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The Internet and the Fall of the Miller Obscenity Standard: Reexamining the Problem of Applying Local Community Standards in Light of a Recent Circuit Split

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**THE INTERNET AND THE FALL OF THE *MILLER*
OBSCENITY STANDARD: REEXAMINING THE
PROBLEM OF APPLYING LOCAL COMMUNITY
STANDARDS IN LIGHT OF A RECENT CIRCUIT
SPLIT**

E. Morgan Laird*

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INTRODUCTION

In 1942, the United States Supreme Court declared that obscene material is one of the few narrow and well-defined categories of speech outside the protection of the First Amendment of the United States Constitution.¹ Since that time, the Court has struggled to create a clear articulation of what material is actually considered obscene.² In an attempt to simplify the situation, the Supreme Court, in 1973, decided to defer to local communities and allow them to determine what is obscene, and therefore unprotected by the First Amendment.³ Juries would be asked to apply the contemporary community standards of the community where

1. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

2. Between 1942 and 2004, the Supreme Court has heard over seventy-five cases considering obscene material.

3. *Miller v. California*, 413 U.S. 15, 24 (1973); *see infra* Part I.B.

they sat and determine if such material being considered was obscene.⁴ This meant that an adult magazine could be categorized as obscene in one community, but perfectly acceptable in another that is more tolerant of such content.⁵ To be categorized as obscene, a jury must find that: (1) “the average person, applying contemporary community standards” would find the work as appealing to prurient interest, (2) the work is patently offensive, and (3) the work “lacks serious literary artistic, political, or scientific value.”⁶

The Internet, however, has jeopardized the Court’s determination that local communities are the best judges of what is obscene. Because the Internet can be accessed anywhere, a local community can no longer easily close its doors to certain adult material by passing ordinances against it. It is relatively inexpensive to post material that is available nationwide, yet virtually impossible to post content that is only available to a single geographic area.⁷ As such, the least tolerant communities can access material posted on the Internet and apply their own “contemporary community” standards to Internet content available nationwide. Given the difficulties in targeting Internet material to specific communities, these least tolerant communities inadvertently become the judge what is obscene on the Internet.

This Comment addresses the problematic application of local community standards when judging obscene material posted on the Internet by analyzing a recent circuit split. Currently, the Ninth Circuit has abandoned the local community standard, finding that a national community standard is more in line with Supreme Court precedent.⁸ Conversely, the Eleventh Circuit expressly rejected a national community standard and continues to apply a local community standard to Internet cases.⁹ To help illustrate the circuit split, this Comment will first discuss the courts’ struggle with developing the community standard.¹⁰ Second, it will analyze the merits and failures of the Ninth and

4. *Miller*, 413 U.S. at 24.

5. *Id.* at 32.

6. *Id.* at 24.

7. *Ashcroft v. ACLU*, 535 U.S. 564, 595 (2002) (Kennedy, J., concurring).

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

9. *See United States v. Little*, No. 08-15964, 2010 WL 357933 (11th Cir. 2010).

10. *See infra* Part I.

Eleventh Circuits' respective decisions.¹¹ Finally, this Comment will review possible solutions and conclude that the only constitutionally permissible result is that obscenity cannot be regulated on the Internet.¹²

I. BACKGROUND

A. *The Court's Struggle to Develop an Obscenity Standard*

1. *Obscenity as Unprotected Speech*

The First Amendment succinctly declares: "Congress shall make no law . . . abridging the freedom of speech."¹³ The Supreme Court has construed the meaning and held that "it is well understood that the right of free speech is not absolute at all times and under all circumstances."¹⁴ In *Chaplinsky v. New Hampshire*, the Court stated, "[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 the insulting or 'fighting words'"¹⁵ The Court did not discuss why obscenity is within this narrowly limited class of speech.¹⁶ In subsequent cases, however—where the Court was asked specifically whether obscene material is unprotected by the First Amendment—it has relied on this statement and has continued to affirm that obscenity is in no way protected by the First Amendment.¹⁷ The problem, however, is that what constitutes obscene materials has not been "well-defined" or "narrowly limited."

11. *See infra* Part II.

12. *See infra* Parts III and IV.

13. U.S. CONST. amend. I.

14. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

15. *Id.* at 572.

16. *See id.*

17. *Ashcroft v. ACLU*, 535 U.S. 564, 569 (2002) ("[O]bscene speech enjoys no First Amendment protection.").

2. *The Challenge of Defining Obscenity*

i. Development of a “Community Standard”

The Court did not directly address obscenity as unprotected speech until 1957 when it decided *Roth v. United States*.¹⁸ There, the Court held, “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties”¹⁹ Then, the Court held that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”²⁰ Thus, because obscene material is outside of the protection of the First Amendment, the Court, in effect, holds that it is “no essential part of any exposition of ideas.”²¹

The result of the *Roth* decision was that federal and state governments could regulate or fully prohibit obscene material, so long as the obscenity statutes did not go too far and infringe on constitutionally protected speech.²² In *Roth*, the Court affirmed the conviction of a man charged with sending obscene circulars and advertisements in violation of a federal obscenity statute.²³ The Court, however, gave no reason why the advertisements were obscene, nor a description of what the advertisements contained.²⁴ Further, the Court provided little guidance to lower courts to determine what is obscene and therefore unprotected by the First Amendment, and what is not obscene and therefore given full First Amendment protection. The Court did express satisfaction with the lower court’s test, which looked

18. *Roth v. United States*, 354 U.S. 476 (1957). The Court noted that “[a]lthough this is the first time the question has been squarely presented to this Court, . . . expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.” *Id.* at 481.

19. *Id.* at 484.

20. *Id.*

21. *Id.* at 485 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

22. *Id.* at 483.

23. *Id.* at 480.

