OBSCENITY IN THE DIGITAL AGE:
THE RE-EVALUATION OF COMMUNITY STANDARDS

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I. Introduction

Constitutionally protected erotic expression "is often separated from obscenity only by a dim and uncertain line."[1] That line is the tripartite test articulated in 1973 by a quintet of Supreme Court decisions, the centerpiece of which was *Miller v. California.*[2] The *Miller* Test determines whether a speaker should be hailed as a contributor to the marketplace of ideas or jailed like a common criminal. Due to the inherent vagueness of the *Miller* test, in a 1977 obscenity case, Supreme Court Justice Powell identified that "the dicey business of marketing [adult] films [is] subject to possible challenge."[3] Given the 2003 PROTECT Act's ratcheting up of the minimum sentences for federal obscenity convictions[4] and the Supreme Court's 1993 approval of wholesale forfeitures for as few as two related obscenity convictions, the stakes are significantly higher now.[5]

Generally, the *Miller* test holds that, in order to strip erotic speech of its presumed constitutional protection so that the disseminator may be punished, a prosecutor must establish, in very general terms, that the materials at issue (a) appeal to the prurient interest in sex, (b) contain patently offensive representations of nudity or sexual activities, and (c) lack serious artistic, scientific, or literary value. While the particulars of each of those prongs of the *Miller* test are beyond the scope of this article, what is important here is that prong (a) and prong (b)

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[1] Bantam Books, Inc. v. Sullivan, 372 U.S. 58,66 (1963).
[2] *See* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); Kaplan v. California, 413 U.S. 115 (1973).
[3] Marks v. United States, 430 U.S. 188, 195 (1977).
[4] Pub. L. No. 108- 21, 117 Stat. 650, 676-86.
[5] Alexander v. United States, 509 U.S. 544 (1993).

both are a function of "local community standards;" prong (c) is not a function of community standards, but rather what a "reasonable person" would conclude.[6] This article questions the definition of "community" in this day and age, when online communities have blurred all past definitions of that term. In short, what is a "community" in the Internet era?

In the context of sale of three-dimensional objects such as books and films, the concept of "community standards" is hopelessly unworkable. It is even more cumbersome in the environment of the Internet. Any recognizable definition of a "local community" is quickly disappearing in the age of ubiquitous and homogenous media brought about by satellite and cable television, international news channels, and more recently, the Internet. Yet prosecutors, and to some extent the courts, have continued to cling to the archaic notion of "contemporary community standards" as measured by local geographic boundaries. As the United States, and indeed the world, becomes more transient, standardized, uniform, and homogenized, the ability of one community to isolate itself by erecting a fictitious legal barrier, designed to keep out certain categories of erotic speech, is quickly evaporating and the law must keep pace.[7]

The time has come for courts to accept the diminished reality of local geographical standards and the development of a variety of national communities, whose standards must be considered in the context of American obscenity law. Assuming the *Miller* test is not too vague for the imposition of criminal sanctions in every instance – 4 of the 9 Justices in the *Miller* quintet believed it was[8] – the definition of "community" must be reexamined given the realities

[6] Pope v. Illinois, 481 U.S. 497 (1987).

[7] Ironically, in *Miller*, 413 U.S. at 32, despite the rapid homogenization of the country that was developing then due to migration and national communication, the Court moved from the then-prevailing view that obscenity should be measured by a national standard to local standards, Chief Justice Burger explaining, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."

[8] Justice Brennan's dissent in *Miller*, 413 U.S. at 47, incorporating his dissent in *Paris*, 413 U.S. at 73, makes a powerful case for the proposition that obscenity cannot be measured with sufficient specificity to adhere to the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution and, indeed, nearly carried the day.

of the current decade. Although a complete reassessment of the local community standards requirement of the *Miller* test is certainly justifiable with respect to all forms of erotic media, the most timely place for such recognition to evolve is in relation to Internet content, which does not exist in any geographic space, and which cannot be blocked from receipt by any particular, local community.

II. The *Miller* Test in Cyberspace

A. *Reno v. ACLU*

The first opportunity the United States Supreme Court took to consider application of the *Miller* Test in the context of online content was in response to the challenge brought by the American Civil Liberties Union to the Communications Decency Act of 1996 ("CDA").[9] At issue were provisions of the CDA that prohibited the transmission of "indecent" communications by means of a telecommunications device to persons under the age of 18, or sending patently offensive communications through use of an interactive computer service to persons under the age of 18.[10]

The Supreme Court invalidated the CDA in a unanimous decision. Finding that it constituted a content-based regulation of speech, the Court subjected the CDA to the strict scrutiny standard of review.[11] The Court found that the act's lack of a precise definition of prohibited behavior would create confusion as to what was truly prohibited,[12] and due to the "obvious chilling effect on free speech" the CDA was void for vagueness.[13] The potential stigma of a criminal conviction and the severe penalties including up to two years' imprisonment for

