

# OBSCEINITY PROSECUTIONS IN CYBERSPACE: THE MILLER TEST CANNOT “GO WHERE NO [PORN] HAS GONE BEFORE”<sup>1</sup>

Laws and institutions must go hand in hand with the progress of the human mind. . . . As new discoveries are made . . . institutions must advance also, and keep pace with the times.<sup>2</sup>

—Thomas Jefferson

Any test that turns on what is offensive to the community’s standard is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment.<sup>3</sup>

—Justice William O. Douglas

## I. INTRODUCTION

Over the past fifty years, humankind, its functions and processes, have undergone a technological revolution based largely on the evolution of a workhorse known as the computer. Computers, perhaps unlike any invention since the wheel, have altered the manner and means of interaction among people.<sup>4</sup> Computer technology has irreversibly impacted the conduct

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1. Adaptation of introductory remarks from the television series, *Star Trek: The Next Generation* (Fox television broadcast).

2. 2 THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 726 (John P. Foley ed., 1967).

3. *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting). Justice Douglas further articulated:

Under that test [using community standards], juries can censor, suppress, and punish *what they don’t like*, provided the matter relates to “sexual impurity” or has a tendency to “excite lustful thoughts.” This is community censorship in one of its worst forms . . . The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.

*Id.* at 512-14 (emphasis added).

4. For a discussion of these changes, see *National Communications Infrastructure: Hearings on H.R. 3626 and H.R. 3636 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 182-86 (1994) (statement of Reed E. Hundt, Chairman, Federal Communications Commission). Kapur and Barlow probably best capture the significance of this new medium to humanity:

[Cyberspace] is familiar to most people as the “place” in which a long-distance telephone conversation takes place. But it is also the repository for all digital or electronically transferred information, and, as such, it is the venue for most of what is now commerce, industry, and broad-scale human interaction. . . .

Whatever it is eventually called, it is the homeland of the Information Age, the place where the future is destined to dwell.

Mitchell Kapur & John P. Barlow, *Across the Electronic Frontier*, July 10, 1990, available over

of business<sup>5</sup> and exponentially improved human communication.<sup>6</sup> All of this and much more derive directly from the proliferation of "computer information systems"<sup>7</sup> that collectively make up the realm of digital data known as "Cyberspace."<sup>8</sup>

Problematically, neither legislatures, the judiciary, nor the bar has

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INTERNET, by anonymous FTP, at FTP.EFF.ORG (Electronic Frontier Foundation).

5. The computer, software, and telecommunications industries will increasingly drive economic growth and place the United States in a leading role in the global economy. Michael J. Mandel, *The Digital Juggernaut*, BUS. WK., June 6, 1994, at 22, 23. To date, most consumer experience on the computer has been limited to stand-alone personal computers used as part of a closed system, or noncommercial use of the Internet. In the future, the information superhighway will be used for commercial and business transactions. See generally Saul Hansell, *Banks Going Interactive to Fend Off New Rivals*, N.Y. TIMES, Oct. 19, 1994, at D1; Kevin Goldman, *McDonald's to Post Golden Arches Along the Information Superhighway*, WALL ST. J., July 21, 1994, at B7; Edmund L. Andrews, *MCI to Offer One-Stop Shopping on the Internet*, N.Y. TIMES, Nov. 21, 1994, at D2; Paul Farhi & Elizabeth Corcoran, *Interactive in Orlando; Data Highway' Gets a Consumer Acid Test*, WASH. POST, Dec. 13, 1994, at A1; Sandra Sugawara & John Mintz, *Racing to Build a Wireless World; Companies, Individuals Invest Millions to Launch Satellite Phone Systems*, WASH. POST, Mar. 25, 1994, at B1.

6. Electronic mail is just one example of the dramatic increases in both the usage and efficiency of the electronic superhighway. See Note, *Addressing the New Hazards of the High Technology Workplace*, 104 HARV. L. REV. 1898, 1909-13 (1991). Recent estimates speculate that more than 20 million Americans use electronic mail regularly. See *Electronic Mail Raises Issues About Privacy, Experts Say*, DAILY LAB. REP., Nov. 17, 1992, at A7; Amy Kuebelbeck, *Getting the Message: E-mail Is Fast and Efficient. But It Isn't Always Private—and That Can Mean Big Trouble for Users*, L.A. TIMES, Sept. 4, 1991, at E1.

7. "Computer information systems," as the term is used in this paper, refers to a multitude of computer services, including bulletin board systems, electronic databases, file servers, networks, and the like. See David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 82-86 (1993).

"[M]any of the first computer bulletin boards were small, not-for-profit operations that functioned as online meeting places for those that shared interests in particular aspects of microcomputer culture. However, the 1980s also saw the emergence of larger, commercial electronic information services such as Comuserve and Prodigy." Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1189-90 (1993) (citation omitted). One source reports that approximately 45,000 public access computer information systems were in operation in 1992. William Grimes, *Computer as a Cultural Tool: Chatter Mounts on Every Topic*, N.Y. TIMES, Dec. 1, 1992, at C13. The source also indicates that there are more than four million subscribers to these commercial operators. *Id.*

8. Loundy, *supra* note 7, at 81. The "shores and rivers [of Cyberspace] are the computer memories and telephone networks that connect computers all over the world. Cyberspace is a hidden universe behind the automatic teller machines, telephones, and WESTLAW terminals which many of us take for granted." *Id.* The word "cyberspace" was coined by science fiction writer William Gibson. See Michael Benedikt, *Introduction to Cyberspace*, in FIRST STEPS 1 (Michael Benedikt ed., 1991). In Gibson's novels of society in the near future, "cyberspace is a postindustrial work environment predicated on a new hardwired communications interface that provides a direct and total sensorial access to a parallel world of potential work spaces." David Tomas, *Old Rituals for New Space: Rights de Passage and William Gibson's Cultural Model of Cyberspace*, in FIRST STEPS, *supra*, at 31, 35.

developed an understanding of Cyberspace sufficient to meet its dramatic evolution and expansion. While at least two courts<sup>9</sup> and Congress<sup>10</sup> have addressed the interaction of the law with computer information systems and transactions in Cyberspace, the law is hardly settled. This dearth of legal guidelines raises particular concerns over the relationship between Cyberspace and the First Amendment.<sup>11</sup>

In addressing itself to new media, the Supreme Court typically concludes that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."<sup>12</sup> However, this guidance

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9. *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996); *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995).

10. Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133, is entitled the Communications Decency Act of 1996 ["CDA"] and is aimed at regulating indecency and obscenity on the Internet. The CDA is reproduced at Appendix B *infra*. The Act bans all expression that is "indecent" or "patently offensive" from all online systems that are accessible to minors. This prohibition seems to go beyond regulating speech that is "obscene" and potentially interferes with otherwise protected expression. For an excellent discussion of the implications of the Telecommunications Act of 1996 generally, see Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415 (1996).

11. The First Amendment prohibits Congress from "mak[ing any] law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I, cl.2. Notwithstanding this apparently sweeping prohibition, in fact, lawmakers at every level have "made" a variety of laws that restrict the freedoms of speech and press, laws that courts have repeatedly upheld as reasonable restrictions on seemingly absolute freedoms. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (government regulation is justifiable if it furthers important government interests unrelated to the content of the expression and if the restriction is no greater than necessary to further the interest). Nevertheless, any government constraint on the content of otherwise constitutionally protected speech is generally subject to strict constitutional scrutiny. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 207 (1992) ("distinguishing among types of speech requires . . . strict scrutiny."); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[t]he government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). In other words, the courts require that the regulatory scheme be very narrowly tailored to serve a compelling state interest. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (the state must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983))). While the "strict scrutiny" standard is the prevailing analytic model in the Court's First Amendment jurisprudence, restrictions directed toward electronic communications media are generally subject to a less stringent standard. See *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994) ("the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the government to place limited content restraints, and impose certain affirmative obligations").

12. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). The Court has repeatedly used analogies to other protected media in order to define the levels of protection provided under the First Amendment applicable to them. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994) (cable entitled to intermediate scrutiny because it does not suffer from same physical limitations as broadcasting); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (radio broadcasting entitled

is rather limited, because Cyberspace has at least six viable legal analogues, each with its own particular First Amendment considerations.<sup>13</sup> Although analogy may work well where neat categories exist and varying levels of protection are easily discernable, in Cyberspace, systems are often used for various purposes simultaneously.<sup>14</sup> This mixed-media/mixed-purpose effect creates particular difficulties in assessing the proper level of First Amendment protection to which electronically transmitted material is entitled.<sup>15</sup>

The indeterminacy of the First Amendment's application to Cyberspace is troubling to those who routinely travel along the "information superhighway."<sup>16</sup> In particular, computer information system operators ("sysops") who sell sexually explicit digital files over common phone lines<sup>17</sup> are battling officials attempting to prosecute them under federal statutes that

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only to rational basis scrutiny because of unique pervasiveness and spectrum scarcity).

13. These include the press, republisher/disseminator, common carrier, traditional mail, traditional bulletin board, and broadcaster. See Loundy, *supra* note 7, at 134-52 (analyzing the various legal analogies that identify the function of computer information systems and the attendant liability issues).

14. For example, the standard consumer America Online account enables a user to simultaneously download files, compose, read, or send electronic mail, and chat with contemporaneous users.

15. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062-63 (1994). This Note argues against

the temptation to analogize new electronic media to existing technologies. . . . Technological characteristics, however, should not be the crucial factor in determining the protection a message receives under the First Amendment. A political editorial is still a political editorial whether it is printed in a newspaper, broadcast as teletext on a television screen, downloaded from a computer network, or faxed over a phone line.

*Id.* However, the problem of applying the First Amendment to computer media is exacerbated insofar as

[n]ewspapers, television programs, movies, phone calls, computer data, commercial services such as banking and shopping, and a host of other forms of information and communication all will be reduced to the same format—digital bits—and all will be sent along the same medium—fiber optic cables. What once were separate fixtures in our households—television, telephone, and computer—will converge, in function if not in form.

*Id.*

16. "Information superhighway" is a term initially popularized by then-Senator Albert Gore. See Albert Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990, at B3.

17. A recent study conducted by Carnegie Mellon University suggests that over 83 percent of the pictures on Usenet groups that stored digitized images were pornographic. Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in over 2,000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1867 (1995). While the study suggests a pervasive presence of sexually explicit materials in cyberspace, such materials appear to be clearly marked for those users who want to access them and for those who want to avoid them. Anne Wells Branscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society*, 83 GEO. L.J. 1935, 1956-57 (1995).

prohibit the interstate transportation of obscene materials.<sup>18</sup>

Because federal statutes do not define "obscenity," courts must apply the obscenity test set forth by the Supreme Court in *Miller v. California*.<sup>19</sup> *Miller* defines obscenity by looking to local "community standards."<sup>20</sup> This vague standard for defining obscenity encourages selective and arbitrary prosecution under federal obscenity statutes.<sup>21</sup>

In one recent case, *United States v. Thomas*,<sup>22</sup> the Justice Department prosecuted a Milpitas, California couple, Robert and Carleen Thomas, for violating federal prohibitions against the interstate transportation of obscene materials.<sup>23</sup> The case was tried not in California, but in the jurisdiction where the information was received, Tennessee. Applying the "community standards" analysis set forth in *Miller*, the government successfully obtained a jury verdict against the Thomases.<sup>24</sup> Robert and Carleen Thomas were sentenced to thirty-seven and thirty months imprisonment respectively, and their computer information system was forfeited to the government.<sup>25</sup>

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18. See 18 U.S.C. §§ 1461, 1462, 1465, 1466 (1994), reprinted in Appendix A *infra*. In the past year, prosecutors have gone after computer bulletin boards in an attempt to enforce obscenity statutes against computer graphics ("GIFs") that people download into their computers. For accounts of some highly publicized obscenity prosecutions, see *Cyberporn Challenge in South; Moral Stop Sign Sought by U.S. on Info Highway*, CHI. TRIB., July 21, 1994, at N4; Naaman Nickell, *Obscenity Convictions Raise Fears on Bulletin Boards*, ARIZ. REPUBLIC, Aug. 8, 1994, at E3.

