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Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas

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Comment

Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of *United States v. Thomas*

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Robert and Carleen Thomas operated the Amateur Action Computer Bulletin Board System (AABBS) from their home in California in 1991.[1] AABBS contained approximately 14,000 sexually explicit pictures stored in Graphic Interchange Format (GIF) files.[2] Paying members could download these pictures to a personal computer from anywhere in the world via electronic access.[3] In July 1993, a United States Postal Inspector[4] re-

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1. *See* United States v. Thomas, 74 F.3d 701, 705 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996). The AABBS was a computer bulletin board system that operated through the use of telephones, modems, and personal computers from the defendants' home in Milpitas, California. The system included e-mail, chat lines, public messages, and files that members could download to their own computers and printers. *See id.*

2. *See id.* The defendants bought various sexually explicit magazines and books from public adult book stores in California. The defendants then used an electronic scanner to convert pictures from the magazines and books into computer files called Graphic Interchange Format files, commonly known as "GIF" files. Members could download and view the GIF files from personal computers anywhere in the world. The defendants also purchased, sold, and delivered sexually explicit videotapes to AABBS members. Customers ordered the tapes by sending the defendants an e-mail message, and the defendants sent the tapes to the customers via the United Parcel Service. *See id.*

3. *See id.* Nonmembers could view introductory screens that contained brief, sexually explicit descriptions of the GIF files and adult videotapes that were offered for sale to members. AABBS limited access to the GIF files to members who were given a password after they paid a $55 membership fee and submitted a signed application form to the defendants. The application form requested the age, address, and telephone number of the applicant. The form also required the applicant's signature. Members accessed the GIF files by using a telephone, modem, and a personal computer. The defendants' telephone modem answered the incoming calls. Once the system verified the

ceived a complaint regarding the AABBS from an individual who resided in the Western District of Tennessee.[5] Using an assumed name, the inspector sent in fifty-five dollars along with a signed application form to AABBS.[6] The inspector then used his password to log on and download sexually explicit GIF files that depicted "images of bestiality, oral sex, incest, sado-masochistic abuse, and sex scenes involving urination."[7] On January 25, 1994, a federal grand jury for the Western District of Tennessee returned a twelve-count indictment of federal obscenity charges arising from the Thomas's operation of their computer bulletin board business.[8] In the first federal prose-

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user's password, members could select, retrieve, and instantly download GIF files to their own computers. A user could then view the "GIF" files on his own computer and print a copy. The GIF files contained the AABBS name and access telephone number. *See id.*

4. Jurisdiction for offenses committed using the U.S. Mail Service falls under the U.S. Postal Inspector. *See* 39 C.F.R. § 233 (1996). The defendants in *Thomas* came under the United States Postal Inspector's jurisdiction because access to the AABBS required users to mail a physical application and $55. *See Thomas*, 74 F.3d at 705.

5. *See id.* The inspector dialed the AABBS telephone number. He viewed the introductory screen, which read "Welcome to AABBS, the Nastiest Place on Earth." *Id.* He then read the graphic descriptions of the GIF files and the videotapes that AABBS offered for sale. *See id.*

6. *See id.* Defendant called the inspector at his undercover telephone number in Tennessee, verified receipt of the application, and then authorized him to log-on with his password. *See id.*

7. *Id.* The inspector ordered six sexually explicit videotapes from the AABBS and received them via United Parcel Service at a Memphis, Tennessee address. The inspector also had several e-mail and chat-mode conversations with the defendants. *See id.* Based on the evidence the inspector acquired, a U.S. Magistrate Judge for the Northern District of California issued a search warrant for AABBS headquarters on January 10, 1994. *See id.* The authorities subsequently searched AABBS and seized its computer system. *See id.*

8. *See id.* at 705-06. The twelve-count indictment charged the defendants with the following criminal violations: one count for conspiracy to violate federal obscenity laws under 18 U.S.C. § 371; six counts for knowingly using and causing to be used a facility and means of interstate commerce under 18 U.S.C. § 1465; three counts for shipping obscene videotapes via U.P.S. under 18 U.S.C. § 1462; one count of causing the transportation of materials depicting minors engaged in sexually explicit conduct under 18 U.S:C. § 2252 (a)(1); and one count of forfeiture under 18 U.S.C. § 1467. *See id.* at 706. 18 U.S.C. § 1465 provides:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other

cution of a computer bulletin board operator for obscenity,[9] a jury found both Robert and Carleen Thomas guilty.[10] Defendants appealed the decision and the Sixth Circuit Court of Appeals affirmed the district court's decision.[11]

In *United States v. Thomas*, the Sixth Circuit Court of Appeals became the first court to consider whether the on-line distribution of materials required a national standard rather than a local one for purposes of judging materials obscene under an established "contemporary community standards" test.[12] The case sought to balance the constitutional protection of freedom of speech against the legal and moral convictions of society against obscenity.

This Comment contends that the definition of "community" used to determine what constitutes obscenity should be redefined to address the geographic limitlessness of the Internet.[13]

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article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1465 (1994).

9. *See First Conviction for Obscenity on the Internet*, THE COMPUTER LAW., Sept. 1994, at 29, 29.

10. The jury found Robert Thomas guilty on eleven of the counts and Carleen Thomas guilty on ten of the counts. *See Thomas*, 74 F.3d at 706. Robert and Carleen Thomas were sentenced to 37 and 30 months of incarceration, respectively. *See id.* The jury also concluded that the defendants' computer system should be forfeited to the United States. *See id.*

11. *See id.* at 705.

12. *Id.* at 710. *See generally infra* Part I.B (discussing community standards as they relate to obscenity). The defendants asserted that their conduct did not constitute a violation of 18 U.S.C. § 1465. They argued that Congress did not intend to regulate computer transmissions because the statute does not expressly prohibit such conduct. Furthermore, they claimed to have a constitutionally protected right to possess obscene materials in the privacy of their home. *See Thomas*, 74 F.3d at 706-15. The defendants also argued venue was improper, and that the case should have been transferred to California. *See id.* at 709. Specifically, the defendants argued that they did not cause the GIF files to be transmitted to the Western District of Tennessee; rather, it was the postal inspector who, without their knowledge, accessed and downloaded the GIF files and caused them to enter Tennessee's jurisdiction. *See id.* Finally, the defendants challenged the propriety of the jury instructions, admission of certain evidence and sentencing, as well as competence of their counsel. *See id.*

13. It is unclear whether AABBS was a modem-based BBS or an Internet-based BBS. *See id.* at 711 (noting amicus curiae argument that cyberspace requires a new definition of "community"). Since both forms of BBSes have the same type of features, and most modern BBSes are linked through the Internet, this Comment assumes an Internet-based BBS. Defendant's arguments support this assumption. Even if this assumption is incorrect, the arguments set forth in this Comment apply to future cases involving Internet-based BBSes.

Part I provides an overview of the current state of First Amendment jurisprudence and the United States Supreme Court's definition of what constitutes obscenity. Part II summarizes the holding and reasoning in *Thomas*. Part III analyzes the failure of the *Thomas* court to address the uniqueness of the Internet in defining the relevant "community" for assessing obscenity. Finally, this Comment proposes that the geographic limitlessness of the Internet demands that "community" be redefined to a national standard for Internet-related cases, rather than a local one. A national standard better recognizes that the Internet "community" is made up of users without regard to geographic boundaries. A national standard further rectifies the shortcomings of the current standard by eliminating use of the lowest-common-denominator standard and by eliminating forum shopping by federal prosecutors.

I. OVERVIEW OF THE INTERNET AND OBSCENITY LAW

A. THE INTERNET

In recent years, the world has witnessed an explosive growth in the use of computer bulletin boards[14] and networks as means of communication.[15] The Internet is the world's largest information network,[16] consisting of over six million host

14. "Computer bulletin board" means any computer system that is both accessed remotely by users and administered by an operator capable of limiting access to the system and establishing guidelines for its use. *See* EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 3-4 (1994) (discussing bulletin board systems, the Internet, and the law). Users can access databases, download files, leave messages, and engage in chat sessions. *See* Eric Schlechter, Note, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 90 (1993) (describing the functions of a BBS). Bulletin board systems are inexpensive to create and easy to maintain. *See id.* at 91.

