Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights

by SARAH KAGAN*

Introduction

In its October 28, 2009, decision in *United States v. Kilbride* [1] the United States Court of Appeals for the Ninth Circuit held that courts should apply a "national community standard" when evaluating whether speech transmitted online or through e-mail is obscene.[2] This case marks the first time that a circuit court has called for a national obscenity standard. The idea has been floated by a handful of Justices on the Supreme Court; however, it has never commanded a majority of the Court.[3] Historically, district and circuit courts have widely avoided "venturing into the uncharted waters of a national obscenity standard."[4] The Ninth Circuit's opinion, however, raises the following questions: 1) What is a national obscenity standard? and 2) How would one be created and applied? The Ninth Circuit left these questions unanswered. This note is intended to begin to address those questions and highlight areas where greater empirical research is needed. Part I of this note is an introduction to obscenity laws and their development. Part II addresses the technological developments necessitating the imposition of a national standard for

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

. *Id.*

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Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 858 (5th Cir. 1979).

Internet communications. Part III will address the relevant national community as well as current research on the definition of obscenity. Part IV will address the First Amendment issues raised by the current standard as well as the potential issues for free speech under a national obscenity standard. Part V will discuss what a national obscenity standard might look like as well as mechanisms to ensure that a national standard is applied consistently.

I. The Development of Obscenity Laws

[5] this First Amendment protection has long been held not to apply to speech that is obscene.[6] Creating a sufficiently clear and lasting definition of what qualifies as obscene has presented significant difficulty for the courts.[7]

A. The Evolution of the Obscenity Standard

Early common law tests for obscenity, such as the "*Hicklin* [8] declared any material containing even an isolated passage that would offend a "particularly susceptible" member of society to be obscene.[9] The Supreme Court refused to adopt the test because of the test's reliance on the standard of particularly sensitive persons.[10] The Court reasoned in *Roth v. United States*

dealing with sex-related issues and therefore had to be rejected as unconstitutionally restrictive of speech and press freedoms.[11] The Court thus exhibited a preference for a test that would enforce prevailing societal values rather than the sensitivities of isolated perspectives.

In *Miller v. California*

5. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

6. *See e.g.*

. *See, e.g.*

. *See*

. *See Roth*

. *Id*

. *Id.*

. *Miller*

of expression.[13] The test has withstood challenge for almost thirty years and is still in use today. The test contains three prongs, each of which must be satisfied for a work to fall under an obscenity statute.[14] The test consists of the following guidelines for the trier of fact:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[15]

Thus, the jury must decide whether the work appeals to the prurient interest. Then, the jury must decide whether the work portrays sexual conduct in a patently offensive way.[16] Finally, the court determines whether the work as a whole lacks serious artistic, political, or other value.[17] In , the Court also addressed the question of whether to apply national or local community standards.[18] Writing for the majority, Chief Justice Burger declared the United States too large and diverse to permit the use of a unified national standard.[19] Since the "contemporary community standards" language did not establish national obscenity standards, exactly what size or kind of community served as the source of the standards remained undetermined.[20]

In *Hamling v. United States*

Hamling

. *Id.*

. *Id.*

. *Id.*

Are 'Contemporary Community Standards' No Longer Contemporary? LEV. ST. L. REV. 105, 111 n.36 (2001).

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18 at 112.

19 , 413 U.S. at 30.

20 Rieko Mashima, *Problem of the Supreme Court's Obscenity Test Concerning Cyberporn: Community Standards Remaining After* HE COMPUTER LAWYER 23, 23 (1999).

21. Hamling v. United States, 418 U.S. 87 (1974).

22 at 105.

should consider the issue on the basis of "knowledge of the community or vicinage from which he comes."[23] also addressed the issue of whether the use of local community standards renders the test unconstitutional because it subjects nationwide distributors of printed materials to the various and unpredictable standards of every community through which the materials may pass.[24] The Court rejected the petitioners' argument that such nationwide distributors should be held to national, rather than local, standards, and likewise refused to adopt Justice William J. Brennan's opinion that to convict the petitioners under a local standards test would deny them due process of law.[25] The Court instead held that local community standards apply not only to persons based in a local area, who have reason to know of the local standards, but also to persons who operate from a distance and are unaware of the local standards.[26]

In *Pope v. Illinois*

Miller

third prong, "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[28]

In *Ashcroft v. ACLU*
constitutionality of the Child Online Privacy Act ("COPA")[30] and

23. *Id.*

24. *Id.* at 106.