19. 413 U.S. 15 (1973).

20. *Id.* at 24. The Court laid out a three-prong test for juries to use in assessing whether the material in question is obscene and thus, beyond the protection of the First Amendment. The analysis is as follows:

- (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 and proscribed by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* If the jury is satisfied that each prong of the analysis is satisfied, then the material in question is not constitutionally protected speech. *Id.* at 24-26.

21. See generally Patrick Ingram, Note, *Censorship by Multiple Prosecution: "annihilation, by attrition if not conviction,"* 77 IOWA L. REV. 269 (1991).

22. No. CR-94-20019-G (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996).

23. *Id.* Specifically, a federal grand jury returned a twelve-count indictment charging the Thomases with one count of conspiracy to violate federal obscenity laws (18 U.S.C. § 371), six counts of using a facility of interstate commerce to transmit obscene materials (18 U.S.C. § 1465), three counts of shipping obscene materials (18 U.S.C. § 1462), one count of transporting child pornography (18 U.S.C. § 2252(a)(1)), and one count of criminal forfeiture (18 U.S.C. § 1467). 74 F.3d at 705-06.

24. *Thomas*, 74 F.3d 701, 706. See also John McChesney, *Couple Found Guilty of Selling Pornography on Internet* (ALL THINGS CONSIDERED, NAT'L PUBLIC RADIO), July 29, 1994 (Trans. II 1558-4), available in LEXIS, News Library, NPR File.

25. 74 F.3d 701, 706.

The *Thomas* case represents the convergence of the major issues which this Note seeks to address, namely whether the *Miller* "community standards" analysis, with its consequential wide prosecutorial latitude as to venue, can be constitutionally applied to an "electronic community now global."<sup>26</sup> Part II of this Note presents the history of the confrontation between obscenity and the law. Part III discusses the constitutional problems inherent in the *Miller* analysis, paying particular attention to the issues concerning electronic communication media. Part IV posits three approaches to the constitutional regulation of obscene material that are workable in the Cyberspace context. These are: (1) First Amendment protection of all obscene matter exchanged between consenting adults, provided the matter does not depict explicit harm or involve minors; (2) a model statute that regulates the transmission of obscene images in Cyberspace and, where prosecution is warranted, places venue at the point of transmission; and (3) a modification of the *Miller* test's obscenity standard that limits the geographic bounds of community to the point of transmission.

## II. A SORDID PAST

### A. *Preserving Social Order and Morality, i.e., Community Standards*

Throughout history, government, whether temporal or ecclesiastical, has consistently attempted to regulate public access to those materials considered *obscene*.<sup>27</sup> Most of these regulatory schemes have been directed toward preserving morality and social order by controlling the literature and art available for public consumption.<sup>28</sup> Although modern

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26. David Plotnikoff, *Putting Couple on Trial Constitutes Real Obscenity*, PHOENIX GAZETTE, Aug. 29, 1994, at C6.

27. "Obscene" refers to those things which are "disgusting to the senses[,] abhorrent to morality or virtue[, or] designed to incite to lust or depravity." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 815 (1983). Except as interpreted by law, the term does not necessarily have sexual connotations. "Pornography," on the other hand, is limited to "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement." *Id.* at 916. Professor Schauer articulates the overlap and differences of obscenity and pornography: "Definitionally, obscenity may or may not be pornographic, and pornography may or may not be obscene." FREDERICK SCHAUER, *THE LAW OF OBSCENITY* 1 n.1 (1976).

28. Contrary to modern notions of obscenity regulation, legal schemes from ancient Greece and Rome tolerated the publication of sexually explicit literature through the 17th century because literature and art were primarily available to the most elite classes of the population. SCHAUER, *supra* note 27, at 1. Works such as those of Aristophanes, Juvenal, Malory's *Morte d'Arthur*, and Chaucer's *Canterbury Tales* clearly demonstrate that works considered obscene by contemporary norms were

obscenity regulation is almost exclusively concerned with sexually explicit literature and films, its predecessors virtually ignored sexually explicit material and, instead, focused on works believed to be politically or religiously heretical.<sup>29</sup> The government's focus on political and religious heresy remained constant for nearly two hundred years.<sup>30</sup>

A transition in the legal definition of obscenity began in the first half of the eighteenth century. In 1727, a London publisher was tried for and convicted of obscene libel for publishing *Venus in the Cloister, or the Nun in Her Smock*, a novel about lesbianism in a convent.<sup>31</sup> Despite this precedent, obscenity prosecutions predicated on sexual literature remained uncommon in England<sup>32</sup> and the United States until several pieces of legislation aimed at sexually immoral material were passed in the middle of the nineteenth century.<sup>33</sup> The passage of regulation in both England and

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nevertheless tolerated by both the government and the church. *Id.* at 1-3.

29. After the printing press was invented in 1428, an ever-increasing percentage of the populace gained access to written works. SCHAUER, *supra* note 27, at 2. Consequently, the Church escalated its efforts to regulate access to works deemed blasphemous and heretical. *Id.* at 2-3. Pope Paul IV responded by issuing the infamous *Index Librorum Prohibitorum*, literally the "index of prohibited books." *Id.* at 3. This first "banned books list" held almost unquestioned legal sway until the Reformation. *Id.*

In England, the systematic regulation of literature and art began during the reign of Henry VIII, who delegated the regulation of written works to the infamous Court of Star Chamber. *Id.* The court strictly censored books and theater through a rigorous licensing regime. *Id.* The church was at the heart of the regulatory scheme: No book or play could be published or performed without the prior approval of either the Archbishop of Canterbury or of York or his designated censor. *Id.* Religion was the primary concern, and works that were "merely bawdy, without offending the church or the state, [were] tolerated." *Id.* (citation omitted).

30. *Id.* at 4-6.

31. *Dominus Rex v. Curl*, 2 Str. 789, 93 Eng. Rep. 849 (1727). Although the author's conviction possessed some of the religious and political overtones that were typical of obscenity prosecutions, the case is historically significant because it represents the origin of obscene libel as a common law crime. SCHAUER, *supra* note 27, at 6.

32. After *Curl*, there were few significant prosecutions for obscene libel during the eighteenth century. SCHAUER, *supra* note 27, at 6. In *The King v. John Wilkes*, 2 K.B. 151, 95 Eng. Rep. 737 (1764), the defendant was convicted for publishing a racy work entitled *Essay on Woman*. Although the common law crime of obscene libel gradually matured throughout the eighteenth century, no one considered sexually explicit literature a great threat to public decency. SCHAUER, *supra* note 27, at 6. This is shown particularly by the fact that John Cleland's *Memoirs of a Woman of Pleasure (Fanny Hill)* was not censored or prosecuted when it was published in 1748. *Id.* at 6. Even so, Cleland's book was the subject of one of the seminal obscenity prosecutions of the twentieth century. *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (concluding that "a book cannot be proscribed unless it is found to be utterly without redeeming social value").

33. In England, the Vagrancy Act of 1824 criminalized the publication of any indecent picture, and Lord Campbell's Act of 1857 empowered law enforcement officials to order the destruction of any obscene material. SCHAUER, *supra* note 27, at 6-7. In the United States, several states criminalized the

the United States set the stage for one of the most interesting doctrinal evolutions in legal history.

In formulating the earliest tests for obscenity, courts in both England and the United States focused on preserving social order and morality and took many different community standards into account.<sup>34</sup> In *Regina v. Hicklin*,<sup>35</sup> Justice Cockburn, an English jurist, proffered the first judicial test for obscenity.<sup>36</sup> Under Cockburn's definition, obscene material was that which had a tendency to deprave and corrupt particularly susceptible individuals who might gain access to the material.<sup>37</sup>

Approximately fifty years later, in *United States v. Kennerley*,<sup>38</sup> Judge Learned Hand recognized that the static, Victorian moral standard embodied in the *Hicklin* test was unworkable.<sup>39</sup> Consequently, he held that the only reasonable way to regulate obscene materials was to refer to dynamic community standards that paralleled the progress of time.<sup>40</sup> Judge Hand further modified the *Hicklin* test by shifting its focus from the most easily corruptible persons in society to those of average conscience.<sup>41</sup>

In 1957, the United States Supreme Court began a thirty-year inquiry<sup>42</sup> to solve what Justice Harlan later called "the intractable obscenity

publication and distribution of obscene materials. *See, e.g.*, 1830 Conn. Pub. Acts §§ 82-84; ACTS AND LAWS OF THE PROVINCE OF THE MASSACHUSETTS BAY 275, 278 (1711); 1821 Vt. Laws ch. 1, § 23. *See also* Roth v. United States, 354 U.S. 476, 483 (1957) (cataloguing early obscenity laws in the United States).

34. *See generally* United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913) (holding that a work's effects on a *person* of average conscience should determine its obscenity); *Regina v. Hicklin*, 3 L.R. 360 (Q.B. 1868) (concluding that a work's tendency to "deprave and corrupt" the *public* mind is determinative of its obscenity).

35. 3 L.R. 360 (Q.B. 1868).

36. *Id.* at 371.

37. *Id.* Justice Cockburn indicated that the judgment of obscenity could be based on the content of certain passages rather than the work as a whole. *Id.* He articulated that "the test for obscenity is this, 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 may fall." *Id.*

38. 209 F. 119 (S.D.N.Y. 1913).

39. *Id.* at 120-21.

40. *Id.* at 121.

41. *Id.* Judge Hand further articulated that to blindly continue following the *Hicklin* test would reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few. . . . 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.

*Id.* *See also* Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding that it is impermissible to so regulate speech as to reduce that available to the adult population to "only what is fit for children").

42. *See* Roth v. United States, 354 U.S. 476 (1957).



problem."<sup>43</sup> In *Roth v. United States*,<sup>44</sup> the Court made its first and most important proclamation concerning obscenity, holding that the First Amendment does not protect obscene expression.<sup>45</sup> The Court concluded that the minimal social value that obscene expression possesses must bow to society's interest in preserving social order and morality.<sup>46</sup> The Court further held that obscene expression is not speech<sup>47</sup> and thus not protected by the First Amendment.<sup>48</sup> The Court then explained that material should be judged obscene if, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."<sup>49</sup> Although the Court failed to articulate the precise definition and scope of the term *community*, the "contemporary community standards" test defined obscenity, worked out some of the problems associated with the *Hicklin* test,<sup>50</sup> and enabled Congress and state legislatures to enact criminal obscenity statutes with relative ease.<sup>51</sup>

43. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

44. 354 U.S. 476 (1957). *Roth* was reaffirmed by *Miller v. California*, 413 U.S. 15, 86 (1973).

45. *Roth*, 354 U.S. at 484-85. While *Roth* was the first case in which the Court addressed obscene materials directly, the Court had placed obscenity beyond First Amendment protection sixteen years earlier in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941). The Court stated that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or 'fighting' words. . . ." *Id.* at 571-72 (citation omitted).

46. *Roth*, 354 U.S. at 485 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

47. *Id.*

48. *Id.*

49. *Id.* at 489. The Supreme Court has since noted that the *Roth* test equates obscenity with "prurience," material that appeals to a "shameful or morbid" interest in sex rather than to a "good, old-fashioned, healthy" interest in sex. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 497-99, 504 (1985).

