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Karma Police: Prosecutorial Strategies in Obscenity Cases and the Broader Culture War

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It is something of a truism to observe that the "law on books" does not always mirror the law in practice, and this is particularly true for criminal law. As William Stuntz observed, federal criminal law is both broad and deep—broad in that it covers a large category of behaviors prohibited by state criminal law, and deep in that it criminalizes many types of behaviors many times over.[1] Resources for federal prosecutors did not grow at a rate proportionate to this federalized criminal law over the past thirty years, however, leaving U.S. attorneys and their assistants a surplus of agency referrals from which to choose. Consequently, "there is an enormous amount that federal prosecutors *can* do . . . but very little that they *must* do."[2] For this reason, scholars seek to understand prosecutorial decision making.

Research considers the behavior of local prosecutors,[3] the relationship between attorneys for government agencies and those in the Department of Justice,[4] and finally the relationship between Department lawyers and federal prosecutors in the 94 U.S. Attorneys' offices spread throughout the country.[5] A central concern in the study of prosecutors is how to understand the forces that motivate their decisions: why do they prosecute some types of crime but not others, and what factors influence their decision making? Local prosecutors, particularly those who face elections, appear to be responsive to the political preferences of the

communities in which they reside.[6] U.S. attorneys are appointed rather than elected, and face a more complex network of influence. On the one hand, U.S. attorneys serve at the pleasure of the president and are beholden to the prosecutorial priorities of the attorney general.[7] These centralizing influences may incline federal prosecutors to pursue national priorities. On the other, the American system of federal prosecution is decentralized (in comparison to the systems of France or Japan, for instance)[8] precisely because we want federal prosecutors to be responsive to local political culture and concerns.[9] Federal prosecutors serve multiple masters.[10] But what happens should these masters disagree as to which types of criminal prosecutions merit prioritization?

In this article, we extend the theoretical and empirical understanding of prosecutorial decision making by examining the case study of federal obscenity prosecutions. Press coverage of modern American politics has emphasized regional differences in political and cultural values, frequently characterized in terms of red states and blue states. Scholars disagree about the extent of this partisan polarization and its effects on political outcomes,[11] though most agree that the "culture war" is being waged on the battlefield of social issues, particularly policies concerning sexual mores.[12] If the culture war theory is accurate—and one must prove that it is—regional variations in both local and federal obscenity prosecutions might mirror the larger localized culture wars.[13] But if federal prosecutors are responsive primarily to centralizing forces rather than local influence, the crucial variable to explaining obscenity prosecutions would not be a red-blue state dichotomy, but rather the priorities of a given presidential administration. Presidential preferences, as articulated by the attorney general, may overcome local political culture. Since the Reagan administration's Meese Commission Report on Pornography, conservative and evangelical groups such as Focus on the Family, the American Family Association, and Concerned Women for America have fought pornography.[14] Attorney General Gonzales made the prosecution of obscenity crimes a top priority of the Department of Justice.[15] Presuming one can demonstrate first that local political culture varies in a way that affects the desirability of bringing obscenity prosecutions, and second that presidents themselves have different priorities in these matters, one can study these various influences on federal prosecutorial discretion.

We employed a mixed methods approach to examine this question. We analyzed state and local obscenity indictments from 1990-2006 in order to see if the red-blue state distinction in fact possessed any explanatory leverage. Finding that it did, we then analyzed federal obscenity prosecutions from 1995-2007 in order to determine the interplay between local and nationalized sources of influence. Finally, we interviewed multiple experts in the area of obscenity prosecutions, including criminal defense attorneys who specialize in defending the adult entertainment industry, law enforcement officials who specialize in these types of prosecutions, and members of the industry itself in order to gain insight into our quantitative findings. Our results yield three conclusions. First, both local political culture and presidential partisanship helped explain the tendency of federal prosecutors to bring obscenity cases. Second—and most important—federal prosecutors employ "charge stacking" strategies as a way of navigating the sometimes competing political forces that influence them. It is a mechanism by which federal prosecutors can attempt to serve contradictory constituencies. Third, as a policy matter the strategies of both local and federal prosecutors may send mixed signals to would-be wrongdoers that ultimately erode the deterrent value of obscenity prosecutions.

Part One below provides background on prosecutorial decision making, the culture war debate, and the law and politics of obscenity prosecutions. Part Two presents our methodology. In Part Three we offer our results, which we discuss in Part Four. We conclude with Part Five.

I. Prosecutorial decision making and the culture wars

A. Prosecutorial decision making

If one were to describe the American system of criminal prosecution in a word, it would be "fragmented." The United States has over 3,000 prosecutorial organizations divided amongst federal, state, and local governments,[16] and while such an approach may seem familiar to us, it is very different from those in countries to which we usually compare ourselves. All French prosecutors, whether

located in Paris, Lyons, or Cannes, work for the same organization, the Ministry of Justice, which issues instructions and policy guidelines to regional chief prosecutors' offices.[17] German prosecutors are career civil servants who work within a hierarchically structured institutional system complete with meritocratic promotion and close oversight by their immediate supervisors.[18] Japan has a single national procuracy, hierarchically organized and staffed by careerists.[19] The Supreme Public Prosecutors Office in Tokyo supervises eight high, fifty district, and 452 local offices which are staffed by prosecutors (*kenji*) and assistant prosecutors (*fukukenji*). These offices are bound by the "principle of prosecutor unity," which provides that "the procuracy is a national, united, hierarchical structure in which superiors command and subordinates obey and all prosecutors form one body."[20]

America is different. In addition to being fragmented between federal, state, and local prosecutorial institutions, the American federal prosecutorial system is itself extremely decentralized due to historical circumstance, constitutional structure and cultural norms. United States attorneys were created by the Judiciary Act of 1789 with the task of representing the federal government in federal district courts.[21] Serving as the "chief law enforcement officer for the judicial district in which they reside," they are nominated by the president and confirmed by the Senate for positions of four years.[22] The attorney general was given no authority over U.S. attorneys by the 1789 Act, and it was not until the creation of the Department of Justice in 1870 that the attorney general was given statutory authority to supervise U.S. attorneys.[23] Indeed, the first government official to have supervisory authority over U.S. attorneys was the Solicitor of the Treasury, who was granted this authority in the 1830s and retained it—in obvious tension with the authority of the attorney general—until 1933. As struggles developed over the course of New Deal litigation, President Roosevelt issued an executive order clarifying once and for all the Department's ultimate authority over all federal litigation and reaffirming the attorney general's authority over U.S. attorneys.[24] The fact that U.S. attorneys predate the Department of Justice helps to explain why they were never historically viewed as mere field agents of the attorney general.

A second explanation for the fragmented American approach to prosecution is that it is, to some extent, required by the constitution. The federal structure of the American political system guarantees at the very least that federal prosecutors will operate independently of their state counterparts, making a single, unitary Ministry of Justice such as those in France or Japan an impossibility. Similarly, the constitutional requirement of separation of powers creates a political environment in which Congress, when at odds with the executive over matters of legal policy making during periods of divided government, seeks to fragment federal prosecutorial authority so as to limit the Department's—and hence the President's—influence over legal decision making.[25]

Finally, American cultural and professional norms help explain the comparative lack of prosecutorial unity. As Kagan explains, the American legal system is "designed to limit central authority's potential for tyranny or political bias . . . power is fragmented among many governmental bodies, often staffed by locally elected officials."[26] We do not vest total control of the federal prosecutorial power in the Department of Justice because our political culture is unwilling to trust any government institution with that much authority. Further, the professional norms of American lawyers in general, and prosecutors in particular, emphasize the manipulability of the law and the need for creative legal analysis rather than strict adherence to predetermined guidelines or hierarchical oversight. It was precisely these norms which led Carter, in his 1974 analysis of local prosecutors, to conclude that hierarchical control was incompatible with the task environment of American prosecutors.[27]

The relationship between the Department of Justice and the ninety-four U.S. attorneys' offices has not remained static over time, of course. During the late 20th century criminal law became increasingly federalized; by the mid-1990s there were over 3,000 federal criminal offenses, leading one legal scholar who wrote on behalf of the Attorney General's Roundtable on the Federalization of Crime to claim that "by virtually any measure, the federal government is playing an increasingly important rule in the enforcement of criminal law." [28] As criminal law became federalized, federal prosecutors found that there was a far larger variety of behaviors they could prosecute, thus raising the possibility that U.S. attorneys would pursue different priorities than the president or the attorney general. It is unsurprising that the Department increasingly has sought to exert more direct control over U.S. attorneys and their decision-making,[29] and U.S. attorneys are expected to conform to the prosecutorial priorities of the attorney general and the

Department both as a matter of law[30] and policy.[31] Some research demonstrates that presidential priorities matter to U.S. attorneys,[32] and the recent purge of several U.S. attorneys by Attorney General Gonzalez, ostensibly for failing to adhere to the political priorities of the Department, testifies to this centralized influence.[33]

High-profile controversies such as the Gonzalez purge aside, the fact remains that the United States employs a highly decentralized structure of federal prosecution in a modern environment that increasingly incentivizes centralized influence. The question becomes how federal prosecutors can accommodate both local and centralized influences, especially should those influences incline towards different priorities. Because federal prosecutors' discretion defines the practical scope of federal criminal law in their jurisdictions, [34] achieving a better empirical understanding of the forces that influence prosecutorial decision making helps clarify the nature of political accountability in the federal justice system. And as the case study of obscenity prosecutions will demonstrate, we can also gain insight into the extent to which culture wars shape legal and political outcomes.