[9] *Reno v. ACLU*, 521 U.S. 844 (1997).
[10] 47 U.S.C. § 223 (a, d) (2002).
[11] *Reno v. ACLU* at 872.
[12] *Reno v. ACLU* at 871 (noting that serious discussions about birth control practices, homosexuality, First Amendment issues raised by the Appendix to the *Pacifica* opinion (438 U.S. 726), or the consequences of prison rape might be perceived by speakers or law enforcement as violating the CDA).
[13] *Reno v. ACLU* at 872 (citing e.g. *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1048-1051 (1991)).

each violation would likely cause speakers to remain silent rather than approach the zone of impermissible conduct.[14]

The government argued that although the CDA regulated speech that was not deemed harmful to adults, but was deemed harmful to children, precedent supported such regulations. The government specifically relied on *Ginsberg v. New York,*[15] *City of Renton v. Playtime Theatres Inc,*[16] and *Federal Communications Commission v. Pacifica Foundation.*[17] However, the Court held that these cases actually supported the ACLU's position rather than that of the government.[18]

The *Ginsberg* decision permitted the government to restrict the commercial sale of materials deemed "harmful" in the hands of a minor, but merely "indecent" in the hands of an adult. However, the law reviewed in *Ginsberg* did not bar parents from acquiring prohibited materials for their children. Under the CDA, parental consent or even parental participation in the acquisition of material on AIDS prevention could still hold the provider of that information criminally liable.[19] Furthermore, the *Ginsberg* case applied only to commercial transactions, and the material was required to be "utterly without redeeming social importance for minors."[20] The CDA has no such limitations.

Renton dealt with a zoning ordinance that prohibited adult movie theaters from residential neighborhoods in an attempt to minimize secondary effects of such businesses. The target of the

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[14] *Reno v. ACLU* at 872 (citing e.g. *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)).
[15] 390 U.S. 629 (1968) (Government was permitted to forbid the sale of materials to minors not obscene to adults because the state has an independent interest in the welfare of its youth and the right of parents to regulate the content of material consumed by children in their household).
[16] 475 U.S. 41 (1986) (The Court upheld zoning ordinances designed to keep pornographic theaters out of residential areas).
[17] 438 U.S. 726 (1978) (Upheld FCC sanctions administrative sanctions against a radio station that broadcast George Carlin's "seven dirty words" routing because the words were deemed offensive in the context of an afternoon broadcast with children in the audience).
[18] *Reno v. ACLU* at 864.
[19] *Reno v. ACLU* at 865.
[20] *Id* at 867.

regulations was not the speech itself, but crime and diminished property values.[21] The government's contention that it was merely engaging in a zoning of cyberspace was rejected due to the fact that the CDA applied to all of cyberspace.[22] Upholding this reasoning would have been analogous to the government placing a zoning ordinance from Key West to Kodiak, while asserting that it was not a blanket provision.

Pacifica was distinguished by the Court in that the FCC had a history of regulating radio content and the broadcast targeted was "a significant departure from traditional program content."[23] The FCC regulations were "time, place, and manner" restrictions, and not blanket prohibitions on speech.[24] Finally, and most importantly, the Court distinguished radio from the internet as a medium because of radio's potential to invade the home unchecked, whereas a series of affirmative steps is required in order to receive internet content.[25] In addition, its analysis that the Internet is not radio's younger brother comes from the recognition that radio's scarce number of frequencies make each channel a public resource.[26] The Internet's boundless size defies the importation of radio's rules.[27] The Court's wisdom in refusing to apply rules properly shackled upon a medium developed in the age of the horse and buggy should not be cast aside in its discussion and application of the term "Community."

The Court's decision in *Reno* began the slow descent into a swirling morass of online censorship jurisprudence, which has plagued the High Court ever since, and has yet to be

[21] *Id* at 867.
[22] *Id* at 868.
[23] *Id* at 867.
[24] *Id.*
[25] *Id*.
[26] *See id.* at 870 *citing Red Lion Broad Co. v. FCC*, 395 U.S. 367, 399-400 (1969).
[27] *Id.*

resolved.[28] Although this early case (1997) involved only one prong of the *Miller* Test, pertaining to patently offensive material, the Court took the opportunity to compare the elements of the *Miller* Test to those used by the CDA.[29] The Court noted that the CDA criminalized all patently offensive communications, whereas the *Miller* Test significantly limited the scope of materials not protected by the First Amendment by requiring that "the [offensive materials also] appeal to the prurient interest, and…lack serious literary, artistic, political or scientific value."[30] In noting the "wholly unprecedented" scope of the CDA as defining a new category of criminal speech, a unanimous Supreme Court struck down the challenged portions of the law as overbroad and a violation of the First Amendment.[31]