50. One author states that the *Roth* test resolved three major flaws in the English test for obscenity. Duvall writes:

First, the *Roth* test required the jury to evaluate allegedly obscene material according to the material's effect on average persons, rather than on unusually sensitive persons. Second, the *Roth* test required that the jury evaluate allegedly obscene material according to present-day community standards rather than obsolete moral standards. Third, the *Roth* test did not focus on the effect of isolated portions of a work, but on the effect of the entire work.

Scot A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 69 (1992). See also Frederick F. Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 8 (1978) (noting the Court's temporal rather than geographical emphasis in defining contemporary community standards).

51. In addition to the primary federal statutes, reprinted *infra* in Appendix A, almost every state has a statute proscribing the distribution or transportation of obscene materials. See ALA. CODE § 13A-12-200.2 (1994); ARIZ. REV. STAT. ANN. § 13-3502 (1989); ARK. CODE ANN. § 5-68-405 (Michie 1993); CAL. PENAL CODE § 311.1 (West 1988 & Sup. 1996); CONN. GEN. STAT. ANN. § 53a-194 (West

### B. Community Standards: A "National" Adventure

During the 1960s, the Court attempted to clarify its decision in *Roth*, and two trends in obscenity jurisprudence emerged: (1) the justices adopted diverging approaches<sup>52</sup> and (2) the Court narrowed the scope of obscenity regulation to hard-core pornography.<sup>53</sup>

1994); FLA. STAT. ANN. § 847.07 (West 1994); GA. CODE ANN. § 16-12-80 (1992); HAW. REV. STAT. § 712-1214 (1985); IDAHO CODE § 18-4103 (1987); IND. CODE § 35-49-3-1 (Burns 1994); IOWA CODE ANN. § 728.2 (West 1993); KAN. STAT. ANN. § 21-4301 (1995); KY. REV. STAT. ANN. § 531.020 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:106 (West 1986); MD. CODE ANN., CRIM. LAW § 418 (1987); MASS. GEN. L. ch. 272, § 29 (1992); MICH. COMP. LAWS ANN. § 752.365 (West 1991 & Supp. 1995); MISS. CODE ANN. § 97-29-101 (1994); MO. REV. STAT. § 573.020 (1994); NEB. REV. STAT. § 28-813 (1989); NEV. REV. STAT. § 201.249 (1995); N.H. REV. STAT. ANN. § 650:2 (1986); N.J. STAT. ANN. § 2c:34-2 (West 1995); N.Y. PENAL LAW § 235.05 (McKinney 1989); N.C. GEN. STAT. § 14-190.1 (1995); N.D. CENT. CODE §§ 12.1-27.1-01 (1985 & Supp. 1995); OHIO REV. CODE ANN. § 2907.32 (Baldwin 1994); OKLA. STAT. ANN. tit. 21, § 1021 (1983 & Supp. 1996); OR. REV. STAT. § 167.087 (1995); 18 PA. CONS. STAT. ANN. § 5903 (1983 & Supp. 1995); S.C. CODE ANN. § 16-15-305 (Law. Co-op. Supp. 1976 & Supp. 1995); TENN. CODE ANN. § 39-17-902 (1991); TEX. PENAL CODE ANN. § 43.23 (West 1994); UTAH CODE ANN. § 76-1-1204 (1990); VA. CODE ANN. § 18.2-374 (Michie 1988); WASH. REV. CODE ANN. § 9.68.140 (1988); W. VA. CODE § 61-8A-2 (1992); WIS. STAT. ANN. § 944.21 (West 1996); WYO. STAT. § 6-4-302 (1995).

52. With the decision in *Manual Enters. v. Day*, 370 U.S. 478 (1962), the justices began a decade-long debate on the issue of obscenity. The result was that a majority of the Court could not be marshalled behind any one definition of obscenity from the *Roth* decision in 1957 through the *Miller* decision in 1973. For example, Justice Harlan, vacillating with each case on a principle of federalism, ultimately called the obscenity problem "intractable." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting). In *Jacobellis v. Ohio*, Justice Stewart articulated the inherent difficulty in attempting to define obscenity, uttering some of the most famous words ever to emanate from the bench:

I shall not today attempt to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justices Douglas and Black continually opined that the First Amendment was absolute and permitted no suppression of speech or press of any kind. *See, e.g., Pryba v. United States*, 419 U.S. 1127, 1130 (1975) (Douglas, J., dissenting); *Jenkins v. Georgia*, 418 U.S. 153, 162 (1974) (Douglas, J., dissenting); *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting). Moreover, Justice Brennan's role reversal exemplifies the confusion inherent in the obscenity issue. Justice Brennan first argued that the Court should define obscenity. *See Jacobellis v. Ohio*, 378 U.S. 184 (1966); *Roth v. United States*, 354 U.S. 476 (1957). He later declared that no formulation of the Court, Congress or the states could adequately distinguish obscene material from protected expression. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

53. *See generally* *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (reversing the determination that the book, *Fanny Hill*, was obscene with a plurality of the Court reaffirming the notion of a national community and adding a requirement that a work must be "utterly without redeeming social value" to be adjudged obscene); *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964) (reversing the state obscenity conviction of an Ohio theater owner with a plurality of the Court stating

In *Jacobellis v. Ohio*,<sup>54</sup> a plurality of the Court concluded that a national standard of decency was required for the adjudication of obscenity issues.<sup>55</sup> The Court declared that the protective scope of the First Amendment is uniform and national in nature; its scope could not vary with state, county, or municipal boundaries.<sup>56</sup> While never commanding more than a plurality of the Court, this concept of a national community defined the Court's obscenity jurisprudence during the 1960s.<sup>57</sup>

In June 1973, the Supreme Court handed down eight obscenity decisions.<sup>58</sup> One of these cases was *Miller v. California*,<sup>59</sup> which stands as the seminal case in the Court's obscenity jurisprudence. *Miller* sets forth the Court's current three-prong obscenity test.<sup>60</sup> Material is "obscene" and thus beyond the scope of First Amendment protection when (1) the average person, applying contemporary community standards, would find that the

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that jurors should make obscenity determinations by reference to national societal standards as opposed to local or state community ones); *Manual Enters. v. Day*, 370 U.S. 478 (1962) (reversing a postal service ban on the shipment of three homosexual magazines with a plurality of the Court sanctioning a uniform national standard of decency to govern federal obscenity cases). *See also* SCHAUER, *supra* note 27, at 41-44.

54. 378 U.S. 184, 193-95. In *Jacobellis*, the Court reversed the conviction of an Ohio theater owner for exhibiting the French motion picture *Les Amants* ("The Lovers"). *Id.* at 186. This decision is important to the extent that it sparked the evolution of the "national" standard of obscenity, the notion of contemporary community standards, and the continuation of the trend toward a "hard-core only" policy.

55. *Id.* at 194-95.

56. *Id.* Chief Justice Earl Warren, however, disagreed with the plurality's conclusion and opined that state and lower federal courts should evaluate allegedly obscene material according to local community standards. *Id.* at 200 (Warren, C.J., dissenting).

57. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964) (finding a national "community" to be the basis of the obscenity analysis and concluding "we do not see how any 'local' definition of 'community' could properly be employed in delineating the area of expression . . . protected by the . . . Constitution"); *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962) ("[T]he proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency").

58. *Alexander v. Virginia*, 413 U.S. 836 (1973) (per curiam); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Heller v. New York*, 413 U.S. 483 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973).

59. 413 U.S. 15 (1973). *Miller* was tried and convicted of mailing unsolicited sexually explicit material in violation of a California statute. *Id.* at 16. In *Miller*, the obscene matter consisted of five brochures that advertised a film, *Marital Intercourse*, and four books: *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of Pornography*. *Id.* at 18. The brochures depicted men and women in groups of two or more engaged in various sexual activities. *Id.* The brochures prominently displayed the genitals of the men and women. *Id.*

60. *Id.* at 24.

work, taken as a whole, appeals to the prurient interest in sex;<sup>61</sup> (2) according to contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct as defined or authoritatively construed by state law;<sup>62</sup> and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>63</sup> The Court further clarified the meaning of the term *community* in *Miller*, articulating that jurors should evaluate the first two prongs of the test using state or local norms rather than national ones.<sup>64</sup> The Court determined that the diversity and size of the United States precluded formulating a uniform national standard and concluded that jurors would be more comfortable deciding the questions of fact embodied in the first two prongs of the test with a familiar frame of reference.<sup>65</sup> Despite its clearly articulated preference for the use of local norms when deciding the first two prongs of the *Miller* test, the Court failed to define the geographic parameters that a jury should follow when evaluating the test's third prong.<sup>66</sup>

### C. Reasonableness enters obscenity jurisprudence

In 1987, the Supreme Court determined the appropriate standard for evaluating the third prong of the *Miller* test in *Pope v. Illinois*.<sup>67</sup> The Court recognized that applying community standards to determine whether the material at issue lacks serious literary, artistic, political, or scientific value was unworkable.<sup>68</sup> Thus, the *Pope* Court decided that the proper standard was "whether a reasonable person would find such value in the

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61. 413 U.S. at 24.

62. *Id.*

63. *Id.* at 24-25 (modifying the "utterly without redeeming social value" prong of the Court's analysis in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), on the ground that it made the burden of proof standard in criminal obscenity prosecutions almost insurmountable). See also 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 186 (1985) (commenting that the apparent intent of the *Miller* decision was to permit more aggressive prosecutions of pornographers).

64. *Miller*, 413 U.S. at 31-34 (upholding the trial court's jury instruction to apply a state community standard).

65. *Id.* at 30. Cf. *Smith v. United States*, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting) (deriding the logic of the Court's geographic premise in *Miller* and opining that a jury is no more capable of ascertaining contemporary community standards in a large and culturally diverse state than it is of ascertaining the relevant national standards).

66. See *Miller*, 413 U.S. at 30. One year later, the Court emphasized that it was proper, in both federal and state obscenity prosecutions, to ask juries to apply contemporary community standards without further geographic specification. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Hamling v. United States*, 418 U.S. 87, 106 (1974).

67. 481 U.S. 497 (1987).

68. *Id.* at 501.

material, taken as a whole."<sup>69</sup>

The *Pope* Court was a splintered one, reminiscent of the Warren era.<sup>70</sup> Justice Scalia, concurring in the judgment, stated that the array of opinions delivered by the Court suggested the need for a re-examination of *Miller*.<sup>71</sup> Justice Brennan, in dissent, reiterated his long-held view that regulation of so-called "obscene" material among consenting adults is wholly unconstitutional because *obscene* defies definition.<sup>72</sup> Finally, Justice Stevens, in a scathing dissent, articulated his belief that attempts by states to "criminalize the sale of magazines to consenting adults" are unconstitutional.<sup>73</sup> Justice Stevens also pointed out that it is virtually impossible to articulate an "even-handed" and judicially manageable standard by which to determine whether something is obscene.<sup>74</sup> This factor, he believed, militated in favor of granting absolute constitutional protection for such publications with respect to consenting adults.<sup>75</sup>

Additionally, Justice Stevens observed that unmanageable and insufficient standards for defining obscenity invariably lead to vague criminal statutes that encourage unconstitutional "selective and arbitrary prosecution."<sup>76</sup> Justice Stevens' dissent in *Pope* emphatically enunciated the peril in which adult citizens are placed when vagueness and subjectivity so pervade a criminal prohibition that due process, equal protection, and free speech guarantees are seriously called into question.<sup>77</sup>

### III. MILLER THE UNWORKABLE

As discussed,<sup>78</sup> the current definition of obscenity is grounded in contemporary community standards.<sup>79</sup> Historically, when obscene materials were physically transported by mail or in trucks from one place to another, the notion of interference with a "community" made a good deal of sense.

