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Distilling Ashcroft: The Ninth Circuit's Application of National Community Standards to Internet Obscenity in United States v. Kilbride

Eric B. Ashcroft

Distilling *Ashcroft*: The Ninth Circuit's Application of National Community Standards to Internet Obscenity in *United States v. Kilbride*

I. INTRODUCTION

The Ninth Circuit's recent decision in *United States v. Kilbride*[1] highlights a circuit split regarding the application of the *Miller v. California*[2] test for determining whether a work is obscene in the context of sexually explicit material disseminated via the Internet. It has long been held that obscene material "is not within the area of constitutionally protected speech or press."[3] The *Miller* test indicates that in determining if material is obscene, a trier of fact must consider, among other things, "whether the average person, applying *contemporary community standards* would find that the work, taken as a whole, appeals to the prurient interest."[4] Lower courts have split over the difficult task of determining whether a national or local community standard should be applied to sexually explicit material transmitted over the Internet. The most recent Supreme Court case related to this issue, *Ashcroft v. ACLU*,[5] left the Court highly divided and gave the lower courts little guidance. Since *Ashcroft*, circuit courts have continued to apply different community standards to sexually explicit Internet material.[6] In *Kilbride*, the Ninth Circuit "distill[ed] the various opinions in *Ashcroft*" and held that a national community standard must be applied in regulating Internet obscenity.[7]

This Note argues that the Ninth Circuit in *Kilbride* incorrectly applied the Supreme Court's decisions in *Miller* and *Ashcroft*. The court failed to properly apply *Miller*'s clear preference that local community standards be applied in obscenity cases. Instead, the

1. 584 F.3d 1240 (9th Cir. 2009).

2. 413 U.S. 15, 24 (1973).

3. *Id*. at 21 (quoting Roth v. United States, 354 U.S. 476, 484–85 (1957)).

4. *Kilbride*, 584 F.3d at 1246 (quoting *Miller*, 413 U.S. at 24) (emphasis added).

5. 535 U.S. 564 (2002).

6. *See* United States v. Little, 365 F. App'x 159, 164 (11th Cir. 2010) (per curiam) (unpublished decision) (rejecting the approach taken by the Ninth Circuit in *Kilbride*).

7. *Kilbride*, 584 F.3d at 1255.

Ninth Circuit distinguished *Miller* and its progeny by asserting that "speech disseminated via email is distinguishable from . . . speech disseminated via regular mails or telephone . . . because there is no means to control where geographically their messages will be received."[8] Further, the Ninth Circuit improperly applied *Ashcroft* by "distill[ing] . . . the various opinions [of *Ashcroft*]"[9] to create a piecemealed holding.

Part II of this Note describes the facts and procedural history of *Kilbride*. Part III explains and describes the relevant legal background against which the court decided *Kilbride*. Part IV outlines the court's reasoning and decision in *Kilbride*. Finally, part V analyzes *Kilbride* as described above.

II. FACTS AND PROCEDURAL HISTORY

A. Facts of the Case

Jeffrey Kilbride and James Schaffer (collectively "Kilbride") began an email advertising business in 2003.[10] In response to new email regulations, Kilbride transferred the business overseas by using servers in the Netherlands and running the business through a Mauritian company, Ganymede Marketing.[11] Kilbride profited from the business by receiving a commission every time a recipient of the company's emails followed a link to an advertised website and paid a fee to use the website.[12] Kilbride's emails included sexually explicit images that formed the basis for the obscenity convictions in this case.[13]

To help mask the operation, Kilbride directed company employees to use various techniques to place fictitious and nonsensical information in place of the correct domain name and "From" field of the unsolicited emails.[14] Additionally, Kilbride falsified the registration of domain names the company used by

8. *Id.* at 1251.
9. *Id.* at 1255.
10. *Id.* at 1244.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1244–45.

listing incorrect mailing addresses, non-functional email addresses, and fake entity names.[15]