1. Pornography, obscenity, and the culture wars

Justice Potter Stewart famously opined about hard-core pornography that "I know it when I see it."[35] "Pornography," however, is a cultural or political distinction, rather than a legal one. Several decades of Supreme Court case law have established three legal categories of sexually-explicit material: the indecent, the obscene, and child pornography. The broadest category, indecency, concerns material that, while suitable for consenting adults, may be regulated as to the time, place, and manner of its distribution. A radio station may play George Carlin's "Seven Dirty Words" monologue, but not during hours when children are likely to hear it.[36] Bookstores may sell indecent sexual materials, subject to city zoning ordinances.[37] Congress cannot constitutionally prohibit adult access to indecent commercial telephone messages (phone sex).[38] In contrast to indecent material, the manufacture, sale, and distribution of obscene material can be criminalized, although its possession cannot.[39] From the 1950s until the 1970s, the Court struggled to differentiate obscenity and indecency, ultimately arriving at a distinction articulated in *Miller v. California*.[40] Obscene material is that which, when judged by contemporary community standards, appeals to the prurient interest, depicts patently offensive sexual content specifically proscribed by law, and when taken as a whole lacks significant literary, artistic, scientific, or political value (the "LAPS" test). As a result, what constitutes obscenity will vary by jurisdiction; obscenity in Provo can be very different from obscenity in San Francisco. Finally, the Supreme Court ruled in *New York v. Ferber* that the manufacture, sale, and distribution of child pornography may be criminalized,[41] and in *Osborne v. Ohio* held that possession of child pornography may be prohibited.[42]

Not everyone agrees with the Court's three-tiered approach, however. For many conservative Christians and some feminists, sexually explicit material of any kind constitutes a grave social harm. Anti-pornography groups justify their priorities not only on the basis of abstract moral positions, but on the argument that pornography harms women and children.[43] Such activism began in earnest during the Reagan administration with the 1986 Meese Commission on Pornography,[44] and has been extended today by groups such as Morality in Media, the American Family Association, Concerned Women for America, and Focus on the Family, all of which place anti-pornography efforts near the top of their political agendas.[45] For example, Concerned Women for America, which argues that the consumption of adult pornography leads to pedophilia, includes anti-pornography efforts as one of its six core mission values. [46]

These advocates employ a variety of strategies to advance their political views.[47] While they cannot constitutionally criminalize all sexually explicit material, obscenity prosecutions can help rid society of the worst types of pornography (and, these groups might hope, deter the production and marketing of other adult material as well). During the 2000 presidential campaign, the American Family Association convinced George W. Bush to agree in writing to prioritize the enforcement of obscenity laws.[48] Although the Department has long had a division devoted to obscenity and child pornography (the Child Exploitation and Obscenity Section, or CEOS), Attorney General Gonzales in 2005 announced the creation of an additional task force within the Criminal Division designed

to focus exclusively on obscenity prosecutions,[49] declaring obscenity prosecutions "one of the top priorities" of the Department.[50] Observers have suggested that one of the eight U.S. attorneys terminated by Attorney General Gonzalez in the controversial firings of 2006 may have been released because he was insufficiently aggressive in prosecuting obscenity.[51] If it is true that U.S. attorneys respond to the centralized forces of presidential and attorney general influence, then *we hypothesize that there will be more obscenity prosecutions brought by U.S. attorneys under the George W. Bush administration than under the Clinton administration.*

But it also is possible that federal prosecutors respond primarily to local political values—regional cultural norms that the popular press and academics have termed the "culture war." James Davidson Hunter popularized the idea of a culture war, which he describes as a new political alignment defined by competition between orthodox Americans who adhere to "an external, definable and transcendent authority," and progressives, "defined by the spirit of the modern age, a spirit of rationalism and subjectivism."[52] Hunter's work spawned a vigorous debate about the intersection of politics and culture in America, which includes empirical studies that question his conclusion.[53] One qualitative study based on 200 interviews with middle-class suburban Americans concludes that most Americans are "moderate in their views, even on so-called moral issues."[54] Another study that analyzed American National Election Studies (ANES) and General Social Survey (GSS) data uncovered a moderate electorate with extensive consensus on social issues, and concludes that it is the "political class," rather than the electorate more generally, that has polarized.[55]

Yet electoral maps depicting a nation of consistently red and blue states suggest support for the culture war hypothesis. Abramowitz and Saunders, relying upon 2004 ANES data, concluded that although claims of a culture war were overstated, there were still significant moral divisions within the electorate.[56] Another study also found qualitative differences in public opinion between red and blue states.[57] Both in the courtroom and at the ballot box, social issues achieved a new prominence in politics, [58] and "polarization seems to be occurring on issues that are important to politically active religious conservatives, such as abortion, sexuality, divorce law, school prayer, and the like."[59] If the culture war theory is correct, and if federal prosecutors respond to local political values, *we hypothesize that there will be more federal obscenity prosecutions in red states than in blue states.*

Sometimes federal prosecutors must navigate competing political demands, and obscenity prosecutions provide the ideal case study with which to evaluate this situation. Consider two contrasting examples: child pornography prosecutions and immigration prosecutions. Analyzing the former provides little insight into potential tensions between localized and centralized influence because child pornography is reviled everywhere. Assuming the culture war theory is correct (which we examine below), pursuing obscenity claims is likely to be salient only for certain political constituencies, and those constituencies will vary by locale and by presidential administration. This variance allows us to study the relative influence of centralizing and localizing forces of influence. Unlike immigration prosecutions, which along with drug prosecutions provide the bulk of federal prosecutors' day-to-day workload,[60] obscenity investigations are rare, discretionary and resource-intensive.[61] One has to seek them out and want to prosecute them. Assuming that our two initial hypotheses are correct, we can examine what happens when federal prosecutors in blue states are asked by a conservative administration to prioritize obscenity cases, or when prosecutors in red states are beholden to a more liberal administration with little interest in stamping out pornography. Although it is a close case—precisely because no one has empirically studied the comparative influence of centralizing and decentralizing forces—*we hypothesize that federal prosecutors will be influenced more by local political demands than by centralized control.*

II. Data and methods

We relied upon multiple data sources and mixed methods to test our hypotheses: records of state and local obscenity indictments, a dataset of federal obscenity referrals and prosecutions, and finally, interviews with law enforcement, adult industry representatives, and their lawyers.

We aggregated data on state and local obscenity indictments using a newspaper index search of Westlaw in order to determine the

distribution of state and local anti-obscenity efforts. Unlike federal prosecutions, which are archived in a national database, there is no simple way to identify state and local prosecutions. Moreover, it is not possible to study prosecutorial behavior by examining state judicial opinions. Most obscenity cases, as with most criminal cases, result in plea bargains; as a result, there are few published judicial opinions. We therefore used Westlaw's "allnews" database to search for newspaper accounts of indictments brought by state or local law enforcement officials between January 1, 1990 and June 30, 2006.[62] We excluded articles that did not meet the criteria for obscenity or identify unique cases. We removed discussions of (a) indictments for child pornography, consistent with the three-tier definition and consistent with previous research on obscenity,[63] (b) indictments for "obscene acts" (misdemeanors involving behavior such as overly-aggressive lap dances and prostitution), (c) indictments for zoning violations (unless they concerned the distribution of obscenity), and (d) indictments for pandering obscenity to a minor, which usually involved merely indecent material. These criteria yielded a dataset of 108 defendants. We were unable to obtain reliable data on case disposition because newspapers reported dispositions in less than half of the cases studied. Two situations that involved what we term "hyper-indictment" were excluded from the dataset as outliers and are discussed separately.

