Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway

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OBSCENITY ON THE INTERNET: LOCAL COMMUNITY STANDARDS FOR OBSCENITY ARE UNWORKABLE ON THE INFORMATION SUPERHIGHWAY

I. INTRODUCTION

The new communications age has reignited age-old debates over the regulation of sexually explicit materials in society. These fears took legislative form in the summer of 1995 when Nebraska Senator James Exon introduced the Communications Decency Act of 1995 as an amendment to the sweeping telecommunications bill already on the floor of the Senate. The amendment provides for prison terms of up to two years and fines totaling $100,000 for individuals who knowingly transmit obscene material over computer networks which are accessible to users under the age of eighteen. A similar bill was sponsored in the House of Representatives by Representative Tim Johnson.

However, not all members of Congress were so eager to curtail this type of computer communications. Speaker of the House Newt Gingrich came out against the measure, saying it was clearly a violation of the First Amendment. Also, two Congressmen introduced the “Internet Freedom and Family Empowerment Act” which would place control in the hands of parents and would bar the government from regu-

1. Edmund L. Andrews, On-line Porn May Be Illegal, SAN JOSE MERCURY NEWS, June 15, 1995, at 1A. The telecommunications bill was broadly designed to deregulate the telephone, cable television and broadcasting industries. Id. The Senate added the amendment to the communications bill with a vote of eighty-four to sixteen. Id. As of June 1995, the House version of the bill did not include any provision similar to the Exon amendment. Id.

2. Id.


5. Id. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.
lating content on the Internet. Current debates in Congress are precursors to the eventual legal battles destined for the United States Supreme Court.

The first case headed for the Supreme Court may have already begun. Robert and Carleen Thomas of California were convicted in Tennessee on eleven counts of transmitting obscene material through interstate phone lines via their members-only computer bulletin board. This is the first case involving the downloading of sexual material that featured images of adults.

At the time of the Thomases' arrest, shockwaves reverberated throughout the growing on-line community, and the Thomases' convictions became the main topic on computer bulletin boards across the country. A decade ago, the Thomases' story would have been of interest to a small community of advanced computer users. However, with advances in technology and the increased affordability of computers, the information superhighway has been greatly popularized. It is estimated that educational users will grow to 1.5


Computer Bulletin Boards (BBSs) are computer systems that allow outside callers to call from another computer and leave messages on the BBS for other users to read. See Mike Godwin, Problems Policing Porn On-Line, S.F. Examiner, Aug. 14, 1994, at B5; see also infra text accompanying notes 127-30.

9. William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community, 30 Wake Forest L. Rev. 197, 204 n.32 (1995) ("To date, this case represents the first criminal prosecution, or at least the first prosecution to proceed to trial, involving the distribution of obscene materials using an electronic bulletin board system"); see also Naaman Nickell, Obscenity Convictions Raise Fears on Bulletin Boards, Ariz. Republican, Aug. 8, 1994, at E3 (noting that there have already been cases prosecuted in the courts involving child pornography materials).

The Supreme Court has treated child pornography differently than other kinds of pornography. See New York v. Ferber, 458 U.S. 747 (1982) (stating that materials showing children engaged in sexual conduct may be banned by states, even though the material may not be legally obscene); see also, Osborne v. Ohio, 495 U.S. 103 (1990) (upholding the statute criminalizing the private possession of nude pictures of children, even though they had upheld the right to possess adult pornography in Stanley v. Georgia, 394 U.S. 557 (1969)).

10. Nickell, supra note 9, at E3.
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million Internet accounts over the next several years. Commercial on-line systems, like Prodigy, America Online, and Compuserve, have already reached four million subscribers combined. Radio and television media also reflect the growing importance of these kinds of computer stories by giving the Thomases' conviction national coverage.

The outrage and legal controversy over the Thomases' case stems from the venue in which they were tried and the standards under which they were convicted. Under the standard set down over twenty years ago by the Supreme Court of the United States, [commercial on-line services] have a long way to go before they reach as many people as TV, radio, or newspapers, but they're well on their way. More than four million people currently subscribe to one or more of the three services covered in this book [America Online, Compuserve, and Prodigy]. Add to that number the subscribers to electronic mail services, other on-line and research services, the thousands of tiny computerized bulletin board systems, and the Internet, and you have a rapidly growing community of more than 20 million people worldwide.

Id.

12. The Internet is a massive network of independent computer systems designed to allow each independent system to communicate. See LANCE ROSE, ESQ. & JONATHAN WALLACE, ESQ., SYSLAW 21 (2d ed. 1992). The independent computer systems are made up of smaller independent systems, which include computer bulletin boards. Id.

The Internet was created over two decades ago in an effort to connect the U.S. Defense Department network (ARPAnet) with various other radio and satellite networks. ED KROL, THE WHOLE INTERNET - USER'S GUIDE & CATALOG 13 (2d ed. 1994). The ARPAnet was designed to support military research occurring around the country. Id. As local area networks (LANs) developed, more and more systems became linked together. Id. at 14. The National Science Foundation (NSF), an agency of the U.S. government, assisted the growth of the Internet by building five super computer centers at major universities across the country which allowed more users to link up to these interconnected centers. Id. The Internet continued to grow in this manner to become the massive group of interconnected systems we see today. Id.

"The Internet today connects more than 45,000 separate networks and 25 to 30 million users in more than 100 countries, and is growing at the rate of 750,000 new users per month." Fred H. Cate, The First Amendment and the National Information Infrastructure, 30 WAKE FOREST L. REV. 1, 36 (1995).


14. Id. For a monthly fee, commercial on-line systems provide computer environments for live conversations in real time, shopping, reading publications, and many other pursuits, including access to the Internet. Id.


16. See Nickell, supra note 9, at E3.
Court in *Miller v. California*,¹⁷ local community standards are used to determine whether material is obscene and, therefore, illegal.¹⁸ The defense in *Thomas* claimed that the government unfairly shopped around for a venue with the most conservative jury.¹⁹ Venue is proper in either the district where the material originated or the district where the material was received.²⁰ Even though the Thomases were in California when the transmissions were sent, they were tried in Tennessee, under Tennessee local community standards.²¹

Society's growing interconnectedness, through modern communications technology and the proliferation of the information superhighway, make local community standards an unworkable rule in the regulation of obscene materials because local community standards no longer exist²² and there is a lack of fair notice to avoid prosecution.²³ Newspapers have already reported that some computer system operators have closed their businesses because of the *Thomas* case, fearing criminal prosecution in a more conservative jurisdiction.²⁴

A major problem is that most computer bulletin boards and on-line systems are accessible to callers from any part of the nation or world in a matter of seconds.²⁵ Callers from states with more restrictive views on what materials constitute obscenity can receive materials not considered obscene in the system operator's state.²⁶ Consequently, system operators are vulnerable to criminal prosecution in the caller's

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²⁰. Byassee, *supra* note 9, at 207.  
²¹. *See Godwin, supra* note 8, at B5.  
²². *See infra* part IV.A.3.  
²³. *See infra* part IV.A.2.  
state, even though the material may not be obscene in the system operator's state.\textsuperscript{27}