24. The court’s only discussion of the actual materials in question was when it stated the defendant was charged with “mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.” *Id.*

to “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”²⁵ The Court failed, however, to explain what “contemporary community standards” meant, or explain how lower courts are to apply such a standard.²⁶

The only issue that was clarified by the case is that obscene material must be sexual in nature.²⁷ To confuse the issue further, however, Justice Brennan, writing the opinion of the Court, wrote “sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.”²⁸ Thus, governments cannot regulate all speech dealing with sex, but only such speech that is appealing to the prurient interest and, thus, obscene.²⁹

Justice Harlan, in his dissent, expressed his concern with the majority’s opinion, believing that it is improper to entrust important constitutional decisions to a jury.³⁰ He wrote that the majority opinion “obscure[s] the peculiar responsibilities resting on state and federal courts in this field and encourage[s] 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.”³¹

ii. The Court’s Failure at Defining Obscenity

The *Roth* decision began a sixteen-year period where the Court could not agree as to what material was obscene and what was not.³² The Court faced two challenges. First, the definition it would create could not be vague or overbroad.³³ Any definition the Court delineates will be used by lower

25. *Id.* at 489.

26. *Id.*

27. *Id.* at 487.

28. *Id.*

29. *Id.* at 480, 487.

30. *Id.* at 496.

31. *Id.* at 498.

32. The Court decided *Roth* in 1957 and it did not agree on a formal obscenity standard until it decided *Miller v. California*, 413 U.S. 15 (1973), more than fifteen years later.

33. The Court held that it is required that the language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices” *Roth*, 354 U.S. at 491 (citing *United States v. Petrillo*, 332 U.S. 1, 7–8 (1947)).

courts. If the definition is vague or overbroad, lower courts may incorrectly deem constitutionally protected speech as obscene. Second, the definition could not be overly narrow so as to infringe on what the Court saw as state governments' historic rights to regulate and prohibit obscene speech that is constitutionally unprotected speech.³⁴ This period demonstrates that the *Chaplinsky* Court was incorrect when it considered obscenity a "well-defined" category of speech outside of the protection of the First Amendment.³⁵

In 1962, in *Manual Enterprises, Inc. v. Day*,³⁶ the Court held that three magazines containing photographs of nude male models were not obscene, but the Justices did not agree on a reason why.³⁷ Justice Harlan, who dissented in *Roth*, stated, "we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency."³⁸ Justice Harlan, joined only by Justice Stewart, explained that they arrived at this conclusion upon their own examination of the material. They found that although the magazines were "dismally unpleasant, uncouth, and tawdry . . . ," they were not obscene.³⁹

Justices Harlan and Stewart wrote that "[o]bscenity . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) 'prurient interest' appeal."⁴⁰ The magazines, Harlan explained, were designed to appeal to the prurient interest, but were not necessarily patently offensive.⁴¹ Interestingly, the two Justices believed that to judge whether material is patently offensive, courts should apply a national community standard when judging whether materials are patently offensive pursuant to federal law.⁴²

34. *See id.* at 488.

35. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

36. *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962).

37. *Id.* at 495.

38. *Id.* at 489.

39. *Id.* at 490.

40. *Id.* at 486.

41. *Id.* at 486. Justice Harlan notes that the "portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates." *Id.* at 490.

42. *Id.* at 488.

When judging obscene material, Harlan wrote:

There must first be decided the relevant “community” in terms of whose standards of decency the issue must be judged. We think that 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.⁴³

Because only Justice Stewart shared Justice Harlan’s opinion, however, the question of what “contemporary community standards” meant remained unanswered.⁴⁴ Further, no other Justices agreed with, or wrote of, applying a national community standard.⁴⁵

Two years after *Manual Enterprises*, the Court revisited the obscenity standard issue, but once again failed to garner the support of five Justices to determine exactly what community standard meant.⁴⁶ In *Jacobellis v. Ohio*, Justice Brennan accepted Justice Harlan’s idea of a national community standard⁴⁷ and unequivocally rejected that the community standard expressed in *Roth* should be a local standard.⁴⁸ He wrote that the community standard refers “to ‘the community’ in the sense of ‘society at large; . . . the public, or people in general’”⁴⁹ and that the “concept of obscenity would have ‘a varying meaning from time to time’—not from county to county, or town to town.”⁵⁰ He justified his argument by explaining that if a local community standard was appropriate, then purveyors of sexually explicit material might practice self-censorship,⁵¹ a practice that the Court has consistently held to unconstitutionally chill speech.⁵² Only

43. *Id.*

44. *See id.*

45. *See id.*

46. *Jacobellis v. Ohio*, 378 U.S. 184 (1964). In *Jacobellis*, the Court held that the French film *The Lovers*, which contained a single explicit love scene, was not obscene. *Id.* at 196.

47. *Id.* at 193.

48. *Id.* at 192 (“It has been suggested that the ‘contemporary community standards’ aspect of the *Roth* test implies a . . . the particular local community from which the case arises. This is an incorrect reading of *Roth*.”).

49. *Id.* at 193.

50. *Id.*

51. *Id.* at 194.

52. *Smith v. California*, 361 U.S. 147, 154 (1959) (“The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the

two Justices, however, supported a national community standard.⁵³ Further, Justice Harlan, who wrote two years earlier of a national community standard, dissented and wrote that that a national standard is only appropriate when applying federal but not state law.⁵⁴

Jacobellis stands at the pinnacle of uncertainty in judging obscene material. In one of the most telling and candid statements, Justice Stewart wrote,

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.⁵⁵

Justice Stewart's comment is curious considering the serious ramifications that occur when material is found to be obscene. Without a clear definition of what constitutes protected non-obscene speech and what falls outside of the protection of the First Amendment, purveyors of sexually explicit material risk going to jail if they cross that line.⁵⁶ Here, for example, the petitioner probably would not have found Stewart's statement humorous if the Court determined that the motion picture was "that" and affirmed his conviction.⁵⁷

In December, 1965, the Court again attempted to create an obscenity standard when it heard three separate obscenity cases.⁵⁸ Justice Brennan wrote the majority opinion, or announced the decision of the court when there was no majority, in each of the three cases.⁵⁹ In *Ginzburg v. United States* and *Mishkin v. New York*, the Court was able to avoid

distribution of all books, both obscene and not obscene, would be impeded.").

