The Local Community Standard: Modernizing the Supreme Court's Obscenity Jurisprudence

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Abstract

The Netflix original film *Cuties* sparked controversy and outrage on its release, simultaneously prompting advocates of the film to celebrate it as a creative success protected by the First Amendment, while generating immense criticism from Senator Ted Cruz as well as a criminal indictment from a Texas grand jury. Because of existing Supreme Court law, any criminal prosecution against a digital media company could fail in one jurisdiction but be successful in another, despite the fact that the film is available to subscribers throughout the United States. This paper explores the application of the First Amendment to this film and others like it, and explains why criminal prosecution of such media is unfortunately and unnecessarily dependent upon the Supreme Court's application of the "local community standard." This paper advocates for the complete removal of the local community standards test from the Supreme Court's obscenity and child pornography jurisprudence.

This paper first provides a summary of obscenity law and its interwoven connections to laws criminalizing child pornography. Second, this paper outlines the key problems central to the Supreme Court's obscenity jurisprudence, demonstrating its analytical shortcomings, its ideological incongruency with the founding philosophies of the Constitution, and its opposition to Biblical principles. Finally, this paper highlights key solutions for solving the problems with obscenity law and how to bring the doctrine back into compliance with America's founding principles and the operation of Biblical values.

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I. Introduction

On January 23, 2020, Maïmouna Doucouré made her directorial debut premiering the Netflix film *Cuties* (*Mignonnes* in its original French), a story that depicts and allegedly combats the hyper-sexualization of pre-adolescent girls.[1] The film follows 11-year-old Amy as she turns away from a traditional Islamic life and joins a dance troupe of other girls, all performing extended sequences of provocative and suggestive dance moves. Under the proffered guise of art raising awareness about the sexualization of pre-teen girls, the film inadvertently provides publicly available content for persons who might derive deviant pleasure from the film.

The First Amendment plays a central role in the public discussion surrounding this debate. Proponents of the film invoke the protections of the First Amendment to safe harbor their actions, with Netflix Co-CEO Ted Sarandos claiming that the film has strong "First Amendment implications" and that those who were attacking the film were trying to "censor storytelling."[2] Critics of the film similarly claim that the First Amendment does *not* protect the actions depicted, with Senator Ted Cruz calling on the Department of Justice to "investigate whether Netflix… violated any federal laws against the production and distribution of child pornography."[3]

The film is clearly speech for purposes of the First Amendment and therefore necessarily falls under its analysis. But what application does the First Amendment guarantee of "free speech" have to such a film? Is the film considered to be "obscene" or "child pornography" under Supreme Court or state law, such that it would strip the film of First Amendment protection? A Texas grand jury believes that it has the answers to these questions, indicting Netflix under a Texas state statute, "Promotion of Lewd Visual Material Depicting a Child."[4] However, this prosecution, as will be articulated in this paper, hangs on the application of a localized standard that is dependent upon the community where the crime is being charged. This means that even if this prosecution is successful in Texas, the Supreme Court law is such that a similar prosecution against Netflix could fail in

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[1] David Rooney, *"Cuties" ("Mignonnes"): Film Review | Sundance 2020* (The Hollywood Reporter, 2020).
[2] Jake Kanter, *Netflix Chief Ted Sarandos Fires Back At "Cuties" Controversy: "It's Surprising In 2020 America That We're Having A Discussion About Censoring Storytelling"* (Deadline, 2020).
[3] Jason Murdock, *Ted Cruz Calls for Justice Department to Investigate Netflix Over "Cuties" Child Porn Claims* (Newsweek, 2020).
[4] Jolie McCullough and Stacy Fernandez, *Texas politicians fueled criticism of "Cuties." Now, Netflix is facing criminal charges in a small East Texas county* (The Texas Tribune, 2020).

another jurisdiction, despite the film being available to subscribers throughout the United States. Similarly, this means that Federal prosecutions, which also rely on the application of a localized standard for obscenity, are nearly impossible to effectuate against Netflix or other national entertainment establishment. Furthermore, because child pornography can be legally attacked directly or collaterally if the material is obscene, this means that efforts by state and federal authorities to enforce child pornography laws face similar challenges, all because of the local community standards prong of the Supreme Court's obscenity test. Therefore, to assist the state and federal prosecution of obscenity and child pornography, this paper advocates for the complete removal of the local community standards test from the Supreme Court's obscenity and child pornography jurisprudence.

To this end, this paper will outline the Supreme Court cases that interpret this challenging area of the law, first providing a summary of obscenity law and its related and interwoven connections to child pornography. Second, this paper will outline the key problems central to the Supreme Court's obscenity jurisprudence, demonstrating its analytical shortcomings, ideological incongruency with the founding philosophies of the Constitution, and its complete and total opposition to Biblical principles. Finally, this paper will highlight key solutions for clarifying and solving the problems with obscenity case law, bringing the doctrine back into compliance with America's founding principles and the operation of Biblical values.

