

# The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions

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## ABSTRACT

*This Article provides an inside perspective on the 2008 obscenity trial and conviction of veteran adult movie producer Paul Little, who is known in the adult industry as Max Hardcore. Little was sentenced by a federal judge to nearly four years in prison after a twelve-person jury in Tampa, Florida found him guilty of multiple counts of selling and distributing obscene content via the U.S. Mail and Internet.*

*The Article centers around comments and remarks drawn from four exclusive interviews conducted in person by the authors with: (1) Jeffrey Douglas, the California-based attorney who represented and defended Paul Little in United States v. Little; (2) H. Louis Sirkin, the Ohio-based attorney who represented and defended the corporate entities controlled by Paul Little in United States v. Little; (3) Mark Kernes, Senior Editor of Adult Video News, a leading adult entertainment industry trade publication, and the journalist who covered the trial of Paul Little; and (4) Larry Flynt, the publisher of Hustler magazine and head of the LFP, Inc. adult entertainment*

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*empire. Each interview was conducted subsequent to Paul Little's June 2008 conviction by the jury in Tampa but prior to his sentencing in October 2008. The Article contextualizes the case within the framework of the Bush administration's efforts to target adult content for obscenity prosecutions.*

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I really enjoy my work, and I also, in some way, enjoy pushing the limits and rubbing their faces in it and saying, “Yes, I can do that.” In some way, I enjoy that. I don’t enjoy writing out checks for \$20,000 and \$25,000 a pop for lawyers, but it’s part of the business. It’s part of the budget. You know, there’s tape, douches, toilet paper, and lawyers’ fees. If you’re going to play it and you’re going to be out at the pointy end of the charge, you’re going to take some hits.<sup>1</sup>

Those are the words of veteran adult-movie producer Paul F. Little, also known as Max Hardcore,<sup>2</sup> spoken on July 19, 2006, at his home in Altadena, California.<sup>3</sup> Nearly two years later in June 2008, Little paid a high price for being at the “pointy end of the charge”<sup>4</sup> when a twelve-person federal jury in Tampa, Florida<sup>5</sup> convicted him and his corporate entity, MaxWorld Entertainment,<sup>6</sup> on multiple counts of transporting obscene<sup>7</sup> content via the Internet<sup>8</sup> and U.S. Mail<sup>9</sup> to Florida.<sup>10</sup> In October 2008 U.S. District Court Judge Susan

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1. Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 278 (2007).

2. See Thomas W. Krause, *Ex-Actress Testifies She Chose to Do Adult Films*, TAMPA TRIB., June 3, 2008, at Metro 2 (writing that Little “goes by the stage name Max Hardcore”).

3. Richards & Calvert, *supra* note 1, at 242 n.44.

4. *Id.* at 278.

5. The twelve jurors engaged in “roughly twelve hours of deliberation” after they completed watching more than eight hours “of extreme pornography on a giant screen in court.” Kevin Graham, *Jurors Judge Movies Obscene*, ST. PETERSBURG TIMES, June 6, 2008, at A1 [hereinafter Graham, *Jurors Judge*]. Some jurors “winced as an adult film producer who calls himself Max Hardcore performed in scenes that included urinating, vomiting, and violently dominating women.” *Id.*

6. See generally Cortera, MaxWorld Entertainment, <http://start.cortera.com/company/research/k2o5kqm5p/maxworld-entertainment> (last visited Mar. 17, 2009) (describing MaxWorld Entertainment as headquartered in Altadena, California, and identifying Paul Little as its president).

7. The First Amendment’s guarantee of free speech does not protect obscenity. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (“[O]bscenity is not within the area of constitutionally protected speech or press.”). The current test for obscenity, which was established by the U.S. Supreme Court thirty-six years ago, focuses on whether the material at issue: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

8. See 18 U.S.C. § 1465 (2008) (stating that it is a crime, punishable by up to five years in prison, to knowingly transport “obscene” content, including a “film,” in interstate commerce via “an interactive computer service”).

9. See 18 U.S.C. § 1461 (2008) (stating that it is a crime, punishable by up to five years in prison for a first offense, to knowingly use the mail to deliver obscene content).

C. Bucklew<sup>11</sup> sentenced Little to forty-six months in a minimum-security federal prison and a \$7,500 fine, as well as a \$75,000 fine for his company, MaxWorld Entertainment.<sup>12</sup>

In July 2008, just one month after Little's conviction, U.S. Attorney General Michael Mukasey went to the Dirksen Senate Office Building in Washington, D.C. to face an oversight hearing held by the Senate Judiciary Committee.<sup>13</sup> Under questioning by Senator Orrin Hatch, a Utah Republican and a longtime foe of obscenity,<sup>14</sup> about the Justice Department's strategy regarding the material it targets for obscenity prosecutions, Mukasey bluntly explained, "We pick our

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10. See Press Release, U.S. Dep't of Justice, Federal Jury Convicts California Producer and His Adult Entertainment Company of Obscenity Crimes (June 5, 2008), available at <http://www.usdoj.gov/opa/pr/2008/June/08-crm-507.html>.

11. See Official Site of the U.S. District Court for the Middle District of Florida, The Honorable Susan C. Bucklew, available at <http://www.flmd.uscourts.gov/judicialInfo/Tampa/JgBucklew.htm> ("Judge Bucklew was appointed a United States District Judge for the Middle District of Florida in December 1993. She received her B.A. in 1964 from Florida State University, her M.A. in 1968 from the University of South Florida, and her J.D. from Stetson University College of Law in 1977.")

12. Mark Kernes, *Max Hardcore Sentenced to 46 Months in Federal Prison*, AVN, Oct. 3, 2008, <http://www.avn.com/law/articles/32647.html>; Press Release, U.S. Dep't of Justice, Adult Entertainment Producer Sentenced to 46 Months in Prison on Obscenity Charges (Oct. 3, 2008), available at <http://www.usdoj.gov/opa/pr/2008/October/08-crm-894.html> ("Paul F. Little, 50, was sentenced today to 46 months in prison as a result of his conviction on multiple obscenity offenses . . . . [Judge Bucklew] also ordered Little to three years of supervised release following his release from prison, to pay a \$7,500 fine, and to forfeit the obscene films charged in the indictment as well as all gross profits from the distribution of the films and the Internet domain names Little used as part of his business."). In February 2009, AVN reported that Little was being held at the Metropolitan Detention Center in downtown Los Angeles rather than at a federal minimum security prison. Mark Kernes, *Max Hardcore to Remain in L.A. Detention Center*, AVN, Feb. 4, 2009, available at <http://business.avn.com/articles/34387.html> (last visited Mar. 20, 2009). By April 2009, attorneys for both the Justice Department and Paul Little had filed their initial pleadings in the appeal process before the U.S. Court of Appeals for the Eleventh Circuit. See Mark Kernes, *Feds File Brief Opposing Max Hardcore*, AVN, Apr. 1, 2009, available at <http://business.avn.com/articles/34887.html> (last visited Apr. 7, 2009).

13. See Oversight of the U.S. Dep't of Justice, U.S. Senate Committee on the Judiciary, July 9, 2008, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3453>.

14. For instance, Hatch co-authored a blistering opinion commentary in the *Washington Times* that blasted U.S. District Court Judge Gary F. Lancaster for a 2005 opinion that dismissed obscenity charges against an adult movie company called Extreme Associates. See Orrin Hatch & Sam Brownback, *'Extreme' Judicial Activism*, WASH. TIMES, Feb. 10, 2005, at A19. Later that same year, in a prepared statement before the Senate Judiciary Committee, Hatch stated that "pornography and obscenity present a problem of harm, not an issue of taste" and that "its effects are protracted, progressive, and profound." See *Why the Government Should Care About Pornography: The State Interest in Protecting Children and Families: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2005), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1674&wit\\_id=51](http://judiciary.senate.gov/hearings/testimony.cfm?id=1674&wit_id=51).

targets carefully; we pick them so as to have the greatest effect and we bring vigorous prosecutions.”<sup>15</sup>

Paul Little, it thus seems, was not just some random adult-movie producer, at least not in the eyes of the Justice Department. Indeed, Mukasey made reference to Little’s case when elaborating on what might colloquially be referred to as the department’s most-bang-for-the-buck prosecution tactics in obscenity cases:

I think what we try to do is to bring those cases that we can win and those cases that are going to have the greatest impact on removing obscene materials which degrade our society and depict behavior that we think is disgraceful. We’ve done that; we had a recent conviction in Tampa of a large-scale producer of this kind of material. We want to do it in a targeted, efficient way. We want to do it in the way that will have the most effect.<sup>16</sup>

The fact that producers of sexually explicit movies *not* featuring acts that either “degrade” or that are “disgraceful”<sup>17</sup> might be somewhat safe from prosecution was also implicit in Mukasey’s remark to Hatch that “there is a tolerance for this in the courts. We don’t want to bring prosecutions that will have the effect essentially of making more-tolerated the kind of material that we think ought to be stamped out.”<sup>18</sup>

Little’s movies were exactly the type of entertainment that Mukasey hoped to stamp out. During the trial, one journalist described the content of Little’s movies as “not for the mainstream”<sup>19</sup> and another reporter explained that his movies involved “rough sex, forced sex, vomiting and urination,”<sup>20</sup> with one scene in which “Little slaps a woman repeatedly and curses at her.”<sup>21</sup>

The federal government’s efforts to stamp out such material is not likely to stop with its success in the prosecution of the Southern California-based Little. Indeed, a federal grand jury in April 2008 indicted another veteran adult movie producer, John Stagliano,<sup>22</sup> and

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15. See Mark Kernes, *Mukasey: DOJ Will Continue Obscenity Prosecutions*, AVN, July 9, 2008, <http://www.avn.com/law/articles/31172.html>.

16. *Id.*

17. *Id.*

18. *Id.*

19. Sue Carlton, *Is Porn Really Our Biggest Problem?*, ST. PETERSBURG TIMES, June 11, 2008, at B1.

20. Thomas W. Krause, *Jurors Watch Adult Video*, TAMPA TRIB., May 30, 2008, at Metro 1.

21. *Id.*

22. See generally Richards & Calvert, *supra* note 1, at 242 n.42 (providing brief biographical information about Stagliano).

two of his companies on obscenity distribution charges.<sup>23</sup> Stagliano seems to make for an inviting, high-profile target for the government; in June 2008 he was named as one of the top twenty-five adult filmmaking pioneers by *Adult Video News*, a leading trade publication for the adult entertainment industry.<sup>24</sup> His movie *The Fashionistas* was named the best adult film at the 2003 *Adult Video News* awards show in Las Vegas<sup>25</sup> and later was produced as a stage show in that city.<sup>26</sup> More recently, at the 2008 awards show in January, a local newspaper observed that “John Stagliano could do no wrong. His sex video empire, Evil Angel, won eighteen Adult Video News awards, the porn industry’s version of the Oscars.”<sup>27</sup> Notably, at that same show, “Stagliano put on stage for the audience of his industry peers an elaborate skit about the government censors coming for them all. The skit was very much Stagliano at his best, mixing his aesthetic sense with his political ideas.”<sup>28</sup> Little did Stagliano know that just a few months later life would imitate art when he would be subject to a federal obscenity indictment.

The specific movies targeted in *United States v. Stagliano*<sup>29</sup> are not mainstream adult fare but rather, as one reporter wrote, are films “aimed at fans of fluid fetishes.”<sup>30</sup> The titles in question are *Milk Nymphos*, *Storm Squirters 2: Target Practice*, and *Fetish Fanatic: Chapter 5*.<sup>31</sup>

Beyond these recent prosecutions, it is clear that, under the administration of President George W. Bush and leadership of former

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23. Press Release, U.S. Dep’t of Justice, Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity Violations (Apr. 8, 2008), available at <http://www.usdoj.gov/opa/pr/2008/April/08-crm-280.html>.

24. *25 Filmmaker Pioneers*, ADULT VIDEO NEWS, June 2008, at 94.

25. See *id.* at 122.

26. Mike Weatherford, *Rob Belushi Part of Comedy Showcase*, LAS VEGAS REV.-J., Feb. 28, 2008, at E1, available at <http://www.lvrj.com/living/16067892.html>. Weatherford describes the *Fashionistas* stage show as “a radically different show that defied easy description or categorization [and] stayed alive for more than three years because it was artificially subsidized by its producer.” *Id.*

27. Mike Weatherford, *A Worthy Experiment: ‘Fashionistas’ Too Hard to Sell Despite Moments of Genius*, LAS VEGAS REV.-J., Jan. 18, 2008, at J6, available at <http://www.lvrj.com/neon/13891052.html>.

28. Richard Abowitz, *Obscenity Undefined: Stagliano Reflects on his Indictment*, LAS VEGAS WKLY, July 14, 2008, <http://www.lasvegasweekly.com/blogs/sage-vice/2008/jul/14/obscenity-undefined-stagliano-reflects-his-indictm>.

29. Indictment, *United States v. Stagliano*, No. 08-093 (D.C. Apr. 8, 2008) [hereinafter *Stagliano Indictment*], available at [http://www.defendourporn.org/stagliano\\_indictment.pdf](http://www.defendourporn.org/stagliano_indictment.pdf).

