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I. INTRODUCTION

Of all the obscenity cases decided by the United States Supreme Court in the last twenty years,[1] none has had the importance, both in the public eye and in the development of obscenity law, as has *Miller v. California*.[2] *Miller* is significant for many reasons,[3] but none so much as its approval of the concept of *local* community standards as the guideline by which the obscenity *vel non* of a given work is to be measured.[4] With this change, however, came the introduction of a new factor in obscenity law—the question of which local community's standard is to be applied in a given case. If a defendant is charged in a criminal prosecution with distributing obscene materials from New York to Connecticut and Rhode Island, which community is relevant in defining contemporary community standards? Does the answer depend on whether

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[1] Since Roth v. United States, 354 U.S. 476 (1957), the Court has handed down full opinions in over thirty obscenity cases (almost all of which have involved several concurring and dissenting opinions), and has decided innumerable cases by per curiam opinions or other forms of summary disposition. Probably no substantive area other than criminal procedure has received as much attention from the Court.

[2] 413 U.S. 15 (1973).

[3] For more comprehensive analyses of *Miller* and its companion cases, see Fahringer & Brown, *Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 10 CRIM. L. BULL. 785 (1974); Hunsaker, *1973 Obscenity—Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN. DIEGO L. REV. 906 (1974); Clor, *Obscenity and the First Amendment: Round Three*, 7 LOYOLA U.L. REV. (L.A.) 207 (1974); Leventhal, *1973 Round of Obscenity—Pornography Decisions*, 59 A.B.A.J. 1261 (1973); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 160 (1973); 18 ST. LOUIS U.L.J. 297 (1973); 49 IND. L.J. 320 (1974); 40 BROOKLYN L. REV. 442 (1973).

[4] 413 U.S. at 30-34.

the prosecution is in New York, Connecticut, or Rhode Island? Or suppose a defendant is charged with transporting obscene material from Florida to North Carolina, during which the material passes through Georgia and South Carolina. If tried in South Carolina, what standards should be used? If the standards of a community other than the forum are to be used, how are those standards to be proved? Similar questions may arise where only a single state is involved in the transaction, depending upon whether the community is defined as a city, a county, or a judicial district.

The proposed situations are by no means hypothetical. Most obscenity cases in fact involve issues of this type, since the production and distribution of motion pictures, books, and magazines involve, in virtually every instance, a number of different geographic areas. Even so, there has yet to be a reasoned judicial discussion of this issue in any of the reported cases. The choice of law decision is generally made without a full realization that there are major choice of law problems in this area involving both traditional conflict of laws issues and significant constitutional considerations. This is due, in part, to the fact that most obscenity cases arise in the context of criminal prosecutions,[5] an area in which choice of law has rarely been an issue. Yet the dynamics of an obscenity case, in light of the local standards concept, are such as to make the conflict of laws issues much more important than in any other type of criminal case. The purpose of this article is to point out the choice of law problems that arise in obscenity litigation, to analyze the competing considerations in making the choice of law decision, and to suggest an analytical framework for making reasoned decisions in this area.

II. The Development of the Local Standards Concept

The determination of whether or not a work is obscene must be measured in the context of "contemporary community standards." This aspect of the test for obscenity can be traced to *Roth v. United States*,[6] the first Supreme Court case to deal fully with the permissible scope of obscenity regulation.[7] In *Roth*, the Court

[5] While not the exclusive method of obscenity regulation, criminal prosecution is by far the most common. There are, however, civil proceedings involving seizures, licensing, injunctions, and declaratory judgements. See notes 102-04 *infra*.

[6] 354 U.S. 476 (1957).

[7] *Roth* was by no means, however, the Supreme Court's first obscenity case. A number of earlier cases had dealt with obscenity, but none discussed in depth the

declared the test for obscenity to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[8] Although this was the first use by the Supreme Court of the term "contemporary community standards" the concept of contemporary community standards, as well as all of the other elements of the *Roth* test, was only a restatement of the test used by a number of lower courts prior to *Roth*.[9] While none of these lower court opinions explicitly used the phrase "contemporary community standards," each placed considerable emphasis on the concept that prevailing views of morality and decency change with time and that what is obscene at one time and place may not be obscene at another.[10] Thus, the concept of contemporary community standards as an element of obscenity litigation was hardly new at the time *Roth* was decided, although it was not until *Roth* that it received the sanction of the United States Supreme Court.

The purpose of the "contemporary community standards" aspect of the *Roth* test is to insure that the finder of fact apply some external standard, rather than his or her personal views of morality of decency, when resolving the question of obscenity in a particular case. It was also intended to prevent a determination of obscenity on the basis of an adverse effect on a "particularly susceptible" subclass of the community.[11] Yet there was no discussion in *Roth* of how community was to be defined, and the Court does

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relationship of obscenity regulation to first amendment restrictions. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (prior restraint); Winters v. New York, 333 U.S. 507 (1948) (statute unconstitutionally vague); Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915) (Ohio censorship act upheld); Swearingen v. United States, 161 U.S. 446 (1896) (libelous newspaper article not within scope of federal obscenity statute); Rosen v. United States, 161 U.S. 29 (1896) (indictment need not contain exact obscene matter; defendant need not have actual knowledge as to obscenity); *Ex parte* Jackson, 96 U.S. 727 (1877) (federal obscenity statute upheld).

[8] 354 U.S. at 489.

[9] The concept seems first to have been enuniciated by Learned Hand, then a Federal District Judge, in United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913). *See also* Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); State v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954); Bantam Books, Inc. v. Melko, 25 N.J. Super, 292, 96 A.2d 47 (1953).

[10] Although the word "community" was frequently used in earlier cases, the emphasis of the concept was that standards change over *time*. *See, e.g.*; Parmelee v. United States, 113 F.2d 729, 731 (D.C. Cir. 1940). The shift in focus to the idea of geographic variations is of more recent origin.

