ARTICLES

The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation

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Introduction

The Internet's rapid growth provides a striking example of the effect of computer networks on modern communication. In 1992, estimates of the number of users on the Internet varied between ten and twenty-five million.[1] The Internet's growth has been exponential: "In 1981, 213 computers were registered on the Internet; by 1989 there were 80,000. In October 1990, there were 313,000; only three months later, in January 1991, there were 376,000. And in January 1992, there were 727,000 Internet registered computers."[2] The Internet's growth rate is estimated at between 10 and 15 percent *per month.*[3]

This communications potential has generated numerous enthusiastic reviews:

> Networks have already changed the way America communicates. Each day, millions of transactions zip across tens of thousands of high-speed connections among computers spread all over the world. It takes only seconds to transmit hundreds of pages across the United States. Requests reach England, Japan, or Australia with a flicker of the computer screen and answers arrive well before a telephone call or fax transmission could be completed. Software stored on a mainframe in California can

1. PAUL GILSTER, THE INTERNET NAVIGATOR 15 (2d ed. 1994); *see* R.E. Calem, *The Network of All Networks*, N.Y. TIMES, Dec. 6, 1992, at F12.

2. TRACY LAQUEY & JEANNE C. RYER, THE INTERNET COMPANION: A BEGINNER'S GUIDE TO GLOBAL NETWORKING 7 (1993) (citation omitted). LaQuey and Ryer note that at this rate of expansion, 1.5 million computers would have been connected to the Internet by the time of their book's publication in 1993. *Id.* In addition, each computer "registered" on the Internet can provide access for numerous individuals and information gateways to other computers on other networks. *See* GILSTER, *supra* note 1, at 18-20. A measurement of the number of computer *networks* connected by the Internet reveals similar growth:

> [B]y 1985, approximately one hundred networks formed the Internet. By 1989, that number had risen to five hundred. The Network Information Center of the Defense Data Network Information Center found 2218 networks connected as of January 1990. By June 1991, the National Science Foundation Network Information Center pegged it at close to four thousand, and . . . connections have more than quadrupled since then. If we extrapolate based on current numbers, the Internet could reach forty million people by 1995, one hundred million by 1998.

Id. at 15.

3. GILSTER, *supra* note 1, at 23 (stating the Internet's current growth rate is 15% each month); LAQUEY & RYER, *supra* note 2, at 6 (10% monthly).

> be downloaded instantly to a desktop in New York using a few simple commands. Researchers from universities and corporate development labs who have never met face to face collaborate on-line to develop and test a new product, saving months or even years in the process.[4]

The revolutionary potential of computer networks such as the Internet easily justifies such enthusiasm. The ability to instantaneously communicate with enormous numbers of people without regard to distance will affect the business environment,[5] the political process,[6] and may even alter the way we communicate on a personal level.[7]

The changed *medium* of communication, however, is unlikely to change the *subject* of communication. "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[8] In addition, just as there are those with an absorbing interest in discussing sex, there are those with an equally absorbing interest in enforcing societal standards of sexual morality.[9] It comes as no surprise, therefore, that the

4. MARY J. CRONIN, DOING BUSINESS ON THE INTERNET: HOW THE ELECTRONIC HIGHWAY IS TRANSFORMING AMERICAN COMPANIES 1 (1994).

5. *See, e.g., id.* (book about the importance of network connectivity for business); Peter H. Lewis, *The Executive Computer: More Home Workers and More Machines in Their Offices*, N.Y. TIMES, May 24, 1992, at C10 (describing the significant growth in the number of people working from their homes).

6. For example, the President is connected to the Internet at "president@whitehouse.gov" and during the 1992 presidential campaign, the Clinton campaign's press releases were distributed over the Internet. *See* GILSTER, *supra* note 1, at 7. Also, Supreme Court opinions are accessible at "ftp.cwru.edu." *Id.* at 11. The increase in two-way communications in electronic media may revolutionize how political campaigns will be conducted. *See, e.g.*, Dane Smith, *Bouza's Gizmos: His High-Tech 'Hey Tony' Campaign Uses E-Mail, Faxes*, STAR TRIB., Feb. 8, 1994, at B1 (use of electronic communications in local political campaign).

7. *See, e.g.*, Tom Steinert-Threlkeld, *Cyberspouse: Online Romance Leads To—What Else?—Electronic Marriage*, CHI. TRIB., Feb. 20, 1994, at C10.

8. United States v. Roth, 354 U.S. 476, 487 (1957).

9. Governmental authority has probably been invoked to regulate or silence sexual speech in every existing form of communication. *See, e.g.*, Butler v. Michigan, 352 U.S. 380 (1957) (books); Miller v. California, 413 U.S. 15 (1973) (use of the mail); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (motion picture theaters); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (drive-in motion pictures); FCC v. Pacifica Found., 438 U.S. 726 (1978) (broadcasting); New York v. Ferber, 458 U.S. 747 (1982) (sale of films); Pope v. Illinois, 481 U.S. 497 (1987) (magazines); Sable Communications v. FCC, 492 U.S. 115 (1989) (sexually related telephone services); Osborne v. Ohio, 495 U.S. 103 (1990) (photographs); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing).

battle between freedom of expression and moral regulation has been waged on the fertile ground of the computer network.[10]

The First Amendment protects against most governmental attempts to control the content of one's speech.[11] Sexual expression, however, is not given the same protection provided for other topics of communication.[12] The Supreme Court has interpreted the First Amendment to allow extensive regulation of the circumstances under which "indecent" speech can be communicated.[13] In addition, "obscene" speech has been excepted from First Amendment protection entirely.[14] Once labelled "obscene," speech can be banned and criminalized.

Under the test currently used by the Supreme Court to determine whether sexual speech is "obscene," the sexual speech must be offensive in light of "community standards."[15] The "community" used to define such standards can be a state or a locality, or it can be left entirely to a jury to determine which community's standards are applicable.[16] In the context of national computer networks, it is impossible to determine what material in the vast amount of information passing across a network could be found offensive according to the standards of all of the vaguely defined communities from which one may connect to the network.[17] In its application to computer networks, the Court's obscenity test is so vague and unpredictable that it will force speakers on those networks to censor constitutionally protected speech out of fear that some authority somewhere may find the speech too offensive.[18]

10. The recent attempts in Congress to regulate sexually related materials on the Internet provide a clear example of the ongoing battle between freedom of expression and moral regulation. *See, e.g.*, Steve Lohr, *Senate Bill Escalates Computer-Smut Debate*, N.Y. TIMES, June 16, 1995, at D4; Mike Mills & Elizabeth Corcoran, *Senate Votes to Ban PC Network "Obscenity,"* WASH. POST, June 15, 1995, at A1; Daniel Pearl, *House Leaders Seek Other Ways to Fight Smut on the Internet*, WALL ST. J., June 21, 1995, at B2; *infra* note 261.

11. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. For the purposes of this Article, the term "speech" will be used to describe all forms of communication: written, auditory, visual, tactile, or olfactory.

12. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 50-54 (1995).

13. *See infra* notes 240-261 and accompanying text.

14. *See infra* notes 44-65 and accompanying text.

15. *See infra* notes 66-83 and accompanying text.

16. *See infra* notes 66-83 and accompanying text.

17. *See infra* notes 216-220 and accompanying text.

18. *See infra* notes 216-220 and accompanying text.

The Court's reliance on local community standards in determining whether sexual speech is sufficiently offensive makes the obscenity test wholly arbitrary in its application to national computer networks. In addition, it betrays the fallacy underlying the Court's obscenity jurisprudence. The "obscenity exception" to the First Amendment rests upon a view of the community as a discrete, homogenous, geographically defined locale.[19] This view of the community is questionable when applied to our modern, highly integrated, metropolitan society. When the increased communications capabilities of computer networks and their potential to revolutionize human interaction are taken into account, the Court's definition of "community" is inadequate.[20]

The Court's view of the community as a discrete, homogeneous "hamlet" also underlies its decision to define obscenity as a question of fact.[21] Because "obscenity" has been defined as a factual question, the determination of whether a work is offensive is largely left to a jury.[22] With the development of international computer networks, the increased diversity of opinion and experience that will follow from increased interaction between formerly isolated localities makes it impossible to continue to assume that there is a definable and predictable standard by which juries may prohibit "offensive" speech.[23] Instead, the impossibility of predicting the reactions of differing juries in differing locales, in combination with the impossibility of preventing those in any given geographic location from gaining access to sexual material, will force both speakers and network service providers to censor sexual speech according to arbitrary "safe" standards. Speech that is supposedly protected by the First Amendment will thereby be eliminated.[24]

Even in the diverse world of computer networks, however, potentially offensive sexually related speech need not be left entirely unregulated. While this Article recommends that the "obscenity exception" to the First Amendment be abandoned, speech can be appropriately regulated to protect unwilling listeners from offense and limit access to sexual material by children.[25] Such regulations, however, must still carefully balance the individuals' right to express themselves and to

19. *See infra* notes 204-210 and accompanying text.
20. *See infra* notes 212-220 and accompanying text.
21. *See infra* notes 223-229 and accompanying text.
22. *See infra* text accompanying notes 115-120.
23. *See infra* notes 223-229 and accompanying text.
24. *See infra* notes 216-220 and accompanying text.
25. *See infra* notes 231-239 and accompanying text.

receive information with the society's right to maintain moral standards.[26]

I. Communications on the Internet

The First Amendment's "obscenity exception" does not properly translate to the modern world of high-speed communication, regardless of the medium of transmission. Because of the Internet's expansive growth and pervasive use, however, this Article will focus on the communication tools available on the Internet to demonstrate how prohibition of "obscene" speech on computer networks will be both ineffective and arbitrary. Before discussing how the conceptual underpinnings of the obscenity exception fail to apply in the digital universe, it is necessary to examine the communication facilities available on modern computer networks.

While many commercial networks such as CompuServe or Prodigy may be operated by a single entity, the Internet is itself a collection of networks with only nominal central authority.[27] Beyond the maintenance of technical protocols, there is no centralized control over the types of communications that take place across the Internet, and no central organization has the authority to enforce a policy limiting the contents of communication traveling across the network.[28] In addition, users on the Internet have a wide variety of means of communication. Users can communicate over the Internet via electronic mail, electronic discussion lists, direct "real-time" conversations, public "news" groups, and file transfers.

A. Electronic Mail

Electronic mail is the most widely used single application on the Internet.[29] Simply put, "[e]lectronic mail provides the ability to send messages by computer."[30] Like ordinary, nonelectronic mail, electronic mail consists of nothing more than a message "mailed" from one user to another. Electronic mail is extremely fast, and can be sent with equal ease to a single addressee or a long list of addressees. In

26. *See infra* notes 240-261 and accompanying text.

27. *See* BRENDAN P. KEHOE, ZEN AND THE ART OF THE INTERNET 4-5 (1993) (describing the Internet, UUCP network, and BITNET, the three major communications networks in the United States). Each of these networks is interconnected so that enormous amounts of traffic flow among them. *Id.*

28. *See* GILSTER, *supra* note 1, at 33-42 (describing the organizations that coordinate Internet activities "to a greater or lesser extent").

29. *See* LAQUEY & RYER, *supra* note 2, at 42.

30. GILSTER, *supra* note 1, at 153.

addition to text, graphic images and other nontextual data may be transferred by electronic mail.[31] While a single electronic mail message may be widely distributed, electronic mail is essentially a private communication between individuals.

B. E-mail Discussion Lists

E-mail discussion lists (or "mailing lists") are essentially group conversations distributed via electronic mail.[32] Members of a mailing list "subscribe" by entering their names on a list. Each member who wishes to contribute to the discussion mails her contribution to a common address where the contributions are compiled into a single message and remailed to all subscribers of the mailing list.[33] While these discussions are limited to those on the mailing list and pass through the otherwise private medium of electronic mail, they are generally accessible to anyone who knows how to subscribe to them.[34]

C. E-mail Services

Other services can be obtained through electronic mail. For example, automated servers at several locations on the Internet provide database services through electronic mail. These services include "white pages" directories, requests for specific documents, and file transfers. One uses these services by mailing a request to the automated server, which then mails the requested information back.[35]

D. "News" and Public Discussion

The Internet "news" provides a seemingly infinite number of public discussion groups.[36] These groups are similar to electronic mailing lists in their operation. There are literally thousands of "newsgroups," each discussing a different topic. Individuals post submissions to these newsgroups, which are then propagated across the Internet to everyone else reading that group. Many of the news-

31. The technology for sending nontextual images via electronic mail is still in its infancy, however. *See* LAQUEY & RYER, *supra* note 2, at 43.

32. *See* KEHOE, *supra* note 27, at 11-13; GILSTER, *supra* note 1, at 151-94; LAQUEY & RYER, *supra* note 2, at 54-62.

33. *See* LAQUEY & RYER, *supra* note 2, at 54.

34. Lists of mailing lists are kept in commonly known locations on the Internet, so it is not difficult to determine how to subscribe to most of the mailing lists. *See* GILSTER, *supra* note 1, at 261.

35. *See* GILSTER, *supra* note 1, at 195-227.

