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Justice Harlan referred to it as "the intractable obscenity problem."[1] Since the Supreme Court began narrowing the scope of obscenity in 1957 and suggested that some portrayals of sex or nudity may be constitutionally protected notwithstanding their negative effects on some members of society,[2] it has struggled to identify the line between protected and non-protected pornography.[3] The problem, in a nutshell, has been to identify a definition of obscenity that preserves the power of government to regulate the worsr forms of pornography for public welfare, and yet does not deter speech of actual value to society.

Now, in the age of mass electronic communication, a new dimension to this problem appears. Whereas the Supreme Court has held that obscenity is defined by reference to "contemporary community standards," it is not clear whose community standard applies for purposes of Internet communication. Is it fair or necessary to hold a publisher on the World Wide Web to the most restrictive community standard in the nation? Or is it necessary for every community connected to the Web to lower its standards to those of the most tolerant locations? Does the Constitution require any particular geographic definition at all?

I argue here that it is constitutionally permissible to apply the traditional test for obscenity, the *Miller* standard, to the Internet, including its reference to "contemporary community standards," without any requirement for a more particular definition. The "contemporary community standards" part of the *Miller* test was not meant to impose geographically varying First Amendment rights for

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1. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J. dissenting).

2. *See* Roth v. United States, 354 U.S. 476, 485-87 (1957).

3. I use the term "pornography" to refer to sexually-themed works that are often considered immoral or corrupting to some people because of potential prurient appeal, but that do not necessarily satisfy the narrower definition of obscenity applicable today.

publishers, and the fact that this standard sometimes results in geographic variation is more incidental than it is a matter of constitutional principle. The community standards component of the *Miller* test exists to acknowledge the role of juries in making findings of fact on matters of imprecise judgment. Use of an undefined community standard is no more constitutionally problematic in an Internet obscenity case than in any other kind of obscenity case. It is analogous to applying a "reasonable person" test to a person's business dealings over the Internet: while it is possible that juries in different parts of the country could sometimes apply that phrase differently, it is not designed as a geographically varying standard, and requires no special geographic definition.

Moreover, if geographic variation in community standards is a matter of constitutional principle or right (and the law is not clear that it is), it only makes sense for it to be a right belonging to civic communities wishing to enforce their standards—not to individual publishers and distributors. Other key elements of the obscenity test are designed to protect individual rights and to ensure that obscenity law does not chill valuable speech in any community. The mere fact that some communities tolerate some types of obscenity that they *could* constitutionally prohibit does not give publishers in such locations a constitutional right (much less does it give them a right to impose such material on others outside of their community). Contrary to popular assumption, the Supreme Court has never held that publishers have a constitutional right to publish according to the standards of their own local vicinage. Nor has it held that publishers have a right to some kind of nationally averaged community standard. In fact, *Miller v. California* squarely rejected this idea, holding that "[i]t 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."[4]

The stakes of this dispute are high. If the Internet requires an exception to the current rules for adjudicating obscenity, and if that exception requires juries to discern the standards of some community other than their own through the use of expert evidence, it will significantly tip the scales in obscenity cases toward defendants. This would happen by changing the community standards inquiry from a

4. Miller v. California, 413 U.S. 15, 32 (1973).

simple question that a juror can answer based on observation with reasonable certainty (as the *Miller* test contemplates) to a sociological question which is likely to confuse the average juror. The ability of government to regulate obscenity effectively depends on the jury's role in judging certain elements of obscenity through experience, observation, and common sense rather than primarily through social scientists. For this reason, the Supreme Court has repeatedly rejected arguments that the First Amendment requires more specific community standards instructions, such as a national community standards instruction.[5] Those who claim that the use of undefined or local community standards to judge Internet pornography is constitutionally problematic are really launching an attack on *Miller* and the line that it has already established between protected and non-protected speech.

This Article proceeds in four parts. Part I describes the background of the community standards/Internet problem, including recent cases that have confronted the problem. Part II addresses whether obscenity law remains viable in the age of the World Wide Web. Part III discusses the development of the community standards part of the obscenity test, and explains why Supreme Court precedent is consistent with leaving the phrase "contemporary community standards" undefined in Internet obscenity cases. Part IV explores whether constitutional policy arguments and technological differences in the World Wide Web call for greater First Amendment protection for Internet publishers than for other kinds of publishers.

I. THE COMMUNITY STANDARDS/INTERNET PROBLEM

In 1973, the Supreme Court announced its most significant obscenity opinion to date, ending a period of confusion in which no majority of the Court could agree on how to define obscenity.[6] In *Miller v. California*,[7] the Court reaffirmed that obscenity is

5. *See infra* notes 94–99 and accompanying text.

6. *See, e.g.*, Redrup v. New York, 386 U.S. 767, 768–71 (1967) (per curiam) (describing the conflicting viewpoints among members of the Court concerning obscenity); Jacobellis v. Ohio, 378 U.S. 184 (1964) (fractured decision producing six separate opinions, no one of which is joined by more than two Justices, and with one Justice—Justice White—declining to join any of them).

7. 413 U.S. 15 (1973).

categorically unprotected by the First Amendment,[8] and announced a revised test for defining it. The test was fashioned in recognition of three principles. First, the First Amendment is designed to protect works of serious social value, which does not include "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain . . . ."[9] Second, states have a constitutional right to regulate or prohibit such hard-core pornographic material for the protection of public welfare and morals.[10] Third, the First Amendment requires that any system of pornography regulation must be narrow, applying only to the most dangerous and explicit forms of pornography, so as not to chill works of serious social value.[11] With these principles in mind, the *Miller* test deems a work obscene if:

> [(a)] the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest[;]
>
> (b) the work depicts or describes, in a patently offensive way [according to contemporary community standards[12]], sexual conduct specifically defined by the applicable state law; [and]
>
> (c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[13]

The Supreme Court emphasized throughout its opinion that the test is limited to offensive and prurient depictions of "hard core sexual conduct."[14] Hard-core pornography is generally understood

8. *Id.* at 23.

9. *Id.* at 35.

10. *Id.* at 32–34; *see also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57–61 (1973).

11. *Miller*, 413 U.S. at 22–23.

12. In *Smith v. United States*, 431 U.S. 291, 300–01 (1977), the Supreme Court clarified that both the "prurient interest" and "patently offensive" prongs of the *Miller* test are to be judged by contemporary community standards.

13. *Miller*, 413 U.S. at 24 (internal quotations omitted).

