

## ***Miller's* Community Standard and the Internet<sup>1</sup>**

The definition of “obscene” set forth in *Miller v. California*,<sup>2</sup> which relies on a “contemporary community standard,” has never been particularly workable, but it is virtually pointless as a guide to dealing with material on the Internet.. This memorandum examines the current legal and academic view of *Miller's* contemporary community standard as it applies to the Internet. Based on both the Supreme Court’s recent decisions and academic writing, *Miller* fails as applied to the Internet. Regulating obscenity on the internet requires a new mechanism for determining what is “obscene.”

### **I. Recent Decisions Involving *Miller* and the Internet**

Although *Miller's* definition of obscenity based on community standards has been upheld for 23 years, recent decisions involving attempts to regulate obscenity on the Internet have left its use in that medium in doubt. In *Reno v. ACLU*<sup>3</sup> (*Reno I*), the Court struck down the Communications Decency Act of 1996 (“CDA”), a statute that prohibited the sending or displaying of “indecent” and “patently offensive” materials to minors,<sup>4</sup> as measured by a contemporary community standard.

Among other things, the Court reasoned that CDA was unconstitutional because the statute did not define “indecent” or “patently offensive” and because these terms potentially cover large amounts of non-obscene material with serious educational or other value. The Court also held that the statute’s use of a contemporary community standard to determine was “patently offensive” on 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.”<sup>5</sup> The implication of this statement is that any definition that refers to “contemporary community standards” in the context of the Internet may be *per se* overly broad.

After the invalidation of CDA, Congress took the criticism of the Supreme Court and, after a great deal of study and care, drafted the Child Online Protection Act (COPA) as an effort to narrow and fix the problems the Court found in CDA. In COPA, the defined term “material that is harmful to minors” uses all three prongs of *Miller's* obscenity test. The statute states that “material is harmful to a minor if (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, lack serious, literary artistic, political, or scientific value for minors.”<sup>6</sup> The only deviation from the Supreme Court ruling is in adding the reference to minors.

The Third Circuit Court’s ruling on the Constitutionality of COPA, *ACLU v. Reno (Reno III)*,<sup>7</sup> affirmed the district court’s preliminary injunction preventing the enforcement of COPA. The *Reno III* court ruled that COPA’s use of the contemporary community standard in defining material harmful to minors was unconstitutionally broad.<sup>8</sup> The court reasoned that, unlike other outlets such as the mail or the telephone, the Internet cannot be geographically constrained; those who place information on the Internet cannot direct information only to specific communities.<sup>9</sup> The court stated that, because people who publish information on the Internet cannot control

where that information goes, using the contemporary community standard would require web publishers “of material that may be harmful to minors [to] ‘comply with the regulation imposed by the State with the most stringent standard or [entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution.’”<sup>10</sup> The Third Circuit concluded that this restriction would unconstitutionally deprive adults of their constitutional right to view such materials.<sup>11</sup> The court opined that *Miller* is useful for contexts other than the Internet, but “has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.”<sup>12</sup>

On appeal (*Ashcroft I*), the Supreme Court vacated the judgment in *Reno III* because the use of a contemporary community standard to define what is harmful for minors does not “by itself” make COPA unconstitutional.<sup>13</sup> However, the Court remanded the case to determine if COPA passed strict scrutiny on other grounds.<sup>14</sup> Even though this appeared to be a glimmer of hope for the contemporary community standard, most commentators expressed doubt as to whether the contemporary community standard would ever pass strict scrutiny or could be used to define obscenity in a case potentially involving adult speech on the Internet.<sup>15</sup>

On remand (*Ashcroft II*), the Third Circuit reaffirmed the district court’s decision because, after applying strict scrutiny to other aspects of COPA, it still found that COPA to be unconstitutional.<sup>16</sup> The Third Circuit once again recognized the vagueness and overbreadth created by using the contemporary community standard and other language in COPA.<sup>17</sup> The court held that this overbreadth showed COPA was not “narrowly tailored” to protecting minors<sup>18</sup> and this, along with not using the least restrictive means to achieve this end, meant COPA did not pass strict scrutiny review.<sup>19</sup>

On appeal (*Ashcroft III*), the Supreme Court plurality did not address the overbreadth of COPA but ruled to enforce the injunction based on the grounds that COPA did not use the least restrictive means necessary to protect minors.<sup>20</sup> Justice Kennedy’s opinion suggested that filters might be sufficient to reach the results Congress desired. Because the majority did not expressly address the community standard in *Ashcroft III*, it is unclear how the Court will rule in future cases involving the use of the community standard to define obscenity on the Internet.

