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A Nation of One? Community Standards in the Internet Era

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2012; B.A., Harvard College, 2008. I am grateful to Professor Abner S. Greene for his support and guidance throughout this process.

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Noah Hertz-Bunzl*

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INTRODUCTION

In 2008, Paul Little was tried on obscenity charges in the Middle District of Florida.¹ Little operated a pornographic website

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in California.² Department of Justice agents in Tampa captured and downloaded five trailers from and ordered and received five DVDs by mail from the website, providing a basis to charge Little in that jurisdiction.³ Little was convicted of violating federal obscenity laws and sentenced to forty-six months in prison.⁴

Little's conviction raises questions about key elements of obscenity law. According to *Miller v. California*,⁵ the question of what constitutes obscenity is answered by a jury, using "contemporary community standards," which are understood to be local.⁶ The same website that might be considered obscene by a jury in Tampa might not be considered obscene by a jury in Los Angeles, for example.

The *Miller* test originated in an era when most obscenity was distributed via postal mail and it was relatively easy to direct content at specific parts of the country and not others.⁷ In contrast, today obscenity is largely transmitted over the Internet, which generally cannot be directed at specific geographic locations.⁸ Accordingly, judges and scholars have argued that a national standard is necessary to avoid subjecting Internet distributors to every local standard in the country.⁹ Otherwise, content providers will be faced with a race to the bottom in which providers must

¹ United States v. Little, 365 F. App'x 159, 159–60 (11th Cir. 2010) (affirming the ruling of the district court).

² *Id.*

³ *Id.* at 161.

⁴ *Id.*

⁵ 413 U.S. 15 (1973).

⁶ *Id.* at 30, 39.

⁷ Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 64 (2005) ("[T]he community standards test was developed at a time when obscenity prosecutions were primarily localized in nature and distributors intentionally chose the geographic areas in which they distributed or displayed their material.").

⁸ Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 347 (2008) ("[I]t is still not possible for a website operator to restrict access only to certain jurisdictions . . .").

⁹ *E.g.*, United States v. Kilbride, 584 F.3d 1240, 1250 (9th Cir. 2009); Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 80 (2010).

follow the standards of the most puritanical community in the nation.¹⁰

Part I of this note considers the origins and development of modern obscenity law. The keystone of this development is the Supreme Court's 2002 decision in *Ashcroft v. ACLU*,¹¹ which centered on indecency aimed at children on the Internet. *Ashcroft* concerned the constitutionality of the Child Online Protection Act (COPA), which placed restrictions on material made available or communications to minors on the Internet that could be considered harmful.¹² The Court considered whether variations in community standards made COPA overbroad when applied to the internet.¹³

The *Ashcroft* case became centrally important in a series of prosecutions of Internet adult obscenity during the Bush administration.¹⁴ In *United States v. Little*, the Eleventh Circuit upheld Little's conviction, rejecting the argument that a national community standard is necessary in Internet obscenity cases.¹⁵ The Ninth Circuit reached the opposite result in *United States v. Kilbride*, involving an obscenity conviction arising from images within an email-spamming operation.¹⁶ Relying on *Ashcroft*, the *Kilbride* court ruled that the use of a local standard was an error and that a national community standard should have been used.¹⁷

Part II of this note identifies a series of policy arguments underlying the different community standards and obscenity law more generally. On the one hand, the community standards test raises serious constitutional concerns related to due process, vagueness, and overbreadth.¹⁸ On the other hand, there is a strong motivation for prosecuting obscenity, which may be amplified by

¹⁰ *Ashcroft v. ACLU*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring) (“[A]dopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”).

¹¹ 535 U.S. 564, 564 (2002).

¹² *Id.* at 569–70.

¹³ *Id.* at 571–72.

¹⁴ *See, e.g.*, *United States v. Little*, 365 F. App’x 159 (11th Cir. 2010); *Kilbride*, 584 F.3d 1240, 1252 (9th Cir. 2009).

¹⁵ *See Little*, 365 F. App’x at 164.

¹⁶ *Kilbride*, 583 F.3d at 1240.

¹⁷ *Id.* at 1254–55.

¹⁸ *See, e.g.*, *Miller v. California*, 413 U.S. 15, 45–46 (1973) (Douglas, J., Dissenting).

the new threats posed by the Internet.¹⁹ Moreover, the way one defines the community standard may not make a significant difference to the outcomes of obscenity prosecutions.²⁰

Part III of this note focuses on proposals to remedy this disparate treatment by courts of the community standard. First, the *Ashcroft* case is applicable only to cases involving obscenity directed at minors; the analysis for adult obscenity is inherently different.²¹ The justices in *Ashcroft* did not intend the holding in that case to apply to obscenity directed at adults, and Ninth Circuit's interpretation of *Ashcroft* put forward in *Kilbride* is incorrect. Second, from a policy perspective, choosing between a national and a local standard is unlikely to rectify the current problems with obscenity jurisprudence or unfair treatment of pornography producers.²² Finally, technological advancements allowing for a more accurate or restricted distribution of goods on the Internet may be the most effective solution.²³ Ultimately, however, even with improvements in technology, courts must clearly and once-and-for-all address the function of the community standard, and perhaps the very concept of the obscenity exception to the First Amendment.

¹⁹ See, e.g., John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. Rev. 1691, 1701–04 (2007).

²⁰ See, e.g., Randolph Stuart Sergeant, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 715–17 (1996).

²¹ See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 587 (2002) (O'Connor, J., concurring) (“[T]his case still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet, for adults . . . in future cases.”).

²² See Sergeant, *supra* note 20, at 715–17.

²³ Lisa Guernsey, *Welcome to the Web. Passport, Please*, N.Y. TIMES, Mar. 15, 2001, at G1, available at <http://www.nytimes.com/2001/03/15/technology/welcome-to-the-web-passport-please.html>.

I. BACKGROUND

A. Overview

Obscenity is not protected by the First Amendment.²⁴ Early American obscenity law utilized a variety of legal tests to determine whether a work was obscene, including the Hicklin test, which focused on the ability of the material to corrupt “particularly sensitive individuals.”²⁵ During the early Twentieth Century forfeiture actions against works such as James Joyce’s *Ulysses* were brought based on obscenity.²⁶ In subsequent years, the Supreme Court justices had considerable difficulty establishing a consensus on how to define obscenity.²⁷ During this period the justices frequently reviewed materials personally to determine if the materials were obscene.²⁸ The Court finally reached a consensus in 1973 when it adopted the *Miller* test,²⁹ but determining the meaning, breadth, and applicability of the *Miller* test has plagued courts ever since.

In the period following *Miller*, the government had in many ways lost the battle over obscenity to the pornography industry, and the test is generally understood to be defendant-friendly.³⁰ However, the George W. Bush presidency brought renewed focus to obscenity and engaged in an ambitious campaign of prosecutions targeting producers of obscene material.³¹ As a statutory matter, obscenity is criminalized under state laws and a

²⁴ *Miller v. California*, 413 U.S. 15, 23 (1973). *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem.”).

²⁵ *See* Boyce, *supra* note 8, at 311–13.

²⁶ *Id.* at 314–15. *See* *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182 (S.D.N.Y. 1933).

²⁷ *See id.*

²⁸ *See, e.g., Paris Adult Theatre v. Slaton*, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting) (explaining that Douglas never chose to act as a censor in this manner because he did not think it was constitutional for him to do so).

²⁹ Boyce, *supra* note 8, at 318.

³⁰ Fee, *supra* note 19, at 1695.

³¹ *See* Boyce, *supra* note 8, at 324; *see also* Calvert, *supra* note 9, at 75 (questioning whether President Barack Obama would continue the “crackdown on obscenity launched during the administration of President George W. Bush”).

number of federal laws, targeting such offenses as the distribution of obscenity via postal mail and transportation of obscenity via interstate commerce or interactive computer network affecting such commerce.³² Accordingly, the Bush Administration Justice Department was able to bring cases in districts of its choosing and prosecute Internet pornography producers in the “least tolerant communities,” thus avoiding litigation in the pornography industry’s home-base of California.³³ Outside of obscenity doctrine, the community standards test continues to be applied in other areas of First Amendment jurisprudence.³⁴

Currently, the job of defining the category of obscene material falls to the states.³⁵ In discharging this duty, states face two distinct standards: one for obscene material directed at adults and another for obscene material directed at children.³⁶ In *Ginsberg v. New York*,³⁷ the Supreme Court concluded that material that may be sold to adults may not necessarily be sold to children and reiterated that “the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed.”³⁸

³² See 18 U.S.C. §§ 1461, 1465 (2006); Fla. Stat. Ann. § 847.011 (West 2008); United States v. Little, 365 F. App’x 159, 161 (11th Cir. 2010).

³³ Calvert, *supra* note 9, at 64, 85.

³⁴ See, e.g., Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2746 (2011); United States v. Stevens, 130 S. Ct. 1577, 1588–90 (2010).

³⁵ See *Miller v. California*, 413 U.S. 15, 23–24 (1973) (“State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.”).

³⁶ Compare *Miller*, 413 U.S. at 24 (defining the test for what constitutes obscene material), with *Ashcroft v. ACLU*, 542 U.S. 656, 659–60 (2004) (questioning the constitutionality of COPA, a congressional statute designed to protect minors from potentially harmful material online).

³⁷ 390 U.S. 629, 636–37 (1968) (holding that the New York State Legislature’s “power to employ variable concepts of obscenity” in denying minors’ access to material condemned under statutory law did not “invade[] the area of freedom of expression constitutionally secured to minors.”).

³⁸ *Id.* at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)). Moreover, the Court also distinguished between the test for determining obscene material directed at minors and child pornography. Compare *Ashcroft v. ACLU*, 542 U.S. 656, 661–62 (2004), with *New York v. Ferber*, 458 U.S. 747, 761 (1982) (“The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect

B. The Community Standards Approach

Miller v. California established the current test for obscenity.³⁹ Under the *Miller* test, the trier of fact determines

(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; (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.⁴⁰

The Court indicated that these standards should be local as opposed to national:

[O]ur 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 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.⁴¹

The first prong of the test emphasizes that the First Amendment was designed to protect works of serious value, not “hard-core sexual conduct for its own sake,” and that states have a

the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”). See also *Fee*, *supra* note 19, at 1696 (explaining that the Supreme Court found it necessary in *Ferber* to hold that child pornography was uncategorically protected because of the difficulty experienced by the states and the Federal Government in prosecuting obscenity post-*Miller*). Child pornography is not protected by the First Amendment and therefore is not subject to the community standards approach set forth in *Miller*. See *Ferber*, 458 U.S. at 761; *Fee*, *supra* note 19, at 1696–97.

³⁹ 413 U.S. 15, 24–25 (1973).

⁴⁰ *Id.* at 24 (internal citations omitted).

⁴¹ *Id.* at 30, 32. The *Miller* case itself involved contemporary community standards of the state of California. *Id.* at 31.

right to regulate such material to protect public morals.⁴² The first prong requires that the work appeal to the prurient interest as determined by contemporary community standards. The reference to contemporary community standards clarified that “obscenity is not [to be] judged by the sensitivities of the most easily offended individuals or by the morals of the past,” but rather that juries should play the role of “representatives of the various communities from which they come.”⁴³ The *Miller* test’s reliance on the application of different community standards is particularly unique in American jurisprudence because the treatment of constitutional rights generally does not vary from one geographic area to another.

The second prong reinforces the community approach by permitting the states to individually determine which sexual conduct they find patently offensive.⁴⁴ On the same day as *Miller*, the Court decided in *Paris Adult Theatre v. Slaton* that Georgia could prohibit the showing of obscene movies in an adult movie theater.⁴⁵ The Court highlighted the States’ “long-recognized legitimate interest” in regulating obscene material, based on notions of decency, quality of life, total community environment, the tone of commerce, and public safety.⁴⁶

The third prong of the *Miller* test addresses the potential impact the test may have on First Amendment-protected speech. The Supreme Court included the third prong to narrow the regulation of obscenity, “so as not to chill works of serious social value.”⁴⁷ Post-*Miller*, the Supreme Court clarified that whether the work in fact has serious literary, artistic, political or scientific value is determined from the perspective of a reasonable person, rather than a juror in a given community.⁴⁸

One year after *Miller*, the Court reviewed an obscenity prosecution which had been decided before the *Miller* ruling was

⁴² Fee, *supra* note 19, at 1694 (quoting *Miller*, 413 U.S. at 35).