15. Computer networks are systems of interconnected computers linked together via telephone lines and relatively simple communications software for the purpose of sharing information between users. *See* CAVAZOS & MORIN, *supra* note 14, at 4. Computer bulletin boards can be part of a network, and a user on a computer connected to a network can communicate with users on other systems connected to the network or access files or other features on other networked systems. *See* Schlechter, *supra* note 14, at 90.

16. The Internet began in the 1960s with the connection of four strategically important sites in the event of a nuclear war. *See* Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 JURIMETRICS J. 1, 2 (1994). This original defense-orientated network was made out of a peculiar architecture

computers[17] and forty-nine million users from over ninety-six countries.[18] The Internet continues to grow at a rate of approximately one million users each month.[19]

The Internet is made up of host computers, access services, and individual users.[20] Host computers store a vast amount of information on almost every imaginable topic.[21] Individual users access the Internet remotely through the use of personal computers, modems, and telephone lines.[22] The information on the Internet passes from user to user and network to network without any central data location and without any governing authority.[23] "Information flow on the Internet resembles that of a river, highway, or circulatory system: local networks funnel information traffic into larger regional networks, which in

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that made it especially susceptible to development into today's World Wide Web. *See 24 Hours in Cyberspace*, U.S. NEWS & WORLD REP., Oct. 21, 1996, at 70, 70. The Internet quickly expanded to include universities, corporate entities, and governments world-wide. *See* Meredith Leigh Friedman, Note, *Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment*, 40 N.Y.L. SCH. L. REV. 1025, 1027 (1996). Several commercial on-line services were quick to follow, offering users a variety of communications applications such as e-mail, Internet Relay Chat, and access to the Internet. *See id.* at 1028. The Internet is a connection of thousands of smaller, independent networks that utilize compatible communications standards to exchange data. *See* Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standards of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 125 (1996) (citing KEIKO PITTER ET AL., EVERY STUDENT'S GUIDE TO THE INTERNET 5-6 (1995)).

17. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

18. *See NII Copyright Protection Act of 1995 (Part 2): Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.* 104th Cong. 278 (1996) (statement of William J. Cook, attorney) [hereinafter *Hearings on NII Copyright Protection Act*]. Commerce on the Internet was estimated at $2.2 billion last year and is expected to increase to $45.8 billion by the year 2000. *See* Catherine Yang, *Law Creeps onto the Lawless Net*, BUS. WK., May 6, 1996, at 58.

19. *See* Mark L. Gordon, *A Lawyer's Roadmap of the Information Superhighway*, 13 J. MARSHALL J. COMPUTER & INFO. L. 177, 182 (1995). The Internet has an annual growth rate of 175%. *See Hearings on NII Copyright Protection Act*, *supra* note 18, at 278.

20. *See generally* CAVAZOS & MORIN, *supra* note 14, at 1-5 (discussing components of cyberspace).

21. *See* Gordon, *supra* note 19, at 180.

22. *See* CAVAZOS & MORIN, *supra* note 14, at 2 (discussing mechanics of access to cyberspace).

23. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 201 (1995). Access can be gained from a multitude of different points. *See id.*

turn are connected to high capacity 'backbone' linkages."[24] The Internet allows virtually free exchange of vast amounts of information between any number of parties without regard to time, distance, or geographic borders.[25] A network user communicates with other users in the same city as easily as with users on other continents.[26] Users are normally unable to determine the identity or the location of those they have contacted.[27]

One of the fastest growing areas on the Internet involves newsgroups and bulletin boards specializing in pornography.[28] Pornography on the Internet contains digitized images, movies, and sexually explicit text.[29] Internet users from around the world can post pornographic material to bulletin boards,[30] while other users can view and selectively download this material instantaneously without the bulletin board operator knowing who is accessing the board or where the user is located.[31] Indeed, even if they wanted to, bulletin board operators could not selectively block out users from accessing the bulletin boards.[32]

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24. Dan L. Burk, *Transborder Intellectual Property Issues on the Electronic Frontier*, 6 STAN. L. & POL'Y REV. 9, 10 (1994).

25. *See* Gordon, *supra* note 19, at 180. Further development of the Internet will change "forever the way people live, work, and interact with each other" as more and more people access the vast network of information to communicate, bank, invest, buy, sell, or entertain themselves. *Id.* Internet users can access numerous services, including e-mail, discussion groups, interactive classes, magazines, and newspapers. *See* Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1086 (1996) (addressing the ease of access and distribution of information on the Internet).

26. *See* Counts & Martin, *supra* note 25, at 1086.

27. *See id.*

28. *See* Suzanne Stefanac, *Sex and the New Media*, THE RECORDER, Sept. 8, 1993, at 8. Event Horizons, one of the largest adult bulletin boards, has over 35,000 users and annual revenues in the millions. *See id.*

29. *See* CAVAZOS & MORIN, *supra* note 14, at 90-92.

30. A user posting to a newsgroup reaches millions of users throughout the world. *See* Frederick B. Lim, *Obscenity and Cyberspace: Community Standards in an On-Line World*, COLUM.-VLA J.L. & ARTS 291, 295 (1996). The Internet provides individual users with distribution capabilities rivaling that of the largest media corporations. *See id.*

31. *See* ACLU v. Reno, 929 F. Supp. 824, 845-48 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997); Shea v. Reno 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd mem.* 117 S. Ct. 2501 (1997).

32. *See id.*

B. CONSTITUTIONAL PROTECTION OF SPEECH AND OBSCENITY

1. First Amendment and Historical Treatment of Obscenity

The founders of our country placed a high value on freedom of expression.[33] The First Amendment of the United States Constitution provides that "Congress shall make no law abridging the freedom of speech, or of the press . . . ."[34] Despite the First Amendment's literal protections, the Supreme Court has repeatedly held that certain classes of speech are not protected by the Constitution.[35] These non-protected classes 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."[36] Most states have laws prohibiting the distribution of obscene

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33. A 1774 letter of the Continental Congress stated that:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Roth v. United States, 354 U.S. 476, 484 (1957) (citing 1 Journals of the Continental Congress 108 (1774)). "Those who won our independence . . . valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . [T]he remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring). "[A] democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves." Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 115 (2d Cir. 1977).

34. U.S. CONST. amend. I. This protection has been applied to the states through the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Board of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 855, n. 1 (1982) (holding school officials may not remove books from school libraries for the purpose of restricting access to the political ideas or social perspectives discussed in the books); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (finding Louisiana's imposition of a tax on newspaper advertising is unconstitutional under the Due Process Clause because it abridges the freedom of the press); Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding a New York law prohibiting anyone from publishing anything advocating, advising, or teaching that organized government should be overthrown by force, violence, or any unlawful means was in violation of the First Amendment).

35. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (finding certain classes of speech not protected by the Constitution).

36. *Id.* at 572.

material,[37] and several federal laws are aimed at reducing obscenity.[38]

In *Roth v. United States*,[39] the Supreme Court addressed the protections afforded obscenity under the First Amendment for the first time. Roth was convicted for mailing obscene circulars and advertisements and for mailing an obscene book in violation of a federal obscenity statute.[40] The defendants argued the statutes in question did not provide reasonably ascertainable standards of guilt and, therefore, violated the constitutional requirement of due process.[41] The Court rejected this argument and held "obscenity is not within the area of constitutionally protected speech or press."[42] The Court reasoned that

37. *See, e.g.*, CAL. PENAL CODE § 311.2 (West 1988) (prohibiting distribution of obscene material); TENN. CODE ANN. § 39-17-902 (1991) (prohibiting distribution of obscene material).