II. Summary

A. *Roth* and the Formation of the Obscenity Test

The Supreme Court has an extensive compendium of cases involving provisions of the First Amendment, including a complex history of dealing with obscenity case law. This sector of Constitutional law is one of the most notoriously confusing and challenging areas of the Supreme Court's jurisprudence. Defining what is obscene and articulating the appropriate judicial response to this complex inquiry has been a taxing struggle for the High Court to manage, with one case eliciting Justice Stewart's famous remark of exasperation, "I know it when I see it."[5]

The Court's most foundational examination into obscenity is *Roth v. United States*.[6] Roth was a New York businessman that would circulate advertisement matter to solicit sales of his books.[7] He was charged with violating a federal

[5] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J. concurring).
[6] *Roth v. United States*, 354 U.S. 476 (1957).
[7] *Id.* at 480.

obscenity statute.[8] The issue the Court looked to was "whether obscenity is utterance within the area of protected speech and press."[9] First, the Court looked to history to determine the breadth of the First Amendment.[10] Examining the state of the law in 1792, the Court noted that all 14 states that existed then "made either blasphemy or profanity, or both, statutory crimes" and cited to a 1712 Massachusetts law that treated profanity and obscenity as "related offenses."[11] Furthermore, the Court cited a 1774 letter from the Continental Congress to the inhabitants of Quebec, noting that the protections of the First Amendment were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" and not for the promulgation of profane or obscene materials.[12] Ultimately, the Court held that looking at the history of the Constitution, "there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."[13] The Court went on to note that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" and that this principle sounded true in international law, throughout all states, in federal law, and in accordance with *Chaplinsky v. New Hampshire*.[14] The Court definitively stated that "obscenity is not within the area of constitutionally protected speech or press."[15]

After this clear statement, the *Roth* Court then began a much less clear analysis into what is now a perennial struggle: defining the meaning of the word "obscenity." The Court first noted what obscenity was *not*, noting that "sex and obscenity are not synonymous" and that obscene material is that "which deals with sex in a manner appealing to prurient interest."[16] The Court also rejected the *Hicklin* standard that had been previously used by courts.[17] After these analytical roadblocks were navigated, the *Roth* Court ultimately defined obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[18]

This definition, albeit better than *Hicklin* or having no definition at all, suffers from an immediate lack of clarity, potential vagueness problems, and presents itself with a litany of latent interpretational issues. However, the Court

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[8] *Id.*
[9] *Id.* at 481.
[10] *Id.* at 483.
[11] *Id.*
[12] *Id.* at 484.
[13] *Id.*
[14] *Id.* at 484-85; *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
[15] *Id.*
[16] *Id.* at 487.
[17] *Id.* at 489.
[18] *Id.*

noted that despite its imprecise definition, "lack of precision is not itself offensive to the requirements of due process."[19] In a moment of prophetic utterance, the Court even heralded the possibility of "marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls" but said that even this was "not sufficient reason to hold the language too ambiguous."[20] Ultimately, the Court affirmed the determinations of the lower court.[21]

B. *Miller*, *Slaton*, and Further Clarification Attempts

After *Roth*, there was a lack of consensus regarding how the area of obscenity should be applied. The clearest restatement of *Roth* comes in the plurality decision of *Memoirs v. Massachusetts*, where that Court restated *Roth* in three elements:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the *material is utterly without redeeming social value."*[22]

As this area of law continued to develop from the High Court and in the Circuits, two problems continued to emerge. First, the Court continued to struggle with a precise articulation of the obscenity definition as set out in *Roth*. Plurality opinions do not bind the Court and thus the lack of majority consensus continued to stifle the clarification of obscenity law. Adding the phrase "utterly without redeeming social important" from *Memoirs* muddied the waters and made it even harder for courts to apply *Roth*'s already imprecise definition. Second, cases such as *Stanley v. Georgia* held that states were barred from "making the private possession of obscene material a crime."[23] Paradoxically, cases such as *United States v. Reidel* held that simply because there was a right to possess obscene materials did not mean that there was a right to *obtain* said obscene materials.[24] Furthermore, the Court in *Osborne v. Ohio* said that child pornography was explicitly excluded from the category of obscene materials that a person could possess under *Stanley*.[25] This created a system where adult pornography could be

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[19] *Id.* at 491.
[20] *Id.* at 491-92.
[21] *Id.* at 494.
[22] *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (emphasis added).
[23] *Stanley v. Georgia*, 394 U.S. 557, 560-64 (1969).
[24] *United States v. Reidel*, 402 U.S. 351 (1971).
[25] *Osborne v. Ohio*, 495 U.S. 103 (1990).

possessed but not obtained, while child pornography could neither be possessed nor obtained. The Court in *Miller v. California* and *Paris Adult Theatre I v. Slaton* attempted to grant some clarity in these two areas.