There are two potential difficulties in employing the Westlaw database to study state and local indictments. First, not every newspaper in the country is included in the database, creating the potential for selection bias. Yet the database is very extensive, and sources are not selected by ideology. A second concern is that newspapers in conservative jurisdictions might be more willing to publish stories about obscenity, resulting in underreporting of the total number of obscenity indictments in liberal areas. However, criminal indictments involving pornographers would be newsworthy anywhere given the sensationalistic nature of these stories.[64]

To investigate the behavior of federal prosecutors, we identified all obscenity referrals to federal prosecutors from 1995 to 2007 using the Transactional Records Access Clearinghouse (TRAC) database at Syracuse University. Department policy requires that federal prosecutors document their ongoing criminal caseloads. TRAC aggregates this information, which allows us to observe the cases that are referred to federal prosecutors by federal agents, the types of referrals that are declined (meaning the prosecutor refused to file charges) or prosecuted, and the outcome of cases that are pursued. In multivariate analysis using this data, our dependent variable was whether an agency referral was prosecuted. The dataset provided by TRAC contained information on 579 obscenity referrals during this 14-year time period.

We added background information relevant to each referral and to variables believed to be relevant to the culture war. Our data spanned two *presidential administrations*; that of Bill Clinton and that of George W. Bush. Our classification of *state political culture* relied on Abramowitz and Saunders' red-purple-blue typology, which classifies states based on the degree of popular support for Republican incumbent George Bush and Democratic challenger John Kerry as determined by 2004 National Exit Poll results.[65] Red states strongly favored Bush, blue states favored Kerry, and the vote share in purple states was narrower than a 55-45% split. Their analysis excluded five states (Hawaii, North Dakota, South Dakota, West Virginia, and Wyoming) and the District of Columbia; as a result, we categorized these as red or blue states based on whether they voted for the Republican or Democratic candidate in the 2004 presidential elections. The dataset provided by TRAC included six referrals from Puerto Rico and three referrals from Guam, which we excluded from our analysis of state political culture.

Finally, we coded the *gender* of the assistant U.S. attorneys that handled each referral. We do this to overcome a potential flaw in the Abramowitz and Saunders typology as applied to obscenity prosecutions. Almost no one who subscribes to the culture war thesis doubts that social conservatives seek to limit pornography. But it is possible that some constituencies within the progressive or left-leaning blue states may wish to do so — Catherine MacKinnon and Andrea Dworkin's efforts to pass an anti-pornography law in Minneapolis in the 1990s is one example.[66] The normative and empirical scholarship on the relationship between feminist politics and anti-pornography efforts is mixed, however, and such an ambivalent relationship is an insufficient basis for our hypotheses. [67] This is especially true since not a single interviewee we spoke with believed that feminism and "left-leaning" political groups were driving anti-pornography efforts after the early 1990s. Nonetheless, we coded for the gender of federal prosecutors who were given

these obscenity referrals in order to test our null hypothesis that *female prosecutors are not more likely to bring obscenity charges than are their male counterparts.*

Because we cannot assume that every obscenity prosecution is created equal, we also identified the nature of the *lead charge* in each referral. Since the 1970s, the total number of federal criminal offenses has increased greatly.[68] Because there are many more crimes that federal prosecutors can charge defendants with, there is the potential for "charge stacking," a prosecutorial strategy by which prosecutors indict defendants for multiple offenses. For example, a person selling methamphetamines could also be charged with tax fraud and false statement offenses for failing to report the proceeds of the drug deals on federal tax forms. Stacking charges is useful both in encouraging defendants to plea bargain—prosecutors offer to drop some charges in exchange for guilty pleas on others—and also in increasing prison terms for especially heinous defendants.[69]

Given that defendants are often charged with multiple criminal violations, the Department requires that prosecutors determine a lead charge when assigned a matter. A lead charge is defined as "the substantive statute that is the primary basis for the referral."[70] Although all of the referrals in our federal dataset come from the program area "Obscenity," many of these defendants were charged with multiple offenses. This raises the possibility that some prosecutions defined as obscenity-related could be purposeful attempts by federal prosecutors to eradicate sexually explicit material, while others could be efforts by prosecutors to stack an obscenity charge on a more serious primary offense in order to help compel a plea bargain or increase a prison term. We used the lead charge information to address these potential differences in prosecutorial strategy. The definition of what constitutes a lead charge pertaining to obscenity is open to interpretation; we thus relied on the legal expertise of the lead author to assess charges that truly appeared to be obscenity. Our classification sought to identify lead charges that unquestionably concerned the prosecution of obscene material; a list of these charges is provided in the Appendix. We coded these lead charges as *core obscenity*, as opposed to the remainder of cases, which we coded as *stacked*—matters where obscenity likely was used as a charge stacking technique.[71] The overwhelming majority of stacked lead charges were unrelated to obscenity—for example, rioting or "liquor violations on Indian land." We placed child pornography in the stacked category because it is uniformly condemned, thus its prosecution does not indicate a cultural position on adult pornography. Some of these cases involved a charge we had identified as core obscenity, but not as a lead charge; for the purpose of our analysis, these also were considered stacked.

Using multivariate logit analysis, we considered all prosecutions that involved a charge from the federal program area "obscenity," both with and without a core obscenity lead charge. Our dependent variable was the choice to prosecute, and we ran two regressions: the first measured the effect of our independent variables on the decision to prosecute core obscenity, and the second measured the effect of those same independent variables on the decision to prosecute stacked charges.

Finally, to provide a better understanding of our quantitative findings, we conducted eleven interviews of professionals involved in obscenity law, including attorneys involved with defense and prosecution of these charges, and individuals creating and reporting on pornography (e.g., directors of and reporters on adult movies).[72] All interviews were conducted by the lead author and were open-ended, lasting roughly thirty to sixty minutes; interview transcripts were iteratively reviewed to identify recurring themes. We provide excerpts from the interviews that exemplify these themes and explain our findings in the context of both state and federal prosecutions.

III. Results

We first review prosecutorial behavior in state and local obscenity indictments, in order to determine if the red-blue-purple state typology is a reliable metric by which to evaluate federal prosecutors. We then analyze obscenity referrals to federal prosecutors, controlling for both presidential administration and local political culture. Overall, we find that local political culture influences both state and federal prosecutorial behavior, and that federal prosecutors have developed sophisticated responses to the pressures

created by sometimes competing sources of political influences.

A. State and local obscenity indictments

Our examination of the incidence of state and local obscenity indictments provides a baseline to evaluate federal obscenity prosecutions. Our results, which are provided in Table 1, suggest that state and local indictments are overwhelmingly a red state phenomenon. Even when two outlier cases which involve large numbers of indictments by a single prosecutor (a strategy we term "hyper-indictment") are excluded, the relationship between state political culture and obscenity prosecutions is evident. Sixty-two percent of all obscenity indictments were brought in red states, compared to just 30% in purple states and 8% in blue states. Furthermore, all purple state indictments occurred in either Ohio or Florida, two states notable for their evangelical constituents' opposition to pornography, according to our interview respondents. Every obscenity indictment in Florida occurred in the mid-state region surrounding Orlando and Tampa northward. In addition, 15 of Ohio's 19 indictments came from the greater Cincinnati area. Cincinnati has a long-running feud with *Hustler* publisher Larry Flynt that was recounted in the movie *The People v. Larry Flynt*. The city also indicted the curator of the Cincinnati Contemporary Arts Center for showing a Robert Mapplethorpe exhibit.[73] If we consider these cases to be situated in local islands of conservative political culture, over 90% of all state and local obscenity indictments in the United States occurred in these areas: red states, central-northern Florida, and Cincinnati.[74]

Table 1: State and local obscenity indictments by state (1990-2006)
Defendants per state

Red state		Purple state		Blue state	
Alabama	7*	Florida	13	Illinois	6
Arizona	1	Ohio	19	Massachusetts	1
Kansas	13			New York	2
Kentucky	6				
Louisiana	1				
Missouri	2				
North Carolina	5				
South Carolina	5				
Tennessee	11				
Texas	2				
Virginia	14				
TOTAL	67 (62%)		32 (30%)		9 (8%)

*Two cases of hyper-indictment have been excluded from the Alabama total.