53. *Jacobellis*, 378 U.S. at 195 ("[T]he constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.").

54. *See id.* at 203 (Harlan, J., dissenting). Harlan explained, "[s]tates are constitutionally permitted greater latitude in determining what is bannable on the score of obscenity than is so with the Federal Government." *Id.*

55. *Id.* at 197.

56. *See id.* at 201 (Warren, C.J., dissenting).

57. Petitioner was charged with violating Ohio Revised Code Section 2905.34, which stated that "[w]hoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one year nor more than seven years, or both." *Id.* at 186 n.1; OHIO REV. CODE ANN. § 2905.34 (LexisNexis 2012).

58. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Memoirs v. Day*, 383 U.S. 413 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966).

59. *Ginzburg*, 383 U.S. 463; *Memoirs*, 383 U.S. 413; *Mishkin*, 383 U.S. 502.

applying a community standard when evaluating the material in question. First, in *Ginzburg*, the Court upheld the conviction of a man who violated a federal obscenity statute when he mailed three different sexually explicit publications via the United States Post Office.⁶⁰ They contained a variety of articles relating to sex and sexuality, and photo-essays containing nude models.⁶¹ The Court avoided addressing an obscenity standard and instead upheld the conviction because the purveyors were selling the material to appeal to people's interest in sexuality.⁶² The court held: "[the purveyors] deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."⁶³ This holding seems to reject Harlan's belief expressed in *Manual Enterprises*, that the material must be patently offensive.⁶⁴ Here, the Court did not address whether the material was patently offensive, and only ruled that it was outside of the protection of the First Amendment because the seller was distributing it to appeal to the prurient interest.⁶⁵ Next, in *Mishkin v. New York*,⁶⁶ the Court upheld the conviction of a man who violated a New York obscenity statute when he had printed "[f]ifty books . . . portray[ing] sexuality in many guises."⁶⁷ The Court avoided any discussion of a proper obscenity test because it found that the New York law at issue was actually stricter than the test articulated in *Roth*.⁶⁸

Finally, in *Memoirs v. Massachusetts*,⁶⁹ the Court attempted to create an obscenity standard, but could not garner a majority of Justices to agree on a single test.⁷⁰ The

60. See *Ginzburg*, 383 U.S. at 467.

61. *Id.*

62. *Id.* at 472.

63. *Id.*

64. *Manual Enters., Inc. v. Day*, 370 U.S. 478, 486 (1962).

65. *Ginzburg*, 383 U.S. at 473 ("[T]he prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient . . .").

66. *Mishkin v. New York*, 383 U.S. 502 (1966).

67. *Id.* at 505.

68. *Id.* at 508.

69. *Memoirs v. Day*, 383 U.S. 413 (1966).

70. See *id.* In a 6-3 decision, four concurring opinions and three dissenting opinions were written. Justice Brennan announced the decision of the court and was joined in his opinion by Chief Justice Warren, and Justice Fortas. Justices Black, Douglas and Stewart wrote separate opinions. Justices Clark, Harlan, and White wrote separate dissenting opinions.

Court was asked to review a Massachusetts Supreme Court decision that held that the book *Memoirs of a Woman of Pleasure* was obscene.⁷¹ Justice Brennan, joined by Chief Justice Warren and Justice Fortas, believed that to be considered obscene “three elements must coalesce.”⁷² First, “the dominant theme of the material taken as a whole appeals to the prurient interest in sex.”⁷³ Second, “the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.”⁷⁴ And, third, “the material is utterly without redeeming social value.”⁷⁵

Following the *Ginzburg*, *Mishkin*, and *Memoirs* decisions, the Court was forced to summarily reverse or affirm obscenity convictions because it could not agree on a single obscenity standard.⁷⁶ Between 1966 and 1972, thirty-one cases were decided in this manner, with various reasons supporting why certain material was considered obscene.⁷⁷ Problematically, these decisions provided no notice to producers of sexually explicit material.⁷⁸ Those who distributed sexually explicit material would either have to take the risk and produce something that may be obscene, which could send them to jail,⁷⁹ or speech used could be limited to well below the obscenity standard, which necessarily chills First Amendment rights.⁸⁰

B. The Development of the Miller Obscenity Standard

1. Miller v. California and the Origins of the Contemporary Community Standard

On June 21, 1973, the Court handed down five decisions dealing with obscenity, each written by Chief Justice Burger.⁸¹ In each of the five opinions, the Chief Justice

71. *Id.* at 414.

72. *Id.* at 418.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* *Miller v. California*, 413 U.S. 15, 23 n.3 (1973).

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *Kaplan v. California*, 413 U.S. 115 (1973); *Miller*, 413 U.S. 15; *Paris*

reaffirmed the holding that the First Amendment does not protect obscene material.⁸² Then, in *Miller v. California*, the Court articulated the test to be used when determining whether something is or is not obscene.⁸³ The Court held:

The basic guidelines for the trier of fact must be: (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.⁸⁴ (Citations omitted).

Further, the Court held that obscene material is only that which “depict[s] or describe[s] patently offensive ‘hard core’ sexual conduct”⁸⁵

In explaining the test, the Court rejected the proposition that “contemporary community standards” should be a national standard, but rather held that the community in which the material was found should judge the material.⁸⁶ The Court justified applying a contemporary community standard by arguing 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.”⁸⁷ In effect, the Court wanted to maintain a level of autonomy for certain communities, and protect those communities from the thrusts of obscene material that might

Adult Theatre v. Slaton, 413 U.S. 49 (1973); *United States v. 12 200-Foot Reels of Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973). Each of the five decisions were 5-4 votes, with Chief Justice Burger, joined in by Justices White, Blackmun, Powell and Rehnquist, on one side, and Justices Brennan, Douglass, Marshall and Stewart dissenting on the other side.