25. *Id.*

26. *Id.*; s*ee also* Ashcroft v. ACLU, 535 U.S. 564, 581 (2002).

27. Pope v. Illinois, 481 U.S. 497, 500 (1987). In *Hamling v. United States*

Jenkins v. Georgia, the Court approved a "trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'" Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

28. *Pope*, 481 U.S. at 500–01.

29. *Ashcroft*, 535 U.S. at 579.

30. The Child Online Protection Act ("COPA") prohibits commercial displays of sexually explicit materials that are harmful to minors on the World Wide Web, with the exclusion of materials having serious literary, artistic, political, or scientific value for minors. 47 U.S.C. § 231(e)(6) (1994) (corresponds to the Communications Act of 1934, § 231(e)(6)).

concluded that, by itself, the statute's reliance on community standards about what material is harmful to minors did not make the statute substantially overbroad. The Court reaffirmed prior holdings that obscene speech falls outside of protected speech freedoms,[31] and that the use of contemporary community standards in determining what speech is obscene does not, by itself, render a federal statute unconstitutional,[32] even if publishers of obscene materials are required to abide by the standards of disparate communities.[33] A plurality of the Supreme Court recognized that "Web publishers currently lack the ability to limit access to their sites on a geographic basis," and that therefore the use of community standards to define "obscenity" "would effectively force all speakers on the Web to abide by the 'most puritan' community's standards."[34] Nevertheless, the plurality found that use of community standards "does not by itself render" a statute unconstitutional.[35] It noted that distributors of such materials are not dismissed from compliance with community standards because they use the Internet, a medium that broadcasts information to virtually every community in the country.[36] The plurality further stated that COPA's test for determining whether material is harmful to minors was modeled on the well-established test (which includes both a "serious value" and a "prurient interest" prong to narrow the applicability of community standards), and the mere use of community standards did not render the statute overbroad.[37]

The majority was not overwhelming in number; at most, five Justices joined some points of the decision, while other points were decided by a mere plurality of three.[38] The opinion is followed by three concurring opinions and one dissent.[39] However, six Justices thought that a national standard might be needed in light of new technology.[40] Justice O'Connor's concurrence emphasized that the

31 , , , 535 U.S. at 574.
32 at 584–85.
33 at 581.
34 at 577.
35 at 585 (plurality opinion).
36 . at 583.
37 . at 578–85 (citing Miller v. California, 413 U.S. 15 (1973)).
38 at 565–66.
39 at 586–612.
40. . at 585 (plurality opinion).

Court's precedents did not rule out adoption of a national standard.[41] Indeed, she stated that a national obscenity standard, when applied to the Internet in particular, would be reasonable in light of the admitted absence of any great disparity even between the most and least restrictive communities' interpretations of what would qualify as obscene under COPA.[42] A national standard is also desirable because it would prevent overburdening Internet content providers with the task of attempting to limit access to their materials.[43] Justice Sandra Day O'Connor concluded that reasonable regulation of the Internet mandated adoption of a nationwide community standard.[44]

Justice Stephen Breyer's concurrence focused on Congress's stated purpose of creating a community standard encompassing all of the nation's adults.[45] By enforcing Congress's intent, he noted, conflicts with the First Amendment could be avoided because the most puritan communities would not be given the "heckler's Internet veto."[46] Applying a national standard would prevent any special need for First Amendment analysis, because the constitutional problems associated with the use of local standards would be avoided entirely.[47] Justice Anthony Kennedy, joined by Justices David Souter and Ruth Bader Ginsburg, found it impossible to decide whether the use of community standards would ultimately invalidate the statute until the scope of all the other provisions had been assessed.[48] He noted that because the Internet is a new and unique medium, prior obscenity regulation holdings were not necessarily analogous.[49] Thus, in total, six members of the Court found that a national standard may be needed, and five concurring opinions viewed the national standard as

41 at 587 (O'Connor, J., concurring).