⁴³ *Id.* at 1695.

⁴⁴ See *Miller*, 413 U.S. at 24–25.

⁴⁵ 413 U.S. 49, 55, 57–59, 69–70 (1973).

⁴⁶ *Id.* at 57–59.

⁴⁷ *Id.* at 1694.

⁴⁸ *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

announced.⁴⁹ The defendants had used the mail to distribute advertisements and copies of a book entitled “The Illustrated Presidential Report of the Commission on Obscenity and Pornography.”⁵⁰ To determine whether the publication contained obscene material, the trial court judge instructed the jury to consider “the standards generally held throughout this country.”⁵¹ In its review, the Court found that use of a national standard did not constitute reversible error, despite the fact that *Miller* calls for a local standard.⁵² In his dissent, Justice Brennan responded to the majority’s affirmation of the local standard set out in *Miller* and raised the concern that the use of a local standard would force producers to cabin their creations within the standard of the most restrictive community where their goods may travel, potentially leading to self-censorship.⁵³

Brennan’s concern is particularly showcased by the numerous forum options for prosecutors in determining where to try an obscenity case. Obscenity prosecutions can be tried in the community where the obscene material is purchased, where the material is produced, or where the producer is primarily located.⁵⁴ In 1982, the Eleventh Circuit upheld the Florida obscenity conviction of a Los Angeles producer who sent content via the mail to an undercover FBI agent operating in Florida.⁵⁵ The court confirmed that the use of common carriers to ship obscene materials is a continuing offense in every judicial district through

⁴⁹ *Hamling v. United States*, 418 U.S. 87, 96 (1974). The defendants were indicted in 1971 and later convicted. *Id.* at 91. The 9th Circuit affirmed on June 7, 1973. *Id.* at 97. *Miller v. California* was decided on June 21 of that year. *Id.*

⁵⁰ *Id.* at 91.

⁵¹ *Id.* at 103.

⁵² *Id.* at 107–08 (“Judging the instruction given by the District Court in this case by these principles, there is no doubt that its occasional references to the community standards of the ‘nation as a whole’ delineated a wider geographical area than would be warranted by *Miller* Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their conviction void as a matter of constitutional law.”).

⁵³ *Id.* at 144 (Brennan, J., dissenting).

⁵⁴ *See, e.g., United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982).

⁵⁵ *Id.* at 829.

which the material passes, and that the legislature intended this flexibility in venue when it enacted the federal obscenity statutes.⁵⁶

Similarly, in *Sable v. FCC*⁵⁷ the Court upheld an amendment to the Communications Act of 1934 imposing a ban on obscene “dial-a-porn” telephone messages despite the fact that the ban would potentially subject operators to varying community standards.⁵⁸ The Court explained that while dial-a-porn operators could be held to varying community standards depending on where in the country the phone service was being accessed, this fact alone did not render the statute unconstitutional. Rather, if the distributors wanted to limit the community standards applicable to their material, then the burden was on the distributors to implement a screening system that selectively served those areas of the country.⁵⁹

The first major obscenity case involving the Internet was decided by the Sixth Circuit in 1996.⁶⁰ In *United States v. Thomas*,⁶¹ the court affirmed the Tennessee conviction of a husband and wife who operated an electronic bulletin board from their home in California from which members could download

⁵⁶ *Id.* at 830. The case involved 18 U.S.C. § 1462 (prohibiting the use of common carriers to transport obscenity) and 18 U.S.C. § 1465 (prohibiting the use of interstate commerce to transport obscenity), both of which are offenses within the provisions of 18 U.S.C. § 3237(a), which holds that any offense involving the use of the mails or the transportation of goods in interstate commerce is a continuing offense that may be prosecuted in every district in which the crime takes place, including the district in which the materials were received. *Id.* at 830–31. Congressional intent in this manner is supported by the 1958 revision of these statutes to overrule a Tenth Circuit decision holding that there was not a continuing offense in every district in which the material was carried. *Id.* at 831 n.7.

⁵⁷ 492 U.S. 115 (1989).

⁵⁸ 492 U.S. at 123–26. “Dial-a-porn” refers to sexually oriented pre-recorded messages that callers pay to listen to. *Id.* at 117–18.

⁵⁹ *Id.* at 125–26. The Court maintained this burden on distributors even after acknowledging that such a screening system may be impractical or prohibitively expensive. *Id.* at 125. The Court did, however, invalidate a portion of the law that would have completely banned dial-a-porn messages that were indecent as applied to minors. *Id.* at 130–31. The Court stated that the ban would have unconstitutionally limited lawful adult-to-adult speech because of the chance that the speech would reach children. *Id.*

⁶⁰ See Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children From Pornography on the Internet?*, 21 J. MARSHALL J. COMP. & INFO. L. 141, 155 (2003).

⁶¹ 74 F.3d 701 (6th Cir. 1996).

pornographic content.⁶² The defendants and amicus curiae, including the ACLU,⁶³ argued that the use of such computer technology required a definition of community “based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial.”⁶⁴ To hold otherwise, they argued, would “chill” permitted speech because anyone could access the material; the electronic bulletin board operators had no means of geographically restricting access to the online content.⁶⁵ The court rejected the argument, finding that the operators of the site, just like the dial-a-porn operators, did have knowledge of and control over where the material was being distributed because part of the membership application for the bulletin board involved users submitting home addresses and local phone numbers.⁶⁶ In addition, the court found that *Sable* supported the contention that it is the responsibility of the distributor to tailor its distribution to the communities it chooses to serve and that the distributor may have to incur the costs necessary to develop a system to accomplish this objective.⁶⁷ After *Thomas*, some commentators argued that the Internet was a unique medium, requiring a national standard based on the nation’s community of Internet users.⁶⁸

C. Congressional Regulation of the Internet and the Ashcroft Case

Congress joined in the obscenity debate in the 1990s and began focusing on laws to make the Internet safer for children,⁶⁹ like the Communications Decency Act of 1996 (CDA)⁷⁰ which “prohibits

⁶² *Id.* at 705.

⁶³ *Id.* at 711 n.8.

⁶⁴ *Id.* at 711.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 711–12.

⁶⁸ See, e.g., Gyong Ho Kim & Anna R. Paddon, *Cybercommunity Versus Geographic Community Standard For Online Pornography: A Technological Hierarchy in Judging Cyberspace Obscenity*, 26 RUTGERS COMP. & TECH. L.J. 65, 85 (1999) (arguing content standards should be more permissive for the Internet than for other mediums such as radio or television in part because of the lack of a “captive audience” problem).

⁶⁹ See Goldstein, *supra* note 60, at 158.

⁷⁰ 47 U.S.C. § 223 (1996), *invalidated* by *Reno v. ACLU*, 521 U.S. 844, 857–58 (1997).

the knowing transmission of obscene or indecent messages to any recipient under 18 years of age” and “prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”⁷¹ Affirmative defenses are available if the defendant takes “good faith, reasonable, effective and appropriate actions” to restrict access to minors or requires proof of age.⁷² The CDA standard for determining obscenity differed from the *Miller* test in two distinct ways: it did not contain equivalents to either the prurient interest or serious value prongs (prongs one and three of the *Miller* test respectively).⁷³

The Court invalidated the law.⁷⁴ The Court found that the law denied adults speech they have a constitutional right to communicate, and was not the least restrictive means of achieving the government’s purpose.⁷⁵ In addition, the law’s potential application was too wide in scope, making it vague and troublesome under the Court’s First Amendment analysis.⁷⁶ The Court speculated that a speaker would not know if he or she was violating the law when discussing topics such as birth control and prison rape, causing a chilling effect.⁷⁷ In addition, the Court clarified that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message.”⁷⁸

⁷¹ *Reno v. ACLU*, 521 U.S. 844, 859 (1997) .

⁷² 47 U.S.C. § 223(e)(5).

⁷³ *Reno*, 521 U.S. at 873.

⁷⁴ *Id.* at 882. The Court allowed one part of the law to survive through its severability clause, retaining the portion of the law pertaining to the “knowing transmission” of obscene—but not indecent—messages to minors. *See id.* at 882–83. O’Connor, joined by Rehnquist, concurred and dissented in part, and argued that the display portions of the law should be struck down but not the “knowing transmission” or “knowing sending” portions of the law where the communicator knows all the recipients are minors and not a combination of adults and minors. *Id.* at 891–93 (O’Connor, J., concurring in part and dissenting in part).

⁷⁵ *Id.* at 874. The government argued the statute’s burden on speech could be cured through the good faith defenses, although the Court doubted whether age verification techniques were economically viable. *Id.* at 881–82.

⁷⁶ *Id.* at 870.

⁷⁷ *Id.* at 871–72.

⁷⁸ *Id.* at 877–78.

Congress' second attempt⁷⁹ at regulating obscene material aimed at children was the Child Online Protection Act (COPA).⁸⁰ COPA prohibits the knowing communication to minors of "material that is harmful to minors" for commercial purposes.⁸¹ This law incorporates a modification of the *Miller* test, making it applicable to material harmful to minors.⁸² A group of website operators, whose websites provided materials such as sexual health and gay and lesbian resources intended for an adult audience, brought a facial challenge to the statute.⁸³ The website operators were concerned that their materials might be considered harmful to minors by some community standards.⁸⁴ Thus, they argued that "COPA violated adults' rights under the First and Fifth Amendments because it (1) 'create[d] an effective ban on constitutionally protected speech by and to adults'; (2) '[was] not the least restrictive means of accomplishing any compelling governmental purpose'; and (3) '[was] substantially overbroad.'"⁸⁵ The district court invalidated the law, finding in part that it was not the least restrictive means of preventing minors from accessing harmful material.⁸⁶ The Third Circuit affirmed on related but different grounds, holding that the use of community standards rendered the statute substantially overbroad because web publishers were not able to limit access based on the geographic locale of particular Internet users, thus limiting the content

⁷⁹ See Goldstein, *supra* note 60, at 166.

⁸⁰ 47 U.S.C. § 231 (1998).

⁸¹ *Id.* § 231(a)(1).

⁸² *Ashcroft v. ACLU*, 535 U.S. 564, 569–70 (2002). The statute defines "material that is harmful to minors" as material that "(A) the average person, applying contemporary community standards, would find, taking the material as a whole and *with respect to minors*, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive *with respect to minors*, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious, literary, artistic, political or scientific value *for minors*." 47 U.S.C. § 231(e)(6) (emphasis added).

⁸³ *Ashcroft*, 535 U.S. at 571.

⁸⁴ *Id.* at 571.

⁸⁵ *Id.* at 571–72 (alterations in original) (quoting Brief for the Respondent at 100–01, *Ashcroft*, 535 U.S. 564 (No. 99-1324)).

⁸⁶ *Id.* at 572.

produced to that deemed acceptable by only the “most puritan of communities” in the nation.⁸⁷

The Supreme Court considered the issue in *Ashcroft v. ACLU*, and reversed and remanded the case to the Circuit court.⁸⁸ Justice Thomas, announcing the opinion of the Court, stated that a local standard is not unconstitutional.⁸⁹ The Court relied on *Hamling v. United States*,⁹⁰ in which the Court held that “requiring a speaker disseminating material to a national audience to observe various community standards does not violate the First Amendment.”⁹¹ The Court reiterated that it is acceptable to prohibit communications considered obscene under some local standards but not others.⁹² Justice Thomas added that the Third Circuit distinguished these cases based on the speaker’s ability to control the distribution of the controversial material to certain geographic communities.⁹³ However, Thomas noted that in neither *Hamling* nor *Sable* was the speaker’s targeting ability integral to the legal outcome.⁹⁴ Instead, the Court emphasized that the Internet does not call for a different standard, and “[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its materials to those communities.”⁹⁵

⁸⁷ *ACLU v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000). The court distinguished *United States v. Thomas*, 74 F. 3d 701 (6th Cir. 1996), finding it dissimilar to a modern Internet case because the defendant in *Thomas* had the ability to geographically distinguish among its bulletin board users. *Id.* at 176–77.