36. Search of rss@dvirginia.edu (March 25, 1994) (author's computer account at the University of Virginia provided access to 2458 separate newsgroups over Usenet, the Internet news service).

groups contain discussion and material on sexual topics.[37] There is no central determination as to which newsgroups will be made available to the users of any individual computer system. Instead, the individual system owners decide how many of these groups to carry and how much storage space will be devoted to storing the enormous amount of material passing through as "news."[38]

E. Direct "Real-time" Conversation

Users may also use the Internet to engage in interactive discussions. For example, a program called "talk" allows two users to simultaneously type messages to each other. In addition, a feature called "Internet Relay Chat" enables multiple parties to engage in on-line conferences.[39]

F. File Transfer and Remote Log In

Finally, the Internet contains an enormous amount of archived information that is generally available to anyone who makes a request. One can access these archives via two different means. File transfer programs allow a user to either upload files to an archive or to download files from the archives to the user's computer. In addition, a remote log-in program allows an individual to log into an archive computer over the Internet.[40] Once logged in, the individual becomes a user of that remote computer and can access material stored there. The individual can often remotely log into yet another computer, making a connection from the user's original computer *through* the first remote computer to the second remote computer.[41]

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37. Search of alt.sex (March 20-25, 1994) (608 contributions covering a wide range of sexually related topics). This newsgroup is one of the most widely read groups in the Internet news system. *See* Pat Craig, *A Web of Seduction*, PITTSBURGH POST-GAZETTE, Mar. 12, 1996, at D1. Groups such as rec.arts.erotica carry erotic poetry or written stories. *See id.* Other groups, such as alt.sex.bondage (for those interested in bondage and dominance) or alt.sex.fetish.feet (for those with foot fetishes), cater to those with more unusual sexual tastes. *See* John P. Barlow, *Thinking Locally, Acting Globally*, TIME, Jan. 15, 1996, at 76. Some Internet newsgroups, such as alt.binaries.pictures.erotica, carry digitized erotic pictures, although in a form that requires decoding before such pictures can be viewed. *See* Richard Gehr et al., *Best of the Net*, VILLAGE VOICE, Apr. 2, 1996, at 21. Finally, some groups focus on an issue that is not intrinsically sexual, but carry a fair amount of sexually related material that some may consider abnormal, such as alt.homosexual. *See Gay Group Criticizes On-Line Censorship*, UPI, Dec. 29, 1995, *available in* NEXIS, News Library, Curnews File.

38. *See* KEHOE, *supra* note 27, at 28-29; LAQUEY & RYER, *supra* note 2, at 60-62; GILSTER, *supra* note 1, at 292-93.

39. *See* GILSTER, *supra* note 1, at 428-31.

40. *See id.* at 135-36.

41. For an easily comprehensible description of this process, see *id.* at 140-41.

The variety of services available over the Internet makes it possible for a single user to use any one of several means to gain access to particular information. Mailing lists, for example, often appear as newsgroups on the Internet news.[42] A file can be requested via electronic mail from an automated database server, or it can be transferred directly via a file transfer.[43] Because of the number of users on the Internet, enormous amount of publicly available information, lack of central authority, and wide spectrum of available tools, strict controls on any topic of discussion or type of information will be nearly, if not completely, impossible to enforce.

II. Obscenity and the First Amendment

A. The Evolution of the Obscenity Test

American obscenity regulation traditionally has rested upon a geographically oriented paradigm that is both inaccurate and oppressive when applied to a modern, integrated society. The development of obscenity law and the articulated justifications for its existence show that the problem goes beyond the obvious misapplication of "local" community standards to national high-speed communications media such as computer networks. Instead, the "obscenity exception" itself rests upon underlying geographically based justifications that simply cannot apply in any meaningful sense to modern computer networks and other international high-speed communications systems.

B. Early Constitutional Considerations and Pre-*Roth* "Obscenity" Tests

Prior to the passage of the Fourteenth Amendment, it was assumed that the states had authority to regulate expression to protect public morality.[44] No constitutional limitations were placed upon the states' power to regulate sexually related expression until the Supreme Court applied the First Amendment's protection of speech

42. *See id.* at 225-26.

43. *See id.* at 117.

44. Justice William Brennan has provided a brief history of state regulation of obscenity:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" . . . .

Roth v. United States, 354 U.S. 476, 482-83 (1957) (citations and footnotes omitted).

and press to the states by incorporating that protection into the Fourteenth Amendment.[45] Early state regulation of obscenity was primarily aimed at preventing "immoral" thoughts or the immoral tendencies that may follow from speech advocating an immoral position.[46]

Following the passage of the first federal obscenity statute in 1842,[47] early federal cases upheld the federal government's power to regulate sexual speech in specific fora. During this period, the Supreme Court upheld Congress's ability to prohibit the mailing of matter "deemed injurious to the public morals."[48] The congressional authority to regulate sexual material in the mail was based on the argument that use of the mail was a privilege upon which conditions could be imposed.[49] Although this doctrine was eventually abandoned,[50] the Supreme Court continued to assume that Congress had the power to prohibit obscenity.[51] Although no explicit "obscenity ex-

45. Gitlow v. New York, 268 U.S. 652, 666 (1925).

46. For example, the Indiana Supreme Court expounded, in extremely purple prose, upon the need to prevent the mailing of obscene or indecent material to directly protect the minds and chastity of young girls and to indirectly protect the family and community:

> The plain and manifest object of the legislature in the enactment of [the statute at issue] . . . was to guard and protect the public morals by erecting barriers which the evil-minded, lewd, and lascivious may not safely pass. The moral worth of every community rests with the family. It is the source from which comes the ever-flowing current that brings with it lessons of probity and chastity. With that fountain-head corrupted, decay and overthrow will surely follow. It is there that the youth are taught that honesty and virtue are above price. It is there that the girls, in the innocence and purity of their youth, are nurtured and guarded against the wiles and intrigues of the wicked and the seducer. If they may be approached and insulted upon the streets with impunity by the vile and depraved, or if the same class may, with impunity, override the barrier that protects the home, and reach the young girls sheltered there, through the public mails, by letters sent to them which teach, or attempt to teach, them that voluptuousness is more to be desired than true womanhood, and that virtue had better be exchanged for sexual dissipation, then, indeed, there is a crying necessity for further legislation.

Thomas v. State, 2 N.E. 808, 809-10 (Ind. 1885).

47. Act of Aug. 30, 1842, ch. 270, § 28, 5 Stat. 548, 566-67 (1842).

48. *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

49. *Id.* ("In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."); *see In re* Rapier, 143 U.S. 110 (1892).

50. *See* Roth v. United States, 354 U.S. 476, 505 n.5 (1957) (Harlan, J., concurring in part and dissenting in part).

51. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There 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 . . . ."); Winters v. New York, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. They are equally subject to control if they are lewd, indecent, obscene, or profane.") (citations omitted). Note that these

ception" to the First Amendment was adopted, the federal courts initially used an approach similar to that of the state courts: they focused primarily on the regulation of sexual morality as a justification for regulating speech.[52] For example, letters arranging assignations for the purpose of committing adultery were prohibited from the mails, even when no obscene words were used.[53]

Following the passage of the Comstock Act[54] in 1873, a wave of federal obscenity prosecutions forced the courts to formulate a definition of "obscenity."[55] *United States v. Bennett*[56] provided an early standard. In *Bennett*, a federal court of appeals adopted an obscenity test used in the English case of *Regina v. Hicklin*.[57] Under the *Hicklin* test, a work could be adjudged obscene based upon the effect that selected passages from the work would have upon the most susceptible members of the population.[58] This standard was followed by numerous federal courts.[59]

Other courts, however, rejected the *Hicklin* test. The Second Circuit, in particular, refused to apply the *Hicklin* test in a series of cases including *United States v. Dennett*,[60] *United States v. One Book Entitled Ulysses*,[61] and *United States v. Levine*.[62] Instead, the Second Cir-

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cases are actually Fourteenth Amendment cases, as they involve regulation of speech by states. In the area of speech regulation, the Court has given the First and Fourteenth Amendments equal force. *See infra* notes 223-229 and accompanying text.

52. *See, e.g.*, Swearingen v. United States, 161 U.S. 446, 451 (1896) ("The words 'obscene,' 'lewd' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel."); United States v. Males, 51 F. 41, 43 (D. Ind. 1892) (holding that federal statute intended to prohibit mailing of matter "calculated to excite the animal passions, and to corrupt and debauch the mind, and not such as are merely coarse, vulgar, or indecent"); United States v. Moore, 104 F. 78 (D. Ky. 1900) (holding federal statute was not passed to protect or obstruct religious thought, but to prevent the use of the mail for promoting immoral tendencies). The courts focused upon whether the material would tend to corrupt the morals of the reader. *See, e.g.*, Knowles v. United States, 170 F. 409 (8th Cir. 1909); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

The statute referred to in these cases is the predecessor to 18 U.S.C. § 1461 (1993), which forbids mailing an "obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance," or mailing solicitations for such material.

53. *See* United States v. Martin, 50 F. 918 (W.D. Va. 1892).

54. Ch. 258, 17 Stat. 598 (1873).

55. *See* Ronald D. Gray, Note, *Balancing Community Standards Against Constitutional Freedoms of Speech and Press*: Pope v. Illinois, 41 Sw. L.J. 1023, 1028 (1987).

56. 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571).

57. 3 L.R.-Q.B. 360 (1868).

58. *See Bennett*, 24 F. Cas. at 1104.

59. *See* Gray, *supra* note 55, at 1028 & n.45.

60. 39 F.2d 564 (2d Cir. 1930).

61. 72 F.2d 705 (2d Cir. 1934).

62. 83 F.2d 156 (2d Cir. 1936).

cuit adopted a test that required that obscenity be judged by the dominant effect the allegedly obscene work would have on the average person in the community.[63] As time progressed, many courts adopted the Second Circuit's standard,[64] although the *Hicklin* test was also frequently used.[65]

C. The *Roth-Memoirs* Obscenity Test

In *Roth v. United States*,[66] the Supreme Court directly confronted the permissible extent of obscenity regulation under both the First and Fourteenth Amendments for the first time.[67] A majority of the Court found "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[68] As a result, "obscenity is not within the area of constitutionally protected speech or press."[69] In reaching this conclusion, the Court adopted the logic of *Chaplinsky v. New Hampshire*, which held that some "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[70]

Although it placed obscene speech entirely outside the bounds of First Amendment protection, *Roth*'s definition of "obscenity" provided some procedural protection for sexual speech in general. The Court attempted to limit the reach of the obscenity exception to ensure that "the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[71] Before material could be labeled "obscene," it had to be shown that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[72]

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63. *Id.* at 158.

64. *See* Gray, *supra* note 55, at 1029 & n.51 (stating that "most courts accepted the dominant effect standard" and citing relevant cases).

65. *See id.* at 1029 & n.52.

66. 354 U.S. 476 (1957).

67. The Court applied the same standard for obscenity to the state governments under the Fourteenth Amendment's Due Process Clause and to the federal government under the First Amendment. *Roth*, 354 U.S. at 493 n.31. *But see infra* notes 147-165 and accompanying text (discussing Justice Harlan's disagreement with this approach).

68. *Roth*, 354 U.S. at 484.

69. *Id.*

70. 315 U.S. 568, 572 (1942).

71. *Roth*, 354 U.S. at 488.

72. *Id.* at 489 (citations omitted).

As interpreted by later cases, *Roth* provided a three-part test for judging whether a work is obscene, although *Roth* itself did not specifically divide its standard in this way. In *Memoirs v. Massachusetts*, a plurality of the Court characterized *Roth* "as elaborated in subsequent cases" as requiring three elements:

> It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[73]

Although the exact formulation used by the *Memoirs* plurality was never adopted by a majority of the Court, the requirements that an obscene work appeal to the prurient interest, be patently offensive, and lack social value were generally accepted.[74]

Roth's adoption of "community standards" as the benchmark for determining whether material appeals to prurient interest was one of the central aspects of the opinion. *Roth* rejected the *Hicklin* test, which allowed a work to be judged obscene by its effect upon particularly susceptible persons.[75] Instead, the Court approved a jury instruction stating:

> The test is not whether [the allegedly obscene work] would arouse sexual desires or sexual[ly] impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish[,] or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated[,] indifferent and unmoved . . . .
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . . . You may ask yourselves does it offend the common conscience of the community by present-day standards.[76]

In *Roth*, however, the Court provided no guidance as to how to define the "community" from which the tastes of the "average" person could be abstracted.

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73. 383 U.S. 413, 418 (1966) (plurality opinion).

74. *See, e.g.*, Manual Enters. v. Day, 370 U.S. 478, 486 (1962) (holding that "[o]bscenity . . . requires proof of two distinct elements: (1) patent offensiveness; and (2) 'prurient interest' appeal"); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) ("[A] work cannot be proscribed unless it is 'utterly' without social importance.").

75. *Roth*, 354 U.S. at 488-89.

76. *Id.* at 490.

In the years following *Roth*, the Court's attempts to determine when material was obscene "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."[77] During this period, the Court made several important refinements to its obscenity standard. The Court prohibited not only convictions for possession of obscene materials unless some degree of scienter is proven,[78] but also the banning of a film or book merely because immoral ideas were advocated.[79] The Court concluded that the circumstances of production, sale, and publicity of material are relevant in determining whether that material has social value.[80] The Court modified the prurient interest standard so that the "appeals to prurient interest" test is satisfied when material designed for a deviant sexual group appeals to the deviant group's prurient interest.[81] The Court also concluded that obscenity can be defined in relation to its appeal to minors when prohibiting the sale of sexual material to minors.[82] Throughout this period, however, the Justices

77. Interstate Circuit v. City of Dallas, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring in part and dissenting in part). For example:

> By 1967 the following views had emerged: Mr. Justice Black and Mr. Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. Mr. Justice Harlan . . . believed that the Federal Government . . . could control the distribution of "hard core" pornography, while the States were afforded more latitude to "[ban] any material which . . . has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." Mr. Justice Stewart regarded "hard core" pornography as the limit of both federal and state power.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 80-81 (Brennan, J., dissenting) (citations omitted). The remaining members of the Court had each adopted some variation of the *Roth* test. *Id.* at 81.

78. Smith v. California, 361 U.S. 147, 154-55 (1959) (holding some level of scienter is required to convict the bookseller for possession of obscene books because the owner of a bookstore need not know the contents of every book in the store).

79. Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 688-89 (1959) (holding a film may not be banned merely because it advocates the idea that adultery may be proper behavior).

80. Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966) (plurality opinion) ("[T]he circumstances of production, sale, and publicity are relevant in determining whether a book . . . [has] redeeming social importance."); Ginzburg v. United States, 383 U.S. 463, 470-74 (1966) (stating that, because representation of publications as erotically arousing heightens the offensiveness of the publications and is relevant to determining whether the work has social importance, "in close cases evidence of pandering may be probative" in determining obscenity).

81. Mishkin v. New York, 383 U.S. 502, 508 (1966).

82. Ginsberg v. New York, 390 U.S. 629, 638 (1968).

continued to disagree over the definition of "community" in the appraisal of "community standards."[83]

D. The *Stanley* Exception

In 1969, *Stanley v. Georgia* added a new factor to obscenity analysis by holding that states cannot outlaw mere private possession of obscene materials.[84] The Court viewed a law prohibiting possession of obscene materials as an attempt to "protect the individual's mind from the effects of obscenity."[85] In response to Georgia's argument that it had the *right* to protect an individual's mind from the effects of obscenity, the Court stated that "[w]e are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts."[86] The Court concluded:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[87]

Stanley represents a departure from previous obscenity analysis. For the first time in an obscenity case, the Court rested its decision, at least in part, on the individual's right to receive information.[88] In addition, the Court rejected the argument that obscenity could be prohibited because it would lead to impure thoughts,[89] even though earlier regulation of sexual speech was clearly designed to control the moral content of the hearer's thoughts.[90] Finally, the Court refused to accept Georgia's justification that exposure to obscene materials may lead to sexual deviance or crime.[91] The Court avoided *Roth*'s appar-

83. *Compare* Hoyt v. Minnesota, 399 U.S. 524, 524 (1970) (Blackmun, J., dissenting) (advocating local standard of decency) *and* Jacobellis v. Ohio, 378 U.S. 184, 200-01 (Warren, C.J., dissenting) (same) *with id.* at 193 (plurality opinion) (advocating national standard in all prosecutions) *and* Manual Enters. v. Day, 370 U.S. 478, 488 (1962) (plurality decision) (advocating national standard of decency in federal prosecution).

84. 394 U.S. 557, 565 (1969).

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 564, 568.

89. *Id.* at 565.

90. *See supra* notes 44-65 and accompanying text.

91. *Stanley*, 394 U.S. at 566-67. *But see* Roth v. United States, 354 U.S. 476, 486-87 (1957) (holding a state has no need to prove exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce recipients of that material to engage in such conduct).

ently contrary language by hinting that *Roth* would apply only to public distribution of obscene materials.[92]

Stanley's potential to expand First Amendment protection was soon limited by *United States v. Reidel*.[93] In *Reidel*, the Court upheld a conviction under federal obscenity laws even though the material involved was distributed only to consenting adults.[94] In reaffirming *Roth*, the Court noted that *Stanley* "does not require that we fashion or recognize a constitutional right . . . to distribute or sell obscene materials."[95] As characterized by *Reidel*, *Stanley* focused simply on "freedom of mind and thought and on the privacy of one's home," and that the right to receive material does not imply a right to transmit such material.[96]

In 1973, *Stanley* was construed even more narrowly. In *United States v. Orito*, the defendant was convicted of transporting obscene materials via private carrier.[97] In rejecting Orito's contention that transportation of the material via private carrier was protected under *Stanley* if it was only meant for consenting adults, the Court held that no "zone of constitutionally protected privacy follows such material when it is moved outside the home area protected by *Stanley*."[98] As recharacterized, *Stanley*'s holding rests more upon privacy in the home than upon the right to receive information.[99] Thus, despite *Stanley*'s broad promise to protect citizens from government attempts

92. *Stanley*, 394 U.S. at 567. The Court justified the *Roth* obscenity standard because "there is always the danger that obscene material might fall into the hands of children . . . or that it might intrude upon the sensibilities or privacy of the general public." *Id.* The first justification for *Roth* does not support the holding in *Stanley*, because privately possessed obscene material could still fall into the hands of children. If the logic behind the second justification was extended, it would foreclose prohibiting any speech where only consenting adults might hear it, regardless of the location where the communication took place.

93. 402 U.S. 351 (1971).

94. *Id.* at 356-57.

95. *Id.* at 356. The Court drew a distinction between private possession in the home and regulation of external speech:

> The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

Id.

96. *Id.*

97. 413 U.S. 139, 140 (1973).

98. *Id.* at 141-42.

99. *See id.* at 142-43 (cataloging "special safeguards to the privacy of the home" provided by the Constitution); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 126-27 (1973) (characterizing *Stanley* as resting upon an "explicitly narrow and precisely deline-

to regulate "moral" thoughts, subsequent cases effectively limit *Stanley* to its facts.[100]

E. The *Miller* Test

In *Miller v. California*,[101] the Court established the definition of "obscenity" that is still used today. While the *Miller* Court maintained the basic elements of the *Roth-Memoirs* test, some elements were changed, with the result that materials could be more readily found obscene:

> A state [obscenity] offense must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[102]

First, the Court made it more difficult for a sexual work to demonstrate sufficient "value" to merit First Amendment protection. "Social value" is no longer sufficient; a work must instead fall within the categories of "literary, artistic, political, or scientific" before it can be considered valuable under the *Miller* obscenity test.[103] In addition, under the *Memoirs* standard, an allegedly obscene work receives First Amendment protection unless it is "utterly" without social value.[104] After *Miller*, otherwise obscene material is protected under the First Amendment only if it has "serious" value.[105] The Court made no attempt to define the level of value required to be considered "serious."

Second, the Court mandated that in applying "community standards" to determine whether a work appealed to the prurient interest or was patently offensive, local rather than national community standards could be used.[106] Finding that national community standards

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ated privacy right" and depending "not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home").

100. *See, e.g.*, *Reidel*, 402 U.S. at 356 (holding the government can prohibit sale of obscene material to consenting adults); *12 200-Ft. Reels of Film*, 413 U.S. at 128-30 (holding state government can prohibit importation of obscene material even though it is only for personal, private use); *Orito*, 413 U.S. at 143-45 (holding interstate transportation of obscene material for private use of transporter or by private carriage can be prohibited); Osborne v. Ohio, 495 U.S. 103 (1990) (holding that even private possession of child pornography in the home can be prohibited).

101. 413 U.S. 15 (1973).

102. *Id.* at 24.

103. *Id.*

104. Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (plurality opinion).

105. *Miller*, 413 U.S. at 24-25.

106. *Id.* at 31-32.

are "unascertainable,"[107] and that it 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,"[108] the Court opined that "in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes."[109] In accordance with its endorsement of local standards, the Court upheld a jury instruction which referred to "'contemporary community standards of the State of California.'"[110]

In subsequent cases, the Supreme Court affirmed and extended its approval of local community standards for evaluating whether a work is obscene. In *Hamling v. United States*,[111] the Court held that a statewide standard is not constitutionally required:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.[112]

Thus, although a statewide community standard is constitutionally permissible, a smaller geographic area also could be used to define the relevant "community."[113] It is not necessary, however, to define *any* specific geographic community from which the jury must abstract a community standard.[114]

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107. *Id.* at 31.

108. *Id.* at 32.

109. *Id.* at 32 n.13.

110. *Id.* at 31. Perhaps in an attempt to compensate for the indeterminacy of "local" standards and the subjectivity involved in determining whether a work contains "serious" value, the *Miller* Court also announced that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law." *Id.* at 27. The Court, however, has not actually required that obscenity statutes contain such specificity. *See* Ward v. Illinois, 431 U.S. 767, 776 (1977) (finding an Illinois obscenity statute was not overbroad when it failed to comply with *Miller*'s requirement that it state specifically the kinds of sexual conduct that could be declared obscene).

111. 418 U.S. 87 (1974).

112. *Id.* at 104-05.

113. In *Hamling*, the Court hypothesized that the "community standard" most likely to be used by the jury was the district from which the jurors were drawn. *Id.* at 105-06.

114. Jenkins v. Georgia, 418 U.S. 153, 157 (1974) ("We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'").

Although the extent of protection given to a work by the First Amendment is indisputably a legal question,[115] the Court has allowed juries to determine what appeals to prurient interest and what is patently offensive on the grounds that these are "essentially questions of fact."[116] The Court has used the factual nature of this determination to limit the types of evidence that defendants may use to demonstrate that their material is *not* obscene according to local standards. For example, in *Hamling* the Supreme Court found that the trial judge could exclude from evidence materials similar to those accused of being obscene: "[T]he availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating."[117] The Court similarly has held that materials, previously adjudicated as nonobscene, are not necessarily relevant evidence as to the obscenity of the material before the jury.[118] In addition, the fact that there is no crime of obscenity under the laws of the community in which a federal prosecution has been brought may be relevant evidence of community standards, but the lack of a state obscenity law does not mean that all material is not obscene under that state's community standards.[119] Finally, by making these issues questions of fact, a finding of obscenity is largely insulated from appellate review.[120]

115. *See* Roth v. United States, 354 U.S. 476, 497 (1957) (Harlan, J., concurring in part and dissenting in part) ("[I]f obscenity is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.").

116. Miller v. California, 413 U.S. 15, 30 (1973); *Jenkins*, 418 U.S. at 159.

117. Hamling v. United States, 418 U.S. 87, 125 (1974). One might think that material similar to that before the jury, for sale in the local community, and purchased by members of that local community would always be relevant to determining the community's tolerance for sexual material. The Court held that "'[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.'" *Id.* at 126 (quoting United States v. Manarite, 448 F.2d 583, 593 (2d Cir. 1971)). The fundamental flaw in this reasoning is that evidence of the activities in which other persons in the community are engaged is exactly the sort of evidence needed to determine the community's tolerance for sexually oriented publications. The Court has not gone so far as to hold that such evidence is *never* relevant. *See* Smith v. United States, 431 U.S. 291, 297 (1977) (noting, without comment, that defendant introduced into evidence "numerous sexually explicit materials that were available for purchase at 'adult' bookstores" in the area).

118. *Hamling*, 418 U.S. at 126-27.

119. *Smith*, 431 U.S. at 303-04.

120. *Hamling*, 418 U.S. at 124. The Court had to draw back from its hands-off position somewhat in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In that case, the Court's grant of power to juries to determine what works of art are socially permissible led to the foreseeable result that a nationally distributed, critically acclaimed film, *Carnal Knowledge*, was

In 1989, the Supreme Court reaffirmed its use of local community standards even for an inherently national or international medium of communication. In *Sable Communications v. FCC*,[121] the Court refused to redefine the test for community standards to create a national standard for dial-a-porn services. In the Court's view:

> Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.[122]

The Court simply refused to consider the "costs" imposed upon nonobscene speech, i.e., the costs imposed upon sexual telephone communications in areas where such communication would not contravene community standards.[123] The difficulty in determining local standards across a large number of localities and the resulting increased cost of communicating were simply irrelevant to the Court's calculus in allowing localities to brand speech obscene.

F. Justifying the Obscenity Exception

When the Court adopted the current obscenity test in *Miller*, the justification asserted by the Court for allowing governmental regulation of obscenity changed from a focus on preventing immoral acts to the regulation of commerce. This change resulted, at least in part, from *Stanley*'s protection of individual private consumption of pornography and its rejection of government "mind control." In resting the obscenity exception on a governmental interest in regulating commerce, however, the Court demonstrated the erroneous assumptions underlying its obscenity jurisprudence.

In *Roth*, the Supreme Court found for the first time that obscene speech is simply not protected by the First Amendment because obscene speech contained no social value.[124] This lack of value, along with a dubious historical argument, are the only grounds upon which the obscenity exception is justified.[125] Prior to *Roth*, obscenity laws

found obscene under Georgia law. The Court then had to rely on its own viewing of the film to hold the film not patently offensive. *Id.* at 161.

121. 492 U.S. 115 (1989).

122. *Id.* at 125.

123. *See id.*

124. Roth v. United States, 354 U.S. 476, 485-86 (1957).

125. *See infra* notes 147-165 and accompanying text (discussing the failings of *Roth*'s historical argument).

had been used to prevent the spread of immoral thoughts and resulting immoral conduct.[126] Under the logic of *Roth* and the Court's assumption that the First Amendment protected only "valuable" speech, it was simply irrelevant whether obscenity regulation was an attempt to regulate the "morality" of a citizen's thoughts.[127]

The Court's protection of private possession of pornography in *Stanley* undermined the traditional argument that obscenity regulation is justified as moral thought control.[128] In *Stanley*, the Court's statement that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds"[129] rejected the argument that the government could regulate a citizen's thoughts. Although *Stanley*'s reach was severely limited by the 1973 Term's decisions, the Court has avoided justifying the obscenity exception on a state's right to control the thoughts of its citizenry.[130]

In its reaffirmation of obscenity regulation in *Miller*, the Supreme Court articulated a new justification for the obscenity exception, without explicitly acknowledging it had changed the obscenity exception's justifications. *Miller*'s expansion of obscene speech to that which does not contain "serious" artistic, literary, scientific, or political value made it possible to ban material containing social value.[131] As a result, the Court could not rely on the justification that obscene speech was regulable because it was utterly devoid of such value.[132] In addition, *Stanley*'s broad pronouncements regarding freedom of thought made it necessary for the Court to distinguish between protecting individuals from the harmful effects of pornography and the "mind control" prohibited in *Stanley*.[133]

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126. *See supra* notes 44-65 and accompanying text.