30. Howard Gensler, *Tattle: Feds Target John Stagliano and His Adult Videos*, PHILA. DAILY NEWS, Apr. 10, 2008, at 42.

31. See *Stagliano Indictment*, *supra* note 29, at 1-3.

U.S. Attorney General Alberto Gonzales, the U.S. Department of Justice took obscenity prosecutions very seriously. For example, in September 2008, the Justice Department's Office of the Inspector General and Office of Professional Responsibility released a lengthy report called "An Investigation into the Removal of Nine U.S. Attorneys in 2006."<sup>32</sup> The report, as the *New York Times* aptly summarized it, "provides the fullest account to date of a scandal that dogged the Bush administration for months [during 2007] over accusations that it had politicized the federal justice system by ousting prosecutors seen as disloyal."<sup>33</sup>

One of the individuals terminated during Gonzales' tenure as attorney general was Daniel Bogden, the former U.S. Attorney for Nevada.<sup>34</sup> The report concluded that Bogden was targeted for dismissal in large part due to his unwillingness to bring an obscenity prosecution.<sup>35</sup> As the authors of the report put it, "we believe that the primary reason for Bogden's inclusion on the removal list was the complaints by [Brent] Ward, the head of the Department's Obscenity Prosecution Task Force, about Bogden's decision not to assign a Nevada prosecutor to a Task Force case."<sup>36</sup> The "removal list" referred to here was prepared in September 2006 by Kyle Sampson, who was then the chief of staff to Gonzales,<sup>37</sup> and it listed eight U.S. Attorneys, including Bogden, under the heading "USAs We Now Should Consider Pushing Out."<sup>38</sup> The report blasted Bogden's termination, emphasizing that

[n]o one asked about Bogden's rationale for declining to assign a prosecutor to the obscenity case, his competing resource needs for other priority issues, his view of the strength of the case, or his alternative offer to provide assistance to the Task Force with office space, grand jury time, secretarial support, and prosecution advice.<sup>39</sup>

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32. U.S. Dep't of Justice Office of the Inspector General & U.S. Dep't of Justice Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (2008), available at <http://www.usdoj.gov/opr/us-att-firings-rpt092308.pdf> [hereinafter *An Investigation into the Removal of Nine U.S. Attorneys*].

33. Eric Lichtblau, *Prosecutor is Named in Dismissal of Attorneys*, N.Y. TIMES, Sept. 30, 2008, at A16.

34. See *An Investigation into the Removal of Nine U.S. Attorneys*, *supra* note 32, at 1 ("On December 7, 2006, at the direction of senior Department of Justice (Department) officials, seven U.S. Attorneys were told to resign from their positions.") Daniel Bogden was one of those seven U.S. Attorneys. *Id.* at 1 n.1.

35. *Id.* at 215.

36. *Id.*

37. *Id.* at 11.

38. *Id.* at 35-36.

39. *Id.* at 216.

In a nutshell, then, Bogden's concerns about going forward with the obscenity prosecution apparently were irrelevant or of no concern to Sampson.

Another prosecutor removed under Gonzales' watch was Paul Charlton, the former U.S. Attorney for Arizona. Like Bogden, Charlton's name also appeared on a list of removal targets prepared by Kyle Sampson.<sup>40</sup> The report concludes that, "Charlton's alleged failure to assist the [Obscenity Prosecution] Task Force"<sup>41</sup> with a potential obscenity case "played a part in Sampson's decision to put him on the list."<sup>42</sup> The bottom line, it seems, is that two of the nine U.S. Attorneys forced out of office while Alberto Gonzales was attorney general were targeted, in part, due to their unwillingness to prosecute obscenity cases.

This Article provides an in-depth and up-close examination and analysis of the current state of federal obscenity prosecutions in light of the jury's conviction of Paul Little and the ongoing case against John Stagliano and in the long shadow cast by the September 2008 report on the dismissals of Daniel Bogden and Paul Charlton. In particular, this Article pivots on four exclusive interviews conducted in person by the authors with: (1) Jeffrey Douglas, the California-based attorney who represented and defended Paul Little in *United States v. Little*;<sup>43</sup> (2) H. Louis Sirkin, the Ohio-based attorney who represented and defended the corporate entities controlled by Paul Little in *United States v. Little*;<sup>44</sup> (3) Mark Kernes, the senior editor of *Adult Video News* who worked as a journalist during the trial of Paul Little in Tampa;<sup>45</sup> and (4) Larry Flynt, the publisher of *Hustler* magazine and head of the LFP, Inc. adult entertainment empire.<sup>46</sup>

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40. See *id.* at 220 ("On September 13, 2006, Sampson sent a fourth list to the White House containing the names of U.S. Attorneys 'We Now Should Consider Pushing Out.' Charlton's name appeared on that list and stayed on successive lists until he was told to resign on December 7, 2006.").

41. *Id.* at 241.

42. *Id.*

43. See *Lawyers Ask Judge to Acquit Porn Defendant*, ST. PETERSBURG TIMES, June 3, 2008, at B3; Interview with Jeffrey J. Douglas, Attorney, The Law Office of Jeffrey J. Douglas, A Professional Corporation, in Santa Monica, Cal. (June 27, 2008).

44. See Kevin Graham, *Porn Producer's Lawyers Ask Judge For Acquittal*, ST. PETERSBURG TIMES, June 3, 2008, at B4 (describing Sirkin as "an attorney for MaxWorld" in the obscenity trial of *United States v. Little* in Tampa); Interview with H. Louis Sirkin, Attorney, Sirkin Pinales & Schwartz LLP, in Cincinnati, Ohio (Aug. 18, 2008).

45. Interview with Mark Kernes, Senior Editor, Adult Video News, in Chatsworth, Cal. (June 27, 2008). Mr. Kernes covered the Little trial.

46. See generally Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM. LAW CONSP. 159 (2001); Interview with Larry Flynt, Publisher, *Hustler*, in Beverly Hills, Cal. (June 26, 2008).

Each interview was conducted subsequent to Paul Little's June 2008 conviction by the jury in Tampa but prior to his sentencing in October 2008.

All interviews were recorded with Marantz broadcast-quality recording equipment on audiotape using a tabletop microphone. The tapes were later transcribed by the authors and then reviewed for accuracy. The authors made some minor changes in syntax in a few places but did not alter the substantive content or material meaning provided by any of the interview subjects. Some responses were then reordered and reorganized, and other portions of the interviews were omitted as extraneous, redundant, or beyond the scope of the purpose of this Article. The authors retain possession of the original audio recordings and printed transcripts of the interviews. For purposes of full disclosure and the preservation of objectivity, it should be emphasized that the individuals interviewed for this Article did not have an advance opportunity to review or preview any of the questions that they would be asked, thus allowing for greater spontaneity of responses. Furthermore, the interview subjects did not at any time review either the raw transcript or any drafts of this Article before its publication.

Part I of this Article focuses on the content of the interviews conducted by the authors with Douglas, Sirkin, Kernes, and Flynt.<sup>47</sup> It is divided into four lettered sections, each focusing on a different theme or topic. The interviews are presented in a question-and-answer format. Each section includes a brief introductory heading, and the authors have, where particularly relevant in the opinions of the authors, added footnotes into the interviews to elaborate on some concepts, cases, and other terms discussed by the interviewees. In some instances, however, it may be unclear as to the case, concept, or idea to which the interviewees were referring; rather than guess at their intended meanings and place words in their mouths, the authors let the interviewees' words stand on their own. Part II then provides a conclusion that places their remarks within the larger context of obscenity prosecutions today.<sup>48</sup>

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47. See *infra* notes 49–117 and accompanying text.

48. See *infra* notes 139–52 and accompanying text.

## I. THE INTERVIEWS

*A. The Trial of Paul Little: From Judicial Irregularities to Juror Behavior*

On May 17, 2007, the U.S. Department of Justice handed down a ten-count indictment against adult entertainment producer Paul F. Little and his company, MaxWorld Entertainment.<sup>49</sup> Evenly split with five counts of transporting obscene matter over the Internet and five counts of mailing obscene materials,<sup>50</sup> the indictment spawned an eight-day jury trial in the U.S. District Court for the Middle District of Florida that culminated in a guilty verdict on all charges on June 5, 2008.<sup>51</sup> The five men and seven women who comprised the jury took twelve hours to reach that decision “after watching eight-and-a-half hours of extreme pornography on a giant screen in court.”<sup>52</sup> Getting the jury to watch all eight-and-a-half hours, it turned out, was not an easy task and, in fact, it forced a showdown between prosecutors and the defense.<sup>53</sup>

During a break on May 29, 2008, a male juror sent a note to presiding U.S. Judge Susan Bucklew, asking her, “[W]ould it be at all possible for clips to be shown to the jury instead of the movie in its entirety?”<sup>54</sup> At first, the judge ruled that the movies would be shown completely—the *Miller* test requires that works be “taken as a whole”<sup>55</sup>—“[b]ut after forty minutes of viewing . . . the judge said she doubted the jury could sit through such a volume of graphic and violent depictions.”<sup>56</sup> Defense attorney Jeffrey Douglas wanted to question the juror who had sent the note, fearing that he might have discussed the matter with other jurors, but the judge refused to allow it, prompting a motion for mistrial that she also denied.<sup>57</sup>

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49. See Press Release, U.S. Dep’t of Justice, Producer Paul Little Indicted on Obscenity Charges (May 31, 2007), available at [http://www.usdoj.gov/opa/pr/2007/May/07\\_crm\\_393.html](http://www.usdoj.gov/opa/pr/2007/May/07_crm_393.html).

50. *Id.*

51. Elaine Silvestrini, *Adult Movie Producer Found Guilty in Obscenity Trial*, TAMPA TRIB., June 6, 2008, at 6 (“This city may be known for its thriving adult entertainment industry, but a federal jury drew the line Thursday, convicting a California movie producer of ten counts of distributing obscene materials.”).

52. See Graham, *Jurors Judge*, *supra* note 5, at A1.

53. Kevin Graham, *Juror Asks to View Less Porn in Court*, ST. PETERSBURG TIMES, May 30, 2008, at B3 [hereinafter Graham, *Less Porn*].

54. *Id.*

55. See *supra* note 7 (explaining the *Miller* test for obscenity).

56. Graham, *Less Porn*, *supra* note 53, at B3.

57. *Id.*

From the outset, prosecutors had objected to showing the material in its entirety, and the defense viewed this tactic as “a ploy by the prosecution to make the movies appear more jarring than they actually are.”<sup>58</sup> The defense insisted that, “if jurors watched the movies as they were intended to be seen, it would desensitize them and take some of the force out of the government’s case.”<sup>59</sup> Given Judge Bucklew’s changed position not to have the prosecution show the movies in their entirety, the defense opted to show the films during its case, apparently confounding the judge, who told Little’s attorneys, “I fail to understand why you all are playing all these videos.”<sup>60</sup>

The controversy surrounding the jury did not stop with the lone note from the male juror. Subsequently, jurors sent a note to Judge Bucklew during deliberations “stating that they were deadlocked and that the deliberations were emotional.”<sup>61</sup> The deadlock was based on three jurors who “were holding out.”<sup>62</sup> One of those jurors—later identified as Kimberly Grimes—also had sent a note to the judge earlier that day asking to speak with her because she “had been fired from her job the night before”<sup>63</sup> and believed the dismissal was retaliation for serving on the jury. The judge waited until after the verdict to meet with the juror “and didn’t tell attorneys in the case about [Grimes’s] note.”<sup>64</sup>

The defense attorneys learned of these developments after the verdict when the trio of holdout jurors visited the hotel where the attorneys were staying to tell them that, “they had initially voted not guilty and were the source of the note to the judge about the fact that they were deadlocked.”<sup>65</sup> The last holdout was Grimes, the juror who had been terminated from her employment. According to a report published in *Adult Video News* (AVN), Grimes told Little and his attorneys, “We tried and we tried and we tried, but we just couldn’t

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58. *Id.*

59. *Id.*

60. Mark Kernes, *Crucial Developments in Max Hardcore Trial*, AVN, May 29, 2008, <http://business.avn.com/articles/30475.html> (last visited Mar. 20, 2009).

61. Elaine Silvestrini, *New Trial Sought Over Juror’s Job Loss*, TAMPA TRIB., June 18, 2008, at 4.

62. *Id.*

63. *See id.* The juror reportedly wrote, “When I got home from jury duty, I received a phone call from my employer that he no longer wanted me to work for him. . . . I feel it is because I have been here on this jury. He did make other reasons for the termination. I know it was because of this.” *Id.*

64. *Id.*

65. *Id.*

get through to the others. They just beat on us and beat on us and beat on us until we gave in.”<sup>66</sup>

These juror irregularities formed part of the basis for the motion for a new trial filed by the defense. Nonetheless, on July 28, 2008, Judge Bucklew denied the defense’s motion, finding “that the issues relating to the firing of the juror and other instances of alleged irregularities involving jurors did not affect the outcome and did not detract from Little’s constitutional rights.”<sup>67</sup>

In this section, Little’s personal and corporate attorneys, Jeffrey Douglas and Louis Sirkin, respectively, discuss the trial, its irregularities, and the potential points for appeal. Mark Kernes, the journalist for *AVN* who covered the entire case from the time of the indictment to the post-verdict motions, weighs in with observations about what took place in the courtroom and how the jury reacted to the material at the center of the case. Additionally, adult entertainment mogul Larry Flynt reacts to the verdict in the case.

#### 1. The Views of Jeffrey Douglas, Little’s Personal Attorney<sup>68</sup>

**QUESTION:** How is Paul Little doing? How is he taking this verdict?

**DOUGLAS:** He is, by nature, a battler. He regards the choices he made about his content, in part, to be a fight against the government’s intrusion into adult material.<sup>69</sup> The confrontational nature of his material suits him. This is, for him, another stage in the battle. No one looks at prison with equanimity—no one sane, that is. I don’t know him well enough to know how he is managing the inevitable anxiety that any person would have about both the loss of liberty and the damage to his business and life’s work that being in prison for three or four years inevitably brings. It’s not like he has done prison time before.

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66. Mark Kernes, *The U.S. vs. Max Hardcore*, *AVN*, May 29, 2008, <http://business.avn.com/articles/30477.html> (last visited Mar. 20, 2009).

67. One local newspaper reported that:

[t]he defense sought a new trial on several other grounds, including an assertion that a prosecutor made an improper comment to a juror during the trial. According to the defense filing, midway through the trial, a federal prosecutor ‘reported that he engaged in an inadvertent, but prejudicial dialogue with a juror in the elevator,’ the defense motion states.

Elaine Silvestrini, *Judge Denies Producer New Trial*, *TAMPA TRIB.*, July 28, 2008, at 6.

68. Interview with Jeffrey Douglas, *supra* note 43.

69. See also Richards & Calvert, *supra* note 1, at 278 (“I also, in some way, enjoy pushing the limits and rubbing their faces in it and saying, ‘Yes, I can do that.’”) (quoting Larry Flynt).

As a criminal defense attorney, everyone I have ever dealt with who is facing custody time, unless they have done a lot of it, automatically fears being assaulted and brutalized. He has articulated none of that to me, and I just don't know how he is dealing with that. Maybe he is just not thinking about it because he has a lot to do between now and sentencing. Sentencing itself is something that focuses one's attention. That part of it is truly tragic. He is working very hard and battling, which is his nature, and I find that very admirable.

