

## A National Standard and the Internet<sup>1</sup>

The government's attempts to regulate obscenity on the Internet have led legal commentators to question the applicability of *Miller's* local community standard to the new medium. Many of these commentators have suggested that, instead of being defined by *Miller's* traditional local community standard, obscenity on the Internet should be defined by a national community standard.<sup>2</sup> These commentators argue that using a national standard would give content publishers fair notice of the obscenity standard that governs Internet content,<sup>3</sup> and avoid requiring all Internet content publishers to comply with the obscenity standards of the least tolerant community<sup>4</sup> - a feature the Supreme Court found especially troubling with applying the local community standard to the geographically borderless Internet.<sup>5</sup>

Critics of a national community standard, however, argue that the nation is too large and too diverse for the courts or jurors to decide what the national community standard for obscenity.<sup>6</sup> These critics fear that if a national standard is used, jurors will either continue to rely solely on their local community standards for obscenity,<sup>7</sup> or turn to expert witnesses to define the national standard, making obscenity cases a battle between experts.<sup>8</sup>

Although legitimate arguments exist on both sides, several Supreme Court justices have suggested the use of a national community standard as a more workable standard for defining obscenity on the Internet. The Court in *Ashcroft v. ACLU* (*Ashcroft I*), examined the constitutionality of the Child Online Protection Act's (COPA), particularly the use of *Miller's* local community standard to define "material harmful to minors" on the Internet.<sup>9</sup> In each of their concurring opinions Justices O'Connor and Breyer, although agreeing with the majority that the use of a local community standard by itself did not make COPA unconstitutional, argued that a national standard should be used to define obscenity on the Internet.<sup>10</sup> Recognizing that the use of a local community standard "would potentially suppress an inordinate amount of expression"<sup>11</sup> by "provid[ing] the most puritan of communities with a heckler's Internet veto,"<sup>12</sup> Justices O'Connor and Breyer argued that "a nationally uniform . . . standard . . . significantly alleviates any special need for First Amendment protection."<sup>13</sup>

Responding to arguments that a national standard is "'unascertainable' and 'unrealistic' because of the size and diversity of the Nation, Justice O'Connor and Justice Breyer were also quick to point out that, although "our Nation is diverse, . . . many local communities encompass a similar diversity," and the Court has historically upheld generalizations based on such communities despite their diversity.<sup>14</sup> Furthermore, the existence of regional variation in applying the national community standard may exist, "but any such variations are inherent in a system that draws jurors from a local geographic area and they are not, from the perspective of the First Amendment, problematic."<sup>15</sup>

In addition to the arguments raised by Justice O'Connor and Justice Breyer, other arguments support the switch to a national standard for the Internet. One example is the Court's current acceptance of the "serious value" prong of the *Miller* Test. In *Ashcroft I*, Justice Thomas noted that the "serious value requirement is particularly important because . . . it is not judged by contemporary community standards" but by "whether a reasonable person would find . . . value in the material, taken as a whole."<sup>16</sup> Justice

Thomas continues: "Thus, the serious value requirement allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value."<sup>17</sup> If Justice Thomas is confident that serious value of material can be judged by a reasonable person standard as a "national floor for socially redeeming value," it seems to follow that other judgments can be made on a national level.

Furthermore, it is unlikely that people have radically different standards across the nation. As one commentator pointed out:

Courts should not assume that an adult standard for what is prurient and what is offensive differs significantly across the Nation, regardless of geographic specification. There is much conjecture, but no evidence before the courts showing that obscenity statutes suppress some material in one area and not in another. Rather, looking to past obscenity decisions, the evidence shows that the same types of material . . . are held to be obscene all over.<sup>18</sup>

Even if this is not true with respect to what people in different communities consider "obscene" for adults, it is likely true for what people view as harmful for minors. For example, it is hard to believe that a sixteen year-old could legally buy a *Playboy* magazine in any state of the Union.<sup>19</sup> In Las Vegas, sixteen year olds cannot go into strip joints or adult theaters. Finally, the Internet and nationalized television have brought people from opposite ends of the country closer than ever before. People in Maine or Mississippi and people in New York and Las Vegas are exposed largely to the same material. The world is very different than it was in 1973 when Justice Burger wrote the *Miller* opinion.<sup>20</sup>

Congress has already used an "adult community standard" to define material harmful to minors for other Internet regulations. The Prosecutorial Remedies and Tools against the Exploitation of Children Today (PROTECT) Act of 2003 prohibits, among other things, using misleading domain names "to deceive a person into viewing material that is harmful to minors on the Internet."<sup>21</sup> It defines material harmful to minors as: any communication consisting of nudity, sex, or excretion, that, taken as a whole and with reference to its context-- (1) predominantly appeals to a prurient interest of minors; (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (3) lacks serious literary, artistic, political, or scientific value for minors.<sup>22</sup>

This "adult community as a whole standard" is not limited to any geographic community.