In *Miller,* the Supreme Court undertook an effort to clarify the definition of obscenity. In that case, the Petitioner had mailed unsolicited advertising brochures that contained pictures and drawings explicitly depicting sexual activities.[26] There was a California statute that criminalized such activity and thus provided the penalty against Miller.[27] The issue the Court primarily looked at was how to "define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment."[28] The Court summarized the controversy since *Roth* through *Memoirs* and beyond, ultimately noting that "no Member of the Court today supports the *Memoirs* formulation."[29] Leaving the *Memoirs* plurality standard behind, the Court next embarked on the process of curating the definition of obscenity. The Court "confine[d] the permissible scope of such regulation to works which depict or describe sexual conduct" and noted that such conduct "must be specifically defined by the applicable state law."[30] The Court ultimately laid out the following revised obscenity definition:

> a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[31]

After the Court noted the problems in this area, it then began the journey of "provid[ing] positive guidance to federal and state courts alike."[32] The Court states that it should not "arbitrarily depriv[e] the States of a power reserved to them under the Constitution."[33] However, the Court was unable to resolve the tension between the ability of the Supreme Court to regulate obscenity law under the Constitution and how the operation of individual state statutes pertains to the exercise of that judicial standard. The best the Court could do was to state that "fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed,

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[26] *Miller v. California*, 413 U.S. 15, 16 (1973).
[27] *Id.* at 18.
[28] *Id.* at 19-20.
[29] *Id.* at 23.
[30] *Id.* at 24.
[31] *Id.*
[32] *Id.* at 29.
[33] *Id.*

uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'"[34] The Court blamed its inability to do this on the fact that the "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."[35] Supposedly, under the Court's view, juries would be able to be the correct individuals to make this determination but any attempt for jurors to look at any kind of "national 'community standard' would be an exercise in futility."[36] By requiring a national standard, the Court said, diversity of opinions throughout America would be "strangled by the absolutism of imposed uniformity."[37]

In addressing the second problem of obscenity, the Court (on the same day it decided *Miller*) in *Paris Adult Theatre I v. Slaton* reviewed a case that involved two "adult" theaters in Atlanta, Georgia that depicted sexual conduct which, under Georgia state law, designated the films as "hard core pornography."[38] The Respondents claimed that they had protected this conduct from unwanted eyes by putting signs on the theater doors that said "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."[39] The Court held that the ruling should be vacated and remanded subject to *Miller*.[40]

The Court made "clear from the outset" that it did "not undertake to tell the States what they *must* do, but rather to define the area in which they *may* chart their own course in dealing with obscene material."[41] Acknowledging the State's interest in regulating obscene material, the Court listed "quality of life… the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself" as some of the state interests that might be implicated in regulating obscenity.[42] In quoting a law review article, the Court adopted the position of Professor Bickel, who argued that a person may do things in private but that

> "[i]f he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his*

[34] *Id.* at 30.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 33.
[38] *Paris Adult Theatre I*, 413 U.S. 49, 50 (1973).
[39] *Id.* at 52.
[40] *Id.* at 54-55.
[41] *Id.* at 53-54 (emphasis added).
[42] *Id.* at 58.

right is to affect the world about the rest of us, and to impinge on other privacies."[43]

The Court went on to argue that neither the right to privacy nor the existence of consent was enough to salvage the existence of the theater.[44] This holding from *Paris Adult Theatre I* shows that the Court continues to allow a person to indulge in certain conduct within the privacy of the home, but that said individuals have no right to obtain that content, however discreetly. The judicial act of turning a "blind eye" to the personal possession of pornography while actively renouncing its public consumption continues to be the controlling legal standard.

Moving forward from the dual decisions of *Miller* and *Paris Adult Theatre I*, the Court decided several other cases that continued to develop and articulate the area of obscenity, clarifying the role that community standards and juries played in the application of the obscenity rules. In *Hamling v. United States*, the Court affirmed that local community standards were dispositive in applying *Miller* as it pertained to the application of 18 U.S.C.S. 1461, a federal statute that makes it a crime to send obscene material through the U.S. mail.[45] However, in *Jenkins v. Georgia*, the Court noted that juries do not make their determinations pertaining to community standards solely apart from the judge, instead holding that the jury verdicts on obscenity were subject to judicial review to determine whether a jury's view of local standards is constitutionally aberrant.[46] The *Jenkins* Court also noted that state juries may be instructed to follow "community standards" without specifying what community.[47] Similarly, the Court in *Smith v. United States* stated that although local community standards govern on prurient appeal and patent but that a state statute cannot go below what is considered "patently offensive" in a federal prosecution.[48] Furthermore, in *Pope v. Illinois*, the Court relented its approach to community standards as to the third prong of *Miller* and held that it is to be governed by "whether a reasonable person would find such value in the material taken as a whole."[49]