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69. 481 U.S. at 501.

70. For a discussion of the divergent approaches of the justices during the 1960s, see *supra* note 52.

71. *Id.* at 505.

72. *Id.* at 507.

73. *Id.*

74. *Id.* at 511-13 (Stevens, J., dissenting).

75. *Id.* at 514 (Stevens, J., dissenting) (citing his dissenting opinion in *Smith v. United States*, 431 U.S. 291, 315 (1977)).

76. *Id.* at 515 (Stevens, J., dissenting).

77. See Ingram, *supra* note 21; Penny E. Paul, Comment, *Pope v. Illinois: The Reasonable Person as the Supreme Court's Latest Arbiter of Obscenity*, 7 CARDOZO ARTS & ENT. L.J. 185 (1988).

78. See *supra* notes 52-66 and accompanying text.

79. *Miller*, 413 U.S. at 24.

The right of certain localities, if they chose, to be free of offensive materials was a viable legal concept. However, the development of the information superhighway heralds a revolutionary trend in global communications.<sup>80</sup> The previously relatively insuperable geographic boundaries that gave meaning to the distinction between “local” and “global” are rapidly being dismantled as impediments to discourse.<sup>81</sup>

In sum, technology appears to have resurrected the historical concept of a commons wherein public meetings and discourse flourish.<sup>82</sup> By contrast, however, the commons of the twenty-first century is not geographically bounded; instead, through the power of electronics, the commons is virtually boundless.<sup>83</sup> Unfortunately, such an amorphous community poses considerable constitutional questions for obscenity jurisprudence, grounded

80. See Allen S. Hammond IV, *Regulating Broadband Communication Networks*, 9 YALE J. ON REG. 181, 189-80 (1992) (noting that broadband communication networks can change communications from a passive to an interactive mode and greatly expand opportunities for speech and assembly).

81. See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1640 (1995). Branscomb states:

[W]e now have within our grasp a technology designed to bring together like-minded individuals, regardless of where they live, work, or play, to engage in the creation of a new type of democratic community: a community unbounded by geographical, temporal, or other physical barriers.

*Id.* See also M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1716 (1995) (observing that “[the] marketplace of ideas is now global as well as national and individual as well as institutional”).

82. One intriguing issue posed by cyberspace is whether information systems constitute a public forum. Public fora historically are owned by the government, dedicated to the exchange of ideas, and, most importantly, subject to public access. See, e.g., *Madsen v. Women’s Health Center, Inc.*, 114 S. Ct. 2516, 2524 (1994) (area around an abortion clinic is a public forum); *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2706 (1992) (airport terminal operated by a public authority is not a public forum); *United States v. Kokinda*, 497 U.S. 720, 725-27 (1990) (postal sidewalk is not a traditional public forum); *United States v. Grace*, 461 U.S. 171, 179-80 (1983) (public sidewalk is a public forum). See generally Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987). A discussion of the application of the public forum doctrine to cyberspace is beyond the scope of this Note; however, other writers have examined the topic laudably. See David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 337 (1995) (arguing that cyberspace, like a city, includes both public and nonpublic fora); Edward J. Naughton, Note, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 413-14 (1992) (arguing that public access rules for networked communications may be premature now but necessary at a later time if content-based restrictions imposed by private operators become pervasive). See also Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51 (1995) (offering a comprehensive discussion of access rights to cyberspace generally).

83. Although separated spatially, the level of interaction gives users a feeling that they are in the same place. M. Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 415 (1993).

as it is in the concept of community standards.<sup>84</sup>

By executing the following six functions, a computer-literate person can bring graphic images, ranging from the Mona Lisa to depictions of bestiality,<sup>85</sup> into her home. This same person, through her actions, may also be subjecting the sysop to liability for any number of federal criminal proscriptions. These range from piracy of copyrighted or otherwise protected materials<sup>86</sup> to the particular set of offenses discussed in this Note: interstate trafficking or transportation of obscene materials.<sup>87</sup>

1. A person with a modem-equipped personal computer dials a computer bulletin board service phone number.
2. The person subscribes to a service through the computer. Payment is made by credit card number.
3. The subscriber views titles of images stored by the bulletin board service.
4. The subscriber chooses titles of files to download or transfer to his computer.
5. Graphics files are transmitted digitally over telephone lines from the bulletin board service computer to the subscriber's computer.
6. The subscriber can view graphics files as pictures on the screen, save them on disk or print them out on a computer printer.<sup>88</sup>

Whether a sysop is subject to liability in any one of the ninety-four federal judicial districts where the subscriber executes the above set of functions will depend on the values of the people in the subscriber's particular local district or districts.<sup>89</sup> This anomalous result derives from

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84. Notwithstanding the problems inherent in a geographic concept of *community* with respect to regulating the electronic transmission of sexually explicit, images, Congress, in its amendments to 47 U.S.C. § 223, grounds the concept of "obscenity" in "community" standards without defining *community*. See Communications Decency Act of 1996, reprinted in Appendix B *infra*.

85. Leonardo da Vinci's *Mona Lisa* can be viewed online at the Web Museum, Paris (*available on line at* <<http://www.cnam.fr/wm/paint/auth/vinci/ljocorde>>). The work of da Vinci is only one example of the array of visual art available online. While depictions of bestiality are available on many sites on the Internet, one representative example is the Ferrari Club (*available online at* <<http://www.alpha-web.com/policy.html>>).

86. Criminal prohibitions against copyright infringement are found at 17 U.S.C. §§ 501(a) and 506 (1994).

87. The act of mailing, transporting or distributing obscene materials violates several federal statutes. The relevant portions of the major statutes are reprinted at Appendix A *infra*.

88. See Chris Conley & Rob Johnson, *Porn Laws Against Computer Graphics Go On Trial Here*, MEMPHIS COM. APPEAL, July 18, 1994, at A1 (discussing the conduct that led to the prosecution of Robert and Carleen Thomas).

89. Patrick Trueman, then-Director, National Obscenity Enforcement Unit, Department of Justice, said: "If someone wants to mail to all 94 jurisdictions, that's their choice. But they have to understand that they're subjecting themselves to different standards in all 94." LEGAL TIMES, June 18, 1990, at 15

the “community standards” analysis set out in *Miller v. California*.<sup>90</sup> As one commentator explained: “Federal obscenity violations are extremely unique crimes; what is a crime in Utah or Tennessee may not be a crime in California or Michigan.”<sup>91</sup> In an effort to eradicate the pornography industry, the Department of Justice has engaged in a series of multiple prosecutions of pornographic material distributors.<sup>92</sup> This practice raises several serious constitutional issues in the area of federal obscenity enforcement including venue,<sup>93</sup> due process,<sup>94</sup> and prosecutorial vindictiveness.<sup>95</sup>

### A. *Due Process and Obscenity Prosecutions*

The Bill of Rights<sup>96</sup> provides the individual with substantial protection against potentially oppressive and intrusive acts by the government.<sup>97</sup> The

(emphasis added).

90. 413 U.S. 15, 24 (1973). *See, e.g.*, *Hamling v. United States*, 418 U.S. 87, 105 (1974) (concluding that jurors in federal obscenity prosecutions should use their knowledge of local community standards in assessing the obscenity of particular material).

91. Ingram, *supra* note 21, at 270.

92. Then-Attorney General Edwin Meese III made his policy initiatives quite clear in a speech delivered to the Advanced Obscenity and Child Pornography Conference in 1988:

G.K. Chesterton once wrote this about the pornographer: “He is taking money to degrade his kind, or else he is acting on that mythical itch of the evil man to make others evil, which is the strangest secret in Hell.”

With that observation in mind, I hope we can put behind us the pollyanna-ism of 1960s permissivism and the self-serving defenses of the obscenity-merchants themselves, and strike some decisive blows against human degradation, against human exploitation, against the making of billions off human weakness—in a word, against obscenity.

EDWIN MEESE III, MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL 1985-88, 159 (1989).

Experts on the First Amendment view the strategies employed by the Justice Department as a means to “coerce distributors of these kinds of materials to self-censor a broader range of materials than the government could achieve by law.” WASH. POST, Mar. 26, 1990, at A4 (quoting Bruce Ennis, counsel for the American Library Association). Likewise, courts have recognized that the goal of the Department of Justice is not merely to prosecute federal offenses but to effectively shut down the pornography business by protracted litigation. *See PHE, Inc. v. United States Dep’t of Justice*, 743 F. Supp. 15, 27 (D.D.C. 1990) (enjoining simultaneous and successive multiple federal prosecutions in different districts for the same material as unconstitutional); *Freedberg v. United States Dep’t of Justice*, 703 F. Supp. 107, 111 (D.D.C. 1988) (noting that those engaged in the business of pornography, “on the other hand, are confronting annihilation, by attrition if not conviction.”). For a partial list of obscenity defendants who have faced simultaneous multiple indictments, see Ingram, *supra* note 21, at 271 n.22.

93. *See infra* notes 116-44 and accompanying text.

94. *See infra* notes 96-115 and accompanying text.

95. *See generally* Ingram, *supra* note 21.

96. U.S. CONST. amends. I-X.

97. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 575 (2d ed. 1985) (observing that the Bill of Rights balances state against federal power and safeguards individual rights).



heart of this protection is the due process provisions,<sup>98</sup> which ensure that all government acts appear to be and are substantively fair.<sup>99</sup> With respect to the aims of the due process provisions of the Constitution, the Supreme Court commented that in order “to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”<sup>100</sup>

Since 1988,<sup>101</sup> the “appearance of fairness” standard has been difficult to apply in obscenity prosecutions. Intuitively, there is nothing equitable about criminal prohibitions that permit prosecution and conviction in some geographic areas but not in others when the predicate subject matter is identical. Consider the following hypothetical:

Eric Erotica operates a major publication and distribution enterprise in New York City that deals exclusively in sexually explicit magazines and films. Lou Ann Lascivious operates a similar, although significantly smaller, enterprise in New York City. Both Eric and Lou Ann obtain the same number of copies of *Pornography on Parade*, a sexually explicit magazine, for distribution. Eric ships his copies to San Francisco for sale and Lou Ann transports hers to Atlanta.

Under current obscenity standards, even though both Eric’s and Lou Ann’s actions are identical, Eric could enjoy a handsome profit, while Lou Ann could be prosecuted,<sup>102</sup> possibly convicted, and forced to forfeit both the shipment and her business.<sup>103</sup> Under uniform federal statutes,<sup>104</sup> a case’s

98. The provisions state: “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. XIV, § 1.

99. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (pointing out the importance of both “the appearance and reality of fairness” in government actions) (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

100. *Ingram*, *supra* note 21, at 284 n.130 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

101. In 1988, the Attorney General announced that obscenity and child pornography would be two of the Justice Department’s top seven priorities. CRIMINAL DIV., U.S. DEP’T OF JUSTICE, U.S. ATTY’S MANUAL, tit. 9, ch. 75, 9-75.001, 1 (1988) [hereinafter U.S. ATTY’S MANUAL]. This policy shift resulted in an exponential increase in prosecutions. LEGAL TIMES, June 18, 1990, at A25 (indicating 360% increase between 1986 and 1989). Such prosecutions included the initiation of multiple prosecutions of single defendants. U.S. ATTY’S MANUAL, *supra*, tit. 9, ch. 2, 9-2.142, at 19.

102. Lou Ann would probably be prosecuted under 18 U.S.C. § 1465 for transporting obscene matters for sale or distribution and/or 18 U.S.C. § 1466 for engaging in the business of selling or transferring obscene matters. Violation of either provision carries heavy fines and the possibility of imprisonment. For the relevant language of §§ 1465 & 1466, see Appendix A *infra*.

