Georgia State University Law Review

Volume 26
Issue 3 *Spring 2010*

Article 6

March 2012

Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's "Contemporary Community Standards"

Shannon Creasy

DEFENDING AGAINST A CHARGE OF OBSCENITY IN THE INTERNET AGE: HOW GOOGLE SEARCHES CAN ILLUMINATE *MILLER*'S "CONTEMPORARY COMMUNITY STANDARDS"

Shannon Creasy*

INTRODUCTION

Freedom of speech is one of our most fundamental[1] and treasured rights, requiring "ceaseless vigilance . . . to prevent . . . erosion by Congress or the States."[2] However, "the right of free speech is not absolute at all times and under all circumstances."[3] Despite the broad language of the First Amendment, certain types of speech are not afforded protection under the Constitution.[4] Such unprotected speech is subject to government regulation that can include bans and criminal punishment.[5] Obscenity is a type of unprotected speech, having been described by the Supreme Court as expression "utterly without redeeming social importance."[6]

---

* J.D. 2010, Georgia State University College of Law.

1. Roth v. United States, 354 U.S. 476, 488 (1957) (referring to speech as a "fundamental freedom" that has "contributed greatly to the development and well-being of our free society").

2. *Id.*

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

4. Miller v. California, 413 U.S. 15, 20 (1973) (citing *Roth*, 354 U.S. 476) (stating that key to the holding was "the Court's rejection of the claim that obscene materials were protected by the First Amendment"); *Chaplinsky*, 315 U.S. at 571–72 (explaining that certain "narrowly limited classes of speech" including obscenity, "fighting" words, and libel fall outside the protections of the First Amendment); JANINE S. HILLER & RONNIE COHEN, INTERNET LAW & POLICY 50–51 (2002).

5. *Roth*, 354 U.S. at 492–93 (holding that the state criminal obscenity statute is constitutional); *Chaplinsky*, 315 U.S. at 572 (citing Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)) (discussing categories of unprotected speech and stating that criminal punishment for use of "'epithets or personal abuse'" would not offend the Constitution); HILLER & COHEN, *supra* note 4, at 50–51; H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity – or Absurdity?*, 15 ST. THOMAS L. REV. 517, 535–36 (2003) (discussing the potential penalties that accompany criminal obscenity convictions).

6. *Miller*, 413 U.S. at 20 (citing *Roth*, 354 U.S. at 476) (stating that key to the holding was "the Court's rejection of the claim that obscene materials were protected by the First Amendment"); *Roth*, 354 U.S. at 484 ("We hold that obscenity is not within the area of constitutionally protected speech or press."); *Chaplinsky*, 315 U.S. at 572; HILLER & COHEN, *supra* note 4, at 50–51. *But see Roth*, 354 U.S. at 509 (Douglas, J., dissenting) (citing Dennis v. United States, 341 U.S. 494, 502–11 (1951)) (for "speech to be punishable [it] must have some relation to action which could be penalized by [the]

Obscenity law has been controversial since its inception, and over the years prosecutions of violations have been sporadic.[7] Under the George W. Bush Administration, the federal government stepped up enforcement of federal obscenity laws.[8] "Mounting the biggest attack on porn since the Reagan Administration," the government secured forty obscenity convictions during Bush's first term, compared to four convictions during President Clinton's two terms in office.[9] Revealing an intention to continue the trend of aggressive enforcement, former Attorney General Alberto Gonzales identified prosecuting obscenity offenses as fourth on the list of priorities for the Department of Justice in 2005.[10]

Widespread Internet access has also brought renewed attention to the issue of regulating obscene materials.[11] Although older obscenity cases often targeted literary works and then began focusing on films, modern criminal prosecutions typically involve images of sexual conduct,[12] which are nearly ubiquitous on the Internet.[13]

---

government"); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 194 (1979) ("The Court's sin, Douglas felt, had been to make obscenity an exception to the First Amendment in the first place.").

