OBSCENITY PROSECUTIONS

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I. MAIN STATUTES

A. Federal (18 U.S.C. § 1461)

§ 1461. †Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and--

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Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

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Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

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Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

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Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

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Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing--

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Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

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Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

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The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

B. Louisiana (La. R.S. 14:106)

§ 106 Obscenity

†††A. The crime of obscenity is the intentional:

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†††(1) Exposure of the genitals, pubic hair, anus, vulva, or female breast nipples in any public place or place open to the public view, or in any prison or jail, with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.

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†††(2)(a) Participation or engagement in, or management, operation, production, presentation, performance, promotion, exhibition, advertisement, sponsorship, or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political, or scientific value.

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†††(b) Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

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†††(i) Ultimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being; or

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†††(ii) Masturbation, excretory functions or lewd exhibition, actual, simulated, or animated, of the genitals, pubic hair, anus, vulva, or female breast nipples; or

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†††(iii) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation, or torture by or upon a person who is nude or clad in undergarments or in a costume that reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or

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†††(iv) Actual, simulated, or animated touching, caressing, or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

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†††(v) Actual, simulated, or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured, or marketed for such purpose.

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†††(3) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, or display of obscene material, or the preparation, manufacture, publication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, or display.

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†††Obscene material is any tangible work or thing which the trier of fact determines (a) that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) above, and (c) the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

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†††(4) Requiring as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication to a purchaser or consignee that such purchaser or consignee also receive or accept any obscene material, as defined in Paragraph (3) above, for resale, distribution, display, advertisement, or exhibition purposes; or, denying or threatening to deny a franchise to, or imposing a penalty, on or against, a person by reason of his refusal to accept, or his return of, such obscene material.

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†††(5) Solicitation or enticement of an unmarried person under the age of seventeen years to commit any act prohibited by Paragraphs (1), (2), or (3) above.

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†††(6) Advertisement, exhibition, or display of sexually violent material. "Violent material" is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture, and mutilation of the human body, as described in Sub-Subparagraph (b)(iii) of Paragraph (2) of Subsection A herein.

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†††B. Lack of knowledge of age or marital status shall not constitute a defense.

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†††C. If any employee of a theatre or bookstore acting in the course or scope of his employment, is arrested for an offense designated in this Section, the employer shall reimburse the employee for all attorney's fees and other costs of defense of such employee. Such fees and expenses may be fixed by the court exercising criminal jurisdiction after contradictory hearing or by ordinary civil process.

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†††D. (1) The provisions of this Section do not apply to recognized and established schools, churches, museums, medical clinics, hospitals, physicians, public libraries, governmental agencies, quasi-governmental sponsored organizations and persons acting in their capacity as employees or agents of such organizations, or a person solely employed to operate a movie projector in a duly licensed theatre.

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†††(2) For the purpose of this Paragraph, the following words and terms shall have the respective meanings defined as follows:

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†††(a) "Recognized and established schools" means schools having a full time faculty and pupils, gathered together for instruction in a diversified curriculum.

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†††(b) "Churches" means any church, affiliated with a national or regional denomination.

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†††(c) "Physicians" means any licensed physician or psychiatrist.

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†††(d) "Medical clinics and hospitals" means any clinic or hospital of licensed physicians or psychiatrists used for the reception and care of the sick, wounded or infirm.

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†††E. This Section does not preempt, nor shall anything in this Section be construed to preempt, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments; however, in order to promote uniform obscenity legislation throughout the state, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments shall not exceed the scope of the regulatory prohibitions contained in the provisions of this Section.

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†††F. (1) Except for those motion pictures, printed materials, and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm, or corporation shall be arrested, charged, or indicted for any violations of a provision of this Section until such time as the material involved has first been the subject of an adversary hearing under the provisions of this Section, wherein such person, firm, or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm, or corporation continues to engage in the conduct prohibited by this Section. The sole issue at the hearing shall be whether the material is obscene.

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†††(2) The hearing shall be held before the district court having jurisdiction over the proceedings within seventy-two hours after receipt of notice by the person, firm, or corporation. The person, firm, or corporation shall be given notice of the hearing by registered mail or by personal service on the owner, manager, or other person having a financial interest in the material; provided, if there is no such person on the premises, then notice may be given by personal service on any employee of the person, firm, or corporation on such premises. The notice shall state the nature of the violation, the date, place, and time of the hearing, and the right to present and cross-examine witnesses.

