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COMMENT

THE “VIRTUAL” NETWORK: WHY *MILLER V. CALIFORNIA*’S LOCAL COMMUNITY STANDARD SHOULD REMAIN UNCHANGED IN THE WAKE OF THE NINTH CIRCUIT’S *KILBRIDE* DECISION

Tim K. Boone[†]

I. INTRODUCTION

“I know it when I see it.”¹ The famous words of Justice Potter Stewart continue to carry significant meaning in the context of obscenity law. His position on obscenity aptly described many Supreme Court Justices’ views on the topic in the 1960s and sums up the problems that obscenity law still encounters today. The Court developed a somewhat vague, but workable, standard in the landmark 1973 case of *Miller v. California*.² In *Miller*, the Court developed a three-pronged test to determine whether material was obscene and thus unprotected by the First Amendment.³ An important aspect of this test called for juries to determine whether material was obscene using a local community standard—that is, juries considered whether their local community would find particular material obscene. This standard has been criticized but has withstood that criticism despite facing numerous court challenges.

With the advent of the Internet in the early 1990s, critics⁴ latched onto a potential issue the new medium created for *Miller*’s local community standard: in the context of the Internet, what is the contemporary

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1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

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

3. *Id.* at 24.

4. General references to widely accepted critical ideas are summarized in the Introduction but will be examined in detail in the body of the Comment. *See, e.g., infra* Parts IV.B.2, 3.

community? Critics suggest that a local community standard is not viable in the Internet Age because the Internet is accessible anywhere in the country, with or without the intention of content providers to target those locations. Because of the inability of content providers to limit the reach of their material, critics of the local community standard fear that content providers will be prosecuted in the least tolerant communities around the country, even when those providers did not target those communities directly. According to critics, this leads to a chilling effect on free speech. These critics claim that the local community standard does not work in the Internet Age and that a new definition of contemporary community is needed. Alternatively, many critics suggest that obscenity law needs to be abandoned entirely.

In *Ashcroft v. ACLU*,⁵ several Justices expressed concern about the viability of a local community standard in the Internet Age; two Justices openly advocated for a national community standard in the Internet context.⁶ In 2009, the Ninth Circuit Court of Appeals used the fractured opinion in *Ashcroft* to adopt a national community standard in the Internet Age.⁷ In early 2010, the Eleventh Circuit Court of Appeals declined to follow the Ninth Circuit's lead.⁸ Thus, a split has emerged among the circuits as to whether a new community standard is needed in the Internet Age.

Part II of this Comment provides an in depth summary of the history of obscenity law. It also details the history of the Internet and what has made it a technological force for the past twenty years. Part III explores the legal debate surrounding *Miller's* local community standard in the Internet context. Part IV discusses certain proposed solutions to the local community standard, especially relating to the adoption of a national community standard. Additionally, Part IV proposes that the local community standard should remain intact because a national standard creates only the illusion of a problem-solving standard while in reality creating problems of its own. Part V concludes the discussion, summarizing the potential problems with replacing the local community standard with a national community standard and, ultimately, arguing that the local community standard—and obscenity law in general—should remain intact.

5. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (plurality opinion).

6. *Id.* at 589. Justices O'Connor and Breyer penned concurring opinions openly advocating for a national standard.

7. *See United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009).

8. *See United States v. Little*, 365 F. App'x 159, 164 (11th Cir. 2010).

II. BACKGROUND

A. *The Road to Miller*

1. The Common Law Rule

The common law rule for obscenity originated in the 1868 English case of *Regina v. Hicklin*.⁹ The *Hicklin* test for obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."¹⁰ The test focused on preventing the weaker members of society from giving in to their own base impulses. American courts soon adopted the *Hicklin* test as the common law test for obscenity in the United States.¹¹

Despite eighty years of prominence, the *Hicklin* test did not escape criticism from American judges. In *United States v. Kennerley*,¹² the famous American jurist, Judge Learned Hand, played an important role in the development of the modern obscenity test. Although Judge Hand ultimately applied the *Hicklin* test, he concluded his opinion with a concise summary of the common law test's weaknesses. He first acknowledged the antiquated nature of the *Hicklin* test for obscenity, stating that the test was "consonant . . . with mid-Victorian morals."¹³ Judge Hand further explained that the common law rule deferred to the most prudish members of society as opposed to the average members of society by stating:

Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think they would forbid all which might corrupt the most corruptible, *or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members*.¹⁴

Judge Hand went on to state that what is obscene should not be determined by reference to an abstract definition but to the moral place at which the

9. *Regina v. Hicklin*, (1868) 3 L.R.Q.B. 360 (Eng.).

10. *Id.* at 371.

11. See *Roth v. United States*, 354 U.S. 476, 489 (1957) (noting that some American courts adopted the *Hicklin* standard).

12. *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913).

13. *Id.* at 120.

14. *Id.* at 121 (emphasis added).

community had arrived.¹⁵ Expanding upon that proposition, he stated that juries should decide whether material is obscene in accordance with a reasonable person standard similar to the standard employed in negligence cases.¹⁶ He concluded his opinion with a statement foreshadowing the modern test that would eventually be adopted: "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."¹⁷

Whereas Judge Hand merely criticized the common law rule, it would take another New York judge to depart from it. In *United States v. One Book Called "Ulysses,"*¹⁸ Judge Woolsey sought to apply the more objective standard Judge Hand had suggested. He stated, "I must endeavor to apply a more objective standard to his [James Joyce's] book in order to determine its effect in the result, irrespective of the intent with which it was written."¹⁹ He then established a new test: "Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts"²⁰ Although Judge Woolsey departed from the *Hicklin* test, his test did not replace the common law rule at the national level.

2. From *Roth* to *Jacobellis*

In 1957, the Supreme Court issued what was at the time a landmark decision relating to obscenity law. In *Roth v. United States*,²¹ the Court finally adopted an objective test for state and federal courts to apply in obscenity cases. First, the Court held that obscenity was not speech protected under the First Amendment.²² Second, the Court held that sex and obscenity were not synonymous and that "obscene material is material which deals with sex in a manner appealing to prurient interest."²³ Last, the Court proceeded to reject the *Hicklin* test and adopt a new test for obscenity: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

15. *Id.*

16. *Id.*

17. *Id.* (emphasis added).

18. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933).

19. *Id.* at 184.

20. *Id.* (emphasis added).

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

22. *Id.* at 485.

23. *Id.* at 487.

appeals to prurient interest."²⁴ The Court's stated rationale for adopting the new test was to bring objectivity to obscenity prosecutions. Echoing Judge Learned Hand's statements in *Kennerley*, the Court said

[t]he test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved.²⁵

Following *Roth*, the Court continued to modify and to struggle with the test it had formulated. In *Memoirs v. Massachusetts*,²⁶ the Court refined the *Roth* test and developed it into a three-part test:

Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.²⁷

As the Supreme Court later noted in *Miller v. California*,²⁸ the key change in the *Memoirs* formulation of the obscenity test involved the burden of proof. The *Roth* test presumed that obscene material was "utterly without redeeming social importance," whereas the *Memoirs* test required the prosecution to affirmatively establish that obscene material was "utterly without redeeming social value."²⁹ Chief Justice Burger stated in *Miller* that

24. *Id.* at 489.