B. Revisiting *Miller v. California*

A brief review of the basic requirements of the *Miller* Test is in order: In 1973, the United States Supreme Court finally settled on a definition of "obscenity," for purposes of regulating erotic materials, after much wrestling, agonizing and debate.[32] Notably, *Miller* was a 5-4 decision that reportedly went the other way on the first vote. The dissenters took the position that regulation of erotica involving only adults could not be accomplished without violating the Bill of Rights. The compromise reached in *Miller* gave us the "basic guidelines" that the trier of fact must apply in cases involving allegedly obscene materials:

> (a) [W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
> (b) [W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

[28] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); Ashcroft v. American Civil Liberties Union, 532 U.S. 1037, 121 S.Ct 1997, 149 L.Ed.2d 1001 (2001); Ashcroft v. American Civil Liberties Union, _ U.S. _, 124 S.Ct 2783, 159 L.Ed.2d 690 (2004)
[29] *Reno*, 521 U.S. at 873-74.
[30] *Id*. at 873 (internal quotation marks and citations omitted).
[31] *Id*.
[32] *Miller*, 413 U.S. 15.

(c) [W]hether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[33]

The federal statutes governing obscenity, including a part of the CDA not at issue in *Reno*, incorporate that definition in an effort to separate unprotected criminal speech from expression protected by the First Amendment. The concept of "local community standards" applies only to the first two prongs of the test involving prurient interest and patent offensiveness.[34] A jury applies its understanding of the standards of the local community from which it comes to decide whether that community accepts, or at least tolerates, the erotic materials at issue. Therefore, the specific geography chosen for prosecution is inextricably linked to the determination of whether the material is sufficiently "sexual" and "offensive" enough to constitute obscenity.[35]

C. *Miller* as an Anachronism

The primary justification for the community standards test is to ensure jurors view the material from the perspective of the average adult, rather than from that of the most sensitive or susceptible member of the community.[36] Secondarily, the community standards test purportedly attempts to preserve the rights of states and their respective communities to define, for themselves, what level of erotic speech is to be tolerated within a specific geographic area.[37]

However, little guidance has been provided by the courts as to the proper geographic contours of the "community" to be used in evaluating allegedly obscene works. In *Hamling v.*

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[33] *Miller*, 413 U.S. at 24 (internal quotation marks and citations omitted).
[34] Smith v. United States, 431 U.S. 291, 301 (1977) (indicating that community standards tests should be used to judge patent offensiveness).
[35] Nitke v. Ashcroft, 253 F.Supp.2d 587, 601 (S.D.N.Y. 2003).
[36] Ashcroft v. ACLU, 535 U.S. 564, 575 (2002) (Plurality opinion). *See generally* Pinkus v. United States, 436 U.S. 293 (1978).
[37] *Miller*, 413 U.S. at 32; *Jacobellis v. State of Ohio,* 378 U.S. 184, 197-98 (1964) (Warren, C.J., dissenting) (although decided before *Miller* approved the societal value prong, *Miller* quoted with approval Chief Justice Warren's observations in this case).

United States[38] and elsewhere,[39] the High Court has indicated trial courts may actually define the relevant community for the jury, or allow jurors to determine for themselves where the geographic boundaries of the community lie. This stunning lack of guidance on such an important element of the *Miller* Test has resulted in widely varying "communities" being used by various courts at different times. For example, the Supreme Court in *Miller v. California*[40] approved an area comprising the entire State of California as an acceptable community from which jurors could draw inferences as to the proper standards in an obscenity case. In other cases, lesser geographic areas have been approved, as small as a single county within a state[41] or a tri-county area.[42] Using this approach, the community standards test simply results in the application of "local" attitudes as a result of a limited geographic area, typically that from which the jury is drawn, but there is no requirement that the "community" be made up of any specific geographic space.[43]

The nature of the test therefore contemplates that material encompassed within its definition may be found criminally obscene in one jurisdiction, whereas the very same material may be found to constitute protected speech in another.[44] However, this result was not found to be problematic by the Supreme Court, which held that the existence of a federal statute incorporating varying community standards did not chill speech to such an extent so as to render

[38] *Hamling v. United States*, 418 U.S. 87, 104-06 (1974).
[39] *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).
[40] *Miller*, 413 U.S. at 30-31.
[41] *Davison v. State*, 288 So.2d 483, 487 (Fla. 1973) (rejecting consideration of the community standards of the entire state).
[42] *Skywalker Records, Inc. v. Navarro*, 739 F.Supp. 578, 587-88 (S.D. Fla. 1990) (holding that the appropriate community to be considered was the geographic area comprising Broward, Palm Beach and Dade Counties).
[43] *Hamling*, 418 U.S. at 104-05.
[44] *Miller*, 413 U.S. at 32. In fact, there have been instances where the same motion picture has been found obscene by one jury and not obscene by another – in the same city, same courthouse and before the same judge, with the two trials occurring within weeks of each other.

the statute unconstitutional.[45] Thus, publishers and speakers are left with little guidance as to which geographic community's standards will be applied in determining whether the speaker's expression is protected by the First Amendment or treated as criminal conduct.