Justice Scalia’s dissent in *Ashcroft III* seemed resigned to using the *Miller* test and its contemporary community standard, but believed COPA to be constitutional. Justice O’Connor, who joined in Justice Breyer’s dissent, had before expressed doubts about the use of the community standard in defining obscene material on the Internet. In her concurring opinion in *Ashcroft I*, she suggested that “this case still leaves open the possibility that the use of the local community standards will cause problems for the regulation of obscenity on the Internet, for adults as well as children in the future.”<sup>21</sup>

## **II. Commentary on the Use of a Community Standard for the Internet**

Commentators questioned the applicability of using a contemporary community standard to define obscenity on the Internet even before the Supreme Court’s rulings on CDA and COPA. Many commentaries have focused on those characteristics of the Internet that make applying the community standard to its content difficult.

### **A. Issues that Make *Miller*’s “Contemporary Community Standard” Difficult to Apply**

According to commentators, the problems with applying the contemporary community standard to material on the Internet can be separated into two categories: the Internet's lack of geographically defined borders and its degree of the public involvement.

### **1. A Geographically Borderless World**

Web publishers do not have the ability to direct or stop their materials from reaching a particular geographical location. Any post is equally accessible to the most liberal community as well as the most conservative community. One commentator states that applying a community standard to the Internet, where publishers cannot choose where to send their materials, would "establish a de facto national standard equivalent of the least tolerant jurisdiction."<sup>22</sup> Such a rule would make "borderline distributors" choose between distributing their material with the possibility of facing criminal or civil liability in some unknown conservative community or not distributing their material at all.<sup>23</sup> This argument was persuasive to Justice Kennedy in *Ashcroft III*.

Academics also recognize that the borderless Internet causes other jurisdictional problems.<sup>24</sup> First, the community standard may allow federal prosecutors to forum shop.<sup>25</sup> Because obscenity is defined by the community standard where the material is received,<sup>26</sup> a federal prosecutor could charge a web publisher with violating anti-obscenity laws by simply accessing the materials in a jurisdiction that is most likely to find the material to be obscene.<sup>27</sup> Similarly, using the community standard on the Internet leaves web publishers open to multiple prosecutions for a single offense because their work may be accessed and deemed obscene in multiple jurisdictions even if web publishers never considered the standards of these jurisdictions.<sup>28</sup> Thus, it appears that the using a community standard to define obscenity on the Internet would have a chilling effect on free expression.<sup>29</sup>

### **2. Popular Control of the Internet**

Another characteristic that makes it difficult to apply a contemporary community standard to material on the Internet is the control that lay, inexperienced individuals, as opposed to businesses, have over it. Most other forms of media dissemination are not readily available to private individuals. On the Internet anyone can create his or her own website, write a blog, or participate in a chatroom or message board service. Most of those who use the internet are not trained in the nuances of obscenity law nor the community standards of other communities, and are without practical resources to learn about these standards.<sup>30</sup> This could lead to the prosecution of people who are unaware that they have done something wrong, which clearly violates their right to fair notice.<sup>31</sup> Presumably, however, users of the internet are savvy enough that a media campaign or link on popular sites, such as Google, Yahoo and AOL, could easily put them on notice of the risks of posting potentially obscene material. To do this, of course, the Supreme Court would have to settle upon a definition that can be easily explained and understood. The current concept of "community standards" is such an awkward fit with the Internet, it would be very difficult to put lay Internet users on notice.

### **III. Possible Alternative to a Community Standard**

Because most commentators believe that the above characteristics make using the community standard to define obscenity on the Internet unworkable, they have tried to develop alternative approaches that would be less burdensome on speech. These approaches include

using a national standard, a virtual community standard, an “origin of the material standard,” and finally, a “bottom, up” approach.<sup>32</sup>

### **A. National Standard**

Many suggest using a national average standard instead of a local community standard. They argue that a national average standard would provide a middle ground between the conservative jurisdictions and the more liberal jurisdictions, eliminate opportunities for forum shopping as stated above,<sup>33</sup> and provide better notice to individuals of the obscenity standard.<sup>34</sup> But how do we settle on an “average”? Who decides? Can we have a concretely defined, published “average” description that is easily accessible to Internet users? When and how can the average change over time?