38. *See, e.g.*, 18 U.S.C. § 1461 (1994) (prohibiting the mailing of obscene or crime-inciting materials); 18 U.S.C. § 1462 (1994), *as amended by* Pub. L. No. 104-104, § 407, 110 Stat. 56 (1996) (prohibiting importation or transportation of obscene materials); 18 U.S.C. § 1464 (1994) (prohibiting the broadcasting of obscene language); 18 U.S.C. § 1465 (1994), *as amended by* Pub. L. No. 104-104, § 407, 110 Stat. 56 (1995) (prohibiting transportation of obscene material for sale or distribution); 18 U.S.C. § 1466 (1994) (prohibiting engaging in the business of selling or transferring obscene material); 18 U.S.C. § 1468 (1994) (prohibiting distribution of obscene material by cable or subscription television); 47 U.S.C. § 223 (1994), *as amended by* Pub. L. No. 104-104, §§ 402, 561, 110 Stat. 56 (1996) (prohibiting obscene or harassing communications in the District of Columbia or in interstate or foreign communications).

39. 354 U.S. 476, 476 (1957).

40. *See id.* at 480. Roth's New York business published and sold books, photographs, and magazines. Roth used circulars and advertising to solicit sales. *See id.*

41. *See id.* at 491. The thrust of the argument is that the statutes were vague. *See id.*; *see also infra* notes 63-68 and accompanying text (discussing vagueness).

42. *Roth*, 354 U.S. at 485. "[T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Id.* at 491 (alteration in original) (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). The Court noted that the guarantees of freedom of expression in effect in the colonies when the founders ratified the Constitution in 1792 gave no absolute protection for every utterance. *See Id.* at 482. The colonies allowed prosecution of libel, blasphemy, profanity, and obscenity. *See id.* at 482-83. The Court reasoned that because these crimes were not protected, the founders did not intend for the First Amendment to protect every utterance. *See id.* at 483. "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." *Id.* According to the Court, the First Amendment protection was intended to assure "unfettered interchange of ideas for the bringing about of political and social

obscenity is "utterly without redeeming social importance."[43] The Court defined obscene material as that "which deals with sex in a manner appealing to prurient interest."[44] The Court further stated the test for obscenity was defined by "whether to the average person, applying *contemporary community standards*, the dominant theme of the material taken as a whole appeals to the prurient interest."[45] The Court did not define "contemporary community standards" until several years later.[46]

The dissent in *Roth* argued the Court's obscenity test gave too much discretion to the local communities and resulted in unconstitutional censorship.[47] The *Roth* test allows juries to punish speech or publication that has an undesirable impact on thoughts even if the speech or action is not unlawful.[48] This

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changes desired by the people." *Id.* at 484.

43. *Id.* at 484. This view is reflected in an international agreement among over 50 nations. *See* Agreement for the Suppression of the Circulation of Obscene Publications, May 4, 1910, 37 Stat. 1511 (describing the procedures that each nation will implement to limit the circulation of obscenity). It is reflected in the obscenity laws of the states. *See Hearings Before Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 84th Cong., 49-52 (1955) (identifying obscenity laws in forty-eight states). It is reflected in the 20 obscenity laws enacted by the Congress from 1842 to 1956. *See* 70 Stat. 699, 699-700 (1956); 69 Stat. 183, 183-84 (1955); 64 Stat. 451, 451 (1950); 64 Stat. 194, 194 (1950); 62 Stat. 683, 768-69 (1948); 48 Stat. 1064, 1091 (1934); 46 Stat. 590, 688-89 (1930); 41 Stat. 1060, 1060-61 (1920); 35 Stat. 1088, 1129, 1138 (1909); 33 Stat. 705, 705 (1905); 29 Stat. 512, 512 (1897); 26 Stat. 567, 614-615 (1890); 25 Stat. 496, 496 (1888); 25 Stat. 187, 188 (1888); 19 Stat. 90, 90 (1876); 17 Stat. 598, 598 (1873); 17 Stat. 283, 302 (1872); 13 Stat. 504, 507 (1865); 11 Stat. 168, 168 (1857); 5 Stat. 548, 566-67 (1842); 18 U.S.C. §§ 1461-1465, 1718; 39 U.S.C. §§ 259a, 259b (1958). "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." *Roth*, 354 U.S. at 485.

44. *Roth*, 354 U.S. at 487.

45. *Id.* at 489 (emphasis added) (citation omitted). Implicit in the community standards approach is the notion that a "community" relies upon the physical proximity of its members. *See* Lim, *supra* note 30, at 294.

46. *See infra* note 50 and accompanying text.

47. *See Roth*, 354 U.S. at 509 (Douglas, J., dissenting). Justice Douglas concluded that the standard the Court adopted conflicted with the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *See id.* at 511-12 (Douglas, J., dissenting).

48. *See id.* at 509.

> The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed.

drastically curtails the protections of the First Amendment. "The danger of influencing a change in the current moral standards of the community, or of shocking or offending readers, or of stimulating sexual thoughts or desires apart from objective conduct, can never justify the losses to society that result from interference with literary freedom."[49]

In 1964, the Supreme Court concluded that the "community" to be used to judge obscenity under its "contemporary community standards" test should be a national community, not a local one.[50] The Court stated that a local community standard would have the effect of denying some parts of the country access to material it deems acceptable but which other communities find unacceptable.[51] Indeed, because the Due Process

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Id. at 513 (Douglas, J., dissenting).

49. *Id.* at 509-10 (Douglas, J., dissenting) (citation omitted).

50. *See* Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). Jacobellis managed a motion picture theater in Cleveland Heights, Ohio. *See id.* at 184. He was convicted on two counts of possessing and exhibiting an obscene film in violation of an Ohio statute. The state appellate and supreme courts both affirmed the conviction. The issue before the U.S. Supreme Court was whether the state courts properly found the motion picture obscene and thus not entitled to the protection of the First and Fourteenth Amendments. *See id.* The Court held the picture was not obscene, under a national standard, which the Court held was the appropriate standard for judging obscenity. *See id.* at 192-93. The government argued that the "contemporary community standards" of the *Roth* test implied local community standards. *See id.* at 192. The Court determined that it should be a national standard, as first stated by Judge Learned Hand:

> Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject . . . still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its memberships . . . but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913). Judge Hand was referring to "community" in the sense of "society at large; . . . the public, or people in general." *Jacobellis*, 378 U.S. at 193 (citing Webster's New International Dictionary 542 (2d ed. 1949)).

51. *See Jacobellis*, 378 U.S. at 193 (citing Butler v. Michigan, 352 U.S. 380 (1957)). The Court reasoned that even at movie theaters and bookstores the patrons do not come from merely the small community surrounding the establishments. *See id.* at 194. Suppressing the book or film in one locality would deter its dissemination in other localities where it might not be obscene. *See id.* Sellers would be reluctant to risk conviction in testing the different standards and such restrictions would limit the public's access to forms of the printed word that the State could not constitutionally suppress directly. *See id.* (citing Smith v. California, 361 U.S. 147, 154 (1960)). Standards vary from city to city, and there are some cities in Georgia where courts have concluded that R-rated movies are obscene. *See* Jon Kerr, *Civil Libertarians De-*

Clause requires the courts to reconcile the conflicting rights of local communities, the Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines."[52]

2. *Miller* and Its Progeny: A Local Community Standard

The Supreme Court again redefined the obscenity test in 1973 in *Miller v. California*.[53] Although it recognized that under a national constitution fundamental First Amendment limitations cannot vary from community to community, the Court rejected the contention that the "community standard" should be a uniform national standard.[54] Instead, it held that courts should judge obscenity by engaging in a three-step analysis. First, courts should consider "whether the average person, applying contemporary community standards"[55] would find "that

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cry 6th Circuit Ruling in Internet Obscenity Case, WEST'S LEGAL NEWS, Feb. 6, 1996, *available in* 1996 WL 258349.

