THE PROBLEM OF OBSCENITY

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ABSTRACT

Under a doctrine first established in Roth v. United States, obscenity is determined according to "contemporary community standards." Individuals who produce or distribute material that violates these standards can be arrested, deprived of their freedom, and permanently branded as criminals. Books can be banned. But these standards have never been explained.

This paper sets forth a model of community standards grounded in social choice theory. It recognizes that the definition of a community standard is inherently normative. A set of desirable normative axioms are presented and defended. It is shown that community standards do not and cannot exist.

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I. INTRODUCTION

Under a doctrine dating back to the 1950s, the freedoms of speech and the press enshrined in the U.S. Constitution do not protect erotic materials deemed obscene according to "contemporary community standards."[1] Books can be banned. Individuals who produce or distribute "obscenity" can be arrested, deprived of their freedom, and permanently branded as criminals. But while the stakes are high and the punishments severe, the nation's highest court has never explained the contemporary community standards test or its relationship to the standards of the individuals who comprise the community. Neither have the commentators who have addressed obscenity law in hundreds of articles written in the aftermath of *Roth*. In this Article, I show that this vague concept remains shrouded in murky language for a reason: the contemporary community standards envisioned by the courts do not, and cannot, exist.

While this doctrine is nearly seventy years old, the desire to ban books remains. Recently, two books, *A Court of Mist and Fury* and *Gender Queer*, were challenged as obscene under a Virginia statute.[2] The challenge failed at the trial court, and the plaintiff, an aspiring politician, chose not to appeal.[3] But the issue is far from settled. A trend seems to be growing among conservatives to suppress ideas contrary to their moral views. Moreover, an increasingly conservative Supreme Court elevates States' rights over individual freedoms and respect for prior decisions.[4] Without the protection of the First Amendment, the specter of censorship raises its head; this time, not for hard-core pornography but for books that challenge traditional gender norms and beliefs about sexuality.

Courts are to apply contemporary community standards. But what can community standards be? The guidance from the Supreme Court is limited at best. The *Roth* opinion upheld jury instructions stating that all members of the community are to be included: "young and old, educated and

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1. Roth v. United States, 354 U.S. 476, 484 (1957). *See also* Miller v. California, 413 U.S. 15, 24 (1973).

2. *In Re: A Court of Mist and Fury*, Final Order, Case No. CL22-1984 (Va. Cir. Ct., August 30, 2022), *In Re: Gender Queer*, Final Order, Case No. CL22-1985 (Va. Cir. Ct., August 30, 2022).

3. Kelsey Kendall, *Books in question for 'vulgar' material can be sold to minors in Virginia Beach for now, but 'fight is far from over,' delegate says*, THE VIRGINIAN-PILOT (Oct 06, 2022, 11:52 AM), https://www.pilotonline.com/news/education/vp-nw-virginia-beach-obscene-books-update-20221006-q2bcqdwa25affc7eos6vjzzpaq-story.html

4. In principle, books such as *A Court of Mist and Fury* and *Gender Queer* should be protected under the "SLAPS" prong of the test enunciated by the court in *Miller:* to be obscene, the work, taken as a whole, must not have "serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. However, the SLAPS test has been the most controversial part of the *Miller* test, and the definition of "serious" is subjective. Given the recent direction of the Supreme Court (evidenced, for example, in *Dobbs*), it is far from clear that these books would be protected.

uneducated, the religious and the irreligious — men, women and children."[5] In *Miller v. California,* the Court held that the community may be defined locally and not nationally, stating that "[i]t 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."[6] These decisions partially answer the question of which individuals comprise the community. But as to the nature of a community standard—whether and how that standard relates to the views of individuals—we are left in the dark.

The question of community standards is still relevant. It is important because the obscenity "carve-out" from the First Amendment draws a fuzzy line between speech that is protected and speech that is criminalized. Imprecision about the nature of the test is costly in that uncertainty may chill constitutionally protected expression. It is also important because offense to community standards has been touted as one of the major justifications for the criminalization of immoral behavior.[7] This distinguishes obscenity from other areas of law in which community standards are used to delineate acceptable behavior, such as in the common law concept of the reasonable person and the civil law requirement of good faith.[8]

This Article analyzes the most basic interpretation, the aggregation hypothesis, which holds that community standards are derived from individual standards. The aggregation hypothesis is quite broad. It makes no claim about the specific nature of the relationship between the individual standards and the community standard. It merely means that knowledge of the standards of all individuals in the community is sufficient to know the community standard. To be clear, this Article assumes the aggregation hypothesis but does not and cannot prove it to be correct. One can, of course, imagine a community standard entirely disconnected from the individuals who comprise the community. But the aggregation hypothesis is the simplest reading of the case law, and it provides us with the most natural starting point.

The aggregation hypothesis is particularly natural from an economic perspective for two reasons. First, unlike individuals, communities are not directly observable. For this reason, only theories consistent with the hypothesis can claim to be scientific. Second, economics has a long history

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5. *Roth*, 354 U.S. at 490. The Court has since ruled that children are not to be included in the jury instruction on the ground that it might lead jurors to exclude constitutionally protected material. *Pinkus, dba Rosslyn News Co. et al v. United States*, 436 U.S. 293 (1978).

6. *Miller*, 413 U.S. at 32.

7. This was the dominant argument made in support of the regulation of morality as part of the famed Hart-Devlin debate. *See* P. Devlin, THE ENFORCEMENT OF MORALS (1965).

8. *See infra* text surrounding notes 13–14.

of studying groups of individuals, which dates back at least as far back as the 1951 publication of Kenneth Arrow's *Social Choice and Individual Values*. Arrow's work, which applied the aggregation hypothesis to the economists' concept of social welfare, laid the foundation for the field of economics known today as social choice theory.

This economic tradition has been developed to study questions of interest to economists, such as the best way to measure social welfare, conduct an election, or aggregate beliefs. However, until now, it has not addressed the question of obscenity. This paper describes the first[9] social choice theoretic model of community standards purpose-built to study the problem of obscenity.[10]

One cannot study community standards without first defining that term, so I begin my analysis by defining the concept of a standard of obscenity. "Standard" is a vague term, and there are countless possible definitions that one could choose. I introduce a definition that relies on four assumptions. First, the standard is defined over (or is applicable to) a very large number of works, such as books, movies, and pictures. Second, if two standards "agree" about the status (obscene or non-obscene) of every book, movie, or picture that has ever been created, ever will be created, or ever could be created, then they should be treated as the same standard. Third, under no standard are one hundred percent of works ever deemed obscene. The constitutional freedom of speech requires that some books, movies, and/or pictures be allowed. Fourth, "individual" and "community" standards share these same characteristics.

The aggregation hypothesis requires that the community standard be derived from individual standards. In other words, knowing each individual's standard makes it possible to know the community standard.

The Article introduces a set of desirable axioms that the community standard should, normatively, satisfy. These axioms require that the community standard (a) preserve unanimous agreements about the entire

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9. While some models are better than others, economic models cannot be perfect. The best models help us understand different aspects of the problem they wish to study. In this vein, this article does not claim to present a "perfect" model of community standards, but rather the "correct" first model of community standards, that is, the model with which the analysis should begin.

10. A version of the model in this paper was published first in Alan Miller, *Community Standards*, 148 J. ECON. THEORY 2696 (2013), and the main result in Part III can be derived with little effort from Theorem 1 in that paper. However, the models are not strictly identical. For ease of exposition the model used in this paper will be described in the notes. The ideas in Miller have also been applied to the use of community standards in tort and contract; see Alan D. Miller and Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012); Alan D. Miller and Ronen Perry, *A Group's a Group, No Matter How Small: An Economic Analysis of Defamation*, 70 WASH. & LEE L. REV. 2269 (2013); Alan D. Miller and Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689 (2013)

standard, (b) become more permissive when all individuals become more permissive, and (c) not discriminate, ex-ante, between individuals or between works.

The Article establishes that exactly one method satisfies these normative criteria. This method is the UNANIMITY RULE, which determines a work to be obscene when all individuals agree that it is obscene. Every other conceivable method of deriving a community standard from individual standards must violate one or more of these criteria.

The unanimity principle has an old and distinguished place in the history of thought. Juries typically must reach a unanimous decision to convict an individual of a crime. In economics, the Pareto criterion states that one state of affairs is preferred to another if every individual prefers it. However, the UNANIMITY RULE cannot be what courts envision when they discuss community standards. Were this to be the case, an individual could not be found guilty unless every single individual in the community considered the work obscene. Convictions would be virtually impossible to obtain.

This Article will not address the broader question of whether the protections of the First Amendment should apply to obscene materials. In particular, it does not address the feminist view that pornographic materials should be prohibited because they are harmful to women.[11] The central argument is limited to the specific concept of contemporary community standards.[12]

Nonetheless, the problem highlighted by this paper has broader implications for the obscenity doctrine and the regulation of morality more generally. Obscenity is different from many other areas of law where this argument has been applied. In the case of tort[13] and contract[14] law, community standards are used as a tool to achieve a consequence considered desirable by some other normative goal. For example, even if community standards are a fiction, we may nonetheless consider it desirable to instruct jurors to make decisions according to this fiction if the decisions that result

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11. *See* Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C. R. C. L. L. REV. CIVIL RIGHTS—CIVIL LIBERTIES LAW REVIEW 1 (1985); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L. J. 589 (1986). This approach has been followed in Canada. *See* R v. Butler, [1992] 1 S.C.R. 452; *see also* Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299.

12. There may be additional indirect implications. For example, Lord Devlin justified the regulation of immoral behavior on the ground that it violated community standards. It is not clear which alternative justifications would be supported by followers of Lord Devlin were the community standards approach deemed to be unworkable. See P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

13. Miller and Perry, *The Reasonable Person*, *supra* note 10; Miller and Perry, *A Group's a Group, No Matter How Small: An Economic Analysis of Defamation, supra* note 10.

14. Miller and Perry, *Good Faith Performance*, *supra* note 10.

from this jury instruction enhance welfare. However, the primary justification for the regulation of obscenity is precisely that it violates a community standard, not that it causes some detectable harm. Consequently, one cannot simply sweep this problem under the rug. If no coherent community standard for obscenity exists, there may be no normative justification for regulating obscenity.