Critics of this approach also argue that, in the end, using a floating or jury-determine “national standard” would be no better than a community standard because juries will still likely apply their own community standards when deciding a case, even though the jury instructions attempt to define a national standard.<sup>35</sup>

Rather than an average, a national standard might be created by an attempt to find some consensus. Critics of this approach argue that a national standard would, in practice, mean that obscenity will be judged according to the most permissive community.<sup>36</sup> They also argue that a national standard would be too difficult to create because the nation is too big and too diverse for there to be consensus on an issue like obscenity.<sup>37</sup>

### **B. Virtual Community Standard**

Other commentators argue that obscenity should be defined using a virtual community standard that “would involve instructing the trier of fact about the nature of the Internet, extent of pornography upon the Internet, availability of blocking devices, and other information that reasonably represents the culture of cyberspace.”<sup>38</sup> This idea has not gained much acceptance because it is “without meaningful definition.”<sup>39</sup> It is unclear as to who would be included in the virtual community<sup>40</sup> and how would a jury be selected from this community.<sup>41</sup>

Another argument against using this approach at this time is that the Internet has now become so polluted with obscenity, the existing standard in Internet users’ minds is that anything goes. It is too late to suggest that the cyber-community is subject to any meaningful restrictions because enforcement against obscenity on the Internet has been virtually nonexistent (except with respect to pornography using children in the production), and self-restraint limited to few of the Internet users who would like to post obscenity. By virtue of having tolerated cyberporn thus far, we have probably waived the notion that the Internet community has chosen any standards at all. Thus, unfortunately, the virtual community is likely more permissive than the most permissive geographical community. This is highly ironic because children in every geographical community can easily find, or unwittingly be sent to, images more obscene than anything obtainable by any means of physical access in their communities. Arguably, because the Internet is available in every community and the majority of Americans now use the Internet, no community has *Miller* standard better than the extant Internet, which has no standard at all.

### **C. “Origin of the Material” Standard**

Other commentators have suggested that obscenity be judged on the basis of the standards of the community where the information is uploaded.<sup>42</sup> This approach would provide

sufficient notice of the law to web publishers because they would be familiar with the community standard where they live.<sup>43</sup> It would also avoid the jurisdictional issues and forum shopping.<sup>44</sup> This standard, however, is problematic because professional pornographers would simply have the material uploaded in the most permissive community.<sup>45</sup> Those who distribute questionable material on the Internet would establish an office in a highly permissive district, or simply find someone in a permissive community willing (for pay or otherwise) to upload material. This approach totally ignores the interest of communities that receive the material in regulating obscenity.<sup>46</sup>

#### **D. “Bottom, Up” Approach to Regulating Obscenity**

Many academics believe that the First Amendment makes it practically impossible for the federal government to regulate pornography on the Internet. Professor Mark C. Alexander suggests that, instead of seeking a federal government solution to regulate obscenity on the Internet from a top, down approach, we should find a solution from the bottom, up, starting with local community efforts.<sup>47</sup> By moving the responsibility to regulate obscenity on the Internet from the federal government to individuals, states, and industry, Alexander argues communities can more effectively maintain particular standards.<sup>48</sup>

Alexander first urges that individuals who “confront these problems every day,” such as parents, schoolteachers, and librarians, should be given the power to make guidelines that dictate how children use the Internet.<sup>49</sup> Because individuals have no power outside their homes, schools, or libraries, this form of protection would necessarily be patchy, and ultimately destroyed by one location where internet access is not restricted. This is essentially the current model, relying entirely on the volunteer use of filters.

Alexander also suggests that states can regulate obscenity by enacting local and state legislation that requires filtrations in schools or libraries,<sup>50</sup> allowing teachers to maintain a higher community standard without infringing on the rights of more liberal communities.<sup>51</sup> As with the individual-based solution, this suggestion assumes that user-end mechanisms exist that can prevent children from accessing harmful sites. Cyberspace experts now recognize that filters are not effective, although many members of the Supreme Court still seem to think filters are sufficient.

Alexander also suggests that the computer industry can handle the problem through the operation of the market.<sup>52</sup> Internet Service Providers (ISP) can be formed geared to serve groups with similar values.<sup>53</sup> This would allow Internet users to join “virtual communities” to protect themselves against Internet obscenity.<sup>54</sup> These ISPs could develop server-side filters that would allow these “virtual communities” to access only the material they want to without “fear of stumbling onto offensive material.”<sup>55</sup> To date however, no ISPs have emerged with the technology or the interest in trying to make the millions of daily decisions necessary to screen offensive material. They would be forced to rely on the same filtration methods currently used, which are based on rudimentary tools of measuring harmful text, unable to discern images, and quickly being overrun by the volume and changing nature of material posted on the internet.

Another possibility, no mentioned by Alexander, but a “bottoms” type approach is to select the community standards of the most lenient geographical community. Currently no geographical location allows display in public places and other locations where minors have legal physical access text or images as sexually explicit and prurient than what can easily be

located on the Internet. We are currently researching the various enforcement actions that have been brought against Las Vegas businesses for indecent displays.