B. Procedural History

Kilbride was indicted on various counts on August 25, 2005.[16] Included in the indictment was a violation of 18 U.S.C. § 1462 for interstate transportation of obscene materials and a violation of 18 U.S.C. § 1465 for interstate transportation of obscene materials for sale.[17] At trial, the sexually explicit images from Kilbride's emails were introduced, and a company employee testified that the images were sent out in connection with Kilbride's email advertising.[18] In arguing that the images were obscene, the government called eight witnesses who testified that they had received sexually explicit images from Kilbride and expressed their views as to those messages.[19] Additionally, the government was able to present over 662,000 complaints sent to the Federal Trade Commission regarding Kilbride's emails.[20]

In instructing the jury as to the *Miller* test, the judge said, regarding contemporary community standards:

> [Contemporary community standards involve] what is in fact accepted in the community as a whole; that is to say by society at large, or people in general, and not merely by what the community tolerates nor by what some persons or groups of persons may believe the community as a whole ought to accept or refuse to accept. . . . The community . . . is not defined by a precise geographic area. . . . You should consider the evidence presented, but you may also consider your own experience and judgment in determining contemporary community standards.[21]

The jury found that the images used in Kilbride's emails were obscene and convicted Kilbride of violating the obscenity statutes.[22]

15. *Id*. at 1245.
16. *Id*.
17. *Id*. These statutes will be referred to collectively as the "obscenity statutes."
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at 1248 (emphasis and quotation marks omitted).
22. *Id*. at 1244.

Kilbride was given a prison sentence of more than four years.[23] Kilbride then appealed the conviction to the Ninth Circuit.[24]

III. SIGNIFICANT LEGAL BACKGROUND

A. Obscenity Law Prior to Ashcroft

1. The three-pronged Miller *test*

In *Miller* the Supreme Court articulated the current test for determining whether sexually explicit speech rises to the level of unprotected obscenity. *Miller* involved the unsolicited mailing of adult advertising material.[25] To determine whether the material was legally obscene, the Court employed a three-pronged test. Prong one required the trier of fact to determine "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[26] Based on this standard, the Court held that it was permissible for the jury to apply the contemporary community standards of California to the material at issue.[27] In buttressing the use of local community standards, the Court stated that: "To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility."[28] Further, the Court reasoned that "our Nation is simply too big and too diverse for this Court to reasonably expect that such [national] standards could be articulated for all 50 States in a single formulation."[29] However, the Court did not hold that use of a national standard would be wholly unpermitted, only that "[n]othing . . . requires that a jury must consider hypothetical and unascertainable 'national standards.'"[30]

2. Miller's *progeny*

Following *Miller*, the Court continued to hold that a local community standard would survive constitutional scrutiny. For

23. *Id.* at 1245.
24. *Id.* at 1247.
25. Miller v. California, 413 U.S. 15, 16 (1973).
26. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).
27. *See id.* at 31.
28. *Id.* at 30 (emphasis omitted).
29. *Id.*
30. *Id.* at 31.

instance, in *Hamling v. United States*, the Court considered whether applying community standards to a federal statute that prohibited the mailing of obscene material was constitutional.[31] The Court held that the statute "is not to be interpreted as requiring proof of uniform national standards which were criticized in *Miller*."[32] The Court reasoned that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional."[33] Thus, the Court rejected the argument that a local community standard unconstitutionally forced "speakers . . . to tailor their messages to the least tolerant community."[34]

The Court reaffirmed the holding of *Hamling* fifteen years later in *Sable Communications of California, Inc. v. FCC*.[35] In *Sable*, a federal statute prohibiting obscene or indecent commercial telephone calls was upheld against a challenge asserting that the statute's use of local community standards unconstitutionally forced "message senders . . . to tailor all their messages to the least tolerant community."[36] In upholding the statute, the Court relied on *Hamling* and stated that: "If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages."[37] Both *Hamling* and *Sable* established the rule that a distributor of sexually explicit material may attempt to tailor its message to specific communities, but that the distributor nonetheless bears the ultimate burden of complying with the varying local community standards.[38]

B. The Uncertainty of Ashcroft

The issue before the Supreme Court in *Ashcroft* was "whether the Child Online Protection Act's (COPA) use of 'community standards' to identify 'material that is harmful to minors' violate[d]

31. 418 U.S. 87, 98–99 (1974).
32. *Id*. at 105.
33. *Id*. at 106.
34. *Id*. *But see* Ashcroft v. ACLU, 535 U.S. 564, 580–81 (2002).
35. 492 U.S. 115 (1989).
36. *Id*. at 124.
37. *Id*. at 126.
38. *See id*.; *Hamling*, 418 U.S. at 106.