42 . at 586. Justice O'Connor pointed out that in , the Court conceded that a community standard could exist covering the entire state of California, one of the largest and most demographically diverse states. at 587–88 (O'Connor, J., concurring).

43 . at 587 (O'Connor, J., concurring).

44 .

45 . at 589–91 (Breyer, J., concurring).

46 . By use of the term "heckler's Internet veto," Justice Breyer no doubt meant that just as a lone, opinionated critic in the audience at a public debate should not be allowed to force his or her perspective on the rest of the attendees by use of veto power; so also should no single community, alone in its discontent, be empowered to deny the rest of the nation access to materials otherwise considered acceptable.

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48 . at 593 (Kennedy, J., concurring).

49 . at 592–93.

not likely posing the same threats to the First Amendment as the current community-based test.

B. The *Kilbride* Decision

and generated approximately 662,000 complaints to the Federal Trade Commission ("FTC") from persons around the country.[52] The defendants were ultimately charged with violations of 18 U.S.C. § 1037(a)(3) through fraud in connection with electronic mail and of two Federal obscenity laws, 18 U.S.C. §§ 1462 and 1465, which prohibit the importation into the United States, and the transportation in interstate commerce, of "obscene, lewd, lascivious, or filthy" books, pictures, and other media.[53]

In , the district court instructed the jury that the obscenity test from could be applied on the basis of standards of "society at large, or people in general."[54] The court said a precise geographic area would not define the relevant community and that jurors could consider their own experiences and judgment.[55] On appeal, the defendants argued that those instructions were erroneous because, under , the court should have told the jurors to apply standards of their local communities.[56] In the alternative, they asserted, because the content at issue was sent via e-mail, did not apply and instructions should have referred to a national community.[57] The Ninth Circuit held that because people using e-mail to transmit possibly obscene works cannot control where those works are received, applying 's location-specific standard would subject all messages to standards of the least tolerant community.[58] The Ninth Circuit cited

50. United States v. Kilbride, 584 F.3d 1240 (9th Cir. 2009).
51 . at 1244.
52 1245.
53 ; 18 U.S.C. §§ 1462(a) & 1465.
54 at 1249 (citing Miller v. California, 413 U.S. 15 (1973)).
55 .
56 . at 1247.
57 . at 1250.
58 .

,[59] as most directly addressing the obscenity issue in . As discussed above in section I.A., in there was no single rationale explaining the result, however the Ninth Circuit distilled from the five assenting opinions a holding on the narrowest grounds.[60] The five Justices concurring in the judgment viewed the application of a national community standard as not or likely not posing the same concerns as the application of community standard in defining obscenity on the Internet.[61]

As a result, the Ninth Circuit found a national community standard for obscenity to be the appropriate standard to apply.[62] With regard to the defendants however, the Court found that there was no plain error, because the standard of the relevant community was not "clear and obvious."[63] Ultimately, the Ninth Circuit found that the district court had committed no reversible error in its jury instructions.[64] The Ninth Circuit's decision may have provided temporary closure to the case; however, it opened up a can of legal worms for practitioners and individuals who may someday face prosecutions for obscenity. The Ninth Circuit did not broach the subject of whether true consensus on the definition of obscenity exists, what a national obscenity standard would look like, or how a jury would apply a national obscenity standard.

The Nature of the Internet Has Made Local Standards for Speech Impracticable.

Kilbride,

. *Id*. (quoting United States v. Recio, 371 F.3d 1093, 1100 (9th Cir. 2004)).