14. *Id.* at 27 ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."); *see also id.* at 28, 29, 35, 36; Jenkins v. Georgia, 418 U.S. 153, 159–61 (1974) (reversing an obscenity conviction for showing the film *Carnal Knowledge*, even though the jury was properly instructed under the *Miller* test, because the film in question did not portray "hard core sexual conduct").

to include explicit depictions of actual sexual intercourse, masturbation or similar ultimate sexual acts for prurient appeal; as opposed to mere nudity, indecency, or implied sexual acts that are common in soft-core pornography and mainstream movies and literature.[15] Only the former is punishable under *Miller*.[16]

Notably, the first two elements of the *Miller* test (the "prurient interest" and "patent offensiveness" elements) are judged by reference to "contemporary community standards." The Supreme Court added this phrase to the definition of obscenity in 1957 to make clear that obscenity is not judged by the sensitivities of the most easily offended individuals or by the morals of the past.[17] The "community standards" component of the *Miller* test is a flexible concept, designed mainly to recognize the role of jurors in obscenity cases as representatives of the various communities from which they come.[18]

Although the *Miller* standard was designed to strike a balance between the interests of civic communities in exercising their traditional police powers with the individual rights of free speech, the test has proved more favorable to the pornography industry than its authors likely intended. In practice, it is highly difficult to prosecute hard-core pornography under the *Miller* standard, even in supposed conservative communities.[19] This is likely due to several factors, including the requirement of unanimous jury verdicts, the "beyond a reasonable doubt" srandard in criminal cases, and the trial tactics of the well-funded pornography industry. Such tactics include the use of paid experts to raise doubts in the minds of jurors about whether their own instinctive judgments of "prurient appeal" and "patent offensiveness" are representative of the communities from which they come. Because of the difficulty of prosecuting obscenity, many state prosecutors gave up the fight against obscenity altogether in the

15. *See Jenkins*, 418 U.S. at 161.

16. *See id.*

17. Roth v. United States, 354 U.S. 476, 489 (1957).

18. *See infra* Part III.

19. For example, in 1996, government officials indicted Larry Peterman, the owner of two video stores in Utah County, Utah, on obscenity charges. After a long and well-publicized trial, in which the defense offered evidence of significant pornography use and availability in Utah County, including various hard-core videos at the Provo, Marriott Hotel, the jury acquitted Peterman in two-and-a-half hours. *See* LEWIS PERDUE, EROTICABIZ: HOW SEX SHAPED THE INTERNET ch. 11 (2002), *available at* http://www.eroticabiz.com/chapter11.doc (describing the Peterman episode).

late 1970s and early 1980s, at least with respect to the most common types of hard-core pornography.[20]

Indeed, as evidence of how difficult it has been for states and the Federal Government to prosecute obscenity since *Miller*, the Supreme Court found it necessary in 1982 to hold that child pornography is categorically unprotected by the First Amendment.[21] Child pornography was never historically understood to be protected speech. So why did it take the Supreme Court until 1982 to recognize this? The answer seems to lie in the evolution of obscenity law. In an earlier era, any sexually explicit depiction involving children would clearly have been deemed obscene. But by 1982, the pornography industry had been so successful at defending various sorts of pornography under the *Miller* test that this was no longer a foregone conclusion.[22] So the Supreme Court, for good reason, announced a bright-line test for child pornography that did not include the subjective elements of the *Miller* test.[23]

Now enter the World Wide Web. In the age of electronic communication, a new problem threatens to further undermine the ability of government to regulate obscenity. Is it fair to apply local community standards to a medium of communication that does not have geographic boundaries? This would, in the words of some, move obscenity regulation to the "lowest-common-denominator."[24] Because of the Web, some commentators suggest that a locally influenced community standards inquiry is outdated as a way of identifying Internet obscenity.[25] Some suggest that a national

20. *See, e.g.*, Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 256–71 (1988) (describing the difficulties of prosecuting obscenity under the *Miller* test in the late 1970s and 1980s as contrasted to earlier times); U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 53–55 (1986) (describing the under-enforcement of obscenity laws).

21. New York v. Ferber, 458 U.S. 747, 763–65 (1982).

22. U.S. DEP'T OF JUSTICE, *supra* note 20, at 84–96.

23. Under *Ferber*, child pornography includes "visual depictions of children performing sexual acts or lewdly exhibiting their genitals." *Ferber*, 458 U.S. at 762. Such material is categorically unprotected, regardless of prurient effect, patent offensiveness, or social value. *Id.* at 763–65.

24. *E.g.*, Erik G. Swenson, Comment, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855, 858 (1998).

25. *See, e.g.*, *id.* at 878.

community standard should be required.[26] Others suggest that an Internet-wide community standard would be more appropriate.[27]

The Supreme Court has not resolved the community standards/Internet issue as far as *Miller*-type obscenity is concerned. But in *Ashcroft v. ACLU*,[28] it addressed a related problem concerning what we might call obscenity-as-to-minors. In *Ashcroft*, the Supreme Court addressed the constitutionality of the Child Online Protection Act (COPA),[29] which makes it unlawful for commercial publishers on the Web to make available to minors any material that is "harmful to minors" without an age-verification screen.[30] The term "harmful to minors" is defined to include standard obscenity, but it also encompasses a much broader category of harmful material.[31] COPA used the language of the *Miller* obscenity test, only adding the phrase "with respect to minors" or "for minors" to each prong, to define what is harmful to minors. Thus, under COPA, material is subject to the restriction if it (a) appeals to the prurient interest *with respect to minors* applying contemporary community standards; (b) is patently offensive *with respect to minors* applying contemporary community standards; and (c) lacks serious social value *for minors*.[32]

The addition of "with respect to minors" was significant to the constitutionality of COPA, because it extended the coverage of the Act beyond *Miller* into the domain of protected speech, requiring the application of strict scrutiny and overbreadth doctrines. Within this strict scrutiny framework, under which laws are presumed unconstitutional, the Third Circuit held that COPA was constitutionally overbroad in its use of "community standards" to define what is harmful to minors, because such a standard would require all Internet publishers to adhere to the standards of the most conservative communities.[33]

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26. *See, e.g.*, Scott A. Duvall, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 96 (1992).

27. *E.g.*, Swenson *supra* note 24, at 879–81.

28. 535 U.S. 564 (2002).

29. 47 U.S.C. § 231 (2000).

30. *Id.* § 231(a)(1), (c)(1).

31. *Id.* § 231(e)(6).

32. *See id.*

33. ACLU v. Reno, 217 F.3d 162, 174–77 (3d Cir. 2000).

The Supreme Court reversed the Third Circuit on this point, and held that the inclusion of "community standards" in COPA's definition of material "harmful to minors" did not render the statute facially overbroad, even though the statute applied to non-obscene speech, and even though communities could potentially vary in their interpretation of what is harmful to minors.[34] The case, however, produced splintered opinions. A plurality of the Court (including Chief Justice Rehnquist and Justices Scalia and Thomas) relied on obscenity precedent to conclude that regional variation in the meaning of "community standards" is not unconstitutional.[35] Justice O'Connor wrote separately to express more narrowly that the plaintiffs at least had not shown the statute to be substantially overbroad on this point.[36] Similarly, Justice Kennedy (in an opinion joined by Justices Souter and Ginsberg) wrote that the Third Circuit was wrong to conclude that the use of varying community standards "by itself" made COPA unconstitutional, and that further information was needed to determine the statute's constitutionality.[37] Justice Breyer wrote that COPA should be interpreted to employ a uniform national community standard for what is harmful to minors, thus avoiding constitutional troubles.[38] Only Justice Stevens would have affirmed the judgment. Because a majority agreed that the Third Circuit's reason for striking down COPA was flawed, the Court remanded to the Third Circuit to consider other claims against the statute.[39]

Since COPA regulates protected speech, and since COPA's use of variable community standards was not alone sufficient to make the statute unconstitutional, it might seem to follow that prosecuting hard-core obscenity on the Web using the *Miller* test would be constitutionally acceptable. However, the splintered opinions in *Ashcroft* leave doubt about this. While the plurality's rationale seems clearly to support this conclusion,[40] the separate concurring opinions

34. Ashcroft v. ACLU, 535 U.S. 564, 585–86 (2002) (plurality opinion).

35. *Id.* at 580–84.