**QUESTION:** We understand that the judge did not require the DVDs to be shown in their entirety. Is that correct?

**DOUGLAS:** It was a catastrophe. In the current round of prosecutions, the government has been desperately trying to avoid showing the entire DVD to the jury. It recognizes that, unlike video, DVDs are long, even though they have chosen to prosecute relatively short DVDs. In principle, there is no reason why the next time they choose to prosecute, they're not going to be dealing with an eight-hour or ten-hour long DVD. So they're desperately trying to make new [case] law that says they don't have to show the whole thing to the jury.<sup>70</sup> This is definitely new ground.

Under previous technology, everything was short enough to digest, except a book, and we haven't been prosecuting books for obscenity for quite a while. Judge Bucklew initially told the government, "No. It's silly. Of course, you can't pick a scene and leave it to the jury to view it." Then, she watched the first movie and she wanted the trial to be over. She clearly was not enjoying watching the movie.

The government, in every case, has grotesquely misrepresented the length of the trial to the judge. They say, "Two days for the government's case." Well, there are more than four days worth of movies. How do you do that? "We'll only do that if you make the silly-ass ruling, following the laws of America, that we have to show the whole movie, and we don't think we have to."

After the first movie, Judge Bucklew announced she was rethinking it and that she might allow the government to show typical material, so the government gave her the excerpts it wanted to show. She ruled that it was representative material, although she told us

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70. The U.S. Supreme Court's test for obscenity requires that the work in question be considered "as a whole." *Miller v. California*, 413 U.S. 15, 24 (1973).

that she had not viewed the entirety, so I don't know how she could make that determination.

Then she said to the government, "What good will it do when the defense, then, as part of its cross-examination, shows the whole movie?" In other words, they haven't gained any time. The Justice Department attorney said, "It all turns on who the jury is going to blame. We don't want them to blame us for seeing the whole movie. We want them to blame the defense." That statement is such an astonishing confession. It has nothing to do with evidence—it's all about gamesmanship. The judge should have stood up, with outrage, and said, "That is unethical. You should be ashamed of yourself. Your job description is not to get a conviction."

Ultimately, the jury saw one movie continuously, from beginning to end. The judge then allowed us to show the remainders of the other movies during cross examination, but still forbade us from showing material that she deemed to be repetitive—even though she had never seen it—and those were the photo galleries and the previews. The only previews that we were allowed to get in were ones that the government conceded were substantially different where we argued that this material has this kind of content that no one has seen before. The government said that's true and the judge said okay.

The problem for us, in terms of preserving an appeal, is that we were asked to play chicken. If we hadn't shown the material on cross-examination, would we have waived the issue that the government failed to show it as a whole? In other words, if we didn't show it when we could show it, would we then be barred from arguing about it? The government's gamesmanship was rewarded.

We still didn't get in the totality. The jury did not see it from beginning to end. It saw the scenes that the government readily acknowledged were the most difficult to watch—the harshest material—and everything else that the DVD portrayed, including humorous material that was lighter weight and nicer, was shown days away from the same material on that DVD that was confrontational.

**QUESTION:** So they were not viewed continuously, as one might watch at home?

**DOUGLAS:** Absolutely not. They charged the DVD as a whole and then turned around and decided they did not have to show it as a whole.

**QUESTION:** Did Jaded Video, the distributing company for Little's films, testify under a grant of immunity?

**DOUGLAS:** Very limited immunity. They got use immunity, which is to say that the testimony only could not be used against the defendant, but if the government so chose—if they didn't like his testimony—they could indict him for ten counts of shipping these exact titles to Tampa. The only defense he would have then is that the material is not obscene. He was operating under the remarkable assumption, based on things the government said to him in the course of their investigation of Paul Little, that they were only interested in going after the bad guys and he wasn't a bad guy. He said to the jury, when asked if he was shipping this material today to Tampa, "Of course, why wouldn't I?" He said he would only stop doing it if there is a conviction and if his lawyer tells him he shouldn't.

**QUESTION:** Was there anything else you found troubling in the prosecution's case?

**DOUGLAS:** One of the things that was so disturbing and strange about the prosecution was that, in opening statements, the prosecutor did not seem to be able to distinguish between the individual Paul Little and the character he plays, Max Hardcore. At first, I assumed that this was tactical. Since Little is in all of his movies, generally speaking, people seem to conflate the actor with the performance. It became very clear, [however], in the course of the prosecution's case and ultimately in the closing argument, that he genuinely could not make the distinction. The prosecutor believed that Paul Little and Max Hardcore were the same person.

Truly astonishingly, he was [also] not able to distinguish between the actress we called as a witness from the character she played. We called an actress known as Summer Luv, who is retired from the industry.<sup>71</sup> She testified about the environment in which she worked and how terrific it was—how everything was staged, planned, and there was no abuse. She worked for fifteen other producers and working for MaxWorld Entertainment was the best because it was the most organized, the cleanest, and everyone was treated extraordinarily well. She was a great witness and presented extremely well. Predictably, the government didn't try to lay a hand on her.

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71. See Krause, *supra* note 2, at Metro 2 ("Melissa Nicoletti, 25, who went by the stage name Summer Luv, testified she acted in the movies because the scenes sounded interesting to her, she enjoyed filming them, and she voluntarily signed up for more work with the producer.").

In closing argument, the government referred to her as Summer Luv and Summer. Typically, you would not ever refer to a witness by her first name. It's patronizing. But the prosecutor did not understand the distinction between a character and reality. His entire closing argument was imbued with that very disturbing assumption. He justified not prosecuting Jaded by saying if he prosecuted Jaded, there would be someone else to sell it. Then, he said, "We want to stop Max Hardcore."

A bit of my closing argument was highlighting that—to a limited effect, of course. It affected the three jurors, but it surely didn't affect the [other] nine. If people cannot distinguish between fantasy and reality, [and lack] the ability to recognize that these are actors playing roles and there is no human being as one dimensional as the Max Hardcore character, then there is a broad danger going on.

**QUESTION:** We have heard that some jurors made after-the-trial statements to Paul Little and the attorneys regarding the verdict. Is there any way for the defense attorneys to use those statements in the appeal?

**DOUGLAS:** The simple answer is that you can't. The only time any element of the deliberation can be brought forward is if there is an act of misconduct that is in a very limited range—deciding the case by lot, resorting to materials not in evidence, going to the scene, etc. Outside of those narrow parameters, you cannot. After the verdict, it was clear to everyone that the jury was deeply split. One of the jurors was crying during the reading of the verdict. When it came to polling the jury, the last juror polled—the one with tears in her eyes—several jurors turned to her, including one with clenched fists. Under the Eleventh Circuit rules, an attorney cannot initiate any contact with a juror. I asked the judge if we could wait in the hallway and see if anyone came up and talked with us, and she said, "Don't do that."

The defense team left and returned to the hotel. Reporters, who were allowed to speak to the jurors, were talking to the jurors and three of the jurors had been on the verge of hanging until the last minute. They asked the reporters if there was any way they could talk to Paul Little and/or his lawyers. The reporters said that we were at this hotel, which was in walking distance. So the three jurors walked over and talked to us, hugged Paul, and apologized. They told us that they believed he was not guilty and that he had not committed a crime.

You want to reach out and grab them and say, "How can you do this? You swore an oath." On the other hand, what they were doing

was extraordinarily generous and brave. The things that they said, in one perverse way, made us feel better. We knew that we had reached them.

2. The Views of H. Louis Sirkin, Little's Corporate Attorney<sup>72</sup>

**QUESTION:** We asked Jeffrey Douglas a similar question that we'd now like to ask you. What's Paul Little's disposition at this point?

**SIRKIN:** Paul's been pretty decent. He has listened to what we have said. He's been very gracious to us. He did not really argue at all with us. I think he really realizes that we certainly have not bull-crapped him.

I think Paul is well aware of the fact that there is a good likelihood that he will go to jail.

**QUESTION:** Did the jury's outcome convicting him on all counts surprise you?

**SIRKIN:** I felt very strongly the government did not show that he mailed the material. I was surprised that we went down on those counts.

He sold it [his movies] in California to Jaded Video, and Jaded actually is the one that made the sale and chose the methods of distribution.<sup>73</sup>

There is really good case law that says you have to show that Paul Little knew that it would be shipped via the U.S. mail—you have to show that he really knew that. Once he sells it to Jaded, he really doesn't know where or how the order is going.<sup>74</sup> From that standpoint, on an evidentiary basis, I was surprised by the outcome. I really felt we had a good, solid case on that.

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72. Interview with H. Louis Sirkin, *supra* note 44.

73. In a 2006 interview, Paul Little described this relationship with Jaded:

What I've done is separate my business—I'm strictly a manufacturer, I'm not a shipper. I sell my work to a third party who, in their best judgment, knows the shipping game. It's a tremendous responsibility. I have two companies that I work with primarily—one is EXP that does my domestic releasing, and the other is JadedVideo.com that does my mail order. It is easier, but it also gives me that firewall, as it were, between me and the authorities. It has always been, in our business: you ship it to the cop, you take the money, you get popped.

Richards & Calvert, *supra* note 1, at 277.

74. See Krause, *supra* note 2, at Metro 2. Little's attorneys argued that Little "had no idea who was buying the DVDs, where the customers lived, or what method the distributor was using to ship the DVDs." *Id.*

The other issue was the web material, which was eight minutes and eight seconds of video.<sup>75</sup> That didn't surprise me as much because of the material. The material is way out there—it's not everyday material.

But Jaded made the decision to sell the European versions in the United States.<sup>76</sup> Danny Aaronson<sup>77</sup> specifically asked the guy from Jaded who testified, "If you had gotten an order from what you knew to be a child, would you have sold it and mailed it there?" He said no, which means that he ultimately had control over that. I don't think that you become an aider or an abettor in a buy-sell situation.

Jaded was never charged and, ultimately, cut a deal. They were only given a promise not to be prosecuted for these tapes in the Middle District of Florida. They didn't get a statutory grant of total immunity. It was surprising that one would be so risky with that. But Jaded was rather cavalier. They continued to sell the movies up through the trial. They said, "Well, we don't know what to sell and not to sell."

**QUESTION:** Jeffrey Douglas spoke with us about the dispute regarding showing the material as a whole. Can you add your thoughts here, please?

**SIRKIN:** It was a pretty shitty situation that Judge Bucklew put us in with changing back and forth about whether the government had to show the material as a whole. Some people said that we shouldn't have shown the movies. My attitude with that is, "Guys, look, we had the opportunity to show them—we had the right to show them. If we didn't show them, then the appellate court's going to say we waived the right to challenge it—when you had your chance to show them, you didn't do it. You have no one to blame but yourself."

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75. This refers to material that was downloaded online rather than distributed through the U.S. Mail.

76. In a 2006 interview, Little explained the content differences between American and European versions of his movies, stating "the smart money knows where not to ship and what not to do, like you don't put pissing, fist fucking, and pooping—I never did that anyway—or gagging a girl until she vomits in the U.S. version. There are some states that are particularly bad." Calvert & Richards, *supra* note 1, at 277. He added that "we have to consider the market. I make two different versions. I make a world—or European—version and I make a U.S. version. I pretty much know what's going to pass the muster . . ." *Id.*

77. Aaronson was hired as local counsel on behalf of Little in the obscenity prosecution in Tampa, Florida. See generally Daniel Aaronson, Benjamin & Aaronson, <http://www.benjaminaronson.com/bio/DanielAaronson.asp> (last visited Mar. 17, 2009) (providing biographical information about Aaronson and noting that he works, among other practice areas, in "the area of First Amendment freedoms and adult entertainment law").

In addition, there's no way of knowing whether the jurors would view them in their entirety, even if they were just out for twenty minutes. You never can get into jury deliberations. So you've got to desensitize them and to try to let them all see it as naturally as you possibly can.

I don't worry about it from the standpoint of who gets punished—the prosecution or the defense—for showing them because my argument back to the jurors is, “Look, the government doesn't feel that you're old enough to view these things. They still continue to censor them, even in the courtroom environment.” You can make some political hay with it, but it was just an uncomfortable way to do it.

**QUESTION:** What is it about Paul Little's movies that make them a target for the government?

**SIRKIN:** These are rough movies. In general, my philosophy is, “You make it, we'll defend it.” It's not for me to start censoring what they should or shouldn't do.

It's a combination of a lot of factors with Paul Little. You've got vomiting and urination. To me, the urination in these movies was not even in a sexual environment. In one or two of the scenes that did have some sex appeal, the vomiting absolutely was a turnoff. You combine that with the degrading language—“You slut,” or “Mommy, what do you think of me now? Daddy, aren't you proud of me now?”—that type of stuff.

Of all the stuff that goes on, I have difficulty with it because I just don't like anybody being treated that way. Jennifer Kinsley, my colleague, says it's just a movie, but you put all of that together and there's not a whole lot that is likeable.

**QUESTION:** Are there possible grounds for appeal in the Paul Little case?

**SIRKIN:** There are issues of what the judge did with showing the movies that we might be able to make some argument about.

**QUESTION:** What did you learn from the Paul Little case that might impact how you defend a case in the future?

**SIRKIN:** It was a reaffirmation, for me, of how important the judicial officer is in a case; it makes a big difference. It also rekindles how important *voir dire* is in an obscenity case.

From my own perspective, if you watch enough of the material enough times, you can academically handle it, no matter what the content is.

I probably learned from [the] Paul Little [case] too that it would be great to get substantial funding to do a focus group to try to see how the material is going to go over—and I'm not one who really goes wild about focus groups. Also, it would be great not to be really limited in what you can try to do in getting experts.

We're really handicapped. These cases are expensive. We're going to take a pounding from the Paul Little case. You had two different defendants. You had to bring in local counsel from Florida. You had to bring in Jeffrey [Douglas] for Paul. You've got Danny Aaronson [as local counsel]. You've got us.<sup>78</sup> You've got two weeks of expenses down there.

**QUESTION:** Jeffrey described to us putting the actress known by the stage name of Summer Luv on the stand. How important was that?

**SIRKIN:** The jurors didn't believe her, but it was our attempt to humanize Paul Little. According to the three jurors that spoke with us, the other jurors thought she was lying.