Part II traces the historical development of obscenity doctrine up until the *Roth* decision in 1957. Part III then sets forth the basic model of community standards of obscenity. Part IV then considers post-*Roth* developments, most importantly the *Miller* decision.[15] The Article concludes in Part V.

II. THE IDEA OF COMMUNITY STANDARDS

To understand the fundamental argument at the heart of this Article, one must be familiar with the community standards doctrine introduced in *Roth v. United States*.[16] Here, I briefly trace the history of obscenity law as the idea of community standards developed in the United States. I then describe the key portions of the *Roth* decision relevant to this analysis. I finish by discussing the case law and academic commentary that has attempted to shed light on the community standards doctrine.

A. Federal obscenity doctrine prior to Roth

Prior to *Roth*, the leading definition of obscenity came from the 1868 English case of *Regina v. Hicklin*.[17] In *Hicklin*, local authorities seized over two-hundred-fifty allegedly obscene pamphlets under a statute allowing for the seizure and destruction of obscene works.[18] The pamphlets were produced by "The Protestant Electoral Union," an anti-Catholic group, and contained excerpts from the writings of Catholic theologians, both in the original Latin and with translations into English.[19]

Ruling that the test of obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort

15. It is not necessary to write the paper in this order; one could simply describe the model to apply to all of contemporary case law at once. However, for purposes of the exposition, I think it is better that the reader grasp the main concept before focusing on the more intricate details.

16. 354 U.S. 476, 484 (1957).

17. Regina v. Hicklin, LR 3 QB 360 (1868). Prior to *Hicklin*, prosecutions for obscenity seem to have been extremely rare. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, at 2 (1960).

18. Regina v. Hicklin, LR 3 QB 360 (1868).

19. *Id.*

may fall," the Court found that as the second half of the pamphlet "would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character," it was therefore obscene and could be suppressed, the good intentions of the defendant notwithstanding.[20]

Two features of the *Hicklin* standard are worth noting. First, under this standard, obscenity was measured by its effects on "those whose minds are open to such immoral influences," i.e., the most susceptible members of society.[21] If the work could deprave or corrupt anyone, then it could be forbidden. Second, works need not be judged as a whole; instead, they could be forbidden based on an isolated excerpt. The pamphlets were forbidden because of the "impure and filthy acts, words, and ideas" contained in its second half, even though, as the first part of the pamphlet showed, they were produced to spread a political and religious agenda and not to encourage immorality.[22]

American courts quickly followed *Hicklin*, at least as early as 1879, in *United States v. Bennett*.[23] The *Bennett* case provides a clear example of this second feature: the defendant was charged and convicted of distributing an obscene book based on select passages contained therein.[24] The defense counsel was not permitted to introduce other passages from the book as evidence on the grounds that they were irrelevant.[25] In *Rosen v. United States* (1896), the U.S. Supreme Court implicitly approved the standard by upholding jury instructions containing language from *Hicklin*.[26]

Early antecedents of the *Roth* decision can be found in two cases from the early twentieth century. First, the idea that obscenity should be judged according to "contemporary community standards" can be traced back to the opinion of Judge Learned Hand in *United States v. Kennerley*.[27] Judge Hand ruled that *Hicklin* had long been accepted by federal courts and held that two pages of the book might be found obscene under that standard.[28] While Judge Hand consequently sent the case to a jury to determine whether it was obscene under *Hicklin*, he used the opinion to voice concerns about that standard.

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20. *Id.*
21. *Id.*
22. *Id.*
23. 24 F.CAS. 1093 (1879).
24. *Id.*
25. *Id.*
26. U.S. 29, at 43 (1896).
27. *Roth* at 489; United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).
28. *Kennerley*, 209 F. at 119.

In his critique, Judge Hand argued that *Hicklin* represented the morality of the mid-Victorian era but neither that of the present nor future, given the direction of contemporary society. Judge Hand's opinion is worth quoting at length:

> I question whether, in the end, men will regard that as obscene, which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature
>
> If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard as much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[29]

Second, the other important factor of the *Roth* test, that works be judged as a whole, originates from a 1922 New York Court of Appeals decision, *Halsey v. New York Society for the Suppression of Vice*.[30] *Halsey* involved the English translation of an 1836 French novel, *Mademoiselle de Maupin*, the author of which, Théophile Gautier, was conceded in the case to "be among the greatest French writers of the nineteenth century."[31] The opinion of Judge Andrews stated that while many paragraphs in the book are "undoubtedly vulgar and indecent," the book "must be considered broadly as a whole."[32]

Federal courts began to move away from the *Hicklin* standard after

29. *Id.* at 120–121.
30. Halsey v. New York Society for the Suppression of Vice, 234 N.Y. 1 (N.Y. 1922).
31. *Id.* at 220
32. *Id.*

Calvin Coolidge appointed Learned Hand and his cousin, Augustus Hand, to the appellate bench in the 1920s.[33] Over the course of a decade, the two cousins wrote four opinions collectively overruling *Hicklin* in the Second Circuit.

First, in *United States v. Dennett*, the Second Circuit held that while a sex education pamphlet might arouse lust in some children, it was not obscene given the legitimate aim of aiding "parents in the instruction of their children in sex matters."[34]

Next, in *United States v. One Book Entitled Ulysses by James Joyce*, the Second Circuit affirmed a lower court ruling that James Joyce's novel *Ulysses* was not obscene.[35] In the opinion, Judge Augustus Hand ruled that while certain passages of the book might be obscene, literary works should be given the same immunity as works on sex education, "where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication."[36] Following *Halsey*, Judge Hand held that the work was to be judged as a whole, and, by that standard, *Ulysses* was not obscene.[37] Judge Hand acknowledged that the ruling was a clear departure from the *Hicklin* standard approved by the *Bennett* and *Rosen* decisions but distinguished *Rosen* on the ground that it dealt with works obscene under any standard.[38] *Bennett* was held as not representative of current law in light of more recent precedent.[39]

In the following years, the Second Circuit took several opportunities to reaffirm its claim that *Hicklin* had been overruled. In *United States v. Levine* (1936), the court ordered a new trial on the ground that the *Hicklin* standard, used in the original trial, had been overruled by the *Dennett* and *Ulysses* decisions.[40] Similarly, in *United States v. Rebhuhn* (1940), the court noted that the "old and abandoned standard of *Regina v. Hicklin*" had been superseded by that of *Dennett*, *Ulysses*, and *Levine.*[41]

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33. *See* Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, 85 WASH. U. L. REV. 215 (2007).
34. 39 F.2d 564 (2nd Cir. 1930).
35. 72 F.2d 705, 707 (2nd Cir. 1934).
36. *Id.*
37. *Id.*
38. *Id.* at 708.
39. *Id.*
40. 83 F.2d 156 (2nd Cir. 1936).
41. 109 F.2d 512 (2nd Cir. 1940).

B. The Roth decision

The question of whether obscenity is protected by the free speech guarantees of the First and Fourteenth Amendments was first addressed by the U.S. Supreme Court in *Roth v. United States* (1957).[42] In *Roth,* the Court consolidated two cases: an appeal by Samuel Roth, convicted of violating a federal obscenity statute,[43] and an appeal by David Alberts, convicted of violating the obscenity provisions of the California Penal Code.[44]

Justice Brennan, writing for the majority, held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" and that, consequently, "obscenity is not within the area of constitutionally protected speech or press."[45] However, while the majority of the court did not want to accord obscenity constitutional protection, it also did not wish to return to the *Hicklin* standard, which was found to place an unconstitutional restriction on non-obscene material legitimately dealing with sex. The court substituted the following test to determine whether the Constitution allowed a work to be banned as obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[46] The opinion did not define "community standards" but cited with approval the jury instructions used by the trial court:

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and

42. Roth v. United States, 354 U.S. 476 (1957).
43. *Id.* at 479.
44. *Id.*
45. *Id.* at 485.
46. *Id.* at 489.

> publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. . . .
>
> In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious — men, women and children.[47]

Chief Justice Warren concurred with the judgment but questioned the broad language of the opinion in that it might later be used to suppress material protected by the Constitution.[48] Justice Harlan concurred in the latter case but dissented in the former on the ground that the Constitution allowed state but not federal regulation of obscenity.[49] Furthermore, he argued that the test introduced was inappropriate in either case: state regulation of obscenity should be upheld unless it either "so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power" or "is inconsistent with our concepts of 'ordered liberty.'"[50] Justices Black and Douglas dissented from the *Roth* judgment on the ground that the Constitution allowed neither federal nor state regulation of obscenity.[51]

C. What are community standards?

In general, the court has not required that evidence be used to establish the local community standards. Community standards are to be determined by the trier of fact based on the factfinders' experience with and understanding of the community. In this sense, any aggregation of individual views into a community standard must be done as a mental exercise on the part of the trier of fact. The court has recognized that jurors in different parts of a large "community," such as a state or the entire nation, may have different perceptions of that community's standards but held that

47. *Id.* at 490.
48. *Id.* at 494.
49. *Id.* at 496.
50. *Id.* at 501.
51. *Id.* at 508–10.

this disparity does not pose a constitutional problem.

As noted above, the origin of the "contemporary community standards" approach can be traced back to a dictum in *United States v. Kennerley*,[52] in which Judge Hand proposed that the definition of obscenity should reflect "the average conscience of the time," indicating "the present critical point in the compromise between candor and shame at which the community may have arrived."[53] In this context, the term "average" is an explicit reference to the common-law concept of the reasonable man. "If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard as much as they do in cases of negligence."[54]

The Ninth Circuit Court of Appeals has held that "community standards are aggregates of the attitudes of average people — people who are neither 'particularly susceptible or sensitive . . . or indeed . . . totally insensitive.'"[55] However, the Supreme Court has since ruled in *Pinkus v. United States* that the jury cannot exclude the views of the sensitive and the insensitive in determining community standards, as "they are part of the community."[56] The views of all adult members of the community are to be included. After *Pinkus*, a case in the Southern District of Florida held that the community standard "is a legal concept whereby a single perspective is derived from the aggregation or average of everyone's attitudes in the area including persons with differing degrees of tolerance."[57] It is unclear whether "average" is meant to be a synonym for "aggregation" and, if so, whether the term implies a mathematical mean or merely some form of a combination.