36. *See id.* at 586 (O'Connor, J., concurring in part and concurring in the judgment).

37. *Id.* at 597–602 (Kennedy, J., concurring in the judgment).

38. *Id.* at 589–91 (Breyer, J., concurring in part and concurring in the judgment).

39. *Id.* at 586. Since the Supreme Court's 2002 decision in *Ashcroft v. ACLU*, the litigation has been to the Third Circuit, 322 F.3d 240 (2003), back to the Supreme Court, 542 U.S. 656 (2004), and to trial in Federal District Court, which ultimately held the Act unconstitutional. *See* ACLU v. Gonzales, 478 F. Supp. 2d 775, 821 (E.D. Pa. 2007).

40. *Ashcroft*, 535 U.S. at 580–84 (plurality opinion).

of Justices O'Connor, Kennedy, and Breyer, all suggest in parts that the use of geographically-varying community standards to define obscenity on the World Wide Web might potentially raise constitutional problems.[41] *Ashcroft* thus leaves unresolved the community standards/Internet problem as to *Miller*-type obscenity.

Only a few lower courts have directly addressed the community standards/Internet issue as to obscenity, and they have not approached it consistently. In *United States v. Thomas*,[42] the Sixth Circuit held that the Federal Government could constitutionally prosecute operators of an on-line bulletin board for transmitting obscenity as measured by the community standards of the trial location (in that case, Tennessee). It dismissed the defendants' objection based on chilling effects and varying community standards, noting that the defendants had the ability to geographically screen through an application process which viewers would have access to their Internet service.[43] Two military courts have reached similar conclusions, allowing the use of varying community standards in judging Internet obscenity.[44]

However, in a more recent case, *Nitke v. Ashcroft*,[45] the Southern District of New York took a different approach. The District Court held that the Communications Decency Act (CDA) is potentially overbroad to the extent that it regulates the transmission of material on the Internet that would be judged obscene in some communities

41. *See id.* at 587 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 590 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 597 (Kennedy, J., concurring in the judgment).

42. 74 F.3d 701 (1996).

43. *Id.* at 711–12.

44. United States v. Maxwell, 45 M.J. 406, 425–26 (C.A.A.F. 1996) (holding that the use of a nationwide standard rather than a narrower community standard for Internet obscenity was error); United States v. Gallo, 53 M.J. 556, 568–69 (A.F. Ct. Crim. App. 2000) (holding that it was constitutional to nse an Air Force-wide standard for judging Internet obscenity).

45. 253 F. Supp. 2d 587 (S.D.N.Y. 2003).

but not in all communities.[46] Accordingly, the court denied the Government's motion to dismiss a facial challenge.[47]

Although the *Nitke* court did not hold the CDA obscenity provision unconstitutional, and in fact set a high hurdle for plaintiffs to show that the provision is overbroad,[48] its methodology in refusing to dismiss the complaint is troubling. Under the First Amendment, a statute is facially unconstitutional only if it sweeps within its coverage a substantial amount of protected speech.[49] Thus, a necessary step in analyzing whether the CDA obscenity provision is constitutional is to identify what counts as protected speech. Remarkably, the district court assumed that potential geographic variation in the application of the community standards (through a mere straightforward application of the *Miller* test) may infringe upon protected speech because some communities make constitutionally protected what other communities do not. In other words, the court assumed that protected speech includes that which is "lacking in serious value, but potentially not patently offensive or appealing to the prurient interest in all communities."[50] The court's assumed definition of protected speech presupposes that the mere toleration of some material by some communities makes it constitutionally protected, thereby implying that every publisher has a constitutional right to place on the Internet whatever its own local community would tolerate, even if this imposes materials on other

46. *Id.* at 605–08. The CDA prohibits the transmission of "obscene" material to minors over the Internet, 42 U.S.C. § 223(a)(1)(B) (2000), and it prohibits the transmission of "obscene" material to anyone over the Internet "with the intent to annoy, abuse, threaten or harass." *Id.* § 223(a)(1)(A). Although the statute does not define the term "obscene," the District Court assumed that this term incorporates a geographically-varying community standard.

47. *Nitke*, 253 F. Supp. 2d at 611.

48. *See id.* at 606–08 (explaining in detail what the plaintiffs would have to show to prove the CDA unconstitutionally overbroad).

49. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression.").

50. *Nitke*, 253 F. Supp. 2d at 606. In its defense, the district court relied on language from Justice O'Connor's concurring opinion in *Ashcroft v. ACLU*, 535 U.S. 564, 587 (2002), implying a similar assumption of how to measure overbreadth in a world of geographically varying standards: ("Where adult speech is concerned . . . there may in fact be a greater degree of disagreement about what is patently offensive or appeals to the prurient interest."). However, Justice O'Connor did not commit to this assumption nor was it necessary to deciding the issue before the Court.

communities that otherwise qualify as obscene. This turns on its head *Miller*'s specific holding that the Constitution does not require Maine to accept the depiction of hard-core pornography simply because it is found tolerable in New York City.[51] The district court's holding in *Nitke* implies that the Internet has superseded this part of *Miller*.

Even under the *Nitke* court's analysis, it seems unlikely that one could show the CDA obscenity provision (or similar provisions regulating obscenity on the Web according to the *Miller* test) to be substantially overbroad for purposes of a facial challenge.[52] But the district court's protected-speech baseline is significant because it could affect jury instructions and as-applied challenges in future obscenity cases. If the court's definition of protected speech is correct, it suggests that jury instructions in Internet obscenity cases should explicitly reference the community standards of either the publisher's own vicinage or that of the most tolerant communities.

II. IS OBSCENITY LAW EVEN VIABLE ON THE WEB?

Before analyzing the community standards/Internet problem at a more technical level, it is worth considering for a moment the broader picture. Readers may legitimately wonder whether preserving obscenity law is even worth it in the age of the World Wide Web. Given the difficulty of prosecuting obscenity under the *Miller* standard, combined with the seemingly endless supply of hard-core pornography on the Internet, one might fairly ask whether obscenity law has outlived its usefulness. The problem is not only one of limited prosecutorial resources, but is compounded by the fact that the World Wide Web serves an international community, so that no effort by the United States to regulate obscenity on the Internet could possibly control all of it. Given these problems, would it even matter if courts resolved the community standards/Internet problem in a way that erodes obscenity law into oblivion?