The information superhighway and modern changes in society require a national standard for all obscenity cases.\textsuperscript{28}

In discussing this issue, this comment will first review the struggle in the Court over community standards and definitions for obscenity;\textsuperscript{29} second, review the modern advances in communications and its effects on society;\textsuperscript{30} and third, critically analyze the current rules, using the \textit{Thomas} case to illustrate the inequities local community standards produce today.\textsuperscript{31} Finally, this comment will review possible solutions and propose a national standard for determining obscenity.\textsuperscript{32}

II. BACKGROUND

A. The "Tortured" History of Community Standards in Obscenity

1. The First Amendment and Obscenity

In order to understand the problems created by sexually explicit materials in the modern communications age, a review of the courts' struggle to define obscenity is necessary. The starting point for any discussion of obscenity is \textit{Chaplinsky v. New Hampshire}.\textsuperscript{33} In \textit{Chaplinsky}, the Court stated that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or 'fighting' words . . . ."\textsuperscript{34} In this first "fighting words" case, the Court only referenced obscenity in passing, without discussing why obscenity is excluded from First Amendment\textsuperscript{36} protection.\textsuperscript{36} Not until 1957, in \textit{Roth v. United

\begin{footnotesize}
\begin{enumerate}
    \item See supra note 26.
    \item See infra text accompanying notes 201-26.
    \item See infra part II.A.
    \item See infra part II.B.
    \item See infra part IV.
    \item See infra part V.
    \item 315 U.S. 568 (1941).
    \item \textit{Chaplinsky}, 315 U.S. at 571-72 (footnote omitted). "Fighting words" are those words likely to incite the average person to retaliate or are likely to create an imminent breach of the peace. \textit{Id.} at 572. The Court held that such words are unessential to the exposition of ideas and are of such little social value that the social interest in order and morality outweighs their protection. \textit{Id}.
    \item See supra note 5.
\end{enumerate}
\end{footnotesize}
States, did the Court directly confront laws punishing obscenity.

2. The Roth Test — Confusion on “Community Standards”

In Roth, the Court attempted to create a standard for judging whether material was obscene, however, it left many questions unanswered. Roth involved a businessman from New York who was convicted of mailing obscene circulars and advertisements in violation of a federal statute. Writing for the Court, Justice Brennan explained that the standard adopted for judging obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” In adopting this standard, the Court appeared to provide minimum safeguards required under the Constitution for obscenity laws across the country. However, the Court did not explore what “contemporary community standards” meant, whether they were local or, if local, why local standards were appropriate.

38. See infra part II.A.2.
40. Justice Brennan wrote the opinion of the Court's six-to-three majority. Id. at 479. Roth was convicted under 18 U.S.C. § 1461, which provided that “obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of indecent character” is “declared to be nonmailable matter,” and whoever knowingly deposits such material for mailing or delivery shall be fined up to $5000 with the possibility of up to five years in prison. Id. at 479 n.1.
42. Id.
43. Id. at 489-90. The Court did not explicitly say whether “contemporary community standards” were local, but it did quote heavily from the Roth trial judge's jury instructions, which included references to community standards. Id. In Roth, the trial judge instructed the jury as follows:

You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of community by present-day standards.

In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious — men, women, and children.

Id.
Justice Harlan, in his dissent, was greatly troubled by the majority's test for obscenity. He feared that "it may result in a loosening of the tight reigns which state and federal courts should hold upon the enforcement of obscenity statutes." Harlan argued for a de novo review of matters thought to be obscene. Harlan wrote,

In short, I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based. I am very much afraid that the broad manner in which the Court has decided these cases will tend to obscure the peculiar responsibilities resting on state and federal courts in this field and encourage them to rely on easy labeling and jury verdicts as a substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.

Implicit in Harlan's argument was a recognition of the danger of cursory conclusions by local juries on what did or did not constitute obscenity. Harlan also believed that to protect freedom of expression, courts must lend to the process more structure, consistency, and clarity.

Justice Douglas dissented from the idea that the State could "step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact" and believed such power would "drastically curtail" the First Amendment's protection. Douglas concluded that "[a]ny test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment." Douglas believed that from a literal view of the First Amendment, "community standards" were too vague to be constitutionally permissible.
3. The Attempts to Recognize a National Standard

In 1962, the Court, in *Manual Enterprises v. Day*, 53 made its first attempt to formulate a national standard for obscenity. 54 In *Day*, the Post Office refused to ship the petitioner's magazines because it viewed them as obscene under federal law. 55 Justice Harlan, writing for a plurality of the Court, 56 believed "the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." 57 Justice Harlan's plurality rule, however, was not shared by a majority of the Court. 58

Two years later, in *Jacobellis v. Ohio*, 59 Justice Brennan embraced Justice Harlan's idea of a national obscenity standard. 60 Writing for a plurality of the Court, Brennan flatly rejected the notion that "contemporary community standards" referred to "the standards of the particular local community" from which the case arose. 61 Judge Learned Hand, Brennan noted, was the first judge to express the concept of "community standards." 62 Brennan wrote that Judge Hand "was referring not to state and local 'communities,' but rather to 'the community' in the sense of 'society at large; . . . the public, or people in general.'" 63 With words that sounded like the death knell to local community standards, Brennan wrote, "[w]e do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of

54. Day, 370 U.S. at 479.
55. Id.
56. Justice Harlan, joined by Justice Stewart, announced the judgement of the Court, while Chief Justice Warren and Justices Brennan and Douglas concurred on alternate grounds. Id.
57. Id. at 488.
58. See id.
59. 378 U.S. 184 (1964). Nico Jacobellis, the appellant, managed a motion picture theater in Ohio and was convicted on two counts of possessing and exhibiting an obscene film. Jacobellis, 378 U.S. at 185-86.
60. See id. at 192. Justice Brennan announced the plurality judgement of the Court. Id. at 185. Justice White concurred. Id. at 196. Justices Black and Douglas concurred on alternate grounds. Id. Justice Stewart and Justice Goldberg concurred on separate grounds as well. Id. at 197. Chief Justice Warren and Justices Harlan and Clark dissented. Id. at 199.
61. Id. at 192.
62. Id.
63. Id. at 193 (quoting from United States v. Kennerley, 209 F. 119 (D.C. S.D.N.Y. 1913)).
expression that is protected by the Federal Constitution.\textsuperscript{64}

In addition, Brennan wrote that sustaining "the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places."\textsuperscript{65} In essence, Brennan believed that one local community's obscenity standard would reach beyond its borders, commenting that, "[i]t would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained . . . [one local community's] judgment . . . ."\textsuperscript{66}

Brennan also explored the competing and legitimate interests of the local community and the rights of the individual.\textsuperscript{67} Brennan recognized "the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children."\textsuperscript{68} However, Brennan noted that if all material that might be harmful to children were suppressed, the adult population would be reduced to only reading material fit for children.\textsuperscript{69}

The most colorful and, indeed, memorable contribution in \textit{Jacobellis} was Justice Stewart's concurring opinion.\textsuperscript{70} Stewart reminded Brennan that it was possible to read Roth in a "variety of ways,"\textsuperscript{71} thereby foreshadowing the local community standard that the Court would eventually adopt nine years later.\textsuperscript{72} However, the phrase that has often been cited from this case is Stewart's definition of hard-core pornography: "I know it when I see it."\textsuperscript{73} Although humorous and