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†††(3) The state or any defendant may appeal from a judgment. Such appeal shall not stay the judgment. Any defendant engaging in conduct prohibited by this Section subsequent to notice of the judgment, finding the material to be obscene, shall be subject to criminal prosecution notwithstanding the appeal from the judgment.

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†††(4) No determination by the district court pursuant to this Section shall be of any force and effect outside the judicial district in which made and no such determination shall be res judicata in

any proceeding in any other judicial district. In addition, evidence of any hearing held pursuant to this Section shall not be competent or admissible in any criminal action for the violation of any other Section of this Title; provided, however, that in any criminal action, charging the violation of any other Section of this Title, against any person, firm, or corporation that was a defendant in such hearing, involving the same material declared to be obscene under the provisions of this Section, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

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†††G. (1) On a first conviction, whoever commits the crime of obscenity shall be fined not less than one thousand dollars nor more than two thousand five hundred dollars, or imprisoned, with or without hard labor, for not less than six months nor more than three years, or both.

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†††(2)(a) On a second conviction, the offender shall be imprisoned, with or without hard labor for not less than six months nor more than three years, and in addition may be fined not less than two thousand five hundred dollars nor more than five thousand dollars.

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†††(b) The imprisonment provided for in Subparagraph (a), may be imposed at court discretion if the court determines that the offender, due to his employment, could not avoid engagement in the offense. This Subparagraph (b) shall not apply to the manager or other person in charge of an establishment selling or exhibiting obscene material.

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†††(3) On a third or subsequent conviction, the offender shall be imprisoned with or without hard labor for not less than two years nor more than five years, and in addition may be fined not less than five thousand dollars nor more than ten thousand dollars.

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†††(4) When a violation of Paragraph (1), (2), or (3) of Subsection A of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than ten thousand dollars and shall be imprisoned, with or without hard labor, for not less than two years nor more than five years, without benefit of parole, probation, or suspension of sentence.

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†††H. (1) When a corporation is charged with violating this Section, the corporation, the president, the vice president, the secretary, and the treasurer may all be named as defendants. Upon conviction for a violation of this Section, a corporation shall be sentenced in accordance with Subsection G hereof. All corporate officers who are named as defendants shall be subject to the penalty provisions of this Section as set forth in Subsection G.

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†††(2) If the corporation is domiciled in this state, upon indictment or information filed against the corporation, a notice of arraignment shall be served upon the corporation, or its designated agent for service of process, which then must appear before the district court in which the prosecution is pending to plead to the charge within fifteen days of service. If no appearance is made within fifteen days, an attorney shall be appointed by the court to represent the defendant corporation with respect to the charge or to show cause why the corporation should not be

enjoined from continuing in business during the pendency of the criminal proceedings. Appearance for arraignment may be made through private counsel.

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†††(3) If the corporation is domiciled out of state and is registered to do business in Louisiana, notice of arraignment shall be served upon the corporate agent for service of process or the secretary of state, who shall then notify the corporation charged by indictment or information to appear before the district court in which the prosecution is pending for arraignment within sixty days after the notice is mailed by the secretary of state. If no appearance is made within sixty days the court shall appoint an attorney to represent the defendant corporation with respect to the charge or to show cause why the corporation should not be enjoined from continuing in business during the pendency of the criminal proceedings. Appearance for arraignment may be made by private counsel.

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†††(4) If the corporation is domiciled out of state and is not registered to do business in Louisiana, notice of arraignment of the corporation shall be served upon the secretary of state and an employee, officer, or agent for service of process of the corporation found within the parish where the violation of this Section has allegedly occurred. Such notice shall act as a bar to that corporation registering to do business in Louisiana until it appears before the district court in which the prosecution is pending to answer the charge.