⁸⁸ *Ashcroft*, 535 U.S. at 564–65. Justice Thomas announced the opinion of the court, supported by Justices Rehnquist and Scalia. Justices O’Connor and Breyer joined the majority opinion in part and also wrote separate concurring opinions. Justice Kennedy concurred, joined by Justices Souter and Ginsberg, and Justice Stevens dissented. *Id.* at 564.

⁸⁹ *Id.* at 566.

⁹⁰ 418 U.S. 87 (1974).

⁹¹ *Ashcroft*, 535 U.S. at 580 (citing *Hamling*, 418 U.S. at 106).

⁹² *Id.* at 581.

⁹³ *Ashcroft*, 535 U.S. at 581–82 (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125–26 (1989)).

⁹⁴ *Id.* at 582.

⁹⁵ *Id.* at 583. The justices considered that because of the law, content that otherwise could be openly displayed would be put behind age verification screens, but did not find any substantial overbreadth as a result. *Id.* at 584–85.

Thomas indicated that he did not believe that the effect of local community standards with regard to COPA would be any greater than under other federal obscenity statutes.⁹⁶ According to Thomas, the Court in *Reno* established the constitutionality of these obscenity laws as applied to the Internet.⁹⁷ In addition, under *Miller*, community standards are not defined by reference to a particular geographic area.⁹⁸ Therefore, the Court held, a national standard is not required and, even under a national standard a juror will inevitably draw from his experiences in the community from which he comes.⁹⁹ Thomas also distinguished COPA from the CDA, because the CDA's use of community standards on the Internet was "particularly problematic in light of the CDA's breadth and vagueness," covering material not limited by the three prongs of the *Miller* test.¹⁰⁰ In contrast, COPA followed *Miller* and importantly excluded material with literary, artistic, political or scientific value for minors.¹⁰¹

The Court made clear that the holding of the case was limited to the narrow issue presented. "[W]e hold only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad" ¹⁰² The justices pointed out that the ruling did not express a position as to whether the statute might be overbroad, vague, or would survive strict scrutiny.¹⁰³

O'Connor joined the Thomas opinion in distinguishing COPA from the CDA and finding COPA not substantially overbroad because of community standards.¹⁰⁴ She wrote separately to point out that many of the materials at issue might already be exempt

⁹⁶ *Id.* at 583–84. Specifically, the Court used the example of 47 U.S.C. § 223(b) (1994). *Id.* 581 n.11.

⁹⁷ *Id.* at 584 (pointing out that in *Reno v. ACLU*, 521 U.S. 844, 877 n.44 (1997), that transmitting obscenity or child pornography on the Internet was already illegal under federal law for adults and juveniles).

⁹⁸ *Ashcroft*, 535 U.S. at 576 (citing *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)).

⁹⁹ *Id.* at 576–77.

¹⁰⁰ *Id.* at 577–78.

¹⁰¹ *Id.* at 579.

¹⁰² *Id.* at 585.

¹⁰³ *Id.* at 585–86.

¹⁰⁴ *Id.* at 577–78, 585.

from COPA's coverage because of their literary, artistic, political or scientific value for minors.¹⁰⁵ For instance, the sex education materials would likely have scientific value in every jurisdiction.¹⁰⁶ Although she was comfortable denying the facial challenge, O'Connor left open the possibility of future facial or as applied challenges to the law.¹⁰⁷ "[G]iven Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask, and would potentially suppress an inordinate amount of expression."¹⁰⁸ O'Connor further explained that *Miller* does not prohibit a national standard; rather *Miller* held a national standard was neither required nor unconstitutional.¹⁰⁹ She continued that a national standard may have been "unascertainable" to the *Miller* court, but developments like the Internet have made jurors more aware of the views of adults in other parts of the country.¹¹⁰ Therefore, according to O'Connor, "[a]doption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity."¹¹¹

Breyer also joined the Thomas opinion in holding the community standards element did not itself render COPA substantially overbroad.¹¹² Breyer wrote separately, arguing that Congress intended the word community in the statute to refer to the view of the nation's adult community as a whole concerning what is appropriate material for minors.¹¹³ Breyer pointed out that while the word community is not defined in the statute, the legislative history indicates that Congress did not intend the word to refer to separate standards among different communities.¹¹⁴ Breyer highlighted a House of Representatives report which indicated that the committee members understood community

¹⁰⁵ *Id.* at 586 (O'Connor, J., concurring).

¹⁰⁶ *Id.* at 587.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 588 (citing *Miller v. California*, 413 U.S. 15, 31 (1973)).

¹¹⁰ *Id.* at 588–89.

¹¹¹ *Id.* at 587.

¹¹² *Id.* at 585 (plurality opinion).

¹¹³ *Id.* at 589–90 (Breyer, J., concurring).

¹¹⁴ *Id.*

standards as an “adult standard . . . reasonably constant among adults in America” rather than a “geographic standard.”¹¹⁵ For Breyer, the advantage of this position was the ability to avoid examining otherwise serious First Amendment problems such as providing “the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”¹¹⁶

Kennedy concurred on the basis that the lower court’s ruling did not sufficiently assess the breadth of COPA’s coverage and the possible variations in community standards across the country, making it impossible to determine if the law was really overbroad.¹¹⁷ According to Kennedy, overbreadth depends on the “extent of speech covered and the variations in community standards with respect to that speech.”¹¹⁸ However, Kennedy explained, there was a lack of information before the Court pertaining to whether, for instance, the variance of community standards under this law would be any more severe than variations of community standards under the federal obscenity statutes.¹¹⁹ Kennedy did identify objectionable elements of the law, finding that “the economics and technology of Internet communication differ in important ways from those of telephones and mail.”¹²⁰ “[I]t is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset.”¹²¹ Nonetheless, Kennedy found that this “observation ‘by *itself*’” was insufficient to enjoin the act.¹²²

¹¹⁵ *Id.* at 590 (emphasis omitted) (citing H.R. Rep. No. 105-775, at 28 (1998)). Kennedy noted that Breyer’s position on the legislative history is unsupported by the record and relies on only one statement to infer the total view of Congress. *Id.* at 596 (Kennedy, J., concurring). Stevens agreed with Kennedy’s position, finding that the clear text of the statute indicated that jurors should consider community standards a “term of art that has taken on a particular meaning in light of our precedent,” relating back to *Miller* which held that a national standard would be an “exercise in futility.” *Id.* at 607 n.3 (Stevens, J., dissenting).

¹¹⁶ *Id.* at 590 (Breyer, J., concurring).

¹¹⁷ *Id.* at 591 (Kennedy, J., concurring).

¹¹⁸ *Id.* at 597.

¹¹⁹ *Id.* at 598.

¹²⁰ *Id.* at 595.

¹²¹ *Id.* (citations omitted).

¹²² *Id.* at 597.

Stevens dissented on the basis of COPA's overbreadth, arguing that the statute covered "arguably every depiction of nudity" which is "in some sense erotic *with respect to minors*."¹²³ Stevens pointed out that because "erotic with respect to minors" is broader than the *Miller* conception of obscenity, the sweep of the law is expansive, and the danger of overbreadth is very real.¹²⁴ Stevens indicated that the Court of Appeals was correct in finding that COPA would impact a large amount of protected speech that would "not be considered harmful to minors in many communities."¹²⁵ However, according to Stevens, Thomas's solution of forcing the speaker to choose a different medium and a more limited forum of expression would make the overbreadth doctrine "toothless."¹²⁶ Stevens instead distinguished *Ashcroft* from *Hamling* and *Sable*,¹²⁷ due to a "fundamental difference in technologies, the rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web."¹²⁸ Stevens clarified that he was primarily concerned with the suppression of racy advertisements and online magazines that could be considered harmful to minors in conservative communities, not "[t]he kind of hard-core pornography involved in *Hamling*" which he believed "does not belong on the Internet."¹²⁹

On remand, the Third Circuit reaffirmed the preliminary injunction against enforcement of COPA.¹³⁰ The court determined that the plaintiffs were likely to succeed on the merits that COPA was overbroad and would fail strict scrutiny.¹³¹ The Supreme Court heard the case again in 2004, this time invalidating COPA because it burdened adult access to protected speech and because

¹²³ *Id.* at 608 (Stevens, J., dissenting).

¹²⁴ *Id.* at 608–09.

¹²⁵ *Id.* at 611.

¹²⁶ *Id.* at 606 n.2.

¹²⁷ *See id.* at 605.

¹²⁸ *Id.* at 606.

¹²⁹ *Id.* at 611–12.

¹³⁰ *ACLU v. Ashcroft*, 322 F.3d 240, 243 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004).

¹³¹ *Id.* at 271.

less restrictive alternatives were available.¹³² As a result the Supreme Court affirmed the circuit court's grant of the preliminary injunction and remanded the case for trial at the district court.¹³³ On remand, the district court permanently enjoined the law for being impermissibly vague, overbroad and for not being the least restrictive means to achieve a compelling government interest.¹³⁴ The Third Circuit affirmed¹³⁵ and certiorari to the Supreme Court was denied.¹³⁶

D. Prosecutions of Adult Obscenity and the Application of the Ashcroft Case

While the Supreme Court was interpreting laws pertaining to obscenity directed at children on the Internet, lower courts began to hear a new wave of prosecutions of obscenity directed at adults.¹³⁷ The Department of Justice under George W. Bush launched several high-profile obscenity prosecutions around the country against southern California-based pornography producers. Some of the recent and most prominent cases are discussed below.¹³⁸

¹³² *Ashcroft v. ACLU*, 542 U.S. 656, 656–57, 666–67 (2004) (“Blocking and filtering software is less restrictive alternative [to COPA]”).

¹³³ *See id.* at 658–59.

¹³⁴ *ACLU v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008).

¹³⁵ *Id.* at 181.

¹³⁶ *Mukasey v. ACLU*, 129 S. Ct. 1032 (2009).

¹³⁷ *See generally* *United States v. Little*, 365 F. App'x 159 (11th Cir. 2010); *United States v. Adams*, 337 F. App'x 336, 340 (4th Cir. 2009) (rejecting the availability of material from the Internet as acceptance of it by the local community for *Miller* test purposes), *cert. denied*, 130 S. Ct. 1161 (2010); *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009) (rejecting local standards in Internet obscenity cases); *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005) (ruling federal obscenity laws unconstitutional), *rev'd*, 431 F.3d 150 (3d Cir. 2005) (finding binding Supreme Court precedent); *United States v. Stagliano*, 693 F. Supp. 2d 25 (D.D.C. 2010) (rejecting motion to dismiss Internet obscenity prosecution); *United States v. Harb*, No. 2:07-CR-426 TS, 2009 WL 499467, at *5 (D. Utah Feb. 27, 2009) (holding that the *Miller* standard and not the *Ashcroft* standard applies to sales of obscenity over the Internet); Rhett Pardon, *Plea Deal Reached in Torture Portal Obscenity Case*, XBIZ NEWSWIRE (July 13, 2010), <http://newswire.xbiz.com/view.php?id=122757> (reporting that a plea deal was reached in NJ federal court for the operator of TorturePortal.com who sent videos by mail to customers).

¹³⁸ *See Calvert, supra* note 9, at 64–68.