One commentator has suggested that the community standard is an average or median in a mathematical sense.[58] However, as another commentator has pointed out, "the notion of an average standard . . . implies the existence of a spectrum of tolerance that can be ranked along a single dimension, from least intolerant to most intolerant. The problem with this approach is that a single dimension of tolerance does not exist."[59] No court

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52. United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).
53. *Id.* at 121.
54. *Id.*
55. United States v. Danley, 523 F.2d 369, at 370 (9th Cir. 1975), citing *Miller*, 413 U.S. at 33. This language in *Danley* was followed by United States v. Wedelstedt, 589 F.2d 339 (8th Cir. 1978) and 134 Baker Street, Inc. v. State, 172 GA. APP. 738 (Georgia 1984).
56. Pinkus v. United States, 436 U.S. 293, 300 (1978).
57. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 589 (S.D. Fla. 1990).
58. See Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV 339, at 354 (1987).
59. Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, at 349 (2008). Boyce,

or commentator has identified an objective way to order judgments along a single dimension.

III. A MODEL OF COMMUNITY STANDARDS

The aggregation hypothesis is the idea that community standards are derived from individual standards. The hypothesis stems from the notion that the community is not a distinct entity but a collection of individuals. It follows that knowledge of all standards held by individuals in the community is sufficient to determine the community standard.

The aggregation hypothesis is normative and not positive. Unlike a statistical hypothesis, it cannot be tested through empirical means. Instead, this Article analyzes the logical implications of this idea. It asks not whether the hypothesis is true or false but whether it is coherent.

It is possible, of course, that the "community standard" would be disconnected from the individuals who comprise the community. It could, instead, be grounded in moral philosophy. However, if this was the intent of the Supreme Court (and the prior decisions of lower courts that developed the concept), the "community standards" language is an odd way to express it.

Why would courts want to adopt the idea of aggregation? They may believe that, fundamentally, it is the individuals in the community who matter. Alternatively, they may want to constrain the power of judges and juries. One cannot ask a question or observe a community except through its members. A judge or juror who may determine the nature of the community standard without reference to individuals' beliefs is free to come to any outcome that he or she pleases.

The aggregation hypothesis is particularly natural from the perspective of economics. This is so for two reasons. First, all empirical claims made by economists must be founded upon observation; this includes any claims concerning the content of community standards. Unlike individuals, communities are not directly observable. For this reason, only theories consistent with the hypothesis can be scientific. Second, economics has a long history of studying collectives of individuals, which dates back at least as far back as the publication of Kenneth J. Arrow's *Social Choice and Individual Values* in 1951.[60] Arrow's work, which applied the aggregation

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however, assents to the principle that community standards "must in some sense be an aggregate of the standards of the individuals who comprise the community."

60. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

hypothesis to the economists' concept of social welfare, spawned an entire field in economics known today as social choice theory.

Social choice theory now deals largely[61] with the aggregation hypothesis; many models have been developed that study collectives as aggregates of individuals. In particular, the Arrow Impossibility Theorem has become a cornerstone of both economic theory[62] and political science[63] and has important applications in many other areas, including law,[64] computer science,[65] quantum physics,[66] and philosophy.[67] Three researchers in the field, including Arrow, have since been awarded the Nobel Prize.[68]

Unfortunately, the literature on aggregation theory has largely been built to satisfy the needs of economists, political scientists, philosophers, and computer scientists; very few models have been constructed to study law and legal institutions. No off-the-shelf models can readily be applied to the study of community standards. This lacuna means that the legal implications of social choice theory are not as well understood as they should be.

This Article presents a model of community standards purpose-built for the study of obscenity law. It is similar to the work of Arrow and other prior work in social choice in that it follows a similar structure—one rarely used in legal reasoning—and deals with the study of collectives as aggregates of individuals. However, it does not rely upon and in no way follows from the Arrow theorem. It contains a structurally distinct model, and the axioms imposed differ in their formal structure and interpretation.[69] The result is also very different—Arrow reached an impossibility result, meaning that his axioms cannot be simultaneously satisfied in the context of his model. While the result of this article is stark and limiting, the result is a "possibility" in the sense that an aggregation method consistent with axioms

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61. But by no means exclusively.

62. For a general reference see AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); KOTARO SUZUMURA, RATIONAL CHOICE, COLLECTIVE DECISIONS, AND SOCIAL WELFARE (1983); HERVE MOULIN, AXIOMS OF COOPERATIVE DECISION MAKING (1988).

63. For a reference see PETER C, ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION (1986).

64. See Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke*, the FCC, and the Courts*, 88 YALE L.J. 717 (1979); Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); KATZ, WHY THE LAW IS SO PERVERSE (2011). Legal applications include jurisprudence, administrative law, constitutional law, corporate law.

65. See HANDBOOK OF COMPUTATIONAL SOCIAL CHOICE (FELIX BRANDT, VINCENT CONITZER, ULLE ENDRISS, JÉRÔME LANG, & ARIEL D. PROCACCIA, EDS., 2016)

66. Ning Bao and Nicole Yunger Halpern, *Quantum voting and violation of Arrow's Impossibility Theorem,* PHYS. REV. A 95, 062306 (2017).

67. CHRISTIAN LIST AND PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2013)

68. Kenneth J. Arrow (1971), Amartya Sen (1998), Eric Maskin (2007).

69. Importantly, it contains no analogue of Arrow's controversial "Independence of Irrelevant Alternatives" axiom.

does exist. However, in practice, this method cannot be used to determine whether a work is obscene for purposes of the First and Fourteenth Amendments.

A. The Model

This section introduces a formal model of community standards consistent with the aggregation hypothesis.[70] To simplify the exposition, the model assumes that community standards are used only in determining whether a work is obscene. The theory also applies to the more complex doctrine introduced in *Miller*, but the specific elements of this doctrine will be deferred to Part III.

The first element of the model is the **community** whose standard is of interest. Here, the community is defined in the abstract as a group of individuals.[71] This interpretation is consistent with the Supreme Court's requirement that the community be defined in geographic terms and contain all adults in that community.[72] It is simultaneously flexible enough to include other possible definitions of the community.[73] It is important to emphasize that the composition of the community should be taken as a given. It is the role of the courts, and not of the Article, to determine whose views should be combined to form the community standard.

The second element of the model is the **set of works** that an individual might possibly consider obscene. It is defined to be a very large set. [74] One may think of it as including every film, written text, and picture that ever has been, will be, or could be created.[75] It may exclude those works determined to be non-obscene as a matter of law.[76]

The third element of the model is the set of **standards**, both of the individuals and of the community. The model relies upon two key assumptions about standards. First, if two standards agree about the status

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70. For more on the origin of this model, see Miller, *supra* note 10.

71. Formally, the community is a set of individuals $N \equiv \{1,\ldots,n\}$.

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

73. Some may wish to restrict the definition of the relevant community to clerics, parents, or some other community of interest. Lord Patrick Devlin claimed that the community consists only of reasonable persons. DEVLIN, *supra* note 12. Devlin's definition may be circular if the status of an individual as a "reasonable person" depends on that individual's beliefs.

74. Formally, the set is defined as infinite because we cannot write down a list of all possible works. The space of works is denoted (W,Σ,μ), where W is the set of works, Σ is the σ-algebra of subsets of works, and μ is a measure on (W,Σ). The space (W,Σ) is assumed to be isomorphic to $([0,1],\mathscr{B})$, where $\mathscr{B}$ is the set of Borel subsets of $[0,1]$. The measure μ is assumed to be countably additive, non-atomic, non-negative, and finite.

75. *Cf.* Jorge Luis Borges, THE LIBRARY OF BABEL (1941).

76. Works are non-obscene as a matter of law if (a) they have "serious literary, artistic, political, or scientific value" or if (b) no reasonable person could find them to be obscene.

(obscene or non-obscene) of every possible work, they should be treated as the same standard. The reasons for their standards are irrelevant except to the extent relevant in determining the status of a work. Second, under no standard may all (or one hundred percent) of the works be deemed obscene. The commitment to the freedom of speech requires no less. Provided that these two requirements are met, all potential standards are permitted. The model does not prescribe a particular form that individual or community standards must take.[77]

The aggregation hypothesis holds that the **community standard** is derived from the individual standards.[78] The method used to derive the community standard is called an **aggregation rule**.[79] In other words, knowledge of each individual's standard and the aggregation rule is sufficient to deduce the community standard.

This is the model: the community, the set of works, the standards, and the aggregation rules. The rest of the analysis will be devoted to a discussion of **axioms**—normatively desirable properties of aggregation rules—and their implications. First, however, it is helpful to discuss several implicit assumptions of the model.

First, the model makes no assumption that there is a method by which works can be objectively compared in terms of a 'level' of obscenity independent of the views of the community members. While the model is flexible enough to allow for such a method, the Article, more generally, is motivated by the implicit assumption that no acceptable method exists. Neither courts nor commentators have yet identified a plausible method of comparison. The lack of an objective method makes even personal views on obscenity difficult to define through a rule. Potter Stewart believed that obscenity could only be prohibited if it was "hard-core pornography" but could not define even that term.[80] He only knew it when he saw it.[81]

Second, even if one cannot make objective comparisons between works,

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77. Formally, the set of allowable standards is denoted $\mathcal{J} \equiv \{J \in \Sigma : \mu(J) < \mu(W)\}$. A profile of standards is a vector $J = (J_1,\ldots,J_n) \in \mathcal{J}^N$, where J_i denotes the standard of individual $i \in N$.

78. Formally, the community standard is a standard $J_0 \in \mathcal{J}$.

79. Formally, the aggregation rule is a function $f: \mathcal{J}^N \rightarrow \mathcal{J}$ which maps a profile of standards into a single standard. For a profile $J \in \mathcal{J}^N$, I define $J_0 \equiv f(J)$.

80. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964).

