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AN OBSCENE GESTURE: A CIVIL APPROACH TO INTERPRETING COMMUNITY STANDARDS

by

Nathan Brent Laursen

Thesis submitted in partial fulfillment of the requirements for the degree

of

HONORS IN UNIVERSITY STUDIES WITH DEPARTMENTAL HONORS

in

Political Science in the Department of Political Science

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Abstract

Since the 1970's, obscenity cases in the US legal system have long been determined by the three-part Miller test. Criminal convictions for obscenity have frequently been disputed due to the ambiguous nature contained within the three-part test, especially having the trier of fact apply "contemporary community standards." Technological advances and increasing homogeneity has added to the dubious nature of the test and some feel obscenity laws need revised, if not eliminated. Numerous suggestions have been made to improve the "intractable problem" of determining what is obscene speech. This paper considers some of those possibilities and suggests commentary on others. One way of determining community standards while maintaining a federalist court system is moving obscenity to the civil courts allowing individuals and communities to define local differing standards.

Acknowledgements/Dedication

I would like to thank the revolutionaries and founders of the United States and its constitution. We are eternally indebted to them for establishing a democratic republic that supplies us with the institutions that protect and provide for individual liberties, freedoms, and education. I would like to thank anyone that has ever taught me anything. This includes all of my schoolteachers from preschool to those I have yet to hear lecture, but most importantly it includes my family and friends.

Without my parents' support my education would not have been possible. I am grateful for the examples of my brothers, my friends, my fellow students, my coaches, and my church and community leaders for their motivation, dedication, and challenges. I would like to thank Utah State University, especially the Political Science Department, Journalism/Communications Department, and the Honors Program. I appreciate all of my professors, and especially those that directly helped with this project.

Finally, I wish to express appreciation for my wife. Without her patience, love, support, and motivation I would rarely accomplish anything. It is through her sacrifices, reminders—both subtle and blunt, and expressions of faith and love that I am inspired to achieve.

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Introduction

The freedoms of speech and of the press are constitutional protected rights. Often the line dividing constitutionally protected speech is difficult to draw.[1] This line is even more difficult when trying to determine what sexually erotic expression is obscene. The Supreme Court has given guidelines for separating obscenity from protect speech, but the changing avenues of expression, such as the Internet, have made applying the *Miller* Test difficult, especially because the contours of what defines a community modify almost daily. Many amendments and reformations of speech law in the United States have been suggested to make it more conducive to contemporary conditions. One such suggestion is the possibility of moving sexually explicit speech to the civil courts and allowing individuals to enforce their personal definitions of obscenity. However, like many other suggestions of reform, such an approach is likely to have its complications. Regardless of which reformation or suggestion is best, a new approach to interpreting the First Amendment is demanded by the changing global environment.

Absolutely not Free Speech

The freedom of speech in the United States is derived from the First Amendment of the Constitution which reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment was part of the Bill of Rights, which was one of the first objects the first congress addressed after ratification. Since the ratification of the First Amendment and the Bill of Rights in December of 1791, the freedom of expression—the individual rights of religion, speech, press, association, assembly and petition---has been seen as vital and fundamental to the U.S. democratic form of republican government. The freedom of expression is ranked as fundamental by those who feel that expression is essential for individual self-fulfillment, advancement of knowledge and discovery of

1 Bantam Books v. Sullivan 372 U.S. 58 (1963).

truth, achieving an adaptable and stable community, and building a society and culture.[2]

The necessity of a "free marketplace of ideas" has long been the reasoning of the courts and people of the United States for protecting expression of all kinds so to allow the most information possible.[3] The specifics of the rights protected by the language of the First Amendment has, like other parts of the Constitution, proven debatable, but the absoluteness of the language cannot be ignored as seeing the rights expressed in it as paramount. However, despite the absolute language of the amendment the rights protected have not been viewed as limitless.[4] History has taught us that restrictions can occur. Certain content and types of speech can be regulated using time, place and manner restrictions. That balances freedom of speech and of the press with other freedoms. In *Chaplinsky* v. *New Hampshire* (1942), a unanimous Court said:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There 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 the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The court noted and specified that certain types of speech are not considered valuable enough to be protected and social interest can outweigh the right to say or publish such ideas. Likewise, the advent of new technologies has always increased the ability and expansion of the idea marketplace, but as the market expands the definitions of what expression is protected and what is not becomes more difficult. One of the greatest examples of this difficulty is the relationship between obscenity and

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2 From *The System of Freedom of Expression* by Thomas Emerson as quoted in Ducat pp. 775-6. See also "*On Liberty*" By John Stuart Mill (1859).

3 See *Abrams v United States* 250 U.S. 616 (1919) (Holmes, dissenting).

4 Numerous cases can be found regarding the restrictions based on different scrutiny's as applied to the different rights mentioned. For rights concerning speech and press see *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).

modern advances like the Internet.

The Risqué History of Obscenity

As noted above in the *Chaplinsky* case the Court ruled that lewd, obscene, and profane, speech was not absolutely constitutionally exempt from restriction. Obscenity has a legal history nearly as obscure as its definition. One of the first obscenity prosecutions in the U.S. was in 1815, but earlier prosecutions occurred under common law crimes against God. The first comprehensive federal obscenity statute known as the Comstock Act became law in 1873 and prohibited the mailing of obscene materials. The law, however, did not define what was obscene, so the U.S. courts, for the most part, adopted the British *Hicklin Rule*[5]*, which* defined obscenity very broadly. Under the rule, a work was obscene if any part of it had the tendency to deprave and corrupt the most open minds. This broad rule allowed for many prosecutions by the state and federal authorities on any materials and speech they deemed too erotic (Pember 462-3).