In 2003, federal prosecutors in Pittsburgh indicted two owners of Extreme Associates, a California-based content distributor.¹³⁹ Extreme Associates required that consumers seeking to access its website become members, and asked for a username, password, and credit card information, but the consumer's geographic location was not required.¹⁴⁰ A United States Postal Inspector¹⁴¹ registered an account and received content by mail and over the Internet in the Western District of Pennsylvania.¹⁴² The content in question included, among other things, the video *Forced Entry*, which simulated a violent rape.¹⁴³ The defendants pleaded guilty in 2009 and each received one year and one day in prison.¹⁴⁴ As part of the plea agreement the defendants forfeited their domain name. The company is now defunct.¹⁴⁵

Defendants Sami and Michael Harb of the Ohio-based company Movies by Mail were indicted in 2007¹⁴⁶ and tried for

¹³⁹ See *Extreme Assocs.*, 352 F. Supp. 2d at 584, 586–88, 593 (dismissing the indictment on the basis that federal obscenity statutes violated substantive due process rights of liberty and privacy (citing *Lawrence v. Texas*, 539 U.S. 558 (2003))) *rev'd*, 431 F.3d 150 (3d Cir. 2005) (finding binding Supreme Court precedent). See also Paula Reed Ward, *Obscenity Case Begs Question: Whose Standard? Extreme Associates Trial May be Catalyst for Change*, PITTSBURGH POST-GAZETTE, Jan. 25, 2009, at B1, available at <http://www.post-gazette.com/pg/09025/944328-52.stm>.

¹⁴⁰ *Extreme Associates*, 352 F. Supp. 2d at 581–82. The membership form referenced by the district court included a Pittsburgh address along with the credit card information. *Id.* at 583.

¹⁴¹ *Id.* at 582. The Postal Inspection Service is the law enforcement arm of the United States Postal Service. See *Mission*, U.S. POSTAL INSPECTION SERV., <https://postalinspectors.uspis.gov/aboutus/mission.aspx> (last visited Sep. 4, 2011).

¹⁴² *Id.* at 584–85. The indictment was based on violations of 18 U.S.C. §§ 1461, 1462, and 1465. *Id.*

¹⁴³ Randy Dotinga, *Legal Threats Stalk Adult Sites*, WIRED (June 15, 2004), <http://www.wired.com/politics/law/news/2004/06/63838>.

¹⁴⁴ Paula Reed Ward, *Porn Producer, Wife Get 1-year Jail Terms: Acrimonious Obscenity Case Took 7 Years*, PITTSBURGH POST-GAZETTE, July 2, 2009, at A1, available at <http://www.post-gazette.com/pg/09183/981250-53.stm>.

¹⁴⁵ Grant Gross, *Couple Gets Prison Time for Internet Obscenity: Extreme Associates Owners are both Sentenced to a Year in Prison*, IDG NEWS SERV. (July 3, 2009), http://www.techworld.com.au/article/309771/couple_gets_prison_time_internet_obscurity/.

¹⁴⁶ Press Release, U.S. Dep't of Justice, Federal Grand Jury in Salt Lake City Charges Cleveland Men with Obscenity Violations (June 28, 2007), available at http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html.

violations of federal obscenity laws in the District of Utah.¹⁴⁷ Undercover agents ordered DVDs produced by Max Hardcore and Extreme Associates from the Harbs' website and had the DVDs mailed to a Utah address.¹⁴⁸ The defendants each pleaded guilty to one count of selling obscene material and were sentenced to a year and a day in prison.¹⁴⁹

Loren Jay Adams was charged with the transportation of obscene materials in the federal district court in West Virginia.¹⁵⁰ Adams, based in Martinsburg, Indiana, was convicted in 2008¹⁵¹ and received thirty-three months in jail.¹⁵² The content at issue included bestiality and fisting videos.¹⁵³ Officers ordered the secondhand DVDs from Adams' website and received them via postal mail.¹⁵⁴ During the trial, Adams unsuccessfully attempted to offer Internet-based evidence to show the local community standards encompassed the work he had sold.¹⁵⁵

¹⁴⁷ United States v. Harb, No. 2:07-CR-426 TS, 2009 WL 499467, at *1 (D. Utah Feb. 27, 2009) (rejecting motion to dismiss and declining to transfer venue).

¹⁴⁸ Press Release, *supra* note 146. The indictment indicated that the defendants had sent 683 packages to addresses in Utah in 2006, 149 of them to Salt Lake City addresses. *Id.*

¹⁴⁹ Stephen Hunt, *Ohio Men Sentenced for Mailing Porn Films to Utah*, SALT LAKE TRIBUNE (Nov. 19, 2009, 5:40 PM), <http://archive.sltrib.com/article.php?id=13826641&itype=NGPSID&keyword=&qtype=>.

¹⁵⁰ United States v. Adams, 337 F. App'x 336, 336, 338, 340 (4th Cir. 2009) (affirming the ruling of the district court).

¹⁵¹ Press Release, U.S. Dep't of Justice, Indiana Man Convicted of Obscenity Violations by Federal Jury in West Virginia (Oct. 1, 2008), *available at* <http://www.justice.gov/opa/pr/2008/October/08-crm-875.html>.

¹⁵² *Adams*, 337 F. App'x at 338, 340.

¹⁵³ *Id.* at 338. The films included *Doggie3Some*, *Anal Doggie and Horse*, and *Fisting I*. *Id.*

¹⁵⁴ *Every Dog Has Its Day in Court: Bestiality, Fisting Videos Seized in FBI Obscenity Bust*, AVN INDUS. NEWS (July 2008), <http://www.mydigitalpublication.com/publication/index.php?i=4724&m=&l=&p=92&pre=&ver=swf>.

¹⁵⁵ Adams attempted to call a computer systems administrator to testify that by typing in the words "bestiality" and "fisting" into Internet search engines, he found thousands of results available in and around Martinsburg, West Virginia. Adams argued that the presence of this material indicated acceptance of this type of content by the community, thereby satisfying the local community standards. The Fourth Circuit affirmed the district court's rejection of this argument on the basis that "availability/accessibility of content . . . does not equal acceptance of that content." Clay Calvert, Wendy Brunner, Karla Kennedy & Kara Murree, *Judicial Erosion of Protection for Defendants in Obscenity Prosecutions?: When Courts Say, Literally, Enough is Enough and When*

Occasionally, prosecutors have brought suits in multiple districts in order to secure indictments. For example, in 2010, prosecutors in New Jersey reached a plea deal with Florida-based¹⁵⁶ operator of tortureportal.com, Barry Goldman, following an indictment for obscenity charges in federal court in New Jersey.¹⁵⁷ A previous indictment against Goldman was dropped in Montana.¹⁵⁸ Goldman's videos, which included *Torture of a Porn Store Girl*, were distributed via the postal mail from Goldman's website.¹⁵⁹ Goldman received three years probation.¹⁶⁰

One of the key issues that has arisen in the legal challenges arising from these prosecutions concerns whether a national standard is necessary for Internet-based obscenity prosecutions, and whether such a standard is mandated by the *Ashcroft* case.¹⁶¹ These particular questions were addressed in obscenity cases in 2009 and 2010 by the Ninth and Eleventh Circuits, and the District Court for the District of Columbia.¹⁶²

The Ninth Circuit addressed the community standards issue in a case arising from an e-mail spamming operation.¹⁶³ Jeffrey

Internet Availability Does Not Mean Acceptance, 1 HARV. J. SPORTS & ENT. L. 7, 32 (2010). Other defense attorneys have attempted to make similar arguments in other obscenity cases. For example, in a Pensacola, Florida case that settled out of court, a defense lawyer planned to use Google Trends to show "orgy" was searched for more frequently than "apple pie." *Id.* at 31. If the correct technology is used with local data including numbers of Internet users, defense attorneys argue, this should demonstrate community acceptance of Internet content. *See id.* at 32–33. *See generally* Shannon Creasy, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's "Contemporary Community Standards,"* 26 GA. ST. U. L. REV. 1029 (2010).

¹⁵⁶ Press Release, U.S. Dep't of Justice, Federal Grand Jury Charges Florida Man with Obscenity Violations (Sept. 16, 2008), available at <http://www.justice.gov/opa/pr/2008/September/08-crm-822.html>.

¹⁵⁷ Rhett Pardon, *Plea Deal Reached in Torture Portal Obscenity Case*, XBIZ NEWSWIRE (July 13, 2010, 2:30 PM), <http://newswire.xbiz.com/view.php?id=122757>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Rhett Pardon, *3 Years Probation for Torture Porn Operator*, XBIZ NEWSWIRE, (Mar. 11, 2011, 10:15 AM) <http://newswire.xbiz.com/view.php?id=131568>.

¹⁶¹ Matthew Dawson, Comment, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of "Local Community Standards" Online*, 60 CATH. U.L. REV. 719, 724 (2011).

¹⁶² *Id.* at 725.

¹⁶³ *United States v. Kilbride*, 584 F.3d 1240, 1240 (9th Cir. 2009).

Kilbride and James Schaffer were charged in federal district court in Arizona¹⁶⁴ with fraud, conspiracy to commit money laundering, and interstate transportation of obscene materials.¹⁶⁵ The obscenity charges arose from two sexually explicit images that appeared within the defendants' e-mails.¹⁶⁶ The government introduced the testimony of witnesses who had complained to the FTC about the defendant's emails, including their reactions to the pornographic images, as well as the text of complaints made to the FTC.¹⁶⁷ The defendants were convicted and each received a prison term of over five years.¹⁶⁸

A three-judge panel of the Ninth Circuit heard the appeal.¹⁶⁹ The defendants challenged the trial judge's jury instruction, which instructed the jury to determine obscenity using "contemporary community standards" but did not provide the precise geographic area of the "community."¹⁷⁰ The appellate court considered the defendants' argument that the jury instruction was incorrect in the context of e-mail, a medium they argued requires a national standard.¹⁷¹ The argument was that distribution via e-mail unavoidably subjects the work to the least tolerant community in the country, burdening First Amendment protected speech.¹⁷² The argument further contends that this speech is distinguishable from *Hamling* and *Sable* because there is no means to control where geographically the message will be received.¹⁷³

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1244.

¹⁶⁶ *Id.* The obscenity charges in the *Kilbride* prosecution were not primarily a result of the Justice Department targeting obscenity as with the other cases discussed in this section. Rather, the obscenity charges arose in the context of criminal charges stemming from e-mail spamming crimes. *Id.*

¹⁶⁷ *Id.* at 1245.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1244.

¹⁷⁰ *Id.* at 1247 (citing *Hamling v. United States*, 418 U.S. 87, 105 (1974)).

¹⁷¹ *Id.* The defendants alternatively argued that the jury instruction was invalid because it allowed the jury to consider standards other than those from their local community, but this was rejected as *Hamling* specifically allowed the use of a community standard without reference to a precise geographic definition. *Id.* at 1247–48.

¹⁷² *Id.* at 1250.

¹⁷³ *Id.* at 1251.

Writing for the court, Judge Betty Fletcher identified that in *Reno v. ACLU*, “one of among several issues of facial overbreadth in the CDA” concerned the use of community standards as applied to the Internet, but that the *Reno* decision did not conclude that the use of local community standards by itself would render a statute facially overbroad.¹⁷⁴ Ultimately, Judge Fletcher decided that *Ashcroft v. ACLU* was more applicable to the defendant’s argument.¹⁷⁵ Judge Fletcher noted that the “divergent reasoning” of the justices in *Ashcroft* failed to provide an “explicit holding,” but she was “able to derive guidance from the areas of agreement in the various opinions” by viewing the holding as the position taken by the members concurring on the narrowest grounds.¹⁷⁶

According to Judge Fletcher, Justice Thomas’ opinion held that either the application of a local or national community standard would pose no constitutional concern by itself.¹⁷⁷ “Justice O’Connor and Justice Breyer held more narrowly that while application of a national community standard would not or may not create constitutional concern, application of local community standards likely would.”¹⁷⁸ Thus, according to Judge Fletcher, these two justices agreed with a limited aspect of Justice Thomas’ holding, “that the variance inherent in application of a national community standard would likely not pose constitutional concerns by itself,” without holding local community standards “similarly unproblematic.”¹⁷⁹ In this narrower holding addressing the lack of constitutional concern of a national community standard, according to Fletcher, O’Connor and Breyer were joined by justices Kennedy, Souter, Ginsburg and Stevens. Ultimately, Judge Fletcher determined that these six justices, five of whom concurred in the judgment, “viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns.”¹⁸⁰

¹⁷⁴ *Id.* at 1251–52.