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65. The Pew Research Center's Internet & American Life Project's latest research on the effects of the Internet and cell phones on people's relationship to information and each other found that: seventy-five percent of adults use the Internet, eighty percent of adults own a cell phone. Further, fifty-seven percent of online adults use social

integral part of people's daily lives. People communicate through e-mail and social networking sites, they shop online, do their banking online, and even read their daily newspaper online. The Internet has also allowed for individuals to access sexually explicit images from practically anywhere a signal can be obtained.[66] In December 2009, there were approximately 234,372,000 Internet users in the United States.[67] From 2000-2009 the number of users in North America increased 145.8%.[68]

The notion of a designated community seems antiquated in the digital era, particularly when material can be produced in one part of the world or nation and then, in the blink of an eye, be sold and transferred automatically, from one site to another, finally ending up in a third locale. Internet activities, such as e-mail, blogging, and the use of social networking websites have been associated with larger and more diverse personal networks.[69] The Internet has the ability to foster communities. Its wide availability enables geographically, culturally, and socially distant people to find one another and form relationships online. However, the Internet's decentralized and open architecture has also made laws dealing with communications over the Internet based on geographic boundaries largely impracticable.[70] In cyberspace, user anonymity permits individuals to travel from site

networking websites, and sevety-three percent of online teens use them. Lee Rainie, *Networked Individuals: How They are Reshaping Social Life and Learning Environments* ESEARCH CENTER INTERNET & AMERICAN LIFE PROJECT (Apr. 2010), http://www.pewinternet.org/Presentations/2010/

Apr/University-of-Connecticut-Library-Forum.aspx.

66. Jo Best, *Cell Phone Porn To Ring Up $3.3 Billion* ZDNET NEWS (Nov. 28, 2006), http://news.zdnet.com/2100-1035_22-150416.html.

67 INTERNET WORLD STATS, http://www.internetworldstats.com/stats14.htm (last visited Mar. 10, 2010). The North American Statistics were updated as of December 31, 2009, and the information comes mainly from the data published by Nielsen Online, International Telecommunication Union, and other reliable sources.

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69. Shanyang Zhao, *Do Internet Users Have More Social Ties? A Call for Differentiated Analyses of Internet Use*, 11(3) J. OF COMPUTER MEDIATED COMM. 8 (2006) (social users of the internet have more social ties than non-users do); *see also*, Charles Steinfield, Nicole B. Ellison & Cliff Lampe, *Social Capital, Self-Esteem, and Use of Online Social Network Sites*

. *See* *Law and Borders—The Rise of Law in Cyberspace*

Modern means of communication affect local community standards, because "[c]ommunications technologies change relationships of time and space," such that geographical barriers have less impact.[73] "Just as the physical and political geography of this country has created physical communities, neighborhoods, cities, and regions, each with common interests and goals, shared experiences and interlocking relationships among its residents so has cyberspace allowed the emergence of virtual communities."[74] The introduction of outside communications adds state, national, and global flavors and accents to community discussions. Introducing influences from across the country into small or large communities is antithetical to the idea of "local" standards because as national views enter the discussion, they shift the midpoint in community consensus.[75] The more outside influence is introduced into the community, the less "local" a standard becomes.

The reality of the modern communications age is that no community exists as an island unto itself, able to maintain its own set of morals completely separate from those of other communities.[76] At the core of the dilemma is the fact that the Internet has no obvious borders within which to define a geographic community. The application of an international standard is an option; however, problems necessarily arise when countries differ, as they will, in their respective definitions of obscenity.[77] The empirical research proposed

71. Lawrence Lessig, , 45 EMORY L.J. 869, 887–88 (1996).

72 Anne Wells Branscomb, *Challenges to the First Amendment in Cyberspaces,*

ECHNOLOGY ASSESSMENT, U.S. CONG., RURAL AMERICA AT THE CROSSROADS: NETWORKING FOR THE FUTURE 60 (1991).