103. 18 U.S.C. § 1467, which describes the kinds of material subject to criminal forfeiture provides:

(a) Property subject to criminal forfeiture—A person who is convicted of an offense involving obscene material . . . shall forfeit to the United States such person’s interest in —

(1) any obscene material produced, transported, mailed, shipped, or received in violation

outcome should not hinge upon the defendant's choice of geographic market. However, under the *Miller* community standards test,<sup>105</sup> if Atlantans believe that *Pornography on Parade* was obscene and San Franciscans do not, Lou Ann and Eric could face very different consequences.<sup>106</sup>

The unfairness of these different results is exacerbated when images are transmitted through Cyberspace. Cyberspace is ubiquitous; it exists wherever there are phone lines and computers.<sup>107</sup> Despite the current state of technology, even the most savvy sysop finds it virtually impossible to control the geographic bounds of access to the material available on his system.<sup>108</sup> A sysop does not affirmatively dispatch material when operat-

of this chapter [18 U.S.C. §§ 1460 et seq.];

(2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and

(3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense, if the court in its discretion so determines, taking into consideration the nature, scope, and proportionality of the use of the property in the offense.

18 U.S.C. § 1467(a) (1994).

104. See 18 U.S.C. §§ 1460-67.

105. *Miller*, 413 U.S. at 24-25.

106. In an amicus curiae brief in *Roth*, legal scholar and author Morris L. Ernst argued that: [A] publisher confronted with the federal obscenity laws lacks even a remote basis for evaluating whether a work may be held obscene. There is no rational body of judicial decision; there is no basis for predicting the subjective reactions of the jury; accidents of time or geography may become determinative. He may know that certain works have been condemned in certain places. But he also knows that the same works have been cleared—in different places or at a different time. He has no means of guessing where or when his publication will be prosecuted, what the mood of the community from which a jury will be drawn may be, whether the jury will reflect what he deems to be prevailing moral standards and in any case whose moral standards they will be. In other words, he is not in a position to make even an informed guess.

53 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 390, 423 (Philip B. Kurland & Gerhard Casper eds., 1975).

107. Connecting to a network requires a computer with a modem, communications (or access) software, and an access link to the network. For an excellent explanation of the functioning of networked computer information systems, see Katsh, *supra* note 83, at 414-38.

The extraordinarily rapid growth of the Internet is doubtless, at least partly, attributable to this ease of access. For example, the number of networks linked to the Internet increased from 217 in July 1988 to 14,121 in July 1993. Between July 1993 and January 1995, as the Internet received more publicity, as software improved, and as commercial possibilities became clearer, the number of networks nearly tripled to 46,318. (Data available online at URL<gopher:// nic.merit.edu:7043/11/ statistics/ nsfnet/ history/ netcount>). The number of host computers linked to the Internet increased from 28,174 in December 1987 to 1,136,000 in October 1992 to 4,852,000 in January 1995. (Data available online at URL<gopher://nic.merit.edu:7043/11/statistics/nsfnet/history/hosts>).

108. Filtering and screening devices and software are available to *users* of computer information systems designed for the "specific purpose of assisting online users in controlling the information they receive through their systems." Plaintiff's Memorandum of Law in Support of a Motion for a

ing a computer information system. Rather, subscribers access the system to upload or download material.<sup>109</sup>

Moreover, even if the material that the subscriber downloads is transmitted from the sysop's system and adjudged obscene, it assumes neither physical nor tangible form.<sup>110</sup> Thus, it would not appear to be the type of obscene matter contemplated by federal obscenity statutes.<sup>111</sup> The images are only in humanly appreciable form at the points of origin and destination and not during transmission.<sup>112</sup> Thus, the transmission of images along the electronic superhighway differs significantly from the transport and distribution of the obscene material currently contemplated by most federal obscenity statutes.<sup>113</sup> These differences create inequity in our

Temporary Restraining Order and Preliminary Injunction at 9, *American Civil Liberties Union v. Reno* (E.D. Pa. Feb. 8, 1996) (No. 96-963) (available online at <<http://www.aclu.org/court/cdacom2.html>>) [hereinafter *ACLU Brief*]. The focus on users rather than disseminators is consistent with the "fundamental shift in media architecture" reflected by the interactive nature of cyberspace. Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *YALE L.J.* 1619, 1633 (1995). Berman and Weitzner continue:

Whereas mass media utilize *broadcast* technologies that "assault"—in the words of the *Pacific* Court—a possibly unsuspecting audience with objectionable content, interactive media are based on an *access* model. Users are not bombarded with one channel or another of programming. The choice of an interactive architecture, with header information, makes effective screening by the recipient possible. No longer will controversial material intrude into users' homes in the manner that, in Congress' view, required steps to aid parents in protecting their children. Rather, users will *request* that particular information be delivered. These requests can be screened or controlled by parents if necessary to limit their children's access to certain kinds of information.

*Id.* at 1633-34 (citation omitted).

109. See Berman & Weitzner, *supra* note 108, at 1633; see generally Loundy, *supra* note 7 (explaining how the subscriber and not the sysop actively seeks out the questionable material).

110. The graphic interchange format ("GIF") files are transmitted electronically in binary code, a series of 0s and 1s appreciable only by a computer. *United States v. Thomas*, 74 F.3d 701, 706-07 (6th Cir. 1996) (addressing the Thomases' claim that the transmission could not be regulated because in transit it is merely "an intangible string of 0's and 1's").

111. 18 U.S.C. §§ 1460-1467 (1994). Congress explicitly demonstrated the need to address different media distinctly in § 1468 and § 2252. The other interstate transport and trafficking statutes, however, fail to cover computer transmissions. Recognizing this gap in the current statutes, Congressman Dan Burton of Indiana introduced a bill to amend 18 U.S.C. § 1465 to include the use of a computer as a means of transporting obscene matter. H.R. 121, 104th Cong., 1st Sess. (1995). More recently, however, Congress passed and the President signed into law the Communications Decency Act of 1996 as part of sweeping telecommunications reform legislation. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56,133. Title V of the Act is entitled the Communications Decency Act of 1996, *reprinted in relevant part in Appendix B infra*.

112. See *supra* notes 110-11 and accompanying text.

113. *But see United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (concluding that the novelty of the means of transmitting or transporting the obscene matter in interstate commerce does not place the transmission outside the scope of comprehensive federal obscenity statutes). See also Appendix B

system of law enforcement<sup>114</sup> and undermine the due process protections afforded by the Constitution.<sup>115</sup>

### B. *Venue and Obscenity Prosecutions*

Defendants clearly have an interest in having their cases tried before impartial juries composed of their peers. The Constitution reflects this interest.<sup>116</sup> In obscenity prosecutions, the issue of whether an impartial jury of the accused's peers can be found becomes significant. Defining the accused's peers has become a recurring problem in light of *Miller*.<sup>117</sup> Should the values under which the accused is to be judged consist of the values of the people he lives with day to day or those whose values he potentially infringes by distributing sexually explicit material into or through their communities.<sup>118</sup> In one district, prosecution could result in bankruptcy, imprisonment or both,<sup>119</sup> and in another district, could result

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*infra*.

114. It seems intuitively obvious that one *actus reus* should only equal one prosecutable offense. See generally MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 169-77 (1993). However, since the mid-1980s, the Justice Department has pursued a policy that encourages the multiple prosecution of those in the business of transporting or otherwise distributing sexually explicit materials. The government promulgated this policy on the theory of "continuing offense" as described both statutorily and judicially. See 18 U.S.C. § 3237 (1994); see also *supra* note 101 and authorities cited therein.

115. U.S. CONST. amends. V & XIV, §1.

116. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

117. See *supra* note 81.

118. Section 3237 of the United States Code appears to answer this question by permitting the prosecutor to choose whether to prosecute in one district or another. 18 U.S.C. § 3237 (1994). Moreover, since 1988, the policy promulgated by the Justice Department has not only permitted the prosecutor to determine in which district to prosecute the offense, but allows prosecutors to bring simultaneous prosecutions in "the district where the material is mailed or deposited with a facility of interstate commerce, the district of receipt, [and] any intermediate district through which the material passes." U.S. ATTY'S MANUAL, *supra* note 101, tit. 9, ch. 75, 9-75.300, at 12. See *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983) (concluding that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent"); *United States v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981) (recognizing that "[v]enue for federal obscenity prosecutions lies 'in any district from, through, or into which' the allegedly obscene material moves") (citation omitted).

119. To examine the statutory texts, see *supra* note 103 and Appendix A *infra*.

in acquittal.<sup>120</sup> Consequently, the venue issue is particularly important in obscenity prosecutions.<sup>121</sup>

The issue of venue for criminal matters is not a mere formality.<sup>122</sup> Venue has been of paramount importance since the colonial period.<sup>123</sup> The Constitution secured the importance of venue by assigning all criminal trials, except impeachment, to an impartial jury in the state or district where the crime was committed.<sup>124</sup> Because history indicates that most crime is committed by defendants within their residential communities,<sup>125</sup> the provisions of both the Constitution and the Bill of Rights can be reasonably read to suggest an historical preference for the prosecution of an accused in the accused's home district.<sup>126</sup> Moreover, if a court determines that a change of venue would further the ends of justice, Federal Rule of Criminal Procedure 21(b) allows a change of venue for the convenience of the parties and/or witnesses.<sup>127</sup> Rule 21(b) attempts to ease the burden on criminal defendants who may be subject to prosecution in more than one state or district.<sup>128</sup>

In obscenity prosecutions, the government may select venue based on the

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120. For a discussion of these divergent results, see *supra* notes 96-106 and accompanying text.

121. Multiple standards based on individual community norms can and do result in materials being protected in one venue and prosecuted in another. Ironically, in *Miller*, the materials at issue resulted in a conviction in Orange County but had drawn a dismissal in Los Angeles County. See 78 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 135-36 (Philip B. Kurland & Gerhard Casper eds., 1975).

122. The Supreme Court has explained: "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy. . . ." *United States v. Johnson*, 323 U.S. 273, 276 (1944) (finding venue in the accused's home district to be more compatible with historical policies and experience).

123. The Declaration of Independence described venue as among the colonists' grievances against the British crown with the statement: "transporting us beyond Seas to be tried for pretended offenses." THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

124. U.S. CONST. art. III, § 2 & amend. VI.

125. See FRIEDMAN, *supra* note 97, at 68-75, 280-99 (describing crime and punishment in the colonial and constitutional periods of United States history).

126. See Ingram, *supra* note 21, at 281 n.109 (citing WAYNE LAFAVE & JERROLD ISRAEL, CRIMINAL PROCEDURE § 16.1(b) (1985)).

127. FED. R. CRIM. P. 21(b). This rule focuses on the convenience to the accused, attempts to ensure that the accused enjoys a fair trial, and tries to avoid any prejudice that might affect the trial's outcome. FED. R. CRIM. P. 21(b) advisory committee's note.

128. The Court has explained that "[t]his result is entirely in keeping with the policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence." *United States v. Cores*, 356 U.S. 405, 410 (1958). Professor Wright has described Rule 21(b) as a "check against the prosecution's power to choose an inconvenient forum in cases where several districts would be proper." 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 341 (1982).

theory of continuing offense.<sup>129</sup> In cases where the illegal matter was mailed, venue is either the point of posting or the point of receipt.<sup>130</sup> It does not include any of the districts through which the material may have passed.<sup>131</sup> Obviously, defendants in obscenity prosecutions would prefer to have venue set in the district of posting. This district is presumably the one in which the defendant operates a business and the district whose community standards are the least likely to forbid the defendant's conduct.<sup>132</sup> However, in an effort to avoid creating a permissive national standard, Congress amended the federal obscenity statutes in 1958 to permit obscenity prosecutions at either end of the mail chain.<sup>133</sup>

According to *Platt v. Minnesota Mining Co.*,<sup>134</sup> the trial judge has the discretion to grant or deny motions for change of venue.<sup>135</sup> In *Platt*, the court articulated several factors that trial judges should balance against the interests of the government when deciding whether to transfer a case.<sup>136</sup>

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129. 18 U.S.C. § 3237 (1994). For an excerpt of § 3237, see Appendix A *infra*. The Court defined continuing offense in *United States v. Lombardo*, 241 U.S. 73 (1916), as "a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter. . . ." *Id.* at 77.