82. *12 200-Foot Reels of Film*, 413 U.S. at 126; *Kaplan*, 413 U.S. at 119; *Miller*, 413 U.S. at 23; *Paris*, 413 U.S. at 54; *Orito*, 413 U.S. at 143.

83. The appellant in *Miller* was convicted for violating California Penal Code section 311.2(a) by sending through the mail unsolicited advertising brochures that contained obscene pictures and drawings. *Miller*, 413 U.S. at 16; CAL. PENAL CODE § 311.2(a) (West 2006).

84. *Miller*, 413 U.S. at 24.

85. *Id.* at 27. The Court later affirmed this in *Jenkins v. Georgia*, 418 U.S. 153 (1974), when the court held that the critically acclaimed movie *Carnal Knowledge*, which starred Jack Nicholson and Ann Margaret, was not obscene.

86. *Miller*, 413 U.S. at 32 n.13.

87. *Id.* at 32.

be acceptable in more tolerant communities.⁸⁸

In *Paris Adult Theatre v. Slaton*,⁸⁹ decided the same day as *Miller*, the Court held that states have the right to regulate the exhibition of obscene material in adult theaters.⁹⁰ Using this as their weapon, the Court held that a city may prohibit an adult theater from exhibiting obscene movies, even when the movies were only shown to consenting adults who paid admission to the films.⁹¹ It did not matter that the viewers of the movie were willing recipients, unlike those in *Miller*, where the recipients viewing the obscene material were unsuspecting adults.⁹²

Interestingly, Justice Brennan, the author of the three obscenity decisions decided in 1965,⁹³ dissented in each of the cases.⁹⁴ He lamented that “[n]o other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards.”⁹⁵ As a result, Justice Brennan stated,

[A]fter 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials.⁹⁶

He then concluded, that because no distinction can be articulated between obscene and non-obscene material, it is improper to suppress obscene material.⁹⁷

88. *See id.*

89. *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

90. *Id.* at 69.

91. *See id.* at 57.

92. *See id.*

93. *See supra* text accompanying notes 48–68.

94. *See Kaplan v. California*, 413 U.S. 115, 120 (1973); *Miller v. California*, 413 U.S. 15, 23 (1973); *Paris Adult Theatre*, 413 U.S. at 53; *United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123, 126 (1973); *United States v. Orito*, 413 U.S. 139, 143 (1973).

95. *Paris Adult Theatre*, 413 U.S. at 73.

96. *Id.* at 84 (Brennan, J. dissenting).

97. *See id.* at 83.

C. Refining the Miller Standard

Despite the *Miller* test's supposed clarity,⁹⁸ the confusion regarding the scope of what constitutes the community standard continues. In *Miller*, the Court found that the district court's application of "contemporary standards of the State of California" was "constitutionally adequate."⁹⁹ Does this mean that contemporary community standards should be statewide or narrower?

1. The Fluid Community

A year after *Miller*, the Court again attempted to define a contemporary community standard. In *Hamling v. United States*,¹⁰⁰ the Court held that the jury is to be instructed to apply a community or vicinage standard and not a national community standard.¹⁰¹ The petitioner mailed obscene advertisements in violation of a federal obscenity statute and, following a jury trial, was convicted.¹⁰² Subsequent to the conviction, however, the Court decided *Miller*.¹⁰³ Petitioner argued his conviction should be overturned because the United States District Court for the Southern District of California applied a test that was subsequently deemed improper by *Miller*.¹⁰⁴ Further, the Petitioner argued that the District Court erred when it instructed the jury to apply a national obscenity standard, instead of applying a local community standard.¹⁰⁵

The Court held that "[t]he result of *Miller* cases . . . is to permit a juror sitting in obscenity cases to draw on knowledge of the community of vicinage from which he comes in deciding what conclusions 'the average person, applying contemporary community standards' would reach in a given case."¹⁰⁶

98. See *Miller*, 413 U.S. at 29. The Court called their test "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." *Id.*

99. *Id.* at 32–33.

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

101. *Id.* at 104.

102. *Id.* at 91.

103. *Id.* at 98.

104. *Id.* at 103.

105. *Id.* The jury was instructed that "[c]ontemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex." *Id.*

106. *Id.* at 105.

Therefore, the jury is charged with interpreting what the standards are for the community in which the jury sits, and apply those standards to the material presented to them.¹⁰⁷ Justice Rehnquist, writing for the Court, again affirmed that there “is no provable ‘national standard,’ and perhaps there should be none.”¹⁰⁸ The Court also held, however, that the statewide standard approved of in *Miller* “did not mean that any such precise geographic area is required as a matter of constitutional law.”¹⁰⁹ Thus, the Court held that even though a national standard is improper, no geographic area is necessary.¹¹⁰ This adds further confusion to what contemporary community standards actually are. They are not to encompass the entire nation,¹¹¹ but can be the size of California.¹¹²

Again, Justice Brennan dissented.¹¹³ He was joined by Justice Stewart and Justice Marshall, and argued that “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.”¹¹⁴ Thus, they believed that it did not matter whether the material was judged by a local community standard or a national community standard; the result would always be an unconstitutional limit on speech.¹¹⁵

2. *The Application of the Miller Test to Modern Technology*

i. *The Miller Test as Applied to Dial-a-Porn*

Sable Communications v. FCC, decided in 1989 is particularly demonstrative of the Court’s commitment to local community standards.¹¹⁶ At issue in *Sable Communications*

107. *Id.* at 106.

108. *Id.*

109. *Id.* at 105.

110. *Id.*

111. *Id.*

112. *See Miller v. California*, 413 U.S. 15, 31 (1973) (supporting the lower court’s jury instruction that they should “apply ‘contemporary community standards of the State of California’”).

113. *See Hamling*, 418 U.S. at 103, 141 (Brennan, J., dissenting).

114. *Id.* at 141–42 (Brennan, J., dissenting) (citing *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting)).