7. JAN SAMORISKI, ISSUES IN CYBERSPACE, COMMUNICATION, TECHNOLOGY, LAW, AND SOCIETY ON THE INTERNET FRONTIER 267, 269 (Allyn & Bacon eds., 2002) ("Pornographers invariably put themselves at risk when producing and distributing their products, especially in the face of laws that leave the definition of pornography open to interpretation and make enforcement subject to the political winds of change."); Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 324–25 (2008); Bradley J. Shafer & Andrea E. Adams, *Jurisprudence of Doubt: Obscenity, Indecency, and Morality at the Dawn of the 21st Century*, 84 MICH. BAR J. 22 (2005), *available at* http://www.michbar.org/journal/article.cfm?articleID=873&volumeID=66. *See also Roth*, 354 U.S. at 496, 508–13 (dissenting opinions of Justice Harlan, Justice Douglas, and Justice Black reflect controversy over whether, and to what extent, government can regulate speech).

8. Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 235–37 (2007) (citing Seth Lubove, *Obscene Profits*, FORBES, Dec. 12, 2005, at 98).

9. *Id.*

10. *See* Shafer & Adams, *supra* note 7 (discussing Attorney General's stated priorities).

11. Dick Ackerman, *Technology & Obscenity: Ever-Changing Legal Challenges*, 10 NEXUS: J. OPINION 37, 37 (2005) ("[T]hese individuals are upset because pornography is no longer confined to little shops on the back streets of a city that they can avoid."); Sean Adam Shiff, Comment, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 734–35 (1996) (discussing difficulties that new technologies create for courts with regard to applying obscenity standards and how recent legislative attention has focused on obscenity on the Internet).

12. Robbins & Mason, *supra* note 5, at 542 (discussing the book burnings of ULYSSES as obscenity, despite it being listed as one of the "greatest novels of the twentieth century"); Doug Linder, *Exploring Constitutional Conflicts, Regulation of Obscenity* (2008), http://www.law.umkc.edu/faculty/projects/

Technological advances that allow pornographers to efficiently stream online video and view pictures have led to an explosion in the pornography market.[14] As of 2006, sources tracking pornography statistics reported that there were approximately 4.2 million pornographic websites, accounting for 12% of the total sites on the Internet.[15] Annual pornography revenue in the United States is estimated at over $13 billion.[16] Additionally, every second, there are as many as 372 people searching "adult" terms online.[17] This easy access to pornography has revived arguments on each side of the regulation issue, with anti-pornography groups calling for increased prosecutions to prevent moral decline and addiction,[18] and free speech activists insisting that obscenity prosecutions violate the freedoms guaranteed by the First Amendment.[19] Obscenity jurisprudence remains controversial because "in the hands of a

ftrials/conlaw/obscenity.htm (discussing early prosecutions focusing on classic literary works, such as ULYSSES and LADY CHATTERLEY'S LOVER, and more recent charges aimed at visual images).

13. Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After* Roth v. United States, 9 TEX. REV. ENT. & SPORTS L. 1, 15 (2007) (discussing how the Internet now makes it easy to receive and consume sexual imagery in your own home); All-Spy Blog, *Internet Pornography Statistics*, www.all-spy.com/blog/2008/07/04/internet-pornography-statistics/ #time (last visited Mar. 15, 2010) (discussing widespread availability of pornography on the Internet).

14. Shiff, *supra* note 11, at 735–36 ("[T]he recent proliferation of Internet pornography can be attributed to [the ability of users to] indulge their fantasies in the privacy of their own home. It can also be attributed to the ease with which users can download such images."); All-Spy Blog, Internet Pornography Statistics, http://www.all-spy.com/blog/2008/07/04/internet-pornography-statistics/ (last visited Oct. 11, 2008).