130. Ingram, *supra* note 21, at 282. The "point of posting" is the locus from which the material is mailed, and the "point of receipt" is the locus where it is received.

131. Ingram, *supra* note 21, at 282 n.115.

132. Legally aware operators of adult businesses are more likely to establish their shops in areas where the "community standards" are more amenable to the material they produce and distribute. Thus, under the "community standards" framework as it currently stands, a person operating a business that deals in sexually explicit materials is less likely to be convicted in the community wherein he operates his business.

133. Pub. L. No. 85-796, 72 Stat. 962 (1958). See Ingram, *supra* note 21, at 282 n.117. Congress intended by these amendments to overturn *United States v. Ross*, 205 F.2d 619 (10th Cir. 1953), which limited venue to the district from which the material was posted. 104 CONG. REC. 17,832 (1958). The legislative intent behind these amendments determined the result in *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976), which held that a motion for change of venue, filed for the convenience of the accused, should only be granted in cases where the government has abused its prosecutorial discretion. *Id.* at 463-64.

134. 376 U.S. 240 (1964).

135. *Id.* at 243-44.

136. Pertinent factors include:

- (1) location of the . . . defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

*Id.* (citation omitted). See also *United States v. McManus*, 535 F.2d at 462 (finding that the government decision on venue may be justifiably overcome by transferring the trial to the district where the accused and most of the witnesses reside).

The *Platt* factors mandate that the trial judge consider “the location of a corporate defendant, the location of witnesses, any disruption of a defendant’s business, the expense to the parties, and the government decision to fabricate venue by bringing the defendant’s [proscribed] materials into the district by ordering from the defendant[] . . . when ruling on a change of venue.”<sup>137</sup> However, obscenity cases highlight the direct conflict between fairness to the accused and the protection of local community standards against involuntary erosion.<sup>138</sup>

Courts recognize that continual deference to the protection of community standards effectively diminishes the rights of the accused.<sup>139</sup> Nevertheless, this conflict is more frequently resolved in the government’s favor because the defendant usually makes a concerted effort to dispatch the offending materials into the forum where the action is brought. This rationale is flawed because in the context of the computer-transmitted image, the subscriber normally makes a concerted effort to transfer the offending material from the district where the sysop resides to his own residence. It is unreasonable to characterize the transmission as a continuing offense under 18 U.S.C. § 3237 and consequently, prosecute the sysop in the more conservative district because the sysop lacks effective control technologies and makes no concerted effort to distribute the material.<sup>140</sup>

The rule of lenity<sup>141</sup> seems to require a more specific congressional

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137. Ingram, *supra* note 21, at 283.

138. See *id.* Ingram points out that this conflict is typically resolved so that what “results [is] a rigid system that ignores the defendants’ venue interests.” *Id.* This seems a particularly accurate statement where the government purposely engages in forum shopping to secure a conviction. See also *United States v. Toushin*, 714 F. Supp. 1452, 1456-57 (M.D. Tenn. 1989) (finding offense with the government’s blatant attempt at forum shopping, but ultimately concluding that the local community standards of *Miller* outweigh the *Platt* concerns).

139. See *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985) (recognizing that crimes where interstate transportation is a jurisdictional predicate “may implicate more than one district”); *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982) (holding that “the use of common carriers to ship obscene materials and the interstate shipment of such materials are continuing offenses that occur in every judicial district which the material touches”), *cert. denied*, 460 U.S. 1047 (1983); *Toushin*, 714 F. Supp. at 1457 (noting “defendants made a deliberate decision to conduct business” where the offense occurred).

140. Allowing prosecutors to choose the venue most likely to improve the chances for a conviction seems inconsistent with our generally protective policies regarding criminal defendants.

141. The rule of lenity mandates that laws aimed at punishing individuals must be strictly construed. See *United States v. Alpers*, 338 U.S. 680, 681 (1950) (acknowledging that criminal statutes must be strictly construed and that “no offense may be created except by the words Congress used”); see also *infra* note 144 and authorities cited therein. If the punitive statute fails to clearly and unambiguously proscribe a particular form of private conduct, the “perpetrator” cannot justly be penalized for such conduct. See LAFAYE & SCOTT, *CRIMINAL LAW* § 2.2(d) (2d ed. 1986). Cf. MODEL PENAL CODE §

pronouncement<sup>142</sup> on the issue of computer transmission of obscene images before offense or continuing offense is found.<sup>143</sup> Under the traditional rule of lenity, prosecutions should not proceed unless the statute specifically proscribes the conduct alleged to be violative.<sup>144</sup> Given the absence of prior congressional action and the government's active fabrication of venue, a broad construction of the obscenity statutes creates unfairness and inequity in the prosecution of federal obscenity laws. These recurring inequities are exacerbated by the emergence of new technologies.

#### IV. EXPLICIT HARM, CHILDREN, AND THE RELEVANT COMMUNITY

As Justice Scalia pointed out in *Pope v. Illinois*,<sup>145</sup> the *Miller* decision needs to be revisited and reexamined.<sup>146</sup> The proper starting point for this reexamination should be the Constitution and the protections it affords freedom of expression. Assuming courts will fail to extend such protection to certain materials otherwise deemed obscene, this Note then proposes legislation targeted toward the transmission of obscene materials through Cyberspace. Finally, this Note offers a third solution: a modification of the *Miller* community standards test that assures defendants will be prosecuted in their own communities and under their own community standards. These proposals are aimed at eliminating the inequities presented by cases such as *United States v. Thomas*.<sup>147</sup>

##### A. Constitutional Protection of Obscene Materials

Since 1957, the Supreme Court has repeatedly held that "obscene"

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1.02(3) (A.L.I. 1985).

142. For an excerpt from the amendment, see *supra* note 98.

143. *But see* *United States v. Thomas*, 74 F.3d 701, 708-09 (6th Cir. 1996) (concluding that computer transmission of obscene images is covered by 18 U.S.C. § 1462). *See also* *United States v. Maxwell*, 42 M.J. 568, 580 (A.F. Ct. Crim. App. 1995) (concluding the plain language of 18 U.S.C. § 1465 unquestionably applies to the electronic transmission of visual images).

144. *See* *United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971) (reversing a conviction for possession of a counterfeit alien registration receipt card on the ground that such a card was not, strictly speaking, "required for entry into the United States" as mandated by the statute's language); *McBoyle v. United States*, 283 U.S. 25 (1931) (reversing a conviction for transporting a stolen airplane across state lines on the ground that the defendant had no fair warning of the prohibition insofar as the term "vehicle" did not commonly evoke aircraft). *But see* *United States v. Yermian*, 468 U.S. 63, 68-70 (1984) (refusing to apply the rule of lenity to narrowly interpret false statement statute); *Russello v. United States*, 464 U.S. 16 (1983) (refusing to interpret forfeiture provisions of RICO narrowly).

145. 481 U.S. 497 (1987).

146. *Id.* at 505.

147. 74 F.3d 701 (6th Cir. 1996). For a brief discussion of *Thomas*, see *supra* notes 22-25 and accompanying text.



material is not protected speech under the First Amendment.<sup>148</sup> Although the definition of "obscenity" has varied over the years,<sup>149</sup> the constitutionality of its criminalization has only been questioned in dissenting opinions.<sup>150</sup> Nevertheless, obscene expression, however defined, should enjoy constitutional protection among consenting adults so long as it does not infringe other compelling societal interests such as protecting minors from exploitation or preventing harm to others.<sup>151</sup> The policies that underlie the First Amendment,<sup>152</sup> when combined with the courts' inability to define

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148. *Roth v. United States*, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press").

149. *See* *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987); *Miller v. California*, 413 U.S. 15, 24 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964); *Roth v. United States*, 354 U.S. 476, 487 (1957).

150. *See, e.g., Pope*, 481 U.S. at 507 (Stevens, J., dissenting); *Miller*, 413 U.S. at 37 (Douglas, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting); *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting); *Roth*, 354 U.S. at 508 (Douglas, J., dissenting).

151. *See Pope*, 481 U.S. at 507 (Stevens, J., dissenting).

152. While some will disagree and argue that this is an incomplete characterization of the ideals underlying the First Amendment, there seem to have been two predominant values that have informed First Amendment jurisprudence: maximizing access to diverse sources of information and minimizing the government regulation of speech.

The Supreme Court explained the diversity goal in *Associated Press v. United States*, 326 U.S. 1 (1945), noting that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public[.]" *Id.* at 20. Assuring a diversity of information sources is important for citizens of a democracy; political debate and public culture cannot flourish without a free, open public forum for the exchange of ideas. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."); *Roth v. United States*, 354 U.S. at 484 ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

The First Amendment also guards against government efforts to choose which information sources are appropriate and which are not appropriate for any given speaker or listener. *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("[I]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."). As the Supreme Court recently noted, "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 114 S. Ct. at 2458. Though there are circumstances in which restrictions on expression are permissible, in general, First Amendment principles are best served when such restrictions are kept to a minimum. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 125-26 (1989) (holding speech regulation acceptable, provided the regulation serves a compelling state interest and the government chooses the "least restrictive means to further the articulated interest"); *see also United States v. O'Brien*, 391 U.S. 367, 377 (1968) (justifying government regulation if it furthers important government interest unrelated to suppression of free expression and if restriction on expression is no greater than necessary to further the interest).

exactly what obscenity is, militate in favor of granting obscenity constitutional protection.<sup>153</sup>

Some argue that the First Amendment speaks in absolute terms and prohibits all obscenity regulation.<sup>154</sup> The most persuasive of these arguments is that the First Amendment embodies a principle of diversity and toleration in the area of expression<sup>155</sup> and, as a matter of course, prohibits the government from deciding which expression is acceptable and which is not, regardless of how offensive the expression may be to some.

This argument embodies the classic libertarian argument most closely

153. "The doctrines of 'vagueness' and 'overbreadth' . . . are deeply imbedded in first amendment jurisprudence." STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS* 155 (1991). Justice Stewart, dissenting in *Parker v. Levy*, 417 U.S. 773 (1974), explained:

As many decisions of this Court make clear, vague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due process of law." As the Court put the matter in *Lanzetta v. New Jersey*, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

Secondly, vague statutes offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis. . . ." The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure.

*Id.* (citations omitted). Few statements from the Court better characterize the plight of those involved in the commercial distribution of sexually explicit materials.