\textsuperscript{64} Jacobellis v. Ohio, 378 U.S. 184, 193 (1964).
\textsuperscript{65} Id. at 194.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 195.
\textsuperscript{68} Id.
\textsuperscript{69} Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)); see also Sable Communications v. FCC, 492 U.S. 115, 131 (1989) (overruling an FCC statute limiting access of adults to telephone messages, because it exceeded that which was necessary to prevent access to minors).
\textsuperscript{70} Jacobellis, 378 U.S. at 197 (Stewart, J., concurring).
\textsuperscript{71} Id. (Stewart, J., concurring).
\textsuperscript{72} See infra notes 80-86 and accompanying text.
\textsuperscript{73} Jacobellis, 378 U.S. at 197 (Stewart, J., concurring).
vague, Stewart’s definition illustrated the Court’s struggle with developing workable definitions and vocabulary to articulate how obscenity should be distinguished from protected speech.\textsuperscript{74}

Chief Justice Warren disagreed with Brennan’s interpretation of \textit{Roth} and believed \textit{Roth} referred to local community standards.\textsuperscript{75} He declared, “there is no provable ‘national standard’ and perhaps there should be none.”\textsuperscript{76} Warren felt that after reviewing the Court’s previous attempts to define obscenity, “it would be unreasonable to expect local courts to divine” a national standard.\textsuperscript{77} Rather than letting individuals to go unaffected by unclear national definitions, the Chief Justice believed that local standards could best balance the needs of the community with those of the individual.\textsuperscript{78} However, it was clear that a majority of the Court had yet to agree on which community’s standards should define obscenity.\textsuperscript{79}

4. The Miller Test and Establishment of Local Standards

In 1973, sixteen years after \textit{Roth}, five Justices agreed that local community standards should govern obscenity. The Court announced an improved standard for obscenity in \textit{Miller v. California}.\textsuperscript{80} Miller was convicted in California for knowingly distributing unsolicited brochures for pornographic books and films to a Newport Beach restaurant.\textsuperscript{81} In a five-to-four decision, Chief Justice Burger announced the revised three part test for obscenity.\textsuperscript{82}

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find 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;

\textsuperscript{74} See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
\textsuperscript{75} See id. at 200 (Warren, C.J., dissenting).
\textsuperscript{76} Id. (Warren, C.J., dissenting).
\textsuperscript{77} Id. (Warren, C.J., dissenting).
\textsuperscript{78} Id. at 201 (Warren, C.J., dissenting).
\textsuperscript{79} See supra notes 53-78 and accompanying text.
\textsuperscript{80} 413 U.S. 15 (1973).
\textsuperscript{81} Miller, 413 U.S. at 17-19.
\textsuperscript{82} Id. at 24.
and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.\textsuperscript{83}

Again, the Court referred to "contemporary community standards," but this time five Justices agreed that they should be local.\textsuperscript{84} Burger wrote that decisions as to whether materials were "patently offensive" or appealed to "prurient interests" were "essentially questions of fact, and our Nation is simply too big and 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."\textsuperscript{85} Summing up the majority view, Burger wrote that "[t]o require a State to structure obscenity proceedings around evidence of a \textit{national} 'community standard' would be an exercise in futility."\textsuperscript{86}

In embracing local standards, Chief Justice Burger explicitly adopted Chief Justice Warren's dissent in \textit{Jacobellis}.

\textsuperscript{87} Burger expounded on Warren's reasoning, noting 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."\textsuperscript{88} Explicit in Burger's rationale was the belief that communities should not be subject to a national standard or to any other community's standard.\textsuperscript{89}

In a stinging dissent, Justice Douglas invoked the argument of fair notice.\textsuperscript{90} Douglas wrote, "[t]oday we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law."\textsuperscript{91} Chief Justice Burger

\begin{footnotes}
\item 83. \textit{Id.} (citations omitted).
\item 84. \textit{Id.} at 30.
\item 85. \textit{Id.}
\item 86. \textit{Miller}, 413 U.S. at 30.
\item 87. \textit{Id.} at 32.
\item 88. \textit{Id.}
\item 89. \textit{See id.} at 33.
\item 90. \textit{See id.} at 37 (Douglas, J., dissenting).
\item 91. \textit{Miller v. California}, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting) (footnote omitted). This argument echoed Justice Black's earlier criticism in \textit{Ginzburg v. United States}, 383 U.S. 463 (1966), where a publisher was sent to prison for obscenely advertising pornographic materials under newly created obscenity definitions. \textit{Id.} Justice Black wrote, "Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed
\end{footnotes}
acknowledged Douglas' criticism by admitting that the history of the Court's obscenity decisions had been "somewhat tortured," and that the quantity of differing views expressed among members of the Court in obscenity decisions was unparalleled in any other constitutional area.

5. Paris Adult Theatre I — Building on Miller; Brennan Concedes That the Court Should Not Define "Obscenity"

On the same day that Miller was decided, the Court ruled on a companion case involving adult movie theatres, Paris Adult Theatre I v. Slaton. Chief Justice Burger again wrote for the Court's five-to-four majority and articulated the legitimate state interests in regulating obscenity, something that previous Courts had not done clearly. Legitimate state interests "include[d] the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." Burger also wrote that "there is at least an arguable correlation between obscene material and crime." Each of these governmental interests provided policy arguments in support of local community standards.

Burger also stated in Paris that "consenting adults" had no defense to prosecution. Burger took this stand because he was unwilling to declare that States were powerless to

matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal." Id.

93. Id. at 22.
94. 413 U.S. 49 (1973).
96. Id. at 58.
97. Id. Chief Justice Burger cited a minority report from the Commission on Obscenity and Pornography which indicated a connection between obscenity and crime. Id. at 58. In addition, Burger cited Justice Clark who wrote that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community. Id. at 58 n.8 (quoting Memoirs v. Massachusetts, 383 U.S. 413, 452-53 (1966) (Clark, J., dissenting)).
98. See supra notes 96-97 and accompanying text.
regulate the conduct of consenting adults. Burger believed that States had broad powers to regulate obscenity in their communities.

In a lengthy dissent, Justice Brennan stepped once more into the mire of obscenity jurisprudence. However, this time Brennan moved away from his previous opinions and ceased his attempt to define obscenity. Brennan conceded that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials." Brennan chose instead to support a rule that broadly protected the rights of persons engaged in pornography and severely limited the state's right to regulate. "I would hold . . . that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Implicit in Brennan's view were doubts in the propriety of allowing local community standards to govern decisions on obscenity because he supported a reduction in governmental regulation.