81. A natural method would be to compare works by their component parts, so that any work containing an obscene component would necessarily be considered obscene. However, this would clearly violate the requirement that works be judged as a whole. *See* Roth v. United States, 354 U.S. 476, 490 (1957) ("The books, pictures and circulars must be judged as a whole in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."). The *Hicklin* standard, which had previously been adopted by some American courts, allowed a work to be judged as obscene on the basis of as single excerpt. Regina v. Hicklin, LR 3 QB 360 (1868). The court in *Roth* expressly disapproved this standard.

it is possible to make objective comparisons between standards in terms of **tolerance**. Alice's standard is as tolerant as Bob's standard if Alice tolerates (considers non-obscene) every work that Bob tolerates.[82] However, not every pair of possible standards can be compared in this manner. It is possible that Alice tolerates one work that Bob considers obscene while Bob tolerates a different work that Alice considers to be obscene. As a result, one cannot compare all possible standards along a single dimension.[83]

B. Axioms

An **axiom** is a property of an aggregation rule. I introduce four axioms. The first axiom is **homogeneity**, which requires, in essence, that the aggregation rule respect complete unanimity. What does this mean? Assume that everyone has the same standard. That is, assume that all individuals share an identical belief about the status (obscene or otherwise) of every book, every movie, and every picture that ever has been, will be, or could be created. This is, of course, completely implausible. We do not live in a world of clones. But in this incredibly rare case, we know what the community standard should be. The one standard that is commonly shared should be the community standard. In other words, while this special case may be rare or even implausible, it nonetheless serves as a reference case. *Homogeneity* may seem to be an obvious requirement, but it is helpful to be explicit about it, as the axiom enables us to eliminate some potential aggregation rules, such as the *Hicklin* test, where the definition of obscenity is based entirely on the judgments of dead people.

> HOMOGENEITY: If every individual has the same standard, then this common standard forms the community standard.[84]

The second axiom is **responsiveness**, which requires the community standard to "respond" in the direction of the individual standards. What does it mean for the community standard to respond in this way? Recall the definition of tolerance: an individual's standard stays as tolerant as it was before if no works become obscene as a result of the change. It would be an odd case if everyone became more tolerant, and yet an individual was

82. Formally, $J_i \subseteq K_i$ denotes that standard J_i is more permissive than standard K_i. Note that every standard is always as permissive as itself.

83. However, the model allows the possibility that every pair of standards *actually found* in the community can be compared according to their permissiveness.

84. Formally, for every $J \in \mathcal{J}^N$, if $J_1=\cdots=J_n$ then $J_0=J_1=\cdots=J_n$.

convicted *as a result* of this newfound tolerance. *Responsiveness* guarantees that this perverse result cannot occur. When there is a change in the individual standards, and each individual remains as tolerant as before, the community standard must remain as tolerant: it either becomes more tolerant or does not change.

> RESPONSIVENESS: If at least one individual judgment changes and each individual's new judgment is as tolerant as that individual's old judgment, then the new community standard must be as tolerant as the old community standard.[85]

The third axiom, **anonymity**, requires that the aggregation rule treat every member of the community equally. Alice and Bob *trade judgments* if both change their individual judgments so that Alice's new judgment is Bob's old judgment, and Bob's new judgment is Alice's old judgment. When individuals trade judgments, the set of standards in the community has not changed, only the names attached to them have. *Anonymity* requires that, in this case, the community standard must not change. This axiom restricts the aggregation rule from assigning different weights to the opinions of different community members.[86]

> ANONYMITY: The community standard is not affected by trades of judgments.[87]

The final axiom, **neutrality**, requires the aggregation rule to treat every work similarly. Suppose we have two books: *Ulysses* and *Lady Chatterly's Lover*. Alice switches her judgment about these two books if (a) her old judgment about *Ulysses* becomes her new judgment about *Lady Chatterly's Lover,* (b) her old judgment about *Lady Chatterly's Lover* becomes her new judgment about *Ulysses*, and (c) her judgment about all other works does not change. *Neutrality* requires that if each individual switches her judgment about these two works, the community standard should also switch its

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85. Formally, for all $J,K \in \mathcal{J}^N$, if $J_i \subseteq K_i$ for all $i \in N$, then $J_0 \subseteq K_0$. While the setting is very different, both this axiom and May's positive responsiveness axiom imply that an "increase" in each of the inputs (where a judgment is considered larger than another if it is more liberal) cannot lead to a "decrease" in the output. *See* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 Econometrica 680 (1952) (defining May's axiom).

86. Note that this is an axiom on the aggregation rule and not on the community. The opinions of certain individuals can be excluded entirely by defining them as non-members of the community.

87. Formally, for every $J \in \mathcal{J}^N$ and any permutation π of N, $f(J_1,\ldots,J_n)=f(J_{\pi(1)},\ldots,J_{\pi(n)})$.

judgment about them. *Neutrality* requires that any distinction made between *Ulysses* and *Lady Chatterly's Lover* must come from the individuals in the community and not from the aggregation rule.

> NEUTRALITY: If every individual switches her judgment about two works, then the community standard must also switch its judgment about these two works.[88]

C. Unanimity Rule

The model and the axioms have been described and defended. Which aggregation rules can we use to derive the community standard from the individual standards? I present a simple rule.

> UNANIMITY RULE: The works deemed obscene by the community standard are those that every individual judges as obscene.[89]

The UNANIMITY RULE is very liberal. A work is tolerated as long as someone—anyone—believes that the work should be tolerated. No one will go to prison with less than unanimous consent. The rule has many advantages: it is simple, clear, and easily applied, even if the court is less than omniscient. The rule may be popular among libertarians who support the legalization of obscenity.[90]

However, this rule cannot be used to convict. Communities are simply too diverse. It is highly improbable that every person in even the most conservative geographical region in the United States would find a contested work to be obscene. It would be virtually impossible in the case where the accused is a member of the community. This is not the definition of community standards that the Supreme Court had in mind.

Though this method is impractical, I discuss it here because it has several other desirable properties. In particular, the UNANIMITY RULE satisfies the four axioms of *homogeneity*, *responsiveness*, *anonymity*, and *neutrality*. This is simple to see upon a quick examination. Less obvious but equally

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88. This presentation of the axiom is slightly simplified; the axiom applies not only to individual works, but to groups of works, as well, provided that the two groups of works are of equal size. Formally, for every $J \in \mathcal{J}^N$ and every automorphism φ of (W, Σ) that preserves μ, $f(\varphi(J_1),\ldots, \varphi(J_n)) = \varphi(f(J_1,\ldots J_n))$. Note that this axiom is restricted only to the case where the two groups have the same number of elements and are of the same proportion.

89. Formally, $f(J) \equiv \bigcap_{i \in N} J_i$.

90. However, the libertarians might prefer a rule in which obscenity is permitted even when everyone considers a work to be obscene.

true is that the UNANIMITY RULE is the unique rule that satisfies these axioms. Every other possible method that can be used to combine individual judgments into a community standard must violate one or more of the axioms. This claim can be formulated as a theorem.

> **Theorem:** An aggregation rule satisfies the four axioms of *homogeneity*, *responsiveness*, *anonymity*, and *neutrality* if and only if it is the UNANIMITY RULE.[91]

In other words, if the UNANIMITY RULE is not acceptable, nothing else will be, either. I next describe several alternative aggregation rules and explain which specific axioms are violated by the rules. A short proof of this theorem follows in section II.E.

D. Other Aggregation Rules

What is wrong with majority rule, according to which a work is deemed obscene when it is deemed obscene by the majority? The simple answer is that the majority rule is not well-defined in this setting. It is possible that every work would be considered obscene by some majority.[92] An example is provided in Figure 1. Here, the judgments of five individuals are shown; each circle depicts the works that one of the individuals would permit. It is apparent that none of the works is permitted by more than two out of the five; this means that every work is considered obscene by at least three individuals, a majority.

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91. For a proof, *see supra* note 10. The full strength of the homogeneity axiom is not necessary for the characterization. Recall that homogeneity requires that, if every member of the community has an identical standard of what counts as obscene, then that is also the community standard. A weaker version of the axiom requires that, if every member of the community has an identical standard of what counts as obscene, then the community standard must consider as obscene every work considered obscene by the individuals. We could obtain a tighter characterization of Unanimity rule if we replaced homogeneity with this weaker axiom.

92. Formally, majority rule would be defined as $f(J) \equiv f(J) \equiv \cup_{S\subseteq N;2|S|>|N|} \cap_{i\in S} J_i$. However, this rule is not well defined because there exists a $J \in \mathcal{J}^N$ such that $f(J) \notin \mathcal{J}$.

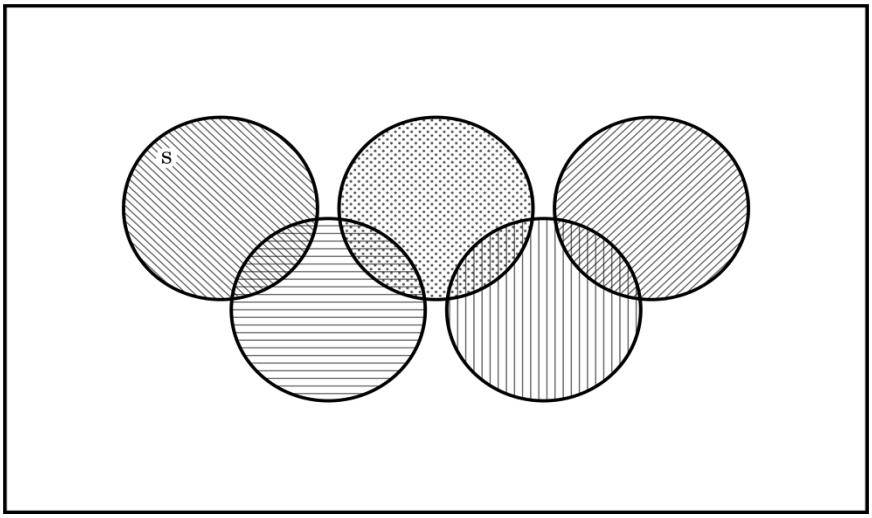

FIGURE 1

Majority rule does not always run into the kind of problem pictured in Figure 1. Because majoritarianism is often considered normatively desirable,[93] one might argue that the majority will should still be followed whenever possible. For example, consider the following rule:

> SEMI-MAJORITY RULE: A work is obscene if a majority considers it obscene unless 100% of the works would be deemed obscene. In this case, a work is obscene if everyone considers it obscene.