The Communications Decency Act, Appendix B *infra*, attempts to explicitly bridge the gap between the current obscenity regime and the unique character of Cyberspace. However, in so doing, Congress has created a vague and overbroad statute that proscribes otherwise protected expression in an effort to protect minors from computer-transmitted, sexually explicit images. See *ACLU Brief*, *supra* note 108. Its operative terms—"indecent" and "patently offensive"—are vague, ambiguous, and subjective. Again, sysops and ordinary citizens can hardly be on notice as to what can and cannot be legally transmitted. *Id.*; see also *supra* note 106. Moreover, because of the nature of the online medium, the Act is effectively a total ban on "indecent" speech in Cyberspace and thus, violates the free speech rights of adult online users. *ACLU Brief*, *supra* note 108, at 19. To borrow one of Justice Frankfurter's most poignant characterizations of overbreadth, the Communications Decency Act "burn[s] up the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

For a helpful treatment of vagueness in criminal statutes, see John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

154. See, e.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

155. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 3, 26-27, 89-91, 93-94 (1948), reprinted in SHIFFRIN & CHOPER, *supra* note 153, at 72-73.

associated with John Stuart Mill.<sup>156</sup> More recently, however, it has been judicially espoused by Justices Black and Douglas.<sup>157</sup> The argument has two parts. First, giving the government the power to decide whether certain speech is offensive creates the potential for suppression of political or religious ideas considered offensive by some.<sup>158</sup> Every act of censorship, whether literary or political, offends someone somewhere. Consequently, prohibiting some forms of expression because they are offensive gives the government a power it was neither intended to nor should have.<sup>159</sup> Prohibiting obscenity and suppressing opposing political or religious views are merely different manifestations of the same evil.<sup>160</sup> Second, assuming some expressions are better than others or that some are worthless assumes omniscience and prescience beyond human capacity.<sup>161</sup> The essence of our society and of the First Amendment is diversity,<sup>162</sup> and the government has no business deciding between these different views.<sup>163</sup> Whatever

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156. See JOHN STUART MILL, ON LIBERTY 10-11, 208, 239-46 (Norton ed. 1975) (1859) (asserting the principle that only self-protection warrants society's control over the individual and only to the extent the individual consents).

157. See *supra* note 52.

158. See Pamela J. Stevens, Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 703 (1982) (asserting that society's interest in order and morality should be an impermissible purpose for government regulation of speech because such regulations are based on distaste for the content of the speech).

159. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 117-18 (1991) (government has no power to discriminate against certain topics or speakers simply because it finds the speech or speakers less worthy of protection); *Leathers v. Medlock*, 499 U.S. 439, 446 (1991) ("The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us" (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971))).

160. See Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography As Act and Idea*, 86 MICH. L. REV. 1564, 1632-33 (1988) (arguing that regulation of pornographic materials will lead to censorship of political expression). Professor Ronald Dworkin has questioned the very integrity of permitting government to regulate in areas of the law that profoundly affect personal constitutional freedom. RONALD DWORKIN, *LAW'S EMPIRE* 184-86 (1986). See also Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963) (arguing that obscenity is sin and should not be a crime, except to the extent that a society wants to punish sin).

161. As the Supreme Court recognized, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

162. The Supreme Court explained the diversity goal in *Associated Press v. United States*, noting that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." 326 U.S. 1, 20 (1945).

163. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." (citing *Winters v. New York*, 333 U.S. 507, 510 (1948))).

danger exists in certain views is best combatted in the marketplace of ideas.<sup>164</sup> Any such danger is still less than the danger of a government that has the power to decide which views and tastes are permissible and which are not.<sup>165</sup>

However, some materials that have been judged obscene should continue to be criminalized due to the real and demonstrable harm they present to society.<sup>166</sup> Obscene material should be that which depicts either the sexual exploitation of minors<sup>167</sup> or explicit violent physical harm to persons.<sup>168</sup> This "societal harm" standard is justifiable under the First Amendment because it shifts the focus of the first two prongs of the *Miller* analysis<sup>169</sup> from the effects of allegedly obscene material on unwilling observers to the nature of the material itself.<sup>170</sup> Thus, this standard takes into account those persons who wish to view sexually explicit materials and simultaneously protects society's interest in prohibiting graphic depictions of physical violence and the sexual exploitation of minors.<sup>171</sup> There are three arguments that support limited regulation of pornography: (1) the production of "graphically violent sexually explicit materials," inherently

164. For the origin of the "marketplace of ideas" doctrine in First Amendment jurisprudence, see Justice Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). Justice Holmes stated his belief that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Id.* at 630.

165. See ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 192 (1982) (noting that "[to] advocate censorship is to choose not to be able to choose at all").

166. See JOEL FEINBERG & HYMAN GROSS, *PHILOSOPHY OF LAW* 195-96 (3d ed. 1986) (discussing the "harm principle," which states that government restrictions on individual liberty are justifiable to prevent direct personal injury to others).

167. This problem is already addressed in 18 U.S.C. § 2252. See Appendix A *infra*.

168. See Duvall, *supra* note 50, at 96. Duvall proposes:

The Supreme Court could improve [its current obscenity jurisprudence] by requiring a uniform national standard of tolerance for sexually explicit material, establishing an objective, "explicit harm" standard. Under an explicit harm standard, the jury's inquiry would be (1) whether, as depicted by the material, one person inflicted serious bodily injury upon another person in the course of sexual activity, or (2) whether one participant most likely did not consent to the sexual activity before production of the material, or (3) whether, in fact or as depicted by the material, one participant in sexual activity most likely was a minor.

*Id.* (citation omitted).

169. See *supra* notes 60-66 and accompanying text.

170. See *City of Urbana v. Downing*, 539 N.E.2d 140, 152-53 (Ohio), *cert. denied*, 493 U.S. 934 (1989) (Brown, J., dissenting) (arguing that "the law should be looking for the existence of 'harm,' not trying to define 'obscenity'").

171. See Duvall, *supra* note 50, at 97.

possesses the potential for harm to others;<sup>172</sup> (2) under current law, harm is presumed in the absence of consent to sexual activities;<sup>173</sup> and (3) both the government and society have a compelling interest in preventing the sexual exploitation and abuse of minors.<sup>174</sup>

Overall, the “societal harm” standard permits the broadest possible sweep for the protections afforded by the First Amendment and protects society’s fundamental interest in protecting its members from the infliction of harm.<sup>175</sup> If this standard were adopted, the *Miller* analysis and its progeny would be moot. Expression between legally consenting adults would be protected, with the exception of depictions of “societal harm.”<sup>176</sup>

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172. *Id.* at 96. While its conclusions are hotly debated even now, the Meese Commission found that sexually violent materials, and material depicting sexual activity without violence but exhibiting degradation, submission, domination, or humiliation, demonstrated negative effects and caused harm morally, ethically, and culturally. ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY: FINAL REPORT 323-35 (1986).

173. *Id.*

174. “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, the Supreme Court has affirmed that the government has a “compelling interest in protecting the physical and psychological well-being of minors,” an interest that “extends to shielding minors from the influence of literature [and other indecent forms of expression] that is not obscene by adult standards.” *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (“First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.”); *New York v. Ferber*, 458 U.S. 747, 756-64 (1982) (individuals may be prosecuted for distribution of pornographic materials using depictions of sexually explicit conduct by children, even if materials are not legally obscene); *Ginsberg v. New York*, 390 U.S. 629, 638-40 (1968) (court upheld conviction of store owner for selling a non-obscene “girlie” magazine to a minor, recognizing that the power of the state to regulate conduct of minors is greater than control of conduct of adults). *See also American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) (concluding that when government has a “strong interest” in prohibiting conduct, such as sexual acts involving minors, that is the subject of material, it may restrict dissemination of the material to reinforce the prohibition), *aff’d*, 475 U.S. 1001 (1986); *City of Urbana v. Downing*, 539 N.E.2d at 152 (noting two types of sexually explicit material that cause harm: publications that utilize minors and those whose production requires the commission of a crime).

175. This is consistent with the libertarian argument of John Stuart Mill discussed *supra* in notes 156-65 and accompanying text.

176. Professor Dershowitz wrote that the critical choice is “between society in which everyone must tolerate some offensiveness as the price of diversity, or society that permits only expression that is offensive to no one.” DERSHOWITZ, *supra* note 165, at 192. To the author, the former is much to be preferred over the latter.

### B. *Proposed Statutory Provisions*<sup>177</sup>

Although constitutional protection of sexually explicit expression would be the ideal solution, given the long history of obscenity regulation,<sup>178</sup> such a solution does not appear terribly realistic. Therefore, an attempt to compose legislation that addresses the current state of obscenity jurisprudence and accounts for the unique characteristics of computer information systems is necessary. The following model statute proscribes the electronic transmission of obscene images to minors. Recognizing the limited control a sysop can feasibly exert over the geographic bounds of access to her system, this model statute places venue at the point of transmission rather than receipt.

(a) Electronically furnishing obscene material to minors.

Except as otherwise provided in this statute, as used in this statute, the following terms and their variant forms mean the following:

(1) "Bulletin board system" means a computer data and file service that is accessed by telephone line to store and/or transmit information;

(2) "CD-ROM" means a compact disc with read only memory which has the capacity to store audio, video, and written materials and is used by computers to access a bulletin board system;

(3) "Electronically furnishes" means:

(A) to make available by electronic storage device, including floppy disks and other magnetic storage devices, or by CD-ROM; or

(B) to make available by allowing access to information stored in a computer, including making material available through the operation of a computer bulletin board system.

(4) "Explicit harm" means in fact or as depicted in the material:

(A) one person is inflicting serious bodily injury upon another person in the course of sexual activity, or

(B) one person has not consented or is legally unable to consent to the sexual activity being performed; or

(C) one participant in the sexual activity is a minor.<sup>179</sup>

(5) "Harmful to minors" means that the description or representation, in whatever form, including but not limited to nudity, sexual conduct or activity, sexual excitement, or sadomasochistic abuse, when

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177. This model statute is derived from a synthesis of various state provisions and MODEL PENAL CODE § 251.4.

178. See *supra* notes 27-77 and accompanying text (outlining the history of government regulation of obscenity).

179. See *supra* note 171 and accompanying text.

(A) taken as a whole,<sup>180</sup> predominantly appeals to the prurient, shameful, or morbid interest of minors;

(B) it is patently offensive to prevailing standards in the adult community as a whole<sup>181</sup> concerning suitable material for minors; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(6) "Minor" means a person under eighteen years of age.

(7) "Sadomasochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(8) "Sexual conduct or activity" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas, or buttocks of the human male or female or the breasts of the male or female, whether alone or between members of the same or opposite sex, or between humans and animals in an act of apparent sexual stimulation or gratification.

(9) "Sexual excitement" means the condition of the human male or female genitals or the breasts of the male or female when in an apparent state of sexual stimulation.

(b) A person commits the crime of electronically furnishing obscene materials to minors if:

(1) knowing or having good reason to know the character of the material furnished, the person electronically furnishes to an individual, whom the person knows or should have known is a minor,

(A) any picture, photograph, drawing, or similar visual representation or image, including digitized images, of a person or portion of a human body which depicts sexually explicit nudity, sexual conduct, explicit harm, or sadomasochistic abuse and which is harmful to minors; or

(B) any written or aural matter of the nature described in

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180. Both *Roth*, 354 U.S. 476 (1957), and *Miller*, 413 U.S. 15 (1973), advanced obscenity jurisprudence by holding that material could only be found obscene if the "dominant theme of the material taken as a whole" is directed to the prurient interest. *Roth*, 354 U.S. at 489; *Miller*, 413 U.S. at 24. Earlier cases allowed obscenity to be judged on the basis of an isolated excerpt from the material. See, e.g., *Regina v. Hicklin*, 3 L.R. 360 (Q.B. 1868). Both *Roth* and *Miller* introduced the requirement that the objectionable material must predominate, at least in effect, in order for an adjudication of obscenity to be sustained. *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196, 199 (2d Cir. 1968).

181. This provision, analogous to the "taken as a whole" standard, is designed to preclude arbitrary prosecution predicated on the whims of a vocal—and, in this instance, more conservative—minority. Otherwise, the ultimate determination of an individual's constitutional rights would be subject to that group's "degree" of sensitivity to questionable material. This notion was rejected by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) ("A question of constitutional power can hardly be made to depend on a question of more or less.").

subparagraph (A) of this paragraph or contains explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement, explicit harm, or sadomasochistic abuse;

(2) the material furnished is harmful to minors; and

(3) the offensive portions of the material electronically furnished to the minor are not an incidental part of an otherwise nonoffending whole.