I believe that the answer is yes. To take this position, however, it is not necessary to defend obscenity law in all of its potential

51. Miller v. California, 413 U.S. 15, 32 (1973) ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine . . . accept public depiction of conduct found tolerable in . . . New York City.").

52. *See Nitke*, 253 F. Supp. 2d at 605–08 (explaining in detail what the plaintiffs would have to show to prove the CDA unconstitutionally overbroad).

applications. It may be that the time has come to reconsider some parts of the *Miller* test. Moreover, it seems highly doubtful that attempting to enforce an effective ban on the sale or possession of all that is obscene (such as government has tried to do in the past) is wise or feasible. Nevertheless, there are good reasons, both practically and constitutionally, to continue to recognize obscenity law in some meaningful form as beyond the scope of First Amendment protection. *Miller* was an attempt to preserve obscenity law to some degree while minimizing the risk that it would chill valuable speech. Before we casually resolve the community standards/Internet problem in a way that undermines that balance, it is worth considering the practical and legal arguments against such a change.

First, it is always possible for the content of obscenity to become worse. Obscenity law is not only about explicit images of adults having polite, consensual sex with one another (if this even qualifies as obscenity anymore). It is true that this type of hard-core pornography is widely available on the Web, and will probably always be so. But there are other forms of pornography that are potentially more damaging, and for which obscenity law currently plays an important role in keeping largely underground. This might include, for example, depictions of actual rape, child sexual abuse, animal sexual abuse, sexual rorture or violence, or sexually themed suicide or murder, all of which could be portrayed to some disturbed audiences for prurient appeal in the absence of obscenity law. It is difficult to know how the elimination or further erosion of obscenity law would affect the availability of such material, or how it would affect society if such material became mainstream, but it seems reasonable for government to use obscenity law to prevent this from happening.

Second, obscenity law allows government to control the time, place, and manner in which hard-core pornography is offered through means that might not be allowed if it were deemed protected by the First Amendment. Some methods of marketing obscenity are more invasive to non-consenting adults and children than others. While pornography producers today know that they are generally safe selling hard-core pornography to consenting adults, fewer are so bold as to publish hard-core pornography in ways that would offend unwilling audiences or target children. One strong deterrent against this is obscenity law. Not only is the manner of

publication and its effect on unwilling audiences or children something that might affect prosecutorial discretion, it could even affect the adjudication of whether a work is found to be obscene. The Supreme Court has held that the context of a work, such as the publisher's method of advertising it, is relevant to whether or not it is obscene.[53] Therefore, while a particular depiction might be found to be non-obscene if shown only to consenting adults, the same work might be considered obscene if it appears in the context of a highway billboard, is sent through e-mail spam, or is offered to children at the park.

On the other hand, if all hard-core pornography were protected by the First Amendment, then most content-based regulations of it would be presumed unconstitutional through strict scrutiny,[54] including modest regulations affecting its time, place, and manner.[55] As the litigation involving COPA and the CDA has shown, it is difficult to impose effective restrictions on non-obscene pornography for the protection of minors under the standard of strict scrutiny. (After two statutory efforts and thirteen years of litigation, Congress still has not found a way to do so constitutionally on the Internet.) Cases involving regulations for the protection of unwilling adults have been similarly strict, with the usual First Amendment rule being that offended onlookers must "avert their eyes."[56] If obscenity law were no longer viable, then "avert your eyes" could become the prevailing constitutional rule for even hard-core or violent pornography depicted in public as well as in private.

Third, it remains the case that obscenity as defined in the *Miller* test is unlikely to encompass works of substantial literary, artistic, scientific, or political value. In fact, the *Miller* test expressly excludes works having such value, and if we do not trust jury decisions on this

53. Splawn v. California, 431 U.S. 595, 599 (1977); Ginzburg v. United States, 383 U.S. 463, 465–66 (1966).

54. There are some exceptions to strict scrutiny that might apply, such as the secondary effects doctrine, *see Renton v. Playtime Theatres*, 475 U.S. 41, 49–50 (1986), or the broadcasting indecency doctrine, *see FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978), but these are relatively narrow in scope.

55. *See* Ashcroft v. ACLU, 542 U.S. 656, 676 (2007) (applying strict scrutiny to the Child Online Protection Act); Reno v. ACLU, 521 U.S. 844, 864 (1997) (holding the Communications Decency Act unconstitutional under strict scrutiny insofar as it affects non-obscenity); ACLU v. Gonzales, 478 F. Supp. 2d 775, 819 (E.D. Pa. 2007) (holding the Child Online Protection Act unconstitutional).

56. Erznoznik v. Jacksonville, 422 U.S. 205, 205 (1975).

prong, the other elements of the *Miller* test limit the scope of the doctrine even further as added protection for the marketplace of ideas. Hard-core pornography is not the kind of communication that the First Amendment was designed to protect, and we are not culturally impoverished by the fact that some forms of hard-core pornography are chilled. As the Supreme Court stated in *Chaplinsky v. New Hampshire*,[57] the prohibition of obscenity "has never been thought to raise any Constitutional problem" because it plays "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[58]

Finally, the interests of judicial restraint counsel against overruling or eroding the historical position that obscenity is unprotected. In reconsidering the scope of *Miller*, one should be reminded that the question is not whether obscenity preferably should be banned or regulated, but rather to what extent should decisions regarding obscenity regulation and prosecution be left to the usual democratic process. Of course, the First Amendment always cuts against democratic decision-making, but in the case of speech that was never historically recognized as protected, that has such low redeeming value in terms of its contribution to the marketplace of ideas, and that has a real potential to cause harm, it is reasonable to place the burden on those who would protect it even further to explain how the democratic process has failed. In the absence of evidence that elected officials are abusing the *Miller* standard in some way that materially harms the free speech marketplace or our national culture, then the decision whether obscenity law has outlived its usefulness should be reserved to the elected branches of government. It would be inappropriate for courts to make this decision through constitutional interpretation.

III. DO PUBLISHERS IN NEW YORK CITY HAVE GREATER FIRST AMENDMENT RIGHTS THAN PUBLISHERS IN MAINE?

Assuming that *Miller v. California* strikes the appropriate balance between individual and community constitutional interests, what does it mean for a medium of communication that binds all communities together? A key line from the *Miller* decision seems to

57. 315 U.S. 568 (1942).