15. Family Safe Media, http://www.familysafemedia.com/pornography_statistics.html#time. (last visited on Mar. 15, 2010).

16. Dan Ackman, *How Big is Porn?*, FORBES.COM, May 25, 2001, http://www.forbes.com/2001/05/25/0524porn.html (discussing estimates of porn revenues as high as $14 billion annually). *But see* Ackman, *supra* (discussing that cited pornography revenues are exaggerated and estimating Internet pornography revenues as approximately $1 billion).

17. Family Safe Media, http://www.familysafemedia.com/pornography_statistics.html (last visited March 23, 2010).

18. Ackerman, *supra* note 11, at 43 (explaining that easy and quick Internet access to pornography has motivated increased public outcry for legislators to regulate obscenity); ObscenityCrimes.org, Morality in Media, http://www.obscenitycrimes.org/WorldOfInternetObscenity.php (last visited Mar. 15, 2010).

19. Free Speech Coalition, http://www.freespeechcoalition.com/index.asp?action=preview (last visited Sept. 14, 2008). *See generally* Calvert & Richards, *supra* note 13 (recounting interviews with attorneys and prominent adult entertainment industry leaders who have spoken out against obscenity regulation).

government willing to use it, obscenity law remains a potentially potent tool of repression."[20]

Despite the controversy, a majority of Supreme Court Justices have consistently upheld laws that support the regulation of obscene materials.[21] The path to a constitutional test for obscenity has not been an easy one.[22] Concerns that regulation of any kind would have a chilling effect on protected speech led to "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." [23] This division resulted in bitter disagreement over how to differentiate protected expression from proscribable obscenity.[24] While the Court clearly stated that "sex and obscenity are not synonymous" and that only "hard core" sexual conduct specifically defined by state statute is prosecutable, identifying the line between legal pornography and illegal obscenity has proven to be extremely difficult.[25]

---

20. Boyce, *supra* note 7, at 325.

21. Miller v. California, 413 U.S. 15, 36 (1973) ("[I]t does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."); Roth v. United States, 354 U.S. 476, 485 (1957) ("[There is] universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.") (internal citations omitted); FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 194 (Richard A. Parker ed., 2003) (citing *Miller*, 413 U.S. at 27) (stating that opinion makes clear that a majority of Justices believed it possible and necessary to find a way to distinguish between protected and unprotected speech). *But see Roth*, 354 U.S. at 508 (Douglas, J., dissenting) (citing Dennis v. United States, 341 U.S. 494, 502–11 (1951)) ("[For] speech to be punishable [it] must have some relation to action which could be penalized by [the] government.").

22. *Miller*, 413 U.S. at 22, 37 (1973) (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed."); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79–80 (1973) (Brennan, J., dissenting) (discussing the difficulties the Court has had agreeing on a definition of obscenity); Ginzburg v. United States, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting) ("[T]he Constitution protects coarse expression as well as refined, and vulgarity no less than elegance."); Jacobellis v. Ohio, 378 U.S. 184, 203–04 (1964) (Harlan, J., dissenting) (stating that the Federal Government should not have as much latitude as the States in regulating offensive material).

23. *Miller*, 413 U.S. at 22–23, 24 (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704–05 (1968)).

24. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 843 (16th ed. 2007) ("The Warren Court's attempt to define unprotected obscenity in *Roth* spawned a tortuous period of divided rulings . . . .").

25. *Miller*, 413 U.S. at 27 (explaining that only "hard-core" pornography can be prosecuted); *Roth*, 354 U.S. at 487.

In *Miller v. California*, after years of wrestling with "the intractable obscenity problem,"[26] the Court set out the three-prong obscenity test that remains in effect today.[27] The *Miller* test requires that "an average person" apply "contemporary community standards" to judge whether material is obscene.[28] Despite criticisms that the test suffers from the same vagueness problems as prior failed efforts,[29] the Court has applied the *Miller* test for thirty-five years, upholding the constitutionality of federal and state criminal obscenity statutes.[30]

Since the introduction of the *Miller* test, courts have struggled to identify and define "community standards."[31] Much debate has centered on how to determine the true values of a community, with defendants introducing a wide variety of evidence intended to establish those elusive standards.[32] Certainly, the *Miller* Court never imagined the Internet and the level of complexity it has added to the process.[33] Recently, a Florida man indicted on federal obscenity

26. *Miller*, 413 U.S. at 16 (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)).