52. *Jacobellis*, 378 U.S. at 194-95 (1964) (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)). "It is, after all, a national Constitution we are expounding." *Id.* at 195.

53. 413 U.S. 15 (1973). Miller conducted a mass mailing of sexually explicit materials in order to promote book sales. *See id.* at 16. The defendant mailed five unsolicited advertising brochures through the mail in an envelope addressed to a restaurant in Newport Beach, California. *See id.* at 18. The brochures advertised four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," as well as a film entitled "Marital Intercourse." The brochures contained descriptive printed material consisting of pictures and drawings that explicitly depicted men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed. The manager of the restaurant, who had not requested the materials, opened the envelope and complained to the police. *See id.* Miller was convicted of violating California Penal Code § 311.2(a) for knowingly distributing obscene material. *See id.* at 16. Miller appealed, and the appellate court affirmed the conviction. *See id.* at 15.

54. *See id.* at 30. The Court stated that application of the *Miller* test is a question of fact to be decided by a jury in the location where trial is brought. The Court further stated that the United States is too big and too diverse to have a single standard. While, the court system historically permits triers of fact to draw on the standards of their community, requiring states to structure obscenity proceedings around a national 'community standard' would be impractical. *See id.* "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33.

55. "Community standards" has been defined as follows:

> Contemporary community standards are set by 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 by what some persons or groups of persons may believe the community as a whole ought to accept or refuse

the work, taken as a whole, appeals to the prurient interest."[56] Next, courts should examine "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[57] Finally, courts should evaluate "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[58]

According to the Court, this test respects the states' legitimate interest in prohibiting the dissemination of obscene materials to minors within their borders.[59] In contrast, the dissent argued that applying a local community standard allowed local censorship of speech in violation of the United States Constitution.[60] The dissent argued that a local community standard was unconstitutionally vague.[61] The local community

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to accept. It is a matter of common knowledge, of which the Court takes judicial notice, that customs change, and that the community as a whole may from time to time find acceptable that which was formerly unacceptable, and not infrequently may find presently acceptable that which some particular group of the population may regard as an unacceptable appeal to prurient interest.

In determining contemporary community standards, the jury may consider what, as shown by the evidence in the case, appears in contemporary magazines, books, newspapers, television, motion pictures, novels and other media of communication that are freely available in the community as a whole.

2 DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 40A.07 (4th ed. 1996 & Supp. 1997). In *United States v. Battista*, the Sixth Circuit approved use of this jury instruction regarding community standards. *See* 646 F.2d 237, 245 (6th Cir. 1981).

56. *Miller*, 413 U.S. at 24 (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States 354 U.S. 476, 489 (1957))).

57. *Id.*

58. *Id.*

59. *See id.* at 18-20. "The States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Id.* at 18-19 (citing Stanley v. Georgia, 394 U.S. 557, 567 (1969), and other cases supporting the proposition).

60. *See id.* at 41, 44 (Douglas, J., dissenting). The dissent argued the Miller test makes it possible to ban any paper, journal, or magazine in a particular place. *See id.* The dissent stated:

> The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society.

Id. at 44.

61. The dissent cited *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), as a demonstration of the unconstitutionality of the *Miller* test. *See Miller*, 413 U.S. at 45 (Douglas, J., dissenting). In *Coates*, the court struck down a stat-

standard was unascertainable because "[c]onduct that annoys some people does not annoy others."[62]

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[63] The Supreme Court of the United States has interpreted this to mean in part that such deprivation must be preceded by fair warning.[64] Therefore, an enactment must be specific about its prohibitions if it is to provide fair warning to would-be violators. Due process requires that "an enactment is void for vagueness if its prohibitions are not clearly defined."[65] The basic principal of fair warning is that a person of ordinary intelligence must have a reasonable opportunity to know what is prohibited.[66] Furthermore, in order to prevent discriminatory enforcement, laws must provide specific standards for those who apply them.[67] Finally, a vague law inhibits basic First Amendment freedoms because people will avoid testing the ill-defined boundaries of the law.[68] Related to vagueness is the doctrine of overbreadth. A statute is overbroad if it encompasses conduct constitutionally protected by the First Amendment.[69]

In 1974, the United States Supreme Court affirmed the *Miller* test in *Hamling v. United States*.[70] In *Hamling*, the defendants challenged convictions for mailing and conspiring to

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ute dictating that "[i]f three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by." *Id.* (quoting *Coates*, 402 U.S. at 614). The Court found the statute to be unconstitutionally vague because it subjected people to an unascertainable standard noting "[c]onduct that annoys some people does not annoy others." *Id.* (quoting *Coates*, 402 U.S. at 614). Therefore, the dissent concluded that the Court in *Miller* impermissibly allowed California to punish people who publish materials offensive to some but not offensive to others. *See id.* at 46.

62. *Id.* (quoting *Coates*, 402 U.S. at 614).

63. U.S. CONST. amend. V.

64. *See generally* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (interpreting the Due Process Clause).

65. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

66. *See id.* Vague laws trap the innocent by not providing fair warning of what is prohibited. *See id.*

67. *See id.* A vague law is delegated to judges, police officers, and juries for enforcement on a subjective basis. *See id.* at 108-09. A vague law provides for arbitrary and discriminatory application of the law. *See id.* at 109.

68. *See id.* at 109. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotations omitted).

69. *See id.* at 114. Overbroad statutes unconstitutionally deter privileged activity. *See id.*

70. 418 U.S. 87 (1974).

mail an obscene advertising brochure with sexually explicit photographic materials.[71] Rejecting the defendants' argument that a national community standard should have been applied,[72] the Court affirmed the convictions and upheld the local community standard. The Court reasoned that a juror is entitled to draw on his own knowledge of the views of the average person in the community in determining what is obscene.[73] The Court also stated the district court was free to admit evidence of standards existing in places outside the forum district if such evidence would help decide the issue.[74]

The dissent argued the appropriate standard was a national one because of the nature of the distribution of the product.[75] The majority's test required national distributors sending their products in interstate travel to be familiar with the community standards of every community to which they send their goods.[76] Because these standards are impossible to discern, the distributors must inevitably conform to the lowest standard that satisfies the First Amendment.[77] Hence, "the people of many communities will be 'protected' far beyond government's constitutional power to deny them access to sexually oriented materials."[78]

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71. *See id.* at 87. The defendants mailed a book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" and an advertisement through the mail. *See id.* at 91. The defendants mailed the advertisement to approximately 55,000 people throughout the United States. *See id.* at 92. The advertisement contained photographs from the Illustrated Report. *See id.* The full page of pictures portrayed intercourse, sodomy, and fellatio. *See id.* at 93. The indictment charged the defendants under 18 U.S.C. §§ 2, 371, and 1461. *See id.* at 91. Section 1461 states, "whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be non-mailable" commits a crime. 18 U.S.C. § 1461. The appellate court affirmed the conviction. *See Hamling*, 418 U.S. at 92.

72. *See Hamling*, 418 U.S. at 104 (stating that appellants misunderstood the *Miller* Court's holdings).

73. *See id.* at 104.

74. *See id.* at 106. Courts have also tailored the standard to comply with the specific community affected. For instance, military courts apply a military community standard, thereby recognizing community beliefs based upon a nongeographic form of community. *See* United States v. Maxwell, 42 M.J. 568, 581 (A.F. Crim. App. 1995) (recognizing validity of military community standard).

75. *See Hamling*, 418 U.S. at 144 (Brennan, J., dissenting).

76. *See id.* (Brennan, J., dissenting).

77. *See id.* (noting that subjecting a national distributor to any community's standards will lead to "debilitating self-censorship that abridges the First Amendment rights of the people").