25. *Id.*

26. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion). The full name of the party "Memoirs" was "Memoirs of a Woman of Pleasure," commonly known as "Fanny Hill," which John Cleland wrote around 1750. *Id.* at 415. Interestingly, the book itself was put on trial and not its publisher or distributor. This odd procedural aspect of the case had its origin in a Massachusetts statute that required the suit to be brought against the book by name, as opposed to the publisher or distributor of the book. *Id.*

27. *Id.* at 418.

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

29. *Id.* at 21-22.

the *Memoirs* reformulation essentially required the prosecution to prove a negative.³⁰

After *Memoirs*, the Supreme Court decided *Jacobellis v. Ohio*.³¹ The Court's opinion in *Jacobellis* is noteworthy for two reasons. First, the Court affirmed that the "contemporary community standards" element of the *Roth* test's second prong was to be determined on the basis of a national standard.³² The Court stated that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding."³³ This particular holding of the Court was eventually challenged and rejected in *Miller v. California*.³⁴ The other noteworthy aspect of the *Jacobellis* decision was on a more humorous note. In his concurrence, Justice Potter Stewart famously stated "[b]ut I know it [obscenity] when I see it, and the motion picture involved in this case is not that."³⁵ In many ways, Justice Potter Stewart's statement exemplified the Supreme Court's approach to obscenity in the years between *Roth* and *Miller*. As Chief Justice Burger later emphasized in *Miller*, apart from *Roth*, no majority at any time had been able to agree on a standard to determine what constituted obscene material.³⁶

Finally, two later cases provided further insight into the Court's approach to issues involving obscenity before *Miller*. In *Stanley v. Georgia*,³⁷ the Court held that the government could not make it unlawful for an individual to possess obscene materials in the privacy of his own home.³⁸

30. *Id.* at 22.

31. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (plurality opinion). Like many of the 1960s obscenity cases, *Jacobellis* was a fractured opinion. Justice Brennan wrote the plurality opinion in which Justice Goldberg joined. *Id.* at 185. Justice Black wrote a concurring opinion joined by Justice Douglas. *Id.* at 196. Justices White, Stewart, and Goldberg each wrote separate concurring opinions. *Id.* at 196-98. Chief Justice Warren wrote a dissenting opinion joined by Justice Clark. *Id.* at 199. Justice Harlan wrote his own dissent. *Id.* at 203.

32. *Id.* at 195.

33. *Id.*

34. *Miller*, 413 U.S. at 37.

35. *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

36. *Miller*, 413 U.S. at 22. "[N]o majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power." *Id.*

37. *Stanley v. Georgia*, 394 U.S. 557 (1969).

38. *Id.* at 565. In *Stanley*, the appellant was charged with possession of obscene matter. *Id.* at 558. Federal and state agents found Stanley's obscene matter (three reels of eight-millimeter film) accidentally. *Id.* The agents originally obtained a search warrant to

The Court would later clarify *Stanley* in *United States v. Orito*,³⁹ holding that while an individual has a right to possess obscene material, he does not have a correlative right to receive, transport, or distribute it.⁴⁰

B. The Miller Test

In 1973, the Supreme Court outlined a new test for obscenity in *Miller v. California*.⁴¹ Writing for the majority, Chief Justice Burger noted that *Miller* was "one of a group of 'obscenity-pornography' cases" that the Court was reviewing and involved "what Mr. Justice Harlan called 'the intractable obscenity problem.'"⁴² He then reaffirmed that obscene material was unprotected by the First Amendment.⁴³ Noting that state statutes regulating obscene material must be carefully limited, the Court outlined the boundaries of obscenity by limiting it to works "which depict or describe sexual conduct."⁴⁴ With this foundation, the Court proceeded to expound a new three-pronged test for obscenity to replace those tests articulated in *Roth* and *Memoirs*:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁵

investigate Stanley's home for evidence of bookmaking activities. *Id.* They found little evidence of bookmaking activity, but while looking through one of Stanley's drawers in an upstairs bedroom, the agents came across the three reels of eight-millimeter film that led to his conviction. *Id.*

39. *United States v. Orito*, 413 U.S. 139 (1973).

40. *Id.* at 143. In *Orito*, Orito was charged under 18 U.S.C. § 14621 for knowingly transporting obscene materials in interstate commerce. *Id.* at 140. The materials involved close to eighty-three reams of film. *Id.* Orito moved to dismiss the complaint on the grounds that the statute violated the First and Ninth Amendments. *Id.* The district court agreed with Orito and held that the statute was unconstitutionally overbroad. *Id.*

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

42. *Id.* at 16.

43. *Id.* at 23.

44. *Id.* at 24.

45. *Id.*

In the context of this new test, the Court gave examples of what state statutes could define as obscene under part (b) of the test. The Court stated that material could be found patently offensive if it contained "offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibition of the genitals."⁴⁶ With this standard, the Court knew that juries might reach different conclusions as to the same material but noted that such a disparity did not abridge constitutional rights.⁴⁷

The Court next addressed how to define the phrase "contemporary community standards." The Court stated there did not need to be "uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'"⁴⁸ Thus, the Court adopted a definition of the contemporary community that was to be based on a local standard rather than a national one.⁴⁹ Earlier in the opinion, the Court had stated that the scope of the local community could encompass a region as large as a state.⁵⁰

C. *The Refinement of Miller*

The Supreme Court decisions following *Miller* further clarified the new test. In *Paris Adult Theatre I v. Slaton*,⁵¹ the Court held that expert evidence of whether material is obscene was allowed when the materials themselves were not placed into evidence.⁵² In *Hamling v. United States*, the Court further expounded upon *Miller's* contemporary community standard.⁵³ The

46. *Id.* at 25.

47. *Id.* at 26 n.9.

48. *Id.* at 30.

49. *Id.* at 37.

50. *Id.* at 33-34 (holding that it was not unconstitutional to allow the jury to evaluate materials with reference to the contemporary community standards of the State of California).

51. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1974). In *Paris*, the petitioners, two Atlanta, Georgia movie theaters and their owners and managers, were operating adult theaters. *Id.* at 50-51. The local state district attorney alleged that two films petitioners were exhibiting—"Magic Mirror" and "It All Comes Out in the End"—were obscene. *Id.* at 51-52. The meanings of these two titles are beyond the scope of this article.

52. *Id.* at 56.

53. *Hamling v. United States*, 418 U.S. 87 (1974). It could be argued that the petitioners in *Hamling* wanted to be convicted of mailing obscenity. William L. Hamling was just one of a number of petitioners, along with Reed Enterprises, Inc. and Library Services, Inc., that conspired to mail and advertise "The Illustrated and Presidential Report of the Commission

Court stated that a juror might rely on his own knowledge of the average person in the community just as he might rely on the knowledge of a reasonable person in other areas of the law.⁵⁴ *Miller's* emphasis on contemporary community standards, however, raised questions about jury discretion.

In two separate decisions, the Supreme Court finally addressed jury discretion in obscenity prosecutions. First, in *Jenkins v. Georgia*,⁵⁵ the Court conceded that although the prurient interest and patent offensiveness prongs of the *Miller* test were questions of fact for the jury, juries did not have unbridled discretion to determine what was patently offensive.⁵⁶ In *Smith v. United States*,⁵⁷ the Court further added that while contemporary community standards must be applied in accordance with the tolerance of the average person in the community, it did not mean that obscenity convictions would be unreviewable.⁵⁸ Consequently, juries were to apply contemporary community standards in determining whether material was obscene, but courts had the power to review those decisions. *Smith* is also noteworthy because the Supreme Court explicitly clarified that the second prong of the *Miller* test—patent offensiveness—was also to be applied using a contemporary community standard.⁵⁹

on Obscenity and Pornography." *Id.* at 91. The advertisement that was found obscene was a single-sheet brochure that gave information as to where, how, and from whom the "Illustrated Report" could be obtained. *Id.* The advertisement was mailed to approximately 55,000 persons around the United States. *Id.* at 92. The petitioners were convicted after a jury trial, and on appeal, the United States Court of Appeals for the Ninth Circuit affirmed. *Id.* at 91-92. If Mr. Hamling and his fellow conspirators intended to be convicted, they were successful.