127. For nonobscene speech, however, the Court found that even sexually related speech could not be prohibited simply because of the ideas advocated by that speech. *See* Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 689 (1959) ("[The First Amendment's] guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.").

128. *See* Stanley v. Georgia, 394 U.S. 557, 565-66 & n.8 (1960).

129. *Id.* at 565.

130. *See infra* notes 134-144 and accompanying text. The promotion of immoral thoughts has not been sufficient to deny First Amendment protection to nonsexual speech. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also* STROSSEN, *supra* note 12, at 40-48.

131. *See supra* text accompanying notes 103-105.

132. This conundrum was what the *Memoirs* plurality sought to avoid when it adopted the "utterly without redeeming social value" test. *See* Memoirs v. Massachusetts, 383 U.S. 413, 419-20 (1966) (plurality opinion).

133. *See infra* note 144.

In *Miller*, the Court repeatedly referred to the commercial exploitation of sex.[134] Although the Court first referred to protecting unwilling recipients or juveniles from offensive sexual material,[135] its holding is not limited to protecting these categories of persons. Instead, the Court focused on the commercial use of sexual material, noting that "[s]ex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."[136] The Court implied that, since only "commercial" speech was at issue, obscenity regulation is constitutional: "We do not see the harsh hand of censorship of ideas . . . and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex."[137] As a result of this lessened protection, the Court concluded that "[o]bscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population."[138]

On the same day as its decision in *Miller*, the Court also decided *Paris Adult Theatre I v. Slaton*.[139] In that case, the Court rested its decision even more explicitly on the commercial nature of pornography,[140] justifying the regulation of commercialized obscenity by "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, pos-

134. *See* Miller v. California, 413 U.S. 15, 25-26 (referring to "exhibition" and "sale" of obscene materials), 35 (referring to "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain"), 35-36 (discussing "state regulation of commercial exploitation of human interest in sex"), 36 (referring to "commercial exploitation of obscene material") (1973).

135. *Id.* at 18-19 ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.") (footnote omitted).

136. *See id.* at 25-26 (citations omitted).

137. *Id.* at 35-36.

138. *Id.* at 32-33 n.13.

139. 413 U.S. 49 (1973).

140. *See id.* at 57 (referring to "regulating the use of obscene material in local commerce"), 57-58 (finding legitimate state interests in "stemming the tide of commercialized obscenity" and in preserving "the tone of commerce in the great city centers"), 61 (comparing the criminalization of obscenity to "much lawful state regulation of commercial and business affairs"), 64 (comparing the criminalization of obscenity to state "blue sky" laws, which "regulate what sellers of securities may write or publish about their wares"), 68 (referring to "[c]ommercial exploitation of depictions . . . of obscene conduct on commercial premises"), 69 (referring to the states' "power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole").

sibly, the public safety itself."[141] Thus, "there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby."[142] This reasoning is in line with decisions that allow the commercial exploitation of pornography to be considered as one factor in finding material obscene.[143] *Miller* and *Paris Adult Theatre I* justify regulation of obscene speech in its public and commercial manifestations even though the obscenity exception formulated in those cases applies equally to noncommercial and private speech.[144]

As with its use of "local" community standards to determine whether material is patently offensive or appeals to prurient interest, the justifications asserted by the Court for excepting the "commercial exploitation of sex" from First Amendment protection rest upon a specific view of the nature of the "community" that must be protected from sexual speech. The Court's emphasis on "the quality of life and

141. *Id.* at 58. The Court continued by citing the minority report from the 1970 pornography commission, finding an "arguable correlation between obscene material and crime." *Id.* at 58 & n.8 (citation omitted). As a final justification, the Court pointed to the "'right of the Nation and of the States to maintain a decent society.'" *Id.* at 59-60 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

142. *Id.* at 57-58.

143. *See* Ginzburg v. United States, 383 U.S. 463, 474 (1966) (holding that where the purveyor's sole emphasis is on the sexually provocative aspects of the publications, pandering is relevant to determining obscenity); Hamling v. United States, 418 U.S. 87, 130-31 (1974). The Court has never held that noncommercial material cannot be obscene. Indeed, such a holding would conflict with some of the cases which limited *Stanley*. *See supra* note 36. The commercial nature of such material, however, is an important factor in the Court's analysis. *See, e.g.*, Splawn v. California, 431 U.S. 595, 598 (1977) (noting that, when determining if material has social importance, circumstances which indicate whether the matter is being commercially exploited for its prurient appeal may be considered); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part) (arguing that even if each book or film sold by a business might not be considered obscene if viewed in isolation, cities could constitutionally prohibit businesses which specialize in selling sexually oriented works).

144. The Court distinguished its justifications for prohibiting obscene films in a theater from the holding in *Stanley*:

> [W]e reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theaters. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication is distinct from a control of reason and the intellect . . . . Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. . . . The States have the power to make a morally neutral judgment that public exhibition of obscene material . . . has a tendency to injure the community as a whole.

Paris Adult Theatre I, 413 U.S. at 67-69 (citation omitted).

the total community environment"[145] and "the tone of commerce in the great city centers"[146] rests upon its view of the community as a physically defined locality where "pornography" has a tangible, forbidden presence. The Court's paradigm of the "community" as a discrete geographical area, however, underlies its use of "local" community standards and fails when applied to computer networks.

III. The Scope of "Community" and Local Control

A. Justice Harlan's Incorporation Argument

Many of the reasons asserted to justify the use of local community standards in obscenity prosecutions were articulated by Justice John Marshall Harlan in the context of a debate over the extent to which the First Amendment should be incorporated into the Fourteenth Amendment. Justice Harlan argued that the First Amendment should not be fully applied to the states, which should be given greater latitude to regulate obscenity than the federal government.[147] Justice Harlan explicitly based his argument on a balance between the state's interest in regulating morality and the individual's freedom of speech.[148]

In *Roth*, the Supreme Court excluded "obscene" speech from First Amendment protection on the grounds that "obscenity" had always been regulated by the states, and obscene speech had too little "value" to merit First Amendment protection.[149] *Roth*'s historical argument, however, ignores the fact that until the passage of the Fourteenth Amendment, the First Amendment restrained only *federal* power.[150] Thus, a history of *state* regulation of obscenity is simply irrelevant to the question of the First Amendment's scope.[151] In addition, the holding that obscenity is "valueless" involves the Court in

145. *Id.* at 58.

146. *Id.*

147. The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws . . . and protection of genuine rights of free expression.

Jacobellis v. Ohio, 378 U.S. 184, 203-04 (1964) (Harlan, J., dissenting).

148. *Id.*; *see* Roth v. United States, 354 U.S. 476, 504-05 (1957) (Harlan, J., concurring in part and dissenting in part).

149. *See Roth*, 354 U.S. at 481-86.

150. *See* Gitlow v. New York, 268 U.S. 652, 664-66 (1925).

151. It is true . . . that obscenity laws appeared on the books of a handful of States at the time the First Amendment was adopted. But the First Amendment was, until the adoption of the Fourteenth, a restraint only upon federal power. Moreover, there is an absence of any federal cases or laws relative to obscenity in the

judgments that the First Amendment seeks to prevent: "Neither reason nor history warrants exclusion of any particular class of expression from the protection of the First Amendment on nothing more than a judgment that it is utterly without merit."[152] On these grounds, Justices William O. Douglas and Hugo Black disagreed with the majority in *Roth*, and argued that neither the states nor the federal government have the power to prohibit obscene speech.[153] This argument rests on the belief that the First Amendment applies fully to the states via the Fourteenth Amendment.[154]

Like Justices Douglas and Black, Justice Harlan drew a distinction between the roles of the states and federal government at the time of the Constitution's passage. Justice Harlan noted that "the interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality."[155] Yet unlike Justices Douglas and Black, Justice Harlan argued that the Fourteenth Amendment should not impose the same restrictions upon the state governments that the First Amendment imposes on the federal government.[156] In large part, Justice Harlan's argument is based upon his view of the differing consequences of state and federal regulation of speech.

Justice Harlan argued that the federal government should be greatly restricted in any attempts to regulate obscene speech on the grounds that "the dangers of federal censorship in this field are far greater than anything the States may do."[157] He based his argument on the effects that would follow from government suppression of sexual speech:

> [T]he dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on . . . a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to exper-

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period immediately after the adoption of the First Amendment. Congress passed no legislation relating to obscenity until the middle of the nineteenth century.

Memoirs v. Massachusets, 383 U.S. 413, 430 (1966) (Douglas, J., concurring).

152. *Id.*

153. *Roth*, 354 U.S. at 508 (Douglas, J., dissenting).

154. *See id.*; *Memoirs*, 383 U.S. at 430-31 (Douglas, J., concurring).

155. *Roth*, 354 U.S. at 504 (Harlan. J., concurring in part and dissenting in part).

156. *Id.* at 504-05.

157. *Id.* at 505. Although Justice Harlan's arguments support the conclusion that the federal government should have *no* power to regulate obscenity, he argued that the government should be allowed to suppress "'hard-core pornography.'" *Memoirs*, 383 U.S. at 457 (Harlan, J., dissenting). Justice Harlan, however, gave no justification for granting the federal government the power to suppress such speech.

> iment will be stunted. The fact that the people of one State cannot read some of the works of D.H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and spirit of the First Amendment.[158]

In Justice Harlan's view, the federal government's ability to regulate sexual speech must be tightly restricted because a federal prohibition would have much greater scope than a prohibition in an individual state.

On the same grounds, Justice Harlan would have left the states free, within bounds, to "experiment" with restrictions on sexually related expression:

> It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. . . . And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.[159]

Thus, Justice Harlan relied heavily on the assumption that the consequences of one state's suppression of sexual speech would be small enough that no great harm to freedom of speech in general could result from balancing the state's interest in the moral welfare of its citizens against the right of individual citizens to engage in sexually oriented speech.[160]

As a result of his lessened concern with state regulation of sexual speech, Justice Harlan's focus in reviewing a state obscenity prosecution was "whether the defendant was deprived of liberty without due process of law."[161] His sole inquiry was

> whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as

158. *Roth*, 354 U.S. at 506 (Harlan, J., concurring in part and dissenting in part).

159. *Id.* at 505-06; *see also Memoirs*, 383 U.S. at 460 (Harlan, J., dissenting) ("Others will consider that the Court's present course unduly restricts state experimentation with the still elusive problem of obscenity" and that "it is the part of wisdom . . . to leave room for such experimentation, which indeed is the underlying genius of our federal system.").

160. "State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States." *Memoirs*, 383 U.S. at 458 (Harlan, J., dissenting).

161. *Roth*, 354 U.S. at 500 (Harlan, J., concurring in part and dissenting in part).

> a rational exercise of power. . . . The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty."[162]

As a result, "the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards."[163]

Because of the lessened impact that he felt state regulation would have on sexual speech in general, Justice Harlan required little in the way of justification to regulate such speech. For example, he would have allowed sexual speech to be prohibited on the grounds that it might cause the hearer to engage in undesirable conduct.[164] In addition,

> [o]ther interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.[165]

Thus, under Justice Harlan's approach, the states would have been given great latitude in regulating sexual speech.

B. Justifying "Local" Community Standards

The rationales asserted by the Court for allowing both state and federal governments to prosecute obscenity cases under local community standards follow Justice Harlan's arguments for giving the states

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162. *Id.* at 501 (quoting Palko v. Connecticut, 302 U.S. 319, 324-25 (1947)).

163. *Memoirs*, 383 U.S. at 458 (Harlan, J., dissenting). In accordance with this view, Justice Harlan dissented in several decisions providing evidentiary or procedural protections to those accused of an obscenity offense. *See* Smith v. California, 361 U.S. 147, 169-72 (1959) (Harlan, J., concurring in part and dissenting in part) (giving states great latitude in defining obscenity offense and arguing that there is no requirement that expert testimony regarding community standards must be admitted); Bantam Books v. Sullivan, 372 U.S. 58, 76 (1962) (Harlan, J., dissenting) (dissenting from a decision imposing procedural requirements on a commission investigating the distribution of obscene material to minors).

164. *Roth*, 354 U.S. at 501-02 (Harlan, J., concurring in part and dissenting in part) ("[I]t is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.").

165. *Id.* at 502.

greater latitude under the Fourteenth Amendment.[166] The local community standards rule has been justified on three grounds. First, the Court has argued that "national" standards are too vague to ascertain.[167] Second, the Court has asserted that the use of local standards is necessary to balance the state's interest in prohibiting obscenity against the individual's right to speak.[168] Third, the use of local standards allegedly prevents the harm that may result from imposing a uniform national standard on all localities.[169]

By using its definition of obscenity as a factual inquiry, the Court argues the impossibility of ascertaining national community standards. For example, in *Miller*, the Court opined that "[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."[170] The supporters of "local" standards assert that it would be impossible to prove the existence of a national standard,[171] claiming that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming that the prerequisite consensus exists."[172] This argument heavily relies upon the Court's decision that "community standards" are a matter of fact rather than of constitutional law:

> When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to

166. The similarities between Justice Harlan's position and the community standards position adopted in Chief Justice Burger's opinion in *Miller* adopting local community standards have been noted. *See* Hoyt v. Minnesota, 399 U.S. 524, 524 (1970) (Blackmun, J., dissenting, joined by Burger, C.J., and Harlan, J.) ("I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders."); Cain v. Kentucky, 397 U.S. 319, 319 (1970) (Burger, C.J., dissenting) ("In my view we should not inflexibly deny to each of the States the power to adopt and enforce its own standards as to obscenity and pornographic materials; States ought to be free to deal with varying conditions and problems in this area."); *see also* Walker v. Ohio, 398 U.S. 434, 434-35 (1970) (Burger, C.J., dissenting) (same grounds).

167. *See infra* text accompanying notes 170-174.