78. *Id.*

In 1989, the United States Supreme Court extended the local community standard established in *Miller* to a case involving telephone distribution of pornographic services.[79] In *Sable Communications of California, Inc. v. FCC*, the defendant offered sexually oriented prerecorded telephone messages across the country.[80] The government prosecuted the defendant under a federal statute that imposed a prohibition on indecent or obscene interstate commercial telephone messages.[81] The defendant argued that the federal statute and the *Miller* test created a national standard of obscenity by forcing the defendant to tailor its messages to the least tolerant community.[82] The Court rejected this contention because the defendant was able to tailor its messages on a selective basis to the communities it chose to serve.[83] The dissent argued the statute was unconstitutionally overbroad because it completely banned obscene telephone messages when the government interest was limited to protecting minors.[84]

In *United States v. Peraino*, however, the Sixth Circuit overturned a conviction for distributing obscene materials under 18 U.S.C. §§ 1462 and 1465.[85] The Court stated that a defendant must know of distribution into a particular community in order

79. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989).

80. *See id.* at 117-18. Defendant used special phone lines designed to handle a large volume of calls simultaneously. *See id.* at 118. The defendants charged those who called a special fee. The fee was collected by the phone company and distributed to the defendant. *See id.* A typical prerecorded message lasted from 30 seconds to two minutes and could be called by up to 50,000 people hourly through a single phone number. *See id.* at 118 n.1. Additionally, the defendants were able to determine where the telephone calls were coming from. *See id.* at 118.

81. *See id.* at 118.

82. *See id.* at 124.

83. *See id.* at 125. The Court further stated that while the defendant may incur some costs in developing and implementing such a system, there is no constitutional barrier to a law that imposes those costs. *See id.* The defendant could "hire operators to determine the source of the calls" or contract "with the phone company to arrange for screening and blocking of out-of-area calls." *Id.*

84. *See id.* at 134 (Brennan, J., dissenting). According to the dissent, banning obscene materials to adults is unconstitutional. *See id.* at 133. The compelling government interest is protecting children from exposure to pornographic material. Steps can be taken to ensure minors cannot access the messages, and thus the statute should only ban interstate telephone messages to minors. *See id.* at 134.

85. *See* United States v. Peraino, 645 F.2d 548, 549, 554 (6th Cir. 1981).

to be convicted.[86] In *Peraino*, the defendant acquired the distribution rights after the obscene film had already been distributed in Tennessee.[87]

3. Venue in Obscenity Cases

In 1982, the Eleventh Circuit, in *United States v. Bagnell*, held venue for federal obscenity prosecutions lies "in any district from, through, or into which" allegedly obscene material moves.[88] The court reasoned the United States Constitution guarantees defendants the right to be tried in the state and judicial district in which the alleged crime occurred.[89] The use of common carriers to ship obscene materials between states is a continuing offense that occurs in every judicial district which the material touches.[90] Therefore, the court concluded that jurisdiction is permissible in any district through which the material passes.[91]

II. *UNITED STATES V. THOMAS*

A. AFFIRMING THE LOCAL STANDARD

In *United States v. Thomas*, the Sixth Circuit Court of Appeals became the first appellate court to consider whether the

86. *See id.* at 552. The *Peraino* court framed its analysis in terms of proof needed for conviction on a charge of conspiracy to distribute obscenity. *See id.* at 551. The *Thomas* court, however, did not discuss any difference between conspiracy to distribute obscenity, as was present in *Peraino*, and the actual distribution of obscenity with which the Thomases were charged. *See* United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996). Therefore, neither does this Comment.

87. *See Peraino*, 645 F.2d at 549.

88. *See* United States v. Bagnell, 679 F.2d 826, 830-32 (11th Cir. 1982) (quoting 18 U.S.C. § 3237).

89. *See id.* at 830 (citing United States v. Davis, 666 F.2d 195, 198-99 (5th Cir. 1982)).

90. *See id.* (citing Reed Enterprises v. Clark, 278 F. Supp. 372, 380 (D.D.C. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 457 (1968)). The defendant in *Bagnell*, a California resident, shipped adult movies into Florida. *See id.* at 829. He was convicted of two counts of common carrier use for the interstate transportation of obscene material in violation of 18 U.S.C. § 1462 and two counts of interstate transportation of obscene material for purposes of sale and distribution in violation of 18 U.S.C. § 1465. *See id.* The defendant actively sought to distribute obscene videos throughout the United States. *See id.* The defendant argued that venue was improper in Florida because the government was able to engage in forum shopping by choosing where to order the films. *See id.* at 830. The court ruled that venue was proper in Florida. *See id.* at 832-33.

91. *See id.* at 832.

geographic limitlessness of the Internet required a national standard rather than a local one for assessing the materials' obscene nature under the "contemporary community standards" portion of the *Miller* test.[92] The court held the local Tennessee community standard was the proper standard.[93]

In reaching this conclusion, the court invoked venue rules,[94] finding that issues of venue correspond to the determination of which community standard to apply.[95] As the court stated, "venue for federal obscenity prosecutions is proper 'in any district from, through, or into which' the allegedly obscene material moves."[96] The court observed that the AABBS allowed members in other jurisdictions to access and download GIF files, which were then electronically transmitted in interstate commerce.[97] The court concluded prosecution was proper in either the district of dispatch or the district of receipt and thus venue was proper in either California or Tennessee.[98] The

92. *See* United States v. Thomas, 74 F.3d 701, 711 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (1996); *see also supra* notes 55-56 and accompanying text (defining material as obscene when the "average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."). On appeal, the Thomases asserted that their convictions violated their First Amendment rights to freedom of speech. *See Thomas*, 74 F.3d at 710. The defendants also asserted their conduct did not constitute a violation of 18 U.S.C. § 1465 because the statute did not apply to intangible objects such as the computer GIF files and Congress did not intend to regulate computer transmissions. *See id.* at 706. In addition, the Thomases argued that venue was improper, *see id.* at 709; they had a constitutionally protected right to possess obscene materials in the privacy of their home, *see id.* at 710; jury instructions given during trial were improper, *see id.* at 712; evidence was improperly admitted, *see id.* at 714; they had incompetent counsel, *see id.* at 715; and sentencing was improper, *see id.* at 716.

93. *See id.* at 711.

94. *See id.* (stating that the issues of venue and community standards are tied together).

95. *See id.*

96. *Id.* (quoting United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981) (quoting 18 U.S.C. § 3237)). Federal obscenity laws generally involve acts in more than one jurisdiction due to their inherent nexus to interstate commerce. *See id.* at 709. The court stated there was not a "'constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent.'" *Id.* (quoting United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982)). Many obscenity cases are brought in Tennessee, where strict community standards exist. *See, e.g.*, United States v. Peraino, 645 F.2d 548 (6th Cir. 1981) (bringing prosecution for obscenity in Tennessee); United States v. Toushin, 714 F. Supp. 1452 (M.D. Tenn. 1989) (bringing prosecution for obscenity in Tennessee).

97. *See Thomas*, 74 F.3d at 709.

98. *See id.* at 711 (citing *Bagnell*, 679 F.2d at 830-31); *see also supra* notes

court further reasoned that cases involving interstate transportation of obscene material should apply the community standards of the geographic area where prosecution is brought, which in this case was Tennessee.[99] The court observed that federal courts have refused to declare that it is unconstitutional to subject interstate distributors of obscenity to varying community standards.[100]

B. INTERNET'S INTERSTATE DISTRIBUTION UNDER THE COMMUNITY STANDARD

In reaching its holding, the *Thomas* court refused to address the defendants' claim that the uniqueness of the Internet required a new definition of "community" that takes into account the geographic limitlessness of the Internet.[101] Citing *Sable*, the court dismissed this argument.[102] The court noted

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88-90 and accompanying text (discussing the facts and holding of *Bagnell*). The court noted that its holding "may result in prosecutions of persons in a community" to which the materials were sent even though the community from which they were sent would not have found them obscene. *See Thomas*, 74 F.3d at 711 (quoting *Peraino*, 645 F.2d at 551).