54. *Id.* at 104-05.

55. *Jenkins v. Georgia*, 418 U.S. 153 (1974). *Jenkins* involved a notable 1970s film, "Carnal Knowledge," which starred several notable, early-1970s actors: Jack Nicholson, Art Garfunkel, Ann-Margaret, and Candice Bergen. *Id.* at 154, 158-59.

56. *Id.* at 160.

57. *Smith v. United States*, 431 U.S. 291 (1977). In *Smith*, two postal inspectors using fictitious names requested that the petitioner, Smith, mail to them various allegedly obscene materials consisting of magazines and films. *Id.* at 293. Smith then mailed the materials from Des Moines, Iowa, to post office box addresses in Mount Ayr and Guthrie Center in southern Iowa. *Id.*

58. *Id.* at 305.

59. *Id.* at 301 ("The *Miller* opinion indicates that patent offensiveness is to be treated in the same way [as prurient interest]. . . . [T]he jury must measure patent offensiveness against contemporary community standards.").

Following the *Smith* decision, one question remained: if the first and second prongs of *Miller* are to be applied using a contemporary community standard, what standard applies to the third prong? The Court addressed this question in *Pope v. Illinois*.⁶⁰ In *Pope*, the Court explicitly addressed what community standard was appropriate to determine whether allegedly obscene material contained any serious literary, artistic, political, or scientific value.⁶¹ The Court held that the third prong was not to be measured against an “ordinary member of [a] given community,” but instead by whether a reasonable person would find value in the allegedly obscene material.⁶² After *Pope*, it seemed that the final questions regarding the *Miller* test were answered. *Miller*’s contemporary community standard, however, soon came under attack with the advent of the Internet.

D. A Brief Background of the Internet

When addressing the issue of determining contemporary community standards in the Internet Age, it is advantageous to look into events surrounding the Internet’s inception and why it raises unique issues for the *Miller* test. The Internet originated as a project within the Department of Defense in the 1960s.⁶³ It started out small—a mere 500 host computers in 1983.⁶⁴ In 2000, there were 360 million Internet users. By 2009, there were 1.7 billion Internet users worldwide, approximately twenty-five percent of the world’s population.⁶⁵ Richard Spinello has called this “global connectivity” of the Internet its “most attractive feature” because it brings together millions of people, as well as thousands of organizations, all over

60. *Pope v. Illinois*, 481 U.S. 497 (1987). In *Pope*, police detectives purchased magazines from the two petitioners who were attendants at adult bookstores. *Id.* at 499. The petitioners were then separately charged with the offense of obscenity for the sale of the magazines under the then-current version of Illinois’ obscenity statute. *Id.* The petitioners argued that the statute was unconstitutional because it failed to require that the value question (*Miller*’s third-prong) be judged “solely on an objective basis as opposed to reference [sic] to contemporary community standards.” *Id.* Both the trial court and the appeals court rejected that contention, and the Illinois Supreme Court denied review. *Id.* at 499-500.

61. *Id.* at 500-01.

62. *Id.*

63. RICHARD A. SPINELLO, CYBERETHICS: MORALITY AND LAW IN CYBERSPACE 29 (4th ed. 2011).

64. *Id.* at 31.

65. *Id.*

the world.⁶⁶ This achievement led *The Economist* to state that the Internet brought the "death of distance."⁶⁷

The surge in the Internet's popularity is attributed to the World Wide Web ("Web"), which is a collection of multimedia documents that are accessed through the Internet.⁶⁸ According to the Internet Systems Consortium,⁶⁹ there were close to 625 million active domain Web sites operating on the Web in 2009.⁷⁰ The Internet's popularity has led to numerous social problems in cyberspace, such as the erosion of privacy and the emergence of perverted forms of speech.⁷¹ With 625 million operating domains, it is easy to see how potentially obscene material could be accessed anywhere across the nation, thus subjecting the owners of those domains to obscenity prosecutions. The Internet's rapid growth and national character have created new challenges for courts that seek to apply *Miller's* contemporary community standard. Courts have struggled with the question of whether the Internet is truly a unique national medium that requires a new standard or, instead, whether it should be treated similar to other broadcast mediums.

III. THE ISSUES OF CONTEMPORARY COMMUNITY STANDARDS IN THE INTERNET AGE

The road that led to the current debate about *Miller's* local community standard began in the late 1980s with *Sable Communications of California, Inc. v. FCC*.⁷² Some early cases dealing with the Internet attempted to transfer the arguments from *Sable* to the Internet. These early challenges to the local community standard all failed. Nevertheless, in *Ashcroft v. ACLU*,⁷³ the Court breathed new life into those who opposed the application of a local community standard to a national medium like the Internet. The

66. *Id.*

67. *Id.*

68. *See id.* at 33.

69. On its website, The Internet Systems Consortium describes itself as "a non-profit 501(c)(3) public benefit corporation dedicated to supporting the infrastructure of the universal connected self-organizing Internet—and the autonomy of its participants—by developing and maintaining core production quality software, protocols, and operations." INTERNET SYSTEMS CONSORTIUM, <http://www.isc.org/> (last visited Feb. 4, 2012).

70. SPINELLO, *supra* note 63, at 34.

71. *See id.* at 40.

72. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989).

73. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (plurality opinion).

aftermath of *Ashcroft* gave the Ninth Circuit the impetus to adopt a national community standard.

A. *Early Cases Dealing With the Internet*

1. *Sable Communications of California, Inc. v. FCC*

Sable Communications of California was notable for involving a medium analogous to the Internet: the telephone network.⁷⁴ In *Sable*, the defendant, Sable Communications of California, Inc. ("Sable"), was a Los Angeles-based affiliate of a company that offered sexually oriented telephone messages, known as "dial-a-porn."⁷⁵ Callers outside the Los Angeles area were able to reach the phone service via a long-distance toll call;⁷⁶ thus, like the Internet, users could access Sable's services from anywhere in the country. Sable filed a suit in federal court seeking a declaratory judgment that an amended obscenity provision to the Communication Act of 1934 was unconstitutional.⁷⁷ Sable argued that the provision compelled it to tailor its messages to the least tolerant members of the community.⁷⁸ The Court held that Congress's prohibition of the interstate transmission of obscene commercial telephone recordings was not unconstitutional.⁷⁹ The Court reiterated its precedents that subjecting distributors of allegedly obscene material to varying community standards did not render a federal statute unconstitutional because it failed to apply uniform national standards.⁸⁰ The Court went on to hold that *Miller's* contemporary community standard test was not unconstitutional even though materials may be found obscene in one community but not another.⁸¹ Thus, the Court held that Sable bore the burden of complying with different communities' prohibitions of obscene materials.⁸²

74. *Sable*, 492 U.S. at 115.

75. *Id.* at 118.

76. *Id.*

77. *Id.*

78. *Id.* at 124.

79. *Id.* at 125.