This led to an increase in obscenity prosecutions and appeals, and in a variety of court rulings, obscenity was redefined. The Supreme Court established the *Roth-Memoirs* test. It was a three-part test that was used to determine if speech was obscene and therefore not protected by the First Amendment. In order to be obscene a speech or published idea had to 1) have a dominant theme that when taken as a whole appealed to the prurient interest in sex 2) had to be patently offensive to community standards in describing sexual matters and 3) had to be found utterly without redeeming social value.[6] The burden fell on prosecutors to prove that materials or speech met all three parts of the test. They were not very successful at doing so, mainly because of the third part of the test. If any part of the speech, or materials had and social value whatsoever it was not obscene. Inserting lines of Shakespeare or claiming educational purposes meant any images and descriptions of sexual erotic speech were

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

6 See *Butler v. Michigan*, 352 U.S. 380 (1957), *Roth v. U.S.*, 354 U.S. 476 (1957), *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966).

constitutionally protected.

The debate about the definition of obscenity continued and the Court heard almost 90 cases dealing with obscenity in a twenty-year span. The courts struggled to use the *Roth-Memoirs* test for 16 years until 1973, when the Court redefined obscenity again in a set of decisions that came to be known as the *Miller* test. The *Miller* test was also a tripartite test that said: "The basic guidelines for the trier of fact must be: (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."[7]

The Court found the third part of the Roth-Memoirs test of "utterly without redeeming social value" was unconstitutional, and a majority had final agreed on a definition of obscenity since 1957.[8] The new three-part test was not free of ambiguity, however, as the subsequent obscenity cases would prove; further definition was still needed. The Miller test did however determine that community standards must be used by the judge or jury members to determine what was "patently offensive" to the "average person." Furthermore, Chief Justice Berger in *Miller* opinion went on to explain that the triers of fact were to use "community standards" local to the forum, and not a hypothetical national standard.

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has

7 *Miller v. Califoria,* 413 U.S. 15 (1973) (internal punctuation and citation omitted).
8 *Miller* was a 5-4 decision that reportedly went the other way on the first vote (Walters 6).

> historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.

The *Miller* test was, as the Court described it, an "attempt to provide positive guidance to federal and state courts alike." They were not attempting to "remedy the tension between state and federal courts by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day." Most jurisdictions translated "community standards" to mean those standards conducive to the state and most state laws defining what constitute "patently offensiveness" emulate the language of *Miller* and further definitions contained in Supreme Court rulings that followed.[9]

An Indecent Standard

The Miller test requires the trier of fact, whether judge or jury member, to consider whether or not a "average person," when applying contemporary community standards would find the work appealing to the prurient interest and patently offensive. The Court clarified that the fact finder was to not apply their own standards, nor the extremes, but the perspective of the average adult in the community.[10] Considering the effects on the most sensitive or insensitive members of the community is acceptable, however. Therefore, the trier of fact applies their understanding of what the standards of the community from which they come are in regards to accepting, and tolerating erotic or "adult" materials and speech.[11]

Therefore, in determining obscenity the standards of certain geographical areas are used, but this has proven difficult in that little guidance has been given as to the size and fabrication of the areas.

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9 See *Jenkins v. Georgia*, 418 U.S. 153 (1974) in which Chief Justice Rehnquist gave a catalog of descriptions which he admitted were not exhaustive as examples of what state laws should regard as patently offensive. Rehnquist stipulated that the judges and juries did not have "unbridled discretion," and laws must relate to "ultimate sex acts," and that descriptions or representations of "masturbation, excretory functions, and lewd exhibitions of genitals" were good examples.

10 *Hamling v. U.S.*, 418 U.S. 87 (1974), *Pinkus v. U.S.*, 436 293 (1978), *Ashcroft v. ACLU*, 535 U.S. (2002)

11 The tolerance standard seems to have developed from Justice Harlan's opinion in *Smith v California*, 361 U.S. 147 (1959) and was again reiterated in *Smith v United States*, 431 U.S. 291 (1977). (dictum).

The Supreme Court has ruled that courts may define and give instruction to jury members of what area constitutes the community they are to consider, but such instruction is not required.[12] First Amendment Attorneys Lawrence G. Walters and Clyde DeWitt assert, "this stunning lack of guidance on such an important element of the *Miller* test has resulted in widely varying 'communities' being used by various courts at different times" (DeWitt and Walters 8).

The High Court itself approved the use of a statewide community in *Miller.* Other cases have limited the community to "more precise geographical terms."[13] The obscenity case involving rap group 2 Live Crew determined the community standard would be based upon "three adjoining counties."[14] Other courts have disregarded consideration of statewide communities and have been as narrow as a single county.[15] This basis on community standards has created the incentive for both prosecutors and defendants to "venue shop" for the jurisdictions must likely to deliver the desired standards. This shopping for certain communities with certain standards has become even more important with the development of new technologies, and a more homogenous global community.

A Web of Indecency

The Internet does not exist in a specific geographic location. It is a global communication system, and as such has provided difficulty in applying the concept of "contemporary community standards" in obscenity cases. The Internet is one of the most unrestricted forums of self-expression and public discourse. It continues to raise "unprecedented jurisdictional and enforcement problems" (Vick 414). The first attempt of regulation of the Internet by the United States was epoch-making.