The Internet's geographic borderlessness has made it difficult for lawmakers and courts alike to apply community-tied standards. Instead of seeking to fit this "square" peg into a "round" whole, lawmakers need to adjust the obscenity standard to fit the unique characteristics of the Internet. By using a national standard, rather than a local community standard, Internet content can be judged, not just by the most puritan communities in the country, but everyone in the Internet's national audience.

Footnotes:

1. Cheryl Preston with Chad Worthen, CP80 Foundation.
2. See Frederick B. Lim, Note, *Obscenity and Cyberspace: Community Standards in an Online World*, 20 COLUM.-VLA J.L. & ARTS 291, 320-321 (1996); Dennis Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 216 (1995).
3. See Chiu, *supra* note 2, at 216.
4. See Lim, *supra* note 2, at 321.
5. See *Reno v. ACLU* [*Reno I*], 521 U.S. 844, 877-878 (1997).
6. See Roman A. Kostenko, Note, *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 CLEV. ST. L. REV. 105, 125 (2001). See *Miller v. California*, 413 U.S. 15, 30 (1973):

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When jurors or judges are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation.

*Id.* For a response to the Court's concern of using a national standard as stated in *Miller*, see Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 40-41 (2004):

A key to reconciling the Supreme Court's approach in *Miller* and the FCC's approach to broadcasting may lie in Chief Justice Burger's statement in *Miller* that obscenity "may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population despite some possible incidental effect on the flow of such materials across state lines." Because so much broadcast content on television and radio comes from national networks, holding broadcasters to varied local standards may have a substantial effect on the interstate flow of such material, rather than the incidental effect ruled permissible in *Miller*.

*Id.*

7. See Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 1012-13 (2002). See also *ACLU v. Reno* [*Reno III*] 217 F.3d 162, 178 (2000).
8. It is unclear, however, how the "expert testimony" argument will work out in reality. The Supreme Court has previously rejected the use of expert testimony in obscenity cases. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n. 6 (1973):

This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.

*Id.*

9. See *Ashcroft I*, 535 U.S. 564 (2002).
10. See *id.* at 586 (O'Connor, J., concurring); *id.* at 590-591 (Breyer, J., concurring).
11. *Id.* at 587 (O'Connor, J., concurring).
12. *Id.* at 590 (Breyer, J., concurring).
13. *Id.* at 591 (Breyer, J., concurring).
14. *Id.* At 588-589 (O'Connor, J., concurring):

For instance, in *Miller* itself, the jury was instructed to consider the standards of the entire State of California, a large (today, it has a population of greater than 33 million people [citation omitted] and diverse State that includes both Berkeley and Bakerfield. If the *Miller* Court believed generalizations about the standards of the people of California were possible,

and that jurors would be capable of assessing them, it is difficult to believe that similar generalizations are not possible for the Nation as a whole.

*Id.*

15. *Id.* at 591 (Breyer, J., concurring). See also, *id.* at 589 (O'Connor, J., concurring):  
Although jurors asked to evaluate the obscenity of speech based on a national standard will inevitably base their assessment to some extent on their experience of their local communities, I agree with Justice Breyer that the lesser degree of variation that would result is inherent in the jury system and does not necessarily pose a First Amendment problems.  
*Id.*
16. *Id.* at 579.
17. *Id.*
18. Robin S. Whitehead, '*Carnal Knowledge*' is the Key: A Discussion of How Non-Geographic Miller Standards Apply to the Internet, 10 NEXUS 49, 52 (2005).
19. For instance, a New York law prohibiting the sale of "girlie magazines" to minors under the age of 17 was upheld as constitutional in *Ginsberg v. N.Y.*, 390 U.S. 629, 631-632 (1968). This law is still on the books today. See N.Y. Penal Law §§ 235.20-235.22 (McKinney 1996).
20. See also *Ashcroft I*, 535 U.S. at 589 ("Moreover, 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.").
21. PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 § 521 (this section codified as amended in 18 U.S.C. § 2252B).
22. 18 U.S.C. § 225B (d).