the First Amendment."[39] The purpose of COPA was to "restrict[] minors' access to pornographic material on the Internet."[40] To restrict minors' access to pornography, COPA "prohibit[ed] . . . 'mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.'"[41] COPA defined "material that is harmful to minors," in part, by borrowing the "contemporary community standards" prong of the *Miller* test.[42] Thus, although *Ashcroft* dealt with child pornography, an area subject to more stringent rules than traditional obscenity cases,[43] it presented the Court with an opportunity to review the *Miller* "contemporary community standards" prong.

In a highly divisive decision, a majority of the Court held that "COPA's reliance on community standards . . . does not by itself . . . render the statute substantially overbroad."[44] Although a majority of the Court agreed that application of local community standards did not render COPA overbroad, five separate opinions discussed the relative merits of using national, as opposed to local, community standards.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, rejected the proposition that national standards must be applied to sexually explicit Internet material.[45] Instead, they found that the reasoning in *Hamling* and *Sable* should apply to the Internet the same as it does to other forms of communication, including mail and phone.[46] Thus, they stated that "[i]f a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standard."[47] To this group of Justices, a publisher of sexually explicit material should bear the risk of violating a given locality's community standards, even if that publisher "distribute[s] its material to every community in the Nation."[48]

39. *Ashcroft*, 535 U.S. at 566.

40. *Id.* at 569.

41. *Id.* (quoting 47 U.S.C. § 231(a)(1) (Supp. V 1994)).

42. *See id.* at 570 (second quotation quoting Miller v. California, 413 U.S. 15 (1973)).

43. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002); New York v. Ferber, 458 U.S. 747, 764 (1982).

44. *Ashcroft*, 535 U.S. at 585 (emphasis omitted).

45. *Id.* at 583.

46. *See id.* at 581–83.

47. *Id.* at 583.

48. *Id.*

Justice O'Connor, although joining Justice Thomas's opinion in part, "wr[o]te separately to express [her] views on the . . . desirability of adopting a national standard for obscenity for regulation of the Internet."[49] Justice O'Connor found it to "be entirely too much to ask" to "expect[] [speakers] to bear the burden of controlling the recipients of their speech," as was required in *Hamling* and *Sable*.[50] Justice O'Connor based this conclusion on the "speakers' inability to control the geographic location of their audience."[51] However, Justice O'Connor did recognize the skepticism of the *Miller* Court towards a national standard and acknowledged that "jurors . . . will inevitably base their assessments [of obscenity] to some extent on their experience of their local communities."[52]

Justice Breyer wrote separately because of his belief that Congress intended the word "community," as used in COPA, "to refer to the Nation's adult community taken as a whole."[53] Justice Breyer cited to a section of a House of Representatives report to confirm that opinion.[54]

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, wrote separately to articulate his concern that "[t]he national variation in community standards constitutes a particular burden on Internet speech."[55] However, Justice Kennedy noted that "[i]n any event, we need not decide whether the statute invokes local or national community standards."[56] Additionally, Justice Kennedy rejected Justice Breyer's use of legislative history as support for a national community standard by saying: "[T]here is no reason to believe that [the statement cited by Justice Breyer] reflects the view of a majority of the House of Representatives."[57]

49. *Id*. at 586 (O'Connor, J., concurring in part and concurring in the judgment).

50. *Id*. at 587.

51. *Id*.

52. *Id*. at 589.

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

54. *See id*. at 590 ("The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors." (emphasis omitted) (quoting H.R. REP. NO. 105-775, at 28 (1998))).

55. *Id*. at 597 (Kennedy, J., concurring in judgment).

56. *Id*. at 596.

57. *Id*.