It is unlikely that the variation between red states and blue states in local obscenity prosecutions is due to differences in the underlying amount of obscene material. Obscenity is not like other federal crimes; prosecutions for cocaine distribution, for example, are more likely in certain cities (San Diego, Miami) because they are international drug importation hubs. The greater incidence of prosecutions for cocaine distribution does not necessarily mean that prosecutors in San Diego are more likely to prosecute, but rather that San Diego has far more agency referrals. Obscenity is not comparable, because although cocaine is cocaine wherever it is located, obscenity is not. Until a jury renders a decision or a plea bargain is reached, it is impossible to determine the amount of obscene material in a given region; instead, prosecution determines the amount of obscenity in a district. Moreover, the amount of pornography cannot serve as a proxy for the amount of obscenity because pornography often is classified as indecent rather than obscene. Furthermore, the internet has made it possible to obtain obscene material regardless of location. If prosecutors in a conservative area wish to charge an individual with obscenity, they can join a website, download content they deem to be obscene in their district, and then file charges.[75]

Our interview respondents offered a more persuasive explanation for the disparity between red states and blue states. They agreed that obscenity cases are more likely to be brought in culturally conservative regions for two reasons. First, conservative (usually evangelical) community members want these cases prosecuted and prosecutors respond to this political influence; second, it is easier for prosecutors to win these cases under the *Miller* standard where community values are conservative—and prosecutors want to

win.

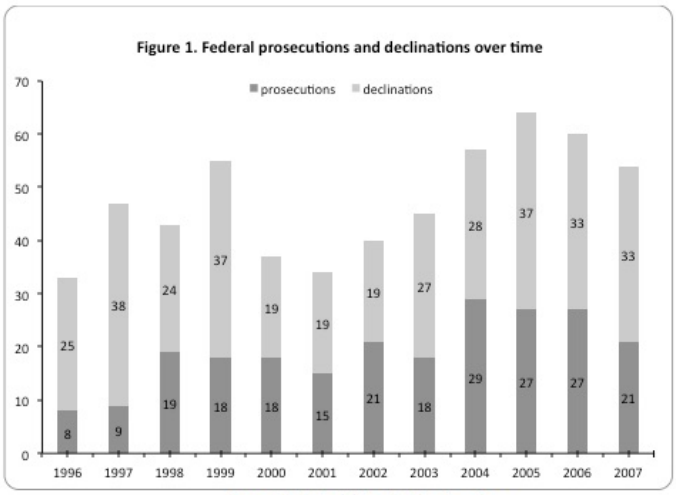
All of the interview respondents, whether they were involved in prosecution or defense, agreed that obscenity prosecutions were politically motivated and respond to the demands of conservative constituencies. One noted that public outcry often leads to investigations, particularly when someone goes into a video store "to rent a porn movie, and sees something shocking to the conscience . . . You have more support for obscenity prosecutions in more conservative and more religious communities [as well as in] small communities, where everyone knows what everyone else does." Another suggested that the increasing number of adult bookstores, coupled with the increasingly extreme nature of material, created citizen activism to which prosecutors respond "because politicians [prosecutors] want to make their constituencies happy." This trend was prevalent in the Bible Belt because "citizens are more likely to issue complaints, and religious views affect the community standards." Defense attorneys and members of the adult entertainment industry agreed that conservative Christian groups were the constituency demanding obscenity prosecutions. When asked why prosecutors bring obscenity cases, one respondent commented, "to make political hay. Local prosecutors are elected, and they want to be able to say, 'I closed down an adult bookstore.'" The South and the Midwest were mentioned as examples of places where local prosecutors were most likely to try and appeal to "crazy religious people." Somewhat surprisingly, none of the interviewees suggested that feminists were a major political force pushing for obscenity prosecutions.[76]

Interview respondents also argued that conservative communities were more likely to convict under the *Miller* standard, and that probability of success was a critical component to these prosecutions. An attorney suggested "prosecutors are political animals. If it helps their careers, they will bring these suits. If it doesn't, they won't. You will see more [cases] where the area is conservative Christian, like Oklahoma City, Memphis, and Tallahassee." Another attorney reaffirmed the importance of prosecutorial victory, because "prosecutions arise only when there is both ideological commitment and political payoff . . . without political benefit, even those ideologically disposed to bring these cases won't prosecute." This observation is supported in the literature; the ability of prosecutors to win a case is a crucial element in the decision whether to file an indictment in the first place.[77] This explains why prosecutors in blue states may not prosecute obscenity even if they personally would prefer to do so.

B. Federal obscenity prosecutions

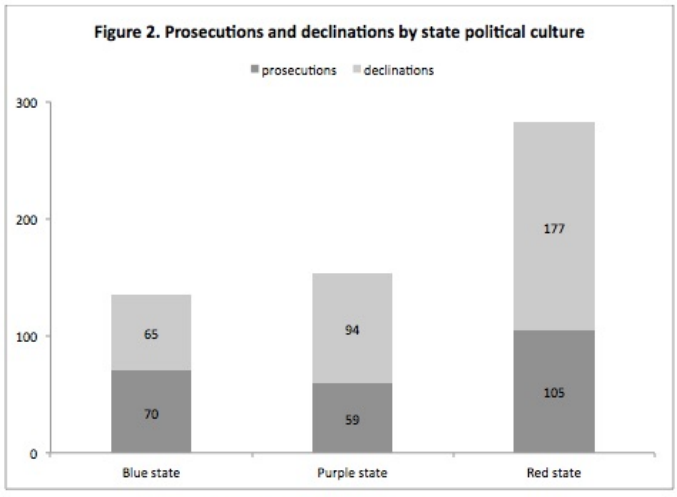
Both the quantitative and qualitative evidence prove that local political culture affects the decision making of state and local prosecutors. This finding, however, provides only a limited test of prosecutorial discretion, because state and local prosecutors are accountable largely to one constituency: local political forces. More interesting questions of prosecutorial discretion arise with federal prosecutors, who theoretically are responsive to both local political influence as well as to national actors such as the president and the attorney general. Consequently, we sought to determine the extent to which federal prosecutors' decisions to pursue obscenity charges were responsive to local political culture, centralized partisan forces, or both.

We begin by reviewing the number of agency referrals to federal prosecutors over time. Our results, presented in Figure 1, list the total number of referrals containing an obscenity-related charge (whether a core obscenity charge or a stacked charge), disaggregated by prosecutions and declinations. Consistent with expectations, there were generally more obscenity referrals and obscenity prosecutions during the Bush administration than during the Clinton administration. Yet the number of referrals with any relationship to obscenity was small in every year; in 2005, the year with the greatest number of referrals, there were still less than 100 of these matters. If federal obscenity prosecutions are responsive to local political culture and serve as a front in the culture war, the frequency of these battles is low. By comparison, a single prosecutor in Alabama, as discussed above, brought more charges pertaining directly to obscenity in a single year than all of the federal matters involving obscenity in all years studied combined. That said, even a few high profile federal obscenity convictions theoretically possess the potential to reshape the practices of the adult entertainment industry by chilling (or deterring) speech.



Source: TRAC and data collected by the authors.

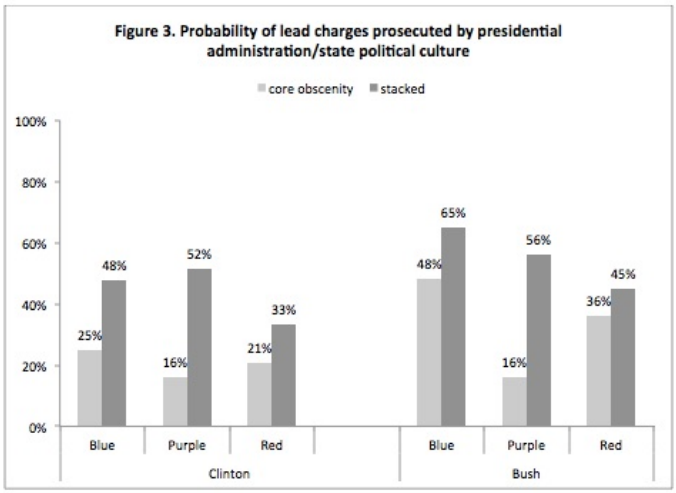
Analyzing referrals more closely, it appears that federal prosecutors are affected by local political culture. Figure 2 lists the referrals and prosecutions by state. There were 282 referrals made in red states, roughly the same number as those in blue and purple states combined (288 referrals), despite the fact that blue and purple states are far more populous. However, the share of referrals prosecuted was higher in blue and purple states; red states federal prosecutors prosecuted 37% of their referrals (105 of 282), while those in purple states prosecuted 39% (59 of 153) and those in blue states prosecuted 52% (70 of 135). Federal prosecutors in red states pursued more obscenity cases, but this is a function of the fact that they received more agency referrals. Judged solely by the probability that a given referral would be prosecuted, federal prosecutors in blue states were more aggressive. This result was unexpected and merited further inquiry.