27. *Id.* at 37 (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972)) ("[O]bscenity is to be determined by applying 'contemporary community standards.'").

28. *Id.* at 24.

29. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85–86 n.9 (1973) (Brennan, J., dissenting) (explaining that obscenity is "incapable of definition with sufficient clarity to withstand attack on vagueness grounds"); *Miller*, 413 U.S. at 43–44 (Douglas, J., dissenting) ("Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."); Robbins & Mason, *supra* note 5, at 528 (explaining that the *Miller* test "suffers from the same frailties as its predecessors").

30. *Miller*, 413 U.S. at 32–35 (upholding state criminal obscenity statute). *But see* Boyce, *supra* note 7, at 319 (discussing Justice Brennan's change of view).

31. Boyce, *supra* note 7, at 320.

32. State v. Haltom, 653 N.W.2d 232, 239–40 (Neb. 2002) (holding trial court did not abuse discretion by refusing to allow evidence of comparable materials because such evidence is not, in and of itself, evidence of community standards); State v. Brouwer, 550 S.E.2d 915, 919, 921 (S.C. Ct. App. 2001) (holding that evidence of comparable materials is generally admissible, but materials offered here were insufficient as comparable evidence); GEORGE M. WEAVER, HANDBOOK ON THE PROSECUTION OF OBSCENITY CASES 73 (National Obscenity Law Ctr. ed., 1985).

33. Boyce, *supra* note 7, at 322 (explaining that a majority of Justices have expressed concerns about the application of the community standards test to the Internet); Gyong Ho Kim & Anna R. Paddon, *CyberCommunity Versus Geographical Community Standard for Online Pornography: A Technological Hierarchy in Judging Cyberspace Obscenity*, 26 RUTGERS COMPUTER & TECH. L.J. 65, 80 (1999) (quoting JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 32 (1st ed. 1996)) ("In defining community standard in *Miller*, the Supreme Court 'neither anticipated nor took into account the rapid advances in computer technology . . . [t]he rapid growth of national and global computer networks . . . [that] have allowed persons to interact without geographic constraints in a nonphysical universe called cyberspace.'"); Shafer & Adams, *supra* note 7, at 24.

charges approached this dilemma in a creative new way.[34] Raymond McCowen proposed to introduce Google search engine data to establish the relevant community standards and to show that, by comparison to the material the residents of his community were searching for on the Internet, his material was not obscene.[35] McCowen's case settled out of court when he pleaded guilty to one count of money laundering, leaving open the question whether the courts would have allowed the data to be used as a window into the community values.[36]

Whether *Miller*'s contemporary community standards test should be completely abandoned has been the subject of much debate and falls outside the scope of this work. [37] To date, most governmental attempts at Internet regulation have been aimed at protecting children from online pornography, which is another issue that falls outside the scope of this work.[38] This Note will, however, explore the challenges the courts have encountered when applying the community standards test, the ways in which both parties have attempted to shed light on *Miller*'s requirements, and how courts can simplify this process by allowing Internet search engine data to be introduced as evidence of the community's values.[39] To that end, Part I traces the history of obscenity law in the United States up to the current *Miller* test.[40] Part II examines the application of the *Miller* test, analyzing the challenges involved in defining the community and the difficulties defendants face when trying to prove the standard with various types

34. Monica Hesse, *Are We What We Google? Attorney Asks What Search Habits Say About Us*, HOUS. CHRON., July 4, 2008, at 14.