6. Community Standards and Geography

To clarify Miller further, in Hamling v. United States the Court explained that the Constitution did not require states to adopt a national standard. Rather, states could create a smaller community if they wished. Justice Rehnquist wrote for the Court and stated that

Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be

100. Id. at 68.
101. Id. at 68-69.
102. Id. at 73 (Brennan, J., dissenting).
103. Id. at 103 (Brennan, J., dissenting).
105. See id. at 113 (Brennan, J., dissenting).
106. Id. (Brennan, J., dissenting).
107. See id. (Brennan, J., dissenting).
based on the uniform nationwide standards of what is obscene. 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 . . . . 110

The Court did not place geographic limits on the local community used to determine whether material is obscene, thus allowing states to define their own geographic dimensions for communities judging obscenity.111 However, the Court itself has not set a geographic dimension to the local community used to decide whether material is obscene.112

7. Modern Case: Dial-a-porn

Since the Court's ruling in Miller, local community standards have been the standard for deciding obscenity.113 In Sable Communications v. FCC,114 the Court reaffirmed its commitment to avoiding a national standard.115 There, a "dial-a-porn"116 operator challenged certain FCC regulations,117 claiming they created a national standard for ob-

110. Id.
112. See cases cited supra note 111.
113. See supra part II.B.4.
115. Id. at 124-25.
116. "Dial-a-porn" is a sexually oriented pre-recorded telephone message. Id. at 117-18. Those who call the telephone number are charged a special fee. Id. at 118. "A typical pre-recorded message lasts anywhere from 30 seconds to two minutes and may be called by up to 50,000 people hourly through a single telephone number." Id. at 118 n.1 (citation omitted).
117. The Communications Act of 1934, 47 U.S.C. § 223(b), was amended in 1988 to impose a blanket prohibition on indecent and obscene interstate commercial telephone messages. Sable Communications v. FCC, 492 U.S. 115, 118 (1989). As amended, § 223(b) stated (at the time Sable Communications filed suit):

Whoever knowingly . . .

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or . . .

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), . . . shall be fined not more than $50,000 or imprisoned not more than six months, or both.
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scenity which was incompatible with the Court's ruling in Miller.\textsuperscript{118} The Court ruled that the federal regulation did not create a national standard and upheld the FCC regulation.\textsuperscript{119} Justice White, writing for the Court, stated that the FCC regulation "no more establishes a 'national standard' of obscenity than do federal statutes prohibiting the mailing of obscene materials,"\textsuperscript{120} which are constitutional.\textsuperscript{121}

Writing an opinion that was consistent with his dissent in Paris, Justice Brennan dissented again in Sable.\textsuperscript{122} He found there was insufficient government interest to support the government's measures.\textsuperscript{123} Consequently, Brennan concluded that the statute should be struck down on its face.\textsuperscript{124}

B. The Modern Communications Revolution

1. No Geographic Barriers to Communication

Obscenity rules were forged, for the most part, in the 1970's\textsuperscript{125} and must coexist with modern technological advancements in communications. Today, there are many more ways to communicate from person to person. Cellular phones, fax machines, pagers, computer modems, CB radio, and traditional telephone communication exist in various communities.\textsuperscript{126} Computer bulletin boards (BBS) are an ex-

\textsuperscript{118} Sable, 492 U.S. at 118. Sable Communications sued to enjoin the government from initiating any criminal investigation or prosecution, civil action or administrative proceeding under indecency and obscenity provisions of the amended § 223(b). \textit{Id.}

\textsuperscript{119} \textit{Id.} at 126.

\textsuperscript{120} \textit{Id.} at 124.

\textsuperscript{121} In United States v. Reidel, 402 U.S. 351 (1971), the Court held that "Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene." \textit{Id.} at 357 (Harlan, J., concurring) (stating the majority's holding).

\textsuperscript{122} Sable Communications v. FCC, 492 U.S. 115, 134 (1989) (Brennan, J., dissenting).

\textsuperscript{123} \textit{Id.} at 134-35 (Brennan, J., dissenting).

\textsuperscript{124} \textit{Id.} at 135 (Brennan, J., dissenting).

\textsuperscript{125} See supra part II.A.

\textsuperscript{126} See Cate, supra note 12, at 2.

The vast majority of information in the United States today exists in electronic form. Text is composed on word processors, stored in computer memories, transmitted via local networks, telephone lines, and satellites, and recorded on printers, facsimiles, and computer monitors. Images and sounds are captured by cameras, scanners, microphones, and other sensors, stored on tape or disc, broadcast over the air or
ample of the new avenues available for people to communicate. A computer bulletin board system allows outside callers to call from another computer and leave messages on the BBS that can be read by all other users who dial in. \textsuperscript{127} A bulletin board can also be used to send private e-mails to another specific user. \textsuperscript{128} In essence, bulletin boards become "forums for people to associate with one another without being hindered by geography." \textsuperscript{129} In addition to textual messages, BBS users may trade computer files, programs, and digital images, including sexually explicit images. \textsuperscript{130}

Modern means of communication affect local community standards, because "[c]ommunications technologies change relationships of time and space," \textsuperscript{131} such that geographical barriers have less impact. \textsuperscript{132} "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." \textsuperscript{133} As Congress' Office of Technology Assessment noted, some deployments of communication technologies have "served to undermine the cohesiveness of rural communities, weakening their sense of autonomy and resolve." \textsuperscript{134}

2. Rural Communities on the Internet

Rural communities have started using the Internet. As Clayton Rye, a farmer who raises corn and soybeans near Hanlontown, Iowa, put it, "[a]ll you need is a modem and an

\textsuperscript{127} Godwin, supra note 8, at B5.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{132} See Byassee, supra note 9, at 198.
\textsuperscript{133} Id.
\textsuperscript{134} See RURAL AMERICA, supra note 131, at 61.
Many people in rural communities use the Internet to post messages on agricultural interest BBSs. Commercial on-line services maintain bulletin boards, called newsgroups, geared towards agricultural interests.

However, there are some difficult-to-reach rural communities that have yet to be connected to the information superhighway. Congress awarded $1.3 million to a "Rural Datafication" project, which is building Internet infrastructure to reach these communities. In addition to Congress' work, the long distance phone company MCI has attempted to address this problem by offering 800 service for its customers in rural communities with little or no affordable connection to the Internet.

President Bill Clinton and Vice President Al Gore have also promised that a "national information network" will be a priority of their administration. Their vision is of a network that would "link every home, business, lab, classroom and library by the year 2015." The Clinton Administration announced a five-part strategy for building their "NII" (National Information Infrastructure) in their first month of office and created a task force for implementation.

With government and private companies working to connect remote areas of the nation, the likelihood is that in the very near future almost every community will be hooked into the information superhighway.

3. Television and Movies

Additionally, one-way communications, like television shows and movies, may break down local identity because of their increasing explicitness. On television, NYPD Blue al-
allows profanity and nudity. The *John Larroquette Show* used the word "penis." In movie theatres or home video, Francis Ford Coppolla's version of *Dracula* included a scene where a character was having sexual intercourse with a wolf-like beast. Quentin Tarantino's *Pulp Fiction* included scenes that hinted of sado-masochism and a representation of anal sex. Michael Douglas and Sharon Stone were shown performing explicit sex scenes in *Basic Instinct*. Almost all forms of sex and nudity are readily accessible through wide-release movies, free television, cable television, or pay-per-view.