Source: TRAC and data collected by the authors.

We next disaggregated the data by state political culture, presidential administration, and type of charge (core obscenity or stacked) as shown in Figure 3. Our findings reaffirm that prosecutions are responsive to presidential administration. The probability of an obscenity prosecution was larger during the Bush administration than during the Clinton administration; whether they were core obscenity matters or matters where obscenity was included as a stacked charge. Although core obscenity prosecutions increased in the Bush years, the relationship between these referrals and state political culture is unexpected. In both presidential administrations, core obscenity was more likely to be prosecuted in blue states than in red or purple states. However, it is critical to note that the number of referrals and prosecutions is so small (four blue state core obscenity prosecutions under Clinton, ten under Bush) that it is not statistically significant. Finally, prosecutions that included a stacked obscenity charges were most likely to be prosecuted in blue states during the Bush administration. It merits emphasis that stacked prosecutions in blue states greatly

outnumbered core-obscenity prosecutions in blue states, by a count of 97 to 37.



Source: TRAC and lead charge classification by the authors (see Appendix).

To understand this unexpected blue state dynamic better, we investigated this variance between state political culture, presidential administration, and the emphasis on obscenity lead charges using multivariate analysis. Our regressions split referrals into those that had a core obscenity lead charge and those that had a stacked charge. Our findings, which are presented in Table 2, make it evident that *federal prosecutors respond to presidential authority, but that they also appear to be influenced by local political culture.* We controlled for both state political culture (comparing blue and purple states to a baseline of red states) and for presidential administration, as well as for the gender of the prosecutor. We discovered that *prosecutions of crimes where obscenity was a stacked charge increased to a statistically significant extent in both blue and purple states during the Bush administration.* This outcome helps to explain the puzzle mentioned above—namely why federal prosecutors in comparatively liberal states during the Bush administration had the greatest probability of prosecuting obscenity cases. Because the choice to stack charges is discretionary, these findings suggest that federal prosecutors may do so strategically to respond to both federal priorities and local political culture. Federal prosecutors in more liberal areas are unlikely to increase their popularity or their probability of winning cases by prosecuting core obscenity. When faced with a presidential administration that demands more focus on obscenity, blue state prosecutors prefer to pair obscenity charges with a lead charge that is more likely to secure a conviction. This strategy makes it possible for federal prosecutors to respond to both local political demands and the objectives of a more conservative administration. Also, such a strategy could help secure a jury conviction; a jury in New York may be more likely to convict for an obscenity charge when that charge is linked to a defendant who is being prosecuted primarily for another offense such as possession of child pornography, rather than when the obscenity charge is brought as a stand-alone offense. Consistent with our null hypothesis, gender was not a significant influence in either core obscenity or stacked prosecutions.

Table 2. Predictors of prosecution for core obscenity and stacked obscenity charges (logit)

	Core		*Stacked*		
	coefficient	s.e.	coefficient	s.e.	
Blue state * Clinton	-0.3	0.62	0.28	0.33	
Purple state * Clinton	-0.76	0.54	0.41	0.38	
Blue state * Bush	0.73	0.49	0.97	0.34	**
Purple state * Bush	-0.89	0.53	0.62	0.31	*
Gender	-0.32	0.25	0.04	0.15	
Constant	-0.7	0.23	-0.38	0.17	
N	206		362		

* Significant at 0.05 level

** Significant at 0.01 level

Source: TRAC and lead charge classification by the authors (see Appendix). The baseline comparison is red states.

IV. Discussion

The results of our empirical analysis, as well as the views of our interview respondents, yield three conclusions. First, federal prosecutors employ charge stacking as a way of navigating competing political forces. Second, there is some merit to the culture war hypothesis. Third, competing prosecutorial strategies may work to undermine deterrence.

A. Charge stacking as a prosecutorial strategy

Scholars have documented the various ways that stacking multiple criminal charges can be used to facilitate plea bargains or enhance criminal sentencing. In 2005, for example, prosecutors in New York alleged that Glen Marcus sexually enslaved women, tortured them, and set up a pay-per-view site to display pictures of the abuse.[78] Marcus was indicted in New York on charges of civil rights violations, sex trafficking, forced labor, and distributing obscene material. Interview respondents familiar with the case believed that Marcus was prosecuted primarily for allegedly enslaving and torturing women rather than because he was distributing obscene material. The obscenity charge was intended to encourage a guilty plea to the more serious charges.

Our research also suggests that charge stacking enables federal prosecutors to navigate the sometimes contradictory forces of centralized priorities and local political culture. Regardless of a prosecutor's personal views on obscenity, federal prosecutors have strong incentives to accommodate the prosecutorial priorities of the attorney general.[79] This task can be difficult, however, when those priorities are at odds with local political culture. As bad as it is to ignore an attorney general's priorities, it probably is worse to pursue them and lose, for such losses raise questions about prosecutorial competence.[80] Stacking obscenity on other charges like sexual trafficking and rape provides a low-cost way of pursuing centralized priorities. Should the case go to trial, a jury ambivalent about the obscenity charge will consider it in the context of an unsympathetic defendant.

These factors explain why prosecutors in blue and purple states stacked obscenity charges. Even in instances such as the Marcus case, where charge stacking was used to encourage a guilty plea, it probably did not hurt the U.S. attorney in New York to be able to reaffirm her commitment to the priorities of the Department. Although our results are preliminary, the extent to which charge stacking is used to navigate competing influences on prosecutorial agenda setting merits further study. Researchers should consider lead charge areas that may conflict with local political culture, such as civil rights prosecutions, hate crime prosecutions, or tax fraud prosecutions in conservative districts, or the prosecution of low-level drug offenses (such as simple possession) in more progressive areas. If true, charge stacking may serve yet another strategic purpose for federal prosecutors—it is a mechanism by which decentralized institutions respond to the imperatives of an increasingly nationalized system of prosecutorial priorities.

B. Obscenity prosecutions and the culture war

In matters of obscenity, both local and federal red state prosecutors behave differently than prosecutors in blue states. Is this disparity in itself evidence of a culture war? As previously mentioned, scholars disagree about the depth and breadth of the culture war. Most agree that political elites, a group to which prosecutors presumably belong, are more polarized than the electorate. The more interesting question is whether this phenomenon provides hints of polarization in the voting public. Our findings suggest that the electorate is polarized over the issue of obscenity, at least to a degree that allows political elites to strategically exploit those cleavages.

Critics of the culture war thesis argue that elites are more polarized than voters because they are institutionally beholden to activist groups.[81] For example, ideological voters are more likely to vote in primary elections, to volunteer for campaigns, and to donate money to candidates.[82] Yet the *Miller* standard is based on community norms, creating a dependence on public opinion given that

prosecutors pursue cases they believe they are likely to win.[83] Although most cases will be settled with a guilty plea, prosecutors must be prepared to convince a jury comprised of local voters that community standards have been violated. While there is systemic selection bias in juries that excludes the poor, women, racial minorities, and the under- and over-educated,[84] juries are not sorted by ideology. Red state prosecutors appear to be confident of their ability to obtain conviction from a (relatively) random sample of voters, suggesting that polarization may be deeper than skeptics have argued.

Although there are disparities between red and blue states, the incidence of these prosecutions is low. If conservative constituencies favor obscenity prosecutions, and prosecutors are willing to engage a culture war for strategic purposes, why are these prosecutions comparatively rare—especially given the dramatic expansion of extreme pornography available via the internet? Interview respondents offered four explanations: lack of prosecutorial expertise, jurisdictional concerns, risk of backlash from other political constituencies, and a "crowd-out" effect caused by the rise in child pornography.

First, prosecutors may be hesitant to try obscenity cases because they lack the prosecutorial expertise to do so. One respondent noted that many district attorneys' offices do not try obscenity cases because their staff believed that they lacked the expertise in first amendment law necessary to secure a conviction. Another prosecutor agreed that the ability to win the case was critical: "I prefer clear-cut cases. If I don't think I can secure a conviction, I won't prosecute. We have an ethical duty not to file a claim without a strong likelihood of victory." The ability to win is a crucial consideration to prosecutors, and while prosecution in a red state may increase odds of victory, prosecutors still may be unwilling to litigate cases with which they are unfamiliar.

A second reason is jurisdictional. One respondent noted that many of the most extreme websites involving bestiality, urination, and gratuitous violence are not located in the United States, but in countries such as Germany or the Netherlands. One could target banks that transact membership fees for these sites, but such an investigation and prosecution is beyond the capacity of all but the largest law enforcement organizations. Jurisdictional constraints are less an issue for federal prosecutors, but resource constraints nonetheless limit pursuit of high-profile obscenity indictments.