Finally, Justice Stevens, in dissent, rejected outright the use of local community standards in Internet obscenity cases because "[i]n the context of the Internet . . . community standards become a sword, rather than a shield."[58] Justice Stevens found that use of community standards in an Internet obscenity context "has 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.'"[59]

The uncertainty that *Ashcroft* left in its wake has led to the current split among circuit courts as to whether local or national community standards should apply in determining whether sexually explicit material transmitted over the Internet is obscene.[60]

C. Lower Court Attempts to Apply Ashcroft

The Eleventh Circuit noted in a recent decision the conflict between the circuits as to the issue of whether to apply local or national community standards to the Internet.[61] On one side, the Eleventh Circuit has continued to hold that application of a local community standard to the sexually explicit material distributed via the Internet is constitutionally permissible.[62] The Court's justification for this approach is that "the *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere."[63] On the other side, the Ninth Circuit, as shown below, has held that national standards should apply to material disseminated via the Internet.[64]

58. *Id*. at 603 (Stevens, J., dissenting).

59. *Id*. at 605 (quoting Manual Enters., Inc. v. Day, 370 U.S. 478, 488 (1962)).

60. *See* United States v. Little, 365 F. App'x 159, 164 (11th Cir. 2010) (per curiam) (unpublished decision) (noting the alternative approach taken by the Ninth Circuit).

61. *See id*.

62. *Id*.

63. *Id*.

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

IV. THE COURT'S DECISION

On appeal to the Ninth Circuit, Kilbride challenged the district court's ruling by arguing that the judge improperly instructed the jury as to the definition of obscenity under the obscenity statutes.[65] Specifically, Kilbride argued that "obscenity disseminated via email must be defined according to a national community standard" and not by a local community standard.[66] Kilbride asserted that a local community standard allows a juror to "draw on knowledge of the community or vicinage from which he comes"[67] and impermissibly burdens protected speech because it "unavoidably subjects [sexually explicit Internet material] to the standards of the least tolerant community in the country."[68]

The Ninth Circuit agreed with Kilbride. However, the court did not reverse the district court's decision because "the district court's error was far from plain. . . . While [the Ninth Circuit's] holding . . . follows directly from a distillation of the various opinions in *Ashcroft*, [its] conclusion *was far from clear and obvious to the district court*."[69]

A. The Court's Distinguishing of Hamling *and* Sable

The Ninth Circuit distinguished sexually explicit material disseminated via the Internet from material disseminated via traditional mail or phone.[70] The court acknowledged that *Hamling* and *Sable* established that the burden of compliance with the contemporary community standards prong of *Miller* rested with the distributor of the alleged obscenity.[71] However, the court agreed with Kilbride that material disseminated via email was fundamentally different than speech disseminated via traditional mail or telephone

65. Kilbride made two arguments regarding the jury instructions. First, he argued that the jury instructions were impermissible because "they impermissibly allowed the jurors to rely on standards outside their own community." *Id.* at 1248. In the alternative, Kilbride argued, as discussed below, that national community standards should be used instead of local community standards. *Id.* at 1250. The Ninth Circuit's key holding came out of an analysis of Kilbride's second argument. *Id.* at 1250–55. This Note will consider only Kilbride's second argument that national standards should be used in place of local standards.

66. *Id.* at 1250.

67. *Id.* at 1247 (quoting Hamling v. United States, 418 U.S. 87, 105 (1974)) (internal quotation marks omitted).

68. *Id.* at 1250.

69. *Id.* at 1255 (emphasis added).

70. *See id.* at 1252–53.

71. *Id.* at 1251.

because "there is no means to control where geographically . . . messages will be received."[72] Because of this fundamental difference, distributors sending out alleged sexually explicit material via email "cannot tailor their message to the specific communities into which they disseminate their speech," and therefore, the rationale of *Hamling* and *Sable* is inapplicable to the Internet.[73]

In distinguishing *Hamling* and *Sable*, the court relied heavily on the concurrences of Justice O'Connor and Justice Breyer in *Ashcroft*. Both Justice O'Connor and Justice Breyer agreed that the burden put on distributors by *Hamling* and *Sable* "may be entirely too much to ask"[74] and would in effect provide certain communities with a "heckler's Internet veto" against distributors.[75] The court agreed with this line of reasoning and was "persuade[d] . . . to join Justices O'Connor and Breyer in holding that a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email."[76] The court, in effect, accepted the same arguments that both *Sable* and *Hamling* had previously rejected.[77]

B. "Distilling" Ashcroft

In trying to reconcile the "divergent reasoning" of the Justices in *Ashcroft*, the court determined that "*Ashcroft* leaves us with no explicit holding as to the appropriate geographic definition of contemporary community standards to be applied here."[78] Because the court determined that *Ashcroft* gave no applicable majority holding, it applied a well-known constitutional rule, found in *Marks v. United States*, which states, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the

72. *Id*.