The SEMI-MAJORITY RULE is part of a broader class of rules that function the following way: a work is obscene if **x** or more people consider it obscene, where **x** varies so that some works are non-obscene.[94] Under the SEMI-MAJORITY RULE, **x** can take two values, 'half of the population' or 'one.' Under another possible rule, **x** is the highest number such that some works are non-obscene.[95] All of these rules are well defined because they guarantee that some works will always be permitted regardless of individual

93. See May's theorem, *supra* note 85.

94. UNANIMITY RULE is not a member of this class because the level **x** does not vary but is always equal to the number of individuals in the society.

95. Steven J. Brams and Peter C. Fishburn, *Approval Voting*, 72 AM. POL. SCI. REV. 831, 831–47 (1978)

judgments. However, these rules are problematic for a different reason.

Under the SEMI-MAJORITY RULE, some works will be permitted regardless of the individual judgments. Consequently, it is a well-defined rule. However, it violates the *responsiveness* axiom. It is possible that a work will be prohibited by the community standard *because* the individuals become more tolerant.

To see this, look at Figure 2. As in Figure 1, the five circles represent the set of works deemed non-obscene (permitted) by the five individuals, respectively. It is easy to see that each individual has become more tolerant than they were before. As illustrated in Figure 3, the circles in Figure 2 contain the respective circles of Figure 1.

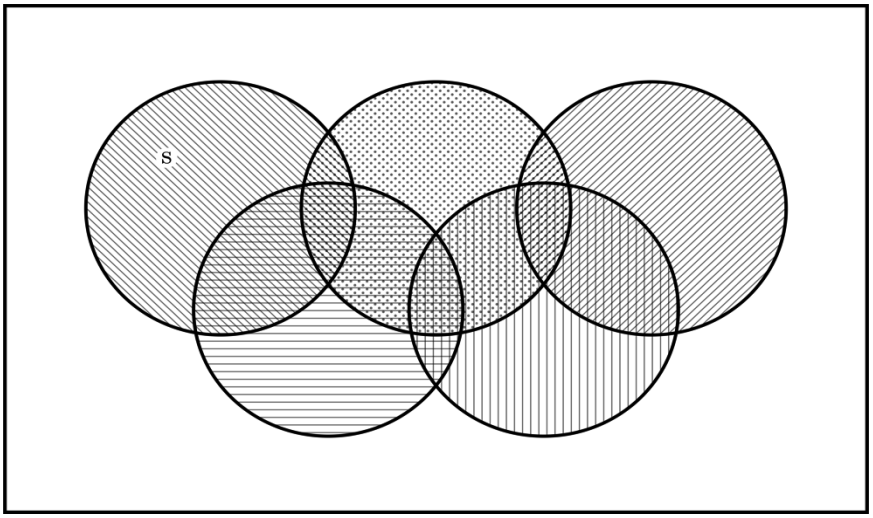

FIGURE 2

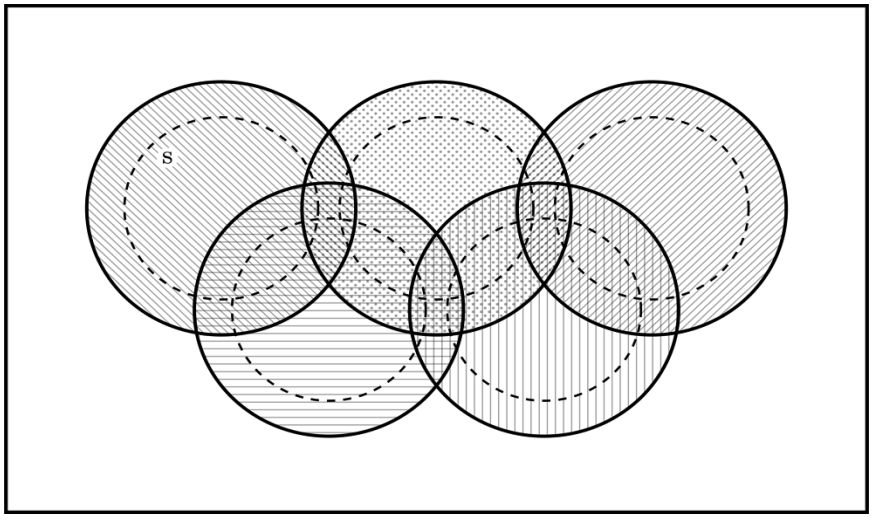

FIGURE 3

The shaded area in Figure 4 depicts the works that would be permitted under the SEMI-MAJORITY RULE if the individuals were to have the preferences shown in Figure 1. No work is considered non-obscene by a majority, and consequently, all works considered non-obscene by at least one person are deemed non-obscene. Note that work *s* is permitted in this case.

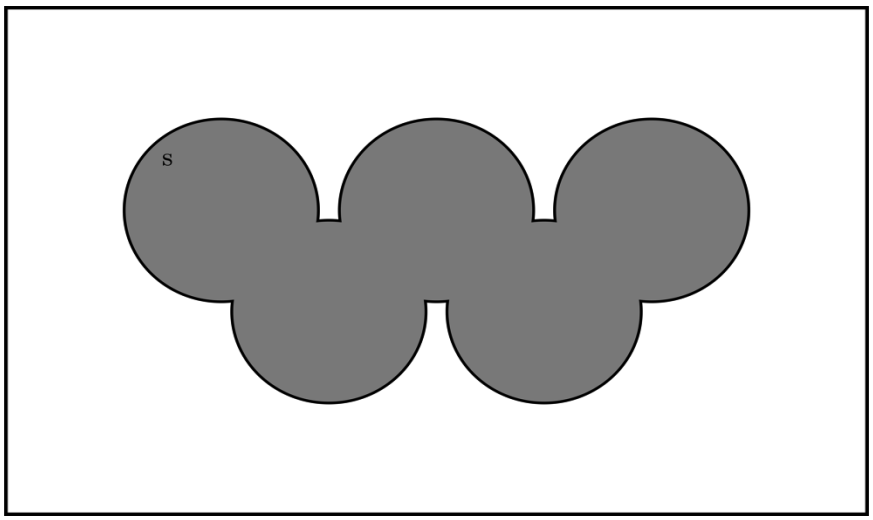

FIGURE 4

The three small, shaded areas in Figure 5 represent the works that would be considered non-obscene under the SEMI-MAJORITY RULE if the individuals were to have the more tolerant preferences shown in Figure 2. Because some works are considered non-obscene by a majority, a work is permitted only when three or more individuals consider it non-obscene. Work *s* is therefore not permitted, even though the individuals have become more tolerant. This shows that the SEMI-MAJORITY RULE violates the *responsiveness* axiom.

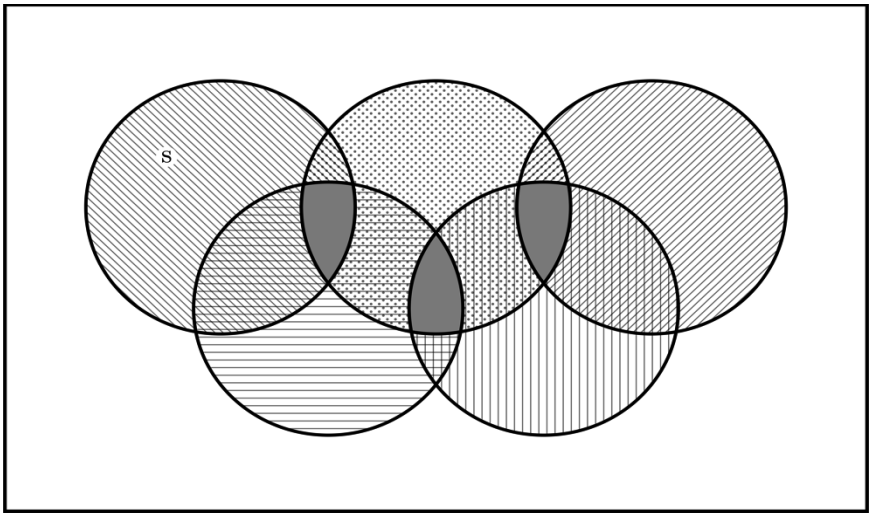

FIGURE 5

It is possible to have a rule that preserves some aspects of majoritarianism, but other problems arise. For example, consider the following rule:

> BIBLE-MAJORITY RULE: A work is not-obscene if and only if a majority considers it to be non-obscene or it is the bible.

The BIBLE-MAJORITY RULE is (mostly) majoritarian and is well-defined. Even if no work is considered non-obscene by a majority, the bible will be judged non-obscene by the community standard. However, it still suffers a serious flaw: it treats the bible differently from all other works. In other words, it violates the *neutrality* axiom.

Alternatively, consider the following rule:

> PRESIDENT-MAJORITY RULE: A work is not-obscene if and only if considered non-obscene either by a majority or by the President of the United States.

The PRESIDENT-MAJORITY RULE is also (mostly) majoritarian and well-defined. It solves the problem differently: by giving the president the right to unilaterally declare a work to be non-obscene, the rule guarantees that some works will be permitted. However, this rule violates *anonymity* as it treats the president differently from all other individuals.

What can we achieve if we move further away from majoritarianism? Consider the following two rules:

> NOT LESS THAN ONE: The community standard deems works to be obscene if they are judged so by every individual unless the resulting group of obscene works would comprise less than one percent of the total, in which case no works are obscene.
>
> ANYTHING GOES: No works are ever deemed obscene.

Under NOT LESS THAN ONE, no works are prohibited as obscene unless a substantial quantity of works is unanimously considered obscene. This rule clearly does not satisfy *homogeneity* because it is possible that every member of the community has an identical standard that deems only a very small proportion of the works to be obscene. There is nothing magical about the one percent threshold; other rules could use any other percentage (such as ten percent, one-tenth of a percent, or ten-millionth of a percent). These rules would still violate *homogeneity,* though they *satisfy responsiveness*, *anonymity*, and *neutrality*).

At the extreme is the case where the threshold is set at one hundred percent; this is the ANYTHING GOES rule, where the works are never deemed obscene, regardless of the individual judgments. This rule also violates *homogeneity* but satisfies the remaining three axioms.

