ballsy Cock device, commonly known as a dildo," "a Doc Johnson Enterprises Crystal Jellies Classic 8 Clear Jelly device, commonly known as a dildo," "a Chrissy the coed cheerleader doll," "a Fujika's waterproof anal probe, commonly known as a butt plug," "A Humm Dinger cock ring," "a Rockman Entertainment DVD entitled 'Teen Cum Targets'"

Method of Distribution: In-Store

Outcome: Charges dropped

17. *Ex parte Dave*, 220 S.W.3d 154, 155 (Texas App. 2007).

Jurisdiction: Texas Court of Appeals

Defendants: Valeria Joyce Dave

Obscenity Charges: Violation of Texas Penal Code 43.23 ("promotes or possesses with intent to promote any obscene material or obscene device.")

Outcome: Court ruled that there exists "no Constitutionally protected right . . . to sell obscene material."

18. *Villareal v. State*, 267 S.W.3d 204, 206 (Texas App. 2008).

Jurisdiction: Court of Appeals of Texas, Corpus Christi-Edinburg

Defendants: Beatrice Villreal (Appellant)

Obscenity Charges: Violation of Texas Penal Code 43.23

Type of Material: Vibrator called "Lick it Lover," reaction makers (stimulators), dildo type devices, anal beads, penis pumps and simulated vaginas

Method of Distribution: In-Store

Outcome: Appeal overruled – Guilty on all counts (Original sentence $1,500 fine, and 1 year imprisonment)

19. *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So.3d 319, 321 (Ala. 2010).

    Jurisdiction: Supreme Court of Alabama

    Defendants: 1568 Montgomery Highway, Inc., d/b/a "Nancy's Nook," "Nancy's Love Stuff," and/or "Love Stuff" (Appellant)

    Obscenity Charges: Violation of § 13A-12-200.5(4), Ala. Code 1975, a part of the Alabama Anti-Obscenity Enforcement Act, § 13A-12-200.1 et seq., Ala. Code 1975 ("the Act"), Violation of § 13A-12-200.2 of the Hoover Municipal Code (Bans sexual aids)

    Type of Material: Adult store, footwear and clothing (such as costumes, lingerie, and hosiery), dress accessories, magazines and books with adult content, and various lubricants, massage oils, and lotions

    Method of Distribution: In-Store

    Outcome: Appellant attempted to challenge the Constitutionality of § 13A-12-200.2, but the statute was upheld

20. *State v. Crump*, 223 S.W.3d 915, 915 (Mo. Ct. App. 2007)

    Jurisdiction: Missouri Court of Appeals, Southern District, Division Two

    Defendants: Robert Crump, Jr.

    Obscenity Charges: Violation of Missouri State Code section 573.030 (Promoting Obscenity

    Type of Material: Adult films, "Different Strokes," "Bi Group Club Sex," and "Ragtime Red."

    Method of Distribution: In-Store

    Outcome: The trial court's guilty verdict was reversed and remanded

21. *State v. Kakosso*, File No. 62-CR-11-9359

    Jurisdiction: Ramsey County District Court, Minnesota

Defendants: Kabika Fiston Kakosso

Obscenity Charges: Violation of Minn. Stat. § 617.23, subd. 1(3) (2010) (Indecent Exposure)

Type of Material: Defendant viewed pornographic material, namely a photograph of a penis, on a public library computer

Outcome: Guilty verdict

Sentence: 51 days imprisonment, $50 fine

Subsequent History: Defendant appealed, judgment affirmed.

22. *Commonwealth v. Dodgson*

Jurisdiction: Massachusetts Superior Court Department, Plymouth

Defendants: Sean K. Dodgson

Obscenity Charges: Count 4, G. L. c. 272, §§ 29 and 31 (dissemination of obscene matter);

Accompanying Charges: Counts 1-3, G. L. c. 272, §§ 28 and 31 (attempted dissemination of matter harmful to a minor); Counts 5-6, G. L. c. 265, § 26C (enticement of a child under the age of sixteen)

Type of Material: Defendant sent a photo of his erect penis to undercover police officers posing as an eighth-grade girl in an online chat room. He also engaged in sexually explicit conversations with the undercover officers

Outcome: Guilty on all counts

Subsequent History: Defendant appealed. The Court of Appeals affirmed counts 4-6, and reversed counts 1-3.

23. *State v. Rayfield*

Jurisdiction: Gaston County Superior Court, North Carolina

Defendants: Douglas Dalton Rayfield, II

Obscenity Charges: One count of disseminating obscene material

Accompanying Charges: Indecent liberties with a child, crime against nature, first-degree statutory sex offense, first-degree statutory rape

Type of Material: Defendant showed a child a video of a young girl performing sexual acts

Outcome: Guilty on all counts

Sentence: No less than 640 months, and no more than 788 months imprisonment

Subsequent History: Defendant appealed, Court of Appeals affirmed

24. *Commonwealth v. Levy*, No.: CP-41-CR-0000988-2011

Jurisdiction: Court of Common Pleas of Lycoming County, Criminal Division

Defendants: Ty M. Levy

Obscenity Charges: obscene or other sexual material, 18 Pa.C.S. § 5903 (c) (Disseminating sexually explicit materials to a minor)

Accompanying Charges: Sexual Abuse of Children, Unlawful Contact with Minors, Corruption of Minors, Indecent Exposure, Open Lewdness

Type of Material: Defendant sent emails which included links to pornographic material, to a 15-year-old girl

Outcome: Convicted on all counts

Sentence: Six-year aggregate term of punishment, including 16 months of incarceration

Subsequent History: Affirmed by *Comm. v. Levy*, No. CP–41–CR–988–2011, 2013 WL 6843076, at *1 (Pa. Super. Ct. Dec. 30, 2013).

25. *Melton v. State*, 69 So. 3d 916 (Ala. Crim. App. 2010).

Jurisdiction: Criminal Court of Appeals of Alabama

Defendants: Corey Beantee Melton

Obscenity Charges: Violation of § 13A-12-192(b), Ala. Code 1975 (Possession of obscene matter)

Type of Material: Numerous child pornography videos located on Defendant's personal computer.

Outcome: Trial court's guilty verdict affirmed

Sentence: 10-years' imprisonment

APPENDIX B: ANNUAL NUMBERS OF FEDERAL OBSCENITY DEFENDANTS