She wasn't ashamed of what she had done. She was pretty open with it, and she communicated really well. She seemed pretty normal—she's now had a child and is doing the OSHA [Occupational Safety and Health Administration] work for a construction company in Las Vegas. She said that Paul was very concerned that nobody got hurt or injured. But the jury automatically thinks that it's a person who's been forced to do something—the abused-wife syndrome.

**QUESTION:** What were the jurors' reactions to the movies?

**SIRKIN:** They handled the movies better than I might have expected, except for one juror, who was an alternate, and he didn't go back in and deliberate. He's the one who said they didn't want to watch them at all. They did watch them. My observation was that they all watched them. They were shown on monitors. Compared to the reactions to the movies in Phoenix in JM Productions,<sup>79</sup> there was

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78. This refers to H. Louis Sirkin and Jennifer Kinsley.

79. This is a reference to the movies targeted for obscenity by the federal government in another recent obscenity prosecution in Phoenix, Arizona. See *Indictment, United States v. Five Star Video, L.C.* (D. Ariz. May 23, 2006), available at [http://www.usdoj.gov/criminal/pr/press\\_releases/2006/06/2006\\_4616\\_2\\_06-01-06obscenityfivestarinidict.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2006/06/2006_4616_2_06-01-06obscenityfivestarinidict.pdf); Press Release, U.S. Dep't of Justice, Federal Grand Jury

much more reaction to the “Gag Factor” movies in Phoenix than there really was to any of these movies.

I think we had a couple of nurses on the jury in Tampa; I don’t like nurses as jurors, but we didn’t have much choice. Nurses can go either one of two ways. I find that nurses are generally very opinionated and they think they know it all. My experience with them has been that they are hard to convince, plus they think that they know it all—and, if you’re going to use psychological testimony, it could be difficult. Now other people disagree. LPNs [licensed practical nurses] are fun because they work with bodily fluids a lot.

I also don’t like school teachers in an obscenity case, particularly if they teach elementary—there’s always that worry about protecting the kids. College level is fine.

**QUESTION:** What did you do to prepare the jury for the movies? Do you tell them in the opening statement what they are going to see?

**SIRKIN:** Yes, you try. The one thing I came out of Tampa with, in comparing what we able to do in voir dire in Phoenix [in the JM Productions case] versus what we were able to do down in Florida, was that while the judges did most of it in both of them, the judge in Phoenix gave them our fifteen-page questionnaire. There were descriptions of the scenes they were going to see and we were able to talk a little bit about them. Judge Bucklew in Tampa wouldn’t give them the questionnaire. We didn’t even get a questionnaire about whether they were married, whether they had children, and exactly where they lived. She went around the room and asked each one to give a little description of themselves. So you didn’t get very much. We also had nothing in advance. The judge in Phoenix gave the questionnaires out a couple of days before we started voir dire. Two days before, we were able to review the questionnaires and, from the questionnaires alone, we were able to eliminate some of the people who said they can’t watch it and whatever else.

That didn’t happen in Tampa. Judge Bucklew gave some description and then we tried to pick up on it in opening statement, a

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Charges Arizona and California Companies and Their Owners with Obscenity Violations (June 1, 2006), available at [http://www.usdoj.gov/opa/pr/2006/June/06\\_crm\\_343.html](http://www.usdoj.gov/opa/pr/2006/June/06_crm_343.html) (identifying the movies at issue as *Gag Factor 18*, *Filthy Things 6*, *Gag Factor 15*, and *American Bukkake 13*); Mark Kernes, *Five Star Video Sentence: Short Probation, Court Costs But No Fine*, AVN, Feb. 25, 2008, available at <http://www.avn.com/law/articles/1907.html> [hereinafter Kernes, *Five Star Video*] (providing an overview of the obscenity case against Five Star Video and JM Productions).

little bit, to tell them about it. Voir dire is a great place to talk about the sexual activity they are going to see.

One or two calls can really change the whole dynamic of what goes on in a courtroom. The judge really wields a lot of power that way. Judge Silver in Phoenix let us do a lot in the questioning, but Judge Bucklew did not. She [also] didn't give us any extra strikes. I think we had to use a peremptory strike to get rid of a cop from Tarpon Springs who said he had worked on these kinds of cases!

**QUESTION:** Is it correct that several jurors originally didn't think Paul Little was guilty?

**SIRKIN:** There were three jurors that initially weren't going to convict. The three just really felt they were browbeaten.

But I was really disappointed in the three—I can understand one collapsing, but not when you've got three and one of them was the foreman. His attitude was just, "I just couldn't think. I wasn't smart enough to argue back." I'm thinking, "You didn't have to argue back. All you had to do was say no."

**QUESTION:** Can you tell us a little bit about the three initial holdouts?

**SIRKIN:** One was a woman and two were guys. The woman was a paralegal—she worked for a lawyer and she got fired right before the decision. One was a pawnbroker. I'm not really sure who the third one was.

They did come and talk with us. As a matter of fact, [attorney] Jennifer [Kinsley of Sirkin Pinales & Schwartz] had some lengthy conversations with the woman; they sort of bonded a little bit afterwards. But it was really disappointing that they collapsed. I've been in situations where one juror has held out for a conviction or held out for an acquittal and they've been able to sustain their position.

I'm finding, more and more, that it's harder to find people willing to stay with a commitment. I think that there has been a conditioning that we've all gotten used to—giving in a little bit. It's my general observation.

**QUESTION:** Tell us about some of the concerns of these three jurors when they came to talk with you.

**SIRKIN:** Well, they felt that there was nothing different about these movies than what else they felt was available, and they felt it was

really no big deal. Just in general, they were supportive of our position politically.

We also made a conscious choice that some people have suddenly criticized. There's something called a *Michigan* instruction, which says that if the content is designed for a specific deviant group, you have to judge it by the average member of that deviant group. When dealing with a deviant group, I really feel it is crucial for the government put on an expert unless your expert fills it. So we made sure that our expert only talked about a deviant group—those that would be into urine, degradation and that sort of stuff, but who didn't talk about the average person. He gave them nothing that would give them ammunition to deal with it from the standpoint for an average person.

From what the three jurors told us, the psychologist that we used had very little impact. I thought he was pretty good. He was from southeastern Florida and he'd done a lot of sexual predator determinations. He came to it from a fairly neutral territory.

**QUESTION:** Did you get a sense, from the three jurors you spoke with, about the feelings of the other nine jurors? Did they come in there ready to convict?

**SIRKIN:** That was the feeling we had. The minute they saw the movies, they were ready to hang us. They didn't like the movies.

We had an incident where one of the young jurors—one that initially went for acquittal—was not wearing his juror badge. He came up on the elevator with an Assistant U.S. Attorney. When the juror pressed the fourteenth floor button, the Assistant U.S. Attorney said, "So, you're going up to watch the porno case." The kid said, "I'm a juror." But the juror never told anyone about it. The Assistant U.S. Attorney apparently got a twinge of guilt and came running to the courtroom to tell the judge, but Judge Bucklew wouldn't call that juror out to ask him anything about that.

**QUESTION:** Why weren't those three jurors initially not willing to convict?

**SIRKIN:** I think, more than anything, they believed in free speech or live-and-let live, leave it alone. It's going into somebody's home. What's the big deal?

**QUESTION:** Were you disappointed that these three jurors rolled?

**SIRKIN:** I was really, really disappointed. I've been in a situation where one juror has hung up a jury. There was a time a while ago when we were getting a bunch of hung juries. In Louisville, a guy held out for four days and never gave in. Down in Tennessee, it was eleven to one for acquittal, with one woman wanting to convict. She held out for eleven hours and wouldn't change her mind.

But today it's like, "Let's get moving on." The deliberation went over a couple of days. I think they held out until mid-afternoon of the second day. But I just find that we don't have this great spirit of going out there and fighting.

### 3. The Views of Mark Kernes, Journalist Covering the Little Case<sup>80</sup>

**QUESTION:** One issue with the Paul Little trial was that the jury was not allowed to watch the DVDs continuously in their totality. What did the jurors get to see? Did it make a difference that they were not allowed to watch them all continuously?

**KERNES:** It's unclear to me how much of a difference that made. First, we know about a note from a juror after the first movie was played—*Fists of Fury* or *Max Extreme 20*. It came from the alternate juror asking, "Do we have to watch all this stuff?" Aside from the judge not questioning the juror about whether he discussed this with the other jurors or if any of them prejudged the material, which apparently they had, the judge allowed no questioning of that.

Then there was the comment by the prosecutor, Edward McAndrew,<sup>81</sup> at the beginning. He said, essentially, "It's going to be a question of who the jury blames for having to watch this material." That's very important. The prosecution realizes that no one who does not affirmatively seek this material out wants to watch it; they either are not interested in it or, in this case, not interested in this type of activity. So when you force them to watch it, there's going to be some resentment. It's inevitable. The question thus was which side—prosecution or defense—was going to be more resented by the jury for making them watch the videos.

As I said, I think several of them were predisposed not to like it no matter what it was or how much of it they had to see. If they were,

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80. Interview with Mark Kernes, *supra* note 45.

81. See Press Release, U.S. Dep't of Justice, Federal Jury Convicts California Producer and His Adult Entertainment Company of Obscenity Crimes (June 5, 2008), available at <http://www.usdoj.gov/opa/pr/2008/June/08-crm-507.html> ("The case is being prosecuted by Trial Attorneys LisaMarie Freitas and Edward J. McAndrew of the Criminal Division's Child Exploitation and Obscenity Section (CEOS), with the assistance of the U.S. Attorney's Office for the Middle District of Florida.").

however, predisposed to blaming someone for making them watch it, it was obviously going to be the side that made them watch the most of it. That's exactly why the government did what it did.

Aside from the government violating certainly the spirit of the *Miller* decision by electing not to play the material as whole, despite having charged it as a whole and having under *Miller* to consider it as a whole, the judge vacillated back and forth between having to show it all and not having to show it all. Eventually, the onus was on the defense to show everything the prosecution didn't show.

I'm unclear what the effect was of showing it out of order because it's not like a storyline feature where suddenly you're taking one scene out of context in a story that includes that scene and there's rising action toward it. It wasn't like that. The problem was that the prosecution did not do its duty to play the material as a whole. Therefore, the jury very likely blamed the defense for having to watch it. I think we'll see more of that tactic.

**QUESTION:** When the verdict came down, what was Paul Little's reaction to it?

**KERNES:** He was very stoic about the whole thing. He took it very well.

When I first got to Florida and spoke to him [before the trial], I could tell there was something wrong. Paul is generally a well-spoken guy, but when he was speaking to me, he would say "um" every few words. That's very unusual for him. He's usually a guy who says what he says. He's not a guy who uses "ums" and "ers"—audible pauses—when he speaks. The facts that the "ums" were showing up in his conversation indicated to me that he was very worried about this.

As the trial went along, he seemed to calm down. Obviously, his attorneys were doing an excellent job. I don't think they could have done a better job. As he saw how confidently and how well the attorneys were handling the day-to-day situation, he calmed down. After the verdict, some of the "ums" were back, and that suggested to me that it concerned him.

I know that his biggest concern was possibly losing his house in this process. Since that's not going to happen, he felt okay. The thought he expressed to me after the verdict was, "If I've got to do five years for this, I've got to do five years for this." Obviously, he doesn't want to. You would have to be out of your mind to want to go to jail. But he was fairly stoic about it. I don't think he thinks he'll get more

than five years—the potential is fifty years and five million dollars in fines.

**QUESTION:** Didn't the defense call an actress who worked with him as a witness?

**KERNES:** Yes, her stage name is Summer Luv—a very sweet girl. I didn't get to talk with her before she testified, but after she testified, she and Max spent several hours reminiscing about what a good time they had together. She made something like fifteen movies together with Max. He took her to Brazil and probably some other foreign countries and paid her very well to do this. At one point, he paid her \$10,000 or \$15,000 for a scene, which gives you some idea of how his stuff is selling. She is a lovely lady, and she was perfectly fine with it.

On the stand, she said he spent an hour discussing with her what was going to happen in the scene before they started filming. Whenever she wanted to take a break, Max was fine with that. There was even one point in which he had hired her for a scene, but when she got there, for some reason or another, she couldn't do the scene and he paid her anyway. That certainly boosted my opinion of Paul as a person. I definitely got a whole different picture of Paul Little as a person, as opposed to Max Hardcore, who is the character.

**QUESTION:** Does Paul Little have many friends in the industry?

**KERNES:** Well, I hope that my articles have given people a somewhat more realistic view of him. But he's still going to be considered a pariah because his material is so far away from the storyline-based, well-directed, well-acted features. On the other hand, there's an entire subgenre of bondage and domination movies for which people are not ostracized. In a sense, it's kind of a separate community, and possibly the reason why Paul gets this kind of reaction from the adult industry is that he's generally been considered part of the mainstream adult industry as opposed to one of the various subsets that are out there—gay, specialty, whatever. He's considered more of a mainstream producer and his stuff is extreme for mainstream. If you considered him in the same category as all the other bondage and domination movies, then his stuff is much more like that, although most of them do not have hardcore sex, and his [do]. It's certainly a domination-themed video. People should at least recognize that.

**QUESTION:** Were you able to watch the jury's reaction to these videos?

**KERNES:** Most of them seemed bored, incredibly bored. A few were taking notes.

Perhaps my thoughts are colored by what I know the eventual jury outcome was and what I heard from the three jurors who originally had voted not guilty. They said the rest of the jury pretty much had walked into the jury room saying, “This guy is guilty.” It wasn’t even a question for them of needing any debate in there. They were out for fourteen hours, and apparently that time was all spent trying to browbeat these three people who were in favor of a not-guilty verdict into voting guilty, and eventually they did—especially after the judge gave them a modified *Allen* charge. Two hours later, they were back.

In terms of the jury’s reaction: again, it was mostly boredom when they were watching the films. There didn’t seem to be a lot of reaction. The attorneys thought they were detecting things in the jury box, but I frankly didn’t see it.

**QUESTION:** Post-verdict, you spoke with some of the jurors who were browbeaten into voting guilty. Did you talk to any of the jurors who were steadfast in their guilty determination?

**KERNES:** They would not talk to me. They apparently talked to the mainstream press. I think they all had an idea who I was because I spent a lot of time talking to the defense. They did hold a little press conference with the mainstream news people, whereas I talked with the putative holdouts.