After these developments in the law, now the community standards prong of *Miller* only applies to the prurient interest and sexual depiction prongs of *Miller*, but not to the whether the work as a whole has artistic, literary, political, or scientific value. This complicated but necessary backdrop is essential for

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[43] *Id.* at 59.
[44] *See Id.* at 63-69.
[45] *Hamling v. United States*, 418 U.S. 87, 106 (1974).
[46] *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).
[47] *Id.* at 157.
[48] *Smith v. United States*, 431 U.S. 291, 303 (1977).
[49] *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

understanding the more narrowed application of the Supreme Court's holdings as to obscenity in the context of child pornography.

C. Child Pornography, *Ashcroft*, and Community Standards

Building on this foundational jurisprudence of obscenity, the Court in *New York v. Ferber* looked at whether a New York statute prohibiting the distribution of material that promoted sexual performances by children under the age of sixteen was constitutional.[50] In defining what conduct was to be prohibited, the Court first looked at whether the "conduct to be prohibited [was] adequately defined by the applicable state law, as written or authoritatively construed," requiring that the "the state offense be limited to works that visually depict sexual conduct by children below a specified age."[51] The Court then went on to clarify the legal status of child pornography based on its precedent in *Miller*, holding that a "trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[52] This means that the State statute in question, must sufficiently describe a category of material that is not entitled to First Amendment protection, but does not *have* to be considered obscenity to do so.[53] Content that is considered obscene under *Miller* would *per se* meet this standard of having no First Amendment protection. However, *Ferber* allowed for child pornography, regardless of whether it was obscene, to be regulated under the applicable state law only if it described content that was so lacking in value as to not be entitled to Constitutional protection, meaning that child pornography that is not Constitutionally obscene could still be protected by the First Amendment, if such content existed.

Crucially, the Court noted in its rationale that this type of content does not exist within a veritable Constitutional vacuum, but that the "[d]istribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[54] This means that there is judicial determination that the harm pertaining to this type of action does not occur in the abstract, but is instead an actual, tangible negative consequence of allowing child pornography to be proliferated. Furthermore, the Court noted that "it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake,

[50] *New York v. Ferber*, 458 U.S. 747, 749 (1982).
[51] *Id.* at 764.
[52] *Id.*
[53] *Id.* at 766.
[54] *Id.* at 759.

that no process of case-by-case adjudication is required."[55] This essentially created a *per se* rule that the vast majority of child pornography was always to be considered obscene, as the balance of harm against the expressive interest would always fall on the side of preventing the harm. However, that ruling would be altered by the unique facts of the Supreme Court's decision in *Ashcroft v. The Free Speech Coalition* in 2002.[56]

In *Ashcroft*, the Court examined the Child Pornography Prevention Act (CPPA), which expanded the definition of child pornography to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[57] The Supreme Court struck down the CPPA as it pertained to virtual child pornography, holding that is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."[58] The Court essentially found a form of child pornography that was not obscene, noting its holding in *Ferber* where it stated that "some works in this category might have significant value but rel[y] on virtual images" which are "an alternative and permissible means of expression."[59] The Court also affirmed that even is virtual child pornography had the effect of encouraging pedophiles to engage in illegal conduct, as the government contended, it could not ban it unless there was "a significantly stronger, more direct connection" between the consumption of the material and the conduct itself.[60]

Decided less than a month after *Ashcroft v. The Free Speech Coalition*, the Supreme Court examined the problems associated with applying the local community standards prong of *Miller* in *Ashcroft v. ACLU*.[61] In that case, the Court examined the Child Online Protection Act's (COPA) use of the local community standards prong to determine whether it was unconstitutional.[62] The law restricted the prohibited material to that which was harmful to minors, establishing this using the *Miller* test.[63] Although it did little to procedurally affect the case, the Court did comment on the claims regarding the federal prosecutions of obscenity involving the application of the local community standard. The majority opinion, written by Justice Thomas, ultimately upheld the use of the local community standards prong despite the introduction of the Internet allowing for a widespread dissemination of

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[55] *Id.* at 763-64.
[56] *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002)
[57] *Id.* at 241.
[58] *Id.* at 249.
[59] *Id.* at 251.
[60] *Id*. at 253-54 (the statute at issue in this was later replaced by the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act" (PROTECT Act)).
[61] *Ashcroft v. ACLU*, 535 U.S. 564 (2002).
[62] *Id.* at 566.
[63] *Id.* at 569-570.

materials over the entire country, stating that a "publisher's burden does not change simply because it decides to distribute its material to every community in the Nation" and that in every community where the content is sent "it is the publisher's responsibility to abide by that community's standards."[64]