Growing concerns of the amount of websites dedicated to sexually explicit images and speech available on the Internet led to attempts and movements to regulate the content available on the World Wide Web. The Communications Decency Act of 1996 (CDA) attempted to apply the existing

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12 Same cases as above in footnote 9 as well as *Jenkins*.
13 *Jenkins v. Georgia*, 418 U.S. 153 (1974)
14 Skyywalker Records, Inc. v. Navarro, 739 F Supp 578 (S.D. Fla. 1990).
15 *Davidson v. State,* 288 So. 2d 483 (Fla. 1973)

regulations on the broadcasting medium that prohibited transmission of "indecent" communications, especially to persons under the age of 18, to the new medium of the Internet.[16] The Supreme Court got its chance to consider how obscenity and the *Miller* test would apply to the Internet, soon after the law was passed when the American Civil Liberties Union and other groups contested it violated the First Amendment protections. The Supreme Court unanimously found the regulation unconstitutional because it was over-broad in what was being restricted, and its vagueness would have a "chilling effect" on speech.[17]

In *Reno v. ACLU*, the government based its arguments on several past precedents in regards to obscenity or indecent material. The Court had previously determined that parents and states had an interest in protecting minors from materials that could be harmful in their possession but simple erotic or indecent when purchased by adults.[18] Indecent and erotic materials are protected by the First Amendment but can be restricted by variable obscenity laws. The type of medium and its pervasiveness into the home is an important consideration, as well as the time of the broadcast.[19] The Supreme Court is also currently considering the amount of times an indecent or obscene word or image can be broadcast.[20] The Court has also determined that minimizing the secondary effects such as crime and diminished property value through zoning ordinances can be enough of an interest for regulation of speech.[21] These are all examples of intermediate scrutiny—time, place, manner considerations-- of erotic speech, but none of the speech was allowed to be completely prohibited because it does not meet the definition of obscenity, it is simply erotic or indecent.

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16 The CDA was part of the Telecommunications Act of 1996. 47 U.S.C.

17 *Reno v. ACLU*, 521 U.S. 844 (1997)

18 *Ginsberg v. New York*, 390 U.S. 629 (1968)

19 *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica*, 438 U.S. 726 (1978). Radio and television mediums limited to certain amount of frequencies making them public resource, and pervasiveness calls for age appropriate material not being broadcast at certain times of the day.

20 *FCC v. Fox* (2006). See also JCOM 4030 Final Project by Nathan Laursen (2008). Fleeting expletives on broadcast medium.

21 City of Renton v. Playtime Theaters Inc., 475 U.S. 41 (1986) Pornographic sexual oriented businesses restricted from residential areas.

The Court refused, in *Reno*, to accept any government claims that the CDA was rezoning cyberspace without making a blanket provision, nor was it willing to accept that the Internet fell in the same category as traditional limited mediums of broadcast media. The Court's opinion echoed that of Justice Frankfurter in *Butler* when he said the over-breadth and vagueness "Surely [was] to burn the house to roast the pig." The Court felt the CDA lacked a provision like the *Miller* test to protect any socially redeeming speech with value that may contain indecent or sexually explicitness. Similar attempts to regulate the Internet and protect children from indecent or sexually explicit materials followed the CDA.

The Child Online Protection Act (COPA) was a reattempt at the CDA with more specific restrictions. COPA made it illegal for commercial websites to knowingly broadcast harmful sexually explicit materials with respect to minors when "contemporary community standards" were applied. The new statute required a way of determining the age of a website viewer through credit cards, or other technological means of age verification.

The Court considered COPA in *Ashcroft v. ACLU.*[22] The Court found that COPA was a content-based restriction on speech and therefore, must pass strict scrutiny. The government had the burden of proving that it had a compelling state interest and that the means of regulation was as restrictive as possible on the speech. The Court found that it was not the least restrictive means available for protecting children from sexually explicit material, and Justice Kennedy of the Court suggested that user filters were just as effective and less restrictive on speech. The statute was again determined unconstitutional in that it was not narrowly tailored to the state interest, was "impermissibly vague, and overbroad" (Pember 482).

An Improper Community

A study in 2006, commissioned by the federal government found that only about 1 percent of

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22 542 U.S. 656 (2004).

web sites indexed by search engines contained sexually explicit material (Pember 480). The above-mentioned attempts to regulate such material were not laws considered to enforce obscenity, but non-obscene speech that could be harmful. The distribution of obscenity over the Internet is illegal, but using the contemporary guidelines set forth by the *Miller* Test to determine content obscene would prove an arduous task. It has also posed the question of what "community's" standards should be applied in determining what is obscene.

Miller suggests that the triers of fact need to use standards that are "contemporary." Difficulty arises in the present time of the Digital Age. The nation, and the world have changed since the *Miller* test was presented. The justices saw ahead and made the test adaptable to the adapting of society. Not only does offensiveness change from community to community but it can also change in respect to a certain community over time. What was not tolerated in the past can often become acceptable to the present and standard to the future.