Later, the holdouts came back to the hotel where the attorneys were staying and carried on a further conversation. I didn’t really talk to the mainstreamers, but it is very troubling that there are news reports that those jurors have discussed doing a book about the trial. If they had decided at any time before that verdict was delivered to do a book—if the notion “we ought to do a book” was mentioned—then that should be reversible error right there.

In a sense, it’s a sad commentary on the way our judicial system works where that is a possibility. Someone might want to consider legislation that says if the jurors want to write books, they don’t get to profit from them. That would be a good cure for that. Be that as it may, that did bother me.

**QUESTION:** Let me ask you about the holdouts. Were they men or women?

**KERNES:** Two men, one woman. The one woman I've written about extensively. When the jury filed in to deliver the verdict, we could all tell something was wrong. We had watched her throughout the trial. She was attentive and certainly not offended by the material. Everyone on the defense side of the table and I had pegged her for not guilty. We thought there were others who were going to vote not guilty, one of whom showed up at the hotel after conference. There were a few others who were set on guilty that we didn't know. When the jury filed in, you could tell that this woman had been crying because her make-up was running and there were dark circles around her eyes. That was when we said, "Oh, shit. If she's that upset, it's guilty and she was apparently the holdout or at least one of the holdouts."

**QUESTION:** What did those three jurors say specifically about the content of the Max Hardcore videos?

**KERNES:** Their feeling was that they wouldn't choose to watch this stuff on their own, but this is America. "We have a Constitution and freedom of speech. If this guy wants to make this stuff and somebody else wants to buy it and nobody got hurt in it, who cares?" That was what these people essentially said.

Certainly, I think that's the American way. On the other hand, as Lou Sirkin said afterwards, "These people still did not have the courage of their convictions." I'm going to be writing about that. It's a real shame.

**QUESTION:** What were their approximate ages?

**KERNES:** The woman was mid-thirties. In fact, they were all mid- to late-thirties. One of the guys was probably on the upper end of the thirties and the other on the lower end. We're not talking about old people, but there really weren't any old people on the jury. I think we had one student, but the rest were at least late twenties to early forties. All were white—no Hispanics and no blacks.

**QUESTION:** When the judge gives the jury instructions in an obscenity case—the *Miller* test incorporated—is there great potential for confusion?

**KERNES:** Absolutely. The jury clearly did not understand the *Michigan* instruction. First of all, they came back with the question asking, "Do we have to figure out if it's the prurient interest for both

the regular people and the deviant sexual group or just one or the other?" I think the judge explained that, but I don't think the jury got it. The jury should have understood that the material was appealing to the deviant sexual group, whether or not it was advertised that way.

I think that was Max's fault. He should have advertised it that way. It certainly wasn't going to lose him any sales if he did. He may have worried that this would paint the target on him. But his target has been painted for a very long time.

But if the jury had recognized that the material was targeted to a specific sexual group like dominant-submissives and, within that category, people who were into vomiting, urination, and fisting<sup>82</sup>—well, God, fisting. Who cares about fisting really? They could not possibly have found that it appealed to the prurient interest of that group. They should have acquitted on that reason, if they weren't already predisposed to finding him guilty.

#### 4. The Views of Larry Flynt, The Publisher of *Hustler* Magazine<sup>83</sup>

**QUESTION:** Was the outcome in the Max Hardcore trial a surprise to you at all?

**FLYNT:** It wasn't a surprise. John Stagliano, who is now being prosecuted, is a good friend of mine. I told him basically the same thing: "If you don't want to be prosecuted and go to jail, then realize that these people aren't censoring you and you really don't even have to censor yourself. You just have to say, "This is what people want and I'm going to make it available.""

If it is pornography made for consenting adults by consenting adults, then I'll stand on the highest mountaintop and defend it. I have done it for my entire thirty-five-year career in this business.

But that other stuff, you can't defend it. I think that it will invite further prosecutions. I think the government will start going to the Internet unless they can find a few others like Max or Rob Black<sup>84</sup>

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82. See Clay Calvert & Robert D. Richards, *Gay Pornography and the First Amendment: Unique, First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images*, 15 AM. U.J. GENDER, SOC. POL'Y & L. 687, 711 (2007) (providing a scholarly examination of the concept of fisting and discussing "a three-finger rule" used by the attorney for one gay adult film company in defining the concept).

83. Interview with Larry Flynt, *supra* note 46.

84. Rob Black was one of the defendants in the federal government's obscenity prosecution in Pittsburgh, Pennsylvania. See, e.g., *United States v. Extreme Associates*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006).

and those guys. The government looks at that stuff and they know what they can get a conviction on and what they can't.

**QUESTION:** Is Max Hardcore considered an outsider in the adult-entertainment industry?

**FLYNT:** He always has been and so is Rob Black, but John Stagliano is different. Stagliano is a businessman, he's intelligent, and he knows how to run a business and make porn. He's good at it. But he's also a Jekyll-and-Hyde figure, and that's not just his personality in real life, it's also his personality in film. When he makes a film this month, you don't know if he's going to be Jekyll or Hyde. That's what got him into trouble.

### *B. Using the Internet to Determine Community Standards*

Since the U.S. Supreme Court's *Miller* decision in 1973, prosecutors and defense attorneys have grappled with the requirement that the sexually explicit material at issue in an obscenity case must be measured against contemporary community standards determined from the average person's perspective.<sup>85</sup> Although this amorphous standard might have made sense to the jurists who prescribed it more than three-and-a-half decades ago—communities were much more defined and options for distributing sexually explicit fare were far more limited—today's high-tech, far-reaching distribution systems that enable content to be spread worldwide with a simple keystroke make the standard seem antiquated and meaningless, if not impossible to determine.<sup>86</sup>

Barring a change to the Supreme Court's definition of obscenity, however, lawyers and judges will continue to spar over how the parameters of a particular community should be drawn in an obscenity case. In *United States v. Little*, the community was defined by the court as the Middle District of Florida, and that community has access to a broad swath of adult materials thanks to the Internet. In fact, half the counts against *Little* stemmed from material downloaded

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85. See *supra* note 7.

86. See generally Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, but New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507, 520 (2001) (examining flaws with the *Miller* test as applied to the Internet and considering whether "we simply should jettison the entire notion of community standards when considering sexually explicit matter posted on the web").

from the web.<sup>87</sup> Accordingly, evidence of what was available to members of the community was relevant.

During the defense's case, two witnesses testified that they "had found sexual material in the Tampa area and on the Internet similar to the material charged in the indictments at issue."<sup>88</sup> An Internet search conducted in the courtroom using the terms "pissing," "porn," and "video" located "roughly 1.7 million pages, while 'fisting,' 'porn,' and 'video' brought up 1.98 million."<sup>89</sup>

The tactic of using search engines like Google Trends to determine website visitor traffic in a community likely will continue in obscenity cases.<sup>90</sup> First Amendment attorney Lawrence Walters planned to use a similar approach in a case against a Pensacola, Florida man who maintained a sexually explicit website "to show that pornography is actually more of a mainstream activity to Pensacola's citizenry than some other recreational pursuits, such as boating."<sup>91</sup>

Walters's plans made national news in June 2008, when the *New York Times* reported that "[t]he search data he is using is available through a service called Google Trends (trends.google.com). It allows users to compare search trends in a given area, showing, for instance, that residents of Pensacola are more likely to search for sexual terms than some more wholesome ones."<sup>92</sup> The case settled before trial.<sup>93</sup>

By moving beyond a simple Internet search that shows the wide availability of adult content, lawyers defending obscenity cases may, in the future, be able to demonstrate "both accessibility and interest in the material within the jurisdiction . . . where the trial is taking place."<sup>94</sup> In the following section, attorneys Douglas and Sirkin

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87. See *supra* notes 49-50 (describing the counts in the indictment).

88. Kernes, *supra* note 66.

89. *Id.* ("By contrast, a search for Heisman trophy winner 'Tim Tebow' and 'video' brought up just 306,000 pages; 'David Cook' plus 'American Idol' plus 'video' brought 1.5 million pages; and the big 'winner,' 'Rolling Stones,' brought up 2.1 million.")

90. See Google Trends, <http://www.trends.google.com> (last visited Mar. 22, 2009).

91. Frank Cerabino, *With Google Looking On, You Can't Hide What You Seek*, PALM BEACH POST, June 25, 2008, at B1 ("This is important to Walters because he is representing a pornographer in a Pensacola obscenity case. The state is trying to shut down his client's website by claiming that it's objectionable to 'the average person, applying contemporary community standards.'")

92. Matt Richtel, *What's Obscene? Google Could Have an Answer*, N.Y. TIMES, June 24, 2008, at A1.

93. Monica Hesse, *The Google Ogle Defense: A Search for America's Psyche*, WASH. POST, July 3, 2008, at C01 ("Obscenity charges hinge on the vague concept of community standards—whether allegedly obscene material would fall under the public's definition of decency. Walters found traditional barometers (skin flick selection in local video stores, etc.) bogus.")

94. Richtel, *supra* note 92, at A1.

discuss the use of Internet searches in court to demonstrate comparable material within a given community. Mark Kernes talks about the how the jury reacted to the demonstration during the defense case at the Little trial.

1. The Views of Jeffrey Douglas, Little's Personal Attorney<sup>95</sup>

**QUESTION:** Could you please discuss the notion of community standards in an obscenity case and using a Google search to help establish what the community standards are in such a case?

**DOUGLAS:** Part of the bizarre nature of the *Miller* opinion is the notion that there is such a thing as a discernable contemporary community standard. They hedged every way they could by saying "as defined by state law." When the state doesn't define it, they pretend that the state defines it. In any case, the judge will announce or state law will inform one of what the community is—what the geographical dimension of the community is. It assumes what no one in the world believes—that there is a knowable, discernable community standard and that a jury can intuit what that is.

**QUESTION:** In the Paul Little prosecution, how did the judge define the community?

**DOUGLAS:** The Middle District of Florida. A number of states have it clearly defined in state law as part of their obscenity standards. In California, for instance, it's a statewide standard. In others, it's by county. In a number of states, the legislature has declined to do it and an appellate court has defined it. Then there are a few states where no one has any idea.

Apart from that problem, you have the other problem of telling the jurors that they are supposed to apply this abstraction that they have never thought of in their life. Even in our very contemporary society where sexuality is better integrated into pop culture than any time in American history, still people do not casually sit around and talk about their sexual fantasies with one another. So asking the jury to know their neighbors' and complete strangers' degree of tolerance is ludicrous.

The courts have said that the government has no burden whatsoever in proving that particular element—something that no one can figure out. Why is it that due process gets to take a vacation in

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95. Interview with Jeffrey Douglas, *supra* note 43.

the middle of an obscenity prosecution despite the fact that it's an element of the offense? Courts have said the government doesn't have to prove it because it can't be proven. You just leave it to the jury. That means that unless you have a dedicatedly hostile judge, the judge is going to give a degree of latitude to the defense's efforts to show what the community standard is. There are some horrific trial opinions where some judges have said, "No. I'm not going to let you do anything because, if I do, you might get acquitted. And we can't have that."

All of the mechanisms that one would use to try to provide circumstantial evidence of what the community standard is provide grave obstacles. It's difficult to get comparables in—material that is available in the community to show that the reason it's on the shelves is that people are buying it. No one would put retail items out that just sit there and gather dust. Even if that were the case with one or two items, if you could show that this material is available everywhere, then that is a reason to infer that it's acceptable. The Phoenix jury found that very, very persuasive.

The best way to show community acceptance or tolerance in the pre-Internet days would have been mail order because of the anonymity or partial anonymity associated with it. Mail order. . . reflect[ed] the community's private consumption, fantasy habits, and, therefore, acceptance or tolerance more effectively than. . . a retail environment where I not only have to disclose my sexual preferences or fantasies when I rent the tape, but I'm renting it from some teenager that goes to school with my kid or, worse, goes to school with me.

Mail-order companies are extremely unwilling to disclose that information because (1) it would open them up to criminal prosecution; and (2) it might allow the intrusion into the privacy of their customer base, which would end their relationships with the customers. Getting mail-order traffic was virtually impossible.

With the Internet, things changed dramatically—at least conceptually—because anyone who has access to a computer can get anything available in the world. It's difficult to argue that content available on the Internet is not part of the community. [Of course], if you are going to put forward evidence, the burden is always on the proponent of the evidence. Even though what I said is logical, the defense, in trying to get this material in, still must meet all the evidentiary obstacles, and it's challenging. If you can overcome that hurdle, and the jury understands that this material is extraordinarily popular through the general traffic, then the next great conceptual

obstacle is to say how much of that traffic can reasonably be attributed to this particular community.

Even if the jury doesn't buy the percentage assumptions that could be used to show specific estimated numbers of how much traffic is coming, for instance, from the Middle District of Florida, there is a visceral impact about the fact that there were 1.2 million English-only web pages, based in America, that self-define through their meta-tags as being piss and porn.

**QUESTION:** Did this reach the jury in Paul Little's case?

**DOUGLAS:** Yes. We did a live Google search in front of the jury as demonstrative evidence that helped us get around some of the evidentiary problems that would have existed if we had a tangible document that we wanted to put in front of the jury. It's sort of depressing, but trial experts, including jury experts, say that juries love demonstrative evidence. What they really love is being able to pick something up. We didn't have that to give them. But the drama of a live search is there, particularly because anyone who has ever done a presentation knows that if you use technology, something horrible is going to happen. You can imagine what it's like doing a Google search.

I did this kind of search in a California case—I had practiced it a million times—but on the second search, the number came out completely wrong. It was one ten-thousandth of what we had seen before. Fortunately, psychologically, we were prepared for this, so we just did it again. We did it exactly the same way, but this time it came out right.

We didn't have that problem in Florida. We just walked them through a Google search. One of the reasons we were able to do it was that the government had done something very similar. The government's expert was trying to prove a connection on some of the counts in Tampa. In the course of his presentation to the jury, he essentially said, "Google searches are extremely reliable," and showed how he had done a Google search at one step along the way. This made it more difficult for the government to argue the impropriety of us doing a Google search.