### Conclusion

Although *Miller's* contemporary community standard has endured for twenty three years, it has become outdated, much like the obscene materials it was originally devised to address. The Supreme Court has not declared that using the contemporary community standard to define obscenity on the Internet is unconstitutional, but it appears that the Internets "unique characteristics" of borderlessness and popular control make it "virtually" impossible to apply this standard to the world's fastest growing medium. This places the Supreme Court at a cross roads: either try to fix a new standard for regulating obscenity on the Internet or rule that the complexities of the Internet make it impossible to regulate Internet obscenity without violating the First Amendment.<sup>56</sup>

#### Footnotes:

1. Cheryl B. Preston, with the assistance of Chad Worthen, CP80 Foundation.
2. *Miller v. California*, 413 U.S. 15 (1973).
3. *Reno v. ACLU [Reno I]*, 521 U.S. 844 (1997).
4. *See id.* at 885.
5. *Id.* at 877-78.
6. *Id.* at 168.
7. 217 F. 3d 162 (2000).
8. *See id.* at 173-74.
9. *See id.* at 176.
10. *Id.* at 176 (quoting *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997)).
11. *See id.* at 177.
12. *Id.* at 180.
13. *See Ashcroft v. ACLU [Ashcroft I]*, 535 U.S. 564, 586 (2002).
14. *See id.*
15. *See id.* at 587 (O'Connor, concurring), and *id.* at 591 (Kennedy, concurring).
16. *See ACLU v. Ashcroft [Ashcroft II]*, 322 F. 3d 240 (2003).
17. *See id.* at 251.
18. *See id.* at 251.
19. *See id.* at 261.
20. *See Ashcroft v. ACLU [Ashcroft III]*, 542 U.S. 656, 673 (2004).
21. *See Ashcroft I*, 535 U.S. at 587.
22. Frederick B. Lim, *Obscenity and Cyberspace: Community Standards in an Online World*, 20 COLUM.-VLA J.L. & ARTS 291, 299 (1996).
23. *See id.*
24. *See* Barbara Ryga, Comment, *Cyberporn: Contemplating the First Amendment in Cyberspace*, 6 SETON HALL CONST. L.J. 221, 252-53 (1995).
25. *See* Lim, *supra* note 22., at 299.
26. *See* *United States v. Thomas*, 74 F. 3d 701, 711 (6<sup>th</sup> Cir. 1996).
27. *See* Lim, *supra* note 22, at 300.
28. *See id.*
29. *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, 1010 (2002).
30. *See* Lim, *supra* note 22, at 315.

31. See Dennis Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 208 (1995).
  32. These arguments are best articulated in Alexander, *supra* note 29.
  33. See Lim, *supra* note 22, at 321
  34. See Chiu, *supra* note 31, at 216
  35. See Alexander, *supra* note 29, at 1012
  36. See Martha McCarthy, *The Continuing Saga of Internet Censorship: The Child Online Protection Act*, 2005 BYU EDUC. & L.J. 83, 99 (2005).
  37. See Roman A. Kostenko, Note, *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 CLEV. ST. L. REV. 105, 125 (2001).
- Dominic F. Maisano, Note, *Obscenity Law and The Internet: Determining the Appropriate Community Standard After Reno v. ACLU*, 29 U. TOL. L. REV. 555, 587 (1998); See also Pat T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117 (1996).
38. Alexander, *supra* note 29, at 1010.
  39. Alexander, *supra* note 29, at 1010.
  40. See *id.*
  41. See Maisano, *supra* note 38, at 587.
  42. See Alexander, *supra* note 29, at 1013-14.
  43. See *id.*
  44. See *id.*
  45. See *id.*
  46. See *id.*
  47. See *id.* at 1021-22.
  48. See *id.* at 1023.
  49. *Id.* at 1024-25.
  50. See *id.* at 1026.
  51. See *id.*
  52. See *id.* at 1027-28.
  53. See *id.*
  54. See *id.*
  55. *Id.*
  56. The District Court of the Western District in Pennsylvania seems to believe the court should follow this path. In *United States v. Extreme Ass'n., Inc.*, 352 F. Supp. 2d 578, 596-97 (W.D. Pa. 2005), the court ruled that "the federal obscenity statutes burden an individual's fundamental right to possess, read, observe, and think about what he chooses in the privacy of his own home by completely banning the distribution of obscene materials." This case was overturned on appeal. *United States v. Extreme Ass'n Inc.*, 431 F.3d 150 (3rd Cir. 2005), cert. den'd, 126 S. Ct. 2048 (2006). See also Clay Calvert & Robert D. Richards, *Vulgarians at the Gate: Privacy, Pornography, & the End of Obscenity Law as We Know It*, 34 SW. U. L. REV. 427, 427 (2005).