[11] 354 U.S. at 488-89.

not seem to have considered the issue.[12]

The Supreme Court first faced the issue of the geographic contours of the community in *Manual Enterprises v. Day*,[13] an appeal from a ruling barring certain magazines from the mails pursuant to 18 U.S.C. § 1461. Justice Harlan, who announced the judgment of the Court and wrote an opinion in which Justice Stewart joined, declared that a "national standard of decency" was appropriate in this federal action, since the federal statute reached the entire United States.[14] While a state might set its own standards, and while Congress might set a more local geographic standard, the relevant community for a federal prosecution, absent state or congressional specification, was held to be the entire country.[15]

Two years later, the Court was faced with this issue in the context of a state obscenity prosecution. In *Jacobellis v. Ohio*,[16] Justice Brennan stated that *Roth* did not in any way mandate that a standard be drawn from the local community. Emphasizing that "it is, after all, a national constitution we are expounding," Justice Brennan stated that the scope of constitutional protection must be uniform throughout the country.[17] To hold otherwise, he reasoned, would have a deterrent effect on the total distribution of material that might be considered offensive in only a small part of the country, since no distributor would take the risk of the varying adjudications that would result from a variable standard.[18] Justice

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[12] The best discussion of this aspect of *Roth* is found in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 49-50 (1960). At least two federal courts adopted a local standard after *Roth*. United States v. West Coast News Co., 30 F.R.D. 13 (W.D. Mich. 1962), *aff'd*, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds per curium sub nom.*, Aday v. United States, 388 U.S. 447 (1967). United States v. Frew, 187 F. Supp. 500, 506 (E.D. Mich. 1960).

[13] 370 U.S. 478 (1962).

[14] *Id.* at 488.

[15] The opinion left open the question of whether Congress could constitutionally prescribe a more local standard. *Id.* Although Congress never attempted to take such action, *Hamling v. United States*, 418 U.S. 87 (1974), seems to allow such action.

[16] 378 U.S. 184 (1964).

[17] *Id.* at 193-95.

[18] *Id.* at 194. *See* Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399, 425 (1967).

This argument, however, addresses itself only to the effect *of* a community with stricter than average standards and not to the effect *on* a community with standards more permissive than the national norm. As has subsequently been noted in *Miller v. California*, 413 U.S. 15, 32 n.13 (1973), a national standard has the effect

Brennan's views on the necessity of a national standard, even in state cases, did not command a majority of the Court; only Justice Goldberg joined in his opinion. Justice White concurred without opinion, and the concurring opinions of Justices Stewart, Black, and Douglas did not discuss the issue of community standards.[19]

Chief Justice Warren, in a dissenting opinion joined by Justice Clark, disagreed with the national standards test, chiefly because he felt that there was, and could be, no one national standard.[20] In a separate dissenting opinion Justice Harlan reiterated his position that a national standard should apply to federal statutes and a more local standard to state obscenity regulation.[21] Thus, regarding the issue of the geographical contours of the community from which a standard of obscenity is to be drawn, those Justices who expressed an opinion in *Jacobellis* were evenly divided, excluding Justice Harlan's variable standard, as to whether the community should be local or national in scope. The national standards view was not accepted by a majority of the Court in either *Jacobellis* or any other case. Despite this, the overwhelming majority of lower courts that faced the problem after *Jacobellis* employed a national definition of contemporary community standards.[22] While some of

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of prohibiting the distribution of material in a permissive community that that community is willing to accept.

As a question of logic, the two dangers are probably of equal significance. In practice, however, they may not be equivalent. The danger of the "chilling effect" of local standards is fairly obvious. The danger of keeping materials from a more permissive community, as theoretically could happen with a national standard, may be illusory, since the material is unlikely to be prosecuted in that community, or the community itself may, by statute, relax its regulation of obscenity.

[19] 378 U.S. at 196-97.

[20] *Id.* at 199-203.

[21] *Id.* at 203-04.

[22] Every federal court that faced the issue after *Jacobellis* selected a national standard. Chemline, Inc. v. Grand Prairie, 364 F.2d 721 (5th Cir. 1966); United States v. Davis, 353 F.2d 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966); Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub nom.* Aday v. United States, 388 U.S. 447 (1967); United States v. Ginzburg; 338 F.2d 12 (3d Cir. 1964); *aff'd*, 383 U.S. 463 (1965); Meyer v. Austin; 319 F. Supp. 457 (M.D. Fla. 1970), *vacated*, 413 U.S. 905 (1972); Grove Press, Inc. v. Philadelphia, 300 F. Supp. 281 (E.D. Pa.), *modified*, 418 F.2d 82 (3d Cir. 1969); United States v. 392 Copies of a Magazine Entitled "Exclusive," 253 F. Supp. 485 (D. Md. 1966), *aff'd*, 373 F.2d 633 (1967); United States v. One Carton Positive Motion Picture Film Entitled "491", 247 F. Supp. 450 (S.D.N.Y. 1965), *rev'd* 367 F.2d 889 (1966).

The First Circuit chose a national standard prior to *Jacobellis*. Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); Flying Eagle Publica-

these lower court opinions recognized the lack of definitive authority and independently analyzed the competing constitutional considerations, most felt that *Jacobellis* mandated national standards—a view that is hardly justified by the opinions in that case.[23] As a result, national standards became the law of the land and so remained until 1973.

In 1973, the Supreme Court finally dealt with the issue in such a way as to give some clear guidance to lower courts. Unlike the previous cases, where the issue of whether national or local standards were to be applied was, at best, a collateral matter, that issue was central to the decision in *Miller v. California*.[24] Chief Justice Burger, writing for the majority, held in *Miller* that it was not error to instruct the jury to apply "contemporary community standards of the State of California."[25] Burger's reasoning in *Miller*

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tion, Inc. v. United States 273 F.2d 799 (1st Cir. 1960).

The state courts were divided. Those that employed a national standard include: State v. Locks, 97 Ariz. 148, 397 P.2d 949 (1964); State v. Lewitt, 3 Conn. Cir. 605, 222 A.2d 579 (App. Div. Cir. Ct. 1966); State v. Smith, 422 S.W.2d 50 (Mo. 1967), *cert. denied*, 393 U.S. 895 (1968); State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963); People v. Stabile, 58 Misc.2d 905, 296 N.Y.S.2d 815 (Crim. Ct. 1969); State v. Childs, 252 Ore. 91, 447 P.2d 304 (1968), *cert. denied*, 394 U.S. 931 (1968); Robert Arthur Management Corp. v. State, 220 Tenn. 101, 414 S.W.2d 638, *rev'd*, 389 U.S. 578 (1967). Those adopting a statewide or smaller community were: *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, *cert. denied*, 395 U.S. 910 (1968); Carter v. State, 388 S.W.2d 191 (Tex. Crim. 1965); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963); People v. Bloss, 27 Mich. App. 687, 184 N.W.2d 299 (Ct. App. 1970), *vacated*, 413 U.S. 909 (1972); Gent v. State, 239 Ark. 474, 393 S.W.2d 219 (1965), *rev'd*, 386 U.S. 767 (1966); Felton v. Pensacola, 200 So. 2d 842 (Fla.) *rev'd*, 390 U.S. 340 (1967). These latter cases, although predating *Miller*, can still be considered valid authority in their respective states and should be consulted in those states for the light they may shed on the definition or boundaries of the local community.