115. *See id.*

116. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

was the constitutionality of section 223(b) of the Communications Act of 1934, which prohibited “indecent as well as obscene interstate commercial telephone messages.”¹¹⁷ The petitioners, who operated a “dial-a-porn” business “offer[ing] sexually oriented prerecorded telephone messages,”¹¹⁸ sought injunctive and declaratory relief against enforcement of the Act.¹¹⁹ The business was designed so that callers would call Sable Communications and pay for sexually explicit recordings.¹²⁰ Sable did not play the recordings unless someone actively called its phone line,¹²¹ distinguishing it from cases like *Miller* and its progeny, where the defendants were actively sending material to unsuspecting individuals.¹²²

The Court upheld the Act, reasoning that because the First Amendment does not extend to obscene speech, “there is no constitutional barrier to the ban on obscene dial-a-porn recordings.”¹²³ Furthermore, the Court held that it does “not read § 223(b) as contravening the ‘contemporary community standards’ requirement of *Miller*.”¹²⁴ The issue, however, was that Sable Communications, which was based in Los Angeles, was being judged by more restrictive communities than where the messages were being sent from.¹²⁵ The Court stated that even though “Sable may be forced to incur some cost in developing and implementing a system of screening the locale of incoming calls,” Congress is still entitled to enact laws that prohibit the distribution of obscene materials.¹²⁶ This holding indicates the strong support the Court has for the local community standard, even when companies are dealing with a national audience.¹²⁷

117. *Id.* at 117.

118. *Id.* at 117–18.

119. *Id.* at 118.

120. *Id.* at 118–19.

121. *Id.* at 119.

122. *See supra* text accompanying notes 69–85.

123. *Sable Commc'ns*, 492 U.S. at 124.

124. *Id.* at 124.

125. *See id.* at 125.

126. *Id.*

127. *Id.*

ii. The Miller Test and the Internet

The *Sable Communications* decision offered a preamble to how the Court applies local community standards to developing technologies that allow users to easily connect with everybody, but make it difficult to limit access to certain individuals.¹²⁸ The Court's first opportunity to consider governments' ability to regulate obscenity on the Internet came in 1997 with *Reno v. ACLU*,¹²⁹ where the Court heard a facial challenge to the Communications Decency Act of 1996 ("CDA"). In a 9-0 decision, the Court held that the CDA was unconstitutional because it was overbroad and, therefore, violated the First Amendment.¹³⁰ Justice Stevens, writing for the Court, acknowledged that "[t]he Internet is 'a unique and wholly new medium of worldwide human communication.'" ¹³¹ The Court held that the Act amounted to government-imposed content-based restriction on speech and that it was subject to and failed strict scrutiny.¹³² In finding the CDA overbroad, the Court was able to skirt the issue of whether or not the *Miller* obscenity standard applied to Internet content.¹³³

In 2002, however, the Court approached the issue squarely in *Ashcroft v. ACLU*.¹³⁴ There, the Court heard another facial challenge to a federal statute regulating the Internet. This time, the Court was asked to consider the constitutionality of the Child Online Protection Act of 1998 (COPA).¹³⁵ In a fractured 8-1 decision, with only Justice

128. In *Sable Commc'ns*, the Court noted that "[i]f Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 126.

129. *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, the Court was asked to consider the constitutionality of certain provisions of the Communications Decency Act of 1996, which attempted to "protect minors from 'indecent' and 'patently offensive' communications on the Internet." *Id.* at 849.

130. *Id.*

131. *Id.* at 850.

132. *Id.* at 851, 878.

133. *See id.*

134. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

135. The Child Online Protection Act was passed in response to the Supreme Court finding the CDA unconstitutionally overbroad. Children's Online Privacy Protection Act, 47 U.S.C. § 231 (2006). For an in-depth discussion of attempts by the federal government to regulate obscenity on the Internet, see generally Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuits Groundbreaking Understanding of*

Stevens dissenting, the court rejected the challenge.¹³⁶ The Court's holding, however, was a narrow one: "COPA's reliance on community standards to identify 'material that is harmful to minors' does not by itself render the statute substantially overbroad for purposes of the First Amendment."¹³⁷ Beyond that, little is clear.

Despite upholding COPA's use of community standards, the various opinions of the Justices demonstrated some support for reevaluating the application of such standards as applied to the Internet. Justice Thomas, who was joined in his opinion by Justices Rehnquist and Scalia, were the only Justices who expressed support for applying contemporary community standards.¹³⁸ His plurality opinion stated, "we do not believe that the [Internet's] 'unique characteristics' justify adopting a different approach than that set forth in *Hamling* and *Sable*."¹³⁹

No other Justices, however, accepted that the *Hamling* and *Sable* fit neatly into Internet obscenity cases. Justice O'Connor wrote a concurrence to "express [her] views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet."¹⁴⁰ Although O'Connor agreed with the other Justices in the majority that the use of local community standard does not, by itself, deem COPA facially unconstitutional, she did predict that COPA may be found unconstitutional in an as-applied challenge.¹⁴¹

Justice Breyer agreed with O'Connor, and wrote: "[a] nationally uniform adult-based standard . . . significantly alleviates any special need for First Amendment protection."¹⁴² Further, he believed applying a local community standard to the Internet was constitutionally unsound because it "provide[d] the most puritan communities with a heckler's Internet veto affecting the rest of the Nation."¹⁴³ Justice Stevens, the sole dissenter, agreed with

Community Standards in Cyberspace, 89 NEB. L. REV. 47 (2010).

136. *Ashcroft*, 535 U.S. at 566.

137. *Id.* at 585.

138. *Id.* at 583.

139. *Id.*

140. *Id.* at 586 (O'Connor, J., concurring).

141. *Id.* at 587.

142. *Id.* at 591 (Breyer, J., concurring).

143. *Id.* at 590.