168. *See infra* text accompanying notes 175-178.

169. *See infra* text accompanying notes 179-180.

170. Miller v. California, 413 U.S. 15, 31-32 (1973).

171. *See* Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Burger, C.J., dissenting) ("I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one.").

172. *Miller*, 413 U.S. at 30.

> require that the answer be based on some abstract formulation. . . . To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility.[173]

Thus, the Court's definition of obscenity allows it to avoid determining the national scope of the First Amendment. As a result, although "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, . . . this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'"[174]

The Court's second justification for applying local community standards rests upon its goal of seeking a balance between the community's interests in enforcing morality and an individual's right to receive pornography. This assertion is closely related to Justice Harlan's argument that states should be free to experiment with restrictions upon speech. In *Jacobellis*, Chief Justice Warren Burger stated the issue as follows: "[W]e are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guaranties of the First and Fourteenth Amendments."[175]

To combat the individual right to "speak" or "hear" granted by the First Amendment, the Court has relied upon a collective "right" to maintain a "decent" society.[176] The Court, therefore, has justified local community standards in terms of the types of public speech people

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173. *Id.* Indeed, the Court's willingness to accept widely divergent results in cases supposedly determining the constitutional protection afforded speech under the First Amendment comes, at least in part, from its definition of obscenity as a factual question rather than a legal one: "The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Id.*

174. *Id.*

175. *Jacobellis*, 378 U.S. at 199 (Burger, C.J., dissenting). Chief Justice Burger eventually won the day and authored *Miller*, where the Supreme Court definitively adopted his "local" standards rule. See *supra* text accompanying notes 172-174.

176. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Jacobellis, 378 U.S. at 200-01 (Burger, C.J., dissenting).

in a locality must "accept."[177] As a result of this localized right to maintain a decent society, the First Amendment may protect material in one community, but deny protection to that same material in another.[178]

The Court borrowed its third justification for using local community standards from Justice Harlan's argument that the First Amendment should impose severe restrictions upon the federal government. In an attempt to balance the obvious chilling effect that results from censoring material according to varying standards by community, supporters of local community standards argue that use of such standards actually provides *greater* protection for free speech:

> The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized.[179]

Under this view, local standards protect permissive communities from the specter of "the absolutism of imposed uniformity."[180]

C. Local Standards and the Discrete Geographical Hamlet Fallacy

Each of these "justifications" for allowing jurors to rely on their perception of "local community standards" is highly suspect, and each rests upon a view of a "community" as a definable territory containing a collection of relatively homogenous individuals with common interests in policing the sexual morality of the neighborhood.[181] This view of the community is neither in accord with modern American life nor the development of communications technology, and the resulting local community standards rule rests upon two main fallacies. First, the Court's assumption that communities are relatively homogenous results in the erroneous conclusion that "local" community standards

177. *See Miller*, 413 U.S. at 32 ("It 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.").

178. *Jacobellis*, 378 U.S. at 200-01 (Burger, C.J., dissenting) ("It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse . . . ."); *see Miller*, 413 U.S. at 30.

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

180. *Id.* at 33.

181. This fictitious locale could be referred to as a "hamlet." *See* Hamling v. United States, 418 U.S. 87, 143-45 (1974) (Brennan, J., dissenting).

are more easily definable than "national" ones. Second, by viewing communities as discrete geographical areas, the Court ignores the effect obscenity regulation in one community has upon sexual speech across a broad range of geographic regions. In the context of national computer networks such as the Internet, the Court's model of the community as a discrete, geographically defined locality will require all of those communicating on such networks to gear their speech to the most sensitive or puritanical locality.

D. The Homogenous Locality Assumption

The Court's argument that local standards should be used instead of national standards presupposes that there is some definable "local standard" of decency. This presupposition rests upon the assumption that some geographical area exists within which the residents not only share a common view of morality, but will also be aware of the moral viewpoints held by their neighbors. As noted by Justice John Paul Stevens, this "assumption can only relate to isolated communities where jurors are well enough acquainted with members of their community to know their private tastes and values. The assumption does not apply to most segments of our diverse, mobile, metropolitan society."[182]

The revolution in communications technology makes the Court's assumption untenable. The vastly increased amount of national and international communication enables people across a wide range of physical communities to develop and foster common interests. In the absence of computers, telephones, fax machines, and high speed transportation, it may be reasonable to assume that members of a local community are subject to similar influences and viewpoints. With rapid national communications, however, local communities can now demonstrate the same diversity exhibited on a national scale.

In his dissenting opinion in *Smith v. United States*, Justice Stevens noted the impossibility of defining a *statewide* community standard, which would be permitted under *Miller*:

> The most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards. . . . The diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prosecuted. Indeed, in *Miller* itself, the jury was asked to apply the contemporary community standard

182. Smith v. United States, 431 U.S. 291, 314 n.10 (1977) (Stevens, J., dissenting).

> of California. A more culturally diverse State of the Union hardly can exist, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard.[183]

As the variety of opinions and viewpoints within each locality increases and importance of geography in defining one's interests decreases, a juror will be no more able to determine the "average" local standard of decency than she would be able to determine a national standard.[184]

It is questionable whether the use of local community standards was ever intended to accurately determine the average member of the community's tolerance for explicit sexual expression. Public opprobrium surely prevents some of those who enjoy "pornographic" sexual material from publicly expressing their enjoyment of such material. Instead of ascertaining the average tastes of the community, jurors are most likely to ascertain a sanitized public image of the community as they believe it to exist,[185] or would like it to become.[186] In addition, the Court has ignored differences in community tolerance of obscenity when doing so has *enhanced* a government's ability to bring obscenity prosecutions. For example, when upholding the federal government's right to bring obscenity prosecutions for *intra*state distribution of obscene material in a state where such activity was not illegal, the Court held that "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive state."[187]

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183. *Id.* at 313-14.

184. Even if some geographic localities are sufficiently homogeneous to develop a provable, nonarbitrary "community standard," the fact that some communities are more easily offended than others does not justify a varying standard of First Amendment protection. "Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution." Jacobellis v. Ohio, 378 U.S. 184, 194 (1964).

185. This result follows from the jury's inability to assess the "private tastes and values" of everyone in the community. *See Smith*, 431 U.S. at 314 n.10 (Stevens, J., dissenting).

186. *See infra* note 228 and accompanying text.

187. *Smith*, 431 U.S. at 307. Of course, since no materials were sent across state lines in *Smith*, there was no issue of sending material "into" the state. The issue was the state's tolerance of *intra*state obscenity. *Id.* at 293-96. While the Court has cited Justice Harlan's concern for diversity when allowing local communities to restrict obscenity, the Court obviously has not shared Justice Harlan's concern that allowing expansive *federal* prosecution would stifle that diversity. *See* United States v. Miller, 413 U.S. 15, 32 n.13 (1973). In *Smith*, the Court noted that

If the assumption that one's geographic locale determines one's taste for erotic material is abandoned, "local" community standards are no more ascertainable than "national" standards. In such an environment, it is unlikely that juries would know the moral standards of the "average" member of their community any better than they would know the moral standards of the "average" citizen of the United States. As geography plays a decreasing role in the formation of sexual mores, there is little justification for assuming that citizens residing within a geographically defined area will share identical views on sexual morality. Therefore, the local community standards rule cannot be supported on the grounds that local standards are more easily or accurately ascertained than the standards of other forms of "community."

E. The Discrete and Insular Community Assumption

The Court's local community standards rule further assumes that these individual, discrete, geographically defined communities can regulate offensive speech without serious repercussions for the constitutionally protected sexual speech available within other communities. Similar to the assumption that geographically defined communities are homogeneous, the assumption ignores modern transportation and communication. If the effects of the Court's "local standards" rule were truly limited to the local community, obscenity regulation would be little more than a zoning ordinance. After all, the members of one geographically discrete community could obtain "obscene" material simply by travelling to nearby geographical communities with less restrictive standards.[188] The use of local community standards to criminalize speech in one community, however, also limits one's ability to speak outside of that local community.

Prohibition of "obscene" material according to indeterminate locality-based standards chills constitutionally protected speech in two ways. First, the effect of declaring a work "obscene" in one locality deters the speaker from exercising speech rights in other localities

> [a]n even stronger reason for holding that a state law regulating distribution of obscene material cannot define contemporary community standards in the case before us is the simple fact that this is a federal prosecution. . . . The community standards aspects of § 1461 . . . present issues of federal law, upon which a state statute such as Iowa's cannot have conclusive effect.

431 U.S. at 303-04.

188. *See* Jacobellis v. Ohio, 378 U.S. 184, 193-94 (1964) ("It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the smallest local 'community' that can be drawn around that establishment.").

where that speech would be protected by the First Amendment. As noted by Justice William Brennan,

> [t]o sustain 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. It would be a hardy person who would sell a book or exhibit a film anywhere in the land after this Court had sustained the judgment of one "community" holding it to be outside the constitutional protection. The result would thus be "to restrict the public's access to forms of the printed work which the State could not constitutionally suppress directly."[189]

In addition, when speech occurs simultaneously in many of these "local" communities, the speaker must weigh the standards of all of those communities in determining whether or not to speak. When one considers the indeterminacy of local standards in a single community and multiplies this indeterminacy by the large number of potential "communities" into which nationally distributed speech may wander, the impossibility of determining when such speech is "obscene" becomes apparent. Those who exercise their freedom of speech in multiple "local" geographical areas have two choices. They may limit the communities where their speech travels, assuming that they would be able to determine the "community standards" of some smaller number of localities.[190] When this is not feasible, they must gear their speech to meet the standards of the least tolerant community.[191] This

189. *Id.* at 194 (quoting *Smith*, 361 U.S. at 154).

190. In *Sable Communications v. FCC*, 492 U.S. 115, 125 (1989), the Court assumed that this option was available for providers of sexual telephone services, although its opinion reveals no consideration on the Court's part as to whether such a limitation was actually possible.

191. This was probably the only feasible alternative for Robert and Carleen Thomas, who were convicted of 11 counts of transmitting obscenity over interstate phone lines. United States v. Thomas, No. 94-20019 (W.D. Tenn. July 8, 1994); *see Defining Obscenity in Cyberspace: Calif. Couple Convicted on Memphis Standards*, WASH. POST, Aug. 15, 1994, at 18; Naaman Nickell, *Obscenity Convictions Raise Fears on Bulletin Boards*, ARIZ. REPUBLIC, Aug. 8, 1994, at E3. The Thomases operated an adult, members-only Bulletin Board System (BBS) in Milpitas, California; their BBS had about 3500 subscribers, who could "chat" with other users on the BBS and make copies of more than 20,000 sexually oriented pictures located on the BBS. *See* Gina Boubion, *On-Line Pornography is Creating a Whole New Set of Problems: Zoning Ordinances Cover Adult Bookstores, but What Do You Do About Home Computers?*, PHILA. INQUIRER, Mar. 12, 1994, at A4. The vast majority of the pictures located on the BBS were not obscene. *See id.*

Obscenity charges were brought against the Thomases after a postal inspector, working with a U.S. Attorney, accessed the BBS from Tennessee. *See* Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415, 440 (1995); Mike

has "'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.'"[192]

Godwin, *Virtual Community Standards*, REASON, Nov. 1994, at 48. Of the 3500 subscribers to the Thomases' BBS, only about five of those subscribers were from Tennessee. Kim, *supra*, at 439 n.216. California officials had investigated the BBS, but had decided not to charge the Thomases with any crimes. *See Defining Obscenity in Cyberspace*, *supra*, at 18. In an unsuccessful motion to transfer the venue to California, the Thomases argued that the prosecuturs shopped for a forum with a particularly conservative jury. *See* Kim, *supra*, at 440; *2 Convicted in Computer Pornography Case*, N.Y. TIMES, July 29, 1994, at B7; *see also Cyberporn Challenge in South: Moral Stop Sign Sought by U.S. on Info Highway*, CHI. TRIB., July 21, 1994, at 4 (noting Memphis prosecutors "have a history of attacking what they consider obscene").

There is little that the Thomases could have done to prevent such a conviction, short of sanitizing their California BBS to comport with the "community standards" of Memphis, Tennessee or other even more conservative jurisdictions. There is no way for the Thomases to accurately identify the location of each of their callers, as anyone with access to a long distance carrier can call the BBS. In practice, it is also impossible for the Thomases to discern the local community standards in each of these localities across the country. The Thomases' only option was to "sanitize" the BBS so that it comports with the community standards of the most conceivably conservative locality in the United States, or take the risk that prosecutors in conservative localities will cull through the more than 20,000 pictures on the BBS, looking for one that could be found patently offensive in their jurisdiction.

192. *Jacobellis*, 378 U.S. at 193 (Brennan, J.) (quoting Manual Enters. v. Day, 370 U.S. 478, 488 (1961)). The United States Court of Appeals for the Sixth Circuit has upheld the Thomases' convictions. United States v. Thomas, Nos. 94-6648/94-6649, 1996 U.S. App. LEXIS 1069 (6th Cir. January 29, 1996), *reh'g denied*, 1996 U.S. App. LEXIS 4529 (6th Cir. Mar. 12, 1996) (*en banc*). The court sidestepped the Thomases' argument that a different definition of "community" should be applied in obscenity prosecutions involving computers. 1996 U.S. App. LEXIS 1069, at *24-*26. It held that "this is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing." *Id.* at *25. Since the Thomases obtained a name and address from every user of their bulletin board, "[d]efendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than that in California." *Id.* The court analogized to the providers of sexual telephone messages in *Sable*, 492 U.S. at 125-26, and held that "there is no need for this court to adopt a new defintion of 'community' for use in obscenity prosecutions involving electronic bulletin boards." *Thomas*, 1996 U.S. App. LEXIS 1069, at *25.