II. MUST READ CASES

Mishkin v. New York, 383 U.S. 502 (1966)

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

Paris Adult Theater v. Slaton, 413 U.S. 49 (1973)

Kapaln v. California, 413 U.S. 115 (1973)

Hamling v. United States, 418 U.S. 87 (1974)

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

Pinkus v. United States, 436 U.S. 293 (1978)

Ashcroft v. ACLU, 535 U.S. 564 (2002)

United States v. Hill, 500 F.2d 733 (5th Cir. 1974)

United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974)

United States v. Thevis, 490 F.2d 76 (5th Cir. 1974))

United States v. Tratman, 524 F.2d 320 (8th Cir. 1975)

United States v. 2,200 Paper Back Books, 565 F.2d 566 (9th Cir. 1977)

Red Bluff Drive-Inn v. Vance, 648 F.2d 1020 (5th Cir. 1981)

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984)

United States v. Pryba, 900 F.2d 748 (4th Cir. 1990)

United States v. Pryba, 678 F.Supp. 1224 (E.D. Va. 1988)

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. 1978)

State v. Short, 368 So. 2d 1078 (La. 1979)

Berg v. Texas, 599 S.W2d 802 (Tex. 1980)

Keller v. Texas, 606 S.W.2d 931 (Tex. 1980)

Knight v. Texas, 642 S.W.2d 180 (Tex. App. 1982)

Asaff v. Texas, 799 S.W.2d 329 (Tex. App. 1990)

Ohio v. Dute, 2003 Ohio App. LEXIS 2495 (Oh. App. 2003)

III. MUST REVIEW

American Porn, PBS Frontline. *See* www.pbs.org/wgbh/pages/frontline/shows/porn/

Canned government briefs filed in obscenity cases.
See http://www.nationallawcenter.org/Plead.htm

IV. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS

Title 18, United States Code, Section 1461, makes it a crime for anyone to use the United States mail to transmit obscene materials.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly used the mails for the conveyance [delivery] of certain materials, as charged;

Second: That the defendant knew at the time of the mailing that the materials were of a sexually oriented nature; and

Third: That the materials were obscene.

Although the government must prove that the defendant generally knew the mailed materials were of a sexually oriented nature, the government does not have to prove that the defendant knew the materials were legally obscene.

Freedom of expression has contributed much to the development and well being of our free society. In the exercise of the fundamental constitutional right to free expression which all of us enjoy, sex may be portrayed, and the subject of sex may be discussed, freely and publicly. Material is not to be condemned merely because it contains passages or sequences that are descriptive of sexual activity. However, the constitutional right to free expression does not extend to that which is obscene.

To prove a matter is "obscene," the government must satisfy a three-part test: (1) that the work appeals predominantly to prurient interest; (2) that it depicts or describes sexual conduct in a patently offensive way; and (3) that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

An appeal to "prurient" interest is an appeal to a morbid, degrading, and unhealthy interest in sex, as distinguished from a mere candid interest in sex.

The first test, therefore, is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of an average person in the community as a whole [to the prurient interest of members of a deviant sexual group]. In making this decision, you must examine the main or principal thrust of the material, when assessed in its entirety and based on its total effect, not on incidental themes or isolated passages or sequences.

The second test is whether the material depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts, normal or perverted, actual or stimulated; masturbation; excretory functions; or lewd exhibition of the genitals.

These first two tests which I have described are to be decided by you, applying contemporary community standards. This means that you should make the decision in the light of contemporary standards that would be applied by the average person in this community, with an average and normal attitude toward--and interest in--sex. Contemporary community standards are those accepted in this community as a whole. You must decide whether the material would appeal predominantly to prurient interests and would depict or describe sexual conduct in a patently offensive way when viewed by an average person in this community as a whole, that is, by the community at large or in general. Matter is patently offensive by contemporary community standards if it so exceeds the generally accepted limits of candor in the entire community as to be clearly offensive. You must not judge the material by your own personal standards, if you believe them to be stricter than those generally held, nor should you determine what some groups of people may believe the community ought to accept or refuse to accept. Rather, you must determine the attitude of the community as a whole. *[However, the prurient-appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if the material in question was intended to appeal to the prurient interest of that group, as distinguished from the community in general.]*

If you find that the material meets the first two tests of the obscenity definition, your final decision is whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value. Unlike the first two tests, this third test is not to be decided on contemporary community standards but rather on the basis of whether a reasonable person, considering the material as a whole, would find that the material lacks serious literary, artistic, political, or scientific value. An item may have serious value in one or more of these areas even if it portrays sexually oriented conduct. It is for you to say whether the material in this case has such value.

All three of these tests must be met before the material in question can be found to be obscene. If any one of them is not met, the material would not be obscene within the meaning of the law.