E. The Proof of the Theorem

The rules described above illustrate why the other rules violate the axioms. However, an illustration is insufficient; here, I prove that only the

UNANIMITY RULE can satisfy the four axioms.[96] The proof works according to the following method: I first assume that the aggregation rule satisfies the four axioms and then show that it must be the UNANIMITY RULE. While the proof works for any number of individuals, the figures will depict the case where there are five people.

Under the UNANIMITY RULE, a work is deemed obscene if and only if every individual considers it obscene. I will prove this in two steps. The first step will show that every work that is considered obscene by everyone must be obscene according to the community standard. The second step will show that the community standard must permit every work permitted by at least one person. Because every work is permitted by at least one person or is considered obscene by everyone, this suffices to complete the proof.[97]

A set of individual judgments is illustrated in Figure 6. The shaded areas represent the set of works permitted by each individual. To prove step one, I will show that work *w*, which is considered obscene by all individuals, must be deemed obscene according to the community standard. To prove step two, I will show that work *x*, which is permitted by at least one individual, must be permitted by the community standard.

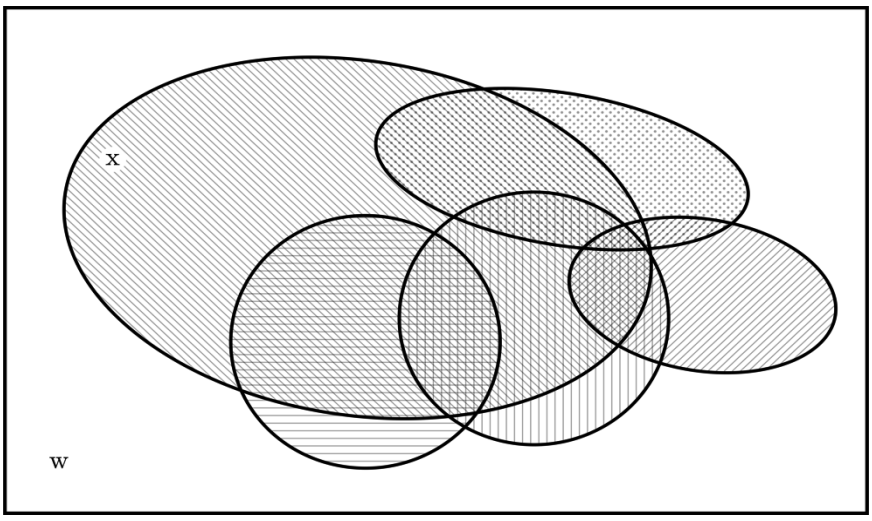

FIGURE 6

96. That UNANIMITY RULE satisfies the four axioms is trivial and is not proven here.

97. Formally, the first step is to show that $\cap_{i \in N} J_i \subseteq f(J)$, and the second step is to show that $f(J) \subseteq \cap_{i \in N} J_i$. Together, these two steps imply that $f(J) = \cap_{i \in N} J_i$, completing the proof.

Step one. A work considered obscene by everyone must be obscene under the community standard.

To prove that every work that is considered obscene by everyone must be obscene according to the community standard, step one supposes that each individual becomes more permissive so that they now (a) permit a work if *anyone* permitted that work before and (b) consider a work obscene if *everyone* considered it obscene before. This change is illustrated in Figure 7. There are two features of particular importance. First, every individual still considers work *w* to be obscene in Figure 7. Second, every individual has the same judgment as to which works are obscene. Consequently, the *homogeneity* axiom requires that work *w* be deemed obscene according to the community standard in Figure 7.

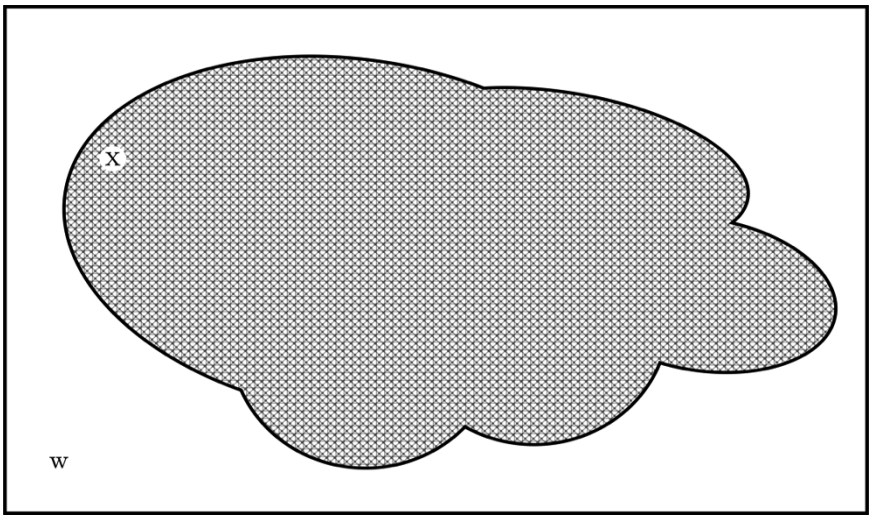

FIGURE 7

Further, because the *responsiveness* axiom requires the community standard to become more permissive when all individuals become more permissive, any work permitted in the less permissive state must be permitted in the more permissive state. Conversely, the *responsiveness* axiom also implies that the community standard must become less permissive when all individuals become less permissive. Therefore, any work considered obscene in the more permissive state must be considered obscene in the less permissive state as well. Because work *w* is considered obscene by the community standard in the more permissive state (Figure 7), it must have been considered obscene by the community standard in the less

permissive state (Figure 6). This completes the proof of step one.[98]

Step two. The community standard must permit every work that is permitted by at least one person.

To prove that the community standard must permit every work that at least one person permits, let us return to the original judgments (depicted in Figure 6) and suppose that the judgments change so that (a) the new judgments are less permissive than the old judgments, (b) no two individuals permit the same work, (c) the set of permissible works is of same size, and (d) one individual still permits work *x*. This is depicted in Figure 8. It is important to note that for any initial set of judgments and for any work that is permitted by at least one person, it is always possible to find a new set of judgments that satisfies these requirements.

In Figure 8, every work is either considered obscene by everyone or permitted by exactly one person. From step one, we know that every work considered obscene by all must be considered obscene according to the community standard. In addition, the judgments are entirely symmetric: the individuals' sets of permissible works do not overlap and are of the same size. Consequently, the *anonymity* and *neutrality* axioms imply that all works considered permissible by one person must be treated the same by the community standard—either all are permitted or all are deemed obscene. However, it cannot be the case that all are deemed obscene because, in that case, *all* works would be deemed obscene, contradicting the requirement that some works be non-obscene. Consequently, in Figure 8, every work permitted by exactly one person (including work *x*) must be permitted by the community standard.

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98. For a formal proof of step one, let $J \in \mathscr{J}^N$, and let $K = (\bigcap_{i \in N} J_i, \ldots, \bigcap_{i \in N} J_i)$. By homogeneity, $f(K) = \bigcap_{i \in N} J_i$. By responsiveness, $K_i \subseteq J_i$ implies that $f(K) \subseteq f(J)$, and therefore that $\bigcap_{i \in N} J_i \subseteq f(J)$, completing the proof.

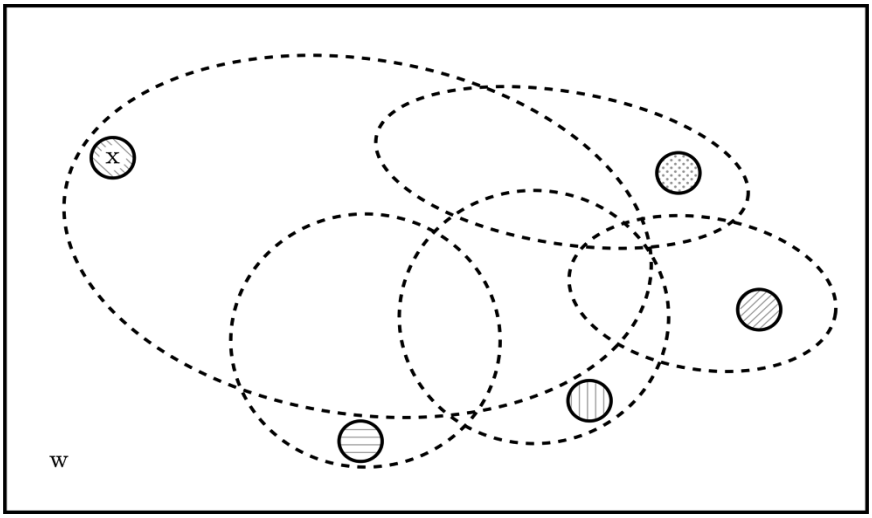

FIGURE 8

Because the original judgments were more permissive than the new judgments, the *responsiveness* axiom implies that the community standard in Figure 6 must have permitted every work permitted by the community standard in Figure 8. Because work *x* was permitted by the community standard in Figure 8, it must have been permitted in Figure 6. This proves the second step and, consequently, the theorem.[99]

IV. CURRENT LAW

The community standards test established in *Roth* has since been superseded by a revised test introduced sixteen years later in *Miller v. California*. The *Miller* test did not arise out of nowhere. The vague *Roth* test was difficult to implement, and attempts were made to revise the standard as early as 1962. Here, I briefly discuss the problems that arose when the Supreme Court attempted to apply the holding of *Roth* in subsequent

99. For a formal proof of step two, let $J \in \mathcal{J}^N$, and let $x \in W \backslash J_1$. Without loss of generality, it is sufficient to show that $x \notin f(J)$. Let $K \in \mathcal{J}^N$ such that (a) $J_i \subseteq K_i$ for all $i \in N$, (b) $x \in W \backslash K_1$, (c) $K_i \cup K_j = W$ for all $i,j \in N$ such that $i \neq j$, and (d) $\mu(K_i) = \mu(K_j)$ for all $i,j \in N$. Because $J_i \subseteq K_i$ for all $i \in N$, it follows that $f(J) \subseteq f(K)$. To complete the proof, I show that $x \notin f(K)$. Suppose by means of contradiction that $x \in f(K)$. Then, by neutrality, $W \backslash K_1 \subseteq f(K)$. By anonymity and neutrality, $W \backslash K_i \subseteq f(K)$ for all $i \in N$. Thus $\cup_{i \in N} (W \backslash K_j) = W \cup (\cap_{i \in N} K_i) \subseteq f(K)$. By step one, $\cap_{i \in N} K_i \subseteq f(K)$. This leads to the contradiction that $W \subseteq f(K)$, which completes the proof of step two.

obscenity cases in the 1960s. I then discuss the test laid out in *Miller*, which remains valid law. I finish by explaining how the theorem laid out and defended in Part II can be applied to the *Miller* test.