35. *Id.*

36. Tom McLaughlin, *Local Porn Producer Pleads Guilty to Money Laundering: Clinton Raymond McCowen's Plea Avoids Court Case over Constitutional Issues*, NORTHWEST FLA. DAILY NEWS, June 26, 2008, *available at* 2008 WLNR 12004366.

37. Calvert & Richards, *supra* note 13, at 1 ("[T]his article calls for jettisoning and abandoning obscenity jurisprudence as we know it . . . ."); John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 3 (2003) (recommending that Congress and the courts "reconsider the *Miller* standard and the very notion of obscenity regulation"). *See generally* Robbins & Mason, *supra* note 5, at 517.

38. *See generally* Tehranian, *supra* note 37, at 2–7; Jonathan P. Wentz, Ashcroft v. ACLU*: The Context and Economic Implications of Burdened Access to Online Sexual Speech*, 17 GEO. MASON U. CIV. RTS. L.J. 477 (2007).

39. *See infra* Part I, Part II, and Part III.

40. *See infra* Part I.

of evidence.[41] Finally, Part III argues in favor of more clearly identifying the relevant community and, under any definition of community, allowing Google searches (and other search engine data) to be admitted as evidence to establish the values of that community.[42]

I. THE "TORTURED HISTORY"[43] OF OBSCENITY LAW

A. Roots and Early Efforts at Regulation

Efforts to control sexual expression were relatively rare in the United States until the late nineteenth and early twentieth centuries.[44] Between the Civil War and the 1930s, federal courts largely followed a fairly precise rule from an early English case, *Regina v. Hicklin*.[45] The *Hicklin* test allowed any material that could "deprave and corrupt those whose minds are open to such immoral influences" to be banned as obscenity.[46] This test had the unintended result of assessing materials based on the effect they had on the most susceptible, or sensitive, members of the community.[47] Under *Hicklin*, books and other materials could be judged obscene based on the effect an insignificant, isolated passage had on a child.[48] As Judge Learned Hand pointed out, the *Hicklin* test "would 'reduce our

41. *See infra* Part II.

42. *See infra* Part III.

43. Miller v. California, 413 U.S. 15, 20 (1973); *see also* SULLIVAN & GUNTHER, *supra* note 24, at 843 ("The Warren Court's attempt to define unprotected obscenity in *Roth* spawned a tortuous period of divided rulings . . . .").

44. Boyce, *supra* note 7, at 307 (explaining that obscenity law can be traced back to English common law, but suggesting that the true motive was to control political or religious expression, since charges of obscenity were almost always intertwined with sedition, blasphemy or breach of the peace offenses). *See* United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 135 (1973) (inferring early obscenity law was a guise for political agenda since the only early prosecutions involved politically unpopular defendants).

45. Robbins & Mason, *supra* note 5, at 523; Eric Yun, *Autonomy, Not Aesthetics: "Contemporary Community Standards" and Speech on the Internet*, 2 GEO. J.L. & PUB. POL'Y 357, 358–59 (2004) (quoting Queen v. Hicklin, (1868) L.R. 3 Q.B. 360, 368).

46. Robbins & Mason, *supra* note 5, at 523 (citing Queen v. Hicklin, (1868) L.R. 3 Q.B. 360, 371); Yun, *supra* note 45.

47. Boyce, *supra* note 7, at 311; Robbins & Mason, *supra* note 5, at 523–24.

48. Eric Handelman, Comment, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 718 (1995).

treatment of sex to the standards of a child's library in the supposed interest of a salacious few.'"[49] To prevent this bizarre result, the *Hicklin* standard fell out of favor and was abandoned with the Supreme Court's ruling in *Roth v. United States*.[50]