The limited number of jurors we talked with said those jurors who were guilt-prone blew it off, just like they blew off all of the other evidence. In contrast, those who were leaning towards not guilty found it very persuasive. Those jurors, after several days of deliberation, announced that they were hung. The judge gave them what is known as an *Allen* charge, which is to say, "Don't hang up. It's

not going to do any good. We're going to retry the case, and it's going to be really expensive. There's no reason to think there will be anything different the next time. Those of you in the minority, rethink your views and really try to have a unanimous verdict." It's not quite a gun to the head of the jury as was the older version of the *Allen* charge, known as a dynamite charge, which said unless the jury is split six to six, the minority should accede to the views of the majority.

2. The Views of H. Louis Sirkin, Little's Corporate Attorney<sup>96</sup>

**QUESTION:** Can you tell us little bit about the use of comparables on the Internet to determine the community standard?

**SIRKIN:** I give credit to Jeffrey [Douglas] on that one. Jeffrey worked with our investigator. We brought in a wireless laptop and went online to show the number of hits for certain terms. If you searched for "sex and urine," you'd get 452,000 hits. We went to "Tim Tebow," the coach of the Tampa Bay Buccaneers, and other [locally relevant] terms. The only one that exceeded the number of hits you got on sexual terms was "The Rolling Stones." It shows how easily available and accessible this stuff really is. We showed how available comparable material is.

It obviously wasn't enough. To me, if we could have gotten a hung jury in the case, I would have just been elated, given the nature of the content.

**QUESTION:** What were the comparables in this case?

**SIRKIN:** Believe it or not, there are a lot of movies out there with urine—a lot. And there were a lot down in Tampa until Max Hardcore got charged. Our investigator went out and stores told him, "We carried it until Max got charged and then we pulled it off the shelves."

I'd never seen the vomiting. I'd seen the gagging from the *Gag Factor* movies in Phoenix. I've not defended any movies that have shit in them. The gagging is pretty natural and the squirting. I think that in the case in Washington against John Stagliano the government initially thought it was urine, but it's not—it's girls squirting.

The Stagliano movies are, in my opinion, kind of tongue-in-cheek, like target practice with squirting from across the room. I'm sure the government thinks that it's urine. And there's one scene in

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96. Interview with H. Louis Sirkin, *supra* note 44.

which they give the girl a milk enema and she squirts out milk. It's really not sexual, but you wonder if this is where the stuff is going to go.

There's a generational gap that's really sort of out there. It's trying to convince a broad range of audience that we've reached a time in our society that really matches, a little bit of the 1970s, where sex is now being considered, to many, as recreational sex. People are engaging in sexual activity more because it's pleasurable. It's not so conditioned on romance and love and so on. It just feels good. The difficulty is trying to find a way to make a jury, with a wide spread of ages, feel comfortable in accepting the principle that there doesn't have to be love and sex. It's one of the things that we still have to struggle with.

**QUESTION:** Tell us a little bit about Tampa, please.

**SIRKIN:** The thing that most people don't realize about Tampa is that, as free spirited as the city of Tampa may be, the Middle District of Florida generally is pretty conservative. You've got Polk County, Tarpon Springs, Bradenton, Clearwater, and St. Petersburg. They're not very avant-garde. But, to a large extent, I would say that a lot of it had to do with the material.

### 3. The Views of Mark Kernes, Journalist Covering the Little Case<sup>97</sup>

**QUESTION:** How do you think the jurors reacted to the Google search that was done in court to try to demonstrate contemporary community standards per the *Miller* test?

**KERNES:** I think the jurors who came back to the hotel afterwards said they thought it was interesting, but they were already predisposed to find him not guilty anyway because they didn't see a crime being committed. I don't think the Google search played much of a part for them and, obviously, it didn't play any part for the people who found him guilty. As a matter of fact, the three jurors said that there was no need to put on an expert. As far as they were concerned, they should have showed the movies, made their argument, and that was it.

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97. Interview with Mark Kernes, *supra* note 45.

*C. The Impact of the Paul Little/Max Hardcore Verdict on the Adult Entertainment Industry*

Just how much of an impact the conviction of Paul Little will have on the adult entertainment industry remains unknown. In reaction to the verdict, First Amendment attorney Lawrence Walters, who defends obscenity cases as part of his legal practice, said the outcome “will rightly spur industry professionals to look at their businesses and take stock of how prosecutable they are.”<sup>98</sup> Walters added, however, “that the industry shouldn’t get too worried because of the extreme, fringe nature of Hardcore’s movies.”<sup>99</sup> Walters said the real concern would come only if the government were to target “vanilla porn, a feature with a storyline and characters.”<sup>100</sup> Little’s attorney, Jeffrey Douglas, agreed that his client’s case would have minimal effect on adult producers, saying, “There were so many anomalous things about this case that [the conviction] means very little.”<sup>101</sup>

In this section, Douglas elaborates on this point. Attorney Sirkin, however, does not dismiss the negative effect of the verdict and warns other producers that they should not be quick to ostracize Paul Little. Likewise, industry insiders Mark Kernes and Larry Flynt are not so sanguine about the impact of the case. They discuss how Little’s conviction marks the first significant federal obscenity conviction in several years.

1. The Views of Jeffrey Douglas, Little’s Personal Attorney<sup>102</sup>

**QUESTION:** Do you believe that the overall effect on the adult industry will be de minimis?

**DOUGLAS:** I believe that deeply. Apart from the vanilla sex material—everybody cites Wicked<sup>103</sup> and Vivid<sup>104</sup>—there is a lot of

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98. Bob Preston, *Lawyers React to Max Hardcore Verdict*, XBIZ, June 13, 2008, available at <http://www.xbiz.com/news/web/95153>.

99. *Id.*

100. *Id.*

101. *Id.*

102. Interview with Jeffrey Douglas, *supra* note 43.

103. This is a reference to Wicked Pictures, one of the leading adult movie companies in Southern California. See Wicked News and Press, Wicked Pictures Company History, [http://news.wickedpictures.com/index.php?option=com\\_content&task=view&id=321&Itemid=40](http://news.wickedpictures.com/index.php?option=com_content&task=view&id=321&Itemid=40) (last visited Mar. 17, 2009).

104. This is a reference to the Vivid Entertainment Group, which describes itself on its website as “the world’s leading producer of high quality erotic movies” and “the only adult film company to create a successful professional business development and licensing program. It has grown the brand name through marketing partnerships with companies

stuff that is very harsh, like choking, nasty words, and group sex, and yet there has been no effort by the government to go after this material. Robert Peters of Morality in Media<sup>105</sup> and formerly of every pro-censorship group out there said, “The war is over and we have lost.” In this stage in American development, sexual material is not illegal. I think everyone recognizes that, and that part is very encouraging. There is something fundamentally wrong about cherry-picking outlier material. There is something fundamentally wrong with saying that a disturbing or unpopular idea can be banned by virtue of the fact that it’s disturbing or unpopular, which is at the heart of the obscenity law.

2. The Views of H. Louis Sirkin, Little’s Corporate Attorney<sup>106</sup>

**QUESTION:** If Paul Little goes to jail, will that affect the Southern California-based adult movie industry?

**SIRKIN:** They say, “We’re not like Paul Little. His stuff is way out there.” That, to me, is just absurd. They live in their own little world.

**QUESTION:** So it should be a wake-up call to everyone in Southern California in the adult entertainment business, but it has not been taken that way?

**SIRKIN:** I don’t think they take it seriously. But believe me, if they brought a charge against Larry Flynt, the adult industry would shit in their pants. For some reason, they’ve not wanted to. That would really send a ripple. Or going after Stevie Hirsch.<sup>107</sup>

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that manufacture a wide variety of Vivid products and services—from condoms to comic books and a range of apparel.” Vivid Entertainment Group, <http://www.vividentertainment.com/index.aspx> (last visited Mar. 17, 2009).

105. Morality in Media describes itself on its website as being:

established in New York City in 1962 to combat pornography. Now national in scope, MIM works to inform citizens and public officials about the harms of pornography and about what they can do through law to protect their communities and children. MIM also works to maintain standards of decency on TV and in other media. Contributions to MIM are tax-exempt.

Morality in Media, Inc., <http://www.moralityinmedia.org> (last visited Mar. 21, 2009).

106. Interview with H. Louis Sirkin, *supra* note 44.

107. Hirsch is the chief executive of Vivid Entertainment who “desire[s] to make Vivid an adult brand with mainstream appeal.” Matthew Garrahan, *Rude Awakening*, FIN. TIMES WEEKEND, Oct. 4-5, 2008, at 1.

But I think people in the industry will probably consider Paul Little to be the modern-day Al Goldstein<sup>108</sup> that people won't really care about. They'll say that his stuff was this, that, or the other. They only care about themselves. It's a different generation today. There's not the loyalty that existed in the past. The world is centered on how fast you can tell on somebody. Nobody is willing to take the fall or to stand there and fight.

**QUESTION:** What, then, can the adult industry do better to avoid being targets?

**SIRKIN:** I think these guys—and you can't tell them otherwise because they won't listen—have got to stop talking about how much money they make, they've got to stop flaunting it, and they've got to take the position, "We are in entertainment and we're fighting for you." They should be out there as spokesmen saying, "Look, I'm in the entertainment field and I'm providing for you entertainment that I believe you want. If you don't want my product, don't buy it." They are the last people, I think, who are out there that can really fight for the First Amendment; they need to say, "First they stopped this film, then they stopped that film, and now they're telling you what you can watch at home. Big brother is here. They're going to tell you what you can bring into your home."

But they come out and they flaunt it. It's all fun to live that way, but don't talk about it. People don't really want to hear it. You're not Brad Pitt, you're not Angelina Jolie. Face what you really are. The bottom line is that you make X-rated movies and a lot of people out there don't like them. Make yourself at least as likeable as you can possibly be.

But everyone wants his day in the sun with it. I don't know where it's going to go. It's been an interesting year.

### 3. The Views of Mark Kernes, Journalist Covering the Little Case<sup>109</sup>

**QUESTION:** What have you heard about the potential effect of the Paul Little/Max Hardcore guilty verdict on the adult entertainment industry?

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108. Goldstein was the founder of *Screw* magazine and he was recently described by *AVN* as a "controversial porn pioneer." David Sullivan, *Al Goldstein Announces 2008 Presidential Candidacy*, *AVN*, Mar. 29, 2007, available at <http://business.avn.com/articles/8019.html>.

109. Interview with Mark Kernes, *supra* note 45.

**KERNES:** Obviously, Little's part of the adult industry—he's distributed by adult distributors, and adult manufacturers put out his stuff. In that sense, he's definitely part of the adult industry.

What I found out from watching the videos at the trial is that his stuff is generally misclassified in the mind of the average viewer. You tend to think of him as simply featuring disgusting, hardcore sex, but it really isn't that. These are domination fantasies—the entire purpose of the videos is to show him dominating the woman. In terms of sex, they rarely have vaginal sex. They never start out with vaginal sex; it's always anal, if it starts with sex. Also, he pees on the girl. His girlfriends pee on her—notably Catalina and Chloe Adams, who apparently were regulars of his. Sometimes they pee in her mouth, and she gurgles it. Most of the time you can see it's running down the edges, so it's going in and going out right away.

I really don't watch much of his material. In fact, the first full-length Max movies I've seen, in at least the last seven or eight years, were the ones I saw in court.

**QUESTION:** This may be the first time in a long, long time when someone will actually go to jail for the creation and distribution of these types of films. Is that going to wake some people up in this industry to the reality that the times may be changing?

**KERNES:** The general reaction is that people say, "My stuff can never get busted like Max's did." [While] following the Ira Isaacs case,<sup>110</sup> Paul Thomas,<sup>111</sup> the famous Vivid director, gave a quote to the *L.A. Weekly*, essentially saying, "I work for Vivid and this could never happen to us." But it can happen to them. It's just a question that depends on who becomes president in 2009 and beyond. It's a matter of their working their way up to it.

In the religious-right newsletters that I get on a daily basis, whenever they talk about porn, they are adamant about the fact that Vivid should be prosecuted. When I say Vivid, I mean any of the more mainstream adult products—stuff with storylines and decent acting. As far as they are concerned, that should be prosecuted right along

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110. This is a reference to the obscenity case now pending in Los Angeles, California, against Ira Isaacs. See Scott Glover, *Man's Obscenity Charge Stands*, L.A. TIMES, Sept. 23, 2008, at B4 (describing the case against Isaacs and how U.S. District Court Judge George King refused to dismiss the case despite the fact that Alex Kozinski—the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit and the judge initially presiding over the case—earlier had "declared a mistrial after acknowledging he had posted sexually explicit material on his own publicly accessible personal website").

111. Thomas was named by *Adult Video News* as one of the top twenty-five adult-filmmaking pioneers. 25 *Filmmaker Pioneers*, *supra* note 24.

with Max Hardcore and Ira Isaacs, who does a bestiality tape and a scatological tape. To them, it's all the same stuff. There is no difference in their mind between someone who has a woman eating her own feces and someone who has a woman in a very sensual mood, with nice art direction, or two well-dressed people who can actually say a line with meaning and are going to have sex with each other. There's no difference to them between those scenarios.

4. The Views of Larry Flynt, The Publisher of *Hustler* Magazine<sup>112</sup>

**QUESTION:** What impact, if any, do you think the guilty verdict in the Paul Little case will have on the adult entertainment industry?

**FLYNT:** It's not going to help. It actually could hurt a great deal because we've avoided any significant obscenity convictions in recent years. People in the business have abided by certain rules that have nothing to do with censorship, but instead are all about disciplining your product to the marketplace. What good does it do you to produce something if you can't get it into the hands of people?

When you start looking at the material in question—necrophilia, bestiality, extreme bondage, a few fetishes that are on the fringe—it's not within the norm. Maybe it's 5 percent of the population when you wander into those areas, especially the degradation of women.

When I am speaking of degradation, I'm talking about pouring feces and urine on the bodies of women, shoving their heads down a commode and flushing it—treating them worse than animals. That's somebody who's got some kind of deep-seated hatred toward women—whether his mommy spanked him too hard when he was a baby or what. It's something that we don't need to make part of our mainstream culture.