Enter the World Wide Web. The Internet has been called "the most participatory form of mass speech yet developed."[46] According to the Court, the Web is a "unique and wholly new medium of worldwide human communication."[47] Significant distinctions exist with regard to online communications as opposed to more typical broadcast or print media. "[T]he vast democratic [forums] of the Internet" have not historically been subject to the type of governmental regulation and supervision that has been upheld in relation to the broadcast and print industry.[48] One of the primary reasons for this difference in degree of regulation is the fact that the Internet is not as intrusive on the viewer or listener as is radio or television.[49] It has been specifically held that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter [Internet] content 'by accident.'"[50]

Importantly, it has been held that each medium of expression must be analyzed in terms of its own unique elements, and may present its own problems.[51] For example, certain justifications for regulation of the broadcast media have been held to be not applicable to other speakers.[52] In earlier cases, courts have relied on the history of extensive governmental

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[45] *Hamling*, 418 U.S. at 106.
[46] *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (quoting *ACLU v. Reno*, 929 F.Supp 824, 883 (E.D. Pa. 1996)).
[47] *Reno v. ACLU*, 521 U.S. at 850.
[48] *Id*. at 869 n.33.
[49] *Id*. at 869.
[50] *Id*. (citing *ACLU v. Reno*, 929 F.Supp at 844 (E.D. Pa. 1996)).
[51] *Southeast Promotions, LTD. v. Conrad*, 420 U.S. 546, 557 (1975); *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000), *cert. granted by*, *Ashcroft v. ACLU*, 532 U.S. 1037 (2001), *vacated by*, Ashcroft v. ACLU, 535 U.S. 564 (2002), *remanded to*, *ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003), *cert. granted by*, Ashcroft v. ACLU, 124 S.Ct. 399 (2003), *aff'd and remanded to*, Ashcroft v. ACLU, 124 S.Ct. 2783 (June 29, 2004).
[52] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

regulation of the broadcast media, the scarcity of available frequencies, and the invasive nature of radio and television as a basis for regulation of content.[53] In other cases, dealing with obscene telephone messages, the Court has noted that placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.[54] Those distinctions alone warrant a fresh approach when it comes to application of community standards to online media.

Notably, the community standards test was developed at a time when obscenity prosecutions were primarily localized in nature and distributors intentionally chose the geographic areas in which they distributed or displayed their material.[55] Purveyors of adult materials could at least theoretically evaluate the particular community standards applicable in a given jurisdiction, and make a considered, intelligent decision whether to disseminate those materials in a given locality, based on the results of their investigation. The presence of multiple retail outlets where comparable materials may be rented or purchased by the public may heavily impact a distributor's decision to make certain erotic materials available in a given community, for example. The existence of a particularly conservative jurisdiction had no impact on the print media distributor's ability to sell or display erotic materials in more liberal jurisdictions, given this ability to pick and choose distribution points.[56] This theoretical ability to "geotarget" distribution of traditional adult materials formed the rational foundation for the earlier federal obscenity cases.[57]

[53] *Red Lion,* 395 U.S. at 399-400; *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-638, (1994); *Sable Communications of California v. FCC*, 492 U.S. 115, 128 (1989).
[54] *Sable Communications*, 492 U.S. at 128.
[55] *E.g., Paris Adult Theatre No. I v. Slaton*, 413 U.S. 49, 58, (1973).
[56] *Nitke*, 253 F.Supp.2d at 603.
[57] *Id.; Hamling,* 418 U.S. at 106.