80. *Id.*

81. *Id.* at 125-26.

82. *Id.* at 126.

2. *United States v. Thomas*

Although *Sable* concerned a medium analogous to the Internet, *United States v. Thomas* was one of the first obscenity cases involving the new Internet medium.⁸³ In *Thomas*, the defendants operated an online message board from their home in California.⁸⁴ Using the message board, individuals could access, transfer, and download sexually-explicit, Graphical Interchange Format ("GIF")⁸⁵ files onto their computers.⁸⁶ Notably, access to the GIF files was limited to people who were paying members.⁸⁷ An individual who resided in Tennessee filed a complaint with a United States Postal Inspector.⁸⁸ Following an investigation, charges were filed against the defendants in the Western District of Tennessee.⁸⁹

The defendants asserted that *Miller's* contemporary community standard prong did not apply.⁹⁰ The court rejected that argument, reasoning that the GIF files were transferred from defendants' home to Tennessee.⁹¹ Therefore, the court held that in cases involving the Internet, prosecutions could be brought either in the district where obscene materials were dispatched or in the district of receipt and that the local community standards prong applied.⁹²

The court also addressed the defendants' and *Amicus Curiae's* argument that the Internet required a new definition of community, one based on cyberspace rather than geographic location.⁹³ The court, however, rejected

83. *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996).

84. *Id.* at 705.

85. *What is the GIF graphics file format?*, INDIANA UNIVERSITY'S KNOWLEDGE BASE, <http://kb.iu.edu/data/aovp.html> (last visited Feb. 3, 2012).

The Graphical Interchange Format (GIF) is one of the most widely used image formats on the web. GIF files are recognizable by their .gif file extension. GIF is suitable for images with sharp edges and relatively few gradations of color, such as line art, cartoons, and text. You can also create background transparencies and animations using GIF images.

Id.

86. *Thomas*, 74 F.3d at 705.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 711.

91. *Id.*

92. *Id.*

93. *Id.*

this argument, reasoning that the present case was not a situation in which the defendant had no knowledge or control over where the obscene materials would be downloaded.⁹⁴ Access was limited to the defendants' message board, and members were screened and issued passwords before materials were distributed.⁹⁵ Thus, the court reasoned that the defendants had the power to preclude liability in less tolerant communities.⁹⁶ Ultimately, the court determined that there was no need to adopt a new definition of "community" in cases involving Internet message boards.⁹⁷

B. The Strange Case of Ashcroft v. ACLU

In 2002, the Supreme Court rendered a fractured decision in *Ashcroft v. ACLU* that cast doubt about the viability of a local community standard in Internet obscenity cases.⁹⁸ In *Ashcroft*, the ACLU and several Internet websites challenged the constitutionality of the Child Online Protection Act of 1998 (COPA).⁹⁹ The Child Online Protection Act was Congress's second attempt at protecting children from Internet pornography.¹⁰⁰ The respondents challenged COPA § 231(e)(6)(A), which defined "material harmful to minors" with reference to the test outline in *Miller*.¹⁰¹ That provision stated that obscene material was to be measured by whether "the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest[.]"¹⁰² Respondents claimed that COPA's use of contemporary community standards would render some of their website content harmful to minors in some communities, but not in others.¹⁰³ The Third Circuit agreed with the respondents, holding that the Court's prior community standards jurisprudence had no applicability to the Internet because Web publishers

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 712.

98. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (plurality opinion).

99. *Id.* at 566; *see generally* Child Online Protection Act of 1998, 47 U.S.C. § 231 (1998).

100. COPA's predecessor, the Communications Decency Act of 1996, had been declared unconstitutional in *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

101. *See Ashcroft*, 535 U.S. at 570.

102. *Id.*

103. *Id.* at 571.

did not have the ability to control the geographic scope of their communications.¹⁰⁴

1. Justice Thomas's Plurality

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote the plurality opinion of the Court¹⁰⁵ and affirmed *Miller's* definition of community standards in Internet cases.¹⁰⁶ Justice Thomas rejected the respondents' argument that the unique characteristics of the Internet required that the Court adopt a different approach to community standards in Internet cases.¹⁰⁷ Justice Thomas reiterated that community standards did not need to be defined with reference to a specific geographic area¹⁰⁸ and that a different standard—the adult population as a whole—would not solve the variance in community standards that the respondents feared.¹⁰⁹ Furthermore, Justice Thomas was of the opinion that any danger resulting from the variances the local community standard posed was limited by *Miller's* "value prong."¹¹⁰ Justice Thomas, therefore, relied on the holdings in *Hamling* and *Sable* to reiterate that if a publisher chose to send its material into a particular community, it was the publisher's responsibility to abide by that community's standards.¹¹¹ Thus, just as in *Sable*, an Internet content provider's burden in preventing obscene materials from reaching particular communities did not change because it chose to distribute its materials to every community in the United States.¹¹²

2. Justice O'Connor Advocates for A National Standard

Justice O'Connor wrote a concurring opinion in which she openly advocated for the adoption of a national community standard in Internet obscenity cases.¹¹³ She noted, "[T]he use of local community standards will

104. *Id.* at 575.

105. *Id.* at 566.

106. *See id.* at 583.

107. *See id.*

108. *Id.* at 576.

109. *See id.* at 577.

110. *See id.* at 579.

111. *Id.* at 583.

112. *Id.*

113. *Id.* at 586 (O'Connor, J., concurring in part and concurring in the judgment) ("I write separately to express my views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet.").

cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases.”¹¹⁴ She further stated that expecting Internet publishers to bear the burden of controlling the recipients of their speech, as in *Hamling* and *Sable*, would be “entirely too much to ask” and “would potentially suppress an inordinate amount of expression.”¹¹⁵ For these reasons, she felt it was necessary to adopt a national standard “for any reasonable regulation of Internet obscenity.”¹¹⁶

Justice O’Connor then explained why a national standard was not incompatible with the Court’s prior obscenity jurisprudence. She noted that Supreme Court precedent and the First Amendment did not prohibit adoption of a national standard and that the Court in the *Jenkins* and *Miller* decisions did not mandate adoption of local community standards.¹¹⁷

Also, Justice O’Connor was not concerned about potential difficulties with a national standard. She noted that the Court in *Miller* allowed local community standards to be applied to the State of California, a large and diverse state containing thirty-three million people.¹¹⁸ Thus, she did not think that generalizations about the national community of the United States would pose a problem, considering the Court felt jurors were capable of making generalizations about the State of California.¹¹⁹ Therefore, Justice O’Connor believed that a national standard was not only constitutional in Internet cases but also reasonable.¹²⁰

3. Justice Breyer Advocates for A National Standard

In his separate concurring opinion, Justice Breyer joined Justice O’Connor in advocating for a national standard in Internet obscenity cases. Justice Breyer wrote separately because he believed that Congress, in drafting COPA, intended the word “community” in “contemporary community standards” to refer to the “[n]ation’s adult community taken as a whole, not to geographically separate local areas.”¹²¹ Therefore, Justice

114. *Id.* at 587.

115. *Id.*

116. *Id.*

117. *Id.* at 587-88.

118. *Id.* at 588-89.

119. *Id.* at 589.

120. *Id.*

121. *Id.* (Breyer, J., concurring in part and concurring in the judgment).