In *Roth*, the Supreme Court addressed the issue of obscenity directly for the first time.[51] Having previously categorized obscenity with "fighting words" and libelous speech, the Court's holding that federal obscenity statutes did not violate the Constitution was unsurprising.[52] The Court merely affirmed what had previously been implied—that obscenity was not entitled to First Amendment protection.[53] The *Roth* Court expressly rejected the *Hicklin* test as unconstitutionally restrictive, piecing together a new test for obscenity from various lower court holdings.[54] Designed to address the constitutional infirmities of the *Hicklin* test, the *Roth* test required that the material in question be viewed as a whole, rather than allowing portions to be judged individually.[55] Additionally, instead of gearing the test to the most susceptible member of society, the new test required jurors to apply the perspective of the "average person."[56] The *Roth* test deemed material obscene when "to the average person, applying contemporary community standards, the dominant theme of

49. *Id.* at 718 (citing United States v. Kennerley, 209 F. 119, 120–21 (S.D.N.Y. 1913)).

50. WEAVER, *supra* note 32, at 3 (discussing rejection of the *Hicklin* test); Robbins & Mason, *supra* note 5, at 523–24 (discussing Judge Learned Hand's reaction to the *Hicklin* test and the change with *Roth*).

51. Roth v. United States, 354 U.S. 476, 481 (1957).

52. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (categorizing obscenity with "fighting words" and libelous speech, Justice Murphy wrote that expressions of this nature are not an "essential part of any exposition of ideas, and . . . that any benefit . . . derived from them is clearly outweighed by the social interest in order and morality").

53. Miller v. California, 413 U.S. 15, 23 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 92 (1972)) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); *Roth*, 354 U.S. at 484 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); Calvert & Richards, *supra* note 13, at 2. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942). *But see* Boyce, *supra* note 7, at 317 (quoting *Roth*, 354 U.S. at 512 (Douglas, J., dissenting)) (explaining that application of a test of community standards "would not be an acceptable one if religion, economics, politics, or philosophy were involved").

54. *Roth*, 354 U.S. at 488–89.

55. *Id.* (rejecting the *Hicklin* standard for the test substituted by a lower court); Boyce, *supra* note 7, at 316.

56. *Roth*, 354 U.S. at 488, 490; Boyce, *supra* note 7, at 316.

the material taken as a whole appeals to [the] prurient interest."[57] Initially seeming to resolve the definitional battles, the *Roth* test proved to be just the beginning of the Court's struggle.[58] Later opinions included seemingly minor alterations to the test that ultimately rendered it unworkable.[59]

For years, the Court wrestled with the application of the *Roth* standard.[60] When efforts to apply it continued to fail, the Court resorted to systematic case-by-case reviews, with the Justices each applying their own obscenity test.[61] This practice resulted in the review and reversal of many lower court convictions without additional explanation or opinion, such that "judicial attempts to follow [the Court's] lead conscientiously . . . often ended in hopeless confusion."[62]

B. Tweaking Roth *to Get to* Miller*—If Only it Were That Simple*

Finally, the Court's efforts to gain consensus on a new obscenity test paid off.[63] In *Miller v. California*, the Court reached majority

57. *Roth*, 354 U.S. at 488–89 (explaining that the lower courts had adopted this standard and then holding that the lower courts had "sufficiently followed the proper standard").

58. *See generally Miller*, 413 U.S. 15.

59. *Miller*, 413 U.S. at 22 (discussing, *inter alia*, the Court's inability to achieve a majority agreement on the standard for determining what constitutes obscenity); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 419 (1966) (finding error with lower court holding and announcing new test requiring that material be "found to be *utterly* without redeeming social value"); SULLIVAN & GUNTHER, *supra* note 24, at 843 ("The Warren Court's attempt to define unprotected obscenity in *Roth* spawned a tortuous period of divided rulings . . . ."); Calvert & Richards, *supra* note 13, at 2 (discussing how *Roth* set the Court on the "tortuous and tumultuous path" of its obscenity jurisprudence); Shiff, *supra* note 11, at 739 (explaining how the addition of the "utterly without redeeming social value" requirement to the test in *Memoirs* made prosecution virtually impossible).