Where online speech is involved, distributors have no reliable means of limiting the geographic distribution of erotic materials on the Internet.[58] The Internet does not function in relation to the physical, geographic world, and these crucial differences between the "brick and mortar" and cyber dimensions affect the First Amendment analysis. "The Internet is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than document geographic location."[59] Those considerations require a dramatically different First Amendment analysis in the context of application of a community standards test to online media. As observed by the Third Circuit Court of Appeals, "the unique factors that affect communication in the new and technology-laden medium of the Web [create] crucial differences between a brick and mortar outlet, and the online Web that dramatically affect a First Amendment analysis."[60] Unlike traditional retail outlets for erotica, the Web is not "geographically constrained," rendering geography a virtually meaningless concept when it comes to the Internet.[61]

The United States Department of Justice ("DOJ") currently takes the position that Internet content can be prosecuted in any jurisdiction from where it is sent, through which it

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[58] *ACLU v. Reno*, 217 F.3d 162, 175 (3rd Cir. 2000) ("Web publishers are without any means to limit access to their sites based on geographic location of particular Internet users."); *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002) (Plurality opinion); *Nitke*, 253 F.Supp.2d at 603. Although various geotargeting software devices have been made available in recent times, none have proved effective at blocking a geographic area as small as a county, as would be required to avoid exposure to obscenity prosecutions based on a particular county's conservative community standards.

[59] *Cyberspace Communications, Inc., v. Engler*, 55 F.Supp.2d 737, 744 (E.D. Mich. 1999), *aff'd.*, 238 F.3d 420 (6th Cir. 2000), *summ. judg. granted same grounds,* 142 F.Supp.2d. 827 (E.D. Mich. 2001).

[60] *ACLU v. Reno*, 217 F.3d 162, 174-175 (3rd Cir. 2000) (quoting *Reno v. ACLU*, 31 F.Supp.2d 473, 495 (E.D. Pa. 1999)) (internal quotation marks omitted).

[61] That is not to say the community-standards test did not wreck havoc on national distributors of traditional erotic media. Where distribution was national, the distributor was effectively responsible for learning the community standards of hundreds of divisions of the 93 federal judicial districts, the statewide standards of such diverse states as Illinois, Texas, and California, which all embrace standards of the entire state, and the various counties of states such as Florida and Indiana, where county standards apply. As difficult as it is to predict the standards of one's own community, expecting anyone to predict the standards of hundreds of other communities is totally unrealistic. Worse, there is no way to judicially learn the standards in advance. *Adult Video Ass'n. v. United States Dept. of Justice*, 71 F.3d 563 (6th Cir 1995) (upholding the trial court's refusal to issue a declaratory judgment as to whether a particular motion picture was obscene.).

passes, or where it is received.[62] For example, in one of the most recent federal obscenity prosecutions against an adult Web site operator, the defendants were prosecuted in the Western District of Pennsylvania, despite the fact that they operate their website from, reside in, and, with respect to the relevant transactions, never left the State of California.[63] One of the counts against the defendants in that case involved transmitting allegedly obscene video clips to computers in the Western District of Pennsylvania, where the materials were downloaded by government agents.[64] Therefore, this concern is real, not conjectural. People will go to jail or be set free depending on the ultimate resolution of the "community standards" issue. Historically, the DOJ has ordinarily prosecuted obscenity cases in the place of receipt, which is almost always more conservative than the place from where the material was sent.[65]

The government's position on local community prosecution raises a significant constitutional concern, often called a "heckler's veto." Purveyors of adult material online cannot comply with the CDA, which prohibits distribution of obscene materials online, or any other law premised on application of local community standards, by tailoring their speech to each individual community's standard. In order to offer erotic materials online, those materials must

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[62] *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. den.* 519 U.S. 820 (1996) (holding venue proper in district from which viewer accessed defendant's bulletin board files); Memorandum of Law in Support of Motion to Dismiss, filed in *Nitke v. Ashcroft, et. al.,* Case No. 01-Civ-11476 (S.D.N.Y. 2002) (noting that a prosecution for sending obscene material from one place to another is appropriate in the district from which it was sent, the district in which it is received, or any district through which it passes). *See also Ashcroft v. ACLU*, 535 U.S. at 601 ("[P]rosecution may be proper 'in any district in which [an] offense was begun, continued, or completed.'" (quoting 18 U.S.C. §3237(a))). Thus, "it seems likely that venue would be proper where the material originates or where it is viewed." *Ashcroft v. ACLU*, 535 U.S. at 602.

[63] *United States v. Extreme Associates, Inc., et. al.*, 2005 W.L. 121749 (W.D. Pa. January 20, 2005).

[64] *Id.* The trial court in the above-referenced case ultimately dismissed all of the counts, finding that the federal obscenity law is unconstitutional. The court reasoned that the government failed to meet its burden of demonstrating the existence of a compelling governmental interest to justify the restrictions on speech in light of the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558 (2003), which, as interpreted by this Court, prevented the government from using the establishment of a "moral code" as a justification for obscenity laws. That decision is likely to be appealed by the government, and the issue of which community's standards to apply was never resolved.