58. *Id.* at 572.

provide a direct answer: "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."[59]

Despite the clarity of this statement, often those who address the community standards/Internet problem begin with the premise that *Miller* guarantees the converse of this statement. That is, many seem to assume that individuals have a First Amendment right to publish pornographic material that their own local communities would tolerate, even if it meets all the elements of the *Miller* test and would be subject to prosecution in another jurisdiction.[60]

This assumption is mistaken as an interpretation of existing law. It misunderstands the nature, purpose, and origin of the community standards requirement. It not only contradicts the community standards cases from which it claims support, but it is flawed in theory. Why should a pornography publisher in New York City have federal constitutional rights any greater than a pornography publisher in Maine, just because the New York City publisher is fortunate to have tolerant neighbors? The answer must either be (a) that there is no constitutionally significant difference between publishers' rights in different places; or (b) that the application of constitutional law varies from place to place only because when obscenity enters a community in violation of that community's standards, it causes greater harm than when it remains solely within communities that find it tolerable. Either way, it does not follow that a publisher who uses a means of communication that reaches every community in the United States has greater First Amendment rights

59. Miller v. California, 413 U.S. 15, 32 (1973).

60. *E.g.*, Rebecca Dawn Kaplan, *Cyber-Smut: Regulating Obscenity on the Internet*, 9 STAN. L. & POL'Y REV. 189, 190 (1998) ("If the community standards of New York City cannot be constitutionally applied to Mississippi, certainly the community standards of Mississippi cannot be constitutionally applied to New York City."); John B. Morris, Jr., Julie M. Carpenter & Jodie L. Kelley, *Free Speech on the Internet*, *in* 2 INTERNET LAW AND PRACTICE § 24, § 24:21 (updated 2006) ("Nor, conversely, are the people of Las Vegas and New York City required to limit their speech to that which is acceptable in Maine or Mississippi."); *see also* Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O'Connor, J., concurring) (suggesting that variation in community standards might create overbreadth problems for publishers in more tolerant communities); *id.* at 597 (Kennedy, J., concurring) (same); Nitke v. Ashcroft, 253 F. Supp. 2d 587, 606 (S.D.N.Y. 2003) (assuming that the potential overbreadth of the CDA's obscenity provision is measured by reference to what a publisher's own local community would tolerate).

than those publishers who reside in the most conservative communities of the United States.

Core First Amendment rights are the same for all citizens of the United States, wherever they reside, and the Supreme Court's use of the term "contemporary community standards" is no exception.[61] As to sexually explicit material, one's constitutional entitlement to publish a work is defined by those elements of the *Miller* test that do not vary from place to place: (1) one has a right to publish in any jurisdiction material that does not constitute hard-core pornography in an objective sense;[62] (2) one has a right to publish in any jurisdiction even hard-core pornographic material that has serious social value, taken as a whole.[63] The Supreme Court has held that these requirements provide Web publishers ample notice and guarantee that no material of serious worth to the freedom of speech will be prohibited in any community.

But what of the community standards part of the test? If the First Amendment means the same thing for publishers in Maine and New York City, what then explains the Supreme Court's use of "contemporary community standards" as part of the definition of obscenity? Some historical background is useful to answering this question.

A. History of the Community Standards Requirement

The idea of using "contemporary 'community' standards" as a jury instruction in obscenity cases originated in a 1913 opinion by Judge Learned Hand, *United States v. Kennerly*.[64] At that time, the prevailing test for obscenity, known as the *Hicklin* test,[65] asked only whether the material had a tendency to corrupt "those whose minds are open to such immoral influences and into whose hands a

61. As the Court stated in *Miller*, "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community." 413 U.S. at 30.

62. *See id.* at 27 (obscenity only includes hard-core depictions); Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing an obscenity conviction because the movie was not hard-core pornographic in an objective sense, even though a Georgia jury had found it to violate its community standards).

63. *See* Pope v. Illinois, 481 U.S. 497, 501 (1987) (holding that the value of allegedly obscene material is judged by a reasonable person standard).

64. 209 F. 119, 121 (S.D.N.Y. 1913).

65. The test was named for the case *Regina v. Hicklin*, L.R.3 Q.B. 360 (1868).

publication of this sort may fall."[66] Although Judge Hand did not reject the *Hicklin* test, he expressed concern that such a test, which was applied liberally during the late nineteenth Century, might be inconsistent with modern notions of literary acceptability. He further worried that the *Hicklin* test could lead to censorship of publications "honestly relevant to the expression of innocent ideas."[67] He therefore suggested that the law of obscenity should be allowed to evolve through jury application, as in other areas of law:

> [S]hould not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that *a jury should in each case establish the standard much as they do in cases of negligence.*[68]

In later cases, federal and state courts cited *Kennerly* and gradually rejected the *Hicklin* standard, holding that obscenity is governed by the average sensibilities of contemporary society, rather than the most sensitive members of society.[69] Thus, in 1940, the D.C. Circuit reiterated that the meaning of obscenity is based on "the present critical point in the compromise between candor and shame at which the community may have arrived here and now."[70] Judge Vinson further wrote that "the 'standard of the community' has been substituted for the 'standard of the weak and susceptible . . . .'"[71]

Courts applying a contemporary community standard in the post-*Kennerly* period did so as a matter of statutory interpretation or as part of state common law. But in 1957, in *Roth v. United States*,[72] the Supreme Court gave the standard constitutional significance.

66. *Kennerly*, 209 F. at 120 (quoting Regina v. Hicklin, L.R.3 Q.B. 360 (1868)).

67. *Id.* at 120–21.

68. *Id.* at 121 (emphasis added). As part of his point, Judge Hand emphasized the jury's unique role in judging obscenity: "A jury is especially the organ with which to feel the content comprised within such words [as "lewd" or "obscene"] at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." *Id.*

69. *See* Roth v. United States, 354 U.S. 476, 489 n.26 (1957) (citing cases).

70. Parmellee v. United States, 113 F.2d 729, 732 (D.C. Cir. 1940) (quoting *Kennerly*, 209 F. at 121).

71. *Id.* at 739 n.5 (Vinson, J., dissenting).

72. 354 U.S. 476 (1957).

Recognizing that obscenity is not protected by the freedom of speech because it is "utterly without redeeming social importance,"[73] the Court also recognized that some depictions of sex or nudity for non-prurient purposes have serious social value. The Court concluded: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech . . . for material which does not treat sex in a manner appealing to the prurient interest."[74] The Court held that the standard developed by lower courts since *Kennerly* is constitutionally adequate, and rephrased it as follows: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[75]

When *Roth* wrote the phrase "contemporary community standards" into constitutional law, it did not attach geographical significance to the idea. The Court did not suggest thar a defendant has the constitutional right to publish according to his own local community standard, even if this standard should differ from those of state, national or other local communities that his published works might affect. Rather, the concept was designed to make clear two things: (1) obscenity does not encompass everything that the most easily corrupted members of society would find prurient, but refers to what an average adult would find prurient; and (2) the meaning of obscenity is not frozen in the past, but may evolve through jury application as the meaning of negligence does in tort law. These qualifications were especially significant because "prurient appeal" was the only element of the obscenity test.

B. Community Standards in Miller *and More Recent Cases*

In the years following *Roth*, the question "whose community standard?" first arose. It was one of several obscenity questions that divided Justices of the Supreme Court in the 1960s. In one case, Justice Brennan argued in a plurality opinion that since community standards could potentially vary from place to place, the Constitution requires that juries be instructed to apply a national community standard on the basis that constitutional law should be uniform.[76]

73. *Id.* at 484.

74. *Id.* at 488.

75. *Id.* at 489.

76. *See* Jacobellis v. Ohio, 378 U.S. 184, 192–95 (1964) (plurality opinion).