73. *Id*.

74. *Id*. at 1253 (quoting Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O'Connor, J., concurring in part and concurring in the judgment)).

75. *Id*. (quoting *Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring in part and concurring in the judgment)).

76. *Id*. at 1254.

77. *See id*. at 1250 ("Defendants' argument is not an entirely novel one.").

78. *Id*. at 1253.

narrowest grounds."[79] Using this rule, the court began its "distillation" process.

Applying *Marks* to *Ashcroft*, the court determined that "five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns."[80] Additionally, the court determined that "five justices concurring in the judgment viewed the application of a national community standard as not or likely not posing the same concerns [as a local standard] by itself."[81] The court stated it reached these determinations by "'construing] one Justice's concurring opinion as representing a logical subset of the plurality's.'"[82] Accordingly, the court determined that three Justices, including Justice Thomas, Justice Scalia, and Chief Justice Rehnquist, held that applying either local or national community standards would pose no constitutional problem in regulating Internet obscenity.[83] In the court's view, "None of the remaining justices . . . joined that broad holding."[84] Instead, Justice O'Connor and Justice Breyer agreed only to the extent that "a national community standard would likely not pose constitutional concerns by itself."[85] The other three concurring Justices, including Justice Kennedy, Justice Ginsburg, and Justice Souter, concurred in the judgment only to the extent that "reliance on community standards . . . [did] not *by itself* render [COPA] substantially overbroad."[86] However, the Ninth Circuit determined that Justice Kennedy's concurrence agreed with Justice O'Connor's concurrence, Justice Breyer's concurrence, and Justice Stevens's dissent as to the conclusion that "application of local community standards in defining obscenity on the Internet . . . generat[es] serious constitutional concerns."[87] Thus, the court's final tally was that six members of the Supreme Court would *not* apply a local community standard to alleged Internet obscenity, while only three

79. *Id*. at 1253–54 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

80. *Id*. at 1254.

81. *Id*.

82. *Id*. (quoting United States v. Williams, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006)).

83. *Id*.

84. *Id*.

85. *Id*.

86. Ashcroft v. ACLU, 535 U.S. 564, 585 (2002); *see id*. at 597 (Kennedy, J., concurring in the judgment).

87. *Kilbride*, 584 F.3d at 1254.

members of the Supreme Court would apply either a local or a national standard.

V. ANALYSIS

This Note offers a critique of the Ninth Circuit's treatment of precedent in *Kilbride*. While a comparison of the relative merits of using a national community standard versus a local community standard is beyond the scope of this Note,[88] the following sections argue that the Ninth Circuit incorrectly interpreted and followed the Supreme Court's decisions in *Miller* and *Ashcroft*.

Wholly absent from the Ninth Circuit's reasoning on the issue of national community standards is a discussion of *Miller*.[89] Considering that *Miller* formulated the contemporary community standards test, it was improper for the court to re-interpret a key aspect of the *Miller* test without any discussion of *Miller* itself. Rather than grapple with *Miller*, the court proceeded to "distill" a holding from *Ashcroft*. The court improperly manufactured a holding from the various opinions in *Ashcroft*, rather than acknowledging, as the Justices did in *Ashcroft*, that the decision in *Ashcroft* was a narrow one that did not reach the issue of whether a national standard should apply to cases of Internet obscenity.

A. Disregarding Miller *and Its Progeny*

Criticizing the Ninth Circuit's treatment of *Miller* is easy because the court failed to cite, let alone discuss, *Miller*.[90] Even a cursory reading of *Miller* makes clear the Supreme Court's preference for using local community standards over national community standards. Although the Court held in *Miller* that national community standards may be used to instruct a jury, it noted that structuring proceedings in such a way would "be an exercise in futility."[91] By

88. For a discussion of the merits of the Ninth Circuit's approach, see 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 (2010).

89. The court does cite *Miller* when discussing the first of Kilbride's alternative arguments. *See supra* note 65. However, in the section where the court holds that a national standard must apply to obscenity disseminated via the Internet, the court fails to cite *Miller* once. *Kilbride*, 584 F.3d at 1250–55.