[65] In a spate of obscenity prosecutions in the late 1980s and early 1990s targeting adult video manufactures in Los Angeles, prosecutions materially all were brought in the conservative jurisdiction to which the materials were shipped, including Oklahoma City, Dallas, Tallahassee, Memphis and Flagstaff, Arizona.

be compliant with the lowest common denominator – the most conservative community's standards – given that all online materials are contemporaneously available in every community.[66] That is so because the Internet publisher cannot avoid distributing to more restrictive areas.[67] Publishing materials for viewing by any community makes them available for all. In order to avoid liability under a law based on local community standards, the Internet publisher would need to severely censor its publications to comply with the most conservative of communities.[68]

Sent back to the drawing board by the Supreme Court when it rejected the CDA, Congress made a second attempt to "clean up the internet" by drafting the Child Online Protection Act (COPA). Before the ink was dry on President Clinton's signature, the same groups that challenged the CDA filed suit seeking an injunction enjoining enforcement of the COPA, on the grounds that it was overbroad and restricted adult access to constitutionally protected material.[69]

In the district court opinion granting injunctive relief against COPA, the court found that the act created an "impermissible risk of suppression of ideas." As an example, the court used the site of Mitchell Steven Tepper, operator of the Sexual Health Network, which provides information about sexuality to the disabled for profit. Tepper's site is clearly beyond what Congress sought to prohibit, but was just as clearly in violation of COPA.[70]

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[66] *Nitke*, 253 F.Supp.2d at 604.
[67] ACLU v. Reno, 217 F.3d 162, 169-170 (3rd Cir. 2000), *rev'd on other grounds,* Ashcroft v. ACLU, 532 U.S. 1037 (2001), *vacated by*, Ashcroft v. ACLU, 535 U.S. 564 (2002), *remanded to*, ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003), *cert. granted by*, Ashcroft v. ACLU, 124 S.Ct. 399 (2003), *aff'd and remanded to*, Ashcroft v. ACLU, 124 S.Ct. 2783 (June 29, 2004).
[68] *Id*. at 174
[69] *See* Kelly M. Doherty, *www.obscenity .com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 280 (1999).
[70] *See Reno II* at 485.

Despite Congressional intent to limit only minor access to commercial pornography, nothing in the text of COPA did so, and the term "commercial pornographers" never appeared in the statute.[71] Just as its parent, the CDA "burned down the house to roast the pig," COPA had identical pyromaniac tendencies.

The concern with the "heckler's veto" caused the Third Circuit Court of Appeals to invalidate COPA, which also incorporated the community standards test to determine which online materials must be accompanied by some form of age-verification device.[72] While the United States Supreme Court ultimately determined that this constitutional concern, by itself, did not render the statute substantially overbroad for purposes of the First Amendment, it did generate a significant degree of concern among at least six United States Supreme Court Justices as to how local community standards could be applied to Internet communications.[73] For example, Justice O'Connor, in her concurrence, stated:

> I agree with Justice Kennedy that, given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable,* may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.[74]

Justice O'Connor further opined that adoption of "national standards" may indeed be appropriate in cases involving online media.[75] Although noting that Supreme Court precedent does not forbid adoption of a national standard, she also observed that *Miller* called such standards potentially "unascertainable,"[76] and "unrealistic."[77] If generalizations about the standards applicable to the people of a state of the size and diversity of California were

[71] *See Reno II* at 480.
[72] ACLU v. Reno, 217 F.3d 162 (3rd Cir. 2002).
[73] Ashcroft v. ACLU, 535 U.S. at 585-86.
[74] Ashcroft v. ACLU, 535 U.S. at 587 (O'Connor, J., concurring).
[75] *Id*. at 588.
[76] *Miller*, 413 U.S. at 31.
[77] *Id*. at 32.

discernable in 1973, why would similar generalizations not be possible for the nation as a whole, in an era of instantaneous, nationwide (and indeed worldwide) communication?[78]

Although Justice O'Connor was the only Justice in that case to specifically call for adoption of national standards for Internet speech, five other Justices expressed varying degrees of concern about the application of local community standards to online media. For example, Justice Breyer observed:

> To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.[79]

Justice Breyer ultimately concluded that COPA intended to use the standards of the adult community as a whole, in the United States, as opposed to some specific geographic standard, and thereby avoided invalidating the law on those grounds.