But in the same case Chief Justice Warren argued that the Constitution does not require a national community standard jury instruction.[77] One of the significant features of *Miller v. California* is that it finally resolved this issue by majority opinion, adopting Chief Justice Warren's position that the Constitution does not require such an instruction. In the process, the Court made clear again the limited purpose of the community standard element.[78]

The *Miller* Court reasoned that although the Constitution is uniform and national in application, the question of "prurient appeal" is a factual question for the jury, and juries have historically been allowed to draw upon their experiences from their own communities in resolving such questions.[79] Moreover, it would even be "an exercise in futility" to require jurors to attempt to discern a national standard in deciding what is prurient.[80] The Court suggested that to force jurors to ascertain a national standard would favor obscenity publishers too much at the expense of states' rights to set their own standards within the limits allowed by the Constitution.[81] It was in this context that the Court stated that the Constitution does not require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City" through imposition of a national standard.[82]

At the same time, it is significant that *Miller v. California* imposed two other elements, not previously articulated in *Roth*, that limit how far any local government or local jury may go in identifying obscenity. The first is that the work, taken as a whole, must lack any serious social value, which is determined according to a reasonable person standard.[83] Second, the work must portray "'hard core' sexual conduct."[84] The Court included an exemplary list

77. *Id.* at 200–01 (Warren, C.J., dissenting).

78. In *Miller*, the Court upheld an obscenity conviction based on a jury instruction to apply the "contemporary community standards of the State of California." *Miller*, 413 U.S. at 31.

79. *Id.* at 30.

80. *Id.*

81. *See id.* at 31–33.

82. *Id.* at 32.

83. *Id.* at 24; Smith v. United States, 431 U.S. 291, 300–01 (1977).

84. *Miller*, 413 U.S. at 27, 28, 35 (referring to obscenity as encompassing only portrayals of "'hard core' sexual conduct"); *see also* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) ("[I]t would be a serious misreading of *Miller* to conclude that juries have unbridled

of the kinds of hard-core conduct which might be obscene to portray in an explicit manner, including "ultimate sexual acts," "masturbation," "excretory functions," and "lewd exhibition of the genitals."[85] As made clear in later cases, this list was "intended to fix substantive constitutional limitations" on the scope of obscenity law,[86] which appellate courts are obligated to enforce.[87] It is because of these two requirements, which are objective and do not vary from place to place, that the *Miller* Court could confidently hold that obscenity law is narrow enough to avoid chilling valuable speech,[88] that it gives adequate notice to publishers,[89] and that it is uniform throughout the nation in its core elements.[90]

Another obscenity case decided the same day as *Miller*, *Paris Adult Theatre I v. Slaton*,[91] complements *Miller*'s "community standard" holding by resolving a related issue. The question in *Paris Adult Theatre I* was whether expert testimony is required to support an obscenity conviction. The Supreme Court held that such expert testimony is not required—that is, a jury is competent to determine for itself, without the use of experts, whether material is obscene to the average adult applying contemporary community standards.[92] The pornography industry's expert-testimony argument and its national-community-standard argument were related in that they both mistakenly attempted to turn the phrase "community standard" into a social science inquiry for trial, making it easier for defense attorneys and expert witnesses to sow doubt in the minds of jurors, rather than allow jurors to function in their usual role as representatives of the community's common wisdom.[93] Both

discretion in determining what is 'patently offensive.'").

85. *Miller*, 413 U.S. at 25.

86. *Smith*, 431 U.S. at 301 ("The kinds of conduct that a jury would be permitted to label as 'patently offensive' . . . are the 'hard core' types of conduct suggested by the examples given in *Miller*."); *Jenkins*, 418 U.S. at 160.

87. *See Jenkins*, 418 U.S. at 160; *Miller*, 413 U.S. at 25.

88. *Miller*, 413 U.S. at 34–36.

89. *Id.* at 27; *see also* Hamling v. United States, 418 U.S. 87, 114 (1974) (rejecting a vagueness challenge to a federal obscenity statute because of *Miller*'s "hard core sexual conduct" limitation).

90. *Miller*, 413 U.S. at 30.

91. 413 U.S. 49 (1973).

92. *Id.* at 56.

93. *See Hamling*, 418 U.S. at 104–05 (explaining how *Miller* and *Paris Adult Theatre I* holdings are related, and are intended to enable jurors to draw on their own experiences in making obscenity determinations).

arguments, in effect, sought to require jurors to disregard their own interpretation of whether a work is prurient or patently offensive to the typical adult, and to apply instead an abstract standard presented to them through social science data and testimony. In both *Miller* and *Paris Adult Theatre I*, the Court made clear that the Constitution does not require this; the phrase "community standards" was not meant to present a sociological question for which experts are needed to inform the jury, but rather calls for the application of lay judgment by jurors based on common sense and individual experience.[94]

Supreme Court cases after *Miller* reiterate that the phrase "community standards" was designed to instruct juries to perform the role for which they are best suited—that is, to serve as community representatives in evaluating through their own eyes and experience whether a particular work is prurient and patently offensive. To ask "what is the relevant community?" therefore, is to demand a level of precision that the Constitution does not require. It is constitutionally sufficient thar the work (a) portrays hard core sexual conduct in an objective sense; (b) lacks serious social value, when taken as a whole; and (c) is found by a properly empanelled jury to be patently offensive and prurient to average adults. Typically, and most appropriately, the relevant community of adults is the one from which the jury is drawn.

Thus, in *Jenkins v. Georgia*,[95] the Supreme Court approved a trial court's instructions that did not define the term "community" at all, saying:

> States have considerable latitude in framing [the community srandards] element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.[96]

94. The Court held that "[t]his is not a subject that lends itself to the traditional use of expert testimony" because hard core pornography "can and does speak for itself." *Paris Adult Theatre I*, 413 U.S. at 56 n.6 (quoting United States v. Wild, 422 F.2d 34, 36 (1970)). It further commented that expert witness practices in obscenity cases "have often made a mockery out of the otherwise sound concept of expert testimony." *Id.*

95. 418 U.S. 153 (1974).

96. *Id.* at 157.

And in *Hamling v. United States*, the Court held that it is appropriate, even in cases arising under federal law, to leave the term "community standard" undefined, thus allowing juries to draw on their own local community experience in adjudicating obscenity cases.[97] The Court explained:

> *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as "hypothetical and unascertainable." But in so doing, the Court did not require, as a constitutional matter, the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of "the average person, applying contemporary community standards." [When combined with our holding in *Paris Adult Theatre I* regarding the lack of need for expert testimony,] the import of the quoted language from *Miller* becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.[98]

The Supreme Court has thus made clear that *Miller*'s use of the phrase "community standards" to define the scope of obscenity law does not confer geographically varying constitutional rights. It does not mean that a publisher in New York City has a right, based on his own vicinage, to publish hard-core material that other communities would find obscene. To the contrary, "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."[99] Whatever variation there might exist between local communities in their interpretation of "patently offensive" and "appealing to the prurient interest" is a byproduct of practical adjudication; it does not create, as a matter of constitutional principle, a class of protected speech for some but not for others.[100]

97. *Hamling*, 418 U.S. at 104–05.