A. Obscenity after Roth

In *Manual Enterprises v. Day*,[100] the Court reversed an appellate court's ruling upholding a decision by the postal service to seize magazines on the grounds that (a) they were obscene and (b) they contained advertisements for obscene material. However, the justices could not agree on the grounds for reversing the appellate court's decision. Justices Harlan and Stewart argued that the magazines were not obscene because they lacked "patent offensiveness"—they "cannot be deemed so offensive on their face as to affront current community standards of decency"—and patent offensiveness, they held, is an element of obscenity, although not explicitly mentioned as one in *Roth*.[101] The opinion further argued that the magazines could not be seized because of the advertisements for obscene material without evidence that the publisher knew the advertisers were offering to sell obscene material.[102]

Neither the concurrence nor the dissent in *Manual Enterprises* addressed whether patent offensiveness was an element of obscenity. The concurrence of Justice Brennan, joined by Chief Justice Warren and Justice Douglas, argued that the federal obscenity statute does not permit the post office to seize allegedly obscene material.[103] The lone dissent by Justice Clark claimed only that the material could be seized on the basis of the advertisements.[104]

Problems with the *Roth* standard resurfaced with the appeal of Nino Jacobellis, a manager of a theater near Cleveland, Ohio, of his conviction for possessing and exhibiting the film "Les Amants" ("The Lovers") by French director Louis Malle.[105] A majority of six reversed the conviction, finding the work to be protected. However, the majority agreed on little else: no single opinion was supported by more than two justices. Justice Brennan, writing again for the court but joined only by Justice Goldberg, stated that, for purposes of *Roth*, the relevant community was to be defined nationally:

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100. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).
101. *Id.* at 482.
102. *Id.* at 493.
103. *Id.* at 495.
104. *Id.* at 519.
105. Jacobellis v. Ohio, 378 U.S. 184 (1964).

> "[T]he constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding."[106]

In a separate concurrence, Justice Goldberg stated an independent ground for reversal: that the film could not possibly be obscene by "any arguable standard."[107] Justices Black and Douglas reiterated their belief that the Constitution does not permit censorship of obscene works.[108] Justice Stewart took the opinion that the Constitution allowed only the prohibition of "hard-core pornography." While he did not define that term and admitted that he might "never succeed in intelligibly doing so," he argued that "I know it when I see it, and the motion picture involved in this case is not that."[109] Justice White concurred in the judgment but not in any opinion.[110]

Chief Justice Warren and Justice Clark dissented from the judgment on the grounds that "community standards" are local and not national.[111] Further, in their view, the role of the Court was not to sit as an "ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent *de novo* judgment on the question of obscenity," but rather to apply a "sufficient evidence" standard of review.[112] Justice Harlan dissented on the ground that states should not be prohibited "from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."[113]

The *Roth* test was revisited two years later with the appeal of a Massachusetts judgment declaring obscene *Memoirs of a Woman of Pleasure* (also known as *Fanny Hill*), a novel written by John Cleland in the middle of the eighteenth century.[114] The Supreme Court reversed, holding the book to be protected. However, again, there was no agreement as to the underlying reasons. The plurality opinion of Justice Brennan, joined by Chief Justice Warren and Justice Fortas, held that a work could be forbidden only if "the material is utterly without redeeming social value."[115] Justice

106. *Id.* at 195.
107. *Id.* at 197.
108. *Id.* at 196.
109. *Id.* at 197.
110. *Id.* at 196.
111. *Id.* at 199.
112. *Id.* at 202.
113. *Id.* at 203.
114. Memoirs v. Massachusetts, 383 U.S. 413 (1966).
115. *Id.* at 418. Justice Brennan's opinion in *Roth* had found that obscenity was "utterly without

Stewart concurred with the judgment, reiterating his belief that the Constitution protected everything but hard-core pornography.[116] Justices Black and Douglas also concurred, again, on the grounds that the Constitution does not permit censorship of obscene material.[117] Justices Clark, Harlan, and White each filed separate dissents. Justices Clark and White reiterated their support for the *Roth* test and claimed that the addition of a "no social value" requirement materially changed that test.[118] Justice Clark added further that the book in question was indeed utterly without redeeming social value.[119] Justice Harlan followed his dissent in *Jacobellis*, arguing that states should have wide latitude in regulating obscenity.[120]

To the extent that the views of individual justices changed between the *Roth* and *Memoirs* decisions, they became more permissive. This can be seen most clearly in the case of Justice Brennan, who authored both opinions. Others, such as Justices Black, Douglas, and Stewart, retained the same views throughout the period: the first two maintained that the Constitution permitted no censorship of obscene material, while the third maintained consistently that only hard-core pornography was forbidden.

When the Supreme Court revisited the *Roth* test seven years later in *Miller v. California* (1973), the same trend continued. However, in the intervening period, there were five new justices— four of them nominated by President Nixon. The Court's liberalizing trend ended, and the "utterly without redeeming social value" element of the *Memoirs* test was replaced by a new element that expanded the amount of proscribable material. The *Miller* decision was also the first in which a majority of the court could agree on a definition of obscenity. The standard set forth in *Miller* remains the current test of whether the Constitution protects a work.

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redeeming social importance;" in *Memoirs* he turned that language into a test. Whether this was a reasonable interpretation of his opinion in *Roth* is questionable. While he wrote both opinions, it seems clear that his views on the prohibition of obscenity became more liberal over time. The majority in *Miller*, 413 U.S. 15, 24 (1973), found the *Memoirs* standard to be incorrect. In the aftermath of *Roth*, at least one commentator foresaw the *Memoirs* standard as a natural consequence of the statement that obscenity was worthless: "If the obscene is constitutionally subject to ban because it is worthless, it must follow that the obscene can include only that which is worthless." Kalven, *supra* note 17.

116. Justice Stewart referred to his opinions in Ginzburg v. United States, 383 U.S. 463, at 497 (1966) and Mishkin v. New York, 383 U.S. 502, at 518 (1966), decided the same day.

117. Justice Black referred to his opinions in Ginzburg v. United States, 383 U.S. 463, at 476 (1966) and Mishkin v. New York, 383 U.S. 502, at 515 (1966), decided the same day. For Justice Douglas's opinion see Memoirs at 424.

118. For Justice Clark and Justice White's opinions, see Memoirs at 441 and 460, respectively.

119. *Id.* at 441.

120. *Id.* at 455.

B. The Miller Test

The current test of obscenity, as established in *Miller*, is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[121] A work lacks constitutional protection only if all three elements of the test are met.

The first two elements of the Miller test, (a) that the work appeals to the prurient interest and (b) that the work be patently offensive, are to be evaluated according to community standards.[122] The third element of the test, (c) that the work lacks "serious literary, artistic, political, or scientific value," is to be determined according to the reasonable person standard and not according to community standards.[123] For purposes of the First Amendment, the value of a work does not "vary from community to community based on the degree of local acceptance it has won."[124]

The Miller court held that in determining whether the first two elements of the Miller test have been met, the relevant community may be state or local and need not be the entire country.[125] More recent decisions have held that local community standards may be used to determine obscenity even in prosecutions under federal law, whether involving the use of mail,[126] telephones,[127] or the internet.[128] The Court has been clear that both the states and the federal government are to be given wide latitude in determining the relevant geographical community by which community standards are determined. An individual posting a website in San Francisco with local community information may be subject to federal prosecution in Memphis, Tennessee.

C. Multiple Standards

Until this point, I have assumed that there is a single community standard for obscenity. The U.S. Supreme Court has held that contemporary

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121. *Miller*, 413 U.S. 15 at 24
122. Smith v. United States, 431 U.S. 291 (1977).
123. Pope v. Illinois, 481 U.S. 497, 497–98 (1987).
124. *Id.* at 500.
125. The court has even held that the jury need not be instructed as to the relevant community. Jenkins v. Georgia, 418 U.S. 153, 157 (1977).
126. Hamlin v. United States, 418 U.S. 87 (1974).
127. Sable Commc'ns of California v. FCC, 492 U.S. 115 (1989).
128. Am. C.L. Union v. Ashcroft, 535 U.S. 564 (2002).

community standards are to be used in evaluating two of the three elements of the *Miller* test: (a) whether the work appeals to the prurient interest and (b) whether the work is patently offensive. This implies that there are at least three types of judgments individuals can make: (1) which works appeal to the prurient interest, (2) which works are patently offensive, and (3) which works both appeal to the prurient interest and are patently offensive. The first two types of judgments are not logically related. As a matter of law, a work may appeal to the prurient interest but not be patently offensive. Alternatively, a work may be patently offensive but not appeal to the prurient interest. If one judgment implied the other, there would be no need for both elements to appear in the *Miller* test. Each of the first two types of judgments, however, is clearly related to the third. If a work both appeals to the prurient interest and is patently offensive, it also appeals to the prurient interest.

If there is a single community standard for obscenity, as assumed in this paper, the judgments aggregated are of the third type. We might label the resulting standard the "prurient interest and patently offensive" community standard. However, one could infer from the Supreme Court opinions that there are two community standards: (a) the "prurient interest" community standard and (b) the "patently offensive" community standard.

A model of two community standards would take the following form. Individuals would make two separate judgments about which works (1) appeal to the prurient interest and (2) are patently offensive. The judgments would then be aggregated to form (a) the "prurient interest" community standard and (b) the "patently offensive" community standard. These two community standards need not be aggregated independently—it is conceivable, for example, that the individual judgments about which works are patently offensive are somehow relevant in determining the "prurient interest" community standard.