Justice Kennedy, joined by Justices Souter and Ginsberg, expressed concern about subjecting Internet speakers to the standards of the most puritanical community in the United States, through application of local community standards.[80] That concern, alone, was not sufficient to invalidate the law under consideration, but the Justices did reaffirm the important requirement that each mode of expression has its own unique characteristics, and therefore must be accessed for First Amendment purposes by the standards best suited to it.[81] Justice Stevens found significant distinction between online communications and those sent through the mail, as

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[78] Ashcroft v. ACLU, 535 U.S. at 588-89.
[79] Ashcroft v. ACLU, 535 U.S. at 590 (Breyer, J., concurring).
[80] Ashcroft v. ACLU, 535 U.S. at 590-91 (Kennedy, J., concurring).
[81] *Id*. (citing Southeast Promotions Ltd., v. Conrad, 420 U.S. 546, 557 (1975); *Id*. ("Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for 'differences in the characteristics of new media justify…differences in the First Amendment standards applied to them.'" (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969))). [WE'RE NOT SURE IF WE CAN USE TWO IDS]

in *Hamling,* or over the telephone lines, as in *Sable,* because the sender could avoid destinations with the most restrictive senders.[82] In previous cases, he noted, local community standards were upheld based on the sender's ability to tailor his messages to the communities it chose to serve, thus creating a permissible burden on the speaker to comply.[83] However, the sender of Internet transmissions must necessarily display his message to all of the millions of Americans who have access to the Internet if he chooses to display that message to one; accordingly this "fundamental difference in technologies," requires a difference in the rules applicable to that particular medium.[84] Even after a second visit to the United States Supreme Court, the case involving application of community standards to the Internet has not yet been resolved, and the High Court has once again remanded the matter for additional fact-finding in light of advances in filtering technology since the original rulings.[85]

III. Problems with Defining "the Community" in Obscenity Cases

A. Standardization of Geographic Boundaries

Despite substantial litigation regarding the proper community standard to be applied in resolving obscenity cases since the advent of the Internet, the issue remains an open question. While the question is certainly a difficult one, and subject to a variety of different analyses, the changes in technology, and society in general, militate for a reconsideration of the concept of community standards in obscenity cases. While the standards of a nation as a whole may have been inherently unknowable or indiscernible at the time *Miller* was decided in 1973, that is not necessarily the case thirty years later. For better or worse, our nation has adopted commonalities from coast to coast, and is much more homogenized than it once was in the pre-*Miller* culture.

[82] Ashcroft v. ACLU, 535 U.S. at 602 (Stevens, J., dissenting).
[83] *Id*. at 605.
[84] *Id*. at 606.
[85] Ashcroft v. ACLU, 124 S.Ct. 2783 (2004).

Instead of fifty unique states with their own identifying characteristics and cultures, Americans now eat the same McDonalds™ hamburgers, drink the same Starbucks™ coffee, and wear the same GAP™ clothes. While many mourn the loss of uniqueness and distinction that was once pervasive throughout our nation, the reality is inescapable. Whereas differences existed as a matter of course a few decades ago, cultures such as the Amish must now go to great lengths to sequester themselves from the mind-numbing sameness that has taken over the United States like a plague. No county is an island in this day of worldwide media and entertainment, where we have as much in common with acquaintances across the country as we do with our next door neighbor.

It is not only the Internet that requires reevaluation of the concept of local community standards; it is the progress of mankind itself. The standardization of information brought about by the Internet is merely a symptom of an ever-increasing wave of uniformity that tends to average out all people, of all nations and cultures. The absurdities resulting from attempts to judge online media by the standards of some local city, county, or state is merely one example of how technological progress and convergence of all media distribution mandates a reevaluation of the standards by which we judge protected speech from illegal obscenity.

B. Technological Advances Allow Greater Monitoring of Standards

Interestingly, whatever standards that might exist in this country are becoming easier to quantify and determine, from a technological standpoint. In prior cases, evidence of community standards often came from introduction of "comparables," i.e., other similar erotic materials that are accepted or tolerated within the ideal community. Often, this evidence took the form of retail sales information generated from nearby adult media outlets that were willing to cooperate and provide such information.

As one can imagine, such proprietary revenue information was often difficult to extract from competitors, or those local businesses that simply chose not to get involved in a criminal prosecution. With the advent of Internet traffic monitoring technology, detailed statistics can be generated, identifying the level of consumption (and therefore acceptance) of various types of adult material in the United States. Current traffic monitoring programs allow for the detailed analysis of consumption of a particular adult website, or even specific pages within an adult website, by number of hits, page views, bandwidth and various other categories. Web traffic from the United States can be readily excised from foreign traffic, to provide immediate, real time, accurate information as to the desirability or acceptance of a particular website in the United States. Never before has such accurate information been available in regards to comparable material, or even the allegedly obscene material itself. For better or worse, the standards that do exist are becoming easier to prove, and more capable of dissection and analysis on various relevant levels, given advances in technology.

C. Reduced Presence of Adult Materials in the Community

While the concept of community standards is undergoing a radical shift, it is also becoming less relevant as the presence of the materials in the community is becoming more and more intangible. The existence of modern adult media is barely felt by the community as compared to when *Miller* was decided. For example, Internet images do not have any real presence in the potentially offended community, since they only exist on the server from which they are requested by the user, and on the computer on which they are received. With filters, children or particularly sensitive adults will not accidentally pass by or encounter materials that violate a particularly conservative community's standards as they might have in the '70's or '80's when the vast majority of adult materials were obtained from retail outlets or theaters.