In the kind of pornography in which I'm involved—we deal with plain old, vanilla sex, just like Baskin-Robbins—that's one thing. But these items on the fringe are indefensible. It's easy to say, "I'm a great crusader for the First Amendment and that kind of free expression should be tolerated." But get in front of a jury and try telling them that—they're not going to buy it. I don't think juries want to interfere with people's sex lives, and they don't care what they're reading or viewing in the privacy of their homes. But if someone is violating children or practicing bestiality and things of that nature, then a jury will get turned off real quickly and convict the

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112. Interview with Larry Flynt, *supra* note 46.

defendant in a second. That's why people like Max Hardcore and Rob Black have problems.

*D. The Future of Obscenity Prosecutions in the United States*

The adult entertainment industry—irrespective of Paul Little's conviction—faces some rough terrain in the coming years. The proliferation of free adult content on the Internet is forcing adult producers out of business. The *Financial Times* reported in October 2008 that “[f]ree porn is so pervasive that persuading consumers to start paying for porn again—either online or through buying DVDs—is not going to be easy.”<sup>113</sup> In that same article, Larry Flynt, referred to as “one of the porn industry's elder statesman,” in fact “predicted that 50 percent of all producers would be out of business within 12 months.”<sup>114</sup>

Regardless of whether the adult industry is falling on hard times, the federal government continues to move forward with prosecutions. In October 2008 a federal judge in Pittsburgh set the trial date for adult movie company Extreme Associates and its principals Rob Black<sup>115</sup> and Janet Romano<sup>116</sup> for spring 2009.<sup>117</sup> In March 2009, the defendants in *United States v. Extreme Associates*, which was then the longest-running obscenity trial in the country's history, “each entered guilty pleas to one count of conspiracy to distribute obscene material.”<sup>118</sup>

Attorney Jeffrey Douglas, though, does not believe that the conviction of Paul Little represents “a beachhead from where the

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113. Garrahan, *supra* note 107, at 1 (“The websites—YouPorn, RedTube and PornoTube are among the biggest—look similar to YouTube and attract large audiences.”).

114. *Id.*

115. *See supra* note 84 and accompanying text.

116. Janet Romano, who goes by the name of Lizzie Borden, is the wife of Rob Black. *See Zicari and Romano Indicted in Extreme Associates Obscenity Case: Ongoing*, AVN, Aug. 8, 2003, available at <http://business.avn.com/articles/8753.html> (writing that Rob Zicari and Janet Romano are “better known within adult as Rob Black and Lizzie Borden of Extreme Associates”); David Sullivan, *Extreme Associates Trial Set for March 16*, AVN, Oct. 8, 2008, available at <http://business.avn.com/articles/32733.html> (writing that “Extreme Associates owner Rob Black and his wife, director Lizzie Borden, were indicted by a federal grand jury in August 2003 on 10 counts of distributing obscene material”).

117. Slav Kandyba, *U.S. Judge Sets Trial Date for Extreme Associates Obscenity Case*, XBIZ, Oct. 8, 2008, <http://www.xbiz.com/news/100091>. The case of *United States v. Extreme Associates* never reached trial, as the defendants reached a plea agreement with the government in March 2009. *See* Mark Kernes, *Behind the Extreme Associates Guilty Plea*, AVN, Mar. 11, 2009, available at <http://business.avn.com/articles/34653.html> (describing the nature of the plea and the details behind it).

118. Mark Kernes, *Extreme Defendants Plead Guilty*, AVN, Mar. 11, 2009, available at <http://business.avn.com/articles/34645.html>.

government can launch a full-scale assault on the industry.”<sup>119</sup> Nonetheless, Diane Duke, executive director of the Free Speech Coalition,<sup>120</sup> the adult industry’s trade association, called Little’s conviction “a terribly disappointing decision” and excoriated the government for continuing “to push the agenda of fundamental extremists with misplaced priorities that are out of touch with Americans.”<sup>121</sup>

In this section, Jeffrey Douglas discusses what he believes will be the future of the Obscenity Prosecution Task Force under an Obama administration. Louis Sirkin also gives his observations on the cases currently pending in federal court.

1. The Views of Jeffrey Douglas, Little’s Personal Attorney<sup>122</sup>

**QUESTION:** What is the future for federal obscenity prosecutions?

**DOUGLAS:** At the most fundamental level, the government has acknowledged that the adult material consumption habits of America have fundamentally changed. That’s due, in part, to the technological developments where people can privately—truly privately—and confidentially choose to see whatever they want to see. That changes everything. Because so much material is available through the Internet from overseas—material that would never be produced or distributed domestically within the United States—that also means that when you look at the American adult industry on the spectrum, the entirety of the adult industry is in the center of that curve. It makes it very difficult to characterize the material as being outlandish.

In the current era, every federal obscenity prosecution that involves a download carries enormous risks for the government because, sooner or later, judges will say, “Taken as a whole means taken as a whole.” There are no appellate rulings on it, so every trial judge is free to rule as he or she chooses. The body of law favors the notion that you may not cherry-pick what you like or don’t like from a unit, such as a website. If judges start ruling that a website is the whole unit and the jury must review the entirety of the website, prosecutions will be placed at risk because most adult websites have

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119. Preston, *supra* note 98.

120. See generally Free Speech Coalition, <http://www.freespeechcoalition.com> (last visited Mar. 17, 2009) (providing information about the Free Speech Coalition, the adult entertainment industry’s leading trade association).

121. Preston, *supra* note 98.

122. Interview with Jeffrey Douglas, *supra* note 43.

such a variety of material that, taken as a whole, they are not going to violate the community standards.

The other component that puts obscenity prosecutions at risk is that once it is recognized that the material available in the community on the Internet is part of the community, then it means that material that is created outside the United States is subject to being compared with the material being prosecuted. Material sold online within the United States—from English-only websites that self-characterize when they are filling out their Google application as being U.S.-based sites—is plentiful. There were close to two million web pages, according to a Google search we did in front of the jury in Tampa, that involve pornography, photographs, and urination. When we compared that to the Rolling Stones, David Cook from *American Idol*, and Tim Tebow, the Heisman Trophy-winning quarterback from the University of Florida, who is close to a religious figure there, the only one that was of the same magnitude was the Rolling Stones. Piss and porn outstripped American Idol David Cook.

**QUESTION:** Do you think the guilty verdict in the Paul Little case will further embolden the federal government to bring more obscenity prosecutions?

**DOUGLAS:** My guess is probably not. The verdict has relatively little significance for anyone other than Paul Little, the people who care for him, his family, and his employees.

There are several reasons for this. First, the material was never intended for distribution in the United States. It was European-version only. An independent third-party, Jaded, made a business decision to sell it domestically. The material itself is otherwise not available in the United States.

One of the films primarily featured fist insertion. Others depicted urination in conjunction with sex or vomiting in conjunction with oral sex. Insofar as there is domestically distributed material of that nature—I don't think there is much, if any—that material certainly is at greater risk.

Second, when you look at the amount of resources that Congress has allocated to attack the adult industry and how little has come of it—and most of that at the end of the Bush administration—it suggests that the vast majority of material apparently is deemed by the federal government not to be prosecutable. Certainly, more than 90 percent of the commercially distributed adult material is hands-off for the government. That's really quite extraordinary.

**QUESTION:** So you don't see the government coming after companies like Vivid or Wicked—the more established adult companies?

**DOUGLAS:** Not only not coming after the Vivids or the Wicked, but even the other material that is not designed to be pretty or nice and not designed for the majoritarian audience.

What the government has come to accept is that they need to convince a jury that the material they are prosecuting is outlandish in nature. It is not the same pornography that is available in their community and in America generally. In the two federal obscenity cases that I have defended recently, one was from the Child Exploitation and Obscenity Section,<sup>123</sup> or CEOS, and the other was from the Obscenity Prosecution Task Force.<sup>124</sup> They are competitors against one another as much as they are adversaries of the adult industry. They come from very, very different places, ideologically and otherwise.

Both of the prosecutors went out of their way in their opening statements to the jury to emphasize the fact that they were not attacking the adult industry and sexually explicit material generally. In Tampa, for instance, the government said that the defendant gave pornography a bad name. The implication that they wanted to make to the jury is that they were not ideological crazies hostile to sexually explicit material.

It was noteworthy that, although we did not intend it, there were several Max Hardcore domestic titles on a list of potential comparables that was turned over to the government. They were there by mistake, but the response of the government attorneys to seeing that was noteworthy. They said, "These are not Euro-versions." To them, the idea that Max Hardcore domestic could be deemed comparable to the Max Hardcore European version was silly and outlandish.

The implications of that are pretty clear to me. They don't consider Max Hardcore domestic material to be prosecutable. Yet, in the spectrum of sexually explicit material domestically distributed,

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123. This section of the Justice Department states on its website that its mission "is to protect the welfare of America's children and communities by enforcing federal criminal statutes relating to the exploitation of children and obscenity." U.S. Department of Justice, Child Exploitation and Obscenity Section, <http://www.usdoj.gov/criminal/ceos> (last visited Mar. 17, 2009).

124. The Obscenity Prosecution Task Force describes itself on its website as "dedicated exclusively to the protection of America's children and families through the enforcement of our nation's obscenity laws." U.S. Department of Justice, Obscenity Prosecution Task Force, <http://www.usdoj.gov/criminal/optf> (last visited Mar. 17, 2009).

Max Hardcore domestic material is regarded as being an outlier. But that wasn't good enough—the material had to be beyond that.

Another reason why I don't think the verdict has significance for future conduct or puts the rest of the industry at greater risk is that, without any evidence, I believe passionately that the Paul Little prosecution and other pending prosecutions—particularly John Stagliano—have nothing to do with anything other than a bureaucratic war for funding, office space, and jobs.

**QUESTION:** Who is bringing the Stagliano case?

**DOUGLAS:** The Obscenity Prosecution Task Force. I think the timing of that is significant, too. I don't have any insider information—this is just a series of assumptions I am making.

The Task Force and CEOS are necessarily going after outlier material. They have to because they have reached the conclusion that mainstream material cannot be effectively prosecuted. The likely targets—with the exception of Stagliano—who produce this type of commercially distributed material, were known to everyone. On a list of ten, Extreme Associates occupied the top five spots and Max Hardcore was right up there. With JM Productions, it's not so much that their material is that much different than others of that subgenre—bukkake<sup>125</sup> and such—but they market themselves very aggressively with a lot of superlatives like “We're the most . . . . [unfinished sentence]”

The first efforts of the Task Force could only be described as catastrophic. The JM verdict in Arizona was just a complete humiliation for them. First, it was tainted by the firing of the U.S. Attorney in Arizona,<sup>126</sup> which Brent Ward's<sup>127</sup> hands were all over. The Senate investigation revealed memos from Brent Ward

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125. Bukkake is “a form of group sex in which men take turns ejaculating on a woman's face.” Stacey Grenrock Woods, *Sex*, *ESQUIRE*, Dec. 2005, at 86.

126. This is a reference to the dismissal of U.S. Attorney Paul Charlton. See *An Investigation into the Removal of Nine U.S. Attorneys*, *supra* note 32, at 241 (describing the dismissal of Charlton).

127. Ward is a former U.S. Attorney in Utah who was appointed to direct the Obscenity Prosecution Task Force. Steve Tetreault, *No Answers Foreseen in Probe of Federal Prosecutors' Firings*, *LAS VEGAS REV.-J.*, Oct. 4, 2008, at B1; see also Brent D. Ward, U.S. Attorneys for the District of Utah, <http://www.usdoj.gov/usao/ut/history.html#ward> (last visited Mar. 17, 2009) (providing a brief biography of Ward). In a June 2008 commentary published in *Adult Video News*, Mark Kernes blasted Ward, writing that “Ward has had a (if he'll pardon the expression) hard-on for the adult industry for more than two decades.” Mark Kernes, *Commentary: On Hanging Together*, *ADULT VIDEO NEWS*, June 2008, at 34.

demanding that the U.S. Attorney be fired not because he was interfering, but because he wasn't enthusiastic enough.

When the case got to trial, they were essentially unprepared. Their ideology so distorted their judgment that they believed that any right-thinking judge would agree with them, even though they weren't doing the basic, necessary things. The judge told them early and often that the normal rules of evidence were still going to apply here—to get in business records against JM Productions, they would have to lay the foundation. They didn't want to, and they kept insisting that the judge allow them to do that which the rules of evidence do not allow. And the judge kept saying no. They kept ignoring it.

Their primary target was JM Productions and its principal. An FBI agent testified that the other defendants—those associated with Five Star—were there strictly out of bad luck. He testified that the government had no particular interest in them, but they felt if they had indicted only JM, they had risk of being forced to live with only California standards, so they had to find a third-party outside of California, and they didn't care who or where. Five Star had the misfortune of being high up on a Google search. He testified to this in front of a jury, and my eyes were getting so wide that I thought my eyelids would rupture. I couldn't believe I was hearing this, let alone under oath in front of a jury.

When they couldn't introduce the documents to show what it was that JM shipped—they could show that UPS shipped a box, but they had no means to show what was inside the box—they had to dismiss that [charge] against JM. That's humiliating, but the timing was even more humiliating because it was after opening statements in front of the jury. They were essentially playing chicken with the judge—informing her that if she didn't ignore the rules of evidence, they would lose their case. She had the wherewithal to say, “I don't think that's my problem.”

This is not a judge who is a defense-oriented judge by any means whatsoever. She was hostile to the material and hostile to the defense, but not substantially more than I am accustomed to in doing trial work. By reputation, she certainly is a judge who is favorably inclined toward the government. She granted motions to dismiss on both of the individual defendants because, again, the government insisted that it's a strict liability offense—ignoring *Smith v. California*, which says the government has to prove some awareness

of the content of the material rather than just, “You sold it. You’re guilty.”<sup>128</sup>

They lost all of the human defendants, leaving only two corporate defendants. The jury acquitted on one of the titles, and told Brent Ward and the trial attorney that had the judge not precluded them from discovering the other materials very similar that were available throughout the community, they would have acquitted those, too. The corporations ended up being fined \$200 each. This was essentially the worst possible result for the debut of the Obscenity Prosecution Task Force.