¹⁷⁵ *Id.* at 1252.

¹⁷⁶ *Id.* at 1253–54 (citing *Marks v. United States*, 430 U.S. 188 (1977)).

¹⁷⁷ *Id.* at 1254.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* Judge Fletcher recognized that Kennedy and Stevens identified problems with the national standard, including that a national standard will not produce actual

Judge Fletcher went on to state that, as applied to obscenity statutes 18 U.S.C. §§ 1462 and 1465, the application of local standards “generate[s] grave constitutional doubts as to the use of such standards.”¹⁸¹ Therefore, according to Judge Fletcher, the district court should have applied a national standard.¹⁸² Despite this finding, Judge Fletcher did not reverse the conviction, finding no plain error.¹⁸³ Instead, Judge Fletcher found the law in this area is highly unsettled and held that the jury instruction did not amount to reversible error.¹⁸⁴

Similar issues arose in the *Little* case.¹⁸⁵ In 2008, Paul Little and Max World Entertainment, Inc. were convicted of distribution of obscene materials.¹⁸⁶ California-based Little, who went by the name Max Hardcore, was responsible for videos in which female actors drank urine, vomited, and used medical and dental devices in sex acts.¹⁸⁷ Department of Justice agents captured and copied five trailers found on the company’s website, which were representative of the videos the website was offering for sale.¹⁸⁸ In addition, Postal Inspectors used a Tampa shipping address to order five DVDs from the company’s website, which were sent via postal mail.¹⁸⁹ The defendants were convicted on all ten counts of violation of federal obscenity statutes.¹⁹⁰ Little was sentenced to a

uniformity as applications will vary based on juror’s own local understanding. She noted that the *Kilbride* holding does not preclude a future challenge to national standards. *Id.* at 1254 n.8.

¹⁸¹ *Id.* at 1254.

¹⁸² *Id.* at 1250.

¹⁸³ *Id.* at 1255. The conviction was affirmed with a remand for a clerical correction for misdemeanor charges that were miswritten as felonies. *Id.* at 1245–46.

¹⁸⁴ *Id.* at 1255.

¹⁸⁵ *United States v. Little*, 365 F. App’x 159, 162–64 (11th Cir. 2010).

¹⁸⁶ *Id.* at 160 (affirming the ruling of the district court).

¹⁸⁷ Ben Montgomery, *To the Jury, obscene; to him, a day’s work*, ST. PETERSBURG TIMES (June 8, 2008), <http://www.tampabay.com/news/courts/criminal/article611988>.
ece.

¹⁸⁸ *Little*, 365 F. App’x at 161.

¹⁸⁹ *Id.* The trailers formed the basis for the five counts under 18 U.S.C. § 1465, transportation of obscenity via interstate commerce or interactive computer service affecting such commerce. *Id.* No information was required from the website user before in order to access the trailers. *See id.* The DVDs formed the basis of the five counts under 18 U.S.C. § 1461, distribution of obscenity via postal mail. *Id.*

¹⁹⁰ *Id.*

forty-six month prison term and fines.¹⁹¹ Little's website was forfeited.¹⁹²

In the appeal following the conviction, the appellants challenged the use of local standards in an Internet-based obscenity case.¹⁹³ They argued that the district court should have applied a national or Internet community standard as opposed to the local community standard of the Middle District of Florida.¹⁹⁴ They contended that the use of local standards infringed on their First Amendment rights because the Internet publisher can be judged according to the strictest community standards in the nation, even if no specific speech was targeted at those communities.¹⁹⁵ Appellants distinguished themselves from the appellant in *Miller* because they “did not direct their Internet publication at any one area.”¹⁹⁶ The appellants relied heavily on *Ashcroft* and *Kilbride*.¹⁹⁷ The foundation of the appellants' argument was the proposition that the “transmission of materials over the Internet is inherently different than traditional, concrete, real world conveyance of materials.”¹⁹⁸

Unconvinced, the court affirmed the conviction, declining “to follow the reasoning of *Kilbride*.”¹⁹⁹ The court found that the portions of *Ashcroft* dictating a national community standard were “dicta, not the ruling of the court.”²⁰⁰ The court cited Justice O'Connor's concurring opinion in *Ashcroft*—“I write separately to express my views on the constitutionality and desirability of

¹⁹¹ *Id.* Little received a \$7,500 fine and a \$1,000 special assessment. Max World Entertainment, Inc. received thirty-three months probation and a \$75,000 fine. *Id.*

¹⁹² Mark Kernes, *Judge Finds Max Hardcore Guilty on All Counts in Obscenity Trial*, AVN INDUS. NEWS (June 6, 2008, 8:58 AM), <http://www.defendourporn.org/?p=29>.

¹⁹³ *Little*, 365 F. App'x at 163–64.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 163.

¹⁹⁶ *Id.* The court pointed out that *Miller* was meant to protect geographically distinct parts of the country from each other's tastes, but “*Miller* could not envision the amorphous and viral nature of the Internet.” *Id.* at 163 n.9.

¹⁹⁷ *Id.* at 164.

¹⁹⁸ *Id.* at 163.

¹⁹⁹ *Id.* at 164.

²⁰⁰ *Id.*

adopting a national standard”²⁰¹—as well as Justice Kennedy’s concurring opinion—“[W]e need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order.”²⁰² Therefore, the appellate court held that the district court did not err in using the “average person of the community as a whole” standard of the Middle District of Florida.²⁰³

Similar issues arose in a case originating in the District of Columbia.²⁰⁴ John Stagliano and his California-based production company, Evil Angel Productions, were indicted in 2008²⁰⁵ in Washington, D.C., for distribution of obscene materials.²⁰⁶ FBI agents downloaded a free trailer on the website and placed an order for two DVDs by mail by mailing a form printed from the defendant’s website.²⁰⁷ In the course of the case, the district court for the District of Columbia considered a motion to dismiss the indictment for trafficking in obscenity because the community standards requirement rendered the statute overbroad.²⁰⁸ The defendants argued that “the ‘community standards’ test, [suppresses] more speech than is constitutionally permissible when

²⁰¹ *Id.* at 164 n.10 (citing *Ashcroft v. ACLU*, 535 U.S. 564, 586 (2002) (O’Connor, J., concurring) (emphasis omitted)).

²⁰² *Id.* (citing *Ashcroft* 535 U.S. at 586 (Kennedy, J., concurring)).

²⁰³ *Id.* at 164.

²⁰⁴ *United States v. Stagliano*, 93 F. Supp. 2d 25, 27 (D.C. Cir. 2010) (denying motion to dismiss).

²⁰⁵ Richard Abowitz, *Vegas Producer Stagliano Charged with Obscenity*, LA TIMES BLOG (Apr. 9, 2008, 10:34 AM), <http://vegashblog.latimes.com/vegas/2008/04/former-vegas-pr.html>. In regard to the mailed DVDs, the defendants were charged with knowingly transporting obscene materials in interstate commerce in violation of 18 U.S.C. § 1465 and knowingly using an express company or common carrier to ship the films in violation of 18 U.S.C. § 1462. *Stagliano*, 93 F. Supp. 2d at 28. In regard to the website trailer, the defendants were charged with knowingly using an interstate computer service to distribute obscene material in interstate commerce in violation of 18 U.S.C. § 1465 and knowingly using an interstate computer service to display an obscene image in a manner available to a person under eighteen in violation of 47 U.S.C. § 223(d). *Id.* In addition, they were charged with intent to distribute obscene material in interstate commerce while engaged in the business of selling obscene material in violation of 18 U.S.C. § 1466. *Id.*

²⁰⁶ *Stagliano*, 93 F. Supp. 2d at 27.

²⁰⁷ *Id.* at 28–29. The trailer was entitled *Fetish Fantasies Chapter 5*. The DVDs were entitled *Milk Nymphs* and *Storm Squirters 2: Target Practice*. *Id.*

²⁰⁸ *Id.* at 27–29.

applied to the Internet. Because Internet publishers, unlike those who use mail or telephone, cannot limit the geographic reach of the materials they post on the Internet.”²⁰⁹

The district court determined that while *Ashcroft* voiced concerns over the community standards requirements, “those concerns hardly suffice to render the more narrow obscenity statutes unconstitutional as applied to the Internet.”²¹⁰ The court continued that if “incorporation of community standards did not *by itself* render [COPA] substantially overbroad,” then it certainly could not be true for the obscenity statutes, which are more limited in scope.²¹¹ Judge Leon expressed the argument as follows:

[T]o the extent that the obscenity statutes are overbroad at all . . . it stands to reason that the potential scope of that overbreadth is less extensive than the overbreadth resulting from COPA. After all, COPA threatened greater overbreath because it regulated far more than obscenity—it regulated “material that is harmful to minors.”²¹²

Obscenity statutes, which exempt material with literary, artistic, political or scientific value and contain the requirement that the material appeal to the “prurient interest” or be “patently offensive,” are more limited than COPA.²¹³ Therefore, Judge Leon could not invalidate the obscenity statutes when the Supreme Court was unwilling to invalidate COPA in the absence of substantial overbreadth.²¹⁴ In addition, because the value of obscene speech is so low, any burden imposed upon it by an overbroad statute would be minimal, further weakening the argument for the invalidation of obscenity statutes.²¹⁵

²⁰⁹ *Id.* at 30–31.

²¹⁰ *Id.* at 31.

²¹¹ *Id.* at 32.

²¹² *Id.*

²¹³ *Id.* at 33.

²¹⁴ *Id.*

²¹⁵ *Id.* at 33 n.9. The defendants also argued the overbreath of the obscenity statutes was aggravated on the Internet by the requirement that the obscene material be evaluated as a whole, raising the difficulty of assessing pictures and images in the context of the websites on which they are found. *Id.* at 33–34. The court was satisfied that limiting

Judge Leon also disagreed with the *Kilbride* court's reading of *Ashcroft*.²¹⁶ Judge Leon did not find that five justices supported the application of a national standard.²¹⁷ Rather, Judge Leon began with the premise that "[e]ight justices concurred in the judgment that the use of community standards did not 'by itself' render the statute substantially overbroad."²¹⁸ Among the eight, Leon continued, Thomas, Rehnquist and Scalia upheld the local standard "based on their belief that COPA was sufficiently narrow in its application."²¹⁹ Four justices—O'Connor, Kennedy, Souter, and Ginsburg—were willing to approve variations in community standards "based on the amount of speech covered and the degree of variance among communities."²²⁰ However, Judge Leon did not find a fifth justice to support this position because Justice Breyer determined that a national standard should apply.²²¹ Unlike the other justices, in Judge Leon's interpretation, Breyer did not concur with Justice O'Connor's opinion not because the plaintiffs failed to offer proof, but because he believed, based on congressional intent, that the statute called for a national standard.²²² Unlike his colleagues, Justice Breyer did not find that local community standards might be constitutional.²²³ Thus Breyer's reasoning differed from the other justices and Judge Leon did not find it controlling and the defendants' motions to dismiss were rejected.²²⁴

The differences between the Ninth Circuit in *Kilbride*, the Eleventh Circuit in *Little*, and the District Court for the District of Columbia in *Stagliano* have led some scholars to call for Supreme

instructions could be used to avoid this problem and ensure that works are judged as a whole on the Internet. *Id.* at 34.

²¹⁶ *Id.* at 33 n.8.

²¹⁷ *See id.*

²¹⁸ *Id.* (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2003)).