The leading articles on contemporary community standards prior to the *Miller* case are: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 108-12 (1960); O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1, 6-7 (1964); Note, *The Geography of Obscenity's Contemporary Community Standard*, 8 WAKE FOREST L. REV. 81 (1971); Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399 (1967); Port, *Standards of Judging Obscenity—Who? What? Where?* 46 CHI. B. REC. 405 (1965); Comment, 1971 WASH. U.L.Q. 691; Comment, 16 S.C.L. REV. 639 (1964).

[23] Of the cases cited in note 22, it is generally the state cases that have the more reasoned opinions.

[24] 413 U.S. 15 (1973).

[25] *Id.* at 30-34. Discussions of the community standards concept that post-date *Miller*, and, therefore, analyze the issue in terms of the local standard formulation,

is built upon the premise, first made by Chief Justice Warren in *Jacobellis*, that a national standard is non-existent or, at best, is not capable of determination. Although the majority in *Miller* accepted the view that "fundamental First Amendment limitations" must be uniform, this same majority did not agree that this concept required the essentially factual determination of contemporary community standards also be uniform:

> These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.[26]

Later, the Court went on to note:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[27]

A national standard, as the *Miller* court noted, is probably incapable of identification. Litigation under the national standard tended to focus on the temporal, rather than the geographic, nature of the concept of contemporary community standards. It can be argued that the more localized standard set forth by the *Miller* court provides a standard that is more ascertainable and, thus, gives vitality to the geographic aspects of the standard without detracting from the temporal aspects. Although the period of experience with the *Miller* formulation has been reasonably brief, it

include: Comment, *Obscenity: Determined By Whose Standards*, 26 U. FLA. L. REV. 324 (1974); Comment, *Pornography, The Local Option*, 26 BAYLOR L. REV. 97 (1974); Comment, 8 GA. L. REV. 225 (1973); Comment, 8 VALPARAISO L. REV. 166 (1973).

[26] 413 U.S. at 30.

[27] *Id.* at 32.

appears that *Miller* may add a test that did not in fact exist under the national standards formulation.[28] This increase in significance of the contemporary community standards test makes it much more important that courts properly determine and apply the standard of the *appropriate* community.

Miller was, of course, a review of a state court prosecution and, thus, did not clearly face the issue of the application of the local standards formulation to federal prosecutions under the various federal statutes dealing with obscenity.[29] However, two companion cases to *Miller* signaled the demise of the national standards concept in federal, as well as state, prosecutions. In *United States v. Twleve 200 ft. Reels*[30] and *United States v. Orito*,[31] the Court said that the *Miller* standards were applicable to federal prosecutions. Since the *Miller* standards embodied the local standards concept, there seemed a fairly clear inference that local community standards were to be applied in federal prosecutions. Since the major justification for the change to local standards was the elusive nature of national standards, it seemed unlikely that standards that were unascertainable or unworkable in state prosecutions would magically become ascertainable and workable when the location of the trial shifted to the federal courthouse.[32]

The issue was resolved a year later in *Hamling v. United*

[28] Evidence in obscenity cases prior to *Miller* tended to focus on the now-discarded "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966). Evidence at obscenity trials since *Miller* has been oriented primarily towards the community standards test.

[29] 18 U.S.C. § 1461 (Supp. 1975) prohibits the mailing of obscene matter; 18 U.S.C. § 1462 (Supp. 1975) prohibits the importation of obscene matter and the use of a common carrier for carriage in interstate or foreign commerce of obscene matter; 18 U.S.C. § 1463 (Supp. 1975) prohibits the mailing of obscene or indecent matter on wrappers or envelopes; 18 U.S.C. § 1464 (1966) prohibits the broadcasting of obscene language; 18 U.S.C. § 1465 (1966) prohibits the transportation in interstate or foreign commerce of obscene matter for the purpose of sale or distribution; 19 U.S.C. § 1305 (Supp. 1975) provides for the seizure of obscene material by customs authorities, and 39 U.S.C. §§ 3001-3011 (Supp. 1975) deals with nonmailable matter, including obscene matter.

[30] 413 U.S. 123, 130 (1973).

[31] 413 U.S. 139, 145 (1973).

[32] Despite this, at least one federal court continued to follow the national standards concept after *Miller*, relying on *Manual Enterprises* and *Jacobellis* to say that such a significant change in federal law would have to be more explicit before those cases could be ignored. United States v. One Reel of Film, 481 F.2d 206, 210 (1st Cir. 1973) (Coffin, J., concurring); United States v. Palladino, 490 F.2d 499, 502-503 (1st Cir. 1974).

States.[33] Justice Rehnquist, writing for the same members of the Court who made up the *Miller* majority, said that the concept of local community standards was equally applicable to federal prosecutions. Justice Rehnquist reasoned that when *Orito* and *Twelve 200 ft. Reels* said that the *Miller* standards were applicable to federal prosecutions, the *Miller* definition of contemporary community standards was included.[34] It is, of course, in the area of federal prosecutions that the choice of law issue becomes most significant, because, except for those cases involving the mails under 18 U.S.C. § 1461, the jurisdictional basis for federal power necessarily involves more than one state and, therefore, more than one potentially applicable local standard.

In *Miller*, the Supreme Court approved the instructions of a California trial judge who had instructed the jury to apply the community standards of California.[35] The Court did not indicate

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[33] 418 U.S. 87 (1974).

[34] *Id.* at 103-10.

[35] 413 U.S. at 31. There is, of course, the question of just what is to be measured in terms of contemporary community standards. When the community standards test first appeared in *Roth*, it was part of the test that material is to be judged obscene according to "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Thus, the purpose of community standards was to provide a frame of reference by which the prurient interest of the material could be measured. Because what is prurient in one time and place may not be prurient in another, the community standards test was designed to add focus to this determination. The first section of the *Miller* test is a restatement of the original *Roth* test, and thus there is no question that contemporary community standards still provide the guideline for determining whether or not material appeals to the prurient interest. The second part of the *Miller* test is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." 413 U.S. at 24.