Their next case to be tried is the one currently sort of pending in Los Angeles—the prosecution of Ira Isaacs for non-commercially distributed material, meaning material that is not ever available in retail outlets.<sup>129</sup> The material, according to news reports, involves bestiality and scatological content—that is, excrement, defecation, and sex.<sup>130</sup> That one has blown up in their face, truly through no fault of their own. By virtue of the fact that Judge Alex Kozinski<sup>131</sup> dismissed the jury after it was impaneled,<sup>132</sup> there is an extraordinarily strong argument that Isaacs cannot be brought to trial again without violating double jeopardy. Assuming he decided that he could not sit on the case, Judge Kozinski had two choices. One was to require another judge to come in, take his seat, and continue the case with the new judge. By virtue of the fact that he dismissed the case, he cited

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128. See 361 U.S. 147, 152-154 (1959) (discussing the necessity of a scienter requirement in obscenity cases involving the sellers of adult material). The Court in *Smith* wrote that

if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.

*Id.* at 153.

129. See Scott Glover, *Trial to Gauge What L.A. Sees as Obscene; Jurors will Watch Hours of Sex Fetish Videos to Decide Whether They Have Any Artistic Value*, L.A. TIMES, June 9, 2008, at A1 (providing background on the prosecution of Ira Isaacs).

130. See *id.* (describing the content of these films).

131. Kozinski is the Chief Judge of the United States Court of Appeals for the Ninth Circuit. See United States Court of Appeals for the Ninth Circuit, <http://www.ca9.uscourts.gov> (last visited Mar. 17, 2009); see also generally Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 259 (2003) (profiling Kozinski and providing insights into his views, beliefs, and opinions about freedom of expression).

132. See Scott Glover, *U.S. Judge in Obscenity Trial Steps Down*, L.A. TIMES, June 14, 2008, at B1. Kozinski “stepped down from a high-profile obscenity trial in Los Angeles, three days after acknowledging that he had posted sexually explicit material on a publicly accessible personal website.” *Id.* Kozinski stated, “In light of the public controversy surrounding my involvement in this case, I have concluded that there is a manifest necessity to declare a mistrial.” *Id.*

manifest necessity, and that involves a very limited set of categories—jury misconduct being one of them—but a judge being humiliated is not any one of them. There is a substantial likelihood that when the case reconvenes, there will be a motion granted to dismiss on the basis of double jeopardy.<sup>133</sup> So that one isn't going to work out too well for the Task Force.

The other one they have pending is the Utah prosecution of *Movies By Mail*,<sup>134</sup> and I don't have any opinion on that case. The content is Max Hardcore and Extreme Associates—again, an indication that the government does not believe, even in Utah, that it can go after non-outlier material and have a good result.

The indictment of John Stagliano, to me, is an indication that the Task Force does not expect to have a life expectancy in a new administration. The key of the indictment is timing. This will have to go on into next year, which means that Brent Ward is going to get a paycheck at least into 2009. If he did not have an open case—it's likely that Isaacs and *Movies By Mail* will be resolved by the time a new attorney general is appointed and starts doing things—then it's highly likely that it would be disbanded. I assume Ward is getting paid well and does not want to be disbanded, so an indictment that will go on substantially into 2009 would have that attraction. It takes the government awhile—eighteen months or longer—to get geared up for an obscenity trial.

What made Stagliano so attractive was not so much the content, but the fact that, due to the extensive civil litigation he had been engaged in for copyright violation, the government didn't have to do all the things it normally would have to do before a grand jury—subpoena records from all over the country from billing companies, credit card companies, and phone companies. That material was already in a court record. They would be able to put together an indictment in a fraction of the time. I think primarily that's why Stagliano's number came up.

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133. This did not, however, turn out to be the case. In September 2008 a federal judge allowed the case to proceed despite a motion to dismiss it on the grounds Douglas describes here. See Scott Glover, *Man's Obscenity Charge Stands*, L.A. TIMES, Sept. 23, 2008, at B4. U.S. District Court Judge George King "refused to dismiss obscenity charges against a Hollywood filmmaker whose prosecution was halted when a judge overseeing the case declared a mistrial after acknowledging he had posted sexually explicit material on his own publicly accessible personal website." *Id.*

134. See Press Release, U.S. Dep't of Justice, Federal Grand Jury In Salt Lake City Charges Cleveland Men with Obscenity Violations (June 28, 2007), available at [http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_471.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html) (describing the indictment charging Cleveland, Ohio residents Sami R. Harb and Michael Harb—doing business as *Movies by Mail*—with shipping allegedly obscene movies into Utah).

But unlike the Extreme Associates material or the Max Hardcore material, my understanding is that the Stagliano material has a very different feel to it. It's more whimsical, if not particularly funny, and there is an absence of mean-spiritedness, perhaps. The material in JM and Max Hardcore was characterized as being very mean-spirited. I don't think that's the case with Stagliano's material at all. He was just a very attractive target in that they didn't have to do much work. Assuming that the Task Force recognizes that they are not destined for a long life and, with a change of administration, they would be a very attractive target for removal, they still want to be viable.

At an early hearing, the trial judge asked the government lawyers why in the world would they bring the case in Washington, D.C. The answer from the Justice Department attorney was that he doesn't like to travel. It was absolutely astounding.

**QUESTION:** There's been a great deal of discussion over the past several years about the mainstreaming of porn—people are more comfortable with it—and the revenue is an indication of its popularity. Then we have the Paul Little verdict. Is this still a matter of the jury's unwillingness to come out publicly in support of adult entertainment or is it more a visceral reaction to the type of material in this particular case?

**DOUGLAS:** The latter is not only my strongly held view, and those of the defense team, but the prosecutors made that clear to us in the informal chatting that inevitably goes along with it. It is just super-abundantly clear to me that these prosecutors—again, this is not attributable to any statement they made, but my read on them—did not believe they could possibly get a conviction on anything other than this kind of material.

For instance, take vomiting. There is either a learned or inherent response to watching someone gag, and that is that you gag. Having to watch a movie where women repeatedly throw up, at least initially, provokes a reaction where people get nauseated. It's very difficult to ask them not to ban it. People respond to it by saying, "This is bad. I hate this material. I hate watching the material." It's truly distinct from what people think of when they think of adult material. Again, it wasn't intended for distribution in the United States.

2. The Views of H. Louis Sirkin, Little's Corporate Attorney<sup>135</sup>

**QUESTION:** Do you think the Little conviction will embolden the federal government to continue to take these cases?

**SIRKIN:** They got court costs in Phoenix.<sup>136</sup> With Paul Little, they'll get some time, but they didn't get the forfeiture of his house. On that one, the woman juror who initially held out on the conviction said that they went back into deliberations and she said, "We'll be here forever. I won't ever forfeit his home." So she held absolutely firm on that. They took three web names and that's what they got.

**QUESTION:** Why do you think they went after John Stagliano?

**SIRKIN:** I don't know. Al Gelbard<sup>137</sup> will tell you that he thinks it is because Stagliano got that big verdict in the piracy case.<sup>138</sup> I think they started to look at Stagliano and they thought that the squirting was urination. John is one of the brightest, most articulate people of anybody I've met in this industry. He is smart and he communicates well.

## II. CONCLUSION

The lasting impact on the adult movie business of the 2008 conviction and prison sentence of Paul Little remains unclear. What is clear now is that the federal government is on a roll after the verdict in *United States v. Little*, as the following examples illustrate:

• In September 2008 a federal jury in Martinsburg, West Virginia, convicted Loren Jay Adams on six counts of selling and distributing obscene films via the U.S. Mail.<sup>139</sup>

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135. Interview with H. Louis Sirkin, *supra* note 44.

136. Kernes, *Five Star Video*, *supra* note 79.

137. See Mark Kernes, *Stagliano Indictment Raises Unique Questions*, ADULT VIDEO NEWS, June 2008, at 140 (identifying Allan Gelbard as John Stagliano's attorney). *Adult Video News* recently named Gelbard as one of the top twenty-five "First Amendment Defenders" who have strived "to protect the rights of adults to make sexually explicit material for adults, with adults, to be enjoyed by adults." *25 First Amendment Defenders*, ADULT VIDEO NEWS, June 2008, at 112.

138. See Mark Kernes, *Evil Angel, Jules Jordan Win Over \$16.6 Million in DVD Piracy Case*, AVN, Aug. 10, 2007, <http://www.avn.com/video/articles/1896.html> (reporting on a federal jury's ruling in favor of John Stagliano and his company, Evil Angel, in a piracy case in August 2007).

139. See Press Release, U.S. Dep't of Justice, Indiana Man Convicted of Obscenity Violations by Federal Jury in West Virginia (Oct. 1, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/October/08-crm-875.html> (describing the outcome of the

• Also in September 2008 the federal government unsealed an indictment in Montana charging a Florida-based producer named Barry Goldman, who operates the businesses Torture Portal, Masters of Pain, and Bacchus Studios, “with three counts of using the mails to deliver DVDs containing obscene films to an address in Billings and one count that seeks forfeiture of certain assets of the defendant.”<sup>140</sup>

• In July 2008 a federal grand jury indicted a Milpitas, California man, who owns a business called Amateur Action,<sup>141</sup> with three counts of mailing obscene matters and one count of engaging in the business of selling or transferring obscene matters.<sup>142</sup>

• In August 2008 a Pennsylvanian named Karen Fletcher was sentenced to five years of probation, including six months of house arrest, after she had pleaded guilty “to violating federal obscenity law for writing stories depicting the rape, torture, and murder of children that conjured images only in readers’ minds.”<sup>143</sup>

Today’s environment, in brief, is a far cry from that of the 1990s under the Clinton administration when there was a dearth of federal obscenity cases.<sup>144</sup> It also seems like quite a different point in time from that of October 2000—before the election of President George W. Bush—when a jury of twelve women in Missouri found that

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trial). The jury heard testimony that Adams “shipped obscene films from Indiana to Martinsburg through the U.S. mail. In addition to the conviction on charged counts, the jury also found that Adams should forfeit all obscene films in his possession and the website used to conduct his business.” *Id.* In December 2008 Adams was sentenced to thirty-three months in prison and was “required to forfeit his website domain name and all copies of DVDs involved in the case.” Press Release, U.S. Dep’t of Justice, Indianapolis Man Sentenced for Obscenity Violations (Dec. 12, 2008), available at <http://www.usdoj.gov/opa/pr/2008/December/08-ag-1097.html>.

140. See Press Release, U.S. Dep’t of Justice, Federal Grand Jury Charges Florida Man with Obscenity Violations (Sept. 16, 2008), available at <http://www.usdoj.gov/opa/pr/2008/September/08-crm-822.html> (describing the indictment and identifying the movies in question as *Torture of Porn Star Girl*, *Pregnant and Willing*, and *Defiant Crista Submits*).

141. See Amateur Action, <http://www.amateuraction.net> (last visited Mar. 17, 2009) (describing the content available on the website as including “Pissing, Piss Drinking, Girls Pissing, Fisting, Pussy Fisting, Anal Fisting, Ass Fisting, Peeing, Golden Showers, Watersports, BDSM, Extreme Insertions, Squirting, Spanking, & Bizarre Sex Fetish DVD Videos & more!”).

142. See Press Release, U.S. Dep’t of Justice, Federal Grand Jury Charges California Man with Obscenity Violations (July 24, 2008), available at <http://www.usdoj.gov/opa/pr/2008/July/08-crm-650.html>.

143. Editorial, *Disturbing Words*, PITT. POST-GAZETTE, Aug. 12, 2008, at B4.

144. See Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2008, at A27 (describing “the rarity of obscenity prosecutions during the eight years of the Clinton administration”); Abbie Vansickle, *Trial About More than Smut*, ST. PETERSBURG TIMES, June 1, 2008 (writing that “few” obscenity “trials took place under the Clinton administration” and that “more have taken place during the current Bush administration”).

two adult movies that depicted anal, oral, and vaginal sex among women and between men and women, were not obscene.<sup>145</sup>

In an October 2008 editorial written after Paul Little's sentencing, Mark Kernes described the chilling effect and danger to adult companies of indictments and convictions like those today:

If enough people get scared enough and start refusing to buy an indicted company's product, as saleable as it might have been the day before, then that company's revenues dry up and it can't defend itself against the shitstorm the government has the power to lay on any adult production company in the U.S.<sup>146</sup>

Yet the comments of both U.S. Attorney General Michael Mukasey in July 2008<sup>147</sup> and Jeffrey Douglas in June 2008<sup>148</sup> suggest the government may actually be targeting only the content that is the worst of the worst. The outcome of the prosecution of John Stagliano<sup>149</sup> may help to determine just how much some jurors are willing to tolerate and just how far the government is willing to go.

The unknown "X factor" (or perhaps "XXX factor" here) is the willingness—or lack thereof—of the administration of President Barack Obama to keep up the assault on sexually explicit content involving consenting adults.<sup>150</sup> The current wave of indictments could fall by the wayside if the Justice Department, under U.S. Attorney General Eric Holder, chooses to allocate prosecutorial resources to different matters. It might decide that resources are better spent on matters other than obscenity prosecutions.

The bottom line for now, however, is that Paul Little is in prison for nearly four years, unless an appeal is successful. It is the cost he is paying for being "out at the pointy end of the charge."<sup>151</sup> Ultimately, under the administration of President George W. Bush, two U.S. Attorneys lost their jobs<sup>152</sup> and Paul Little lost his liberty, all in the name of squelching sexually explicit speech.

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145. Michele Munz, *Jury Finds Explicit Videos From Store Are Not Obscene*, ST. LOUIS POST-DISPATCH, Oct. 27, 2000, at 1.

146. Mark Kernes, Editorial, *The Adult Industry And Max: Time To Walk The Walk*, AVN, Oct. 9, 2008, <http://www.avn.com/law/mark-kernes-mental-floss/32769.html>.

147. See *supra* notes 15-18 (quoting Mukasey's comments made during a hearing before the U.S. Senate Judiciary Committee).

148. See *supra* Part I, Section D, Subsection 1 (providing Douglas' comments relevant to this point).

149. See *supra* notes 22-31 and accompanying text.

150. In October 2008, Diane Duke, the executive director of the Free Speech Coalition, remarked, "We're celebrating the end to eight years of a presidential era that has sought to repress the adult entertainment industry." Mark Kernes, *FSC Honors Industry Freedom Fighters at 2008 Election Bash*, AVN, Oct. 12, 2008, <http://www.avn.com/video/articles/32806.html>.

151. Richards & Calvert, *supra* note 1, at 278.

152. See *supra* notes 32-42 and accompanying text.