Technological advances such as satellite, Internet, and cellular phones have made the world community a smaller more homogenous society. DeWitt and Walters suggest that there are "significant distinctions" between online communication as opposed to the more typical print and broadcast media, and these distinctions "warrant a fresh approach when it comes to application of community standards to online media" (9-10). DeWitt and Walters claim that the *Miller* Test is archaic and was created in a time when media distributers had more control on the distribution of adult materials. They suggest that distributors of online speech "have no reliable means" of limiting what physical communities their materials are distributed to on the Internet. They claim,

> The Internet does not function in relation to the physical, geographic world, and these crucial differences between the "brick and mortar" and cyber dimensions affect the First Amendment analysis. The Internet is wholly insensitive to geographic distinctions, and Internet protocols were designed to ignore rather than document geographic location. Those considerations require a dramatically different First Amendment analysis in the context of application of a community standards test to online media. As observed by the Third Circuit Court of Appeals, the unique factors that affect communication in the new and technology-laden medium of the Web [create]

> crucial differences between a brick and mortar outlet, and the online Web that dramatically affect a First Amendment analysis. Unlike traditional retail outlets for erotica, the Web is not "geographically constrained," rendering geography a virtually meaningless concept when it comes to the Internet (DeWitt and Walters 11, *Original citations omitted*)

The concept of a physical geographic community does appear to be inconceivable when considering the Internet and standards to be applied. The burden of controlling where distribution of possibly obscene materials has always been placed on the distributers, but many, like DeWitt and Walters, argue that the current position of the Department of Justice and prosecutors will lead to an excessive restriction on adult material and sexually graphic speech that is not obscene.[23] Further strengthening the argument of DeWitt and Walters are the individual opinions of some of the Justices in *Ashcroft v. ACLU.*

Justice Sandra Day O'Connor agreed with Justice Kennedy that, "given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech...may be entirely too much to ask, and would potentially suppress and inordinate amount of expression." [24]

Justice Brennan expressed similar concerns for national distributers in *Jenkins* suggesting that fear of prosecution by the most conservative of communities would reduce speech to a national standard of the lowest common denominator of tolerance. This has often been referred to as a "heckler's veto", as DeWitt and Walters point out (12). Recent obscenity convictions involving distribution over the Internet and through the postal services show that recent policy of prosecutors, officials, and many courts is that jurisdiction can be granted from the area in which allegedly obscene materials are sent, pass through or are received.[25] This results in venue shopping by prosecutors to

23 See DeWitt and Walters as well as Pember (pp. 466-7), *The Internet and the First Amendment* by Vick, and *Some Unanswered Questions About the Application of the Contemporary Community Standard* by Kelly Parker.

24 *Ashcroft v. ACLU*, 535 U.S.

25 *United States v. Extreme Associates* (2005) was a case in which a Southern California company and its owners were

ensure conviction by bringing charges in the most conservative communities, and therefore, courts.

Justice Breyer observed his concerns also, "To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious."

DeWitt and Walters point out that Justice O'Connor went on in her opinion to consider that the special circumstances of online speech may promote the adoption of a national standard despite *Miller's* warnings that it was not feasible. They suggest that a national standard would be easier to determine now as compared to 1973 when *Miller* was passed because the nation has "adopted commonalities from coast to coast," and instead of 50 unique states with different cultures Americans need to accept the "inescapable" reality that because Americans eat the same fast-food, drink the same coffee, and wear the same brand of clothes their standards are the same. They assert that, "No country is an island in this day of worldwide media and entertainment, where we have as much in common with acquaintances across the country as we do with our next door neighbor"(17).

Technology: It goes both ways

DeWitt and Walters suggest that technological advances allow a better monitoring and quantification of what community standards really are. In many of the past court cases community standards were based on the tolerance and acceptance of erotic materials within a geographical area. DeWitt and Walters suggest that not only have sexually explicit materials become "more and more intangible," but also the emergence of Internet traffic monitoring technologies can allow national standards to be developed by using statistics about consumption of different types of adult material on

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successfully tried in a Pennsylvanian court by the federal government because a postal inspector had accessed and ordered adult content via the company's website. The court was a much more conservative area than that of Southern California where adult-video industry headquarters are located. *United States v. Thomas,* 74 F. 3d 701 (1996) A California couple was convicted of distributing obscene images on the Internet via interstate phone lines in Tennessee despite being investigated but not charged by California police because the images did not meet obscenity based on California community standards.

the Internet. DeWitt and Walters assume the old policy about sexually explicit materials that consumption and existence equal toleration and acceptance by a community.

This tolerance standard seems to have developed from Justice Harlan's opinion in *Smith v California*, 361 U.S. 147 (1959) when he opined, "the community cannot condemn that which it generally tolerates." The idea of community standards based on tolerance was reiterated after the *Miller* Test in *Smith v United States*, 431 U.S. 291 (1977) in which the Court stated in dictum, that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community."[26]

Despite this instruction by the Court, other courts have refused to use the tolerance standard.[27] In these cases, the courts have asserted that the Supreme Court never intended for terms of tolerance to be used in determining current community standards while some insist that they do. The High Court itself has never addressed the issue directly. The biggest problem with the suggestion that consumption equals acceptance and acceptance--or toleration—equals community standards is that in order for specific speech or expression to be considered accepted or tolerated it has to be recognized; one must have knowledge that the materials are present in their community, and like the Supreme Court Justices they must see it in order to make the judgment of whether or not it is obscene.[28]

Widespread availability of material is not a valid argument for its acceptance or consumption in a community. The Supreme Court noted in *Hamling*, "...the mere fact that materials similar to the brochure at issue here are for sale and purchased at book stores around the country does not make them witness of virtue...Mere availability of similar material by itself means nothing more than other people

26 See *Some Unanswered Questions About the Application of the Contemporary Community Standard* by Kelly Parker.
27 *Andrews v State,* 652 S.W.2d 370 (Tex. Crim. App. 1983) and *New York v. Ferber*, 458 U.S. 747 (1982).
28 *Jacobellis v. Ohio*, 378 U.S. 184 (1964) Justice Potter Stewart said, "...I know it when I see it." Also *The Brethren,* by Bob Woodward and Scott Armstrong (1979).

are engaged in similar activities."[29]

Other scholars have also suggested various ways that advances in technology can be utilized in solving the problem of community standards and the Internet. DeWitt and the Court proclaimed that the burden on distributers to control which geographic areas their material was available was too difficult and heavy. A few years after the first Ashcroft case, the Court again heard arguments concerning COPA. The Court remanded the case for further fact-finding as advances in filtering software and technology made the possibility of "geotargeting" more realizable. In 2007, Professor Cheryl B. Preston suggested a proposal known as CP80, which offered different ports in which potentially offensive or obscene materials could be restricted from designated Internet ports known as "community ports."[30] Similar suggestion of establishing ".xxx" domains and porn Virtual Private Networks have also been circulating in the technological and legal academic fields. Many have been criticized as being content based speech restrictions and therefore unconstitutional because they fail to meet the compelling interest of strict scrutiny.