²¹⁹ *Stagliano*, 93 F. Supp. 2d at 32 n.8.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* All charges were dropped in 2010 due to serious inconsistencies in the government testimony. *See* Richard Abowitz, *The Stagliano Victory Party: Field Notes from the Justice Department's Obscene Case against the Adult Film Industry*, REASON (July 19, 2010), <http://reason.com/archives/2010/07/19/the-stagliano-victory-party>.

Court resolution.²²⁵ Clay Calvert, for example, welcomed the *Kilbride* court's implication that a national standard would be more permissive of sexual expression than that of the least tolerant community in the nation.²²⁶ However, Calvert pointed out, a national standard could also be difficult for jurors to apply because they may not have an awareness of what comprises the national standard.²²⁷

Calvert found that the division between the Eleventh and Ninth Circuits, and ensuing disagreement among prominent scholars could provide an opportunity for the Supreme Court to "revisit the *Miller* test generally."²²⁸ In the meantime, federal prosecutors will likely continue their aggressive prosecution campaign in conservative jurisdictions, but stay away from bringing cases in the Ninth Circuit.²²⁹

Similarly, Sarah Kagan welcomed the *Kilbride* decision, arguing that "the application of local community standards to the Internet, an amorphous, virtual community that transcends lines drawn on maps, is inappropriate."²³⁰ The use of the local standard fails to provide notice, allows for forum shopping, and chills speech.²³¹

In contrast, another scholar, Orin Kerr disagreed with the Ninth Circuit's interpretation of *Ashcroft*.²³² According to Kerr: "[C]oncerns are not positions. You can't count the number of Justices who had a particular thought and then say that the thought is somehow binding on the lower courts."²³³ In addition, Kerr pointed out that *Miller* still directly controls despite the *Ashcroft*

²²⁵ Calvert, *supra* note 9, at 80–84.

²²⁶ *Id.* at 80.

²²⁷ *Id.* at 85.

²²⁸ *Id.* at 84–85.

²²⁹ *Id.* at 85.

²³⁰ Sarah Kagan, Note, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 HASTINGS CONST. L.Q. 233, 257 (2010).

²³¹ *Id.* at 251.

²³² Orin Kerr, *Ninth Circuit Adopts National Standard for Internet Obscenity*, VOLOKH CONSPIRACY BLOG (Oct. 29, 2009), <http://volokh.com/2009/10/29/ninth-circuit-adopts-national-standard-for-internet-obscenity/>.

²³³ *Id.*

ruling, and that *Miller* must be followed by the lower courts until the Supreme Court indicates otherwise.²³⁴

II. CRITICISM AND PRAISE FOR COMMUNITY STANDARDS

The courts represent one subset of the legal community divided over the application of obscenity law in the Internet context. Scholars are also divided about what standards should be applied in online obscenity cases. A subset of these scholars has defended the use of a local standard in obscenity prosecutions.²³⁵ Others have argued that the local standard is untenable.²³⁶ In the wake of *Lawrence v. Texas*²³⁷ some scholars have questioned whether obscenity law should exist at all.²³⁸ This section identifies three sets of policy arguments. The first set is critical of obscenity law, the community standards approach, and local standards. The second set supports prosecutions of obscenity under the community standards approach, including the use of local standards. The third set of arguments develops the theory that a rule requiring either local or national standards will not make a meaningful difference and the only way to achieve change in

²³⁴ *Id.*

²³⁵ See Timothy S.T. Bass, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471, 472 (1996); Fee, *supra* note 19, at 1692.

²³⁶ See Dr. Yuval Karniel & Haim Wismonskey, *Pornography, Community and the Internet—Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMP. & TECH. L.J. 105, 129 (2004); Kim & Paddon, *supra* note 68, at 66. Both articles argue for a national standard based on the nation's community of Internet users.

²³⁷ 539 U.S. 558 (2003) (invalidating conviction interfering with the sexual privacy of consenting adults).

²³⁸ See Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1678–79 (2005) (noting that moral harm should not be the basis of censorship of obscenity and modern obscenity prosecutions tend to be arbitrary in nature); Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 26–27 (2005) (finding that modern technology has limited the harms obscenity has posed to society and *Lawrence* held morality cannot justify legislation); see also Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1425 (2008) (noting that obscenity doctrine has produced a discriminatory effect against gays and lesbians). Jeffrey Rosen has argued that with the rise of hard-core pornography as a large industry, it has become impossible to develop social consensus about what constitutes obscenity in any community. See Jeffrey Rosen, *The End of Obscenity*, 6 NEW ATLANTIS 75, 80 (2004), available at <http://www.thenewatlantis.com/publications/the-end-of-obscenity>.

obscenity law is to change the community standards approach altogether.

A. *Obscenity's Troubling Elements*

Arguments against the community standards test and the use of a local standard, emphasize due process, vagueness, and overbreadth concerns. The due process problem occurs when individuals in certain communities want to purchase content and producers and distributors are willing to sell it to them. Under the community standards approach, producers and distributors may be subject to criminal penalties solely because of where the buyer lives, even if the buyer himself voluntarily and knowingly purchased the material.²³⁹ In this fact pattern, the state (or more specifically the local community), is making moral choices for an individual. The Supreme Court, in cases like *Lawrence*, has disapproved of this type of state-influenced moral decision-making.²⁴⁰ Nevertheless, the Third Circuit rejected a due process challenge to the obscenity statutes on exactly this basis in the *Extreme Associates* case.²⁴¹ The due process criticism of community standards is not unique to the Internet in particular, and would be valid for any medium through which obscenity is distributed.²⁴²

In addition, there is a vagueness problem associated with the community standards test. Producers might not know how to comply with obscenity law—how to create pornography without

²³⁹ See *Hamling v. United States*, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting) (“National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander.”).

²⁴⁰ See *Lawrence v. Texas*, 539 U.S. at 585 (holding that “a law branding one class of persons as criminal based solely on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause under any standard of review.”).

²⁴¹ See *United States v. Extreme Assocs.*, 431 F.3d 150, 151–54 (3d Cir. 2005) (rejecting the principle that after *Lawrence* “the government can no longer rely on the advancement of a moral code” as a compelling state interest inconsistent with Supreme Court holdings on obscenity).

²⁴² See *Hamling*, 418 U.S. at 144 (1974) (Brennan, J., dissenting) (Brennan’s *Hamling* dissent concerned obscenity distributed via the postal mail, but raised concerns about punishing the producer simply because of where his products could possibly travel).

facing criminal prosecution.²⁴³ Trends in what is prosecuted have altered over time. For instance, the current focus of the Justice Department is on extreme sexual acts, but in the 1980s many prosecutions were focused on more traditional pornography.²⁴⁴ By the early 1980s, most state prosecutors had ceased prosecuting “the most common types of hard-core pornography.”²⁴⁵ When the targets of what is obscene change over time, there is no way to know what to produce and what not to produce. This is again not a new problem unique to the Internet era, but rather has been a longstanding criticism of *Miller*.²⁴⁶

The third criticism of the community standards approach is the issue of overbreadth and the potential chilling effect on protected speech. There is no clear method by which distributors can anticipate which communities to avoid.²⁴⁷ Like the vagueness and due process critiques, the overbreadth problem is not necessarily unique to the Internet but it may be exacerbated by it. The Internet has made much more content available and freely accessible. The Internet allows for the widespread dispersal of information to all communities in the United States, without regard for location. If producers must cater to the limitations imposed by the most conservative communities that will limit speech and likely render obscenity laws overbroad in the context of the Internet.

B. Defending the Prosecution of Internet Obscenity

There are also arguments in support of the community standards approach and the use of local standards in the Internet

²⁴³ Justice Douglas dissented in *Miller* and argued that an administrative censor reviewing work prior to publication would be better than the community standards approach; at least then “the publisher would know when he was on dangerous ground” and could decide to defy the censor or not. *Miller v. California*, 413 U.S. 15, 41 (1973) (Douglas, J., dissenting). The *Miller* approach creates “ex post facto law.” *Id.*

²⁴⁴ For instance, the material at issue in *Bagnell* consisted of “oral, anal, and genital copulation” among heterosexual and homosexual actors. *United States v. Bagnell*, 679 F.2d 826, 837 (11th Cir. 1982). *Hamling* involved group intercourse, oral sex, and masturbatory acts. *Hamling v. United States*, 418 U.S. 87, 92–93 (1974).

²⁴⁵ Fee, *supra* note 19, at 1695–96.

²⁴⁶ See *Miller*, 413 U.S. at 41 (Douglas, J., dissenting) (Douglas’ dissent in *Miller* concerned obscenity distributed via the postal mail, but addressed concerns about not knowing what material produced could be considered obscene).

²⁴⁷ Fee, *supra* note 19, at 1715.

context.²⁴⁸ Local standards may be considered necessary to protect conservative communities from the most intense pornography on the Internet, including bestiality,²⁴⁹ pissing and vomiting scenarios,²⁵⁰ and simulated rape.²⁵¹ To the extent *Miller* and the community standards approach provide a justification for prosecuting this material, there is an increased rationale to do so as the Internet allows this extreme material to reach intolerant communities quickly and easily.²⁵²

Keeping obscenity removed from easily accessible parts of the Internet helps achieve a goal of *Miller*—namely, allowing communities to decide what content to make available. In *Paris Adult Theatre*, the Court expressed concerns over “decency,” “quality of life,” and the “tone of commerce” when discussing the regulation of adult movie theatres.²⁵³ Some consider obscenity to have so little value and contribute so little to society, that banning it preserves the “social interest in order and morality.”²⁵⁴ Using local community standards on the Internet, and doing so by holding the entire country to the standard of its most conservative communities, may in fact safeguard the communities most threatened by extreme material.

Critics of community standards and of the local standard in particular often label prosecutorial practices in regard to obscenity on the Internet “forum shopping.”²⁵⁵ These prosecutions, however, may be considered positive, as they respect “the autonomy of those communities where obscenity is unlikely to be tolerated.”²⁵⁶ The result of these prosecutions may ultimately limit the production of certain kinds of extreme content altogether or force pornography

²⁴⁸ See generally Bass, *supra* note 236.

²⁴⁹ See *United States v. Adams*, 337 F. App'x 336, 338 (4th Cir. 2009).

²⁵⁰ See *Montgomery*, *supra* note 188.

²⁵¹ See *Dotinga*, *supra* note 143.

²⁵² See *id.* (“Extreme material is especially popular on the internet.”).

²⁵³ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973).

²⁵⁴ Fee, *supra* note 19, at 1719 (citing *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372, 2381 (2007)).

²⁵⁵ *Dotinga*, *supra* note 143 (“[F]ederal prosecutors decided to pursue the case in Pittsburgh because they think it’s more likely to cough up conservative jurors.”).

²⁵⁶ Fee, *supra* note 19, at 1716–17.

producers to be selective, to the extent possible with the Internet, in where they distribute content.

This kind of a chilling effect on production is not a new development in the pornography industry. For instance, the cable pay-per-view pornography industry tailors content to hotels in different areas of the country.²⁵⁷ Producers may also simply decide not to ship content to certain areas of the country.²⁵⁸ For example, most adult companies will not ship content to Utah.²⁵⁹ It is true, however, that the Internet is different than cable television. In its current technological form content cannot be directed to particular localities and not others.²⁶⁰ But despite this general limitation, Internet distributors may be able to create limited content barriers based on geography through the development of more accurate limiting technology, including firewalls, to geographically restrict user access.²⁶¹ This process would allow producers of obscene material to control the areas into which they distribute and thereby ensure its legality.

C. *Questioning Distinctions Between Local and National Standards*

The third set of arguments focuses on whether a national or a local standard would make a meaningful difference in obscenity prosecutions. Some have argued that there is no meaningful distinction between the local and national standards in reducing obscenity laws' chilling effect on free speech, because speakers on national networks "will still be unable to predict how every jury in every community will view the 'national' decency standard."²⁶² In

²⁵⁷ Calvert, *supra* note 9, at 71–72.

²⁵⁸ *Id.* at 70.