Third, prosecutors may fear that focusing on obscenity prosecutions could engender a public backlash. One defense attorney related a story in which a local district attorney in a conservative district decided to pursue obscenity prosecutions aggressively, but faced such widespread public opposition for perceived misallocation of prosecutorial resources that he promised not to bring more indictments. An investigator echoed this dynamic, suggesting that citizens might not object to obscenity prosecutions per se, but instead might feel that these prosecutions divert resources from prosecuting more serious crimes. He noted that, "[O]n a scale of one to ten, most head prosecutors would rank [obscenity prosecutions] a three. They have to worry about other felonies like murders. They have to allocate their resources." Obscenity prosecutions may be highly salient for some constituents, but many crimes, such as drug dealing, rape, homicide, and bank robberies, are salient for almost everyone. Sometimes—though interview respondents agreed that such situations are the exception rather than the rule—obscenity prosecutions appear to be an elite-driven culture war to which the general public does not subscribe.

Finally, the increased presence of child pornography may explain why a small number of obscenity crimes are prosecuted. The spread of inexpensive digital cameras and the internet greatly facilitated the ability of potential child pornographers to manufacture and distribute such content.[85] One interview respondent suggested that the growth in child pornography had encouraged anti-pornography legislation more generally, noting that, "[C]hild pornography is a political football. Legislators will lump child pornography with adult pornography and wrap us together." This position is reasonable when one considers recent federal anti-indecency laws such as the Child Online Protection Act and the P.R.O.T.E.C.T. Act. The presence of child pornography can be used to highlight the ostensible link between adult pornography and harm to children, and thus make restrictions on the adult pornography more politically palatable.

However, the framing device employed by anti-pornography advocates may prove counterproductive. Conflating adult and child pornography may yield law enforcement institutions with dual jurisdiction over both, such as the Child Exploitation and Obscenity Section (CEOS) of the Justice Department. Yet every respondent agreed that prosecutors would choose to prosecute child pornography before obscenity. A prosecutor noted that, "[C]hild pornography is a more serious offense. When we receive these matters, they get prioritization because we rush to identify the children." The growth in child pornography crowds out investigative and prosecutorial attention to obscenity. An investigator noted that when law enforcement efforts against obscenity and child pornography are combined, as they are with the CEOS, "[I]t's hard to prioritize obscenity over child pornography. They need separate resources, or else, understandably, obscenity will not be the priority." This logic explains why Attorney General Gonzales created an anti-obscenity task force within Main Justice that had authority to prosecute adult but not child pornography, even though the CEOS already had the ability to prosecute obscenity. Absent the rapid growth in child pornography, the Bush administration would have been able to devote more resources to the prosecution of obscenity.

Prosecutors can exacerbate, heighten, or magnify cultural cleavages through their case selection. But a case must be minimally salient to jurors in the first place lest the prosecutor risk an acquittal or appear of overzealous. In interviews, law enforcement personnel and defense attorneys cited the importance of local political culture in determining whether to prosecute obscenity cases. Our research reveals a national culture skirmish over obscenity. Although voters in red states might not always prioritize the prosecution of obscenity, prosecutors expect them to be more hostile toward obscenity than residents of blue states. Rather than thinking of the culture war as a hot war between activist citizens, it can be thought of as a cold war driven by the political calculations of prosecutors who know they can win cases by highlighting regional values.

C. The problem with prohibition

Although constituent demand helps explain the decision to file an obscenity indictment, there is one stark difference between the law and the politics of obscenity: the case law is clear that not all pornography is obscene, but anti-pornography advocates rarely make this distinction. Prosecutors reflect this divide. *Regulators* approach the adult entertainment industry as a distasteful albeit legitimate enterprise in which some businesses behave illegally. Their goal is to signal the permissible bounds of adult material. *Prohibitionists*, in contrast, seek to eradicate pornography.

Regulators believe that the role of law enforcement is to send signals that facilitate self-policing by the adult entertainment industry. One prosecutor interviewed focused only on particular types of content such as that involving bestiality, defecation, urination, fisting, and simulated rape. He noted, "there is a perception that police and prosecutors are going out on wild raids—an assumption that these suits are politically generated. Politics may play some part of it, but it's not my job to legislate morality." He believed that over time the industry had learned what was likely to result in prosecution. In his estimation, forty to sixty percent of the industry tried "to do the right thing," especially larger companies that viewed themselves as mature businesses. This prosecutor, as well as a criminal investigator, argued that when industry members chose to challenge the articulated boundaries, they did so purposefully, to appeal to profitable niche markets.

Prohibitionists, however, seek to communicate that all pornography is prohibited, and they employ two unique strategies. The first, hyper-indictment, has been described above.[86] The second is a multi-jurisdictional indictments strategy used exclusively by federal prosecutors who venue-shop in order to find locales with the most restrictive community standards. For example, adult video distributor Avram Freedberg agreed in 1991 to permanently close his business "after the Justice Department told him he'd be prosecuted in as many districts as necessary to obtain convictions."[87] Attorney General Thornburgh acknowledged that his barrage of indictments in the early 1990s was designed to notify "large-scale producers of illegal hard-core pornography . . . [that] they will be pursued in every state in the nation."[88]

Supporters of this strategy argue that it is uncontroversial; the fact that a distributor shipped to fifty cities where its material is not considered obscene does not mitigate the fact that it shipped to one where the material is illegal. However, federal officials in written memoranda and public speeches acknowledged that multi-jurisdictional cases were designed to "keep defense attorneys busy and running around the country."[89] Critics argue that multi-jurisdictional prosecutions constitute improper forum shopping. In the federal prosecution of Cal Vista, a major manufacturer/distributor located in California, the FBI set up a sham video store in Broken Arrow, Oklahoma in order to purchase Cal Vista's films. It was established at trial that the only videos Cal Vista shipped to Oklahoma were those ordered by the FBI.[90]

Prohibitionists may also push the *Miller* test far beyond the boundaries of reasonable legal interpretation. Sample cases include prosecuting a video store that stocked the John Waters movie *Pink Flamingos* despite the fact that the movie was not designed to appeal to the prurient interest;[91] prosecuting an adult bookstore for selling a magazine containing nonsexual adult nudity;[92] prosecuting the curator of the Cincinnati Contemporary Arts Center for hosting a Robert Mapplethorpe exhibition;[93] and prosecuting parents who have taken nonsexual photos of their children in situations such as blowing "raspberries" on a mother's breast or taking a shower.[94] That these prosecutions rarely succeed is beside the point; the process is the punishment.[95] The mother who had taken the photo of her six-year old blowing a raspberry on her breast was acquitted at trial, but only after being forced to admit on the stand that she had had an online affair. The prosecutor responded to the acquittal by stating that he intended to try her again.[96]

The problem for defendants is that it is difficult to determine not only what a jury will find obscene but also the type of prosecutor one may face. Interview respondents from the adult entertainment industry and their lawyers agreed that communities in the South had more restrictive standards, but could not predict where lines would be drawn. One attorney, when asked whether the industry picked up prosecutorial signals about the permissible boundaries of adult content, said, "I don't know what prosecutors will choose to try." Another claimed, "[T]he industry is lousy at getting signals from prosecutors. There is no Magic 8-Ball to determine what you will be prosecuted for. Some types of content are more high risk, such as scat and bestiality, but the prosecutor might decide to set the bar lower." An industry representative was more skeptical claiming, "there are no objective standards. A movie may sit on a shelf for years, nothing will happen, then suddenly there is an indictment." It is tempting to dismiss these views as strategically feigned ignorance, and for a narrow category of extreme material, such skepticism is justified. But prohibitionists are willing to prosecute far beyond this category—in some instances the frustrations of defense attorneys seem quite reasonable. Moreover, a risk-averse strategy of "assume the worst" is not a viable option because attempting to comply with the preferences of a prohibitionist would require going out of business.

As a result, prohibitionists undermine the signaling efforts of regulators. Signaling is difficult by nature because definitions of obscenity vary by jurisdiction. But theoretically, producers and distributors could attempt to conform to these geographic differences if prosecutors employed obscenity indictments to articulate the standards. Yet prohibitionists reduce prosecutorial signaling to background noise. If any type of adult material may be prosecuted, why not market the most extreme types, which often are the most profitable? This is especially true as many members of the adult entertainment industry focus on the financial costs of obscenity prosecutions. An adult director suggested that the goal of prosecutors "is to bankrupt you, not jail you." Consequently, he continued to market extreme content, partially out of moral conviction, but largely because it was profitable to do so. He believed that he faced prosecution no matter what type of content he produced, so he preferred to confront trial with a large cash reserve.