Breyer was of the opinion that Congress envisioned COPA to incorporate a national adult standard, not a community standard.¹²²

Justice Breyer opined that adopting a local community standard in the context of the Internet would raise First Amendment issues.¹²³ He therefore stated that adopting a local community standard "would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the [n]ation" and that the "technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious."¹²⁴ He then asserted his opinion that a "nationally uniform adult-based standard" would therefore alleviate "any special need for First Amendment protection."¹²⁵

4. Justice Kennedy's Plurality

Justice Kennedy wrote a concurring opinion in which Justices Ginsburg and Souter joined.¹²⁶ Justice Kennedy expressed his view that the Internet created difficulties for the community standards criterion, meaning that "any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."¹²⁷ He therefore believed that the Internet was a medium that posed difficulties for the community standards criterion in a way the mediums in *Hamling* and *Sable* did not.¹²⁸ Justice Kennedy was of the opinion that "national variation in community standards [constituted] a particular burden on Internet speech."¹²⁹ Therefore, Justice Kennedy's concurring opinion expressed doubts about the viability of a local community standard in Internet obscenity cases but did not expressly reject such a standard or adopt a different standard.¹³⁰

122. *Id.* at 590.

123. *Id.*

124. *Id.*

125. *Id.* at 591.

126. *Id.* (Kennedy, J., concurring in the judgment).

127. *Id.* at 593-94 (quoting *Reno v. ACLU*, 521 U.S. 844, 877-88 (1997)) (internal quotation marks omitted).

128. *Id.* at 597.

129. *Id.*

130. *Id.* at 602.

5. Justice Stevens's Dissent

Justice Stevens filed a dissenting opinion in which he opined that *Miller's* contemporary community standard criterion did not work in the Internet context.¹³¹ He stated that the *Miller* test was meant to be a shield to protect offensive communications from the least tolerant members of society.¹³² In the context of the Internet, he believed that community standards became a "sword, rather than a shield" and that "[i]f a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web."¹³³ Justice Stevens believed that because of the unique nature of the Internet, where information is accessible everywhere to anyone online, Internet publishers could not "control access based on the location of the listener, nor [could they] choose the pathways through which [their] speech is transmitted."¹³⁴

Although Justice Stevens found difficulties with applying a local community standard to the Internet, he did not necessarily believe a national standard was the solution. He stated that even jurors applying a "national, or adult, standard" would reach "widely different conclusions throughout the country."¹³⁵

Justice Stevens did opine, however, that the Internet needed a different standard. He reiterated his view that the *Miller* test acted not only as a shield to protect potentially offensive communications but also as a shield to protect audience members because it allowed people to "self-sort" in different communities "based on their preferences."¹³⁶ He believed that this "sorting mechanism" did not exist in cyberspace and that, as a result, audience members could not "self-segregate."¹³⁷

The *Ashcroft v. ACLU* decision created uncertainty about the future of the local community standard in Internet obscenity cases. Only three Justices firmly adhered to the local community standard approach while two advocated for a national standard; three Justices had doubts about the viability of the local community standard approach in Internet cases and one opined that a local or national community standard would present

131. See *id.* at 602-03 (Stevens, J., dissenting).

132. *Id.*

133. *Id.* at 603.

134. *Id.* at 605.

135. *Id.* at 607 n.3.

136. *Id.* at 612.

137. *Id.*

significant issues.¹³⁸ Consequently, *Ashcroft's* fractured opinion left open the door for a new standard in Internet obscenity cases.

C. *The Circuit Courts' Post-Ashcroft Maneuvering*

1. The Ninth Circuit Shakes It Up: *United States v. Kilbride*

The *Ashcroft* decision gave new latitude to the circuit courts in Internet obscenity cases. In *United States v. Kilbride*,¹³⁹ the Ninth Circuit took advantage of *Ashcroft's* fractured opinion to adopt a national community standard in Internet obscenity cases.¹⁴⁰ In *Kilbride*, the defendants challenged the instruction to the jury concerning "contemporary community standards," arguing that the jury should have been instructed to apply a national community standard.¹⁴¹

The court examined the Supreme Court's precedents in light of the contemporary community standard in the *Ashcroft v. ACLU* decision. The court noted that *Ashcroft* was a plurality decision: Justice Thomas and two other Justices upheld local community standards¹⁴² whereas Justices O'Connor and Breyer both advocated for a national community standard in Internet cases.¹⁴³ The Ninth Circuit was of the opinion that Justices O'Connor's and Breyer's opinions agreed with a limited aspect of Justice Thomas's holding that "variance inherent in application of a national community standard would likely not pose constitutional concerns by itself."¹⁴⁴ The court finally noted that the five concurring Justices did not view the application of a national community standard as problematic.¹⁴⁵ Relying on this Supreme Court precedent,¹⁴⁶ the Ninth Circuit held that a national community standard must be applied in regulating speech on the

138. See *supra* Part III.B.

139. *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009).

140. *Id.* at 1250.

141. *Id.* at 1247.

142. *Id.* at 1252.

143. *Id.* at 1253.

144. *Id.* at 1254.

145. *Id.*

146. The court held that, in the case of a fragmented court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted) (internal quotation marks omitted)).

Internet because Justices O'Connor's and Breyer's holdings had rested on the narrowest grounds.¹⁴⁷

2. The Eleventh Circuit's Traditional Approach

With the Ninth Circuit's adoption of a national community standard, the question arose whether other circuits would follow. The answer came in the form of a firm negative several months later in *United States v. Little*.¹⁴⁸ In *Little*, the appellants had produced and sold videos of a sexually explicit nature that were marketed online at their sexually explicit website.¹⁴⁹ As in *Kilbride*, the appellants asserted that a national or Internet community standard should apply in Internet obscenity cases.¹⁵⁰ The Eleventh Circuit rejected this argument¹⁵¹ and affirmed that *Miller's* contemporary community standard remained the test for defining obscenity on the Internet.¹⁵² In reaching this decision, the court acknowledged that the Ninth Circuit had adopted a national community standard in *Kilbride*¹⁵³ but that the portions of the *Ashcroft* opinion on which the Ninth Circuit relied were dicta and not the ruling of the Supreme Court.¹⁵⁴ Therefore, the court held that *Miller's* contemporary community standard should still be applied in Internet obscenity cases.¹⁵⁵

D. Forum Shopping

Forum shopping is cited as a chief reason behind the need to adopt a national community standard in Internet obscenity cases. Forum shopping in the obscenity context has been defined as "prosecutors . . . bringing charges only in conservative communities, where they have a greater chance of empanelling a jury that will judge sexually oriented materials obscene."¹⁵⁶

147. *Id.*

148. *United States v. Little*, 365 F. App'x 159 (11th Cir. 2009).

149. *Id.* at 161.

150. *Id.* at 163-64.

151. *Id.* at 164.

152. *Id.* at 162.

153. *Id.* at 164.

154. *Id.*

155. *Id.*

156. Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 56 (2010) (quoting Robert F. Howe, *U.S. Accused of 'Censorship by Intimidation' in Pornography Cases*, WASH. POST, Mar. 26, 1990, at A4).