Memoirs v. Massachusetts, 38 U.S. 413 (1966), related the patently offensive test to the concept of community local standards by defining obscene material as that which "is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Id.* at 418. Since the patently offensive part of the *Memoirs* test was neither rejected nor criticized in *Miller*, and since the *Miller* court discussed the failings of the national standards test in terms of *both* the prurient interest and patent offensiveness standards (413 U.S. at 30), it is reasonable to conclude that local community standards apply also to the patent offensiveness requirement. United States v. B & H Dist. Corp., 375 F. Supp. 136, 141 (W.D. Wis. 1974). Offensiveness is certainly as susceptible to geographic variations as prurient interest, and since a work is not obscene unless if offends the community's standards, both prurient interest and patent offensiveness must be evaluated in light of the redefined contemporary community standards. However, since the Court has never referred to the "literary, artistic,

directly whether a local community instruction was in fact required, nor did it give any indication of whether local standards drawn from a geographical area narrower than an entire state would also be acceptable. The opinion said nothing at all about the size or definition of the community that was to provide the basis for the local contemporary community standards. The Court did, however, express enough negative views about national standards to indicate that a national standard in a particular case would be unacceptable,[36] and a year later the Court said further that a national community standard was no longer permissable.[37]

The question still persists regarding the size of the local community. In trials under state law, the trial can be conducted under the community standards of the entire state, as was done in *Miller*, even in the absence of any state law defining community standards. In the absence of a state law, the jury could be instructed to apply the standards of the county, the city, the judical district in which the trial occurs, or any other appropriate geographical area. There are, of course, competing factors of workability on the one hand and first amendment values on the other hand involved in selecting the size of the community. The factor of workability, which was the basis of *Miller*, will most often militate in favor of a narrow area, especially where the entire state encompasses either a large or a diverse community. Certainly the community standards of a small town in upstate New York are no more similar to the standards of New York City than the standards of Maine are similar to the standards of Las Vegas, to use the Supreme Court's example in *Miller*.[38] For a state like New York, California, or

political, or scientific value" aspect of the test (413 U.S. at 24) as varying from community to community, and since this is much less a question of fact than it is a matter of constitutional law, this third part of the *Miller* test is not subject to the community standards factor. This is the part of the test that embodies the essentials of first amendment theory, the principle that *any* expression of ideas is within the scope of first amendment protection, and geographic variations in basic first amendment values are not considered acceptable. *See* Miller v. California, 413 U.S. at 30.

[36] See text accompanying notes 26-27 *supra*.

[37] Hamling v. United States, 418 U.S. 87, 107 (1974). But the majority did not feel that instructions as to the wrong standards required reversal of a conviction where no specific harm or prejudice could be shown. *Id.* at 110.

[38] 413 U.S. at 32. Similarly, there may be no reason to believe that the standards, for instance, of adjacent and similar areas such as Westchester County, New York, and Fairfield County, Connecticut, would be different merely because a state line intervenes.

Texas, a statewide standard is little more ascertainable than a national standard. Yet if the area chosen is too small, there may be a chilling effect on the distribution of generally accepted materials if a distributor or seller must deal with too many different community standards. These competing considerations have led some to believe that this should be a legislative determination; a number of legislatures have specifically defined the community in the wake of *Miller*.[39]

Another approach is to ignore any specific instructions to the jury concerning how the community is defined or to instruct the jury to call upon their own experience and knowledge in assessing the standards of the community. The size of the community then is theoretically the area from which the jury is drawn, but there is nothing to prevent jurors with wider or narrower perceptions from implicitly adopting a different community. The Supreme Court specifically approved such instructions in *Hamling v. United States*,[40] a federal prosecution, and although some federal courts have still utilized a specific and narrow definition of community, the *Hamling* approach will probably be followed in many federal cases.[41]

Jury instructions in obscenity cases are very often determinative of the outcome, and the community standards phase of the instructions is that which is often most clear in the jury's mind. Therefore, defining the community in the instructions becomes extremely important. Furthermore, evidence in obscenity cases is

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In McJunkins v. State, 10 Ind. 140 (1858), the defendant had been convicted of public indecency for using obscene language and singing obscene songs. In reversing the conviction on the grounds that the use of obscene language was not within the intent of the statute, the Supreme Court of Indiana noted as a potential problem the varying concepts of indecency. "Is the public sentiment of each locality to be reflected through the jury?" 10 Ind. at 146.

[39] *See, e.g.*, CONN. GEN. STAT. ANN. § 53(a)-193(a) (amended by P.A. 74-126); MASS. GEN. LAWS ch. 272 § 31 (amended by ch. 430, Acts of 1974); N.C. GEN. STAT. § 14-190.1(b)(2) (Supp. 1974); TENN. CODE § 39-3010(G) (Supp. 1974); VT. STAT. ANN. tit.13 § 2801(B) (Supp. 1974). All of the foregoing define the community as being the state. Illinois and Montana do not define community but provide that acceptance of the material in the state is relevant evidence. ILL. ANN. STAT. ch. 38, § 11-20 (Smith-Hurd Supp. 1974); MONT. REV. CODES ANN. § 94-8-110(3) (Supp. 1974).

[40] 418 U.S. 87, 104-05. (1974). See United States v. Cangianio, 491 F.2d 906, 914 (2d Cir. 1974).

[41] The only reported case is United States v. One Reel of 35 mm Color Motion Picture Film Entitled "Sinderella," 491 F.2d 956, 958 (2d Cir. 1974) (court, sitting without jury, applied standards of Eastern District of New York).

often oriented toward proof of community standards. Whether such proof is offered by expert testimony,[42] by comparable materials,[43] by surveys,[44] or by other means,[45] the proper definition of the community becomes crucial in the qualification of witnesses and in the admissibility of evidence. Thus, where several discrete communities are available, the proper choice among them should be based on a reasonable decision. Since these issues occur most often in criminal prosecutions,[46] it will be helpful to discuss some of the general principles of choice of law in criminal cases.

III. Choice of Law in Criminal Cases[47]

The choice of applicable law in criminal cases has rarely been discussed, in large part because choice of law and jurisdictional power have always been treated as the same question. As Professor Leflar points out, choice of law in civil cases is a major issue because most civil actions are "transitory," thus allowing suit to be brought, as long as there is jurisdiction over the subject matter and the parties, in a jurisdiction not necessarily related to the underlying cause of action. Criminal cases, however, are "local" and may be prosecuted only in the jurisdiction where the crime, or at least the controlling portion of the crime, in fact occurred.[48] Two major

[42] *See generally*, McGaffey, *A Realistic Look at Expert Witnesses in Obscenity Cases*, 69 Nw. U.L. Rev. 218 (1974). Qualification of an expert witness on the issue of what the community's standards are may be a difficult task but should be permitted if the expert's occupation necessarily involves an assessment of community standards, as does that of police officers, ministers, journalists, and, perhaps, public officials. Of course, it would be important if the knowledge of community standards included direct knowledge of the community's standards regarding the depiction of sexual matters.