²⁵⁹ *Id.*

²⁶⁰ See Ashcroft v. ACLU, 535 U.S. 564, 569–70 (2002).

²⁶¹ *Frequently Asked Questions*, HULU.COM, http://www.hulu.com/about/media_faq (last visited Apr. 9, 2011); *Frequently Asked Questions*, NETFLIX.COM https://www.netflix.com/Help?faqtrkid=4&p_search_text=abroad&srch=Search (last visited Apr. 9, 2011) (“Q: Can I watch instantly outside the United States? A: We currently have the rights to distribute streaming content within the United States and Canada. This means you may only watch instantly on your compatible computer or Netflix-ready device within the 50 U.S. states, the District of Columbia and Canada.”).

²⁶² See Sergent, *supra* note 20, at 716 (arguing that obscenity should receive the same First Amendment protections as ordinary speech).

Ashcroft, Justice Thomas pointed out that even if a national standard existed, jurors would still reach inconsistent conclusions.²⁶³ Justice O'Connor similarly expressed the concern that even with a national standard, jurors would still “inevitably base their assessments to some extent on the experience of their local communities.”²⁶⁴ Thus, even with a national standard, prosecutors would still be able to forum shop and bring cases in those jurisdictions with less tolerant communities.

While the standard currently in place is termed the local standard, in actuality the standard used by courts varies from case to case. However, the variety in the kinds of standards used has not resulted in different outcomes. To demonstrate this point, consider the various standards and instructions used by courts across the nation. In *Bagnell*, the jury was instructed to consider the standards of the “southern district of Florida, particularly Dade County.”²⁶⁵ In *Little*, the district court instructed the jury to consider the standards of the Middle District of Florida.²⁶⁶ In *Thomas*, the court applied the standards of the Western District of Tennessee.²⁶⁷ In *Miller*, the jury was instructed to evaluate the materials by the standards of the state of California.²⁶⁸ In other cases the community has not been geographically defined at all. In *Kilbride*, for example, the jury was instructed that the community was not to be defined by any particular geographic area and that they could consider evidence from outside the particular district of the trial.²⁶⁹ In *Hamling*, the jury was expressly instructed to consider a national standard—“the standard throughout this

²⁶³ *Ashcroft v. ACLU*, 535 U.S. 564, 567–77 (2002).

²⁶⁴ *Id.* at 589 (O'Connor, J., concurring).

²⁶⁵ *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982). The use of Dade County was acceptable despite it being a smaller area than the judicial district because *Miller* envisioned no precise geographic area when determining community standards. *Id.* at 835–36. The point was only to allow the juror to draw on the community from which he comes to assess the conclusion that the average person, applying community standards, would reach in a particular case. *Id.*

²⁶⁶ *United States v. Little*, 365 F. App'x 159, 163–64 (11th Cir. 2010).

²⁶⁷ *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996).

²⁶⁸ *Miller v. California*, 413 U.S. 15, 15 (1973).

²⁶⁹ *United States v. Kilbride*, 584 F.3d 1240, 1248 (9th Cir. 2009).

country concerning sex and matters pertaining to sex.”²⁷⁰ Each of these cases involved a similar fact pattern and each resulted in either guilty pleas or a conviction.²⁷¹ Given the consistency in results among the variety of standards currently in place, it is unclear why or how the results might differ if juries were always instructed to use a national standard.

On the other hand, it is also possible that a national standard could change outcomes, especially over time. If jurors are consistently introduced to one set of clearly defined community practices and standards, it is conceivable that this would lead to increased consistency across the nation in what is considered obscene and what is not.²⁷² If the practices of the national community being considered included residents of large urban centers as well as smaller rural towns—and everywhere in between, thereby forming a representative sample of the nation’s various viewpoints—one would expect consistency across jurisdictions.

A switch to a national standard would also likely enhance the ability of defense lawyers to raise comprehensive defenses to obscenity charges. Defense attorneys could introduce evidence that the materials are present in the community and demonstrate that the charged material does not in fact violate the community’s standards of obscenity. For example, in one non-Internet-based obscenity case from Utah, a defense lawyer introduced into evidence data on local residents’ use of cable and satellite pay-per-view television pornography in local hotels, resulting in a not guilty verdict.²⁷³ Under local standards, it is difficult for defense lawyers to show that the residents of a particular geographic

²⁷⁰ *Hamling v. United States*, 418 U.S. 87, 103 (1974). The *Miller* Court disapproved of this jury instruction but did not find it rendered the conviction void. *Miller*, 413 U.S. at 31.

²⁷¹ See *supra* Part I (discussing each of these cases in detail).

²⁷² See *Ashcroft v. ACLU*, 535 U.S. 564, 589 (2002) (O’Connor, J., concurring) (“the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the views of adults in other parts of the United States.”).

²⁷³ See Timothy Egan, *EROTICA INC.—A Special Report; Technology Sent Wall Street Into Market for Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1, available at <http://www.nytimes.com/2000/10/23/us/erotica-special-report-technology-sent-wall-street-into-market-for-pornography.html?src=pm>.

community use the Internet in a certain way, just as it is difficult for Internet producers to limit the distribution of their content to any particular geographic part of the country.²⁷⁴ A national standard would likely open the door to more evidence from around the nation, including the nationwide popularity of pornographic websites. Strengthening this defense may alleviate concerns defendants face about being tried anywhere in the country for obscenity. It is therefore critical to determine whether the adoption of a national standard would significantly change the community standards approach to resolve disputes over the application of obscenity law to the Internet.

III. OBSCENITY LAW LACKS A SIMPLE PATH FORWARD

Obscenity law is currently in a state of uncertainty. The *Ashcroft* decision does not mandate the use of a national standard in adult obscenity cases.²⁷⁵ The *Kilbride* court misinterpreted the divergent opinions in *Ashcroft*.²⁷⁶ The *Ashcroft* justices were clear that the holding was limited to obscene material aimed at children, and did not extend to obscenity aimed at adults.²⁷⁷ From a policy standpoint, the choice between a national and a local standard may not have a large impact on obscenity prosecutions, as prosecutors would still be able to bring charges against obscenity in districts across the nation even under a national standard.²⁷⁸ Nonetheless, critics of obscenity law make a strong case that the local community standards approach violates due process, and is vague and overbroad, especially when applied to the Internet.²⁷⁹ Ultimately, the only chance for real reform in this area requires reevaluating the entire community standards approach to obscenity, and either specifically defining obscene content or

²⁷⁴ See *Ashcroft*, 535 U.S. at 595 (Kennedy, J., concurring) (recognizing that identifying Internet usage by locality is more difficult than identifying local cable and satellite pay-per-view television usage which can be easily tracked to certain hotels or residential communities).

²⁷⁵ See generally *Ashcroft*, 535 U.S. at 564.

²⁷⁶ *United States v. Kilbride*, 584 F.3d 1240, 1252–54 (9th Cir. 2009).

²⁷⁷ See *Ashcroft*, 353 U.S. at 570, 578–79.

²⁷⁸ See *Sergent*, *supra* note 20, at 674–76.

²⁷⁹ See *Calvert*, *supra* note 9, at 85.

repealing obscenity laws altogether.²⁸⁰ Alternatively, there may also be technological solutions by which Internet content could be more purposefully directed at geographic areas within the United States.²⁸¹ Even without a technological solution, access to Internet sources can be limited in parts of the country through digital access applications and the distributions of some content through non-Internet mediums.²⁸² It is clear that more fundamental change is needed in this area of the law.

A. *Ashcroft's Limited Holding*

In the wake of the *Ashcroft* decision, the *Kilbride* court held that a national standard was necessary in adult Internet obscenity cases.²⁸³ However, *Ashcroft* does not require a national standard in adult Internet obscenity cases and the *Kilbride* case was wrongly decided. The *Kilbride* method of understanding the position of five justices in *Ashcroft* is flawed. Fundamentally, the overbreadth concerns set forth in *Ashcroft* concerning COPA do not apply to adult obscenity statutes, as COPA concerned a much larger scope of material. The justices in *Ashcroft* made clear that they were addressing the standard for material directed at minors under COPA, and did not extend the holding to standards for adult obscenity under federal obscenity statutes.

In the *Kilbride* case, Judge Fletcher looked for agreement among five concurring justices on the narrowest possible grounds.²⁸⁴ In her interpretation, the Thomas group held that there was no requirement to use either a local or a national standard.²⁸⁵ In addition, according to Fletcher, the O'Connor, Kennedy, Breyer and Stevens opinions each found significant problems with the use

²⁸⁰ For example, in Canada the courts have moved away from a community standards approach and have turned towards a definition of obscenity based on harm or significant risk of harm posed by the content, including harm to the functioning of society, the creation of anti-social behavior and the degradation of women. See Boyce, *supra* note 8, at 335–38. Scholars have also put forward arguments for abolishing obscenity laws altogether. See Koppelman *supra*, note 238, at 1636; Loewy, *supra* note 238, at 22.

²⁸¹ See Guernsey, *supra* note 23, at G1.

²⁸² See *Ashcroft*, 535 U.S. 564, 583 (2002).

²⁸³ *United States v. Kilbride*, 584 F.3d 1240, 1250 (9th Cir. 2009).

²⁸⁴ *Id.* at 1253–54.

²⁸⁵ *Id.* at 1252.

of local community standards for Internet obscenity or indecency, but not with the use of a national standard.²⁸⁶ Therefore, Fletcher concluded, five justices concurred in the use of a national standard—O'Connor, Kennedy, Souter, Ginsburg and Breyer.²⁸⁷

One key problem with Fletcher's approach is that the hesitations expressed by justices O'Connor, Kennedy, and Breyer regarding the use of the local standard are not part of the Court's holding but are, as the *Little* court asserted, dicta.²⁸⁸ Every hesitation a justice has about other possible scenarios is not a part of the holding and as Orin Kerr has pointed out, "concerns are not positions."²⁸⁹ Another problem with *Kilbride's* five-justice count is that, as the *Stagliano* court highlighted, the justices' opinions are very different from one another. The Thomas group held that COPA was not overbroad as applied to the Internet because it was never problematic for variations in local community standards to exist.²⁹⁰ O'Connor stressed that the use of local community standards in Internet cases could be problematic, but that there was not enough evidence to find it problematic based on what was before her.²⁹¹ Kennedy similarly did not believe that there was sufficient evidence before the court to reach a ruling on COPA's facial constitutionality, but identified possible problems with applying a community standards approach to the Internet.²⁹² Breyer concurred in the judgment, but for a different reason; Breyer believed COPA already called for a national standard.²⁹³ Therefore, his reasoning is unique to the law before him—COPA—and is not applicable to other laws that were not before the Court. Therefore, Judge Fletcher's assertion in *Kilbride* that five justices—Breyer, O'Connor, Kennedy, Souter, and

²⁸⁶ *Id.* at 1254.

²⁸⁷ *Id.*

²⁸⁸ *United States v. Little*, 365 F. App'x 159, 164 (11th Cir. 2010).

²⁸⁹ Kerr, *supra* note 233.

²⁹⁰ *See Ashcroft v. ACLU*, 535 U.S. 564, 583 (2002).

²⁹¹ *Id.* at 586–87 (O'Connor, J., concurring). O'Connor thought, for instance, that much of the possibly problematic material that the plaintiffs introduced would have literary, artistic, political or scientific value for minors and would thus be exempted. *Id.*

²⁹² *Id.* at 592–93 (Kennedy, J., concurring).

²⁹³ *Id.* at 589 (Breyer, J., concurring). Breyer also acknowledged problems with the use of a local standard. *Id.* at 590.

Ginsberg—take the same position in *Ashcroft* is incorrect.²⁹⁴ Only four justices take the position she asserts because she wrongfully included Breyer.