C. Two Worlds Colliding — Obscenity and the Communications Revolution

1. The Thomas Case

The *Thomas* case provides the first opportunity to question whether the Court's use of local community standards to define obscenity is still viable in the modern computer communications context. Robert and Carleen Thomas ran a private, adults-only sexually oriented computer bulletin board system in Milpitas, California. Working with an assistant U.S. Attorney, a Tennessee postal inspector signed on to the Thomases' bulletin board under an assumed name. The postal inspector then downloaded sexual pictures and sent unsolicited child-pornography magazines to the Thomases. A federal indictment for transmitting obscene

145. Id.
146. *Bram Stoker's Dracula* (Columbia Pictures 1992). This is the scene where the character, Lucy, is lured out into the garden and has a sexual encounter with Dracula, still in a wolf-like form. Id.
147. *Pulp Fiction* (Miramax 1994). This is the startling, yet funny, scene in the pawn shop with the leather-clad character, called the "Gimp." Id.
148. *Basic Instinct* (Coralco 1992). Throughout the movie there are explicit sex scenes. Id.
149. Byassee, *supra* note 9, at 204 n.32.
151. Id. *See also* Byassee, *supra* note 9, at 204.
152. Godwin, *supra* note 8, at B5, B8. *See also* Byassee, *supra* note 9, at 204-05. The indictment listed various images which were transmitted, including "depictions of bestiality, oral sex, incest, and sadism." Id. at 206 n.35. Approximately 17,000 images were on file and were available through the Thomases' BBS. Id.
pictures ensued.¹⁵³ In addition to the obscenity charges, Robert Thomas was also indicted on one count of child-pornography.¹⁵⁴

In late July, 1994, a jury in Memphis, Tennessee convicted the Thomases on all eleven obscenity counts, but acquitted Robert Thomas on the child-pornography charge.¹⁵⁵ Each of the Thomases' convictions carried a maximum sentence of five years in prison and $250,000 in fines.¹⁵⁶ The appeal of the convictions is currently proceeding.¹⁵⁷

2. *The Extent of Pornography On-line*

To place the *Thomas* case in context, a recent Carnegie Mellon University study titled “Marketing Pornography on the Information Superhighway” revealed a surprisingly large amount of sexually explicit materials being traded on the Internet.¹⁵⁸ The eighteen month study found 917,410 sexually explicit pictures, descriptions, short stories and film clips.¹⁵⁹ In newsgroups that contained stored graphic images, the


The indictments against the Thomases were brought under the following federal statutes: 18 U.S.C. §§ 371, 1462, 1465 and 1467. *Byassee, supra* note 9, at 205. 18 U.S.C § 1465 made criminal the transportation in interstate commerce for the purpose of sale or distribution obscene materials. *Byassee, supra* note 9, at 204. 18 U.S.C. § 1462 made criminal the use of a common carrier, which was United Parcel Service in the Thomases' case, for the purpose of carrying obscene materials. *Byassee, supra* note 9, at 205. 18 U.S.C. § 371 dealt with conspiracy and 18 U.S.C. § 1467 allowed the forfeiture of the Thomases' computers. *Byassee, supra* note 9, at 205.

The Thomases were convicted for transmitting obscene materials because the mere private possession of such materials cannot be made criminal according to the Supreme Court’s decision in *Stanley v. Georgia*, 394 U.S. 557 (1969). The Court has not recognized a right to supply even consenting adults with obscene materials. See *U.S. v. Reidel*, 402 U.S. 351 (1971) (upholding the conviction of defendants charged with mailing obscene materials to consenting adults). The Court has even refused to recognize the right to import obscene materials for personal use. See *U.S. v. Twelve 200-Foot Reels of Super 8MM. Film*, 413 U.S. 123 (1973).

¹⁵⁴. *Byassee, supra* note 9, at 205-06.
¹⁵⁵. *Id.*
¹⁵⁷. Professor Ellen Kreitzberg of Santa Clara University School of Law has joined the attorneys working on the Thomases' case and stated during an interview that the petitioner's brief will be submitted in March, 1995. Interview with Prof. Ellen Kreitzberg, Professor of Law, Santa Clara University, in Santa Clara, Cal. (Jan. 19, 1995).
¹⁵⁹. *Id.*
study found that 83.5% of the pictures were pornographic. The five largest private adult-oriented bulletin boards generated annual revenues in excess of one million dollars each.

However, the study has come under fire. Criticisms revolve around the qualifications of its authors and the method in which the authors calculated the concentration of obscene materials they found on the Internet. Another company revealed that out of about six million on-line pages, only 13,000 used the word “sex.” The Carnegie Mellon study, itself, found that only 0.3 percent of all messages on the Internet were posted to pornographic discussion groups.

III IDENTIFICATION OF THE PROBLEM

The difficulty in drawing clear lines between obscene material and material that is protected by the First Amendment has existed since the Court first allowed regulation in this area of speech. In addition to problems inherent in the regulation of obscenity, obscenity jurisprudence must exist in the modern communications era where geographic limitations are almost meaningless and communities are less individual.

In Miller, the Court avoided announcing a black letter definition for obscenity by creating a floating standard that varied with each community. When Miller was decided in 1974, the nation had yet to widely use much of the modern telecommunications equipment we have today. Communities in parts of the country like Mississippi seemed very distant from communities like Las Vegas. The Court feared that

160. Id.
161. Id. at 40.
162. Rory J. O'Connor, Sex on the Net Sparks Debate on Free Speech, SAN JOSE MERCURY NEWS, July 5, 1995, at 1A.
163. Id.
164. Id.
165. Id.
166. See supra part II.A.
167. See supra part II.A.
168. See supra part II.B.
169. See supra part II.B.1.
170. See supra part II.B.
171. See supra part II.A.4.
172. See supra text accompanying note 88.
more conservative, rural communities would be injured if a national standard of lesser moral fortitude was created.\textsuperscript{173}

However, the obscene materials transmitted from computer to computer do not cause the societal ills that the Court used to support the obscenity regulation in \textit{Paris}.\textsuperscript{174} Pictures are discreetly transmitted through phone lines and are not seen by anyone except the computer user at the receiving end.\textsuperscript{175} Also, communities like those in Mississippi are not so distant from communities like Las Vegas anymore.\textsuperscript{176} The information superhighway is part of the technology and communications revolution that has swept across the world.\textsuperscript{177} As the nation moves towards a society where geographic boundaries to information disappear, it is difficult, if not impossible, to cleanly separate communities from the rest of the nation in any way.\textsuperscript{178}

The lack of geographic boundaries will affect obscenity law, because the ability of computers to communicate with other computers in different states exacerbates problems of fair notice.\textsuperscript{179} Computer users from different jurisdictions can call into computer systems, usually without the system operator's knowledge.\textsuperscript{180} Also, the system operators have no notice of what standards exist in the community to which they are transmitting.\textsuperscript{181} The current use of local community standards to judge obscenity places system operators at risk of being unaware that they are committing crimes.\textsuperscript{182}

The use of a national standard for obscenity is the best solution to the growing difficulties presented as obscenity jurisprudence enters the modern communications age.