Breyer on this issue.¹⁴⁴ Thus, three Justices expressed direct support of the application of a national community standard.¹⁴⁵

Justice Kennedy, joined by Justices Souter and Ginsburg, wrote that there was a real concern that “COPA in effect subjects every Internet speaker to the standards of the most puritanical community in the United States.”¹⁴⁶ Therefore, although COPA was upheld, six Justices recognized that there is a problem with applying local community standards to the Internet.¹⁴⁷ Beyond this, however, there is no clear holding from *Ashcroft*, leaving the question of what standard should apply to the Internet to be answered at a later date.

iii. Lower Courts Attempt to Apply Ashcroft v. ACLU

The Ninth Circuit, in *United States v. Kilbride*,¹⁴⁸ attempted to form a single holding from the *Ashcroft* decision to determine whether it is appropriate to apply a local community standard or a national community standard to obscene material available on the Internet.¹⁴⁹ In *Kilbride*, the defendants were convicted for interstate transportation of obscene material in violation of federal obscenity statutes.¹⁵⁰ Their convictions “arose from conduct relating to their business of sending unsolicited bulk email . . . advertising adult websites.”¹⁵¹ The defendants challenged the application of the *Hamling* definition of contemporary community standards “[b]ecause persons utilizing email to distribute possibly obscene works cannot control which geographic community their works will enter”¹⁵² The Ninth Circuit

144. *Id.* at 612 (Stevens, J., dissenting) (“[I]n the context of the Internet [the] shield also becomes a sword, because the community that wishes to live without certain material not only rids itself, but the entire Internet of the offending speech.”).

145. *Id.* at 586 (O’Connor, J., concurring); *id.* at 591 (Breyer, J., concurring); *id.* at 612 (Stevens, J., dissenting).

146. *Id.* at 593 (Kennedy, J., concurring). Kennedy concedes that although this is a “real concern,” it is not enough to invalidate the act. *Id.*

147. In 2008, the Third Circuit held that the Child Online Protection Act was unconstitutional. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2009). The Supreme Court refused to review the decision, effectively killing the Act. *Mukasey v. ACLU*, 129 S. Ct. 1032 (2009).

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

149. *See id.* at 1250–55.

150. *Id.* at 1245.

151. *Id.* at 1244.

152. *Id.* at 1250.

agreed with the defendants and, in construing the *Ashcroft* decision, held that “the distinctions Justices O’Connor and Breyer made between the constitutional concerns generated by application of a national and local community standards” must control.¹⁵³

Conversely, the Eleventh Circuit Court of Appeals expressly rejected the *Kilbride* decision,¹⁵⁴ and instead held that “the *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere.”¹⁵⁵ Despite this, the Eleventh Circuit did note the growing discord surrounding the application of the *Miller* test to Internet material.¹⁵⁶

II. IDENTIFICATION OF THE PROBLEM

Since the Supreme Court included obscenity in the narrow and well-defined area of unprotected speech,¹⁵⁷ it has had trouble distinguishing between what is obscene and what is not.¹⁵⁸ Although the Court claimed to create “concrete” guidelines, by incorporating contemporary community standards in *Miller*,¹⁵⁹ the test has become problematic in the Internet age. Those who wish to exercise their First Amendment right to free speech and, subsequently, post sexually explicit material cannot be sure who will access the material. Thus, those individuals cannot be sure to which community’s standards they should tailor the material.

When the *Miller* test was created in 1974, the nation had not yet begun incorporating modern communications into everyday life. People from Maine and Mississippi seemed much more distinct than people from New York City and Las Vegas.¹⁶⁰ The Court wanted to ensure that obscene material was not thrust upon those in the less tolerant areas, nor allow

153. *Id.* at 1254.

154. *See* United States v. Little, No. 08-15964, 2010 WL 357933, at *164 (11th Cir. Feb. 2, 2010) (“We decline to follow the reasoning of *Kilbride* in this Circuit. The portions of the *Ashcroft* opinion and concurrences that advocated a national community standard were dicta, not the ruling of the court.”).

155. *Id.*

156. *Id.* at *163.

157. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942).

158. *See supra* Part I.A.2.

159. *Miller* v. California, 413 U.S. 15, 29 (1973).

160. *Miller*, 413 U.S. at 32.

the less tolerant areas to govern what material could be accessed in more tolerant areas.¹⁶¹ The problem with maintaining a variable definition of obscenity,¹⁶² where a single image can be held obscene in one area and not obscene in other areas, is that once the image is posted to the Internet, anyone can access it from any part of the country.¹⁶³

The current circuit split between the Ninth and Eleventh Circuits muddies the waters further.¹⁶⁴ With different tests being applied, and the fact that the material can be brought in any jurisdiction in which the material is found, purveyors of obscene material are subject to any and all community standards in existence.

Eliminating Internet obscenity laws may solve the problems that exist when applying the *Miller* standard to the Internet.¹⁶⁵

III. ANALYSIS

A. *The Ninth Circuit's Application of a National Community Standard Is Improper*

There are three reasons why the Ninth Circuit's application of a national community standard is improper. First, a majority of the Justices did not support the application of a national community standard.¹⁶⁶ Only Justices O'Connor and Breyer expressly stated that a national community standard should be applied when judging Internet material.¹⁶⁷ Second, a national community standard will force more tolerant communities to lower their standards, thereby reducing their access to currently available material.¹⁶⁸ Finally, there will always be a problem with how a fact finder is to determine what a national community standard actually is.¹⁶⁹

161. See Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 60–61 (2004).

162. See *supra* Part I.B.1.

163. *Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002).