90. *Kilbride*, 584 F.3d at 1250–55.

91. Miller v. California, 413 U.S. 15, 30 (1973).

ignoring this clear directive in *Miller* to avoid national community standards, the Ninth Circuit disregarded the seminal case in the area of obscenity law.

When reformulating the traditional approach in a given area of law, courts typically criticize and distinguish prior case law. This process is especially important when courts decide to divert from the well-marked path of other case law.[92] Although "stare decisis is not an 'inexorable command' [for the Supreme Court]," especially in constitutional cases, lower courts must sufficiently distinguish the case at bar before refusing to apply a prior rule of law.[93] In *Kilbride*, the court takes none of the necessary steps to distinguish *Kilbride* from *Miller*, and thus diverted, without sufficient justification, from the path of *Miller*. It may in fact be true that *Miller*'s preference for local community standards does not provide a workable method of assessing Internet obscenity. However, if the Ninth Circuit found this to be the case, the court should have squarely addressed *Miller*. The Eleventh Circuit correctly addressed this issue when it stated: "[T]he *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere."[94] The Ninth Circuit's neglect in failing to address *Miller* is significant and undermines the court's decision.

Although the Ninth Circuit failed to address *Miller*, the court did address two cases decided after *Miller*, specifically, *Hamling* and *Sable*. However, the court's explanation as to why it did not follow *Hamling* and *Sable* is unpersuasive because the court relies on what is essentially "dicta"[95] from *Ashcroft*. As discussed below, the Ninth Circuit recognized that *Ashcroft* is anything but clear.[96] Because the Justices were so divided in *Ashcroft*, it was improper for the court to rely solely on that case to deviate from *Hamling* and *Sable*. Two

92. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 920 (2010) (Roberts, C.J., concurring) ("[W]e have long recognized that departures from precedent are inappropriate in the absence of special justification." (quotations omitted)).

93. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

94. United States v. Little, 365 F. App'x 159, 164 (11th Cir. 2010) (per curiam) (unpublished decision).

95. *Id.*

96. *See* United States v. Kilbride, 584 F.3d 1240, 1252, 1255 (9th Cir. 2009) (making the following statements regarding *Ashcroft*: "[t]he Supreme Court's *fractured decision*"; "eight Justices . . . applied *divergent reasoning* to justify the Court's holding"; and "the *extremely fractured* opinion in *Ashcroft*" (emphasis added)).

important obscenity law principles follow directly from *Hamling* and *Sable*. First, instructions regarding contemporary community standards need not be defined by a "precise geographic area."[97] Second, distributors of sexually explicit material bear the burden of complying with the various community standards when they distribute their material.[98] Several Justices in *Ashcroft* either questioned or outright rejected these principles in the context of obscenity distributed via the Internet.[99] However, several Justices, including some who questioned the above principles, also admitted that defining community standards through a national lens was also problematic.[100] Thus, *Ashcroft* did not decisively resolve the issue of how to apply contemporary community standards to Internet obscenity, and it was a significant overreaching by the Ninth Circuit to rely on *Ashcroft* as if a majority of the Supreme Court had rejected *Hamling* and *Sable*.

B. "Distilling" a "Holding" from Ashcroft

Kilbride's "distillation" of a "holding" out of *Ashcroft* is at odds with traditional interpretative rules that lower courts follow in adhering to Supreme Court precedent. Two rules, established by the Supreme Court, should have been used in *Kilbride* to properly interpret and apply *Ashcroft*. First is the *Marks* rule, which, as noted above, essentially says that if the Court issues a fragmented decision, then "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[101] The second rule, articulated in *Rodriguez de Quijas v. Shearson/American Express Inc.*, states, "If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to

97. Hamling v. United States, 418 U.S. 87, 105 (1974).

98. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124–26 (1989).

99. *See supra* Part III.B.

100. *See supra* Part III.B.; s*ee also* Ashcroft v. ACLU, 535 U.S. 564, 589 (2002) (O'Connor, J., concurring in part and concurring in the judgment) ("[J]urors asked to evaluate the obscenity of speech based on a national standard will inevitably base their assessments to some extent on their experience of their local communities."); *id.* at 602 (Kennedy, J., concurring in judgment) ("[J]uries will inevitably apply their own community standards.").

101. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

[the Supreme Court] the prerogative of overruling its own decisions."[102] In *Kilbride*, the Ninth Circuit applied the first rule, although incorrectly, and failed to apply the second rule.

The invocation of *Marks* in *Kilbride* makes it appear as if the only decision the Ninth Circuit could make with regard to interpreting *Ashcroft* is to hold that "a national community standard *must* be applied in regulating obscene speech on the Internet."[103] However, this is simply not the case. A comprehensive reading of *Ashcroft* shows that the Ninth Circuit did not *have* to hold that a national community standard applies to the Internet. Rather, at best, *Ashcroft* indicates that several Justices would be willing to reevaluate the current framework for community standards as applied to the Internet *at some future date*. To illustrate, Justice O'Connor stated in her concurrence: "[I]n *future* facial challenges to regulation of obscenity on the Internet, litigants may make a more convincing case for [a national standard]."[104] Further, Justice Kennedy found that "[the Court] need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order."[105] Statements, such as these, by members of the Supreme Court should be indicative of the willingness of those members of the Court to reevaluate the national community standard issue in the future; they should not be used by lower courts to indicate that their opinions may be used as a "holding."[106] Although *Kilbride* invoked *Marks* as the proper rule for interpreting *Ashcroft*, it incorrectly applied *Marks* to "distill" a holding from *Ashcroft* that was not really there.

Kilbride also failed to invoke the *Shearson/American Express* rule, as noted above. As a starting point, it is far from clear that *Ashcroft* requires that national standards be applied to Internet obscenity.[107]

102. 490 U.S. 477, 484 (1989).

103. United States v. Kilbride, 584 F.3d 1240, 1254 (2009) (emphasis added).

104. *Ashcroft*, 535 U.S. at 587 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added).

105. *Id*. at 596 (Kennedy, J., concurring in judgment).

106. *See* Orin Kerr, *Ninth Circuit Adopts National Standard for Internet Obscenity*, THE VOLOKH CONSPIRACY (Oct. 29, 2009, 11:38 PM), http://volokh.com/2009/10/29/ninth-circuit-adopts-national-standard-for-internet-obscenity ("But here the Ninth Circuit is counting the number of Justices who had 'concerns.' Concerns are not positions. You can't count the number of Justices who had a particular thought and then say that the thought is somehow binding on the lower courts.").

107. *See* discussion *supra* Parts III.B, V.B.

However, even assuming a majority could be "distilled" from the various opinions in *Ashcroft* requiring that national standards be applied to Internet obscenity, that fragmented holding would be contrary to much of the reasoning in *Miller*, *Hamling*, and *Sable*.[108] At that point, a proper application of *Shearson/American Express* would require that the lower court follow the reasoning in *Miller*, *Hamling*, and *Sable*. Then, if the Supreme Court determined that the rule should change, it could do so and reverse the lower court.[109] The Ninth Circuit, in *Kilbride*, overlooked *Shearson/American Express* and thus failed to invoke an important interpretative rule.

VI. CONCLUSION

The Ninth Circuit's opinion in *Kilbride* reads as if the case presented a distinct issue from the *Miller* line of cases and was in fact already determined by a "majority" in *Ashcroft*. However, these assertions are incorrect. *Miller* continues to be the baseline for obscenity cases. The reasoning from *Hamling* and *Sable* has yet to be abandoned by a true majority of the Supreme Court. Additionally, *Ashcroft* was anything but a clear mandate that national community standards should be the sole standard to be applied in sexually explicit Internet material cases. Regardless of the supposed faults of local community standards, the Ninth Circuit's reasoning in *United States v. Kilbride* failed to follow clear Supreme Court precedent and led to an incorrect decision.

Eric B. Ashcroft[*]

108. *See* discussion *supra* Part III.A.

109. *See* Medellin v. Dretke, 544 U.S. 660, 669 n.1 (2005) (Ginsburg, J., concurring) (citing *Shearson/American Express* for the proposition that it is for the Supreme Court to determine a variety of questions related to the binding effect of an International Court of Justice decision).

* J.D. Candidate, April 2012, J. Reuben Clark Law School, Brigham Young University.