VI. CONSTITUTIONAL TEST FOR OBSCENITY

The current test for obscenity is a three pronged test that is set forth in *Miller v. California*, 413 U.S. 15 (1973):

The first prong of the test of obscenity is whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interests.

The second prong of the test is whether, applying the contemporary community standards, the material depicts or describes sexual conduct in a patently offensive way.

The third prong is whether the material, taken as a whole, lacks serious literary, artistic, political and scientific value.

A. Sex and Obscenity are Not Synonymous

> "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

Roth v.United States, 354 U.S. 476, 487 (1957)

B. Prurient Interests

The phrase "appeals to the prurient interests" refers to the effect or impact the materials have on the average person, that is whether the material produces a shameful or morbid sexual response in the average person.

The fact that one portion or scene of a work may have some appeal to the prurient interest of the average person is not sufficient. Rather, the dominant theme of the work-- that is, the work taken as a whole-- must appeal to the prurient interest of the average person.

Use of the term "average person" means that the material is not to be judged on the basis of individual tastes. Rather, the material is to be judged based upon the hypothetical average adult person in the community. The average person adult does not include children. Likewise, material is not to be judged through the eyes of the most tolerant or the most sensitive. *See generally, Pinkus v. United States,* 436 U.S. 293 (1978).

The prurient appeal of the material can also be based on an appeal to a deviant sexual group in order to satisfy the first prong of the *Miller* test. *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966). (*See* discussion *infra.* as to whether this would require the government to put on expert testimony.)

C. Contemporary Community Standards

Contemporary community standards are what is accepted/tolerated (*see* discussion *infra.* as to accepted vs. tolerated) in the community as a whole.

Generally speaking, the community standards consist of the standards from the area from which the jury is chosen, however, specificity as to a precise geographic area is not required as a matter of constitutional law. *United States v. Miller* 413 U.S. 15, 30, 33-34 (1973), *Hamling v. United States,* 418 U.S. 87 (1974). How the "community" is defined varies from jurisdiction to jurisdiction. For example, in federal court, the scope of the community is usually not defined but is considered to be either the judicial district or the division within the judicial district. In state

court in Texas, the community is considered the state as a whole, not the county in which the trial takes place.

Prosecutions can be brought in the district of transmission or receipt. *See, e.g., United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982); *United States v. Peraino*, 645 F.2d 548, 551-53 (6th Cir. 1981); *United States v. Thomas*, 613 F.2d 787, 792 (10th Cir. 1980); *United States v. Cohen*, 583 F.2d 1030, 1041 (8th Cir. 1978). The "community" in those cases is the "community" where the trial takes place.

For internet obscenity cases, there is a ongoing debate as to how to define the scope of the community. *See, e.g., Ashcroft v. ACLU*, 122 S.Ct. 1700 (2002); John S. Zanghi, *Community Standards in Cyberspace*, 21 U. Dayton L. Rev. (1995).

D. Value of Material

The first two prongs of the *Miller* test is judged using "contemporary community standards." The third prong is judged using a reasonable person test. *See Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). In other words, would a reasonable person, considering the material as a whole, believe that the material lacks serious literary, artistic, political or scientific value.

E. Scienter

It is not necessary for the government to prove that a defendant knew the material was obscene. All the government must prove is that the material was of a sexually oriented nature. *Hamling v. United States*, 418 U.S. 87, 119-24 (1974). Indeed, it has been held that "advice of counsel" is not a defense to an obscenity prosecution. *See Schindler v. United States*, 208 F.2d 289 (9th Cir. 1953).

There is a strong argument that, when a defendant is charged with a conspiracy to distribute obscene material or aiding and abetting the distribution of obscene material, that these require the defendant to know that the material was, in fact, obscene. This presupposes that conspiracy and aiding and abetting are specific intent crimes.

VII. PRE-TRIAL PREPARATION

The following is a non-exhaustive list of suggestions for preparing for trial and obtaining an understanding of the community standards:

1. Watch the PBS Frontline video entitled "American Porn."

2. After determining the sexual acts in the material on trial, visit as many adult bookstores as possible in your community.

    a. Review videos available in both heterosexual sections and homosexual section for material depicting those acts.

        1. Some DVDs now contain the "making of" the production.

    b. Review devices available that show that people engage in those type of acts.

    c. Talk to store employees about sales figures for different types of material involving those acts.

    d. Take a videotape of the inside of the store and of the material available in the store related to those acts

    e. Review "swinger" magazines to determine how many people within the area are seeking partners to engage in numerous different types of sexual activity.