98. *Id.*

99. Sable Comme'ns v. FCC, 492 U.S. 115, 125–26 (1989).

100. Indeed, the only Supreme Court obscenity case that mentions a speaker's ability to geographically tailor its communication rejects the concept of geographically varying rights. *See id.* The Court notes that it does not matter that it would be costly to geographically channel

As far as *Miller* holds, the constitutional rule for all publishers is the same: speech is unprotected if it constitutes hard-core pornography, lacks serious social value taken as a whole, and if a reasonable jury could find that it appeals to the prurient interest and is patently offensive.

IV. DOES THE WORLD WIDE WEB CALL FOR A NEW RULE?

Even if one accepts *Miller*'s holding as to print and film pornography, some might argue that there are features of modern technology that call for greater First Amendment protection on the Web. For example, should courts interpret the First Amendment as requiring a national community standard instruction for Internet cases, even though *Miller* holds that the First Amendment does not require this in other types of obscenity cases?

Before answering this directly, let us be clear about the relevant constitutional question that is likely to come before the courts. It is not whether Internet obscenity ideally should be controlled at the local, state, or national level. In one sense, this question is already answered. As explained below, the regulation and prosecution of Internet obscenity is largely the exclusive domain of federal law, because the Commerce Clause sharply limits the ability of states and local governments to restrict what out-of-state publishers do.[101] Nor is the question whether a local, state, or national community standard would be ideal. The issue, more accurately, is whether the First Amendment requires that juries be instructed to apply a particular geographic definition of "contemporary community standard" in Internet obscenity cases arising under federal law, and, if so, what that definition must be.

Put another way, the community standards/Internet issue is about what type of judgment jurors must apply in obscenity cases, just as this was the core issue in *Miller*. Does the Constitution require a social science-type inquiry in which jurors are required to discern the community standards of some broader society that it is largely unfamiliar with, or does it allow jurors to make findings of

one's communication to avoid certain local communities because "there is no constitutional impediment" to imposing costs on obscenity, and the defendant "ultimately bears the burden of complying with the prohibition on obscene messages." *Id.*

101. *See infra* notes 108–09 and accompanying text.

prurience and offensiveness based on their own experience with average adults?

Applying the *Miller* framework to Internet obscenity would mean that jurors would typically decide obscenity cases without reference to a specific geographically-defined community standard, unless federal statutory law were to require something more specific. An undefined community standard means that a juror

> draw[s] on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his [own] knowledge of the propensities of a "reasonable" person in other areas of the law.[102]

As a practical matter, this would mean that an Internet publisher of hard-core pornography could be subject to jury biases in any location in which he submits himself to personal jurisdiction through publication. Publishing on the Internet therefore could be riskier for some pornography producers than publishing through other means.

By contrast, requiring a specific geographic definition of community standard, such as a national community standard instruction, would favor defendants in most cases by making it easier for them to cause jurors to doubt.[103] If, as the Supreme Court feared in *Miller*, it becomes an "exercise in futility" to ascertain a uniform national standard on matters of prurience and offensiveness, jurors in Internet obscenity cases would be required to give defendants the benefit of the doubt, thus weakening obscenity law across the board.[104] For many publishers, it would be safer to publish on the Internet where this regime would govern rather than through print or film where the practice of leaving "community standard" undefined applies.

With this in mind, let us consider the arguments that some commentators make that the First Amendment requires a more speech-protective regime for obscenity on the Internet than in other

102. *Hamling*, 418 U.S. at 104–05.

103. As the Supreme Court observed in *Paris Adult Theatre I v. Slaton*, "the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." 413 U.S. 49, 56 n.6 (1973).

104. It is conceivable that a national community standard instruction could favor the prosecution in cases in which Internet obscenity is tried in the most tolerant communities. However, this effect is likely to be less significant than the opposite effect in less tolerant communities because jurors are instructed to resolve all doubts in favor of the defense.

mediums of communication. One might argue that applying the *Miller* framework to the Internet raises new and serious constitutional problems for several reasons, including: (a) that publishers on the Web might not have adequate notice of the community standards in every part of the nation; (b) that this encourages forum-shopping by prosecutors; (c) that it is politically unfair to allow the most conservative communities to govern the Internet through their own community standards; and (d) that this would chill speech that otherwise might be protected.

A. Notice

First, one might argue that applying a varying community standard regime to the Internet would raise a serious constitutional problem of notice. No Internet publisher could possibly anticipate the community standards of every place in the nation. The argument suggests that this problem is even worse for Web publishing than for national distributors of magazine, videocassette, and DVD pornography because there is no way to geographically restrict the Web.

Because "community standards" is a phrase in a jury instruction, and is not something one can look up in the library for a local definition, it is undoubtedly true that its effect in obscenity cases is unpredictable at the margins. But this is true of all obscenity cases. If we accept the reasoning of *Miller*, it does not matter whether Internet publishers would have more or less difficulty than national print and DVD distributors ascertaining the community standards of some places, or tailoring their distribution to their findings, because the Supreme Court has not relied on a publisher's ability to predict local community standards and tailor its distribution to address the notice problem.

The Supreme Court held in *Miller*, *Hamling*, and *Smith v. United States*, that adequate notice exists under the *Miller* test because it only encompasses depictions of "hard-core sexual conduct" specifically defined under applicable law:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific

> prerequisites will provide fair notice to a dealer in such materials. . . ."[105]

In other words, those who wish to publish sexually explicit works without triggering obscenity laws have a reasonably clear line to govern their work, which is to avoid publishing explicit depictions of ultimate sexual acts, masturbation, excretory functions, or lewd exhibition of the genitals[106] in such a way that a reasonable jury could find that it appeals to the prurient interest, is patently offensive, and lacks serious social value.[107] This is as true for Web publishers as it has been for other kinds of publishers. If anything, Web publishers have it somewhat easier than national distributors of print and DVD pornography, because Web publishers only need be concerned with federal law and the law of their own originating state, rather than with the laws of fifty states.[108]

B. Forum Shopping

Some might argue that allowing varying community standards will encourage forum shopping by government prosecutors. The observation is probably true. However, forum shopping by itself does not violate the First Amendment. Indeed, in this context there is a positive aspect of forum shopping. The ability of government to choose where to bring a trial in a world of varying community standards might encourage publishers of unprotected obscene material to use a means of publication other than the Web. By sending pornography through some other medium, the publisher could avoid communities in which juries are likely to enforce obscenity restrictions to the fullest constitutional extent. As long as the material is constitutionally unprotected in an objective sense,

105. Miller v. California, 413 U.S. 15, 27 (1973); *see also Hamling*, 418 U.S. at 110–15; Smith v. United States, 431 U.S. 291, 308–09 (1977).

106. *See Miller*, 413 U.S. at 25.

107. *Id.* at 24.