99. *See id.* (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125 (1989); Hamling v. United States, 418 U.S. 87, 105-06 (1974); Miller v. California, 413 U.S. 15, 15, 30-34 (1973)).

100. *See id.* (citing *Hamling*, 418 U.S. at 106; United States v. Sandy, 605 F.2d 210, 217 (6th Cir. 1979)).

101. *See id.* at 711. The defendants argued that the computer technology used in this case required a new definition of "community" based on the "broad-ranging connections among people in cyberspace," instead of the geographic locale of the federal judicial district of the trial. *Id.* The defendants argued that "[w]ithout a more flexible definition . . . there will be an impermissible chill on protected speech because BBS operators cannot select who gets the materials they make available on their bulletin boards." *Id.* Therefore, BBS operators would be forced to censor their materials to the community with the most restrictive obscenity standards. *See id.*

102. *See id.* (citing *Sable*, 492 U.S. at 125-26). The court dismissed this argument, stating that the defendants in this case had control over the jurisdictions where materials were distributed for downloading or printing. *See id.*

However, in another case related to obscenity and the Internet, one judge has stated:

> As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos . . . . Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.

ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (opinion of Dalzell, J.),

the *Sable* court's finding that distributors of obscene materials may be subjected to varying community standards, but that the distributor "'was free to tailor its messages, on a selective basis . . . to the communities it chooses to serve.'"[103] The court also stated that additional costs were not a constitutional impediment.[104] Specifically, the court determined the defendants in *Thomas* had knowledge and control over the jurisdictions where materials were distributed.[105] Defendants knew that the member in question was from Memphis, Tennessee because the AABBS had limited membership and required signed paper applications with members' addresses and phone numbers.[106] Consequently, the court concluded the defendants had the means to limit access in jurisdictions where obscenity standards were lower than in California.[107] The court concluded that defendants should have refused membership to the Memphis member if they did not choose to be subject to the obscenity standards of Tennessee.[108] Therefore, the court determined that a new definition of "community" for use in obscenity prosecutions involving electronic bulletin boards was unnecessary in this case.[109]

III. REDEFINING COMMUNITY STANDARDS IN LIGHT OF THE GEOGRAPHIC LIMITLESSNESS OF THE INTERNET

Future courts should reject the approach taken in *United States v. Thomas* because the *Thomas* court improperly relied

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aff'd, 117 S. Ct. 2329 (1997).

103. *See Thomas*, 74 F.3d at 712 (quoting *Sable*, 492 U.S. at 125). *See supra* notes 79-84 and accompanying text (discussing the court's holding and reasoning in *Sable*). The defendants in *Thomas* argued that 18 U.S.C. § 1465 did not apply to intangible objects like computer files, citing *United States v. Carlin Communications, Inc.*, 815 F.2d 1367, 1371 (10th Cir. 1987), as the relevant precedent. *See Thomas*, 74 F.3d at 706. The court stated that "telephonic communication of pre-recorded sexually suggestive comments or proposals . . . is inherently different from the obscene computer-generated materials that were electronically transmitted from California to Tennessee." *Id.* at 707.

104. *Id.* at 712 (citing *Sable*, 492 U.S. at 125).

105. *See id.* at 711.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 712. The court stated it is a cardinal rule to "never reach constitutional questions not squarely presented by the facts of a case." *Id.* (citing Brockett v. Spokane Arcades, Inc. 472 U.S. 491, 502 (1985)).

on distinguishable precedent in upholding the defendants' convictions. The court failed to consider the uniqueness of the Internet.[110] The court also did not account for the shortcomings of applying the existing standard to Internet cases, which results in a lowest-common-denominator approach as well as forum shopping by federal prosecutors. The proper "community" for the purpose of the Internet should be one applicable to all users of the Internet, where the members of the Internet community define what constitutes obscenity. A standard designed specifically for the unique nature and attributes of the Internet would further the policy of prohibiting obscenity in conformance with past precedent and would uphold the constitutional rights of free speech and due process.

A. THE *THOMAS* COURT'S RELIANCE ON PAST PRECEDENT WAS INAPPROPRIATE

1. *Bagnell*, *Miller*, and *Hamling* Are Clearly Distinguishable on Their Facts

In arriving at its holding, the *Thomas* court improperly relied upon precedent set forth in *Bagnell*, *Miller*, and *Hamling*.[111] The court cited *Bagnell* for the proposition that venue was proper in Tennessee,[112] and *Miller* for the proposition that community standards were to be determined by the community where the trial took place.[113] Citing *Hamling* as authority, the court then concluded that because venue was proper in Tennessee, Tennessee's community standards were proper for assessing the obscenity of the material.[114] Unfortunately, the *Thomas* court extended the principles of *Bagnell*, *Miller*, and *Hamling* to an inapplicable fact situation.

In *Bagnell*, the defendant actively sought purchasers of obscenity throughout the United States, and used a common carrier to ship the obscene materials interstate.[115] Similarly, in *Miller* and *Hamling*, the defendants purposely sent obscene materials nationwide.[116] In these cases, the communities involved had a right to judge the appropriate behavior for their commu-

110. *See supra* notes 13, 109 and accompanying text.
111. *See supra* notes 92-100 and accompanying text.
112. *See supra* note 98 and accompanying text.
113. *See supra* note 99 and accompanying text.
114. *See supra* note 99 and accompanying text.
115. *See supra* notes 88-91 and accompanying text.
116. *See supra* notes 53, 71.

nity, and to hold those that purposely avail themselves of their communities liable for inappropriate actions, because their communities were actually targeted by the respective defendants.

In contrast to these cases where the defendants sent materials into communities, the defendants in *Thomas* did not actually solicit sales from or send anything into Tennessee.[117] The postal inspector logged into defendant's bulletin board system *in California*, scanned the information, and then selectively downloaded pictures into Tennessee.[118] Significantly, it was the federal agent who purposely availed himself of the Tennessee community, not the defendant.

In addition, the government can only prosecute bulletin board operators when they *knowingly distribute* materials to those communities.[119] Unlike *Miller* and *Hamling* where the defendants purposely sent obscene materials into the communities, the *Thomas* defendants merely approved an application for access to their bulletin board system from a Tennessee resident.[120] Approval of a paper application that allows access to the bulletin board is not distribution of obscenity. It is the Tennessee resident who crosses into California, views the files, and then downloads them to Tennessee. Consequently, the defendants did not knowingly distribute the materials into Tennessee in violation of 18 U.S.C. § 1465, but instead they knowingly provided a Tennessee resident with access to their California bulletin board.[121] In addition, they did not distribute the materials into Tennessee. It was the postal inspector who downloaded the files into Tennessee. Unlike *Bagnell*, *Miller*, and *Hamling*, the facts of the *Thomas* case fail to fall within the statute's language of "knowingly" and "transports."

2. *Sable* is Distinguishable from *Thomas*

The *Thomas* court also improperly relied upon *Sable* in determining that a new definition of "community" was not re-

117. *See supra* notes 1-3 and accompanying text (discussing method of distribution involved in the *Thomas* case).

118. *See supra* note 3 and accompanying text; *see also supra* notes 5-7 and accompanying text.

119. *See supra* notes 85-87 and accompanying text (discussing the "knowledge" requirement of 18 U.S.C. §§ 1462 and 1465).

120. *See supra* note 6 and accompanying text.