3. After determining the sexual acts in the material on trial, visit sexology sections of mainstream bookstores such as Borders and Barnes & Nobel for books discussing those acts.

4. After determining the sexual acts in the material on trial, see what materials are available on amazon.com discussing those acts.

5. Review mainstream movies such as the opening scene in the unedited version of *Basic Instinct.* Don't limit yourself to American movies (there is a horribly graphic rape scene in an acclaimed French Movie entitled *Baise Moi*).

6. Do a search on www.alt.com which allows you to determine how many people within a given geographic radius are seeking partners to engage in numerous different types of sexual activity.

7. Do an internet search for the type of material at issue (*e.g.* "bestiality videos," "rape videos").

8. Discuss the "value" of the material with experts in the field.

9. Discuss how the material in question was made with the actors and/or producers.

10. Determine whether the sexual acts in the material on trial appear regularly in "mainstream" pornographic magazines such as *Playboy* or *Penthouse.*

VIII. PRE-TRIAL ISSUES

A. Constitutional Challenges to Obscenity Laws

Obscenity statutes have withstood various types of constitutional challenges.

The United States Supreme Court held in *Roth v. United States* that the First Amendment to the United States Constitution does not protect obscene material.

The Supreme Court, in *Smith v. United States*, 431 U.S. 29, 3091 (1977), rejected an argument that the federal obscenity statute was unconstitutionally vague ("[T]he type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls.").

Likewise, in *Smith v. United States*, 431 U.S. 291 (1977), the Supreme Court rejected a challenge to the federal obscenity statute as violating the due process clause of the Constitution based upon the argument that different juries could view the same material and render different verdicts.

Although there is a right to privacy to possess obscenity (*see Stanley v. Georgia*, 394 U.S. 557 (1969)), the fact that material is only distributed by and to consenting adults does not protect the distribution of the material under the constitutional right to privacy. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 53 (1973) ("We categorically disapprove the theory apparently adopted by the trial judge, that obscene pornography films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only).[1]

B. Selective Prosecution

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[1] While the government might seek to disallow any mention of "consent," this would be improper. The consensual nature of the production of the material and that it is only viewed by willing recipients clearly helps inform the community standards.

Because pornography is a multi-billion dollar industry sponsored by many top corporations (*e.g.* hotel corporations, cable corporations), it is more than likely that a person charged with obscenity will believe that he is being selectively prosecuted. Unfortunately, in order to make out a selective prosecutions claim, one must prove that the prosecution is based upon an impermissible motive, such as invidious discrimination or the violation of a constitutional right- a virtually impossible task. *See United States v. Armstrong*, 116 S.Ct 1480 (1996).

IX. TRIAL ISSUES

A. Voir Dire

Allowed to conduct a proper voir dire, you will discover, *inter alia,* 1) who on the venire panel has never watched an adult movie; 2) who on the venire panel believes that network television is too smutty; 3) who on the venire panel has lived such a sheltered life that they have no appreciation whatsoever as to that type of sexual material that is available in the community; 4) who on the venire panel has such strong religious beliefs against sexual material that they could not follow the law; 5) who on the venire panel could not put their personal standards aside and apply the community standards; 6) who on the venire panel has been sexually abused; 7) who on the venire panel could not watch the material in question and be fair to the defendant.

If your voir dire time is limited, you should engage the *venire* panel in a candid discussion of the material that jurors will be required to review in an effort to exclude for cause those who could not follow the law, by applying their own personal standards rather than the community standards, after reviewing such graphic material.

1. Stock government motion

The government will typically file a Motion *In Limine* seeking to limit *voir dire* questions solely to jurors' memberships in organizations either in favor or against pornography laws. It will attempt to preclude *voir dire* on the following:

> (l) Any questions, or remarks in the presence of the jury panel, regarding their understanding of the First Amendment;

(2) Any questions relating to the First Amendment and its protections generally;

(3) Any question regarding what "consenting adults" should be allowed to read or view;

(4) Any questions regarding an explicit description of the contents of the material alleged to be obscene in this case, and a related question regarding whether they will be too offended by these films and magazines to serve as a juror and be fair;