74. William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*

. *See*

Kilbride

III. Does a National Consensus on the Definition of Obscenity Exist?

Southeast Promotions v. Conrad

Ashcroft v. ACLU *Reno v. ACLU*

see also

. *See Ashcroft* *Reno*

Study Ranks America's Most Liberal and Conservative Cities

A. What Is the Relevant National Community?

LB. L. REV.
1083, 1086 (1996) (addressing the ease of access and distribution of information on the Internet). Further development of the Internet will change "forever the way people live, work, and interact with each other" as more and more people access the vast network of information to communicate, bank, invest, buy, sell, or entertain themselves. The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025-01, 1993 WL 365171 (Sept. 21, 1993) Internet users can access numerous services, including e-mail, discussion groups, interactive classes, magazines, and newspapers.

interacting via e-mail and chat rooms may not know where an individual is geographically. Internet users communicate with other users from all over the world from the privacy of their own home; and, in the case of laptops and web-enabled cellular phones, anywhere they happen to be at the moment.

Implicit in the community standards approach is the notion that a community relies upon the proximity of its members.[86] The proper community standard for purposes of e-mail and the Internet should be a standard designed specifically for the unique nature and attributes of the Internet. This standard would apply only to the Internet domain, and Internet users would determine what is considered obscene material for purposes of the Internet. The American users of the Internet should comprise the community for the national community standards test.[87]

B. Obscenity and Pornography–What Are We Looking At?

C. What Does the National Internet Community Find Obscene?

Or Is It? An Investigation into Community Standards of Obscenity (July 3, 2007) (unpublished report) (on file with the University of Nevada, Reno, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998192).

94. No research currently addresses whether such a national standard or consensus exists. However, if the Court is to continue to prosecute obscenity cases under the guise that it offends community standards, the burden of establishing such a standard should be

Studies on the acceptance of pornography and community standards from a sampling of locales across America including: Atlanta, Georgia;[95] Phoenix, Arizona;[96] San Francisco, California;[97] Corpus Christi, Texas;[98] Allen County, Ohio;[99] and Dade County, Florida[100] have found the majority of respondents favored adults having access to sexually explicit adult material. A 1994 study reviewed the attitudes of adults in ten states regarding sexually explicit content in mass media.[101] In each state they reported that standards had become more acceptable of sexual materials and that adults have a right to obtain such materials and for adults to see materials containing exposure of the genitalia and every kind of sexual activity even in mass media.[102] The only feature of a community standard that could be found, and still seems to hold today, is an intolerance for any materials in which children or minors are involved either as actors, participants, part of production, or viewers.[103]

The most recent and relevant study completed on the issue of qualifying as obscene is small-scale research undertaken in

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placed on the prosecution. Appropriate research is needed in order to apply a national standard, as discussed section III.C. The government should fund such studies to provide further legitimacy to these prosecutions in the long run.

95. Herrman, M. S. & Bordner, D. C., , 21 CRIMINOLOGY 349 (1983).

96. Sowers, C. & James, V. H., *Arizonans Back Right To See Adult Films At Home But Support Porno Crackdown* RIZONA REPUBLIC, May 12, 1985, at A1.

97. Schreiner, T. & Lempinen, E., *Special Bay Area Poll On Sex, Drugs, Politics*

Red Light States: Who Buys Online Adult Entertainment?,

What is Obscene? Social Science And The Contemporary Community Standard Test Of Obscenity *see also,*

Obscenity And The Law: Can A Jury Apply Contemporary Community Standards In Determining Obscenity?

supra

Is There A National Standard With Respect To Attitudes Toward Sexually Explicit Media Material?, EXUAL BEHAVIOR 405 (1994).

102 .

103. Terry Frieden, , CNN, May 13, 2002, http://archives.cnn.com/2002/LAW/05/13/scotus.online.porn/index.html; Robert Peters, July 20, 2004, http://www.obscenitycrimes.org/InternetCommunityStandards.php; Martin Diamond & J. E. Dannemiller, 18(6) ARCHIVES OF SEXUAL BEHAV. 475 (1989).

2007 by Alicia Summers and Monica Miller of the University of Nevada, Reno.[104] Their research model should be implemented on a larger scale as it would provide helpful guidance in the formation of a national standard, whether based on the Internet community standard or the community standard of the American public generally.