121. Unlike the Thomases, most modern day bulletin board operators do not approve physical applications to grant access to their systems. In such a situation, the lower level of knowledge on the part of the bulletin board operators further supports this argument.

quired.[122] The *Sable* court found a telephone service liable even though the telephone service received phone calls from all over the country.[123] The *Sable* court stated the telephone service could feasibly screen out those calls and apply the differing community standards to the service they offered.[124] In *Sable*, the telephone operators knew where the telephone calls had originated.[125] The telephone service could have easily blocked calls from certain jurisdictions by screening for area codes or prefixes.[126]

In contrast, the bulletin board operator does not typically know from what jurisdiction the user is accessing.[127] More importantly, the operator cannot block out access from certain areas.[128] The Internet exists without physical boundaries and without a central governing authority. Access can be gained from a multitude of different points.[129] In the instant case, the postal inspector's application was sent from Tennessee,[130] but the bulletin board operator did not know from where the user was accessing or to where the user was downloading. The user could access the bulletin board from anywhere in the country as well as download to anywhere in the country. For example, if the user had a home-page on a server in a different state, as is typical with on-line service companies, the user could download the files to that server for later access by others. The files would never come in contact with Tennessee, other than through the user viewing those files on-line. In *Sable*, by contrast, the telephone operators always knew where the phone call originated and could block out certain areas. Because bulletin board operators do not know from what jurisdiction the user is accessing and cannot block out access from certain areas, a different definition of "community" is needed.

Although the *Thomas* court based its decision on *Sable*, it also acknowledged that "telephonic communication of prerecorded sexually suggestive comments or proposals . . . is in-

122. *See supra* note 102 and accompanying text.
123. *See supra* notes 80-83 and accompanying text.
124. *See supra* note 83 and accompanying text.
125. *See supra* note 80.
126. *See supra* note 83 and accompanying text.
127. *See supra* note 30-32 and accompanying text.
128. *See supra* note 32 and accompanying text.
129. *See supra* notes 23-27 and accompanying text (discussing the Internet community).
130. *See supra* notes 5-7 and accompanying text (discussing postal inspector's access point).

herently different from the obscene computer-generated materials that were electronically transmitted from California to Tennessee."[131] The inherent differences exist in the method of transmission, in the subject matter of the materials, and in the amount of control the supplier has over the purchaser. Despite noting these inherent differences, the court nevertheless relied upon *Sable*, and reached erroneous conclusions.

B. *THOMAS* AND PAST PRECEDENT DO NOT ACCOUNT FOR THE UNIQUENESS OF THE INTERNET

The "contemporary community standards" test, as defined in *Miller*, is both vague and hard to apply, even to traditional modes of publication and distribution. Community standards vary from one locality to the next.[132] Indeed, due to the vagueness of this test, opponents have claimed the test is an unconstitutional violation of the Due Process Clause.[133] The thrust of this argument rests on the ambiguous language of the statutes and the unclear definition of "community." Neither the words in the statutes nor the definition of community are sufficiently precise because they have different meanings for different people and communities. Nevertheless, courts have traditionally rejected this argument in the context of traditional forms of distribution of obscene materials because the Constitution only requires sufficient warning as to the proscribed conduct, and suppliers who knowingly distribute obscene materials into different jurisdictions have sufficient warning as to the proscribed conduct in those jurisdictions.[134]

With the proliferation of the Internet, the due process argument has new validity, at the very least within the limited context of the Internet. The subjection of bulletin board operators to community standards in the local community where the users reside and where the supplier did not knowingly distribute materials violates the Due Process Clause and suppresses free speech under the First Amendment.[135] Unlike the tradi-

131. United States v. Thomas, 74 F.3d 701, 707 (distinguishing *Thomas* from *United States v. Carlin Communications, Inc.*, 815 F.2d 1367 (10th Cir. 1987), which involved the use of sexually suggestive recordings accessible by telephone).

132. *See supra* note 54 and accompanying text.

133. *See supra* notes 63-68 and accompanying text (discussing void for vagueness doctrine).

134. *See supra* note 42.

135. *See supra* notes 63-68 and accompanying text (discussing due process

tional forms of distribution, the Internet has no geographic boundaries. [136] With users from all over the world, the bulletin board operators do not know the identity or location of individuals accessing or downloading files from their system.[137] Subjecting the operators to varying community standards under these conditions requires an impossible determination by the operators as to which communities are accessing their bulletin boards and which community standards should apply. Therefore, the statute does not provide sufficient warning to bulletin board operators as required by the Due Process Clause. The *Thomas* court, however, ignores this aspect of the Internet and its dissimilarity to traditional media.[138]

C. SHORTCOMINGS OF THE EXISTING TEST

1. Lowest-Common-Denominator Approach

A local community standard leads to the lowest-common-denominator approach, whereby distributors market only material that conforms to the standards of the most sensitive community.[139] This standard creates a de facto national standard that chills freedom of speech. Because Internet distributors cannot tailor material specifically for each jurisdiction, they are forced to tailor material to be appropriate for the least tolerant jurisdiction. This result uniquely affects bulletin board operators because, unlike mass mailing distributors who know which jurisdictions are receiving the materials, bulletin board operators do not know which jurisdictions are accessing their systems.

This lowest-common-denominator approach allows the community with the least tolerance for obscenity to set the standard for the rest of the nation. Further, while the least tolerant community consists of many different people, only a portion of them are Internet users. Consequently, this approach allows non-Internet users in the most conservative jurisdiction of the country to force their values not only upon the rest of the country, but also upon the *world-wide* community of

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requirements).

136. *See supra* note 25 and accompanying text (discussing the structure of the Internet).

137. *See supra* text accompanying note 27.

138. *See* United States v. Thomas, 74 F.3d 701, 711 (6th Cir. 1996), *cert. denied*, 117S. Ct. 74 (1996).

139. *See supra* notes 75-78 and accompanying text.

Internet users. For example, the defendants in the instant case would be forced to tailor the material on their bulletin board to Tennessee's strict standards. The result is that the residents of Tennessee, many of whom are not Internet users, have set a de facto standard for the rest of the nation's Internet users. This imposition amounts to legal censorship in violation of the First Amendment because adults in more tolerant communities have been denied access to their constitutionally protected right to view materials that *their* communities do not find obscene.[140]

The lowest-common-denominator result was never intended by Judge Learned Hand, who first verbalized the community standards test.[141] Judge Hand stated explicitly that society is not prepared to "accept for its own limitations those which may perhaps be necessary to the weakest of its members . . . but to fetter it by the necessities of the lowest and least capable seems a fatal policy."[142] Judge Hand was referring to the "community" in the sense of "society at large; . . . the public, or people in general."[143] Therefore, the relevant community standard should be the Internet "society at large," not the least tolerant community.

2. Federal Obscenity Statutes and Definition of "Community" Are Overbroad

The federal obscenity statutes and definitions are also overbroad in violation of the Due Process Clause. The compelling governmental interest that allows these statutes to overcome the First Amendment protections is in protecting minors from exposure to pornographic material.[144] The varying community standards, however, not only prohibit access by minors, but also by adults. Statutes and definitions must be narrowly tailored to address the government's compelling interest without overly restricting an individual's constitutional rights.[145]

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140. *See supra* note 47 and accompanying text.

141. *See supra* note 50 and accompanying text (quoting Judge Learned Hand on a national community standard).

142. United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913).

143. Jacobellis v. Ohio, 378 U.S. 184, 193 (1964); *see also supra* note 50 and accompanying text.

144. *See supra* note 84 and accompanying text (discussing the government's interest in banning obscene materials).

145. *See supra* notes 69, 84 and accompanying text (discussing overbreadth and constitutionally protected conduct under the First Amendment).

Courts have previously rejected this overbreadth argument, but in a different context. In *Sable*, the Court rejected this argument because the defendant knew from which jurisdictions the telephone callers were calling and could effectively block out those areas.[146] Thus, the court held the statute was not overbroad.[147] In *Thomas* and similar cases involving the Internet, the bulletin board operators cannot effectively block out certain areas. In fact, the bulletin boards can be accessed world-wide.[148] Therefore, in this context, the statutes are overbroad. The statutes not only protect minors from access to pornographic materials, but the statutes also unconstitutionally deny adults access to those materials, because the bulletin board operators must tailor their bulletin boards to the least tolerant community. This unconstitutionally denies adults in areas with more tolerant communities access to materials that they have a constitutional right to view.