[43] United States v. Manarite, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970). Womack v. United States, 294 F.2d 204, 206 (D.C. Cir. 1961); *See also* Hamling v. United States, 418 U.S. 87, 125-26 (1974); United States v. One Reel of 35 mm Color Motion Picture Film Entitled "Sinderella," 491 F.2d 956, 958-59 (2d Cir. 1974). *See generally* 76 Harv. L. Rev. 1498; Comment, 12 De Paul L. Rev. 337 (1963).

[44] Miller v. California, 413 U.S. 15, 31 n.12 (1973); Hamling v. United States, 418 U.S. 87, 108 n.10 (1974). *See generally* Lamont, *Public Opinion Polls and Survey Evidence in Obscenity Cases*, 15 Crim. L.Q. 135 (1973).

[45] For example, in a *federal* prosecution in state *X*, it might be relevant to *X*'s community standards if *X* had no state obscenity laws.

[46] But see text accompanying notes 102-04 *infra*.

[47] This section is clearly an overview of this area. The most thorough treatment of the area is found in Leflar, *Conflict of Laws: Choice of Law in Criminal Cases*, 25 Case W. Res. L. Rev. 44 (1974) [hereinafter cited as Leflar].

[48] Leflar, *supra* note 47, at 48.

principles underlie this approach to criminal cases. The first is the constitutional control over the power of the criminal sanction. This is most often stated in due process terms either from the federal or a state constitution.[49] It may also arise as the result of constitutional provisions concerning jurisdiction or venue of criminal prosecutions[50] or from the full faith and credit,[51] equal protection,[52] or privileges and immunities[53] provisions of the Constitution. Whatever theory is used, the result is a significant constitutional limitation on the power of the state to prosecute crimes that are essentially extraterritorial. Secondly, it is generally accepted that states—or nations—may not enforce the penal laws of other states.[54] Thus, if a crime has no significant relationship with state *A* but only with state *B*, prosecution must be left to state *B*.

This latter factor is the reason why choice of law, as it is commonly known, is generally not an issue in criminal cases. Even those who suggest a more functional or realistic approach to choice of law in criminal cases have not suggested that, in a criminal prosecution, state *A* can prosecute the crime according to the laws of state *B*.[55] The decision to be made in the traditional criminal case is whether or not it would be constitutional, or appropriate, or both, for state *A* to apply its criminal law and exercise its criminal enforcement powers to a given set of facts that may or may not have a sufficient relationship to state *A* for this to occur.

Thus, it can easily be seen that in a normal criminal case the answer to the jurisdictional question also answers the choice of law question. This is unlike the civil area where an affirmative answer to the jurisdictional question may still leave major conflict of laws

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[49] *Id.* at 49.

[50] *See, e.g.*, U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; N.Y. CONST. art. III, § 17; WIS. CONST. art. I, § 7.

[51] U.S. CONST. art. IV, § 1; *see* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959).

[52] U.S. CONST. amend. XIV, § 1; *see* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, (1960).

[53] U.S. CONST. amend XIV, § 1; *see* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws; Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

[54] Leflar, *supra* note 47, at 56-57; Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

[55] "Giving effect to [choice-influencing considerations] in criminal cases should, if anything, be easier, *since the case will not be heard unless it is proposed to apply the forum's law to it.*" Leflar, *supra* note 47, at 61-62 (emphasis added).

issues. Neither of these models, however, is entirely applicable to a criminal obscenity prosecution, for reasons that will be shown, and thus the need for a separate choice of law analysis for the obscenity area seems desirable.

IV. Choice of Standards in Obscenity Cases

There are circumstances when an obscenity prosecution will present traditional choice of law issues of the type described in the previous section of this article. For example, if a defendant ships obscene materials from Pennsylvania for exhibition or sale in West Virginia, a question may present itself as to whether this individual could be prosecuted under the Pennsylvania obscenity statute. The determination of this issue may depend on the operative words of the Pennsylvania statute under which the prosecution is brought. If the offense is publication, then an analogy to the law of criminal libel may be used and the offense may be prosecuted only where the publication occurs, which in this case would be West Virginia.[56] If, however, the offense is shipment, distribution, or possession, the act may properly be prosecuted in Pennsylvania. This is because of the traditional choice of law theory in criminal cases that focuses on the operative word of the crime and allows prosecution only in the jurisdiction where the event described by the operative word occurred.[57] If the crime is defined as "selling," "delivering," or "offering" obscene materials, then the jurisdiction of prosecution, and the law to be applied, is the locus where the actual sale, delivery, or offer occurred.[58] This approach is best exemplified by the case law concerning venue of prosecution under 18 U.S.C. § 1461,[59] which makes a federal crime of mailing obscene

[56] Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825).

[57] Leflar, *supra* note 47, at 54-55.

[58] *Cf.* Harper v. State, 91 Ark. 422, 121 S.W. 737 (1909).

[59] Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1461 (1970).

matter. Prior to the 1958 amendment of the statute,[60] the statute defined the crime as the *deposit* into the mails of obscene matter.[61] The cases interpreting this provision, when faced with a dispute concerning the place of prosecution, held that the crime so defined could be prosecuted only in the district where the materials were actually put in the mail box or delivered to the post office and not in the district where the materials were received.[62] However, in 1958 the statute was amended to define the crime as the *use* of the mails, rather than the deposit into the mails. Thus, by changing the "movement verb,"[63] Congress redefined the offense to be a continuing offense.[64] Therefore, those federal courts that have dealt with the issue after the 1958 amendment have uniformly held that a defendant charged with a violation of 18 U.S.C. § 1461 may be prosecuted in the district of mailing, the district of receipt, or any district through which the material passes.[65] Courts could reach similar judicial interpretations of those statutes involving the transportation[66] and perhaps the distribution of obscene materials, and could conclude that these crimes, too, may be continuing

[60] Act of Aug. 28, 1958, Pub. L. No. 85-796, § 1, 72 Stat. 962, *amending* 18 U.S.C. § 1461 (1948).

[61] Although 18 U.S.C. § 1461 was originally enacted in 1948, it is a derivation of a much earlier statute. *See* Swearingen v. United States, 161 U.S. 446 (1896). The statute is often called the "Comstock Act" after Anthony Comstock, the 19th century leader of the Vice Societies who brought about its adoption.