Not all the Justices shared this view that the local community standards prong of *Miller* should remain so unaffected by the advent of new technology. In her separate opinion, Justice O'Connor noted that "this case still leaves open the possibility that use of local community standards will cause problems for regulation of obscenity on the Internet."[65] Justice Breyer specifically argued that "community" should refer to "the Nation's adult community taken as a whole, not to geographically separate local areas."[66] He references legislative history that clearly indicates the intention of Congress to make a national standard for COPA's application.[67] Justice Kennedy, with whom Justices Souter and Ginsburg joined, summarized the arguments supporting or attacking the use of a local community standard, but stated that the Court "should not make that determination with so many questions unanswered" and that the Court of Appeals should undertake a comprehensive analysis on remand.[68]

After the Supreme Court allowed the litigation to continue in *Ashcroft I*, the case came forward to the Justices again, this time in the form of a preliminary injunction asking for the COPA to be enforced while awaiting trial. The Court upheld the injunction on other grounds, primarily due to other infirmities in the statute and not addressing the local community standards prong.[69] Although the Court has examined other statutes that pertain to this area, *Ashcroft II* marks the last time the Court examined the local community standards prong of the *Miller* test.

III. DISCUSSION

A. Existing Law

1. Key Problems

Applying the local community standard to the remaining two prongs of *Miller* falls short for a plethora of reasons. Firstly, the application of this standard could so severely cripple the definition of obscenity as to altogether eliminate the

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[64] *Id.* at 583.
[65] *Id.* at 587 (O'Connor, J., concurring in part and dissenting in part).
[66] *Id.* at 589 (Breyer, J., concurring).
[67] *Id.*
[68] *Id.* at 602 (Kennedy, J., concurring).
[69] *Ashcroft v. ACLU II*, 542 U.S. 656 (2004).

existence of obscenity in certain communities with a lower collective morality. For example, in the ancient Greek and Roman world, it was common for men to have sex with prepubescent boys for the stated purposes of building camaraderie between troops and initiating boys into the military structure of the day.[70] This extreme example articulates the power that collective thought and isolated community can have on the cultural establishment of morality. In our modern world, similar locations exist where the local community standard would be applied in such an intrinsically incorrect way as to not condemn that which would otherwise be considered obscene. In Pahokee, Florida for example, there is an entire community of registered child sex offenders that all live together to avoid being penalized by the association restrictions of the law.[71] Attempting to enforce a local community standard of obscenity against a film like *Cuties* in Pahokee would be extremely unlikely to be successful because the values of the community would likely not condemn a film depicting children engaging in sexual acts of any kind. Furthermore, its possible that other communities could widely condone the expression of traditionally deplorable sexual orientations, as was urged by Mirjam Heine in her widely disseminated TedTalk.[72] In a controversial video, the German medical student argued for accepting pedophilia as a recognized sexual orientation.[73] Though largely criticized by her peers, the video was still widely posted and viewed thousands of times on social media and is illustrative of the potential normalization of sexually deviant behaviors that could undermine the application of a local community test for obscenity.

Secondly, the local community standard even within an average community can vary for each jury selected. Unlike other areas of criminal law, where the elements of the crime are either met or not, obscenity invites the jury to take a snapshot of their community's current moral compass and to apply that to the circumstances before them. But that could change drastically within even a few years, particularly if the age, population, demographics, or other metrics of the area alter over time. To combat this, a jurisdiction could try to establish their own fixed standard for what would qualify as obscene in their jurisdiction. But this attempt to propose a specific standard is still generally not sufficient to pass Constitutional muster.[74] Thus, the local community standard lends itself to inconsistent

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[70] Enid Bloch, *Sex between Men and Boys in Classical Greece: Was It Education for Citizenship or Child Abuse?* (The Journal of Men's Studies, 2020), 183-204.
[71] Jay Kirk, *Welcome to Pariahville.* (GQ, 2015).
[72] Bailey Vogt, *TEDx speaker argues that pedophilia should be accepted as "an unchangeable sexual orientation."* (MetroWeekly, 2018).
[73] *Id.*
[74] *See American Booksellers Association v. Hudnut,* 771 F.2d 323, (7th Cir. 1985), aff'd mem., 475 U.S. 2001 (1986) (Indianapolis ordinance was struck down as unconstitutional for establishing a set definition of obscenity).

application, continuing to suffer because of its unnecessary flexibility, unaccountability, and amorphous use in each jurisdiction.