(c) Any person accused of violating this code section will be subject to prosecution only in the district from which the material was transmitted.

(d) Any person who violates this code section shall be guilty of a misdemeanor and shall be imprisoned not more than one year or fined not more than \$5,000, or both.

The following hypotheticals explain the model statute and how it should be applied:

[1] Assume that Vince Voyeur, Sr., of Macon, Georgia, makes daily trips on the electronic superhighway to retrieve his e-mail, chat with friends and colleagues, and on occasion, to purchase and download explicit sexual images from his favorite bulletin board, "Absolute Exxxtasy." "Absolute Exxxtasy" is operated out of a suburb of San Francisco by Henry Hacker. When Vince, Sr., purchases these images with his credit card he is asked to verify in writing that he is a consenting adult under the law. Only after such verification is made can Vince, Sr., access the image files. Finally, assume that Vince, Sr., stores these images—all of which depict consenting adults engaging in sexual conduct—on a disk that he keeps out of the reach of children.

Under the facts of this hypothetical, no one is subject to liability under the model statute. The rationale is that all parties to the transaction are consenting adults and the images did not depict harmful conduct, such as graphic physical violence, nonconsensual sexual activity, or the sexual exploitation or abuse of minors.

Even under current obscenity jurisprudence, an argument exists that the parties should not be prosecuted. In *Stanley v. Georgia*,<sup>182</sup> the Supreme Court concluded that the State of Georgia could not criminalize the mere possession of obscene material.<sup>183</sup> Justice Marshall, writing for the

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182. 394 U.S. 557 (1969).

183. *Id.* at 568 (1969). In *Stanley*, the defendant's home was searched by police as part of a continuing investigation into his alleged bookmaking activities. *Id.* at 558. While conducting the search, the officers found three reels of eight-millimeter film that the officers watched, and concluded were



majority, stated that the First Amendment prohibits the state from dictating the private thoughts or morals of its citizens.<sup>184</sup> The Court concluded that the government's interest in regulating obscene matter did not justify intrusion into the traditionally private domain of a person's home.<sup>185</sup>

The previous hypothetical is analogous to driving to an adult bookstore, purchasing a sexually explicit magazine or film, and taking it home for personal and private consumption. The only distinction, and one which strongly suggests a *Stanley* analysis, is that neither the purchaser nor the seller in the hypothetical ever left the privacy of his or her home. Consequently, prosecution should be prohibited.

- [2] Assume Vince Voyeur, Jr., age fifteen, also likes to use the family computer. Vince Jr., recently discovered the wonders of the electronic superhighway, including an interesting bulletin board service called the "Pleasuredome." Vince, Jr., has also discovered that he can use his dad's credit card number, which he jotted down when he purchased hockey tickets for the two of them, to buy fantastic erotic images and download them from the "Pleasuredome" to his own disk for late-night enjoyment. The "Pleasuredome" is operated out of Tulsa, Oklahoma by Larry Lewd. Larry does not check the ages of his subscribers. He only concerns himself with whether the credit card number authorizes the purchase.

Under the model statute, Larry Lewd would be subject to liability because he furnished sexually explicit images to a minor without making any attempt to avoid making a sale to a minor. His liability would not turn on the community standards of Tulsa. Moreover, the *Stanley* analysis is inappropriate on these facts because the transaction did not involve consenting adults. Although Lewd is subject to criminal liability for his actions, the advantage the model statute affords Lewd over current law is

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obscene. *Id.* The defendant was arrested, tried, and convicted for violations of a Georgia law that prohibited knowing possession of obscene material. *Id.* at 558-59. The Supreme Court reversed the conviction and held that "mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* at 559. The Court based its holding on the constitutional rights to protection of privacy and to freely receive information and ideas. *Id.* at 564. The court declared: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565.

184. *Id.* at 565. Justice Marshall explained that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.*

185. *Id.* For an historical treatment of the distinction between public and private realms and the limits on the government's power, see HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958).

that the venue of his prosecution would be the district in which he resides. He would not be forced to stand trial in a distant jurisdiction. This venue-setting provision is specifically designed to reflect Lewd's inability to exercise complete control over the geographic areas with access to his system.

The model statute serves two goals. First, it protects the interests of society by placing a reasonable burden on sysops to ensure that their systems cannot be accessed by minors. Second, it protects the interests of adults who wish to view sexually explicit materials that are otherwise not independently harmful within their own home. The model statute achieves a desirable balance between the interests of society in preserving social order and morality, and the interest of privacy.<sup>186</sup>

### C. *The Relevant Community*

If it is to be retained as the means to define obscenity, the *Miller* community standards test should be modified. For purposes of electronically transmitted sexually explicit images, the relevant community should be the community from which the images are transmitted. Thus, in *Thomas*,<sup>187</sup> venue would only be proper in California, the community in which the couple operated their public access computer information system. This modification would ameliorate the concerns about due process<sup>188</sup> and venue<sup>189</sup> discussed previously. Moreover, such a modification would cause little disruption to current activity—judicial, commercial, and otherwise.

Under this proposed modification of the *Miller* community standards test, disseminators of obscenity could be prosecuted while the rights of computer information systems subscribers, who bring otherwise unprotected obscene expression into the confines of their home would be protected. Those sysops who deviate from the standards of conduct set by the community in which they reside and in which they operate their computer information system,<sup>190</sup> would be on notice that they might be violating obscenity

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186. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (explaining that "[t]he makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."). See also Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

187. No. CR-94-20019-G (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996).

188. See *supra* notes 96-115 and accompanying text.

189. See *supra* notes 116-44 and accompanying text.

190. See Kai Erikson, *Introduction to Wayward Puritans*, in *BEFORE THE LAW* 423 (4th ed. 1989) (noting that deviant individuals are those who violate rules of conduct held in high esteem by the rest

proscriptions in their own community and could thus, be consistently prosecuted according to the due process guarantees of the Constitution. Operators who continue to permit the transmission of sexually explicit images via their systems assume the risk that they may be infringing upon the standards of their community and subjecting themselves to prosecution.

#### CONCLUSION

The *Miller* community standards analysis, which determines the obscenity of certain materials, was designed to protect the individual, expressive freedoms of the American people to the greatest extent possible. It sought to ensure broad protection through the formulation of an analytic paradigm that would protect the standards of the most conservative communities in the country from involuntary erosion by the most liberal. This paradigm was workable in an environment where distribution required an affirmative and physical dispatch of "obscene" materials from one community to another.<sup>191</sup>

In the context of the electronic superhighway, however, the integrity of the "community standard" is fatally threatened. The transmission of visual images along the fiber-optic networks no longer requires an affirmative dispatch by the source. Moreover, such transmission involves no physical, or even tangible transaction.

The electronic superhighway has made it virtually impossible to discretely define and confine community in a constitutional and equitable manner. Consequently, in cases involving Cyberspace transmission, the

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of the community in which they live).

191. Although the ambiguity surrounding the concept of community standards may have been tolerable in a distributional context, requiring the affirmative dispatch over land and through the mails of potentially obscene physical matter, it threatens to become intolerable in cyberspace. See, e.g., Berman & Weitzner, *supra* note 108, at 1632 n.50 (noting that national and international reach of new interactive media raises a host of questions concerning the determination of obscenity based on traditional "community standards"); Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1013 (1994) (stating that the ability to belong to a physical and electronic community simultaneously "is likely to cause new problems relating to community standards."). Perhaps the greatest hurdle in applying this standard in cyberspace is determining what the relevant community should be. Local community standards would seem to be irrelevant in cyberspace, a technological expanse that transcends physical boundaries. The appropriate community arguably should be the virtual community. Branscomb, *supra* note 81, at 1672; William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community,* 30 WAKE FOREST L. REV. 197, 210 (1995); Eugene Volokh, *Cheap Speech and What it will Do,* 104 YALE L.J. 1805, 1845 (1995) (arguing that, while casting no doubt on the basic tenets of the First Amendment, computer networks cloud the concept of local community standards).

*Miller* community standards test should be abandoned as violative of the First Amendment and due process protections of the Constitution. The only exception to this rule should be images that depict the sexual exploitation of children and explicit physical harm.

*J. Todd Metcalf*

## APPENDIX A

The most important federal statutes provide in relevant part:

**Mailing obscene or crime-inciting matter:**

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

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

Whoever knowingly uses the mails for the . . . delivery of anything declared by this section . . . to be nonmailable, or knowingly causes to be delivered by mail . . . shall be fined . . . or imprisoned.

18 U.S.C. § 1461.

**Importation or transportation of obscene matter:**

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

Shall be fined . . . or imprisoned.

18 U.S.C. § 1462.

**Broadcasting obscene language:**

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned.

18 U.S.C. § 1464.

**Transportation of obscene matter for sale or distribution:**

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material . . . shall be fined . . . or imprisoned.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above . . . shall create a presumption that such publications or articles are

intended for sale or distribution.

18 U.S.C. § 1465.

Engaging in the business of selling or transferring obscene matter:

(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene [matter] . . . which has been shipped or transported in interstate or foreign commerce, shall be punished. . . .

(b) As used in this subsection (footnote omitted), the term “engaged in the business” means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit.

18 U.S.C. § 1466.

Criminal forfeiture. Distributing obscene material by cable or subscription television:

(a) Whoever knowingly . . . distributes any obscene matter by means of cable television or subscription services on television, shall be punished. . . .

(b) As used in this section, the term “distribute” means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

18 U.S.C. § 1468.

Certain activities relating to material involving the sexual exploitation of minors:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . . shall be punished.

18 U.S.C. § 2252.

Offense begun in one district and completed in another:

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense, and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237.

## APPENDIX B

*The Communications Decency Act of 1996*

Title V of the Telecommunications Act of 1996 is entitled Obscenity and Violence. Section 501 of the Act refers to the title as the 'Communications Decency Act of 1996.' Section 502 amends section 223 of the Communications Act of 1934, 47 U.S.C. § 223 (1994), by replacing subsection (a) and adding subsections (d) and (e). New subsection (a) reads in pertinent part as follows:

(a) Whoever—

(1) in interstate or foreign communications—

(A) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communications is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . .

shall be fined under Title 18, United States Code, or imprisoned not more than two years or both.

More directly relevant to the subject matter of this Note is the addition to section 223 of the following four subsections dealing specifically with conduct in Cyberspace. The terms of the additions are as follows:



(d) Whoever—

- (1) in interstate or foreign communications knowingly—
  - (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
  - (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communications that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
- (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

(e) In addition to any other defenses available by law:

- (1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.
- (2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises that availability of such communications.
- (3) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.
- (4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.
- (5) It is a defense to a prosecution under subsection (a)(1)(B) or

(d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, and adult personal identification number.

(6) The Commission may describe measures which are reasonable, effective and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

(f) (1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions or higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided however*, that nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, proce-

dures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties, or obligations on the provision of interstate services.

Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under (a) or (d) shall be construed to affect or limit the application or enforcement of any other federal law.

(h) For purposes of this section—

(1) The use of the term ‘telecommunications device’ in this section—

(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

(B) does not include an interactive computer service.

(2) The term ‘interactive computer service’ has the meaning provided in section 230(e)(2).

(3) The term ‘access software’ means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do anyone or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(4) The term ‘institution of higher education’ has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. § 1141).

(5) The term ‘library’ means a library eligible for participation in State-based plans for funds under Title III of the Library Services and Construction Act (20 U.S.C. § 355e *et seq.*).