3. Forum Shopping by Prosecutors

The local community standard approach provides an opportunity for forum shopping on the part of federal prosecutors. Federal prosecutors are free to bring suit anywhere that materials have been distributed.[149] As in *Thomas*, prosecutors access the bulletin boards from the jurisdictions with the least tolerant standards,[150] allowing them to bring suit in the district where they have the best chance of obtaining a conviction.[151] This practice violates the Due Process Clause, since defendants have a right to a criminal trial in the jurisdiction where the offense occurred.[152] In the instant case, the offense did not occur in Tennessee; defendants merely posted the files on their computer in California.[153]

In *Thomas*, the obscene materials were posted in California. However, the postal inspector accessed the system from

146. *See supra* note 83 and accompanying text (discussing the *Sable* Court's reasoning).

147. *See supra* note 83 and accompanying text.

148. *See supra* notes 25-26.

149. *See supra* note 96 and accompanying text (discussing venue for federal obscenity cases).

150. *See supra* note 96 (discussing obscenity cases brought in Tennessee).

151. *See supra* note 98-99 and accompanying text.

152. *See supra* note 89 (discussing constitutional limits of venue in criminal cases).

153. *Cf. supra* notes 85-87 (discussing parallel analysis regarding "knowledge" requirement).

Tennessee, allowing suit to be brought there to take advantage of Tennessee's less tolerant obscenity standard.[154] Under the holding in *Thomas*, prosecutors have the right to prosecute in any jurisdiction they select.[155] This violates the Due Process Clause because the defendants do not have notice of the jurisdictions in which they may be held liable for their postings.[156] If one commits an offense in California, one has fair warning that he will be prosecuted according to California's laws. If prosecutors are allowed to prosecute from any jurisdiction that the Internet touches, however, defendants do not have fair warning as to where they may be held liable.

IV. THE PROPER COMMUNITY STANDARD IS A STANDARD DESIGNED SPECIFICALLY FOR THE UNIQUE NATURE AND ATTRIBUTES OF THE INTERNET

A. THE PROPOSED STANDARD

The proper community standard for purposes of the Internet should be a standard designed specifically for the unique nature and attributes of the Internet. This standard would apply only to the Internet domain, and Internet users would determine what is considered obscene material for purposes of the Internet. The users of the Internet would comprise the community for the community standards test. Implicit in the community standards approach is the notion that a community relies upon the proximity of its members.[157] Computer technologies allow individuals to create unique communities of people who share similar interests and who wish to communicate with each other about those interests. These communities have no geographical boundaries[158] and should not be judged by communities with geographical boundaries. Internet users communicate with other users from all over the world from the privacy of their own home. These users are often more connected to each other than they are to their physical neighbors. Consequently, these citizens of the Internet community should determine what is obscene for citizens of the Internet. This

154. *See supra* notes 5-7 and accompanying text (discussing the postal inspector's methods of gathering evidence against the Thomases).

155. *See supra* notes 96-99 and accompanying text (reviewing the *Thomas* court's reasoning regarding proper venue).

156. *See supra* notes 63-68 and accompanying text.

157. *See supra* note 45 and accompanying text.

158. *See supra* note 25 and accompanying text.

proposed standard would further the policy of prohibiting obscenity in conformance with past precedent and uphold the constitutional rights of free speech and due process.

B. THE PROPOSED STANDARD IS SUPERIOR TO A LOCAL STANDARD

A standard designed specifically for Internet users eliminates any vagueness due to ambiguity. Unlike the local community standard, bulletin board operators would know the standard applicable to the entire Internet and could effectively tailor the content of their bulletin boards to conform to that standard. The operators would not need to know from where the users were accessing and would not need technology to block out certain jurisdictions. In conformance with the Due Process Clause, the proposed standard provides a clearer, more precise standard for what is acceptable over the Internet.

The proposed standard also conforms to past precedent. The courts have traditionally refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines."[159] The *Miller* justification for a local community standard was that the nation was too expansive and too diverse to expect a single standard.[160] This local standard was implemented because, at the time, communities all over the country had different tastes and values.[161] These different communities do not exist on the Internet. All of the users are part of the same community. Furthermore, with modern technology, people communicate and interact with other people from all over the country instantaneously as if the country were one single community, thereby diminishing the past perceived need for local community standards.

In failing to recognize the uniqueness of the Internet, the *Thomas* court also failed to use the Federal Jury Instructions, which define *community* as "society at large" or "people in general," which in this case would be the Internet community.[162] The Sixth Circuit approved use of these federal jury instructions in *United States v. Battista*.[163] The *Thomas* court should

159. Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964) (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)).

160. *See supra* note 54 and accompanying text.

161. *See supra* note 54 and accompanying text.

162. *See supra* note 55 and accompanying text (quoting federal jury instruction for community standards).

163. 646 F.2d 237, 245 (6th Cir. 1981).

have utilized this definition and existing precedent to create a new standard for defining obscenity on the Internet. The proposed standard is consistent with the "society at large" definition of "community."

This proposed standard would eliminate the least common denominator effect and forum shopping by prosecutors. With one standard for everyone accessing the Internet, users of the Internet would determine what is obscene, rather than the local communities with the least tolerant standards. In addition, federal prosecutors would not be able to choose where to prosecute based on the most favorable local standards. Prosecutors could still bring suit anywhere the materials passed, with proper venue, but the proposed standard would be the same in each and every jurisdiction.

The local jury would be instructed regarding the proposed standard, including the nature of the Internet, pornography standards on the Internet, ability to prohibit access, and any other pertinent information. This could be accomplished by presenting expert witness testimony, or possibly physical evidence, as to what standard applies to the Internet community.

Judicial precedent is in place to support the proposed standard. The *Hamling* court stated that the district court was free to admit evidence of standards existing in places outside of the forum district if such evidence would help decide the issue.[164] Other courts have recognized the practicality and validity of community defined by nongeographic factors.[165]

C. THE PROPOSED STANDARD MAINTAINS PROPER BALANCE BETWEEN LEGITIMATE GOVERNMENT INTEREST AND CONSTITUTIONAL RIGHT OF FREE SPEECH

This proposed standard also fits within the language of the federal obscenity statutes and within the states' legitimate interest of protecting minors from exposure to pornographic material.[166] The obscenity statutes require the violator to "knowingly distribute" obscene materials. Under the local community standard, bulletin board operators do not "knowingly distribute" materials into varying jurisdictions.[167]

164. *See supra* note 74 and accompanying text.

165. *See supra* note 74 and accompanying text (recognizing the validity of military community standard).

166. *See supra* notes 8, 84 and accompanying text (discussing statute language and government's interest).

167. *See supra* notes 119-120 and accompanying text.

Rather, the users transport the obscene materials into the varying jurisdictions. By applying the proposed standard, however, the bulletin board operators could be held liable for "knowingly distributing" obscene materials to the Internet community. Furthermore, the proposed standard conforms to the government's interest in protecting children from exposure to obscene material. Minors can still be banned from access to the bulletin board systems while providing adults with access to the obscene material across the entire country.

CONCLUSION

In *United States v. Thomas*, the Sixth Circuit held the local Tennessee community standard was the proper standard for determining what was obscene material under 18 U.S.C. § 1465. The court improperly relied upon precedent inapplicable to the facts of this case and upheld the convictions of the defendants. The court also failed to consider the policy behind that precedent and erroneously applied it to the unique Internet environment.

This Comment asserts that "contemporary community standards" for purposes of the Internet should be redefined specifically for the unique nature and attributes of the Internet. Bulletin board operators are often unaware of users' locations and are not the distributors of the materials. Furthermore, the community at hand is made up of users from all over the world with instant access to the materials. The users of the Internet should comprise the community for purposes of defining what is obscene material on the Internet. This proposed standard upholds the constitutional guarantees of free speech and due process while protecting the states' legitimate interest in protecting minors from exposure to pornographic materials.