Summers and Miller sought to answer two questions in their research: First, is there a community standard of obscenity? And second, are jurors capable of understanding this community standard?[105] Individuals were given the legal definition of obscenity and asked to rate how obscene they personally felt that twenty-four items were, on a scale from one (not at all obscene) to eight (highly obscene).[106] The least obscene items for individual ratings were art books with nudity, movies that imply sexual intercourse, and theater performances with partial female nudity.[107] Items ranked moderately obscene (i.e., scores closest to 4.5) included websites with adult sex stories, sexually graphic language, and magazines that have pictures of naked men.[108] Items ranked highly obscene (i.e., scores above seven) were websites with sexual stories about children, movies with explicit rape scenes, magazines with images of people having sex with animals, and movies that portray sex with corpses.[109]

Following the individual ratings of obscenity, participants were asked to consider how they thought others in their community would see the items and to rate them again. These ratings were aimed at determining participants' perceptions of community standards of obscenity.[110] Participants' ratings of obscenity were less conservative than their perceptions of community standards, demonstrating a pluralistic ignorance bias.[111] Even though individuals are part of their

104. Summers & Miller, note 93.

105 The participants included forty-seven community members from sixteen states and fifty-four students from a mid-size western university. Participants included twenty-eight males and seventy-three females. Participants were from rural areas (40.6%), suburban areas (39.6%), urban areas (15.8%), and metropolitan areas (4%).

106 at 12.

107 .

108 .

109 .

110 . at 13.

111. Pluralistic ignorance is a cognitive bias in which individuals believe that their attitudes and behaviors differ from the expressed social norm. Tracy A. Lambert, Arnold S. Kahn & Kevin J. Apple, , 40(2) THE J. OF SEX RES. 129 (2003).

community, they believe their views are different from the community at large. This misperception of community standards applied in the criminal context might cause a jury to convict an individual of an obscenity crime, even if they do not feel he is guilty.

While the Summers and Miller research has its limitations,[112] it highlights that the assumptions of the test—that community standards exist and that jurors are capable of understanding them—is flawed. While this may also mean that a national standard is just as elusive, until this type of research is undertaken on a grander scale, the question remains unanswered.[113] Further, individual perceptions of obscenity do not match perceptions of community standards of obscenity, an important fact considering the current legal definition and the proposed "national" definition, rest on "community standards" as applied by individual jurors. If the courts are to continue utilizing the test, with or without nationalizing the relevant community, further research similarly structured to the Summers and Miller study must be undertaken on a larger scale. Additionally, the Summers and Miller study tells us that the test for obscenity, if involving community standards, must provide greater checks on juror's flawed perceptions of the community standard.

IV. Constitutional Considerations and the Failures of the Local Standard

Jacobellis v. Ohio

> [T]here is no provable "national standard" . . . this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable.[116]

Thus, Chief Justice Warren found that the potential for suppression of speech seems at least as great in the application of a single nation-wide standard as with a local standard. Nine years later, the majority in stated "[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."[117] In the same vein, it may be argued that the First Amendment does not permit the people of New York or Las Vegas be barred from freely obtaining works acceptable to them simply because those works would be intolerable to the people of Maine or Mississippi.

The opinions above reject a national standard without entertaining the potential benefits and protections it may afford individual rights. Rather than requesting empirical research be done, or that Americans' opinions be obtained, the Court merely claimed that the task is simply too hard. The claim that it is too hard to poll Americans, particularly in today's technologically advanced society, is insufficient when weighed against the implications for individual

114 , 584 F.3d at 1254 n.8.

115 .

116. Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, J., dissenting).

117. Miller v. California, 413 U.S. 15, 32 (1973); Hoyt v. Minnesota, 399 U.S. 524, 524–25, (1970) (Blackmun, J., dissenting); Walker v. Ohio, 398 U.S. 434, 434 (1970) (Burger, C.J., dissenting); at 434–35, (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319, 319 (1970) (Burger, C.J., dissenting); at 319–20, (Harlan, J., dissenting); United States v. Groner, 479 F.2d 577, 581–83. (1973).

rights involved in obscenity prosecutions.[118] The three major constitutional concerns with the current test are notice, forum shopping, and the chilling effect on speech. As discussed below, the local community standard falls victim to all three constitutional issues. The national Internet community standard would potentially solve two of these problems and fall victim only to the potential chilling effect.