The argument is straightforward: because the Internet can be accessed almost anywhere in the country, a local community standard allows prosecutors to bring Internet obscenity prosecutions wherever they please, often in the least tolerant communities in the nation.¹⁵⁷ Some support does exist for this argument, as it appears that prosecutors are willing to bring obscenity prosecutions in less tolerant communities than where the materials are produced.¹⁵⁸

Indeed, the number of obscenity prosecutions reached its zenith in the 1980s and early 1990s.¹⁵⁹ During that period, the federal government openly admitted to a strategy of forum shopping simultaneously in multiple venues.¹⁶⁰ In a letter to then-United States Attorney General Edwin Meese in 1985, Brent Ward, the United States Attorney for Utah, outlined the forum shopping strategy:

The heart of this strategy calls for multiple prosecutions (either simultaneous or successive) at all levels of government in many locations. If thirty-five prosecutors comprise the strike force, theoretically thirty-five different criminal prosecutions could be instigated simultaneously against one or more of the major pornographers I believe that such a strategy would deal a serious blow to the pornography industry This strategy would test the limits of pornographers' endurance. I believe the targeted companies would curtail their operations and withdraw from and refrain from entering geographical markets in which they could not find community acceptance.¹⁶¹

157. See *id.* at 56-61.

158. Alyson Wall, *Prosecutors Seek Conservative Venues for Porn Trials*, PITT. TRIB. REV., May 18, 2004, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_194571.html (discussing federal prosecutors' tendency to prosecute obscenity cases in more conservative communities, such as Pittsburgh, as opposed to Hollywood, California).

159. During this period federal prosecutors successfully put seven of the nation's largest pornography distributors out of business. Jason Krause, *The End of the Net Porn Wars*, A.B.A. J., Feb. 1, 2008, http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/; see also Linda P. Campbell, *Federal Unit Aims at Pornographers*, CHI. TRIB., Apr. 6, 1990, available at http://articles.chicagotribune.com/1990-04-06/news/9001280255_1_justice-department-pornographers-prosecutors (asserting that by April 1990 federal prosecutors had "piled up convictions in 15 states, including Illinois, with fines totaling more than \$3 million").

160. *United States v. P.H.E., Inc.*, 965 F.2d 848, 850 (10th Cir. 1992).

161. *Id.*

Mr. Ward's comments show that, at least in the 1980s, federal prosecutors underwent a coordinated effort to shop for the most favorable fora around the country to obtain obscenity convictions.¹⁶² As an example of the success of this strategy, the federal government used forum shopping in 1991 to target "a shipment of sexually explicit videotapes from a California company to a Dallas distributor who was cooperating with a police department vice squad investigation."¹⁶³ Forum shopping was a legitimate concern in the 1980s and early 1990s.

The zealous pursuit of obscenity convictions has declined in recent years as American society has become more accepting of pornography and as prosecutors have sought to allocate their resources toward what they perceive as more pressing matters, such as child pornography. For example, in 2003, there were eighty-three obscenity prosecutions in the nation compared to 3,294 for child pornography and 1,795 for terrorism.¹⁶⁴ In contrast, during the 1980s and early 1990s, federal prosecutors successfully put seven of the nation's largest pornography distributors out of business.¹⁶⁵ Federal prosecutors' lackluster desire to prosecute obscenity cases is largely responsible for the decline.¹⁶⁶ Many prosecutors perceive obscenity prosecutions as a waste of resources—resources they believe should be directed toward more pervasive evils.¹⁶⁷ For example, Clyde DeWitt, a defense attorney for adult entertainment producers and retailers, has stated: "If you talk to prosecutors on the front lines, they've got fraud, gang activity, organized crime[,] and drug cartels to contend with. Nobody wants resources redirected to dirty movies Whoever gets that assignment is the laughingstock of the department."¹⁶⁸ Even organizations that once

162. See Calvert, *supra* note 156, at 56-57 ("The federal government aggressively used forum shopping—in fact, it employed simultaneous, multiple-venue forum shopping—during its 'Project PostPorn' prosecutions against adult movie producers in the late 1980s and early 1990s." (footnote omitted)).

163. *Id.* at 59 (quoting Dianna Hunt, *Dallas Obscenity Case May Cost Porno Supplier*, HOUS. CHRON., Aug. 11, 1991, at 6A).

164. See Wall, *supra* note 158.

165. See Krause, *supra* note 159.

166. *Id.*

167. In 2005, for example, Alex Acosta, interim United States Attorney for the Southern District of Florida, assigned members of his staff to pornography cases. *Id.* In response, many members of his staff complained to the Associated Press, stating "they were 'stunned' that resources were being used for obscenity cases." *Id.*

168. *Id.* Mr. DeWitt seldom defends obscenity cases for his clients these days due to the decline in obscenity prosecutions. He stated:

focused on combating all obscenity have turned their sights elsewhere. The National Law Center for Children and Families was once focused on combating all obscenity.¹⁶⁹ Presently, the National Law Center for Children and Families helps train Department of Justice lawyers in how to investigate and prosecute child pornography and human trafficking cases but does not do anything with adult obscenity cases.¹⁷⁰ During the Bush administration, obscenity prosecutions did not increase at the rate free speech advocates feared, despite stirring anti-pornography speeches by Attorney General John Ashcroft and his successor Alberto Gonzales.¹⁷¹

E. The "Chilling" of Free Speech

Forum shopping is intertwined with the other great fear of anti-obscenity law proponents: the chilling effects a local community standard has on free speech. The late Justice William Brennan adequately summed up the local community standard's chilling effect on free speech in his 1974 dissent in *Hamling v. United States*:

National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people.¹⁷²

I now spend an ungodly amount of time prosecuting copyright infringement—content that's stolen from my clients—but not doing obscenity work There haven't been enough prosecutions to know, but I have to believe attitudes have changed in the last 15 years so that it would be harder to get a conviction.

Id.

169. *Id.*

170. *Id.*

171. Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, available at <http://www.nytimes.com/2007/09/28/us/28obscene.html>. In actuality, by late 2007 there had been fewer than two-dozen federal obscenity prosecutions that did not also contain charges of child pornography, an offense that is prosecuted much more frequently. *Id.*

172. *Hamling v. United States*, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting).

In other words, under a local community standard, Justice Brennan feared that content providers would be unable to discern what material would be classified as obscene in one part of the country but not in another. Consequently, content providers would be forced to self-censor themselves to avoid obscenity prosecutions in the least tolerant communities in the nation.

Justice Brennan's argument arguably had less force in 1974 than it does today. In the 1970s, content providers had control over where they distributed pornographic materials. If Playboy did not want to send pornographic materials to rural Kansas, it did not have to send them there. The Internet has changed this dynamic. Now, as the argument goes, Playboy has no control over the geographic locations from which an individual can access its website. Therefore, a content provider such as Playboy needs to be cautious about the material it posts on its website, perhaps even resorting to a diluted message than would otherwise be posted if obscenity law did not exist.

IV. WHY THE LOCAL COMMUNITY STANDARD SHOULD REMAIN INTACT

A. *Does the Need for a New Standard Truly Exist?*

Those who oppose obscenity law do so for two reasons: (1) prosecutors' tendencies to forum shop¹⁷³ and (2) its chilling effects on free speech.¹⁷⁴ Many who oppose obscenity law say it should be abandoned entirely. Other opponents argue that to avoid the negative ramifications of the local community standard in the Internet Age, some form of a national standard should be adopted.¹⁷⁵ Nevertheless, whether the need for a national standard truly exists is questionable. It is also questionable whether a national standard would stop the forum shopping and the chilling effects on free speech attributed to the local community standard. Those who support obscenity law believe there is no need to adopt a new community standard

173. See Calvert, *supra* note 156, at 55-61 (providing a thorough analysis of forum shopping in the 1980s and early 1990s); see also *supra* Part III.D.

174. *Hamling*, 418 U.S. at 144 (Brennan, J., dissenting); see also *supra* Part III.E.