An Impure Court and Doctrine

With the development of the Internet and its potential problems of being a "law unto itself"[31] many scholars and commentators have suggested reforms and different approaches to applying the First Amendment. These can range from proposed constitutional amendments to simple shifts in interpretation.

In the 2008 Brigham Young University Law Review, Patrick M. Garry suggested that proposals such as CP80 are "creative and promising" but would likely fail under the traditional strict scrutiny of the courts because they are content-based regulations. Garry criticizes the Court's current use of strict

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29 *Hamling v. U.S.*, 418 U.S. 87 (1974), reference *Do community standards exist in the age of the Internet?* by Robert Peters

30 See *Making Family-friendly Internet a Reality: The Internet Community Ports Act*, by Cheryl Preston (2007).

31 *Kovacs v. Cooper, 336* U.S. 77 (1949), a decade before the Internet would begin to bud, Justice Robert Jackson stated that each medium of speech and expression "... is a law unto itself."

scrutiny for its focus on the fact that all content distinctions are instantly graduated to strict scrutiny regardless of whether or not the subject of the speech is still in plentiful supply in the numerous media venues. Garry argues that because the modern media is not as limited as that of the past, the rule of content neutrality and the doctrine of maximization of the marketplace of ideas are out of date. Garry suggests a new model that resembles intermediate scrutiny by examining the actual burdens placed on the subject of speech in the modern "explosion" of media channels.

Garry's proposed model would give political speech the strictest protection, but would allow ideas like CP80 to constitutionally restrict non-political speech only in certain venues, while maintaining its unrestrained existence in numerous other venues. Garry believes, "the content neutrality doctrine has become a constitutional straightjacket, preventing society from addressing serious social problems brought on by a rapidly changing media environment that aggressively markets its products" (1600). Garry feels that "under current First Amendment analysis, courts consider all the possible burdens that any governmental regulation might place on the access to or delivery of speech, but turn a blind eye to the actual and severe burdens borne by those wishing to prevent their children from being exposed to harmful and offensive speech" (1606).[32]

Similar proposals to Garry's suggest that the Internet and development of new media demand a recuperating of First Amendment doctrine, and the role of speech and its Constitutional validity should be reconsidered.[33] Some of the greatest criticism of the Court is that they are pursing a course of judicial activism and destroying the sovereignty of the states. Many propose that the difficulties of determining community standards and the Internet can be solved by a return to a more federalist judicial system in which deference on moral issues, such as obscenity, is given to state governments to experiment with and determine.

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32 See generally *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age* by Patrick M. Garry (2008).
33 See *Recuperating First Amendment Doctrine* by Robert Post Stanford Law review (pp. 1249-1281).

Federalism: The Other "F"-Word?

It can be argued the Court in the *Miller* Test was trying to return to a more federal system allowing states and local governments-- "communities"--to determine their own standards. This is a direct contradiction of what DeWitt and Walters and other supporters of a national standard support. A national standard of obscenity determined by the Supreme Court is a direct attack on states rights and federalism. Many supporters of federalism argue against the Incorporation Doctrine.

The Supreme Court selectively incorporated the First Amendment, like many of the individual liberties in the Bill of Rights through the due process clause of the Fourteenth Amendment to apply to state and local government action in 1929. In *Giltow v. New York,* 268 U.S. 652 (1925), Justice Sanford established a precedent, through dicta, that would have substantial consequences. When, in a case concerning a New York State law, he wrote,

> For present purposes we may and do assume that the rights of freedom of speech and freedom of the press---which are protected by the First Amendment from abridgment by Congress---are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.

Justice Sanford and the Court assumed that the word "liberty" in the Fourteenth Amendment included the freedoms of speech and of the press, and therefore were protected against state and local government. This incorporation doctrine has been viewed with praise and scrutiny ever since. The *Gitlow* case has been deemed as one that "cannot be underestimated," because it "marked the beginning of attainment of a full measure of civil liberties for the citizens of the nation" (Pember 63).On the other hand, the Incorporation Doctrine of the Court has been called by numerous scholars, legal professionals, and justices themselves as a form of judicial activism that threatens the Constitution and erodes the separation of powers not only between the different branches of the national government, but the state and federal governments.

The *Gitlow* Court had not only set an important precedent through dicta, but had overturned

precedent that the Bill of Rights only applied to the federal government and consequently, the federal courts could not stop enforcement of state laws restricting the liberties enumerated in the Bill of Rights.[34] John O McGinnis, however, does not attack the doctrine of incorporation in his defense of a federalist approach to the First Amendment. Instead he argues on the issues of morality and law.[35]

McGinnis recognizes the "all-too-human fallibility" and suggests "a very desirable feature of constitutional design is a structure that helps...calculate the consequences of our social policies by providing us with more evidence than just our intuitions" (2). The need for "moral and social discovery," according to McGinnis, demands a federal mechanism that demands elected, and therefore accountable, state legislators to have the responsibility for determining the best social policy rather than unaccountable judges.