164. See *supra* Part I.C.2.iii.

165. See *infra* Part IV.

166. See *infra* Part III.A.1.

167. See *supra* Part I.C.2.ii.

168. See *infra* Part III.A.2.

169. See *infra* Part III.A.3.

1. *A Majority of Supreme Court Justices Do Not Support a National Community Standard*

The Ninth Circuit's reasoning rests on a shaky foundation because a majority of Supreme Court Justices did not advocate for a national community standard in any of the previous obscenity cases. The Ninth Circuit was able to come to its conclusion that a national community standard is appropriate because a majority of the Justices expressed some concern over applying a local community standard to online material.¹⁷⁰ The *Kilbride* Court held that because the "five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns . . . ,"¹⁷¹ it is appropriate to apply national community standards. The five Justices that the Ninth Circuit believed made up the majority were Justices Kennedy, Breyer, Ginsburg, O'Connor and Stevens.¹⁷²

Justice Kennedy, in his concurrence which was joined by Justices Souter and Ginsburg, argued that it is inappropriate to require a national standard because it would "impose the community standards of Maine or Mississippi on Las Vegas and New York City."¹⁷³ He recognized that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."¹⁷⁴ Despite this glaring rejection of a national community standard, the Ninth Circuit included Justice Kennedy in the "five Justices concurring in the judgment, as well as the dissenting Justice, viewed the application of local community standards in defining obscenity on the Internet as generating serious constitutional concerns."¹⁷⁵

Only Justices O'Connor and Breyer wrote positively of a national community standard for online material.¹⁷⁶ Further, only Justice Breyer expressed his belief that a national

170. *United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009).

171. *Id.*

172. *See id.* at 1254–55.

173. *Ashcroft v. ACLU*, 535 U.S. 564, 597 (2001).

174. *Id.* (citing *Miller v. California*, 413 U.S. 15, 33 (1973)).

175. *Kilbride*, 584 F.3d at 1254.

176. *Ashcroft*, 535 U.S. at 586 (O'Connor, J., concurring); *id.* at 605 (Breyer, J., concurring).

community standard applied.¹⁷⁷ Justice O'Connor simply expressed her opinion of the “*desirability* of adopting a national standard for obscenity for regulation of the Internet.”¹⁷⁸ She did not elaborate as to how lower courts are to apply such a standard.¹⁷⁹ Additionally, she did not find that applying a local community standard is enough to make the Child Online Protection Act facially overbroad.¹⁸⁰ Therefore, one can conclude that even though Justice O'Connor believes that a national community standard may be desirable, it is not necessary.

2. *A National Community Standard Will Force More Tolerant Communities to Raise Their Standards to Conform to a National Community Standard*

There is another constitutional concern beyond the fact that no Justices support a national community standard. If a national community standard applies to the Internet, places like New York City and Las Vegas will necessarily have to raise their community standards to meet that of the national average. The *Miller* Court expressed this concern when the test was first introduced. It found that “[t]he use of ‘national’ standards . . . necessarily implies that materials found tolerable in some places, but not under the ‘national’ criteria, will nevertheless be unavailable where they are acceptable.”¹⁸¹ Therefore, the Court recognized that even though it is important to maintain states’ police power, obscenity statutes cannot be upheld when individual’s rights to access obscene material is limited.¹⁸² The Court further explained “in terms of danger to free expression, the potential for suppression seems at least as great in the applications of a single nation-wide standard as in allowing distribution in accordance with local tastes.”¹⁸³

177. *Id.* at 586 (Breyer, J., concurring).

178. *Id.* at 586.

179. *See id.*

180. *Id.*

181. *Miller v. California*, 413 U.S. 15, 32 n.13 (1973).

182. *See id.*

183. *Id.*

3. *Juries' Application of a National Community Standard*

In *Miller*, the Court dismissed the application of a national community standard and stated that it was hypothetical and unascertainable.¹⁸⁴ But, has a national community standard become real and ascertainable since *Miller* was decided over thirty-five years ago? The Ninth Circuit offered help to answer this question.

Professor Clay Calvert¹⁸⁵ believes, “[e]stimating what this national standard is . . . seems like an incredibly daunting and difficult task”¹⁸⁶ because juries will “clearly . . . need some assistance in determining what the national community standard is.”¹⁸⁷ Calvert argues juries already have a hard time determining what the local community standards are and that asking them to expand that further intensifies the problem.¹⁸⁸ He asks whether “a cadre of expert witnesses who are ready to testify about what community standards are in various communities throughout the United States will develop?”¹⁸⁹ Thus, even if a national community standard is held constitutionally required for Internet obscenity, it seems unlikely that one can be developed.¹⁹⁰

B. The Eleventh Circuit's Application of Supreme Court Precedent Is Correct but Ignores that Such a Test Limits More Speech than Is Constitutionally Permissible

1. *The Eleventh Circuit's Approach Is Consistent with Supreme Court Precedent*

The Eleventh Circuit was correct when it concluded that the local community standard is still controlling law.¹⁹¹ As discussed above, the fractured *Ashcroft* decision leads to the conclusion that Justices support reevaluating the *Miller* test

184. *Id.* at 24.

185. Clay Calvert is a Brechner Eminent Scholar in Mass Communications and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida. Calvert, *supra* note 135, at 47.

186. *Id.* at 80.

187. *Id.* at 77.

188. *Id.*

189. *Id.*

190. *See id.*

191. *See* United States v. Little, No. 08-15964, 2010 WL 357933, at *164 (11th Cir. Feb. 2, 2010).

as applied to the Internet.¹⁹² But, the Court did not hold that the local community standard should be abandoned. Additionally, a majority of Justices maintained that it is a proper test regardless of the trouble it provides.¹⁹³

First, Justices Thomas, joined by Chief Justice Rehnquist and Justice Scalia, determined that although the community “need not be defined by reference to a precise geographic area [A] juror applying community standards will inevitably draw upon personal ‘knowledge of the community or vicinage from which he comes.’”¹⁹⁴ Thus, these three Justices believe that a local community standard is inevitable. They do not, however, hold that a national community standard is permissible, as the Ninth Circuit interpreted in *Kilbride*.¹⁹⁵

Second, Justice Kennedy, joined by Justices Ginsburg and Souter, continued to support the geographic autonomy that the *Miller* standard created.¹⁹⁶ He noted that just as the First Amendment does not require that the people of “Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City,” it also does not “impose the community standards of Maine or Mississippi on Las Vegas and New York.”¹⁹⁷ If a national community standard is implemented, both results will manifest. To create a national community standard, New York City and Las Vegas will impose some of the standards of Maine and Mississippi, and vice versa. The result will be the end of any geographic autonomy that Justice Kennedy seems to support.¹⁹⁸

Thus, although six Justices found the application of local community standards troublesome,¹⁹⁹ six justices also believed that it would be improper to abandon the local community standard.²⁰⁰

192. *See supra* Part I.C.2.ii.