The main result of this paper would not change if we allowed for two (or more) standards. Even if we allow for interdependent aggregation, the UNANIMITY RULE is the unique aggregation rule that satisfies the four axioms.[129]

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129. In the present example, I have assumed that there are two community standards; however, this result would be true were we to simultaneously aggregate three, thirty, or any number of standards. To show that this claim is true, a few changes need to be made to the model. First, we must redefine the set of judgments so that $\mathscr{J} \equiv \{J \in \Sigma : \mu(J) < \mu(W)\}^M$, where M is an at most countable set of standards. In the example defined in the text, M={"prurient interest", "patently offensive"}. For a profile of judgments $J \in \mathscr{J}^N$, J_{ik} represents agent i's judgment with respect to standard k. Next, because judgments (elements of $\mathscr{J}$) are now vectors instead of sets, we must redefine some of the binary relations and operators so that they make sense in this environment. In particular, I define set inclusion ($\subseteq$), union ($\cup$), intersection ($\cap$), and the automorphism (φ) to apply coordinatewise, so that, for judgments $J_i, K_i \in \mathscr{J}$, $J_i \subseteq K_i$ if $J_{i\ell} \subseteq K_{i\ell}$

D. General Discussion

1. Should some works always be obscene?

In the model described in this paper, individuals and the community may not judge all works to be obscene. Rather, the proportion of works judged to be obscene must be strictly less than one hundred percent. If we are dedicated to the notion of free speech, it makes little sense to have a standard of obscenity under which all possible forms of expression would be forbidden.

However, this assumption overlooks the reality that some works may be non-obscene as a matter of law. These works might not depict sexual conduct as defined by the applicable state statute. They might have serious literary, artistic, political, or scientific value. Or they might be non-obscene as a matter of constitutional law.[130]

This provides a guarantee that only those works that depict sexual conduct, as defined by statute, and which lack serious literary, artistic, political, or scientific value and are not so clearly tame that no community could find them obscene will be banned. Many books, movies, and pictures will be permitted regardless of what people think. One might argue that it is not a problem if everything in this set were to be banned, but this intuition is disconcerting for several reasons.

First, it is not clear that "community standards" refer only to standards over the set of works that are not constitutionally non-obscene. The community standards are defined over all works, and the beliefs of individuals about all works may be relevant in determining the community standard. A more sensible interpretation is that these legal restrictions are there as "checks" on the community standards to make sure that the standards are, in fact, being applied.

Second, to call something "obscene" is, in some sense, to make a strong statement about it. An obscene work is one that is extremely repugnant, much worse than the average. It is possible that according to an individual perception, many works, or even most works, are worse than the average. But the definition of "average" precludes the possibility that all works can

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for all $\ell \in M$, $\cup_{i\in N} J_i \equiv (\cup_{i\in N} J_{i1}, \cup_{i\in N} J_{i2}, \ldots)$, $\cap_{i\in N} J_i \equiv (\cap_{i\in N} J_{i1}, \cap_{i\in N} J_{i2}, \ldots)$, and $\varphi(J_i) \equiv (\varphi(J_{i1}), \varphi(J_{i2}), \ldots)$. Then, a few changes must be made to the second step of the proof. The element x must be moved into a specific standard, so in the first sentence, "$x \in W \backslash J_1$" must be changed to "$x \in W \backslash J_{11}$", and in the second sentence, "$x \notin f(J)$" must be changed to "$x \notin f_1(J)$". The third sentence must also be changed to "Let $K \in \mathcal{J}^N$ such that (a) $J_i \subseteq K_i$ for all $i \in N$, (b) $x \in W \backslash K_{11}$, (c) $K_{ik} \cup K_{j\ell} = W$ for all $i,j \in N$ and $k,\ell \in M$ such that $(i,k) \neq (j,\ell)$, and (d) $\mu(K_{i\ell}) = \mu(K_{j\ell})$ for all $i,j \in N$." The remaining changes are trivial and can be completed by the reader.

130. *E.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974).

be worse than average.

2. Is there an alternate justification for obscenity laws?

Above, I have claimed that the primary justification for obscenity law is that it violates a community standard and not that it causes some detectible harm. In the famed Hart-Devlin debate, for example, Lord Devlin justified the regulation of immorality on the grounds that it violated community standards.[131] However, some may argue that Chief Justice Burger set forth an alternate view in his decision in *Paris Adult Theatre I v. Slaton*, released concurrently with *Miller v. California*.[132] Chief Justice Burger wrote:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.[133]

The lack of evidence that obscenity caused these harms did not cause a constitutional problem. Rather, he wrote, "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."[134] Burger likened laws prohibiting obscenity to "blue sky laws," state securities statutes that limit the commercial speech of firms engaging in the sale of securities.

By this rationale, one might prohibit all forms of speech if the legislature's action had a rational basis. Yet, the courts have not gone this far. Burger's argument was predicated on the assumption that the Constitution does not protect obscenity; it addressed another concern, in particular, that the prohibition of the display of obscene movies to consenting adults violated privacy rights, even though the movies themselves were not protected by the freedoms of speech and of the press. A rational basis argument, by itself, cannot constitutionally define the boundaries of the First Amendment.

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131. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).
132. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
133. *Id.* at 63.
134. *Id.*

3. What are the implications of the theory?

The central claim of this paper is that if (a) community standards are an aggregate of individual standards and (b) the aggregation method satisfies *homogeneity*, *responsiveness*, *anonymity*, and *neutrality*, then the community standards must be aggregated through the UNANIMITY RULE; meaning a community can only ban an obscene work when every member of the community considers the work in question to be obscene. If the defendant in an obscenity case is a member of the community, then it would follow that the defendant should be acquitted unless the defendant also considers the work obscene.

In short, the law can choose one of three paths. First, the law can use the UNANIMITY RULE. Second, the law can use a rule that violates *homogeneity*, *responsiveness*, *anonymity*, or *neutrality*. Third, the law can stop basing the legal rule on the judgments of individuals in the community.

Using the UNANIMITY RULE seems slightly crazy. If the relevant community consists of all individuals (or adults) within the relevant geographical region, as indicated by jury instructions approved by the Supreme Court, the use of the UNANIMITY RULE would make obscenity laws almost entirely meaningless. Defendants who live in the community would (almost) never be liable. The defendant would be liable when everyone, including the defendant, believes the work in question to be obscene.[135] Of course, a defendant could be prosecuted if he is not a member of the community in which the prosecution is brought. In theory, outsiders could be prosecuted successfully in a conservative region if every person in that region believed the work to be obscene.[136] As a practical matter, however, it seems unlikely that the UNANIMITY RULE would allow for many prosecutions, even in conservative states such as Utah.

If, despite this, we decide to press forward with the UNANIMITY RULE, and if the relevant community consists of all reasonable individuals within the relevant geographical region, then the UNANIMITY RULE could be implemented through jury instruction. Jurors would be instructed to find a work obscene only if every reasonable person in the community would consider it obscene. However, for this rule to be meaningful, whether a person is deemed 'reasonable' must not depend on that person's

135. It would be very difficult to obtain a conviction in this case as: (a) the defendant would probably claim that the work was non-obscene, whatever his true belief, and (b) probably could not be compelled to reveal his true belief under the self-incrimination clause of the Fifth Amendment.

136. This is not entirely an unthinkable scenario: the Supreme Court has, in principle, allowed for prosecutions for internet obscenity in any community where the work is viewable. *See* ACLU v. Ashcroft, *supra* note 128.

judgment.[137]

The UNANIMITY RULE, then, allows for a very limited definition of obscenity. In the present era, it is hard to imagine material that would be considered obscene by every reasonable person in even the most puritan of communities in the United States.[138] It seems unlikely that the Supreme Court would accept the claim that the UNANIMITY RULE would be the constitutionally required method for aggregating individual standards or that jurors actually use the UNANIMITY RULE when returning guilty verdicts.[139]

If we do not use the UNANIMITY RULE, we have a large menu of options. The law could allow the threshold for determining obscenity to vary in a manner that guarantees that something is always non-obscene. However, such a rule would violate the *responsiveness* axiom. Alternatively, the law could accord special weight to the views of parents or some other community of interest, violating the *anonymity* axiom. Or perhaps the court could abandon the requirement that works be judged as a whole and use a rule that takes into account the number of four-letter words in a work; such a rule, however, would violate the *neutrality* axiom. In one setting or another, each of these has unappealing features. We would have to learn to live with the normative defects of any given rule. It is unclear which method the Supreme Court would endorse or which method jurors might use to convict. It is clear, however, that every one of these methods must violate one or more of the four axioms: *homogeneity*, *responsiveness*, *anonymity*, and *neutrality*.

Last, the law could cut the connection between the judgments of individuals in the community and the applicable legal standard. It could, for example, follow Canada in replacing the community standards test with a harm-based approach such as that endorsed in feminist scholarship.[140] There is nothing, per se, wrong with such an approach. It would, however, represent a total sea change in the approach of the Supreme Court.

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137. If whether a judgment is 'reasonable' depends on the judgments of other individuals, then the definition is circular.

138. Perhaps in the mid-Victorian era, and possibly even in Lord Devlin's time, a jurist could perhaps have viewed individual standards differently.

139. In his dissent in ACLU v. Ashcroft, Justice Stevens wrote that by "aggregating values at the community level, the *Miller* test eliminated the outliers at both ends of the spectrum and provided some predictability as to what constitutes obscene speech." ACLU v. Ashcroft, 535 U.S. 564 (2002).

140. *Supra* note 11.

V. CONCLUSION

This Article introduces a model of community standards. If community standards are derived from individual standards in a manner that (a) preserves unanimous agreements about the standards, (b) moves in the direction (more permissive or less) of the community, and (c) does not discriminate between individuals or works, then the community standard must be consistent with the UNANIMITY RULE. A work is obscene only when every single member of the community considers it obscene.

The analysis ignores considerations of imperfect information and computational complexity. In doing so, it makes an unrealistic assumption of omniscience on the part of the court. This is a feature, and not a flaw, of the model. A judge or juror who cannot coherently define a community standard, even with omniscience, certainly can not define it without.

This analysis indicates that the concept of community standards is deeply problematic. Every aggregation method other than the UNANIMITY RULE violates one of the properties above. Further, the UNANIMITY RULE is unworkable as a legal test. The properties are, of course, normative — they can be shown to be correct neither through logical proof nor through empirical evidence. But each axiom has a strong normative appeal.

For most of a century, courts have used the language of contemporary community standards to suppress ideas as obscene. It seems strange that, at this time, they have never provided an explanation of the term. These results explain why. They cannot be defined. Community Standards do not exist.