Finally, federal prosecutions are unnecessarily hamstrung by the inclusion of a community standards prong to *Miller*. Congress has given the Department of Justice authority to restrict the dissemination of obscene materials under a wide variety of statutes. Federal law provides punishment for those persons who sell or have the intent to sell "an obscene visual depiction" but only in jurisdictions limited to land in control of the government.[75] Other laws punish, *inter alia*, sending obscene materials through the mail, disseminating obscene media through interstate commerce, broadcasting obscene materials, or engaging in the business of transmitting obscene materials.[76] 18 U.S.C.S. 1466A provides essentially the same provisions as the previous seven statutes, while including information about affirmative defenses and other relevant information.[77] Congress also permitted federal authorities to initiate forfeiture proceedings of said obscene items, and specifically authorized punishment for the transmission of obscenity over cable or subscription television service.[78] These laws give the Department of Justice the statutory authority to prosecute crimes including obscenity, particularly those over a streaming service such as Netflix. The federal government has also authorized the enforcement of laws that are designed to limit the exploitation and exposure of children to sexually explicit content. These laws are broad and place a strong responsibility upon parents to provide for their children's wellbeing and protection as well as a responsibility broadly upon society to avoid exploiting children through the promulgation or creation of child pornography or other explicit material.[79]

While all these statutes grant broad authority to prosecute and punish crimes of obscenity, child pornography, or other similar acts of indecency within the United States and areas under its jurisdiction, each one faces a similar problem. How would a federal judge or jury be able to accurately apply a local community standard if the crime occurred within the broad jurisdiction of the federal government? Or in a remote territory or region under government control that does not have sufficient members to even form a community? For example, if a crime occurred in a conservative rural part of a federal district but was heard in liberal federal court in a metropolitan area, what "local community" would be able to apply their collective morality? These questions and more are troubling and unnecessarily restrict the efficient application of federal obscenity law throughout the United States.

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[75] 18 U.S.C.S. § 1460
[76] 18 U.S.C.S. §§ 1461-66.
[77] 18 U.S.C.S. § 1466A
[78] 18 U.S.C.S. §§ 1467-68.
[79] 18 U.S.C.S. §§ 2251-52, 2256.

2. Legal History

As articulated in *Roth*, the foundational principles of the Constitution were that the freedom of speech existed to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" and that "all ideas having even the slightest redeeming social importance" are to have the full guarantees under the First Amendment.[80] The *Roth* Court wrote that the "door barring federal and state intrusion into [free speech] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[81] Although the Court's attempts to protect free speech are at the core of its expression, the Court seems to have moved away from an expression of the First Amendment that is in line with its original purpose and instead is adopting an approach that is seeking to not limit speech if at all possible, despite clear Congressional intent to do so, as illustrated in many of the cases discussed above.

To the author's knowledge, there is no Supreme Court precedent under this Court's obscenity jurisprudence (save for *Ashcroft*) where the conduct being decried by statute was too invasive and overbroad so as to infringe upon Constitutionally protected speech. Perhaps this is an indication that the "door" for the government to infringe upon speech in this area may need to be opened enough for the government to insert its foot. Otherwise, the pernicious vagrancies of the world may be promulgated with the help of a Constitutional right that was never meant to protect such freedom in the first place.

3. Biblical Principles

The Bible has a great deal to say about the joys of children in their upbringing, development, and the treasure that they are to their parents. King Solomon notes the innocence and impressionable nature of a child, stating that parents are to "Train up a child in the way he should go; even when he is old he will not depart from it."[82] The Psalmist notes the joy and preciousness of children, stating that they "are a gift from the Lord; they are a reward from him" and that "like arrows in the hand of a warrior, so are children born in one's youth. Blessed is the man whose quiver is full of them."[83] Parents are to glory in their children's success and growth, with the Scriptures recording that "I have no greater joy than to hear that my children are walking in the truth."[84]

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[80] *Roth*, 354 U.S. at 484.
[81] *Id.* at 488.
[82] Proverbs 22:6.
[83] Psalm 127:3-5.
[84] 3 John 1:4.

Corresponding, much like the foundational legal principle "where the law provides a right, it must provide a remedy," the Bible gives a strong warning against those that would inhibit the growth and development of a child, prescribing precise instructions for what actions must *not* be taken against children. The Gospel notes that children's access to salvation and the message of hope through Jesus must not be inhibited. As Jesus said, "Let the little children come to me, and do not hinder them, for the kingdom of heaven belongs to such as these."[85] Parents who are entrusted with the responsibility of raising their children must do so in a manner that is consistent with how the Lord loves his children. Paul writes to the Ephesians that fathers should not provoke their children to anger but are to "bring them up with the discipline and instruction that comes from the Lord."[86] Similarly, he writes to the Colossians that fathers must not embitter their children, or the children "will become discouraged."[87] The Lord has strong words for those who would lead children into sin, noting in Matthew's gospel that "Whoever receives one such child in my name receives me, but whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."[88]