Unlike the physical presence of an X-rated movie in a rundown cinema with a suggestive marquis bearing the title for all passersby to see, online materials only exist for a brief nanosecond on the community's telephone lines, coaxial cable or satellite waves that bring them into the requester's personal computer. Pay-per-view satellite and cable television have little, if any, physical presence in a given community, and should likewise be amenable to a national standards analysis. Given the right to possess even obscene materials in the privacy of one's home,[86] and the developing right to personal sexual autonomy,[87] the community can hardly object to this manner of "presence" within the geographic community. Most modern media share these transmission characteristics, and thus should not implicate the same concerns that were addressed in *Miller* and its progeny, relating to each community's right to regulate the type of erotic material whose presence is tolerated within the confines of the local community.

D. Development of Cultural Communities

While the community standards of the nation as a whole have tended to 'average out' and eliminate the differences in communities based on geography, other distinguishing factors have created unique 'communities' defined by non-geographical factors. Perhaps the beginning of this analysis must be from a sociological perspective, rather than a legal one. In 1973 Chief Justice Burger proclaimed, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[88] The fundamental principle overlooked by that statement that is truer now than it was then is that a good many New Yorkers moved there from Mississippi and vice versa. And, realistically, the notion of "community" has evolved, as well. For a dramatic example, given the proliferation of national, Spanish-language

[86] Stanley v. Georgia, 394 U.S. 557 (1969).
[87] Lawrence v. Texas, 539 U.S. 558 (2003).
[88] *Miller*, 413 U.S. at 32.

television networks, the values of an American who is Spanish-speaking is more likely to be influenced by the national viewing audience of those networks than the average resident of his county, judicial district or state. The same is true of members of the National Rifle Association, Republicans, Democrats, gays, African-Americans, sports fans, and so on.

In 1973, people watched ABC, CBS, NBC, PBS and a smattering of local independents in larger markets; they read their local newspapers and Newsweek. Now, they are more likely to read magazines focusing on their particular area of interest or the particular group into which they fall, watch cable or satellite television with the hundreds of available specialty channels, and "bookmark" Web pages that they check regularly for their particular interests – whether it be Notre Dame football or growing roses. And they go to the local Notre Dame Football organization or attend the Rose Convention. Indeed, with the shrunken world, "communities" are defined not by neighborhoods, but rather by station in life and interests. A Baby Boomer is profoundly more likely to share the view of the average Baby Boomer across the country than of the average Generation X'r in his or her own county or state.

A particular problem with the concept of community standards in states like Texas, California and Illinois arises from the fact that people are more likely to agree with those in the same station in life than those in the same state; people from Chicago are more likely to have values consistent with people from Los Angeles than with people from Downstate Illinois; and those people are more likely to have values consistent with people from the agricultural central valleys of California than Chicago.

Turning to the Internet, current notions of "community standards," as noted, reduce speech to the lowest common denominator. Arguably, reducing Internet speech to that acceptable in the most conservative community is not unlike "reducing adult population to

reading only what is fit for children" – "to burn the house to roast the pig."[89] It is time for the courts to recognize that those offended by materials that are not offensive to a substantial group of others will have to pay a price for living in a free society – switch to another channel, rent a different DVD or install Net Nanny on their computers.

Conclusions

If the obscenity test is to continue to embrace the concept of "community standards," recognition must be given the modern definition of "community." Where the test is applied to Internet transmissions accessible throughout the entire world, the courts must change the contours of the "community standards" test to recognize a mode of communication that nobody dreamed of when that concept was developed by the courts.

Ultimately, lawmakers and the courts will need to move to some form of regulation of the time, place, and manner of distribution of hard core erotic speech, as opposed to outright criminalization using obscenity laws based on the increasingly irrelevant concept of community standards. Restrictions that minimize the physical impact on the community, and the viewer's ability to shield himself or herself from accidental exposure to erotic speech, will take precedence over the limited modern utility of obscenity laws. Tomorrow's erotic content regulations will likely involve concepts such as labeling, filtering, warnings, and the like, instead of outright bans as have been used in the past. To the extent that state and federal governments have a legitimate interest in regulating the distribution of erotic materials in a given community, such regulation will only be successful in the Digital Age if it takes the form of valid time, place, and manner restrictions, as opposed to full content bans.

[89] Butler v. State of Mich., 352 U.S. 380, 383 (1957) (striking down a statute prohibiting speech "tending to the corruption of the morals of youth").

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