193. *See supra* Part I.C.2.ii.

194. *Ashcroft v. ACLU*, 535 U.S. 564, 576–77 (2002).

195. *United States v. Kilbride*, 584 F.3d 1240, 1256 (9th Cir. 2009).

196. *See Ashcroft*, 535 U.S. at 595–97.

197. *Id.* at 597 (Kennedy, J. concurring).

198. *See id.*

199. *See supra* Part I.C.2.ii.

200. *See supra* Part I.C.2.ii.

2. *Local Community Standards Are Improper Despite Being Consistent with Supreme Court Precedent*

Although the Supreme Court has not yet advocated for a national community standard, if a local community standard governs obscenity on the Internet, there will continue to be a constitutional issues. Justice Breyer's prediction that more conservative localities will be given a heckler's veto²⁰¹ has come true in the form of forum shopping.²⁰² Calvert writes that the federal government has always used forum shopping as a way to ensure that they will be successful in their prosecutions.²⁰³ He noted, "the federal government did not deny its strategic use of forum shopping in Project PostPorn,"²⁰⁴ which was the government's "first nationwide prosecution of mail-order pornography."²⁰⁵

Under Project PostPorn, "federal agents went 'into Bible Belt regions' and initiated obscenity cases against California X-rated filmmakers in the belief that it [would] be easier to obtain convictions in conservative, rural America than in anything-goes Los Angeles."²⁰⁶ Thus, the *Miller* standard's application to the Internet did provide "conservative, rural America" with a heckler's veto, and federal prosecutors exploited it.²⁰⁷

IV. PROPOSAL

A. *Kilbride and Little Demonstrate that Both Local and National Community Standards Are Problematic*

The Ninth Circuit's decision to abandon local community standards and the Eleventh Circuit's decision to maintain local community standards illuminates the fact that both methods are constitutionally unsound.²⁰⁸ These tests need to

201. *Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring).

202. See Calvert, *supra* note 135, at 56–57.

203. See *id.*

204. *Id.* at 58.

205. *Id.* at 57.

206. *Id.* (citing John Johnson, *Into the Valley of Sleaze: Demand Is Strong, but Police Crackdowns and a Saturated Market Spell Trouble for One of L.A.'s Biggest Businesses*, L.A. TIMES MAG., Feb. 17, 1991, at 10 (attributing this assertion to "John Weston, a Beverly Hills attorney who has represented members of the hard-core film industry").

207. *Id.* at 56–58.

208. See *supra* Part I.C.2.iii.

be abandoned. The problem, however, is that there are no clear alternatives that will both allow governments to regulate obscenity on the Internet, and maintain individual First Amendment rights.

B. Eliminating Internet Obscenity Laws Is the Only Solution

Clarity is necessary when governments regulate obscene material, which has proven to be particularly difficult.²⁰⁹ If laws are vague, they will necessarily limit more speech than is constitutionally acceptable. The only solution to this problem is to eliminate Internet obscenity laws and find such laws unconstitutional. Thus, Justice Brennan was correct when he stated in his *Paris Adult Theatre* dissent that “none of the available formulas . . . can reduce the vagueness to a tolerable level.”²¹⁰

Elimination of Internet obscenity law is the only alternative to the local community standard, which will give such speech full protection under the First Amendment. This way, those who choose to post sexually explicit material on the Internet will not have to worry how the most conservative communities will judge that material. When such people worry about the consequences of what they post, and then do not post, their First Amendment rights are necessarily violated.²¹¹ Thus, the only alternative to ensure that constitutionally protected material is not limited is to eliminate Internet obscenity laws completely.

This alternative will result in constitutionally unprotected speech, that which would be considered obscene in all communities, to be available on the Internet. This consequence, however, is justified in the absence of an alternative that protects speech that is not obscene. Until there is a way to ensure such speech is protected, this is the only alternative that ensures constitutionally protected speech is not chilled.

CONCLUSION

The history of obscenity jurisprudence in the United States is tarnished with inconsistencies and the Internet

209. See *supra* Part II.A.2.ii.

210. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 84 (1973).

211. See *Cenite*, *supra* note 162, at 27.

exacerbates the problem. The recent circuit split demonstrates a need to reevaluate what governments are permitted to sensor on the Internet.

The Court first held in *Chaplinsky* that obscenity is outside of the protection of the First Amendment.²¹² It was not until 1957, however, that it directly addressed obscenity and held that sexually explicit material should be judged by “contemporary community standards.”²¹³ This phrase proved troublesome for the court, and it was not until 1973, when the court decided *Miller*, that five Justices agreed to its meaning.²¹⁴ There, the Court rejected the use of a national community standard and instead proclaimed that the relevant community is a local one.²¹⁵

Since that time, the Court has maintained, at least to some extent, that the applicable standard to apply is a local standard, including for material posted on the Internet.²¹⁶ However, the recent circuit split between the Ninth and Eleventh Circuits demonstrates that applying a local community standard is troublesome.²¹⁷ In order to ensure that constitutional freedoms are not limited, it is necessary that federal and state governments stop regulating obscenity on the Internet.

212. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942).

213. *See supra* Part I.A.2.ii.

214. *See supra* Part I.B.1.

215. *See supra* Part I.A.2.ii.

216. *See supra* Part I.A.2.ii.

217. *See United States v. Little*, No. 08-15964, 2010 WL 357933, at *164 (11th Cir. 2010).