(5) Any question to the jury regarding their definition or understanding of "community standards", or whether they think people "tolerate" the sale of "sexually explicit" materials;

(6) Any question regarding their understanding, definition, or knowledge of "prurient interest";

(7) Any question regarding whether the jurors themselves have a "prurient" (i.e., shameful, morbid, unhealthy, abnormal, etc.) interest in sex;

(8) Any question giving an impression that films or magazines cannot be "prurient" unless they are sexually arousing to the jurors themselves;

(9) Any question discussing or defining the "prurient interest" concept generally;

(10) Any question regarding their understanding, definition, or knowledge of the "average person" or "reasonable person";

(11) Any question regarding their personal sexual preferences and ideas, or what they (or others) may do in the privacy of their homes;

(12) Any question designed, or having a tendency, to embarrass or intimidate the jury panel or member thereof;

(13) Any question exploring the religious beliefs of prospective jurors, and how such beliefs might affect their verdict, other than religious preference or membership generally and frequency of attendance;

(14) Any hypothetical or similar question calling for a prejudgment of the evidence;

(15) Any technical legal question relating to the law to be applied in this case;

> (16) Any question regarding their knowledge of businesses in the community which may distribute "sexually explicit" materials, or the availability of such materials generally.

See Stock government Motion *In Limine* at
http://www.nationallawcenter.org/copy_of_nlc/oblimini.htm

The government will argue that its position is supported by *Smith v. United States*, 431 U.S. 291, 308 where the Court upheld a trial court's refusal to allow *voir dire* on "prospective jurors...understanding of Iowa's community standards and Iowa law." The government will try to convince a court that the Supreme Court held such questions to be *per se* improper. In fact, what the Court concluded in Smith is that "[t]he propriety of a particular question is a decision for the trial court to make in the first instance. In this case, however, we cannot say that the District Court abused its discretion in refusing to ask the specific questions tendered by petitioner."

2. Response

The following consists of a portion of the response to the government's stock Motion *In Limine*:

> The government also seeks to prohibit questions regarding whether jurors could be fair given the nature of the case and the nature of the evidence. The government argues that "[s]uch question[s] [are] misleading because [they] focus [] the jurors on their reaction to what the evidence may be, instead of properly instructing them to place their own feeling and apply the 'average person' and 'contemporary standards' concepts." The government, here, misses the point. If a juror could not, because of his or her reactions to the type of case and/or the evidence expected in the case, correctly apply the law, that juror, then, must be struck for cause. Indeed, would the government argue that a juror could not be asked if he or she could be fair in a case that involved a minority defendant even though the jury would be told it must follow the law and treat such a defendant equally under the law? The simple matter is that, because of the graphic nature of the material in question, some jurors may feel they cannot fairly apply the law. For example, a juror may state that he or she understands that the community standards allow for nudity in movies. The same juror might, however, also state that he or she would be so offended by being required to watch a video containing nudity that he or she would convict the defendants, regardless of the community standards. That juror, then, is subject to be challenged for cause.

Similarly, the government also seeks to prohibit asking jurors whether their education, political and religious beliefs and affiliations would affect their views on the question of obscenity. Again, the government misses the point because of the way it phrases the hypothetical question. Clearly, jurors should be asked whether their beliefs and affiliations would allow them to correctly apply the law in an obscenity case. Indeed, this is no different than the type of question that the government normally requests the Court ask during *voir dire* inquiring whether a person's beliefs or affiliations prohibit a person from sitting in judgment of another person (*i.e.* incorrectly applying the law).

In sum, the defense agrees that the law will require jurors in this case to apply the "community standards" rather than their own. Nevertheless, based upon a particular juror's background and/or life experiences, he or she may not be able to apply this law and may choose to apply his or her own views regarding pornography. All parties have an interest in determining whether jurors can, in fact, apply the law or whether they must be struck for cause. In addition, assuming that a juror could put his or her personal standards aside, all parties in this case also have an interest in determining whether jurors, based upon their background and/or life experiences, would be capable of measuring the community standards of the average person in the community rather than applying the standards of members of the community that are highly prudish or that are overly sexual. Only by probing jurors regarding their backgrounds and/or life experiences will the parties be insured that the twelve jurors selected are capable of applying the community standards of the average person and, thereby, capable of correctly applying the law.