As in *Sable*, the Sixth Circuit's ruling assumes that the Thomases could have determined what obscenity standards might apply in all of the various localities from which people called their BBS. The decision fails to consider the costs imposed by its requirement that a BBS operator continuously re-evaluate which material on the BBS could be considered "obscene" in each locality from which a user could potentially gain access to that material. The Sixth Circuit also failed to address the question of how the Thomases could accurately determine the localities from which the users accessed the BBS. It is an open question whether the Thomases could have been prosecuted in Tennessee if the inspectors had lied about their location when they applied for membership on the Thomases' BBS.

The venue rules for federal obscenity prosecutions illustrate how the use of "local" standards in one area limits constitutionally protected speech in other areas.[193] Under those rules, one can be prosecuted for disseminating "obscene" material in any federal district where obscenity is transmitted, received, or passes through while en route to its destination.[194] As a result, "the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials,"[195] and

> [n]ational distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people.[196]

The end result is that communities where the First Amendment grants protection to sexual speech must suffer from the intolerance of other communities, and the more tolerant citizens are "'protected' far beyond government's constitutional power to deny them access to sexually oriented materials."[197]

The chilling effect of "local" community standards upon speech that is otherwise protected by the First Amendment is enhanced by the manipulability of the size of the "locality" used to determine the local standard.[198] The Court has noted that "[i]f a State wished to

193. Kim, *supra* note 191, at 431-34 (discussing the federal venue rules and their misapplication to computer bulletin board systems); *see also supra* note 191 (discussing Thomases' prosecution).

194. Hamling v. United States, 418 U.S. 87, 106-07 (1974).

> The 1958 Amendments to 1461 constituted the mailing of obscene matter a continuing offense under 18 U.S.C. § 3237. The practical effect of this amendment—intentionally adopted by Congress for that express purpose—is to permit prosecution "in the Federal district in which [the disseminator] mailed the obscenity, in the Federal district in which the obscenity was received, or in any Federal district through which the obscenity passed while it was on its route through the mails."

Id. at 143-44 (Brennan, J., dissenting) (footnote and citations omitted).

195. *Id.* at 144.

196. *Id.*

197. *Id.* at 144-45. "A construction that has such consequences necessarily renders the constitutionality of [the federal venue rule] facially suspect under the First Amendment." *Id.* at 145.

198. This is similar to the effect that the federal venue rules introduce. The venue rules allow for an expansion in the number of localities in which suits can be brought, and therefore an increase in uncertainty as to what standards will be applied. The manipulability of

adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case."[199] States have "considerable latitude" in determining the size of the locality.[200] "A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification . . ., or it may choose to define the standards in more precise geographic terms . . . ."[201] Thus, not only must one who distributes sexual material across more than one locality contend with the indeterminacy of standards in each community, the distributor must also contend with "communities" that vary in size from one state to the next, or which are simply not defined. As a result, "the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor."[202]

The Court has demonstrated no inclination to reconsider its approach in light of modern technology. In *Sable*, the Court dismissed the chilling effects of its local-standards rule, assuming that use of local community standards to judge the obscenity of sexual telephone services would merely force service providers to "incur some costs in developing and implementing a system for screening the locale of incoming calls."[203] In dismissing these effects as simply "incurring costs," the Court demonstrated an unwillingness either to consider those costs when balancing the right to speak against societal interests in regulating morality *or* to consider how those costs would inhibit constitutionally protected speech in other localities.

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the geographic size of the "locality" similarly increases uncertainty by introducing a number of different potential geographic localities which may be used to judge a work's obscenity. The consequences of manipulation of the venue rules are apparent in the Thomas prosecution. *See supra* note 191.

199. Smith v. United States, 431 U.S. 291, 303 (1977).

200. Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

201. *Id.*

202. *Smith*, 431 U.S. at 314-15 (Stevens, J., dissenting).

> [A]lthough a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to compose the jury in a given case.

Id.

Such manipulation is not unlike forum shopping for a conservative locality, as in the Thomas prosecution. *See supra* note 191.

203. Sable Communications v. FCC, 492 U.S. 115, 125 (1989).

F. Computer Networks and Local Standards

The Court's view of the "local" community as a geographically defined, homogeneous, and discrete locality was problematic when applied to our diverse modern society *before* the advent of the computer. With the communication capabilities provided by modern communications networks such as the Internet, the Court's approach has become wholly unrealistic. The widespread use of computer networks will increase the diversity of ideas in local communities, undermining the assumption that there is an ascertainable local standard of "decency." For individual speakers, the indeterminacy of these local standards, in combination with the impossibility of controlling the geographic locations in which one's speech is perceived, forces all speakers to gear their speech to the most sensitive community. For those providing network services, even if a service provider could determine the local community standards in every geographic locality, it would still be impossible to determine the geographic locality of everyone who accesses one's network services or to filter the vast amount of information travelling across such networks according to standards dependent upon the origin and destination of each bit of information.

1. The Decreased Homogeneity of Local Communities

With the increased ease of communication between individuals in disparate geographic localities, computer networks undermine the assumption that standards based upon geographically defined "local" communities are more ascertainable than alternative formulations of "community" standards. As the means of communication available via computer networks become more and more sophisticated, physical proximity will have a correspondingly decreased influence on communication. The dramatic increase in the amount of communication taking place on computer networks will increase the variety of individual tolerance for sexual speech within local, geographically defined communities.

While sexual material has been available through communications channels such as nonelectronic mail or the telephone for some time, computer networks offer the first opportunity for *groups* of like-minded individuals to communicate with each other on topics of their own choosing in a manner similar to discussion between persons in physical proximity. Internet newsgroups or electronic mailing lists offer the opportunity for extended discussion on any topic with any

number of individuals.[204] As computer networks develop greater capabilities, the range of communication available via computer networks is likely to equal or surpass the range of communication available to people in physical proximity to each other.[205] The increasingly rich set of communications options available over computer networks can only increase the influence that communication with persons scattered across a wide range of geographical areas will have upon an individual's opinions.

In addition, computer networks facilitate the formation of such groups of individuals in a manner previously impossible. Unlike previously existing means of communicating across long distances, the computer network itself provides the means by which one can find other individuals who wish to communicate on a certain topic or in a certain way. Anyone on the Internet can find out which Internet newsgroups or electronic mailing lists cater to particular topics.[206] It is similarly easy to find the location of and means of accessing computer archives.[207] There is no need to physically locate one's companions to "find" them or sexual material created by them on a computer network.

Finally, the use of a computer network to communicate provides one with anonymity that is unavailable to those seeking sexual materials in a physical community.[208] Computer users are free to define the persona that they wish to project in their communications independent of any constraints imposed by their physical community. As a result, there may be no relationship whatsoever between the public image projected by members of a physical community and their interactions over a computer network.

While at one time those in a small community would have been limited to the cultural outlook of those in the same locality, the increased use of communications networks reveals this as no longer true. The Internet and its subsidiary networks make a vast amount of information equally available regardless of physical locality, and provide the ability to contact enormous numbers of people across the globe without regard for geography. As the use of such networks increases, locality will have an increasingly small effect on individuals'

204. *See supra* text accompanying notes 32-39.

205. *See* GILSTER, *supra* note 1, at 482-83 (discussing new developments, such as audio and video transmission over the Internet).

206. *See id.* at 248-49.

207. *See id.* at 242-57 (discussing means of finding specific information on the Internet).

208. *See* Kim, *supra* note 191, at 421 ("Cyberspace pornography may be preferable to traditional methods of accessing pornography because of the anonymity it provides.").

personal and professional lives.[209] On a personal level, those with particular interests, tastes, or talents will discover that they are not alone.[210] As individuals have more choices and greater opportunity to develop their own tastes, tolerance for sexual expression can only become increasingly varied among the members of local geographical communities.[211] As a result, the "local" standard for obscenity will become increasingly meaningless and arbitrary.

2. *"Tailoring" Speech by Locality is Impossible*

The use of local standards forces those communicating via national communications media to exercise one of two options. First, they may be able to limit their speech so that it is only accessible to those in specific localities. Alternatively, they must gear their speech to the most sensitive community in which that speech might be perceived. For those speaking on computer networks or operating computer systems that transmit the speech passing over such networks, it will be impossible to place geographic limitations upon the dissemination of their speech. As a result, the local community standards rule forces speakers on such networks to gear their speech to the most sensitive community. Because of the indeterminacy of "local" standards, however, speakers on such networks or the providers of network services will be unable to make a fine-grained determination as to whether each item passing over the network comports with the strictest local standard. Instead, speakers and service providers will be forced to limit speech according to arbitrary and overbroad criteria that will limit much constitutionally protected speech in addition to "obscene" speech.

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209. This is one of the central points made in books advocating the use of the Internet for commercial purposes. *See generally* CRONIN, *supra* note 4.

210. For instance, there are Internet newsgroups devoted to topics such as homosexuality and other minority sexual practices, particular religious beliefs, or survivors of trauma such as child abuse. *See CompuServe Restores Newsgroup Access*, COMPUTERWORLD, Feb. 19, 1996, at 8. In a physically defined community, an individual may have trouble finding others sharing the same interest in any of these areas. The Internet, however, provides a much larger pool of people with which to find common interests. Obscenity regulation, moreover, cannot alter the Internet's ability to bring together people with unusual sexual interests. The First Amendment protects the discussion of ideas and no entire topic of conversation can be prohibited. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

211. *See* Olga Popov, Note, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1128 & nn.115-17 (1991).

In *Sable*, the Court found that providers of sexual telephone services are "free to tailor [their] messages, on a selective basis . . . to the communities [they] choose[ ] to serve."[212] Arguably, providers of national telephone services cannot possibly determine the community standards in every locality in the nation. Dial-a-porn providers, moreover, have at least two capabilities that providers of computer network services do not. First, they have a limited set of messages that can be "tailored" to specific environments. Second, they have some control over the localities to which these "tailored" messages are sent. For the providers of computer network services, such "tailoring" will be simply impossible.

In contrast with sexual telephone services, a vast amount of speech generated by thousands of different individuals passes across the Internet in the form of electronic mail, "news," files, and other network services.[213] Communications take place between individuals, among groups, in public discussions, or as anonymous file transfers to or from an archive site.[214] Computer systems on the Internet will not only be the source or destination system for such traffic, but will also route traffic from other systems destined for still more systems on the network or other networks.[215]

The operator or owner of an individual computer system or network on the Internet will obviously be unable to monitor the contents of the electronic mail or electronic-mail-based discussion lists sent from or to the individual user. The same problem arises with public discussion fora such as newsgroups. The number of these fora, and the quantity of material that passes through them, make it impossible to view each article received by or sent from a computer as "news." Given the vague and variegated standards provided by an obscenity test dependent upon a subjective determination of "local community standards," there is no conceivable way to filter all this information and make a fine-grained determination of the constitutional protection given to each message based upon its source and destination addresses.

Although the problem arises to a lesser degree with files stored in computer archives, it will be difficult or impossible for many networks even to filter archived data according to "local community standards." The owner or manager of a single, small computer system may be able

212. Sable Communications v. FCC, 492 U.S. 115, 125 (1989).

213. *See supra* notes 27-43 and accompanying text.

214. *Id.*

215. *See* KEHOE, *supra* note 27, at 8-11 (discussing electronic mail routes).

to examine material stored on that computer. For a large database or archive site on a busy network, to and from which files are continuously transferred, however, it is unrealistic to suppose that a system operator could make a determination of the constitutional protection afforded to each file under the community standards of both the person who places the file in the archive and the persons copying it.

3. Limiting Speech to Specific Geographic Localities is Impossible

Even assuming that community standards were ascertainable in every locality in the United States, and that system managers and users could determine whether individual electronic transmissions were constitutionally protected under those standards, it would still be difficult or impossible to determine which community's standards apply to a given transmission. Unlike nonelectronic mail or the physical distribution of standard commercial pornography, messages from and to individual users on computer networks are not fixed to an easily ascertainable, geographically related address. In addition, the nature of modern telecommunications makes it increasingly untenable to attempt to distinguish between people based upon their geographic location.

The individual "speaker" on the Internet has no means of determining where the "listeners" are located. For users speaking in newsgroups, there is no way for either the system manager or user submitting an article to a newsgroup to determine where the message will be read. Computer system managers or owners determine which newsgroups their systems will carry and propagate to other systems.[216] As a result, the individual user has no control over the physical localities into which the speech may wander. In fact, the only reasonable assumption is that a news article will be read *everywhere.*

Even for nonpublic speech such as electronic mail, the individual user cannot control the physical locality in which the speech may be heard, or the localities through which the speech will pass on its way to the listener. Even if the user knows the location of the computer to which such communications are sent, the user has no control over the locality from which the hearer would access that computer. Again, the only reasonable assumption is that such speech may either be heard in, or pass through, any possible geographic location.

System operators and users have no means of determining the physical locality of other people on the Internet. Utilities such as the

216. *See supra* note 38 and accompanying text.

remote login feature allow users to use remote computers across the network.[217] Through the use of a remote login or an anonymous automated network server, a user calling from one locality can either transfer and receive messages anonymously or appear to be operating from a choice of different systems. A simple example will demonstrate the dilemma:

> From home, a user in a small town in Virginia calls a computer at the University of Maryland in Baltimore. The user then remotely logs in from the Maryland computer to a computer in California. From the perspective of the computer operator in California, there is no way of determining the user's locality. The user could be sitting at a terminal in downtown Baltimore or placing an international telephone call from Botswana. Either way, once on the Maryland computer, all of the Internet's information-transfer tools are available.