[62] United States v. Ross, 205 F.2d 619 (10th Cir. 1953); United States v. Comerford, 25 F. 902 (W.D. Tex. 1885).

[63] Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L. REV. 751, 791 (1962). See Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399, 401 (1967), which contains a very thorough discussion of the continuing offense concept as it relates to the obscenity laws.

[64] 18 U.S.C. § 3237 (1969) provides, in part, that "any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment by Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matters moves."

The constitutionality of the 1958 amendment to 18 U.S.C. § 1461 has been upheld. Reed Enterprises v. Clark, 278 F. Supp. 372 (D.D.C. 1967) (three judge court), *aff'd per curiam*, 390 U.S. 457 (1968).

[65] United States v. Levy, 331 F. Supp. 712 (D. Conn. 1971); United States v. Sidelko, 248 F. Supp. 813. (M.D. Pa. 1965) (but holding that 18 U.S.C. § 1461 (1970) does not expose to liability thereunder those who order and *receive* obscene material for personal use); United States v. Luros, 243 F. Supp. 160, 176 (N.D. Iowa); *cert. denied*, 382 U.S. 956 (1965).

[66] *See* note 64 *supra*. *But see* Armour Packing Co. v. United States, 209 U. S. 56 (1908).

offenses and may also be prosecuted in any district through which the material passes.

The selection of the appropriate venue for an obscenity prosecution involves substantial constitutional considerations not necessarily related to obscenity laws. The sixth amendment provides that prosecution of all federal crimes must be brought in the district where the crime was committed.[67] In addition, the due process clause of the fifth and fourteenth amendments has been held to incorporate, within the concept of fundamental fairness, the idea that the place of trial must bear some reasonable relationship to the locus of the crime.[68] All of these constitutional provisions incorporate a policy decision in favor of reasonably restrictive venue provisions and, therefore, mandate strict constuction of congressional action defining an offense as a continuing one.[69] In cases involving the mailing or transportation of obscene materials, it is likely that the continuing offense definition could result in venue being fixed in a jurisdiction that has no substantial connection with the act and that a defendant might not have been able to reasonably foresee. In part, this danger has been minimized by general reluctance on the part of federal prosecutors to bring actions in these "intermediate" districts.[70] The primary effect of the continuing offense theory has been to allow prosecutions at the place of delivery, thus avoiding the above difficulties.

It is obvious that these problems of venue are magnified in the context of federal prosecutions involving multi-state transactions. Many of the same issues can arise, however, in the context of a state prosecution. Most states have venue provisions regarding criminal cases that also require the defendant to be tried in the district where the crime occurred.[71] Such state venue provisions are generally based upon the same constitutional considerations that

[67] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,. . ." U.S. CONST. amend VI; *see also* U.S. CONST. art. 3, § 2, cl. 3.

[68] *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Leflar, *supra* note 47, at 48-49.

[69] *See* United v. Johnson, 323 U.S. 273, 275 (1944).

[70] The legislative history of the 1958 amendment to 18 U.S.C. § 1461 shows that the Post Office Department assured Congress that it did not intend to press for prosecutions in intermediate districts. H.R. REP. No. 2624, 85th Cong., 2d Sess. 4 (1958). The absence of cases indicates that this assurance has generally been followed.

[71] *See, e.g.*, ARIZ. REV. STAT. § 13-161 (1956); N.J. STAT. § 2A: 3-4 (1952).

apply to federal criminal prosecutions. These same considerations may also apply to the election by a state to take jurisdiction of a crime involving more than one state. Since most obscenity offenses involve acts that span large areas, such as transportation, distribution, sale, and the like, elective jurisdiction is a continuing problem in obscenity law. In obscenity law, however, unlike many other areas, the selection of venue is likely to determine the outcome of the litigation, and, therefore, the analysis of proper venue becomes of crucial concern.

Prior to the *Miller* case, the selection of venue and choice of law in obscenity cases was of significantly less concern than it is now. Under the national standards concept,[72] the test for obscenity was theoretically uniform throughout the nation, both in state and federal prosecutions. While it is true that the elements of the particular offense varied from jurisdiction to jurisdiction, the fundamental question as to whether the materials involved were or were not obscene was formulated identically in all cases. Thus, in a particular case, the trier of fact was expected to put aside both his own beliefs and his perception of the beliefs of his own community and rely on the evidence presented regarding the standards of the nation. It is not surprising, in this context, that some courts felt that producing some evidence of the national standard was an essential element of the prosecution's burden of proof.[73] Yet even with the assistance of this evidence, it is questionable whether the jury can in fact put aside personal predilections and perceptions and rely only on the national standard. It may be, as Justice Black observed in *Ginzburg v. United States*,[74] that the "guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held."[75] Even though the locus of the trial may have had an effect on the verdict, neither the instructions nor the admissibility of evidence would vary under application of the national standard, and thus true conflicts of laws issues did not arise under the national standard cases.

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[72] See text accompanying notes 6-23 *supra*.

[73] *See* Smith v. California, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring); *Id.* at 171 (Harlan, J., concurring in part and dissenting in part), United States v. Klaw, 350 F.2d 155, 160 (2d Cir. 1965); Comment, 76 HARV. L. REV. 1498 (1963); *contra*, Kahm v. United States, 300 F.2d 78 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962).

[74] 383 U.S. 463 (1966).

[75] *Id.* at 480 (Black, J., dissenting).

With the change to local standards, however, the issue takes on a new importance. The community standards element of the test for obscenity is not necessarily a substantive element of the offense, thus the question of jurisdiction over the offense does not necessarily determine which community's standard applies.[76] If materials are shipped from New York to California, and the defendant is tried in New York, there is no inherent bar in traditional choice of law terms to preclude utilizing the community standards of California to determine whether or not the materials are obscene. If a prosecution for mailing obscene materials under 18 U.S.C. § 1461 is brought in an intermediate district, application of the community standards of the place of mailing or the intended destination would not offend traditional choice of law theory. Since selection of the relevant community is now at issue and since the admissibility of evidence and the instructions to the jury depend on this selection, some rational method of making this choice must be formulated.