\textsuperscript{173} \textit{See infra} part IV.A.1.  
\textsuperscript{174} \textit{See infra} part IV.A.1.  
\textsuperscript{175} \textit{See infra} part IV.A.1.  
\textsuperscript{176} \textit{See supra} part II.B.1.  
\textsuperscript{177} \textit{See supra} part II.B.1.  
\textsuperscript{178} \textit{See supra} part II.B.1.  
\textsuperscript{179} \textit{See infra} part IV.A.2.  
\textsuperscript{180} \textit{See infra} part IV.A.2.  
\textsuperscript{181} \textit{See infra} part IV.A.2.  
\textsuperscript{182} \textit{See Rose \\& Wallace, supra note} 12, \textit{at} 177.
IV. ANALYSIS

A. Miller, Paris, and the Establishment of Local Community Standards

1. Local Communities Should Not Be Protected

In *Miller*, the Court required that a jury use local community standards in obscenity cases. This test implied the belief that local community standards were ascertainable — that local communities, represented by juries, could decide what was "patently offensive" or what appealed to "prurient interests." This Court's analysis assumed that because a local consensus could be created, it should be protected. This was evident in Burger's statement that Mississippi communities should not be subject to material tolerable in Las Vegas. However, why should local community standards be protected?

Not until *Paris* was an answer presented. In *Paris*, the Court outlined the governmental interests supporting the State's right to regulate obscenity. Among the governmental interests was the questionable relationship between crime and obscenity. Chief Justice Burger admitted that there was "no conclusive proof of a connection between antisocial behavior and obscene material" but dismissed this fact by stating that the Court did not demand "scientifically certain criteria" for legislation. "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions." In a criminal obscenity trial, the Chief Justice offered an unverifiable governmental interest. Balanced against the potential deprivation of liberty, this seemed an extremely tenuous governmental rationale.

The other governmental goals included: the interest of the public in maintaining the quality of life and total commu-
nity environment, the tone of the business centers, and possibly the public safety.\textsuperscript{194} Chief Justice Burger quoted Professor Bickell who wrote, "what is commonly read and seen and heard and done intrudes upon us all, want it or not."\textsuperscript{195} However, in the computer environment, the transmission of obscene materials occurs in virtual silence, over discreet phone lines.\textsuperscript{196} The messages are pulses of light on a fiber optic cable, transmitted as ones and zeros into an individual's computer located in a private home.\textsuperscript{197} Arguably, these obscene materials do not affect the public's "quality of life and total community environment,"\textsuperscript{198} the "tone of commerce in the great city centers,"\textsuperscript{199} or "the public safety."\textsuperscript{200} The computer communications process raises questions about the basic reasoning behind the regulation of obscenity through local community standards, because local communities are arguably not affected in the process.

2. **Local Community Standards Provide No Notice**

As Justice Douglas noted in his dissent in *Miller*, defendants may be sent to prison or fined for a law they never knew they were breaking.\textsuperscript{201} Fundamental to our nation's belief in fairness is the requirement that laws be clear so that people may avoid violating them.\textsuperscript{202} As the Court has recently

\begin{itemize}
\item 194. *Id.* at 58.
\item 196. *See Byassee, supra* note 9, at 209. Byassee stated that the prohibition [against dissemination of obscene materials] is not applicable to the distribution of material in cyberspace. First there is no impact on the local community because there is no "touching" — even in a plain, brown paper wrapper — of the local community by the electronic material. Second, both the sender and recipient, the physical components of the cyberspace community, are located in their private homes. These two aspects of cyberspace exemplify how the legal standard for determining obscenity is distorted when applied to the conduct of the Thomases or some other similar cyberspace behavior.
\item 197. *See Byassee, supra* note 9, at 209-10.
\item 198. *Paris Adult Theatre I*, 413 U.S. at 58.
\item 199. *Id.*
\item 200. *Id.*
\item 201. *See supra* note 91 and accompanying text.
\item 202. *See supra* text accompanying notes 90-93.
\end{itemize}
stated, "[l]iberty finds no refuge in a jurisprudence of doubt." 203

Notice arguments take on a new vitality in the current communications revolution. On the information superhighway, most bulletin boards demonstrate increased sensitivity to the notice problems inherent in the use of local community standards. 204 BBSs usually cannot prevent callers from different communities from calling into the system. 205 As an attorney specializing in computer communications described the problem, "[j]ust as you can't, on your own phone, prevent callers from other jurisdictions, you can't do that with a BBS system either." 206 People from all communities can call a bulletin board that they find offensive and attempt to get their own local community to prosecute the bulletin board operator for obscenity violations. 207

The Thomas case is different in some respects, because there was a short application and fee process before callers could join the bulletin board. 208 However, the Thomases still had no notice that they were sending material to a community that would find it offensive. 209 The Thomases had no warning of precisely what constituted obscenity in Tennessee. 210

204. See David Landis, Sex, Laws & Cyberspace, USA TODAY, Aug. 9, 1994, at 1D.
205. Id.
206. Id.
207. See id.
208. See Byassee, supra note 9, at 204.
209. Id.
210. See id. In the last two decades, the Court has not found the lack of consistency in defining obscenity to be troubling. In Sable Communications, the Supreme Court held that "the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Sable Communications v. FCC, 492 U.S. 115, 125 (1989) (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)). Additionally, the Court saw no problem with laws that require distributors of allegedly obscene materials to tailor their messages on a selective basis or screen callers. Id.
3. *Local Community Standards are No Longer Viable in the Modern Communications Context*

Special or unique community views on obscenity may be less feasible in the current communications revolution.\(^{211}\) As Congress' Office of Technology Assessment reported,

Although isolated and remote, rural communities do not exist in a vacuum. They are linked to the world surrounding them through a variety of transportation and communication networks and the commodities that flow over them. Rural communities have, throughout American history, been shaped by advancements in transportation and communication technologies. By extending their ties and expanding their markets these technologies have made rural communities more vulnerable to external developments and events.\(^{212}\)

"[C]ommunication is the basis for all human interaction and one of the means for establishing and organizing society."\(^{213}\) Today, there are many more ways to communicate from person to person. Cellular phones, fax machines, pagers, computer modems, CB radio, and traditional telephone communication exist in various communities.\(^{214}\) Modern means of communication affect concepts of what is "local," because "[c]ommunications technologies change relationships of time and space,"\(^{215}\) and geographical barriers have little impact.\(^{216}\)

Remote rural communities were at the heart of what the Court attempted to protect by supporting local community standards for obscenity.\(^{217}\) Small rural communities, however, have entered the information superhighway.\(^{218}\) If these communities reflected greater national influences because of advances in communications, the existence of "local community standards" would be severely questioned.\(^{219}\)

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211. See *Rural America*, *supra* note 131, at 35.
212. Id.
213. Id. at 59 n.1.
214. See *supra* note 126.
216. See Byass, *supra* note 9, at 209-10 (stating "the computer user's interaction transcends the local community because that user, from the privacy of her own home, is participating in a community for which geographical bounds are irrelevant.").
218. See *supra* part II.B.2.
219. See *infra* part IV.A.3.
gress' Office of Technology Assessment noted, some deployments of communication technologies have "served to undermine the cohesiveness of rural communities, weakening their sense of autonomy and resolve." A possible theory for this is that through "acts of communication, people define themselves — their sense of uniqueness as well as their self concepts — and negotiate and sustain a position and place for themselves in the world." This process of negotiation and definition with a wider area, not confined to geographic barriers, would have the likely effect of weakening local identity.