Of course, with the advent of mobile telephony, the problem becomes even more complicated. It would make no sense to treat the user differently if the account is accessed while on a visit to Washington, D.C. than if at home in Virginia. Yet, under the logic of "local community standards," any constitutional protection afforded to information transmitted or received by the user must depend upon the user's locality at the time of the transfer.[218]

The indeterminacy of the "local" standard for any given community, the impossibility of determining such standards for the vast range of communities across the United States, and the impossibility of determining the geographic source or destination of much of the material passing over computer networks make it impossible for either users or information service providers to determine what level of constitutional protection is granted to sexual speech. In addition, the severe penalties imposed for obscenity violations[219] make it likely that service providers will be afraid to flirt with an obscenity prosecution. In this environment, factors such as artistic, literary, or political value—considerations that grant constitutional protection to even the most offensive work—will be subordinated to a mechanical calculation of the number of sexual references or a bald judgment as to

217. *See supra* text accompanying notes 40-41.

218. Even more absurd examples can be constructed. Assume that the user is traveling from Virginia, through Washington, D.C., to a small town on Maryland's eastern shore. Surely, information providers cannot be not expected to discern the constitutional protection afforded to the user traveling through these varied localities.

219. *See* Fort Wayne Books v. Indiana, 489 U.S. 46, 61 (1989) (allowing the use of RICO laws and their massive penalties in obscenity prosecutions).

whether or not a communication deals with "safe" subject matter.[220] Even without self-censorship by service providers, individual users who have no control over the eventual destination of messages must constantly determine how their work might be viewed in every conceivable locality. In this environment, the obscenity test formulated by the Court reaches far beyond the offensive "low-value" speech that the Court believes can justifiably be prohibited.

4. Justice Harlan Revisited

In the context of computer networks, the "local" community standards rule is unable to actually give local communities the ability to "balance" community interests against the right of free speech. With networks such as the Internet, it is impossible to discriminate between communities when providing network services. Since a user cannot choose *not* to communicate with a given community, all communities will be denied the opportunity to hear sexual speech because the morals of the strictest conceivable community will control the level of discussion. In this environment, neither Justice Harlan's incorporation argument nor the local community standards argument are justifiable. The consequences of local regulation of obscenity are the same as the consequences of national regulation of obscenity: everyone must gear their speech towards the most sensitive community. Justice Harlan's argument for increased state control of obscenity has now been turned on its head. The use of local standards to define obscenity rests upon the premise that "no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book."[221] This is no longer true; the use of local community standards

220. This was the approach taken by Carnegie-Mellon University, when it decided to remove all sexually oriented newsgroups containing "binaries" (files that can be decoded and converted into pictures). Jeffrey E. Faulette, Note, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1164-65 (1995). As one commentator noted, "[t]he newsgroups contain a tremendous amount of information, both text and [encoded] images, including some very hard-core pornography . . . . But removing these potentially illegal images . . . also requires removing a great deal of traditionally protected speech. . . . CMU . . . chose to try to solve the dilemma by censoring altogether the sexually oriented binaries newsgroups." *Id.* The vast majority of the material in these newsgroups consists of discussion of photographs and "cheesecake" pictures, such as those available in *Playboy*, which could not be considered legally obscene under any standard. *See id.*

221. United States v. Roth, 354 U.S. 476, 506 (1957) (Harlan, J., concurring in part and dissenting in part).

no longer protects obscenity regulation from "the absolutism of imposed uniformity."[222]

IV. An Alternative Approach

A. "National" Standards Are No Solution

Modern communications networks vividly illustrate the problems inherent in the Court's adoption of local community standards as the benchmark against which the constitutional protection for sexually related speech must be measured. Simply changing the "local" standards test to a "national" standards test, however, will not solve the problems of indeterminacy, subjectivity, and excessive chilling of constitutionally protected speech. Under either standard, the variations in "community standards" from locality to locality will be impossible to determine.

Because "community standards" are a factual issue left to the discretion of the jury, the community standards adopted by any single jury will be heavily dependent upon the individual experiences of those jurors. Even though "contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case,"[223] the Court has argued that the use of community standards does *not* allow jurors to base judgments on their own opinions. In the Court's view, "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[224] The Court, however, has repeatedly acknowledged both the subjectivity and the indeterminacy of this standard.[225]

The central problem with the "community standards" approach is that there is *no* appropriately discernable community standard. The

222. Miller v. California, 413 U.S. 15, 33 (1973).

223. Smith v. United States, 431 U.S. 291, 300 (1977) (footnote omitted).

224. Hamling v. United States, 418 U.S. 87, 107 (1974) (citations omitted).

225. *See* Pinkus v. United States, 436 U.S. 293, 300-01 (1978) ("Cautionary instructions to avoid subjective personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical 'average person' he is to determine the collective view of the community, as best as it can be done."); *Smith*, 431 U.S. at 302 ("It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, *if it were even possible for such a definition to be formulated.*") (emphasis added); Kois v. Wisconsin, 408 U.S. 229, 232 (1972) (per curiam) ("[T]here is an undeniably subjective element in the [community standards] test as a whole.").

obscenity test is inherently subjective because, like any "reasonableness" determination, jurors will import their own standards into the determination rather than use an "objective" standard. In formulating the "community standards test," the Court noted the connection between "community standards" and a "reasonableness" inquiry:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.[226]

As the Court noted in *Pinkus v. United States*, however,

> [e]very man is likely to think of himself as the happy exemplification of "the reasonable man"; and so the standard he adopts in order to fulfill the law's prescription will resemble himself, or what he thinks he is, or what he thinks he should be, even if he is not.[227]

Simply replacing the word "local" in the *Miller* definition of obscenity with the word "national" cannot reduce the obscenity test's chilling effect, because those speaking on national or international computer networks will still be unable to predict how every jury in every community will view the "national" decency standard. Perhaps in tacit acknowledgement of the impossibility of defining a predictable and logically supportable obscenity standard, the Court has abdicated the final definition of "obscenity" to the jury.[228] As Justice Stevens has noted, however, the fact that the Court cannot describe "obscenity," and therefore cannot give notice of what speech may be prohibited, is no justification for leaving the issue to the vagaries of individual juries:

> The conclusion that a uniformly administered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases. Quite the contrary, it is a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material.[229]

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226. *Hamling*, 418 U.S. at 104-05.

227. 436 U.S. at 301 (quoting Simon E. Sobeloff, *Insanity and the Criminal Law: From* McNaghten *to* Durham, *and Beyond*, 41 A.B.A. J. 793, 796 (1955)).

228. *Smith*, 431 U.S. at 313 (Stevens, J., dissenting) ("Even the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source.").

229. *Id.* Justice Harlan also noted the same point. *See* Memoirs v. Massachusetts, 383 U.S. 413, 460 (1966) (Harlan J., dissenting) ("Short of saying that no material relating to sex may be banned, or that all of it may be, I do not see how this Court can escape the task of reviewing obscenity decisions on a case-by-case basis."); Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 708 (1959) (Harlan, J., concurring in judgment) ("Nor

Even under a hypothetical "national" standard, those communicating on computer networks must filter their speech according to their best guess as to the possible views of a national standard by differing juries. Even if a national standard of decency is used, information service providers will most likely feel safe only when using an arbitrary and overly expansive test for determining whether material could potentially be obscene anywhere in the country. Any test that would be practicable in safeguarding the service provider or speaker from an obscenity prosecution in every locality would necessarily chill constitutionally protected sexual discussion by its overbreadth.[230]

B. The Redefinition of Community

The Court's rejection of a uniform, national standard of decency was correct. The Court's error lies in its assumption that there is some way for discrete geographically based localities to regulate speech without chilling constitutionally protected speech elsewhere. The Court's model of geographically defined and discrete local communities appears grotesquely archaic in light of modern communications. In fact, modern communications networks should lead to a redefinition of how we view "communities."

While the Court has always defined "community" in geographic terms, discussion groups, electronic mail, and real-time communications on modern information services provide, for the first time, the potential to create "virtual" communities. People can, and do, spend more time in communication with individuals in remote locations across the globe than with the people who live in geographic proximity.[231] As a matter of self-identification, the different groups of people

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can I see, short of holding that all state censorship laws are constitutionally impermissible, a course from which the Court is carefully abstaining, how the Court can hope ultimately to spare itself the necessity for individualized adjudication.")

230. A statute is overbroad when it seeks to regulate conduct or speech not protected by the First Amendment, but would also incidentally prohibit or "chill" expression that is protected:

> An overbroad statute—a statute that is written too broadly, or more broadly than necessary—is one that is designed to burden or punish activities that are not constitutionally protected, but its flaw is that, as drafted, it also includes activities protected by the First Amendment. In the case of a statute that is overbroad on its face, a carefully drawn statute could have reached the conduct. Nevertheless the Court will strike the overbroad statute because it might apply to others, not before the Court, who may engage in *protected* speech or activity that the statute appears to outlaw.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8, at 996 (5th ed. 1995).

231. *See* Betty J. Turock, *The Big Chill on the Internet*, CHI. TRIB., Apr. 11, 1996, at N29.

sharing common interests and problems on computer networks form a community in a very real sense.

As communications networks become even more pervasive and local geographical communities become even more tightly integrated with the communications "web," individuals within the same geographical community will in reality participate in vastly different virtual communities. Local regulations designed to control the moral content of a citizen's thoughts will be oppressive in application and ineffective in result once it becomes impossible to exclude anyone from the wealth of information and the diversity of human experience available across the communications web.

The geographic definition of "community" may make sense when regulating physical institutions such as x-rated movie theaters or adult book stores. Certainly, the "total community environment" and "tone of commerce" of the geographic community is directly affected by the *exterior* manifestations of such physical institutions.[232] One can also argue that the geographically defined community is affected by the consenting adults who make use of such sexually oriented businesses to the extent of crowd-control and other concerns usually addressed by zoning laws.[233] This same regulatory approach, however, makes no sense when applied to sexual material obtained by an individual in the privacy of the home from a location with no relationship to the local community. Sexual material transmitted directly into the home from distant localities via national computer network simply does not affect the "tone of commerce" in the local community.

While one may argue that the physical community is *indirectly* affected by an individual's communications on an electronic communications network, this argument must rest entirely upon how an individual's actions differ as a result of hearing sexually related speech that would be offensive to others in the community. Three problems arise when one attempts to justify regulating speech on communications networks because of subsequent actions of individuals who may hear such speech. First, the effect of pornography upon the individual does not comprise a particularly strong justification for prohibiting speech, because as the Court noted in *Stanley*, "in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to

232. *See supra* text accompanying notes 134-144 (discussing the Court's reliance on the "tone of commerce" as a justification for obscenity regulation).

233. *See* Renton v. Playtime Theatres, 475 U.S. 41, 46-47 (1986); Young v. American Mini Theatres, 427 U.S. 50, 72-73 (1976).

prevent crime are education and punishment for violations of the law.'"[234]

Second, whatever the merits to the argument that exposure to sexual speech inevitably leads to unacceptable conduct, the "inherent harm" in pornography obviously does not support the obscenity standard as currently formulated. If sexually related speech by itself is inherently and provably harmful, the local standards rule in fact has the effect of *requiring* governments in permissive localities to bear the harmful effects of pornography, while those in less permissive localities can safely eliminate such harmful material. The Court has been careful to avoid relying on the inherent "harm" of sexual speech, and instead has based its test on local community control over such speech. This local control, however, creates an environment where much constitutionally protected sexual speech on computer networks will be silenced.

Finally, an argument resting solely upon the effect of sexual speech on the individual is similar to arguments that have been rejected by the Court when the government attempted to silence Communists and Klansmen based on the effects of their political speech.[235] Even though most Americans would consider it indubitably harmful if the American government were overthrown by force, or all nonwhite races were subjugated, such speech is protected by the First Amendment.[236] It is only sexually related speech that is considered too dangerous.[237]

Allowing speech to be prohibited on the grounds that it is too offensive to certain geographically defined communities will impose heavy burdens on members of some virtual communities. This effect follows directly from the fact that only "shameful" lust or prurient interest can be labelled obscene, while healthy, "normal" lust is acceptable.[238] Those communities most likely to be considered "shameful" by the majority will be the inevitable targets of obscenity

234. Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)).

235. *See supra* note 130.

236. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

237. Of course, the line between "sexual" and "political" speech is often arbitrary. For groups such as homosexuals, the assertion of one's sexuality is often as much a political act as a sexual one. *See* STROSSEN, *supra* note 12, at 56-58 (arguing that attempting to draw a line between "sexual" and "political" speech "ignores the significant overlap between those categories made clear by the many major recent political controversies that have centered on sexual issues").

238. Brockett v. Spokane Arcades, 472 U.S. 491, 504-05 (1985).

prosecutions.[239] Thus, those speaking on topics such as homosexuality will suffer from the indeterminacy of the subjective definitions of "shameful" applied in various jurisdictions across the country to a much greater extent than those discussing more "normal" topics. Under this vague standard, it is inevitable that a zealous application of the obscenity laws will silence speech in such communities far beyond what the First Amendment should allow.

C. Regulating "Indecent" Speech: Protection of Minors and Nonconsenting Adults

Prohibiting sexually related speech is not the only means by which such speech can be regulated.[240] The Court has developed intermediate standards by which sexually related speech can be limited or channelled in certain ways, even if it cannot be absolutely prohibited. These standards focus upon the protection of minors and nonconsenting adults from "indecent" speech and fall into the category of time, place, and manner restrictions.[241]

Minors can be shielded from material which is not obscene as to adults.[242] In general, content-based restrictions such as regulation of sexually "indecent" materials "may be sustained only if the government can show that the regulation is a precisely drawn means of serv-

239. *See* Osborne v. Ohio, 495 U.S. 103, 137 n.12 (1990) (noting that "the overwhelming majority of arrests for violations of 'lewdness' laws involve male homosexuals"); STROSSEN, *supra* note 12, at 217-47 (describing how hate speech laws have been used primarily against minorities and Canada's recent pornography laws have been used primarily against expression by lesbians).