Applying a varying community standard regime to the Internet raises a serious constitutional problem of notice. No Internet publisher could possibly anticipate the community standards of every place in the nation. 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, its effect in obscenity cases is unpredictable.

Some maintain[119] that adequate notice exists under the 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 . . . ."[120] In other words, those who wish to publish sexually explicit works without triggering obscenity laws supposedly 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 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.[121]

However, the definition of "hard core" set out in has shifted, and prosecutors around the country have applied differing

118. The punishment for a violation of 18 U.S.C. §1466 is imprisonment for not more than 5 years. 18 U.S.C. § 1466(a).

119 Hamling v. United States 418 U.S. 87 (1974).

120 , 413 U.S. at 27.

121 at 25.

standards in determining what they will and will not prosecute.[122] Further, the trend at the federal level has been away from prosecuting obscenity as a stand alone crime, and towards prosecuting obscenity when attached to public nuisances like spam e-mail.[123] Recently, the government has focused on extreme material including sexual violence, defecation material, and material involving children.[124] Short of those three broad categories, there is little consistency in how individuals are singled out for prosecution. Without consistency and explicit guidelines, an adult entertainment producer has insufficient notice of what activities will result in prosecution. By utilizing a national standard, with explicit guidelines, the guessing game of obscenity is removed.[125] Where clear guidelines are set out, individuals can conform their behavior accordingly. As Ira Isaacs, a producer of controversial adult material summed it up, "[t]his is the

122. Deputy City Attorney from Los Angeles, Deborah Sanchez, discussed offensive elements she uses to define what is prosecutable under obscenity law ("CURBFHP"). The "C" stands for "children involved." The "U" is for urination or defecation in conjunction with sex acts. The "R" is for rape scenes. The "B" is for bestiality. The "F" is fisting or foot insertion. The "H" is for homicide or dismemberment in conjunction with the sex act. And the "P" is for severe infliction of pain. INTERVIEW DEBORAH SANCHEZ, http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/sanchez.html (last visited Sep. 29, 2010).

123. Matt Richtel, , N.Y. TIMES, June 24, 2008, http://www.nytimes.com/2008/06/24/technology/24iht-24obscene.13934221.html. In the last eight years, the Justice Department has brought roughly fifteen obscenity cases that have not involved child pornography, compared with seventy-five during the Reagan and first Bush administrations.

124 , ., United States v. Extreme Assocs., 352 F. Supp. 2d 578 (W.D. Penn. 2003); United States v. Corbett, (S.D. W.V. 2003) (The progress of is unclear, but parties were indicted on April 9, 2003. Corbett's Web site offered for sale and delivery, via the U.S. mail, a total of fifty-three video tapes and DVDs, fofty minutes to two hours in length, depicting graphic and sexually explicit scenes of defecation and urination);

18 U.S.C. §§ 2251 et seq. ("Priority has been given during this administration to cases involving the use of minors in producing pornography and cases involving the interstate or foreign shipment of material depicting minors engaging in sexually explicit conduct"); Memorandum for all United States Attorneys from Eric G. Holder, Jr., , June 10, 1998, http://www.justice.gov/dag/readingroom/obscen.htm. Jeffrey Douglas, a Santa Monica lawyer who represents the adult industry, has tracked nationwide obscenity prosecutions since 1987. He found that of the materials that have been judged obscene—by a judge or a jury—there are several common elements: explicit showing of excretion, bestiality, necrophilia, incest, or any type of non-consensual sex. OBSCENITY—LEGAL INFORMATION FOR ADULT WEBSITE WEBMASTERS, http://www.adultweblaw.com/laws/obscene.htm (last visited Sep. 29, 2010).