McGinnis emphasizes the importance of learning from the feedback of such a system,

> Most importantly... federalism creates feedback on a range of possible balances as states experiment with different social policies. Thus, unlike a system in which the Supreme Court enforces some national rule of its own devise, we would be able to make comparisons and learn about consequences by reviewing the actions of many relatively similar jurisdictions. If one state puts restrictions on pornography and another does not, we will be able to compare their results.

McGinnis offers an argument against a national standard, and relies instead on informed elected representatives rather than legislators hiding in robes. McGinnis, like the others, also suggests the use of technology in his federal system, and emphasizes the importance of state autonomy,

> The reason is that the increasing power of computers improves dramatically our ability to evaluate the consequences of laws. Greater computer capacity enables us to collect and record facts in systematic form, and to make more precise measurements of the effects of a legal regime. Over seventy years ago. Justice Louis Brandeis argued that federalism creates laboratories of democracy. Today, technological innovation can bring this vision to pass. This more scientific approach to social policy can be effective, however, only if the States can experiment so that their different laws can be evaluated. Researchers can then run scores of

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34 *Barron v. Baltimore*, 32 U.S. 243 (1833)

35 *The Federalist Approach to the First Amendment* by John O. McGinnis speech given at the Twenty-Sixth Annual National Federalist Society Student Symposium.

regressions on their laptops in a few hours and readily assess the results.

McGinnis and other federal approaches to interpreting community standards directly contradict the idea that "no county is an island," and a national standard based on morals would not only be a raping of state sovereignty, but a blasphemy to the Constitution. Whereas, individual standards by the states would be a course of determining the best government policies.

Arguments like McGinnis', however are, undercut by a damaging Supreme Court decision that subverts the states' ability to determine their own standards based and morals. In *Lawrence v Texas,*[36] the Court suggested that states could not regulate based on morality. Justice Kennedy delivered the opinion of the Court that threatened the long held idea that only the states were able to police on issues of morality, "the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." The ruling threatened to remove a large part of the powers retained by the state governments after the adoption of the Constitution. DeWitt and Walters claim that the Supreme Court decision in *Lawrence* coupled with decision protecting the right to possess obscene materials in the privacy of one's home[37] is further evidence against complaints of the presence of potentially obscene materials in a geographic community.

A Private Affair

Many theories exist on how to interpret the First Amendment and the definition of what constitutes speech. The absolutist approach—most famously linked to Justice Hugo Black-- interprets the absolute language of the First Amendment quite literally. Under this philosophy, speech is excluded from any government regulation, and considerations of balancing social or government interests are futile. Following this approach the laws regarding speech would deter greatly then the currently do.

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36 539 U.S. 558 (2003)
37 *Stanley v. Georgia*, 394 U.S. 557 (1969)

Certain types of speech would not receive certain degrees of protection. Political speech would be seen equal to obscenity, libel, and commercial speech, and the First Amendment would not permit regulation of any. Justice Black did, however, recognize a difference between "pure speech" and "speech plus." Absolutists see speech as "natural oral or written expression." Expression is not the same as speech, under this way of thought. Expression that included more than natural oral or written expression were not speech, but conduct. This conduct mixed with speech, or "speech plus," does not receive the absolute protection under the First Amendment, according to theorists like Black. Under and absolutist approach much of the expression argued to be obscene, such as pornographic images on the Internet would likely be seen as conduct and subject to time, place, manner restrictions (Ducat 775-78).

Other theories suggest that the preferred position of speech against regulation is based on the social function of speech in a democracy. This approach is most apparent in the way obscenity has been treated in the *Chaplinsky* case and *Roth* case where and emphasis was put on the social value of speech. This approach was described most clearly by Professor Alexander Meiklejohn, and has inherited his name.[38] This technique suggests that the First Amendment protects two kinds of speech, public and private. Public speech consists of oral and written expression that focuses on contemporary issues. Political speech is one way of describing public speech essential to democratic self-governance. Freedom of speech becomes a social obligation more than and individual right (Ducat 779).

Meiklejohn's procedure introduces the idea of private speech included in the word "liberty" found in the Due Process Clauses of the Fifth and Fourteenth Amendment, and the protection of private property. The Fifth Amendment contains protections that involve the right to speak, as well as the protection of private property and liberties during criminal proceedings. According to Meiklejohn, private speech is within the realm of government regulation. Private speech would include speech merely for the purpose of self-expression. Speech such as libel, obscenity, and "fighting words" would

38 *Free Speech and Its Relation to Self-Government, (1948)*

likely fall under this type of speech. In order to prohibit speech the government would only have to prove that the restriction is reasonable and non-discriminatory.

However, some adopt the philosophy that speech that is private is outside the means of government regulation because of the right to privacy. Cases such as *Jenkins* strengthen the argument that obscene or libelous speech is protected from government regulation when they are within the walls of the home.

Determining whether or not speech is "pure speech" or speech mixed with conduct appears to be a simple task, but has proven moot. Likewise, determining the private or publicness of speech can also become complicated.[39] All of the theories of defining and protecting speech seem to focus on the fact that speech is an important social function and therefore deserves protection, but few claim speech as a liberty inherent within an individual.[40]

A More Civil Approach?

One possibility that arises out of categorizing obscenity and sexually explicit speech as private is moving obscenity to the civil courts and allowing individuals and communities to define differing contemporary community standards by seeking damages against offenders. This libertarian approach is one way of establishing community standards while maintaining some degree of a federalist system. Using tort law as a deterrent along with, or in place of, criminal convictions could establish a more efficient and limitless system for societies, cultures, communities or regions to establish what they find "patently offensive" and obscene.