175. See Calvert, *supra* note 156, at 52 (discussing a previous national standard he proposed); Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 70 (2004) (proposing a minimal—or most permissive community—national standard).

in the Internet Age.¹⁷⁶ Those who oppose obscenity law believe that the local community standard poses a problem that needs to be fixed. In this author's view, the "problem" that anti-obscenity advocates have with obscenity law is not a problem at all. In fact, the changes offered by anti-obscenity advocates create further problems of their own. As a result, obscenity law should be preserved, and there is no need to change the community standard because it guards against many of the concerns expressed by anti-obscenity advocates.

B. Possible Changes to the Local Community Standard Approach

1. Abandon Obscenity Law

The simplest change to the issue of local community standards is to abandon obscenity law in its entirety. Numerous scholars have advanced this position, claiming that self-regulation is a more effective—and less problematic—means of handling obscenity.¹⁷⁷ Although some Justices on the Supreme Court have expressed doubts about the viability of the local community standard in the Internet Age, none has expressed doubts about the viability of obscenity law itself.¹⁷⁸

Still, if the Supreme Court declared obscene speech to be protected speech under the First Amendment, the ramifications would be far-reaching. Content once considered taboo¹⁷⁹ by a majority of porn producers would become rampant. In a post-obscenity world, it would certainly be interesting to see if porn producers would engage in the kind of self-regulation that anti-obscenity law advocates claim they would. If the statements of porn producers are any indication, then it seems likely that self-regulation would not occur. Porn producer Larry Flynt admits that much of the self-regulation in the industry occurs, not as a result of moral duty, but out of a fear of obscenity prosecutions. Mr. Flynt, a self-described

176. See, e.g., John Fee, *Obscenity And The World Wide Web*, 2007 BYU L. REV. 1691 (2007) (advocating that the local community standard remain intact in Internet obscenity cases).

177. See, e.g., Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 1021-29 (2002).

178. See *supra* Part III.B.

179. Paul Cambria, a porn industry lawyer, created what has been called the "Cambria list" consisting of sex acts he advises his clients to treat as taboo, among them, "[e]jaculation on the face [and] urination." Transcript, *Frontline: American Porn* (PBS television broadcast Feb. 7, 2002), <http://www.pbs.org/wgbh/pages/frontline/shows/porn/etc/script.html> (last visited Mar. 18, 2012).

purveyor of “plain vanilla sex,” said that “[t]here are certain things you don’t do, not because you don’t feel you have the right to do them, but because they are indefensible in court.”¹⁸⁰ The questions then become, how far would porn producers go without obscenity law; where would they draw the line, if they would have a line at all; and, as porn producers try to outdo one another, what impact will their one-upmanship have on society and on the consumption of pornography? These are questions that, potentially, have troubling answers.

2. A National Standard

Many scholars who favor abandoning obscenity law are willing to resort to a national community standard as a compromise.¹⁸¹ The problem with adopting a national standard, however, is the form that it will take. Only two viable options¹⁸² are present: (1) a minimal national standard or (2) an average national standard.¹⁸³ The minimal national standard is, in essence, a *most permissive* national standard—that is, jurors would be required to determine whether the most permissive community in the nation would find an Internet website obscene. For example, a jury in rural Kansas would have to determine whether the average person in Los Angeles would find Internet content obscene. The other option—an average national standard—has been aptly described by one author as striking “a middle ground somewhere between the values of West Hollywood, California where [Larry] Flynt’s Hustler Hollywood emporium is situated and Provo, Utah where the wholesome-image Osmond family resides.”¹⁸⁴ The average

180. Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview with Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56, 80 n.57 (2010).

181. Among those advocating this position are Cenite, *supra* note 175, at 70-71 (proposing a minimal national standard if obscenity law is not to be abandoned in its entirety); Julie Hilden, *Should the Local Standard For Internet Speech Be National Or Local?*, FINDLAW (Mar. 2, 2010), <http://writ.news.findlaw.com/hilden/20100302.html> (proposing a minimal national standard if obscenity law is not to be abandoned).

182. A potential third option—a least tolerant community national standard—is not viable because it “would provide the most puritan of communities with a *heckler’s Internet veto* affecting the rest of the Nation.” *Ashcroft v. ACLU*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring) (emphasis added).

183. Mark Cenite explained the concept of a national standard using three hypothetical communities. On a 10-point scale, with 10 being the most tolerant, he stated that an average national standard would be a community where anything above a “6” would be found obscene, while a minimal national standard community would find material above an “8” to be obscene. See Cenite, *supra* note 175, at 59-60.

184. See Calvert, *supra* note 156, at 52.

national standard, however, presents potential problems of overbreadth.¹⁸⁵ While adopting an average or minimal national standard has a certain appeal, these options may not address the issues that the local community standard poses.¹⁸⁶

Advocates of the national standard believe that it would address overbreadth and the chilling effects on speech that are attributed to the local community standard. Essentially, advocates of the national standard argue that such a standard would require juries to determine whether the national community in the United States would find material to be obscene. Juries would thus be required to do one of two things: (1) determine what the average American thinks or (2) determine what the average, permissive American thinks. Requiring a juror to do so is a task that may be impossible and potentially de-fang obscenity law.

In this author's view, Justices Stevens correctly addressed this issue in his dissenting opinion in *Ashcroft v. ACLU*.¹⁸⁷ He noted that the Court in *Miller* believed that asking jurors to apply a national standard would be "an exercise in futility" because "jurors instructed to apply a national, or adult, standard will reach widely different conclusions throughout the country."¹⁸⁸ Justices Stevens, therefore, was of the view that no matter what community standard jurors are asked to apply—national or local—they will still reach different conclusions as to whether material is obscene. In other words, a national standard would create the illusion of a problem-solving standard. A national standard, in reality, would still carry the same issues as a local community standard.

First, a jury would still have the difficult task of determining what the average or most permissive American thinks. A jury in rural Kansas may have no idea how the residents of San Francisco would view material. In fact, a Kansas jury may have a misperception of what kind of material residents of San Francisco would permit, let alone what San Francisco residents would find obscene. A jury is already burdened with the task of determining what its *own* community considers obscene, let alone a community that the jury has never—and may never—experience.

Second, a national standard may render obscenity law ineffective and useless. If a jury must apply the community standard of a community other

185. See Cenite, *supra* note 175, at 60-61 (believing an average national standard to be overbroad).

186. See *supra* Part IV.A.

187. *Ashcroft*, 535 U.S. at 602-12.

188. *Id.* at 607 n.3.

than its own and of which it is most likely unfamiliar, then the jury may misjudge what the other community would find obscene. For example, if a Kansas jury believes that it should apply the community standard of a community with the permissiveness of San Francisco, it may believe that San Francisco would permit material that, in actuality, the community of San Francisco would find obscene. In essence, a national standard may actually tip the balance in obscenity prosecutions in favor of content providers and may make obscenity prosecutions difficult to obtain.

With a national standard, prosecutors would still know that a jury in rural Kansas would reach a different conclusion than a jury in Los Angeles. Counsel for content providers of adult materials would be aware of this fact, and content providers would still engage in self-censorship.¹⁸⁹ The growing reluctance among prosecutors to prosecute obscenity cases, combined with changing attitudes regarding pornography, unfortunately points to an eventual modification—if not outright abandonment—of obscenity law.