This is not to say that regions of the country do not have their own distinctive qualities, cultures, and religious values. However, the introduction of outside communications add state, national, and global flavors and accents to community discussions. As one commentator wrote, "the corrosive effect on public taste is every bit as much a danger to national standards as . . . TV Violence . . ." Introducing influences from across the country into small or large communities is antithetical to the idea of "local" standards because national views enter the discussion, shifting the midpoint in community consensus.

To frame the discussion another way, the more outside influence is introduced into the community, the less "local" a standard becomes. The question then begs to be asked — why use a "local" standard to judge obscenity, if the standard is not in fact "local"? 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. The laws regarding obscenity and community standards should be national to give protection to people like the Thomases during this transitional period in which laws, communities, and courts adjust to the new realities in communications and personal interaction.

220. RURAL AMERICA, supra note 131, at 61.
221. Id. at 59 n.1.
222. See id.
223. Du Brow, supra note 144, at F1.
224. See supra part II.B.1.
225. See supra part II.B.1
226. See supra part II.B.1.
B. Jacobellis and the Establishment of a National Standard

In *Jacobellis*, Brennan posited the argument that "contemporary community standards" should be national.\(^{227}\) He reasoned that unless there was a national standard, one community's obscenity standard would deter dissemination of possibly non-obscene materials in more tolerant communities, because no one would risk conviction.\(^{228}\) This argument holds equal weight today.\(^{229}\) After the Thomases were brought from California to Tennessee and convicted, some computer operators quit their businesses in fear of prosecution.\(^{230}\) The chilling effect predicted by Brennan in *Jacobellis* occurred.

In advocating a local community standard in *Miller*, Chief Justice Burger wrote that the nation was "too big and too diverse for this Court to reasonably expect that such [obscenity] standards could be articulated for all 50 states in a single formulation."\(^{231}\) However, Brennan approached the diversity of the nation differently, noting that, "[i]t is true that local communities throughout the land are in fact diverse," but in these cases "the court is confronted with the task of reconciling the rights of such communities with the rights of individuals."\(^{232}\) Brennan recognized that the nation was diverse, but believed that in order to protect the individual the Court should provide a national standard.\(^{233}\)

Concerns have been raised against using a national standard for obscenity. One concern is that many people will be forced to live with morally offensive materials that they believe are obscene.\(^{234}\) Another concern is that the lowest common denominator in the open market will determine what material is deemed obscene.\(^{235}\)

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\(^{227}\) See supra notes 59-69 and accompanying text.

\(^{228}\) See supra notes 65-66 and accompanying text.

\(^{229}\) See supra notes 10, 16-24 and accompanying text.

\(^{230}\) See supra note 24 and accompanying text.

\(^{231}\) Miller v. California, 413 U.S. 15, 30 (1973).

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) See supra note 87-89 and accompanying text.

\(^{235}\) See Sable Communications v. FCC, 492 U.S. 115, 124 (1989). Lawrence H. Tribe, a noted constitutional scholar, argued for Sable Communications that the FCC regulations created "an impermissible national standard of obscenity, and that it places message senders in a 'double bind' by compelling them to tailor all their messages to the least tolerant community." Id.
These are valid arguments against the use of a national standard, but the problems caused by advancements in communications technologies and inequities in the use of local community standards are substantial and growing. Referring back to Brennan in Jacobellis, the needs of local communities, provided they still exist, must be weighed against the threat to individuals. Considering Robert and Carleen Thomases’ case, modern computer communications and the risk of unfair prosecutions make a national standard the least imperfect solution. A national standard would provide more notice because it is one standard affected by every community’s population, including the community of the sender of the pornographic materials.

C. One Extreme: Justice Brennan’s Dissent in Paris and Broad Protections for Pornographers

A major criticism of both local and national standards is that both do not clearly define obscenity. In both theories, there is an optimistic belief that juries will be able to agree among themselves what the national or local standard should be and then judge the material in question according to that consensus. However, the law and courts have not said exactly what those standards should be. Justice Brennan came to the conclusion that obscenity cannot be defined sufficiently to provide fair notice to the distributors.

In Paris, Brennan designed a rule that would restrict almost all government action that sought to regulate allegedly obscene material. This broad protection for sexually oriented materials would probably offer the greatest amount of protection for the computer bulletin board operators, since such a rule would stop most prosecution.

However, Brennan’s Paris rule is the extreme position. It can be criticized as an abdication of the Court’s

236. See supra notes 201-07 and accompanying text.
237. See supra notes 67-69 and accompanying text.
238. See supra text accompanying notes 75-78, 102-04.
239. See supra text accompanying notes 75-78, 102-04.
240. See supra text accompanying notes 75-78, 102-04.
241. See supra note 106 and accompanying text.
243. See id.
duty to punish purveyors of obscene material. Brennan's rule can also be criticized as ignoring stare decisis by allowing First Amendment protection for obscene materials. Despite the Court's "somewhat tortured history" in dealing with obscenity cases, a majority of the Court has always recognized that obscene material was undeserving of First Amendment protection. Most members of the Court disagreed on the standards for judging allegedly obscene material, not whether obscene material existed. Brennan's rule could open the floodgates to all kinds of sexually explicit materials.

In addition, Chief Justice Burger criticized Brennan's opinion in Paris because it gave "no indication of how the division between protected and nonprotected materials may be drawn with greater precision." Burger pointed out that Brennan's rule contained no clear line, and that his formulation was equally imprecise.

D. The Other Extreme: Calls for a Per Se Rule

Taking a position opposite to Brennan's rule in Paris, some commentators would provide uniformity through a "simple prohibition of hardcore pornography." The per se rule for hardcore pornography would be a statute used in conjunction with the Miller test to make prosecution easier." "[I]t would make prosecution easier for the material Miller always reaches — the hardest of the hard-core pornography: actual intercourse or ejaculation occurring in front of a cam-

244. See Miller v. California, 413 U.S. 15, 29 (1973).
246. Miller, 413 U.S. at 20.
247. See supra part II.A.
248. See supra part II.A.
251. Id. at 272. The proposed statute would read:

No person with knowledge of the character of the material shall knowingly distribute or exhibit, to the public or for commercial purposes, any hard-core pornography.

Hard-core pornography means any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, analingus, and masturbation, where penetration, manipulation or ejaculation of the genitals is clearly visible.

Id. at 271-72.
era for commercial exploitation."\textsuperscript{252} Such a rule would seem to provide more notice to dealers and distributors of sexually explicit materials, including those transmitting on BBSs, of what is legally obscene.