Ashcroft primarily concerned whether *COPA* was overbroad.²⁹⁵ The argument that *COPA* was overbroad rested on the premise that the law suppressed excessive adult material in proportion to the statute's legitimate scope.²⁹⁶ This disparity could be aggravated by the application of local community standards to the Internet, exacerbating variations in standards utilized across the nation.²⁹⁷ Because Internet content providers cannot control where they send their material, a fear of being prosecuted under the act would force them to cater to the most puritanical communities and could suppress speech; content could be forced behind age verification screens or off the Internet entirely.²⁹⁸ This would limit the speech of adults, and of minors, in more tolerant communities.²⁹⁹

The federal obscenity statutes, coupled with the application of community standards to the Internet, raise similar concerns.³⁰⁰ However, the obscenity statutes cover less material than *COPA*.³⁰¹ The scope of *COPA* extends to the communication or making available of harmful material to minors for commercial purposes.³⁰² The federal obscenity statutes are limited to hardcore pornography that satisfies the *Miller* test.³⁰³

²⁹⁴ United States v. Kilbride, 584 F.3d 1240, 1254 (2009).

²⁹⁵ See generally *Ashcroft*, 535 U.S. at 583.

²⁹⁶ See *id.* at 609–10 (Stevens, J., dissenting).

²⁹⁷ See *id.* at 593–96 (Kennedy, J., concurring).

²⁹⁸ See *id.* at 590 (Breyer, J., concurring); *Id.* at 605 (Stevens, J., dissenting).

²⁹⁹ See *id.* at 604, 611.

³⁰⁰ See Kagan, *supra* note 231, at 336–39.

³⁰¹ Compare 18 U.S.C. § 1462 (2006), with 47 U.S.C. § 231 (2006).

³⁰² See *Ashcroft*, 535 U.S. at 570. *COPA* defined material “harmful to minors” as any content that a jury could find exceeds community standards with respect to minors through its appeal to the “prurient interest” of minors, “in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast and lacks literary, artistic, political, or scientific value for minors.” See 47 U.S.C. § 231(e)(6).

³⁰³ See *Hamling v. United States*, 418 U.S. 87, 115 (1974) (“It is plain from the Court of Appeals’ description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller*.”); *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974) (overturning obscenity

If COPA was not held to be overbroad because of variations in community standards in *Ashcroft*, it stands to reason that the federal obscenity statutes would not be overbroad because they apply to less material.³⁰⁴ The *Stagliano* opinion expressed it best: “Surely I cannot do to the obscenity statutes what the Supreme Court was unwilling to do to COPA in the absence of *substantial* overbreadth.”³⁰⁵

It is clear from the opinions in the *Ashcroft* case that most of the justices were thinking of the federal obscenity statutes as a separate category from COPA. Justice Thomas indicated that he did not believe that the variations in community standards under COPA for the limited amount of material it covered—namely, obscene material directed at minors—would be greater than the variations under the federal obscenity statutes.³⁰⁶ The opinion postulated that if COPA was unconstitutional because of community standards, so would the obscenity statutes as “applied to the Web”³⁰⁷ and this would be in tension with *Reno*, where appellees conceded that the CDA applied to obscene speech.³⁰⁸ Similarly, Justice Kennedy voted to remand *Ashcroft* in part because of the absence of findings as to whether the variations in community standards under COPA would be any more severe than variations under the federal obscenity statutes.³⁰⁹ Justice Stevens dissented because COPA was unconstitutionally broad compared to traditional adult obscenity laws because it extended to images in commonplace advertisements and magazines that might be inappropriate for minors.³¹⁰

conviction for the film *Carnal Knowledge*). *Miller* “was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination[,]” which are inconsistent with a conviction based “on a defendant’s depiction of a woman with a bare midriff.” *Jenkins*, 418 U.S. 160–61.

³⁰⁴ See *Miller v. California*, 413 U.S. 15, 23–24 (1973).

³⁰⁵ *United States v. Stagliano*, 693 F. Supp. 2d 25, 33 (D.D.C. 2010).

³⁰⁶ See *Ashcroft*, 535 U.S. at 583–84.

³⁰⁷ See *id.* at 584.

³⁰⁸ See *id.*; *Reno v. ACLU*, 521 U.S. 844, 883 (1997).

³⁰⁹ See *Ashcroft*, 535 U.S. at 598–99 (Kennedy, J., concurring).

³¹⁰ See *id.* at 611–12 (Stevens, J., dissenting) (describing material, Justice Stevens stated, “[t]he kind of hard-core pornography involved in *Hamlings*, which I assume would be obscene under any community’s standard, does not belong on the Internet.”). It is

B. Possible Solutions

A national standard is not mandated by case law for obscenity aimed at adults, and it may be inappropriate from a policy perspective. There is considerable debate about whether using a local or national standard will result in meaningfully different outcomes. Therefore, it may be the case that the problems with obscenity law are inherent in the community standards approach itself rather than the varying definition of community standards.

There are strong criticisms of the community standards approach to obscenity.³¹¹ The vagueness and due process criticisms regarding obscenity on the Internet are in many ways similar to arguments regarding the enforcement of obscenity law with respect to previous mediums, including the postal mail in *Hamling* and telephone services in *Sable*. If that were the case, there would not be a need for a national community standard or a change in obscenity law because of the Internet, as the policy problems would not be substantially different than those encountered in obscenity law in pre-Internet times.

However, it may be that the lack of geographic boundaries and the accessibility of the vast array of content on the Internet have created a situation in which the number of communities that welcome obscene material dwarfs the number of unwelcoming communities. This has the potential to be an overbreadth problem of the kind addressed in *Reno*, where the CDA's attempt to protect minors by limiting adult speech was too restrictive.³¹²

This problem of varying tolerances in different communities could be solved if there was a perfect technological solution that allowed Internet providers to target specific communities. Internet Protocol (IP) addresses can be mapped to a geographic location to

important to note, however, that Justice O'Connor's opinion *did* apply to adult obscenity. *Id.* at 587 (O'Connor, J., concurring) ("The use of local community standards will cause problems . . . for adults as well as children in future cases Where adult speech is concerned, for instance, there may in fact be a greater degree of disagreement about what is patently offensive or appeals to the prurient interest?").

³¹¹ See *supra* part II.A (discussing criticisms of the obscenity doctrine).

³¹² *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

limit access to websites.³¹³ Many are familiar with such restrictions when they unsuccessfully try to access sites with limited copyright distribution rights, such as video streaming sites Hulu or Netflix, from foreign jurisdictions.³¹⁴ In recent years, courts have considered this technology too imprecise to limit access to certain jurisdictions or prohibitively expensive.³¹⁵ However, while it is not perfect, the technology has advanced over time and studies have demonstrated 85–98 percent accuracy in identifying the state associated with an IP address.³¹⁶ A sign of the increasing acceptance of geolocation technologies is a proposed federal Internet gambling law, mandating that gambling sites use these geo-location technologies.³¹⁷

While a perfect technological solution may be unavailable, imperfect solutions are already in place involving limitations on access.³¹⁸ These methods involve content producers and

³¹³ See Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot*, 11 COLUM SCI & TECH. L. REV. 41, 58 (2010).

³¹⁴ See *Frequently Asked Questions*, HULU.COM, *supra* note 261 (“Currently, Hulu is a U.S. service only. . . . To [service other regions] . . . , Hulu must clear the rights for each show or film in each specific geographic region, which will take time.”); see also *Frequently Asked Questions*, NETFLIX.COM, *supra* note 261 (last visited Apr. 9, 2011) (“We currently [only] have the rights to distribute streaming content within the United States and Canada . . .”).

³¹⁵ Boyce, *supra* note 8, at 347 (citing *ACLU v. Gonzalez*, 478 F. Supp. 2d 775, 820 n.13 (E.D. Pa. 2007) (considering COPA on remand from the Supreme Court)).

³¹⁶ See King, *supra* note 314, at 59 (exploring how geolocation technologies could be used to make Internet gambling regulation more responsive to longstanding federalism principles).

³¹⁷ *Id.* at 63 (providing that the proposed Internet Gambling Regulation, Consumer Protection, and Enforcement Act “would require gambling sites to use geolocation technologies to ensure that the individual placing a bet or wager is physically located in a jurisdiction that permits Internet gambling . . .”).

³¹⁸ The producers in *Thomas* required a membership application, including a home address, before content could be downloaded. *United States v. Thomas*, 74 F.3d 701, 705 (6th Cir. 1996). The producers in *Extreme Associates* required a membership form, which included credit card information, before content could be received by Internet or postal mail. *United States v. Extreme Assocs.*, 352 F. Supp. 2d 578, 581–82 (W.D. Pa. 2005). A credit card billing address is not synonymous with a home address, but billing addresses may correlate with where customers actually live. Billing addresses can be an imperfect substitute to provide distributors with information to identify the part of the country from which the recipient originates. This raises the possibility that a customer could lie about their geographic location. In such an instance, content producers might

distributors using the internet for teasers and trailers, and then mailing the full content.³¹⁹ Content producers and distributors can require users to provide a residential address or billing address as part of credit card information.³²⁰ This would allow the content providers to decide whether to send content, by mail, to jurisdictions where they may not wish to face an obscenity prosecution. Producers would be able to choose not to do business with a customer located within a certain community. This approach would not hinder the ability of adults in welcoming communities to easily access material, but would prevent at least the downloading or mailing of obscene content to less welcoming communities.³²¹ Such imperfect solutions serve a broader goal of *Miller* by ensuring that objectionable content is not available—or at least not readily available—in unwelcoming communities.

Ultimately, real reform in this area of the law will not be reached by tweaking whether community standards are defined as local or national in jury instructions. The very notion of varying communities making different decisions about content across the country creates a legal structure that is particularly ill-attuned to distribution mechanisms that at present are particularly insensitive to geography. Change will only come by more dramatic alterations to this area of the law. Such alterations may include

conceivably claim they took every reasonable step to ensure the material was being sent to a certain community and not another.

³¹⁹ In *Little and Stagliano* some content was online and openly accessible and some was shipped by mail. See *United States v. Little*, 365 F. App'x 159, 161 (11th Cir. 2010); *United States v. Stagliano*, 693 F. Supp. 2d 25, 28–29 (D.D.C. 2010).

³²⁰ See, e.g., *Thomas*, 74 F.3d at 705 (involving a membership application that required a home address); *Extreme Assocs.*, 352 F. Supp. 2d at 581–82 (involving a membership form that included credit card information).

³²¹ Forcing adults in tolerant communities to encounter paywalls and other screening devices may raise anonymity concerns of the kind discussed in *Ashcroft*. See *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004) (upholding the invalidation of COPA as not the least restrictive way for Congress to protect children on the Internet, considering the existence of filtering technologies). “Under a filtering regime, childless adults may gain access to speech they have a right to see without having to identify themselves or provide their credit card information.” *Id.* at 667. It is arguable whether the need for anonymity would be as compelling in a situation involving adults attempting to access adult obscenity as opposed to content that is unproblematic for adults but problematic for children. In addition, some of these screening devices may already exist on pornographic websites to ensure viewers are not minors.

abolishing the community standards approach to make obscenity a specifically defined crime with uniform definitions, or repealing laws aimed at obscenity directed at adults altogether.

CONCLUSION

Courts have long struggled with how to best apply the community standards approach to regulate obscene material. *Ashcroft* did not determine that a national community standard must be applied to instances of adult obscenity on the Internet. On the one hand, the logic of community standards suggests that as the Internet poses a greater danger to intolerant communities, more measures are justified to prevent that dissemination. However, a high burden is placed on Internet content providers and distributors, who cannot effectively limit distribution of their material to certain locations without functionally keeping it off the Internet altogether. Ultimately, asking a jury to apply a local or national standard may be immaterial when community standards allow every jurisdiction in the nation to make its own decision about whether a given piece of content is obscene. There may be a technological solution to improve the ability of the Internet to reach specific areas of the country, or non-technological solutions to reach the same result. In the end, more fundamental questions must be addressed about the validity of the very concept of the community standards rationale and the obscenity exception to the First Amendment. Until there is a solution, Internet-based obscenity distributors will continue to face prosecution in communities across the nation.