One often attempted method of proving that a work is not obscene is to show, by the use of comparable materials, that the work is no more offensive than other materials that are both available and accepted by the community.[77] Therefore, the admissibility of these materials will depend on which community is chosen. Similarly, the prosecution or the defense may wish to introduce a survey of the views of the community on obscene material generally or on the particular material at issue.[78] The results of this survey, and its admissibility, will clearly depend upon selection of the relevant community. The same problem arises where a party to litigation wishes to use expert testimony regarding the nature of the standards of the community.[79] Only if the expert is familiar with the standards of the *appropriate* community will his testimony be relevant and admissible. Of course, the instructions to the jury will also depend on which community is chosen. Thus, a choice that reflects all the appropriate considerations is especially important here since so many issues at trial will turn on this choice.

The simplest solution, and the one that has been followed by

[76] But see section III of this article.

[77] See note 43 *supra*.

[78] See note 44 *supra*.

[79] See note 42 *supra*.

those lower courts that have faced the problem,[80] is to apply the community standards of the forum of the prosecution. It is perhaps reasonable to assume that regardless of the evidence presented, and regardless of the instructions, a jury will inevitably apply the standards of the community with which they are most familiar.[81] Thus, applying the standards of the forum limits the possibility that both the evidence and the instructions will be ignored. Practical problems also arise when evidence of a standard other than that of the forum is used. Witnesses must be brought from other areas to enable the prosecution to present evidence of the distant community's standards. This evidence probably must appear in the prosecutor's case-in-chief, despite the holding of the Supreme Court that prosecution evidence of community standards is not normally required.[82] In fact, it can be argued that by eliminating the requirement that the prosecution present evidence on this issue the Court indicated that it, too, believed that the standards of the forum will prevail in all prosecutions regardless of the evidence or the law. In *Hamling v. United States*,[83] however, the Court declared that it might be proper under certain circumstances to "admit evidence of standards in some place outside of this particular district."[84] It is impossible to tell whether the Court in *Hamling* meant a larger area that includes the district, a different area not including the district, or both. But the recognition by the Court that the jury can receive and appreciate evidence of community standards other than those of which the jury is familiar further indicates that a close look at the standards to be chosen in a given case is required.

The most significant difficulty with merely applying the standards of the forum is that it can lead to the most extreme examples of forum-shopping by the prosecution.[85] The question of guilt or innocence should not, and does not normally, turn on the law where the prosecution occurs, but this is the inevitable result when

[80] United States v. One Reel of 35 mm Color Motion Picture Film Entitled "Sinderella," 491 F.2d 956, 958 (2d Cir. 1974); United States v. Friedman, 488 F.2d 1141, 1142 (10th Cir. 1973).

[81] The Supreme Court has recognized that instructions to the jury cannot always correct previous impressions. *See* Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964).

[82] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

[83] 418 U.S. 87 (1974).

[84] *Id.* at 106.

[85] *See* S. REP. No. 1839, 85th Cong., 2d Sess. 3 (1958). The Senate originally opposed inclusion of the "intermediate" district in the revision of 18 U.S.C. § 1461.

a major substantive element of the offense,[86] by definition, varies from place to place. The dangers of selective prosecution become even greater in situations, such as an obscenity case, where the place of prosecution defines the offense charged. In a prosecution under 18 U.S.C. § 1461 for sending obscene matter through the mails, the prosecution could, as has previously been explained,[87] be brought at the place of mailing, the place of delivery, or any place through which the package passes. If the standards of the community are in fact different in each state, which seems a reasonable assumption,[88] a putative defendant may run the risk of prosecution under standards that he has no logical reason to believe will be employed. Nor can he, with assurance, plan his activities in such a way as to avoid those areas where such activities are illegal. This apprehension of violation of unforseeable law creates a substantial danger of a chilling effect on the distribution of material that is in fact constitutionally protected. But what of its effect on distribution of material that would be questionable but not necessarily legally obscene? It is very conceivable that sellers might not risk the variability of different standards, or assume the burden of knowing a large number of different standards, especially where there is uncertainty about which of those standards is applicable.[89] Thus, the availability of tangentially related, but substantially irrelevant, standards could likely prevent the distribution of works to or in those communities where those works are in fact acceptable. To the extent that the shift to local standards may involve this type of chilling effect, uncertainty regarding which community's standards will be applied increases the danger of such a chilling effect.

Since the issue has yet to be squarely faced by any court, a suggested analysis seems appropriate. In actuality, this is a conflict of laws problem, because the effect of a geographic variation in the substantive standards for criminality under the same statute is analytically indistinguishable from that of the application of conflicting statutes. Traditional choice of law in criminal law

[86] It is a substantive element of the offense because virtually all obscenity statutes prohibit the transportation, distribution, or mailing of obscene material only, and according to *Roth* and *Miller*, matter is not obscene unless it offends some community's standards.

[87] See text accompanying notes 59-66 *supra*.

[88] *See* Miller v. California 413 U.S. 15, 30-32 (1973).

[89] *See* Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399, 403, 425(1967).

has already been discussed; in criminal cases the choice of law decision has been more localized than in civil litigation. Thus, the fact that obscenity litigation involves criminal penalties probably explains those obscenity decisions that have used, without discussion, the standards of the forum. But deference to the law of the forum inevitably ignores some of the first amendment and due process considerations discussed which are especially relevant to obscenity law. A possible solution, or at least a preferable method of analysis, may lie with the adoption of some of the more modern theories of choice of law applied to civil cases.[90] Since jurisdiction is not a problem in the issue under discussion, there is no reason why a method of analysis used in civil cases cannot be appropriate here.

One possible alternative might be the application in obscenity cases of the "center of contacts" or "groupings of contacts" theory, employed most notably in the New York Court of Appeals decision of *Babcock v. Jackson*.[91] This theory applies the law of the jurisdiction that has the largest number or most significant contacts with the alleged wrongful act or the cause of action.[92] Under the center of contacts theory a jurisdiction only tangentially related to the essence of the litigation, such as a jurisdiction which is merely the place of an accident or the place of the signing of a contract,[93] may not have sufficient relevance to the entire transaction to justify the application of its law to the case. This approach, in an obscenity case, would require an examination of all potential geographic contacts, including the place of prosecution, the place of origin, the place of destination, the residence of the expected readers or viewers, the place where the material was created, and other similar factors. Upon an examination of all of these, the standards of the community having the most significant contacts would be selected as the community against whose standards the material is measured to determine whether the material is obscene by contemporary *community* standards. This approach would certainly prevent

[90] *See generally* Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457 (1972); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTI-STATE PROBLEMS (1965). Strict territoriality in choice of law has been almost universally discarded. Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

[91] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[92] *See, e.g.*, Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); *cf.* Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero v. Internation Terminal Operating Co., 358 U.S. 354 (1959); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, 188 (1971).