B. Comparables

It will be your job to educate the jurors as to the "community standards" (*i.e.* what is available in the community). One way to do this is the use of comparable materials more graphic than the materials at issue in trial that are available in both adult and mainstream outlets (remember *Basic Instinct*). The government will fight you at every turn. As part of its canned Motion *In Limine*, it will argue that "federal and state courts rarely admit such comparison evidence when offered by the defendant, and only if a rigorous foundation for its admissibility is satisfied."

The government's argument is absolutely misplaced unless what it means to say is that, in cases in which it has secured a conviction (perhaps because comparables were excluded), appellate courts appear to have given trial courts a great deal of latitude in area of comparables.

In point of fact, comparables are very important to gauging community standards. *See, e.g., United States v. Various Articles of Obscene Merchandise, Schedule 2102,* 709 F.2d 132 (2d Cir. 1983) (Judge, sitting as the trier of fact, based his decision that materials in question were not obscene on comparable materials). Texas state courts, in fact, recognize that the community standards in Texas are best comprehended by jurors who have access to "comparables." *See, e.g., Berg v. State*, 599 S.W.2d 802 (Tex. 1980). A recent Ohio opinion held that it was reversible error not to allow a defendant to put on comparable material involved in an earlier prosecution in which a different defendant was acquitted. *See Ohio v. Dute,* 2003 Ohio App. LEXIS 2495 *(*Oh. App. 2003) ("The defendant in an obscenity case must be allowed to introduce competent, relevant evidence bearing on the issues to be tried. It is error for a trial court in an obscenity case to deny or unreasonably curtail a defendant's right to introduce into evidence competent and non-repetitive testimony or exhibits that directly relate to or bear upon the absence of any or all of the elements of the *Miller* obscenity test. The *Metcalf* videotapes, having been found by a Hamilton County jury not to†be obscene, arguably demonstrated contemporary community standards. A trial court may not unreasonably curtail the right of the defendant in an obscenity case to introduce competent, non-cumulative evidence bearing upon the *Miller* test elements, including evidence of community standards.").

There are two very important cases to read in relation to the introduction of comparables. The first is *Hamling v. United States*, 418 U.S. 87, 125-27 (1974) where the trial court's allowance of some comparables and disallowance of others is discussed at length. Nevertheless, the ultimate holding in *Hamling* is simply that the trial court has a great amount of discretion in this regard. The second is *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961) which most courts rely upon to determine the foundation requirements for comparables:

> The predicate for a conclusion that a disputed piece of mailed matter is acceptable under contemporary community standards, as shown by proffered other matter already in unquestioned circulation, must be that the two types of matter are similar. And as another part of his foundation he must show a reasonable degree of community acceptance of works like his own.

Id. at 206. It is not at all clear when comparable material goes from being "available" to being "accepted" and that is the fight you will face. That is why having statistics related to how often comparable material is purchased and/or rented could be essential.

In short, you will have to fight to educate the jury. During voir dire you will hear the common refrain from venire panel members: "How am I suppose to know the community standards, all I know is my own standards?" Hopefully that will resonate with the judge and, even in the face of the government's obstreperousness, the judge will allow you to educate the jury as to community standards through the use of comparables.

C. Expert Witnesses

You can also use expert witnesses to educate the jury regarding what goes on in the community. Many times you will want to use a psychiatrist, counselor or sexologist to educate the jury regarding human sexual behavior. A pollster may conduct public opinion studies regarding the material in question.[2] There may be times where an expert is necessary to show the redeeming value of the material (such as a professor of literature or political science). An expert on the internet might be helpful if you intend to show the availability of similar material over the internet (this expert would have to be able to come up with a statistical model of how many *distinct* hits one gets for a particular search and how many people in a particular geographical region go to the particular sites). The list is endless.

As with comparables, the government will oppose any attempt to help educate the jury. They will argue that the Supreme Court held in *Paris Adult Theatre v. Slaton,* 413 U.S. 493, 56

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[2] *See,* Admissibility of evidence of public-opinion polls or surveys in obscenity prosecutions on issue whether materials in question are obscene. 59 A.L.R. 5th 749.