125. The empirical research proposed in section III.C would provide clear, categorical guidelines of what type of behavior, when depicted, would fall into the category of obscenity. This is more notice and guidance than the current amorphous definition of "prurient" which is then modified by individual communities.

only crime you don't know you did until the jury tells you you did it."[126]

Varying community standards encourages forum shopping by government prosecutors. Forum shopping is problematic in light of the Fifth Amendment's Due Process Clause.[127] Forum shopping by prosecutors offends the sense of justice, particularly if the fair resolution of a case hinges on technical differences from one jurisdiction to the next, as it does in obscenity. The ability of the government to choose where to bring a trial in a world of varying community standards places web publishers of sexually explicit material in the position of being prosecuted in all fifty states, with a seemingly infinite number of community standards. Some argue that web publishers have availed themselves to every forum in which their materials can be accessed. Generally speaking, individuals that "do business" over the Internet can expect to be subject to jurisdiction in any state in which such sales are conducted. The key that has emerged is "targeting"—if a publisher has not specifically targeted its content toward a specific state, it should not be held to be subject to the jurisdiction and law of that state consistent with due process of law.[128] While it could be argued that adult websites have targeted all adults in the United States, unlike businesses selling tangible products online prosecuted for tort liability under codified standards, providers of adult materials are being judged by an undefined local standard. Under the current test, the "local community standard" is determined by twelve randomly selected jurors who construct their own community's standard. While this could hypothetically work in favor of a defendant, it is highly unlikely as the party bringing the suit selects the forum and the prosecution may take advantage of localities with demographics that research has found to have more

126. Joe Mozingo, , L.A. TIMES, Oct. 9, 2007, http://articles.latimes.com/2007/oct/09/local/me-obscene9. Ira Isaac's case is currently pending on appeal before the Ninth Circuit.

127. U.S. CONST. amend. V.

128. Young v. New Haven Advocate, 315 F.3d 256 (2002), , 538 U.S. 1035 (2003); United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). A California couple was convicted under a Tennessee obscenity statute for making available on their California website photographs found to be obscene under Tennessee law, where the community standards (the relevant legal test) differed greatly from California. The Sixth Circuit Court of Appeals affirmed in part, finding that defendant had approved applications for "membership" to the website, thereby explicitly approving transmissions into Tennessee or other users' locations.

conservative tastes.[129] A national standard would prevent forum shopping, and increase consistency in application of obscenity law to Internet communications.

Varying community standards as applied to Internet obscenity chills speech.[130] Of course, any meaningful obscenity standard, if enforced, is likely to chill speech to some degree. However the geographic "local community" standard would chill speech protected in some jurisdictions at the service of locations with more stringent standards of speech and would adversely affect the free-market of ideas supported by members of the Court in the past. While the Supreme Court held in that "[t]here is no constitutional barrier under to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others,"[131] this argument misses the point in the context of Internet speech. The Court premised their reasoning in on the ability of the defendant, a provider of adult telephone messages, to screen the area-code origin of incoming calls through caller ID. While technically feasible in the telephone medium, such an approach will not work on the Internet. The Internet works on a different dynamic, one that allows any user to place or retrieve information within its realm. Because no individual can control with absolute assurance who will access information placed on the Internet based on location, the reasoning the Court fashioned in to allow the application of individual community standards would be so vague as to irreparably chill speech. While the application of a national standard would not eradicate the risk of chilled speech, it will serve to provide notice, consistency and fairness where there currently is none. If anything, then, wouldn't a national standard provide fair notice, but at the same time, clearly have a more chilling effect on free speech? Speech at the extreme may be impacted with a national standard, but not more so than it currently is under the local community standard.

129 Robert Peters, , Morality in Media, Inc., July 20, 2004, http://www.obscenitycrimes.org/InternetCommunityStandards.php; Summers & Miller, note 93.

130 ., Nitke v. Ashcroft, 413 F. Supp. 2d 262 (S.D.N.Y. 2005). Barbara Nitke, a New York photographer who works with erotic subject matter, challenged the constitutionality of being hauled into court in the least tolerant jurisdiction, arguing that this could chill protected speech throughout the Internet.

131. Sable Communications of California v. FCC, 492 U.S. 115, 125–26 (1988).

Crafting and Applying a National Obscenity Standard

Conclusion