240. In fact, neither *Roth* nor *Miller require* states to regulate obscenity. States are free to leave sexual speech entirely unregulated. *See* State v. Henry, 732 P.2d 9, 17 (Or. 1987) (holding Oregon's constitution does not have an "obscenity" exception to its protection of freedom of speech).

241. Such restrictions are valid when "they are justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (citations omitted); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). Although time, place, and manner restrictions must generally be content neutral, in limited circumstances the government may "shield the public from some kinds of speech on the ground that they are more offensive than others, . . . [such as] when the speaker intrudes on the privacy of the home, . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* (citations omitted).

242. Ginsberg v. New York, 390 U.S. 629 (1968). The *Ginsberg* Court justified finding material obscene as to minors by judging its appeal to minors. *Id.* at 643. The Court based its decision upon the parents' claim to authority in their own household to direct the rearing of their children and the state's "independent interest in the well-being of its youth." *Id.* at 639-40.

ing a compelling state interest."[243] The Court has recognized a "compelling interest in protecting the physical and psychological well-being of minors."[244] This interest has been based upon both the state's interest in allowing parents to control their children's exposure to sexual material and an independent state interest in preventing children from gaining access to sexual material regardless of the parents' wishes.[245]

Regulations shielding minors from sexual material must be narrowly drawn. First, states may not "reduce the adult population . . . to reading only what is fit for children."[246] In addition, because minors are also entitled to First Amendment protection, "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them."[247] As a result, the government must choose the least restrictive means of furthering this interest.[248] Courts have repeatedly struck down complete prohibitions on the sale of material to adults on the basis of protecting minors,[249] and have found other regulations too vague in their application.[250] Sufficiently drawn statutes or regulations, however, have been upheld.[251]

243. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

244. Sable Communications v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747, 756-57 (1982); Action for Children's Television v. FCC, 852 F.2d 1332, 1343 (D.C. Cir. 1988) [hereinafter *ACT I*].

245. *See Sable*, 492 U.S. at 126; FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).

246. Butler v. Michigan, 352 U.S. 380, 383 (1957). (finding an ordinance unconstitutional that made it an offense to make certain material available to the general reading public and "not reasonably restricted to the evil with which it is said to deal"); *cf.* Bantam Books v. Sullivan, 372 U.S. 58, 71 (1963) ("[A]lthough the Commission's supposed concern is limited to youthful readers, . . . adult readers are equally deprived of the opportunity to purchase the publications.").

247. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-13 (1975).

248. *Sable*, 492 U.S. at 126.

249. *See id.* at 127-28 (ban on dial-a-porn); *Butler*, 352 U.S. at 382-83 (ban on printed matter); *Erznoznik*, 422 U.S. at 213-14 (prohibition against nudity at a drive-in movie theater); Action for Children's Television v. FCC, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991) [hereinafter *ACT II*] (24 hour ban on indecent speech imposed upon broadcast media).

250. *See* Interstate Circuit v. City of Dallas, 390 U.S. 676, 689 (1968) ("Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children."); *Bantam Books*, 372 U.S. at 71.

251. Ginsberg v. New York, 390 U.S. 629, 639-40 (1968); Carlin Communications v. FCC, 837 F.2d 546, 556-57 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 924 (upholding regulations preventing minors from accessing dial-a-porn services). In fact, the Court's logic in *Sable* leaves open the possibility that material protected by the First Amendment could be completely banned as to adults if such a ban were the only way to protect minors. *See Sable*, 492 U.S. at 126-29.

The Court has also allowed restrictions to be placed upon material to protect nonconsenting adults, although such restrictions are more limited in permissible scope than those directed at the protection of children. In upholding such bans, the Court has required a "showing that substantial privacy interests are being invaded in an essentially intolerable manner."[252] When adults are able to avoid "further bombardment of their sensibilities simply by averting their eyes," discarding reading material, or turning off a radio or television, courts have not found the effect of speech on nonconsenting adults to be a justification for time, place, or manner restraints.[253]

Under an "indecency" approach, sexually explicit materials could be regulated by separating sexual and nonsexual materials into separate "areas" on an information service. The service could create specific fora for explicit discussion of sexual topics, and specific databases for storage of explicit sexual materials. This would protect nonconsenting adults from exposure to such material, because the placement of explicit sexual discussion in separate fora will ensure that the user must take affirmative steps to access the sexually explicit material.[254] This type of system would protect unwilling adults from the risk of being confronted with offensive, explicit sexual material every time they use an information service.

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252. Cohen v. California, 403 U.S. 15, 21 (1971).

253. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting *Cohen*, 403 U.S. at 21); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980); Action for Children's Television v. FCC, 11 F.3d 170, 174-76 (D.C. Cir. 1993) [hereinafter *ACT III*].

One exception to this approach, however, is the Court's ruling in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In *Pacifica*, the Court justified FCC regulation of indecent speech over broadcast media on the grounds that

> [p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home . . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Id. at 748-49. The result in *Pacifica*, however, was also justified because "broadcasting is uniquely accessible to children." *Id.* at 749. The *Pacifica* decision has since been characterized as an "emphatically narrow holding" and should not be read as a general justification for regulating indecent speech to protect adults. *Sable*, 492 U.S. at 127. As the D.C. Circuit stated, "[w]e too are reluctant to recognize any generalized government interest in protecting adults from indecent speech," even in another case dealing with indecency in broadcasting. *ACT III*, 11 F.3d at 175-76.

254. *Cf. Sable*, 492 U.S. at 127-28 ("In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication.").

Although regulating minors' access to sexual material presents a more difficult problem, controlling the dissemination of material to minors through appropriately drawn statutes or regulations can be accomplished with less detriment to free expression than will be caused by application of the current "obscenity" test.[255] By focusing on the age of the user, network services providers could be freed from guessing the user's locality. It would be easier to control the dissemination of materials based upon the user's *status* as a minor than upon the user's *locality* for two reasons. First, with the right software adaptations, service providers can take reasonable steps to assure that only adults are using their service. One's status as a minor will not change until one reaches the age of majority. In contrast, no software adaptation can continuously monitor the localities from which users are calling, especially since those users may often have *no* fixed locality. Second, the determination of whether a user is a minor or an adult is a single bright-line standard. In contrast, the current obscenity test requires a fine-grained determination of the chances of particular material being deemed obscene under the differing standards of innumerable localities. Given that it should be easier to regulate minors' access to sexual material than to attempt to censor the content of such material, it is not surprising that some information services have already taken steps in this direction.[256]

In *Miller*, the Court argued that it would be as difficult to determine whether material is sexually explicit enough to merit a separate forum as it would be to determine whether material is obscene.[257] Even if one accepts this assertion as true, the consequences of channeling speech via indecency regulations are less egregious than the

255. Any regulations prohibiting minors from adult fora would have to be narrowly drawn. This would seem to be an easier problem than that encountered in broadcasting, however, where adult users' interests in receiving material must be balanced against the interest in prohibiting access to children. Where adult access is not an issue, the Court seems to take a more deferential approach to the need to prevent children from accessing sexual material. *Compare ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) *and ACT II*, 932 F.2d 1504 (D.C. Cir. 1991) *and ACT III*, 11 F.3d 170 (D.C. Cir. 1993) (illustrating the FCC's problems with balancing adult rights against the interest in preventing minors from gaining access to indecent broadcasting) *with Sable*, 492 U.S. at 126-31 (upholding regulation prohibiting minors' access to indecent dial-a-porn services while permitting adult access to same services).

256. *See* Richard Louv, *Coming of Age at 12 in Cyberspace*, SAN DIEGO UNION-TRIB., Mar. 12, 1994, at E1 (describing protection for youths available on America On-Line).

257. Chief Justice Warren Burger has argued that "state regulation of hard-core pornography so as to make it unavailable to non-adults . . . has all the elements of 'censorship' for adults; indeed even more rigid enforcement techniques may be called for." Miller v. California, 413 U.S. 15, 36 (1973).

consequences of criminal punishment via obscenity laws. In speaking on a sexual topic under a system of indecency regulations, the question is not *whether* to speak but *where* to speak. When speech is channeled, the user who is afraid that her speech is too explicit for general use can still speak in the reserved fora without fear. In contrast, obscenity laws are used to prevent speech altogether. In light of the vague and indeterminable standard of "obscenity," a concerned user must remain silent.

The difference between prohibiting speech and channeling speech means that even if it is as difficult to determine which materials should be channeled as it is to determine which materials should be prohibited, the consequences of making an incorrect or overly broad determination are less serious when speech is channeled. While "general audience" fora on information services may become overly sanitized because of indecency regulations, adult users who wish to discuss sexual topics will still be able to have such discussions elsewhere. Similarly, while we should be concerned that youths not be arbitrarily excluded from participation on computer networks, our concern with youth access to sexual material is not as great as with adult access to such material.

Rather than requiring communication services to examine every piece of data that passes over their networks to see if it complies with a vague and indeterminable obscenity standard, it is more reasonable to focus on the creation of specialized fora to which only adult and interested users are permitted access.[258] In such fora, users may be free to engage in sexually explicit discussion without fear. Those who would be offended by such discussion can avoid the specific fora yet still fully participate in other fora of more interest to them. In addition to protecting the sensibilities of some users, this approach would provide important protection for those creating "virtual" communities dispersed across wide geographic areas by giving them the ability to define their "boundaries" free from the harassment of individual juries in distant locales. Those who find sexual speech on certain topics offensive would also have the ability to define their own standards, although they would only be able to enforce those standards as to material that they themselves might see.

258. Some of the commercial on-line services, such as CompuServe, Prodigy and America Online have already taken steps in this direction. *See* David Hayes, *Explicit Material Put Back On-line: But CompuServe Gives Customers Power to Block Sites They Find Offensive*, KANSAS CITY STAR, Feb. 14, 1996, at B1; Joel Kilsheimer, *How Parents Can Protect Children from Cyberporn*, ORLANDO SENTINEL, July 11, 1995, at E1.

As the Court has repeatedly noted, however, a regulation purportedly designed to protect minors will not be upheld if it is overbroad, vague, or if it is nothing more than a covert attempt to prohibit adult access to sexual material.[259] In addition, minors themselves are not wholly exempt from First Amendment protection, and the government must use the least restrictive means of preventing minors from gaining access to indecent sexual discussion.[260] Many of the current proposals that seek to punish providers of computer services if a minor obtains sexual material seem to have ignored these constraints and probably should be found unconstitutional even if they succeed in becoming law.[261]

Conclusion

The *Miller* obscenity test relies heavily on subjective judgments such as whether speech is offensive in light of "community standards." In the context of national computer networks, the test is so vague in its application that it will force speakers on those networks to censor constitutionally protected speech out of fear that some authority in some locality may find such speech criminally sanctionable. The *Miller* test relies upon assumptions about the nature of American society which are no longer descriptively accurate. Further, such a test has far more serious consequences for the right to speak freely than the Court cares to admit.

Rooted in Justice Harlan's desire to grant the states greater control over speech, the use of "local" community standards in *Miller*'s obscenity test can no longer promote the "diversity" that the Court assertedly seeks to foster. This reliance on "local" standards betrays the fallacy underlying the Court's obscenity jurisprudence. The obscenity exception to the First Amendment rests upon a view of the community as a discrete, homogeneous, geographically defined locale. This view of the community is incorrect when applied to our modern,

259. *See supra* text accompanying note 246.

260. *See supra* text accompanying notes 247-248.

261. On February 9, 1996, Congress enacted one such "indecency" proposal as the Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-36 (1996) (to be codified at 47 U.S.C. § 223(a)-(h)). This most recent attempt at regulating indecency on the Internet has been challenged and temporarily enjoined. ACLU v. Reno, No. CIV.A.96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996); *see* Amy Harmon, *Lobby Emerging to Fight Restrictions on the Internet*, L.A. TIMES, Feb. 27, 1996, at D1; James Coates, *Telecommunications Act Spurs Cyberprotest*, CHI. TRIB., Feb. 9, 1996, at 1; *see also supra* note 255 (discussing the difficulty involved in drawing appropriately narrow regulations that balance the protection of minors against the rights of adults to engage in indecent speech).

highly integrated society, especially in light of computer networks' increased communications capabilities and their potential to revolutionize human interaction. Instead of promoting diversity, the Court's obscenity test actually forces speakers to accommodate the least tolerant community.

The Court's view of the community as a discrete, homogeneous "hamlet" also underlies its decision to define obscenity as a question of fact. Because "obscenity" is a factual question, the determination of whether a work is too offensive is largely left to a jury. With the development of international computer networks, the increased diversity of opinion and experience that will follow from increased interaction between formerly isolated localities makes it impossible to define a predictable standard by which one can determine in advance whether particular speech is so offensive as to be "obscene." Instead, the impossibility of predicting the reactions of differing juries in differing locales will force both speakers and network service providers to censor sexual speech according to arbitrary "safe" standards, thereby eliminating much speech that is supposedly protected by the First Amendment. Because there is effectively no way to isolate particularly sensitive localities from any information on the computer network, all speech on such networks must be censored according to the demands of the most sensitive locality.

The "obscenity exception" to the First Amendment should be abandoned. Its detrimental effect on constitutionally protected speech will fall most heavily upon disfavored groups of individuals who can be labelled "shameful" by an intolerant majority. Instead, by appropriately narrow regulations, speech could be channeled to protect unwilling listeners from its offensiveness and to limit access to sexual material by children. Channeling sexual speech, while not prohibiting it, appropriately balances individuals' right to express themselves and receive information with the society's interest in preventing offense to adults and protecting minors.