Inconsistent regulatory enforcement can be ineffective, and obscenity prosecutions risk this problem. Just as anti-pornography advocates, by conflating adult pornography and child pornography, created institutions that did not prosecute many obscenity cases, prohibitionist prosecutors may create a legal environment in which the rational business strategy may be to create obscene rather than indecent material.

V. Conclusion

Scholars seek to understand not only the ways political forces shape the decision making of prosecutors, but also how cultural distinctions between regions in the United States translate into observable policy differences. By studying obscenity prosecutions, a policy area highly salient to the conservative evangelical community, we gain insight into whether there is a culture war in America, and if so, how prosecutors strategically respond to its influence. Our evidence of state and local obscenity prosecutions clearly documents a relatively deep culture war, exhibiting regional differences in opinion. The experience of federal prosecutors, however, is more nuanced—an understandable outcome given the competing political pressures they face. While most obscenity prosecutions occurred in red states, the willingness of blue state federal prosecutors to take these cases is surprising. Or rather, it is surprising until one understands the strategies of blue state federal prosecutors, who bring obscenity cases not primarily to limit pornographic material, but rather as a means of charge stacking defendants accused of other more serious offenses. By use of this technique, federal prosecutors accommodated the Bush administration's anti-obscenity efforts without having to bring the types of obscenity cases unlikely to appeal to blue state juries.

Our interviews of those involved with obscenity prosecutions support this conclusion. Obscenity prosecutions are more likely to occur in conservative communities because prosecutors respond to the political demands of citizens, as well as the fact that trying these cases in conservative communities makes it easier to secure a conviction. Prosecution is an inherently political act, and prosecutors do not like to lose. The fact that obscenity prosecutions are comparatively rare even in red states can be explained by prosecutors' fear of trying unfamiliar cases, jurisdictional concerns, the risk of public backlash from political constituencies concerned about other areas of criminal conduct, and the growth of, and consequent need to prosecute, child pornography.

Prosecutors exhibited differences not only in strategies, but also in goals; some tried to regulate the more extreme producers of adult entertainment, while others tried to eradicate pornography entirely from their districts by employing hyper-indictment or multi-jurisdictional approaches. Which strategy is normatively correct is open to debate, but the prohibitionist approach is problematic for two reasons. First, it is at odds with fifty years of case law that distinguishes between indecency and obscenity. It is one thing to make good faith efforts to reshape case law, but another to flood the local courts with so many obscenity indictments that judges complain. Second, the prohibitionist strategy risks encouraging the creation of the very type of pornography that is most legally and ethically questionable. In culture wars, as in wars more generally, we must always look askance on Pyrrhic victories.

Appendix I. Lead charge classification

Obscenity	
18 US Code 1460	Obscene material on federal property
18 US Code 1461	Mailing obscene or crime-inciting matter
18 US Code 1462	Importation of transportation of obscene matters
18 US Code 1464	Broadcasting obscene language
18 US Code 1465	Transportation of obscene matters for sale or distribution
18 US Code 1466	Engaging in business of selling or transporting obscene material
18 US Code 1467	Obscenity—criminal forfeiture
18 US Code 1468	Distribution of obscenity by cable or subscription television
18 US Code 1470	Transfer of obscenity intended for minors
Expanded obscenity (all of the above and…)	
18 US Code 0225	Continuing financial crimes enterprise
18 US Code 0371	Conspiracy to commit offense or to defraud US
18 US Code 0552	Officers aiding importation of obscene or treasonous material
18 US Code 1001	Fraud and false statements
18 US Code 1029	Fraud and false statements—access devices
18 US Code 1030	Fraud and false statements—computers
18 US Code 1737	Manufacture of sexually related mail matter
18 US Code 1952	Racketeering—interstate/foreign travel/transport
18 US Code 0004	Misprision of felony

Endnotes:

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[1] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 512 (2001).

[2] *Id.* at 543.

[3] Lief H. Carter, The Limits of Order (1974); Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1969); Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 Am. J. Pol. Sci. 334 (2002); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 Law & Soc'y Rev. 247 (1998).

[4] Donald L. Horowitz, The Jurocracy: Government Lawyers, Agency Programs, and Judicial Decisions (1977); Cornell W. Clayton, *Introduction: Politics and the Legal Bureaucracy*, *in* Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics (C. W. Clayton, ed., 1995); Neal Devins, *Towards an Understanding of Legal Policy-Making at Independent Agencies*, *in* Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics (C. W. Clayton, ed., 1995); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study on Prosecutorial Discretion*, 24 Stan. L. Rev. 1037 (1972).

[5] James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems (2008); James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 Seattle U. L. Rev. 219 (2008) [hereinafter "Firings"]; Todd Lochner, *Prosecutorial Agenda-Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 Just. Sys. J. 281 (2002); Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 Law & Soc. Inquiry 239 (2005); H.W. Perry Jr., *United States Attorneys–Whom Shall They Serve?*, 61 Law & Contemp. Probs. 129 (1999); Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of United States Attorneys*, 3 J. of Pub. Admin. Res. & Theory 3 (2002).

[6] Gordon & Huber, *supra* note 3; Stuntz, *supra* note 1.

[7] Eisenstein, *supra* note 5, at 2-3; Lochner, *supra* note 5, at 279-280.

[8] Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Calif. L. Rev. 539 (1990); Johnson, *supra* note 3.

[9] Eisenstein, *supra* note 5; Perry Jr., *supra* note 5.

[10] Perry Jr., *supra* note 5, at 129-131.

[11] Morris P. Fiorina, Samuel J. Abrams, & Jeremy C. Pope, Culture War? The Myth of a Polarized America. (2nd ed. 2006); James D. Hunter, Culture Wars: The Struggle to Define America (1991); Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. Pol. 542 (2008).

[12] John H. Evans, *Have Americans' Attitudes Become More Polarized—An Update*, 84 Soc. Sci. Q. 71 (2003).

[13] Abramowitz & Saunders, *supra* note 11.

[14] Donald Alexander Downs, The New Politics of Pornography 103-105 (1989). *See also* Joseph F. Kobylka, *A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity*, 49 J. Pol. 1061 (1987) (discussing the role of the American Civil Liberties Union and trade groups in litigating obscenity cases).

[15] Barton Gellman, *Recruits Sought for Porn Squad*, Washington Post, September 20 2005, at A21.

[16] Johnson, *supra* note 3 at 258.

[17] Frase, *supra* note 8.

[18] John Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 Mich. L. Rev. 204, 211 (1979).

[19] Johnson, *supra* note 3, at 258.

[20] *Id.* at 259-260.

[21] The historical summary that follows is borrowed largely from Eisenstein's definitive work on U.S. attorneys. *See* Eisenstein *supra* note 5.

[22] Occasionally, U.S. attorneys will serve beyond that time period should their president serve two terms.

[23] Eisenstein, *supra* note 5, at 9-10.

[24] *Id.*

[25] Clayton, *supra* note 4, at 9.

[26] Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. Pol'y Analysis & Mgmt. 369, 393 (1991).

[27] *But see* Johnson, *supra* note 3, at 300-303 (suggesting that American prosecutors could learn some beneficial lessons from the more hierarchically structured Japanese system).

[28] Tom Stacy and Kim Dayton, *The Underfederalization of Crime*, 6 Cornell J. L. & Pub. Pol'y 247, 251) (1997) (internal citations omitted).

[29] Lochner, *supra* note 5, at 280.

[30] 28 U.S.C. § 51.

[31] U.S. United states Department of Justice, United States Attorneys' Manual (1997).

[32] Whitford *supra* note 5.

[33] Eisenstein, "Firings," *supra* note 5.

[34] Stuntz, *supra* note 1, at 578.

[35] *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[36] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[37] *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

[38] *Sable Comm. Inc. v. FCC*, 492 U.S. 115 (1989).

[39] *Stanley v. Georgia*, 394 U.S. 557 (1969).

[40] *Miller v. California*, 413 U.S. 15 (1973).

[41] *New York v. Ferber*, 458 U.S. 747 (1982).

[42] *Osborne v. Ohio*, 495 U.S. 103 (1990).

[43] Downs, *supra* note 14; Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 Stan. L. Rev. 607 (1987); Nadine Strossen, *A Feminist Critique of 'The' Feminist Critique of Pornography*, 79 Va. L. Rev. 1099 (1993).

[44] Strossen, *supra* note 43, at 1114.

[45] *Promoting a Decent Society Through Law*, Morality in Media Inc., (2007), http://www.moralityinmedia.org/.