In the Old Testament, the Bible notes the deplorability of the twin cities of Sodom and Gomorrah, specifically pointing out their fornication and sinfulness. In the story of Lot, after angels visit him, the crowd comes to Lot's home and wants to have sexual relations with the men, to which Lot replies "Look, I have two daughters who have never slept with a man. Let me bring them out to you, and you can do what you like with them."[89] Lot attempted to give up his own children's virginity for a temporary comfort from an aggressive, perverted crowd that was threatening his immediate safety. Consequently, Lot was only saved because of his connection to Abraham, and the cities of Sodom and Gomorrah were destroyed because there was less than ten righteous people there.[90]

The promulgation and proliferation of child pornography must not be allowed to exist in a Nation that wants to glorify the Lord by protecting the innocence of its children. Protecting the lives of children must be of paramount importance to the church and the government, as both have a monumental interest in preserving the next generation of leaders and citizens for the good of society. Similarly, content that provides an opportunity to satisfy the desires of pedophiles

[85] Matthew 19:14.
[86] Ephesians 6:4.
[87] Colossians 3:21.
[88] Matthew 18:5-6.
[89] Genesis 19:8a.
[90] *See* Genesis 18:32.

and other individuals with a deviant interest must not be allowed to be safe harbored under the protections of America's great freedoms.

The Bible gives examples of governments that engaged in efforts to remove evil from the land, including King Asa of Judah. In 2 Chronicles, the prophet Azariah comes to King Asa and tells him that "The Lord is with you while you are with him. If you seek him, he will be found by you, but if you forsake him, he will forsake you."[91] These words motivated Asa to dedicate himself and all the people of Judah back to the Lord and to remove sin from their land. The passage goes on to note that a great multitude of people "entered into a covenant to seek the LORD, the God of their fathers, with all their heart and with all their soul but that whoever would not seek the Lord, the God of Israel, should be put to death, whether young or old, man or woman."[92] The enforcement of crimes was so thorough that even Asa's own mother was removed from the palace for having an Asherah pole.[93] By giving a Biblical example of the governmental enforcement of moral crimes, God provides a clear allowance and prescription of this behavior for America to follow similarly today.

The Biblical admonitions emphasizing the importance and value of children must not be overlooked when addressing this pivotal area of Constitutional law. Additionally, the stories in the Bible that give examples of children being mistreated or abused present a clear warning for society to intervene when possible to protect the safety and wellbeing of children. The freedoms of speech, the press, and expression exist for individuals to engage in the marketplace of ideas that will shape and change our Nation as we continue in this great experiment of democracy, not to shield the deplorable interests of a depraved minority that seek to abuse and exploit the most delicate members of American society. Based on this solid Biblical foundation and the existing Supreme Court precedent, there is clear authorization for the civil authorities to act in this area and a need to address the shortcomings of *Miller* and other Supreme Court cases.

B. Proposal for Change

1. Solutions

In addressing the failings of the local community standards prong of Miller, the solution to these problems is that of Justice Breyer in *Ashcroft I*: The Court should eliminate the community standards prong of *Miller* and replace it with an objective test that using a reasonable person standard.

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[91] 2 Chronicles 15:1.

[92] 2 Chronicles 15:12-13.

[93] 2 Chronicles 15:16.

Firstly, the Supreme Court looks to objective reasoning for nearly every other area of the law, as is discussed in more detail below. Secondly, the advent of modern technology has obliterated the necessity of the community standards prong of *Miller*, as the concurring opinions noted in *Ashcroft I* above. Finally, this remedy has already been applied to one prong of *Miller* through *Pope*. By limiting the application of community standards to the first two prongs of *Miller* and including an objective reasonableness standard into the third prong, the Court has already taken steps to remove the subjective language of the local community standards test from *Miller*. There is no indication that public policy would not permit the Court to similarly adjust the *Miller* test to have all three prongs be an objective test, as the rationale of *Ashcroft I* centered on other issues with the procedural posture of the case and did not find the local community standards prong to be dispositive of the case, either for rejecting or approving its use. This adjustment would be within the purview of the Court to do so and would be consistent with the existing judicial trend regarding obscenity jurisprudence.

Additionally, to assist the uniform and expedient administration of child pornography prosecutions by states and the federal government, the Court should make all child pornography *per se* obscene under the Constitution so as to not rely on state definitions to animate the application of obscenity prohibitions. Although most state laws prohibiting the transfer or possession of child pornography are sufficiently clear as to qualify as obscenity, a state could change the definition of child pornography to give a particular media enough artistic protections as to shield it from a constitutional challenge. In a situation involving a film like *Cuties*, where the content has been lauded by many in the film industry as having strong artistic value, it is possible that the film would not qualify as obscenity under the local community standard, even if it was found to qualify as child pornography. This issue is similar to the problem with using local community standards for obscenity, meaning that all fifty states could have varying degrees of what constitutions child pornography, but if it is not obscene as defined by state law, then there is either a diminished ability or no authority at all to prosecute it.