In such a system an individual's naivety, mind, and innocence would become similar to a property right. A marketplace for each individual's mind, time, and attention already exists as evident

39 Considerations such as the private life of a public individual, or obscene or libelous words used as emphasis in a political debate make distinctions difficult. See Ducat and respective references.

40 This seems to support the arguments made by those like Garry who feel speech has reached too high a level of Constitutional importance, and needs reduced to intermediate scrutiny in all cases except pure political speech. For more in-depth analysis of different theories about speech see Ducat and respective references.

by the sexually explicit material that already exists.[41] People are obviously willing to exchange their time, money, innocence, and ignorance to have access to sexual content or the online existence and other forms of media would not survive in the commercial market, but others have the right to not be exposed. People do voluntarily expose themselves to material that may be obscene to other's but the right to such access should not trump the right to not be exposed. Those who are involuntarily exposed would have the right to seek compensation for the unwanted exposure. This makes the tort very similar to the right to privacy and the guidelines for claiming an invasion of privacy could be adopted.[42]

The Court has already determined that the state as well as parent's have and interest and right to what their children are exposed to. Therefore, children of a certain age-- most likely 18--would not be able to willingly consent, and must go through their parents to obtain access to such materials. Allowing a parent to seek damages against an individual who said a sexually explicit word in front of his child would be one example of how a civil system of defining obscenity would work. The system would be similar to the already existing legal system for assessing tort damages for non-monetary injuries such as pain and suffering, libel, invasion of privacy, and defamation. A well-defined system of legal standards for determining rewards and compensation would need to be established. Pain and suffering awards have been criticized for being too large and numerous, and many legislative reforms have been proposed. By establishing an *ex ante* approach that applies full compensation juries can ask how much a reasonable person would pay to eliminate the offense of experiencing the indecent or obscene expression that harmed them, and base the awarded damages on this amount.[43]

A different tort system could also be setup to award tort damages for monetary losses. As an

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41 According to Pember, Americans spent $13 billion on sexual entertainment, $2.8 billion of that being Internet content in 2006. Another analyst in 2006, estimated online sexual content industry would reach $6 billion a year. (Pember pp. 459 and 480).

42 For a summary of invasion of privacy tort law see Pember chp. 7-9 pp. 239-354.

43 For explanation and suggestions on how to best calculate such compensation awards see *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries* by Mark Geitsfeld. See also *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions* by Roselle Wissler, David Evans, Allen Hart, Marian Morry, Michael Saks for experiments that show tort compensation in action.

example, someone who becomes addicted or harmed by obscenity in some monetary way could be sought after. The jury is still out on whether or not sexually explicit material causes certain physical acts of violence, disrespect, or addiction. Studies have been done and presidential commissions have been formed, but a general consensus has not been agreed upon.[44]

In order to submit a lawsuit the plaintiff—person claiming harm---would need to establish that they did not willingly expose themselves to the offending materials or speech. They would also need to prove that the exposure harmed them in some way, whether it was physically, mentally, or financially. An approach similar to libel and other similar torts could be adopted to prove that this occurred. Finally, and probably most difficult the plaintiff would likely have to prove that the person saying or distributing the material in question did so knowing that it would be considered obscene by the person claiming harm. An example would be if at a sporting event a person used offensive language and was warned by a nearby spectator or a security guard that such speech was offensive, but then used the offensive language again, a suit could be filed. This could also be used in regards to pop-up windows or SPAM emails, once a individual asked to no longer receive such materials fault could be claimed if it happened again.

The complexity of libel, and invasion of privacy torts are evidence that problems are likely to arise from a civil approach to enforcing obscenity law. The biggest difficulties are likely to arise of balancing the right to speak with the right to not be spoken at.

The Dworkin-MacKinnon Ordinance

In 1980, Linda Boreman, known for her role as "Linda Lovelace" in the pornographic movie “Deep Throat” made public statements accusing her ex-husband Chuck Traynor of violently coercing her to make pornographic films. Boreman teamed up with feminine activists Andrea Dworkin, and

44 Attorney General's Commission on Pornography—*The Meese Report* (July 1986) and *President's Commission on Obscenity and Pornography* (1969).

Catharine MacKinnon to pursue the idea of using a federal civil rights law to seek damages for the abuse and humiliation that she had experienced at the hands of Traynor and the makers of "Deep Throat." Boreman stated that Traynor had raped her, threatened her life and forced her at gunpoint to perform in the movies.[45]

Dworkin and MacKinnon, in 1983, taught a course at the University of Minnesota together about pornography. The two were hired by the Minneapolis city council to draft an anti-pornography ordinance. The Dworkin-MacKinnon Ordinance defined pornography, and proposed to treat it as a violation of women's civil rights, and allowed women to seek damages through lawsuits in civil court. The Minneapolis ordinance passed twice but was determined to vague by the mayor who vetoed it. Several other ordinances were modeled after Dworkin and MacKinnon's and proposed in Cambridge, Massachusetts; Indianapolis, Indiana; and Bellingham, Washington.[46]

This civil approach of protecting discrimination against women was ruled unconstitutional by the Seventh Circuit Court of Appeals in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (1985). The opinion said, "The definition of pornography is unconstitutional. No construction or excision of particular terms could save it." The ordinance being found unconstitutional could serve as a means of criticism against attempts to move obscenity to civil court. But the move would be a much greater reformation of the court system rather than an effort to protect women against discrimination and control obscenity. The passage of the few ordinances shows that civil litigation over offense is a possibility.