108. As explained below, state laws that regulate what out-of-state publishers put on the Web are generally unconstitutional under the Dormant Commerce Clause doctrine. *See infra* note 109 and accompanying text. However, it is not unconstitutional under the same doctrine for a state to prosecute a publisher who mails material into that state in violation of state law, because the publisher has the ability to avoid that state and continue to mail the material to other states. Thus, as a practical matter, those who distribute pornography by mail to many states must concern themselves with a wider range of laws than those who publish on the Internet.

then to encourage this kind of selective distribution is a good thing, as it respects the autonomy of those communities where obscenity is unlikely to be tolerated.

Government's ability to choose the forum only raises a First Amendment problem to the extent that an obscenity trial in the least tolerant community is likely to violate the Constitution by punishing protected speech. If that is the case, there is a much deeper problem than forum shopping that needs to be solved. Constitutionally speaking, we should be just as concerned for publishers and distributors who reside in conservative communities as we should be for those who reside in more tolerant communities and wish to publish on the Web. If obscenity trials in Maine are not protective enough of speech, the real problem is not forum shopping, and a special rule for Internet obscenity does not fix the larger problem. So if commentators believe that the *Miller* standard, with its potential for varying community standards, does not sufficiently protect speech in some communities, they should make the argument for overruling *Miller* for all modes of communication. But if *Miller* is constitutionally sound for print publications, the forum-shopping argument does not justify a special rule for Internet publications.

C. Political Unfairness

Another common argument against varying community standards on the Web is that this allows the most conservative communities to set national policy over the will of others. This raises a potential problem of political fairness and representation. One may say that if Maine wishes to prohibit obscenity to the fullest constitutional extent in its state, that is acceptable because its own citizens are at least represented in the state government; but it would be patently unfair if Maine were able to censor all publishers on the World Wide Web according to its own standard, even if all citizens in all other forty-nine states disagreed with the standard.

This "lowest common denominator" or political representation argument would be a serious one, if it were not for the Dormant Commerce Clause doctrine. Under that doctrine, no state is allowed to impose a law extraterritorially in a manner that imposes significant burdens on interstate commerce. Courts have repeatedly used this doctrine to strike down state laws that regulate the World Wide Web

extraterritorially.[109] For this reason, any state law that attempts to regulate obscenity on the Web that is published by out-of-state publishers is likely to be unconstitutional. For reasons wholly apart from the First Amendment, an obscenity regulation or standard enacted solely by the State of Maine cannot control what a New York City resident uploads on the Web.

Because of the Commerce Clause, only the Federal Government may regulate obscenity on the Web in a manner that applies to publishers in every state. For this reason, there is no failure of national political representation with regard to Internet obscenity, no matter how community standards are defined at trial. If Congress chooses to regulate obscenity on the Web to the fullest constitutional extent according the *Miller* test, and if the Executive Branch chooses to prosecute all Internet obscenity cases in conservative venues such as Maine, then the resulting decisions would reflect the choices of a nationally elected government. On the other hand, if the Federal Government chooses to abandon any regulation or prosecution of obscenity on the Web, then the resulting freedom to publish all types of obscenity on the Web would likewise reflect the choices of a nationally elected government.[110] To be sure, if the Federal Government chooses to prosecute obscenity, then jurors in federal obscenity trials could play a role in deciding the boundaries of permissible material on the Web, and they may be influenced by their local experiences. But one should remember that jurors in such cases can only find to be obscene that which federal law allows them to find obscene, they can only apply what standards federal law allows them to apply, and they can only do so in cases that the Federal Government has chosen to bring.

109. *E.g.*, PSINet, Inc. v. Chapman, 362 F.3d 227, 239–40 (4th Cir. 2004) (holding Virginia child protection statute unconstitutional as applied to the Web); Am. Booksellers Found. v. Dean, 342 F.3d 96, 102–04 (2d Cir. 2003) (Vermont child protection statute held unconstitutional as applied to the Web); ACLU v. Johnson, 194 F.3d 1149, 1160–62 (10th Cir. 1999) (similar); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York regulation of Internet obscenity held unconstitutional).

110. Indeed, this is close to describing the policy of the Clinton administration, which largely abandoned federal obscenity prosecution. *See* Clyde DeWitt, *Representing the Adult Entertainment Industry*, 22 ENT. & SPORTS LAW. 1, 24 (2005) ("The 1992 election of President Clinton stopped federal obscenity prosecutions cold."); *see also* Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 239 (2007) (contrasting the lax enforcement of obscenity during the Clinton administration with the increased enforcement under President George W. Bush).

Thus, the lowest common denominator argument is misleading and flawed. It raises nothing new in the age of the Internet to justify a departure from *Miller*. As in other areas of law, the Federal Government may in practice set the federal standard for obscenity enforcement anywhere between that of the most restrictive states or that of the most tolerant ones, and in practice it will likely vacillate to some extent between these.[111] As far as the First Amendment should be concerned, however, if the most restrictive standard is constitutional for the people of the most restrictive state, nothing should be unconstitutional about the Federal Government adopting a parallel standard for the nation.

D. Chilling Effects

A final argument that some authors raise against allowing varying community standards to apply to Internet obscenity is that it chills speech. Of course, any meaningful obscenity standard, if it is enforced, is likely to chill speech to some degree. That is its purpose. As the Supreme Court recognized in its most recent term, "speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas."[112]

Therefore, unless one is seeking to overrule *Miller* and the balance that it has established, the burden for those who would seek a separate set of constitutional rules for Internet obscenity is heavier than showing the mere existence of chilling effects. They must show that the usual rules for adjudicating obscenity established in *Miller* and related cases are likely to chill speech *of such value* on the Web that the First Amendment should require additional protection in this medium. Moreover, they must show that the chilling effects are worse in a constitutionally material way on the Web than in other mediums of communication in which the *Miller* test applies, and that revised jury instructions on the community standard element would fix this.

111. *See* sources cited *supra* note 110 (describing the contrasting approaches of the Clinton and Bush administrations with respect to obscenity).

112. Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381 (2007).

Although these questions may ultimately depend upon subjective judgments of value, it seems unlikely that one can show all of this. If anything, the Web has seemed to reduce whatever chilling effects previously existed as to sexually explicit speech rather than enhance them. It has opened such a diversity of sources and channels for information and art that the argument that obscenity law causes material harm to the marketplace of ideas through chilling effects seems far weaker today than it was in 1973 when *Miller* was decided.

V. CONCLUSION

The presence of the World Wide Web has caused a flurry of interest in revisiting the *Miller* standard for judging obscenity. However, contrary to popular argument, the constitutional issues raised by the regulation of Web obscenity are not genuinely new. It appears that those who argue that the World Wide Web is distinguishable for constitutional purposes from other methods of publishing either do not appreciate the arguments that *Miller* resolved, and the context in which *Miller* resolved them, or they simply do not like the answers that *Miller* and related cases gave.

Whether or not one prefers obscenity regulation as a policy, there is constitutional value in allowing the elected branches of government to decide how to regulate this class of publication that has never been considered protected speech within the bounds set by *Miller*. If anything, the presence of the Web makes it all the more compelling that government retain its historical power to regulate hard-core pornography for the general welfare of society.