C. *Why the Local Community Standard Should Remain Unchanged*

The Ninth Circuit's decision in *Kilbride* gave newfound legitimacy to calls for *Miller's* local community standard to be abandoned in favor of a national standard. As stated in Part IV.B.2, a national standard would not be the answer its proponents believe it to be. More likely, a national standard would result in juries in different communities still reaching widely different verdicts, while at the same time giving a legal advantage to producers of potentially obscene content. There are two other reasons a national standard is not appropriate in the Internet Age. First, individual communities should have the opportunity to determine what content each finds obscene. Second, the *Miller* test has inherent safeguards that prevent local communities from finding material obscene that should not be found obscene.

1. The "Speech" They Fight To Protect

Anti-obscenity advocates believe that obscenity law prohibits speech that should be allowed. They believe that obscenity law is from a bygone era when sex was dirty and prudishness ruled the day. They view obscene speech as essentially harmless speech; speech that society should tolerate; speech that no reasonable society would want to prohibit. The question thus becomes, what is the speech that *they* want to protect? Paul Little, a

189. Granted, content providers may engage in a lesser form of self-censorship than they do now, but it would be difficult to measure this lesser form of self-censorship.

convicted pornographer, stated that content that would get him in trouble includes "pissing, fist f***ing, and pooping . . . or gagging a girl until she vomits" ¹⁹⁰ In a recent obscenity prosecution, Extreme Associates was prosecuted for producing hardcore pornographic material that involved simulated rapes and actual beatings. ¹⁹¹ In 2002, before Extreme Associates was prosecuted, a PBS documentary entitled *Frontline: American Porn* described a scene from one of Extreme Associates's films in graphic and grotesque terms:

Before the scene is finished, Lizzie's friend, Veronica, will be kicked and beaten. She will have . . . sex with each of these actors. Then they will pretend to cut her throat and leave her for dead in a pool of blood. ¹⁹²

It is this type of content that anti-obscenity advocates seek to protect. This content is what they consider to be free speech. It may be that someday society will believe that such speech is acceptable, perhaps even welcome, but, until that day, segments of society must be given the opportunity to decide for themselves if they want to allow such speech. Individual communities must have the opportunity to say that *some* content goes too far. The local community standard gives communities that opportunity.

2. The *Miller* Standard Safeguards Against Juries' Abuses of Discretion

Beyond communities around the country being allowed the opportunity to determine what material they find obscene, it is important to remember that the *Miller* test has built-in safeguards against a jury's abuse of discretion. In *Jenkins v. Georgia*, ¹⁹³ the Court held that juries did not have unbridled discretion in determining what was patently offensive, ¹⁹⁴ and in *Smith v. United States*, ¹⁹⁵ the Court held that obscenity convictions were reviewable. ¹⁹⁶ Thus, higher courts are allowed to review the decisions of

190. See Calvert, *supra* note 156, at 70.

191. Richards & Calvert, *supra* note 180, at 74-75 (2010) (discussing the content Extreme Associates produced that caught the attention of federal prosecutors).

192. Transcript, *Frontline: American Porn* (PBS television broadcast Feb. 7, 2002), <http://www.pbs.org/wgbh/pages/frontline/shows/porn/etc/script.html> (last visited Mar. 18, 2012).

193. *Jenkins v. Georgia*, 418 U.S. 153 (1974).

194. *Id.* at 160.

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

196. *Id.* at 305.

juries to prevent prudish communities from reaching conclusions that are unjust and inconsistent with the material at issue.

In addition, the third prong of the *Miller* test prevents otherwise valuable material from being found obscene, a point expounded upon by Justice Thomas in *Ashcroft v. ACLU*.¹⁹⁷ The third prong of *Miller* asks the jury to determine “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁹⁸ To understand how this prong protects content providers, consider a hypothetical prudish community that might find the Oscar-nominated 2008 film *The Reader*¹⁹⁹ obscene. This hypothetical prudish community could have found that the film’s explicit depiction of a sexual relationship between a thirty-six-year old woman and a fifteen-year old boy appealed to the “prurient interest” and was “patently offensive” according to local community standards. *Miller*’s third-prong, however, would protect the film from being found obscene. The third-prong provides a further safeguard because, unlike the “prurient interest” and “patently offensive” prongs, the third prong is judged by a reasonable person standard, not a local community standard.²⁰⁰ Additionally, it would be practically impossible for a jury to conclude that a reasonable person could find that an Oscar-nominated film like *The Reader* lacked “serious literary, artistic, political, or scientific value.”²⁰¹ Thus, the *Miller* test has inherent safeguards that prevent juries from exercising unbridled discretion in finding material obscene, countering the possible prudishness of the local community. Over the past decade, material like *The Reader* has not been adjudged obscene. On the contrary, what has been found obscene is material involving “pissing, fist f***ing, and pooping . . . or gagging a girl until she vomits”²⁰²

V. CONCLUSION

The Internet, as any new technology, has challenged traditional legal standards. *Miller*’s local community standard has caused many people in the Internet Age to re-think the very idea of community. Furthermore, the

197. *Ashcroft v. ACLU*, 535 U.S. 564, 577-79 (discussing how the Communication Decency Act did not include any limiting terms resembling *Miller*’s other two prongs relating to prurient interest and serious literary, artistic, political, or scientific value).

198. *Miller v. California*, 413 U.S. 15, 24 (1973).

199. *THE READER* (The Weinstein Co. 2008).

200. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

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

202. See Calvert, *supra* note 156, at 70.

Internet's national scope poses challenges to the local community standard that differ in significant ways from other mediums of communication. The question is whether the nature of the Internet requires a unique standard of "community" distinct from the "local community" standard used for other mediums. If the Internet requires a re-evaluation of *Miller's* contemporary community standard, should it also require a re-evaluation of obscenity law itself? Although applying the local community standard to the Internet may result in forum shopping and chilling effects on free speech, the local community standard may not be the problem that many of its detractors claim.

Several options are available to address the issue of contemporary community standards in the Internet Age. If the Supreme Court eventually revisits the issue of contemporary community standards in the Internet Age, it has a few options before it. As many have argued, the Supreme Court could simply abandon the notion of obscenity entirely, at least with regard to adult pornography. The Court could also choose to adopt some form of a national standard in Internet obscenity cases. A national standard could take the form of a minimal national standard or an average national standard. Determining how the minimal or average national standard should be measured, however, is a difficult matter and may provide only the illusion of addressing the issues posed by a local community standard. In reality, a national standard would be hard to measure and could result in just as many variant results as the local community standard. Furthermore, a national standard could give the legal advantage to content providers because juries could have misconceptions about what the average person in the nation would find obscene. Proponents of a national standard do not ultimately see it as a permanent change but, instead, as a way to further weaken obscenity law, with the ultimate goal being the abandonment of obscenity law in its entirety. So far, only the Ninth Circuit has adopted a national standard,²⁰³ but the Tenth Circuit,²⁰⁴ along with the others, has yet to see the need for a new standard.

All of these changes to the local community standard, however, presuppose that the local community standard is in fact a problem. In this author's view, the current local community standard is not a problem and should remain intact. Prosecutors' lackluster desire to prosecute obscenity cases, as well as changing social attitudes about pornography, are just two of the various reasons that the local community standard may no longer pose

203. See *supra* Part III.C.1.

204. See *supra* Part III.C.2.

the issues that it once did. In addition, the *Miller* standard provides inherent safeguards against many of the issues attributed to the local community standard. The local community standard has worked since 1973, and as the old adage says, "if it ain't broke, don't fix it." In this day and age, that is wise advice.