(1973) that the government is not required to introduce expert testimony, but, of course, that is entirely beside the point. In *Kaplan v. California*, 413 U.S. 115, 121 (1973), the Supreme Court made clear that, in fact, the "defense should be free to introduce appropriate expert testimony" in obscenity cases. *See also, United States v. Bagnell*, 679 F.2d 826, 833 (11th Cir. 1982) ("While expert testimony in obscenity cases is not required, it clearly is permissible."). Of course, like any expert testimony, you must meet the standards of *Daubert* and *Kuhmo Tire Co.*[3]

One issue to keep in mind is that the Supreme Court has left open the question of whether, where the material is alleged to appeal to a deviant group under the first prong of the *Miller* test, the government is required to prove such an appeal by expert testimony. *Paris Adult Theatre v. Slaton*, 413 U.S. 493, 56 (1973). The Second Circuit made clear in *United States v. Petrov*, 747 F.2d 824, 830 (1984) that, at least in that circuit, "where the prurient interest is of a deviant segment of society, the government must not only identify the deviant group, but must also establish that the material in question appeals to that group's prurient interest. Both facts are generally established through the use of expert testimony."[4]†Therefore, as noted below, you should oppose a "deviant group" instruction unless supported by expert testimony from the government.[5]

D. Jury Instructions

Proper objections will be necessary to preserve error as to many of the jury instruction issues that have already been decided. For example, an objection should be lodged to any

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[3] *See United States v. Pryba*, 678 F.Supp. 1224, 1231-32 (E.D. Va. 1988), *aff'd.* , 900 F.2d 748, 757 (4th Cir. 1990) as an example of a court disallowing the defense to put on expert testimony.

[4] The rule in the Fifth Circuit appears to be to the contrary. *United Sates v. Hill*, 500 F.3d 733, 740 (5th Cir. 1974)

[5] For the use of experts and comparable material in Louisiana *see State v. Short*, 368 So. 2d 1078 (La. 1979).

restriction on the geographic scope of the "community." Likewise, you should object to a scienter instruction that does not require a defendant's knowledge that material is obscene. Again, the law on these issues has been decided, but, if you ever want to see your case make it to the Supreme Court and be given an opportunity to convince the Court that it was wrong in those earlier cases, you must preserve the error.

You should fight hard for the following instruction: "If you are unable to determine the community standards for whatever reason, you must return a verdict of not guilty." This instruction has support in the case law, although the government will fight it for obvious reasons. *See United States v. 2200 Paper Back Books*, 565 F.2d 566, 570-71 (9th Cir. 1977) ("Here the trier of fact concluded that the government failed to provide him with sufficient information as to the relevant community standard upon which he could base a finding of obscenity. That conclusion was not in error."); *United States v. Trainor*, 374 N.E.2d 1216, 1219 (Mass. 1978); ("A defendant is entitled to rulings or instructions that, if the trier of fact cannot determine Commonwealth norms, the defendant is entitled to a finding in his favor...."); *Hawaii v. Kam*, 726 P.2d 263, 265 (Haw. 1986) (adopting *Trainor*). This instruction allows you to take advantage of the government's failure to help educate the jurors regarding the community standards and the jurors lack of ability to determine the community standards apart from their personal standards.

Likewise, you should argue that the proper standard is community "tolerance," not community acceptance. While the general body of law appears to be contrary to such an instruction, support can be gleaned for the instruction from several cases. *See United States v. Petrov*, 747 F.2d 824, 831 (2d Cir. 1984); *Red Bluff Drive-In v. Vance*, 648 F.2d 1020, 1029 (5th Cir. 1981; *Goldstein v. Allain*, 568 F.Supp. 1377 (N.D. Miss. 1983); *Asaff v. Texas*, 799 S.W.2d 329 (Tex. App. 1990); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Col. 1985); *Leech v. American Bookseller's Association, Inc.* 582 S.W.2d 738, 746-48 (Tenn. 1979).

As discussed above, in reliance on the Second Circuit's opinion in *Petrov*, if the government does not put on expert testimony that the material in question applied to a deviant

group, you should oppose any mention of an appeal to a deviant group in connection with the first prong of the *Miller* test.

E Sentencing

Given the lack of scienter required for obscenity convictions in federal court, it is an open question as to whether a defendant who admits to mailing the material and admits he or she knew the material was of a sexual nature, should be denied acceptance of responsibility under U.S.S.G § 3E1.1 simply for exercising his or her constitutional right to a trial. After all, the material is presumptively protected under the First Amendment until such time, if ever, a jury determines it to be obscene.

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