However, as Brennan would argue, "the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments."\textsuperscript{253} In addition, after years of experimentation and debate, Brennan would probably not be convinced of any rule's possibility of success.\textsuperscript{254} Also, the "hard-core pornography" rule would not address material on the cusp between legal and illegal works — leaving the tough questions still unanswered.\textsuperscript{255}

E. Limiting the "Community" to the Community of Computer Users

One commentator and the attorneys conducting the Thomases' appeal have suggested that the community used to define obscenity should be the community of computer users.\textsuperscript{256} The argument rests on the belief that the community designated to judge what material is obscene should be the one affected by the obscene materials. "If the test [for obscenity] is intended to apply the standards of the community through which the material, in some relevant sense passes or affects, then the material on the Thomases' BBS exists in and affects only the virtual community of cyberspace."\textsuperscript{257}

Since the Supreme Court in \textit{Hamling} and \textit{Jenkins}, allowed the "community" to be any size smaller than a national community, the creation of a community of computer users in computer transmitted obscenity cases appears to be permissible under the Court's \textit{Miller} test.\textsuperscript{258} However, according to \textit{Hamling} and \textit{Jenkins}, the individual states would have to designate this as the community, and it seems unlikely that communities eager to prosecute these kinds of cases would

\textsuperscript{252} Id. at 272.
\textsuperscript{254} See id. at 83-84.
\textsuperscript{255} Taylor, supra note 250, at 276.
\textsuperscript{256} See Byassee, supra note 9, at 209.
\textsuperscript{257} Byassee, supra note 9, at 210.
\textsuperscript{258} See supra notes 108-12 and accompanying text.
write laws making it more difficult for them to get convictions.259

Consequently, the creation of a community of computer users based on only those with access to the obscene materials in question is problematic when created through local community standards. Local communities have too much control over the remedy and probably would not pass legislation creating a community of computer users for obscenity cases. Hence, they are not the appropriate authority to effect a solution to the inequities caused by local community standards in the modern communications context.

Additionally, the courts are unlikely to create a standard based on computer communities. If they were to set such a precedent, courts could not find a principled way to deny every non-geographical community which circulates some form of obscene material status as the community which defines obscenity.

V. PROPOSAL

A. Using Local Community Standards to Define Obscenity is Unworkable

The existence of local community standards has either become extinct or is about to enter extinction because of society's growing interconnectedness.260 The transfer of information, blind to state and city borders, will force the courts to alter their concepts of locality.261 Community ideas and morals are not “local” anymore, and the Miller test which allows local community standards to govern obscenity is an anachronism. People like the Thomases, who operate in the modern telecommunications age, risk liberty and property without reasonable notice.262 In addition, the dangers that were outlined by the Court in Paris are not created through computer communications.263

259. See supra notes 108-12 and accompanying text.
260. See supra part II.B.3.
261. See supra part II.B.3.
262. See supra notes 90-91 and accompanying text.
263. See supra notes 194-200 and accompanying text.
B. **A National Standard is the Best Solution**

A national solution is required to effect changes on a national level as the information superhighway and modern communications technologies interconnect the nation and world. A national standard is the best solution for the future.

Although a national standard is still open to criticisms of imprecision, a national standard is less open to the charge that it provides no notice. A national standard is more likely to provide notice to every citizen in the country, because it is one standard that applies to the distributor's community as well as the recipient's community. A national standard also recognizes the existence of obscenity without creating an inflexible *per se* rule. This would insulate it from the criticisms of Brennan's *Paris* rule, which extended First Amendment protections to almost all sexually explicit materials. A national standard would provide more notice to BBS operators, and ensure equal protection for outsiders, regardless of the venue in which they are prosecuted.

Juries should be instructed to use Justice Brennan's formulation in *Jacobellis*. In that case, Brennan quoted Judge Hand, who was the originator of the term "community standards." Judge Hand believed that juries should base their decision on the views of the society at large and people in general. This is basically a national standard.

National standards for determining obscenity are workable through the use of expert witnesses. In determining current local community standards, some commentators already suggest that "litigants in an obscenity trial should introduce relevant and appropriate expert testimony on the issue of contemporary [local] community standards." The expert witnesses would testify to evidence collected using social science sampling techniques and surveys.

264. *See supra* notes 227-36 and accompanying text.
265. *See supra* notes 227-36 and accompanying text.
266. *See supra* notes 243-48 and accompanying text.
267. *See supra* notes 59-64 and accompanying text.
268. *See supra* notes 59-64 and accompanying text.
269. *See supra* notes 59-64 and accompanying text.
271. *Id.*
This same suggestion could apply to the national standard. Expert witnesses, relying on social science data, could assist the jury in determining whether or not material is obscene. Expert evidence would be a practical solution to the problem of defining obscenity that leaves the definition flexible to changing national views.\textsuperscript{272}

VI. CONCLUSION

The information superhighway is part of an information revolution occurring all over the country and the world.\textsuperscript{273} Computer bulletin boards are part of a world where information may be transmitted freely and quickly to anyone with the right computer equipment.\textsuperscript{274} However, the law has not kept up with these rapid advancements in technology.\textsuperscript{275}

The history of obscenity jurisprudence is long and riddled with inconsistencies. In 1941, the Supreme Court first officially recognized that obscene materials were not protected by the First Amendment.\textsuperscript{276} However, it was not until 1957 that the Court set out standards for judging obscene materials.\textsuperscript{277} The Court indicated that "contemporary community standards" should dictate whether or not material was obscene, but failed to indicate what "community" the Court was referring to.\textsuperscript{278} In 1964, a plurality on the Court attempted to assert that it had meant a national community standard.\textsuperscript{279} However, in 1973 the Court rejected the national standard in favor of a local community standard.\textsuperscript{280} Since 1973, the Court has maintained that local community standards should be used to judge allegedly obscene material.

In July of 1994, the Thomases' convictions demonstrated a serious problem with the current formulation of obscenity standards.\textsuperscript{281} Computer bulletin boards are often caller driven and do not distinguish between local and out-of-state

\textsuperscript{272} See id.
\textsuperscript{273} See supra part II.B.
\textsuperscript{274} See supra part II.B.
\textsuperscript{275} See supra part II.A.
\textsuperscript{276} See supra part II.A.1.
\textsuperscript{277} See supra part II.A.2.
\textsuperscript{278} See supra notes 40-43 and accompanying text.
\textsuperscript{279} See supra notes 59-64 and accompanying text.
\textsuperscript{280} See supra notes 80-89 and accompanying text.
\textsuperscript{281} See supra part IV.A.
callers. The risk of unintentional violation is particularly great in these kinds of information transfer situations where material is sent over phone lines in a matter of seconds to anyone, anywhere. In addition, there is no notice of exactly what each community's standards are.

The last decade has seen tremendous advances in communications which raise the question of whether “local” community standards still exist. More uniform rules and increased notice would be the likely advantages to introducing a national standard to judge obscenity.

A national standard for judging allegedly obscene materials would better fit today’s society, where geography is almost meaningless and information transfer is reduced to pulses of light in a fiber optic cable. A national standard for obscenity should be established because it is most likely to grow with technology while still prohibiting those materials that are indeed obscene.

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282. See supra notes 204-07 and accompanying text.
283. See supra notes 204-07 and accompanying text.
284. See supra notes 204-07 and accompanying text.
285. See supra notes 211-26 and accompanying text.
286. See supra notes 227-37 and accompanying text.

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