[93] Assuming, of course, that there was no other connection with this locality.

the application of the standards of a community only incidentally involved, such as a community whose only connection with the transaction is its position on a mail or bus route by which the material is transported; for that reason alone it seems clearly preferable to the approaches now being used.

An even better alternative would be the application of a functional choice-of-law theory in obscenity litigation. This approach weighs all of the interests that may be involved, such as the interest in predictability of results, the interest in orderly administration of justice between states, the particular govermental interests of the forum, and similar factors, before selection of the law to be applied is made.[94] All of these factors may be relevant in a particular obscenity case, and each must be analyzed before the choice is made of the appropriate community in each case.[95] The most significant factor in this approach, however, is that of looking to the purpose of the law involved before making the decision regarding the law to be applied.[96] The primary purpose of most obscenity laws is to protect the "target" community, the community where the material is actually available to the public and the purpose of the community standards test is to allow that community to govern what materials will or will not be available.[97] In order to best serve this purpose the standards of the target community or the point of ultimate availability or exhibition of the material would become the relevant community. In other words, the relevant community under this approach is that one in which the materials come into contact with the group that the appropriate statute is designed to protect from obscene materials. This approach also has the advantage of fair notice and predictability, since it can in most cases be presumed that a distributor or sender will generally know the object of his actions. If material is sent through the mail, the route of the package, and perhaps even the place of mailing, are

[94] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTI-STATE PROBLEMS 76-79 (1965) [hereinafter cited as VON MEHREN & TRAUTMAN]; R. LEFLAR, AMERICAN CONFLICTS LAW § 105 (1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Brown v. Church of Holy Name of Jesus, 105 R.I. 322, 252 A.2d 176 (1969); Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

[95] Since we are concerned with a conflict of relatively subjective standards rather than a conflict of laws as such, some of the choice-influencing considerations, such as maintenance of interstate order and application of the better rule of law, are less significant than they would be in the normal choice of law situation.

[96] VON MEHREN & TRAUTMAN, *supra* note 94, at 76-79, 102-17.

[97] *See* Miller v. California 413 U.S. 15, 32 (1973).

somewhat fortuitous, but the package must always have an intended destination. Of course, the purpose of the statute may be somewhat different. If the statute seems designed to prevent a certain locality from being the place of production of obscene materials, then that community's standards would seem most relevant even if prosecution is instituted elsewhere. If the purpose of the law is to keep material from the "stream of commerce,"[98] then there would seem ample justification for employing the community standards of some intermediate point.[99]

These problems become even more difficult where conspiracy is alleged. It may be that a prosecution in Mississippi alleges that *A,B,C,* and *D* conspired to distribute obscene materials. *D* himself, may in fact have only distributed the materials in Oregon. It is clear that, under established law, venue is proper in Mississippi if any overt act in furtherance of the conspiracy occurred there.[100] Yet the problems of holding the Oregon distributor to the community standards of Mississippi are apparent. Of course, it can be argued that one entering into a conspiracy should be responsible for the community standards of all communities relevant to the conspiracy, just as in a conventional conspiracy prosecution each coconspirator is responsible for all acts of other conspirators within the scope of the conspiracy.[101] Nevertheless, the scope of the conspiracy may not be determined until the trial and may be a matter for determination by jury. At this point, it could be too late for presentation of evidence regarding the standards of the ultimately relevant community or the jury might be forced to apply alternate community standards depending on the resolution of the conspiracy issues. Thus it might be appropriate for each conspirator to be judged on the basis of whether or not his actions offended the community standards of the community that is most appropriate to those actions. This too would require evidence of multiple community standards, but at least such standards would not be presented in the alternative. Each standard proved would be clearly

[98] See Champion v. Ames, 188 U.S. 321 (1903); Caminetti v. United States, 242 U.S. 470 (1917); Brooks v. United States, 267 U.S. 432 (1925).

[99] The logical inference to drawn from the "stream of commerce" theory is that the harm is as great at an intermediate point as at either end.

[100] Hyde v. United States, 225 U.S. 347 (1912); United States v. Strickland, 493 F.2d 182 (5th Cir. 1974); United States v. Patrisso, 262 F.2d 194 (2d Cir. 1958); McDonough v. United States, 227 F.2d 402 (10th Cir. 1955).

[101] R. PERKINS, CRIMINAL LAW 632 (2d ed. 1969); Delli Paoli v. United States, 352 U.S. 232 (1957); People v. Lyon, 135 Cal. App. 2d 558, 575, 288 P.2d 57, 68 (1955).

applicable to a particular defendant. The first amendment problems of holding a defendant to the standards of a community that are not relevant to his actions are apparent, and thus this approach may be a preferable approach.

Finally, it should be noted that not all obscenity cases are criminal prosecutions. There may be proceedings involving seizures,[102] or injunctions against distribution or exhibition,[103] or licensing.[104] Yet since the suggested analysis is independent of the factors peculiar to a criminal prosecution, there is no reason why the analysis would not be equally applicable to civil proceedings.

V. CONCLUSION

The approach advocated by this article is, of course, based on the assumption that the trier of fact can apply the standards of a community other than his own. The Supreme Court has indicated its acceptance of this assumption,[105] and there seems no reason why a properly instructed jury could not also apply the standards of a community other than its own. If this assumption is proved erroneous, however, it may become inevitable that the only standards applied are those of the forum community. If this happens, it may be that a complete rethinking of the entire community standards concept would be required.

The suggested analysis is not so much an argument advocating the adoption of a particular approach as it is the suggestion that in this area all of the best thinking in the conflict of laws field should be used. A complete analysis of all modern choice of law thinking is beyond the scope of this discussion.[106] The major premise here is that in choosing the relevant community in an obscenity case, the courts should not feel bound to historic notions of choice of law in criminal cases that are not particulary relevant to the choice of a community in an obscenity case.

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[102] As, for example, under 19 U.S.C. § 1305. *See* Comment, 13 COLUM. J. TRANSNAT'L L. 114 (1974).

[103] Obscene exhibitions have been enjoined as nuisances. *See* 5 U. TOLEDO L. REV. 171 (1973); 49 IND. L.J. 320 (1974).

[104] Most licensing schemes in the obscenity area, however, involve substantial prior restraint problems. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); United States v. Paramount Pictures, 334 U.S. 131 (1948).

[105] Hamling v. United States, 418 U.S. at 106.

[106] The authorities cited in note 94 *supra* represent a more complete picture.