[46] http://www.cwfa.org/about/issues/ *Our Issues*, Concerned Women for America, http://www.cwfa.org/about/issues/ (last visited March 21, 2015).

[47] Brest & Vandenberg, *supra* note 43.

[48] Greg Beato, *Xtreme Measures: Washington's new crackdown on pornography*, Reason, May 1, 2004, at 29.

[49] Gellman, *supra* note 15, at A-21.

[50] Max Blumenthal, *The Porn Plot Against Prosecutors*, The Nation, (April 2, 2007), (available at http://www.thenation.com/article/porn-plot-against-prosecutors http://www.thenation.com/article/porn-plot-against-prosecutors)

[51] *Id.*

[52] Hunter, *supra* note 11, at 44.

[53] Paul J. DiMaggio, John Evans, & Bethany Bryson, *Have Americans' Social Attitudes Become More Polarized*? 102 Am. J. Soc. 690 (1996).

[54] James Davidson Hunter &Alan Wolfe, Is There a Culture War? A Dialogue on Values and American Public Life 46 (J. D. Hunter and A. Wolfe, eds. 2006).

[55] Fiorina et al., *supra* note 11, at 166.

[56] Abramowitz & Saunders, *supra* note 11.

[57] Pietro S. Nivola Et Al, Red and Blue Nation? Characteristics and Causes of America's Polarized Politics, (Pietro S. Nivola & David W. Brady, eds., 2006).

[58] *See* generally Lee Epstein, Conservatives in Court (1985); Daniel R. Pinello, Gay Rights and American Law (2003).

[59] Evans, *supra* note 12, at 87.

[60] Of federal prosecutions initiated in April 2014, 58% involved immigration offenses and 10% involved drug trafficking. http://trac.syr.edu/tracreports/bulletins/overall/monthlyapr14/fil/

[61] *See infra* p. 27.

[62] The query was: indict! /p obscen! pornograph! % "child pornography" & da(aft /1/2000 & bef 6/30/2006).

[63] Joseph F. Kobylka, The Politics of Obscenity: Group Litigation in a Time of Legal Change (1991); *see also* Joseph F. Kobylka, *A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity*, 49 J. Pol. 1061, (1987); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 Am. Pol. Sci. Rev. 715, 717 (1993).

[64] See James Fallows, Breaking the News: How the Media Undermine American Democracy (1997).

[65] Abramowitz & Saunders, *supra* note 11.

[66] Downs, *supra* note 14.

[67] *Id*.; Strossen, *supra* note 43.

[68] John C. Jeffries Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 Hastings L.J. 1095, 1096-1097 (1995).

[69] Miller & Eisenstein, *supra* note 5; *see also* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583 (2005).

[70] *About the Data: Understanding the Terminology Which Agencies Use*, Transactional Records Access Clearinghouse (1999), http://tracfed.syr.edu/help/data/dataTerminology.html

[71] Because our definition of what constituted obscenity was somewhat intuitive, we also tested an expanded definition of what constituted an obscenity lead charge, including both the charges we originally identified as core obscenity as well as those that

sometimes are associated with a core obscenity prosecution—particularly those against manufacturers, distributors, or purveyors of adult material (these also are listed in the Appendix). Including these expanded charges did not materially change our findings, so results are presented using the original definition.

[72] Institutional approval to conduct research on human participants was provided on January 31, 2007 by [university name redacted] (application number 06-40).

[73] Stephan Salisbury, *Despite Verdict, Tremors Linger from Mapplethorpe Case*, Philadelphia Inquirer, October 7, 1990, available at http://articles.philly.com/1990-10-07/news/25890633_1_mapplethorpe-case-dennis-barrie-marc-d-mezibov.

[74] One outlier we found merits its own explanation. Alabama District Attorney Jimmy Evans filed hundreds of obscenity indictments in 1990 in order to shut down adult businesses, a strategy we term "hyper-indictment." In response to parental complaints that children had obtained access to adult movies broadcast on the Home Dish satellite network, he returned over 500 obscenity indictments against the Home Dish cable company, three affiliated companies, and ten owners. Paul Newberry, *Triple-X Satellite Network Shot Down by Alabama Prosecutor*, Akron Beacon Journal, May 3, 1990. The indicted companies that provided the satellite signals for Home Dish pleaded ignorance and cut off Home Dish service throughout the United States rather than face litigation, forcing it to cease operations. *Id.* Evans was subsequently elected state Attorney General, where he once again employed a hyper-indictment strategy, this time against local adult bookstores. He filed over 700 cases—all multi-count misdemeanor obscenity charges—against eleven businesses and fifty individuals. Steve Visser, *State Dismisses 32 Porn Charges, Takes $80,000 in Plea Agreement*, Birmingham News, March 17, 1996, at 1996 WLNR 5664765. Law enforcement personnel would enter an adult bookstore, rent a video, catalogue the transaction, and then charge the bookstore owner and the store clerk with distribution of obscene material. This strategy proved less successful than the Home Dish prosecutions, largely because the bookstores chose to litigate. Judges refused to impose the maximum allowable penalties of a $10,000 fine and one year in jail on store clerks, and ultimately pressured prosecutors to settle the cases because they grew tired of having court dockets tied up with watching porn movies. *Id.*

[75] The Court in *Hamling v. U.S.*, 418 U.S. 87 (1974), held that for purposes of the community standards prong of the Miller test, purveyors of adult material are responsible for adhering to the community standards where there material is received. This strategy was used by federal prosecutors to prosecute Paul Little, a.k.a. "Max Hardcore" for obscenity violations in Tampa, Florida. Kevin Graham, *Jurors convict adult film producer*, TAMPA BAY TIMES, June 5, 2008 available at http://www.tampabay.com/news/courts/criminal/jurors-convict-adult-film-producer/609794.

[76] Interviewees suggested that by the late 1990s into the early 2000s, many feminists were less concerned with pornography and turned their attention to other political matters.

[77] Eisenstein, *supra* note 5; *see also* Keith Hawkins, Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency (2002).

[78] Zach Haberman, *S&M Man Tortured by Cyberban*, N.Y. Post, June 21, 2005, available at http://nypost.com/2005/06/21/sm-man-tortured-by-cyberban/

[79] Eisenstein, *supra* note 5; Lochner, *supra* note 5.

[80] Hawkins, *supra* note 77.

[81] Fiorina et al., *supra* note 2.

[82] Morris P. Fiorina & Matthew Levendusky, *Disconnected: The Political Class Versus the People*, *in* Red and Blue Nation? Volume I – Characteristics and Causes of America's Polarized Politics 49 (P.S. Nivola & D.W. Brady, eds. 2006).

[83] *See supra* note 77.

[84] *See also* Hayward R. Walker Jr., Carl Hosticka, & Michael Mitchell, *Jury Selection as a Biased Social Process*, 11 Law & Soc'y Rev. 9 (1976); Edward N. Beiser, *Are Juries Representative*, 57 Judicature 1913 (1973); Hiroshi Fukurai, Edgar W. Butler, & Richard Krooth, *Cross-sectional jury representation or systematic jury representation? Simple random and cluster sampling strategies in jury selection*, 19 J. Crim. Just. 31 (1991).

[85] *See Child Exploitation and Obscenity Section*, U.S. Deparmtment of Justice, (May 30, 2015), http://www.justice.gov/criminal/ceos/subjectareas/childporn.html.

[86] *See supra* note 74 and accompanying text.

[87] *Riders of the Purple Page: Federal Posse Chases Pornographers Justice Unit Prosecutes Hard-Core Smut Producers in Multiple Locales*, BALTIMORE SUN, December 30, 1991, at 1991 WLNR 763357.

[88] *Id.*

[89] Laurie Casady, *Attorneys say Broken Arrow Chosen for Obscenity Test Case*, Tulsa World, October 24, 1991, http://www.tulsaworld.com/archives/attorneys-say-ba-chosen-for-obscenity-test-case/article_c9e129e6-d905-5837-ba9d-792d74d263e5.html.

[90] *Id.*

[91] Bob Levenson, *Video Shops: What's Dirty, What's Not?*, Orlando Sentinel, July 15, 1990, available online at http://articles.orlandosentinel.com/1990-07-15/news/9007150743_1_unrated-video-pink-flamingos

[92] *Id.*

[93] Salisbury, *supra* note 73.

[94] Robert L. Smith, *Life changed in a day for mother accused of obscenity*, Cleveland Plain Dealer, November 11, 2000.

[95] *See generally* Malcom Feeley, The Process is the Punishment (1979).

[96] Smith, *supra* note 94.

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