An Obscene Gesture

Moving obscenity to civil courts does not solve all of the nebulousness surrounding obscenity law. There still remains the possibility that the country would be divided up into court districts as

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45 *E! True Hollywood Story: Linda Lovelace*

46 *Pornography and Civil Rights: A New Day for Women's Equality* by Andrea Dworkin and Catharine MacKinnon (1988)

litigants would venue shop for juries and judges that would be most likely to give compensation awards, or the largest compensation awards. The move continues to leave much discretion up to the juries, as it does under current obscenity law.

Another possible criticism of creating civil cases concerning obscenity is that the United States is already a country addicted to litigation and claiming offense to obscenity would just be another avenue for citizens to seek million-dollar lawsuits. According to the National Center for State Courts in 2001, tort filing in 30 states actually decreased by 10% from 1997-2000. During that same time period federal courts saw a 5% decrease in civil cases. The Bureau of Justice Statistics estimated in 1995 that about 97% of civil cases are terminated before trial whether by the judge or settlement.[47]

The biggest obstacle, however, is the heavy burden that is shifted onto the plaintiff to bring forth evidence they were harmed. With conflicting evidence on the effects of obscenity, claiming damage is a difficult task.[48] Putting a price on one's virtue, or innocence would also be arduous.

Conclusion

Obscenity law in the United States has been obscure since its beginning. The three-part test of *Miller* was and attempt by the Court to allow state and local governments to distinguish definitions of obscenity based upon "contemporary community standards." The modern explosion of new venues for speech has made defining what a "community" entails even more difficult than it was when *Miller* was made over 30 years ago. Many reformations have been proposed for improving, or outright eliminating obscenity law. Many feel a shift from strict scrutiny to intermediate scrutiny and considerations of time, place, and manner regulations is the best way to apply obscenity law to contemporary circumstances. Others believe utilizing technological advances such as filters, labeling, and tracking are the most

47 Newsaic.com/mwcivil.html

48 Compare *Indecent influence: The positive effects of obscenity on persuasion* by Cory R. Scherer and Brad J. Sagarin an experiment that showed swearing at the beginning and end of a speech generate more positive feelings toward the message. And *The Effects of Sexually Arousing and Violent Films on Aggressive Behavior* by Timothy P. Meyer The Journal of Sex Research, Vol. 8, No. 4 (Nov., 1972), pp. 324-331.

appropriate way to guard against offense. Some feel the courts have over stepped their bounds and their inconsistency has caused the struggle to define obscenity.

Establishing different definitions, types, and degrees of speech are suggested as an approach that would get to the core purposes of the First Amendment's intent to protect. Perhaps, the deeper issue is that regulation and determination of obscenity is a moral issue, which can be very personal. Balancing the rights of expression with the right to voluntarily not hear speech is a difficult one. Pure speech is the mode of expression that has historically be given the most protection because its necessity for the common good. The marketplace of ideas theory of speech is under scrutiny because of all the multiple venues of speech available now. Of the many proposals civil litigation puts sexually explicit speech in a category of private speech that should not be a concern of the government unless it becomes public, and allows individuals to enforce their different definitions of obscenity.

Allowing individuals to express themselves and to dictate what messages are expressed to them are rights in constant conflict with the freedom of speech. Contemporary communities are difficult to explain, and perhaps the simplest way to explain it in this modern digital age is to reduce the community standards to an individual level. Speech law in the United States is under the pressure of increasing avenues and modes of expression, and the only way to avoid an explosion of problems would be a reconsideration or reformation of current law.

"Supreme Court case law is not an effective method for determining what social norms we should apply to this disruptive technology, or any of the other moral issues that technology acceleration will raise in the years ahead… In contrast, a federalist structure for the First Amendment will permit states to react creatively to technological change. We can then analyze the cost and benefits of divergent responses."

--McGinnis

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Author's Biography

Nathan Laursen, raised in Nibley, Utah, graduated from Mountain Crest High School in 2002. Throughout his high school career, Nathan was involved in academics, student body councils, sports, and other community service clubs and activities. After his graduation, he served in the California Anaheim Mission as a full-time missionary for the Church of Jesus Christ of Latter-day Saints from April 2003 to May 2005. Upon his return to Cache Valley, he was anxious to continue his education, and applied to Utah State University. After cycling through several combinations of a variety of majors and minors, Nathan's interest in U.S. government, law, and philosophy combined with his love for writing and he decided to pursue a dual degree in Political Science and Journalism/Communications.

While going to school beneath the shadow of Old Main, Nathan had sundry experiences. Nathan always tried to balance a full class schedule with numerous occupations; throughout most of his time as an Aggie, he served as the Advertising Manager and a writer for the Utah Statesman, while also working off-campus at a local men's clothing store. Nathan first met his wife, Vicki, in Ted Pease and Brenda Cooper's Media Smarts class. The couple moved to Smithfield and continued to pursue their individual degrees at Utah State.

Nathan supplemented his education by being a Honors Fellow for Honors Connections and Scholar's Forum (Honr 2000), serving as the Media Relations Director for the Government Relations Council of Utah State University, and was recently elected to the Pi Sigma Alpha Executive Board. In his junior year, Nathan was awarded the Wright Scholarship for Journalism and the Lillywhite Scholarship. Nathan has been on the Dean's List, and plans to graduate with *magna cum laude* honors in the spring of 2009.

After his graduation, Nathan plans to pursue a Master's in Business Administration at Utah State

University before seeking his Juris Doctorate and practicing and teaching First Amendment/Constitutional Law. He plans to continue writing as a hobby and means of self-fulfillment and serving his community and church while providing for his family.