Because the cross-section of media that could considered pornographic but not obscene is a relatively small one, the enormity of this issue and the urgency commensurate with addressing it should indubitably be secondary to that of the community standards prong. Nevertheless, it behooves the Court to be aware of the collateral effects that one area of its jurisprudence has on the other. Because of the inextricable connection between obscenity and child pornography, these areas should be addressed concurrently by the Court, with preference given to establishing an objective test over the classification of child pornography as *per se* obscene should there not be occasion to address both issues.

2. Constitutional History

No other rights contained within the Bill of Rights or the Constitution have been subject to a similar standard of community focus. For example, in the Fourth Amendment context, law enforcement officers in many jurisdictions inevitably will have different normative procedures for interacting with the public. However, their actions under the Constitution have required thresholds that they must meet, regardless of how community standards regarding reasonableness may be in a particular part of this Nation.

The standards for the many provisions of the Fourth Amendment are applied indicate that the Court is fully capable and willing to define objective conduct for other areas of fundamental liberty. As it relates to the Fourth Amendment, the Court has established that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[94] Similarly, the Court in the landmark case of *Terry v. Ohio* has also noted that "it is imperative that the facts be judged against an objective standard."[95]

The Court has even applied a reasonableness standard to other aspects of First Amendment litigation, such as in *Ward v. Rock Against Racism* where the Court held that "the government may impose *reasonable* restrictions on the time, place, or manner of protected speech."[96] *Miller*'s rationale against the establishment of a "national" community standard for obscenity simply does not have a corollary provision in the rest of the Supreme Court's jurisprudence. If there is any apprehension for applying a national community standard in other areas of Constitutional interpretation, then the Court does not admit those qualms in any of its opinions. The pervasive application of a national, objective standard of reasonableness throughout Constitutional interpretation is inapposite to a localized test as advocated in the two prongs of *Miller* that still apply it. The Court's insistence on using a community-based standard is *sui generis*, does not have an analog anywhere else in its wide breadth of Constitutional jurisprudence, and therefore should be dismissed in favor of an objective analysis for all three prongs of *Miller*.

3. Biblical Principles

As noted above, the Bible has a great deal to say regarding the protection of children and the importance thereof. Laws that protect children from

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[94] *Graham v. Connor*, 490 U.S. 386, 397 (1989)
[95] *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *See United States v. Leon*, 468 U.S. 897 (1984) (applying an objective standard to the exclusionary rule).
[96] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added).

exploitation, abuse, or sexualization in popular media are near to the heart of God. The Bible notes that the moral priorities of an individual will be made manifest by their actions, noting that "Even a child makes himself known by his acts, by whether his conduct is pure and upright."[97] Paul emphasizes the importance of holistically caring for and providing for one's family, noting that "if anyone does not provide for his relatives, and especially for members of his household, he has denied the faith and is worse than an unbeliever."[98] Christians must not only be holding on the priority of children in their families, but also in society at large. It is one thing for Christians in the church to say that they value the family, but it is another entirely for them to take steps to change the law to reflect that reality.

As it relates to the establishment of a national rather than a community standard, the Bible makes it clear that natural law exists upon the heart of every human being and that there are moral realities that are written on each person's heart. *See* Romans 1:20; Ecclesiastes 3:11. The Apostle Paul notes

> "…Gentiles, who do not have the law, by nature do what the law requires, they are a law to themselves, even though they do not have the law. They show that the work of the law is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them."[99]

The Old Testament is also replete with examples of an objective-based application of national standards of morality. Beginning with the codified text of the law under the Mosaic covenant, God made it clear that the standards for morality would apply to all persons. Applying a national standard to the Supreme Court's obscenity test allows for the actions of sanctified and justified believers, as well as those persons who are unsaved but still have natural law written upon their hearts, to be able to overcome individual pockets of darkness and sin throughout our nation. This appeal to an objective standard resonates with the realities of how God has created each human being and will bring obscenity law more in line with the principles of the Word of God.

IV. Conclusion

In light of the clear Biblical admonitions regarding the protection of children, as well as the examples of governmental action that wields the power of

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[97] Proverbs 20:11.
[98] 1 Timothy 5:8.
[99] Romans 2:14-15.

the sword against those who would promulgate sin in the land, this area of law is one that has strong Biblical authority for its involvement. Additionally, natural law is a universal standard of application, just as this law should be in its reach to all citizens and sectors of the United States.

Regardless of the result of any prosecution against *Cuties* or similar forms of media, examining the Supreme Court's jurisprudence from *Roth* to *Ashcroft I* demonstrates that this area of the law is complex, occasionally convoluted, and in the case of the local community standards test, counterintuitive in its application to the dissemination of media through the Internet and streaming services such as Netflix. Obscenity jurisprudence must continue to work diligently to hold steadfast to the principles of the First Amendment. Therefore, the local community standards test should be removed from the Supreme Court's obscenity and child pornography jurisprudence and be replaced by a national standard.

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