60. William D. Deane, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. UNIV. L. REV. 245, 252 (2001).

61. *Miller*, 413 U.S. at 23 n.3 (stating that thirty-one cases had been decided using the "Redrup 'policy'"). *See* Walker v. Ohio, 398 U.S. 434, 434 (1970) (Burger, C.J., dissenting) (complaining there was no justification for allowing the Court to "assum[e] the role of a supreme and unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before it . . ."); WOODWARD & ARMSTRONG, *supra* note 6, at 192–193; Boyce, *supra* note 7, at 318.

62. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting).

63. WOODWARD & ARMSTRONG, *supra* note 6, at 244–73 (discussing the year-long work by Justice Brennan and Justice Burger to formulate a new position); Boyce, *supra* note 7, at 318 (discussing the political pressure on the Burger Court and the efforts to gain consensus for a new constitutional obscenity test).

support for a new test.[64] Fashioning the new *Miller* standard from the old *Roth* test,[65] the *Miller* Court formulated a three-prong conjunctive test requiring the trier of fact to determine:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[66]

If the material in question meets all three of the requirements of the test, that material is deemed obscene.[67]

In the *Miller* opinion, the Court directly addressed several issues that made earlier test applications difficult.[68] First, the Court expressly limited the definition of "obscene material" to items that deal with sex, specifically material depicting or describing "hard core" pornography.[69] Additionally, the Court emphasized that the material at issue must be viewed as a whole and could not be examined piecemeal.[70] Finally, the Court limited state regulation to only that sexual conduct specifically defined by statute, or authoritatively construed, as being illegal to depict or describe.[71]

Despite these efforts, the *Miller* test has been widely criticized as unconstitutionally vague and overbroad.[72] The "contemporary

64. *Miller*, 413 U.S. at 24–25.

65. *Id.*; FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 194 (Richard A. Parker ed., 2003) ("The three-pronged test owed much to earlier opinions.").

66. *Miller*, 413 U.S. at 24–25 (internal citations omitted).

67. *Id.* at 24.

68. *See id.* at 25–27 (defining and clarifying various issues that caused difficulties in the past).

69. *Id.* at 27.

70. *Id.* at 24.

71. *Id.* at 23–24 ("State statutes designed to regulate obscene materials must be carefully limited.").

72. *Miller*, 413 U.S. at 37–48 (Douglas, J., dissenting); Handelman, *supra* note 48, at 731–737 (discussing criticisms of the *Miller* test and difficulties its application presents). *But see* Richards & Calvert, *supra* note 8, at 262 (interviewing defense attorney Louis Sirkin, who discusses fear that a new

community standards" portion of the test has been particularly troublesome.[73] Although an obscenity measure relying upon the "average conscience" and flexible enough to reflect modern views was not a new concept when *Miller* was decided,[74] the *Miller* Court's holding essentially "collapsed the average person and community standards elements into single concept" to be applied to the first two prongs of the test.[75] As a result, Justice Douglas argued in dissent that the proposition "that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding."[76] Addressing such constitutional criticisms directly, Chief Justice Burger held that the "contemporary community standards" test is "constitutionally adequate" and serves the "protective purpose" of insuring that the material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one."[77] Despite the Court's clear finding that the community standards test provides the necessary constitutional safeguards, the test is still widely criticized on constitutional grounds.[78]

---

test might be worse given the political climate, explaining that at least *Miller* worked for him when he was able to successfully defend a museum's Robert Maplethorpe exhibition under the *Miller* test).

73. Boyce, *supra* note 7, at 320; Calvert & Richards, *supra* note 13, at 15; Deane, *supra* note 60, at 253; Handelman, *supra* note 48, at 726–27, 729–31 (discussing the difficulties of applying a community standard versus a national standard).

74. *Miller*, 413 U.S. at 24–25 (citing cases that attempted to settle on an average person's perspective with flexibility to change with the times); United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913) (Learned Hand, J.) (stressing a need for flexibility in the definition of obscenity by suggesting that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now").

75. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) ("Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them."); WEAVER, *supra* note 32, at 10; Handelman, *supra* note 48, at 736 (discussing the community standards test and explaining that "[t]he major problem with the *Miller* standard is that it further opens an already wide door to subjective judgments of what is obscene"); Shiff, *supra* note 11, at 740 (explaining that the community standards are applied to the first two prongs of the *Miller* test).

76. *Miller*, 413 U.S. at 44.

77. *Id.* at 33–34 (citing Mishkin v. New York, 383 U.S. 502, 508–09 (1966)).

78. Boyce, *supra* note 7, at 320; Deane, *supra* note 60, at 253; Robbins & Mason, *supra* note 5, at 542 ("Obscenity laws are an ugly form of censorship, and censorship should never be tolerated.").

II. CHALLENGES OF APPLYING THE MODERN TEST

A. Identifying the Community—The Nation, the State, the City, or the Cyber-Community?

Although the "contemporary community standards" test has been governing law for almost four decades, the Supreme Court has provided little guidance for identifying the relevant community.[79] Court opinions post-*Miller* provide insight into what the community definition is *not* required to include, but give virtually no guidance as to what *is* constitutionally required.[80] Critics debate whether the courts should apply a national standard, a statewide standard, a standard based on smaller community units, an "average adult" standard, or in Internet cases, a cyber-community standard.[81] An inability to define the community is a serious concern because it prevents the defense from being able to properly exercise its right to put forward evidence to prove the community standards.[82]

1. A National Standard Versus a Local Standard

Before *Miller*, the Supreme Court applied a national standard in federal obscenity cases.[83] In *Jacobellis v. Ohio*, the Court stated that a local definition of the community did not provide sufficient

79. SAMORISKI, *supra* note 7, at 267 ("Definitions under the *Miller* standard . . . can vary from place to place, judge to judge, jury to jury, and even from time to time."); Shiff, *supra* note 11, at 742–43.

80. Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (stating there is no constitutional requirement for state obscenity juries to apply a statewide standard); Hamling v. United States, 418 U.S. 87, 103–09 (1974) (upholding conviction despite jury instruction to apply a national standard).

81. Robin S. Whitehead, *"Carnal Knowledge" is the Key: A Discussion of How Non-Geographic* Miller *Standards Apply to the Internet*, 10 NEXUS: J. OPINION 49, 53 (2005) ("The constitutional decision is not a choice between 'local' and 'national.' It is always an average adult community standard . . . ."); Shiff, *supra* note 11, at 743–46.

82. Darlene Sordillo, Casenote and Comment, *Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards*, 10 LOY. ENT. L.J. 619, 632 (1990).

83. Manual Enter., Inc. v. Day, 370 U.S. 478, 488 (1962) ("We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."); WEAVER, *supra* note 32, at 10 (explaining that although national standard was applied, that approach never garnered majority support).

protection of rights deriving from the U.S. Constitution.[84] Rejecting the application of a local standard, the Court pointed out that it had previously "explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines.'"[85] Opponents of a national standard, however, argued that given the size and diversity of the United States, a national standard would be unascertainable.[86] The requirement of a national standard was highly controversial and has never enjoyed majority support from the Court.[87]

In *Miller*, the Court indicated that a local standard was appropriate.[88] Finding no constitutional requirement for application of a national standard, the Court held that the jury instructions in *Miller* calling for jurors to apply a statewide standard did not violate the Constitution.[89] However, a year later, in *Hamling v. United States*, the Court stated that the application of a national standard is not a constitutional violation either.[90] Further clarifying what is not constitutionally required, in *Jenkins v. Georgia,* the Court held that juries in state obscenity prosecutions do not have to be instructed to apply a statewide standard.[91] The Court explained that under *Miller*, jurors can "rely on the understanding of the community from which they came as to contemporary community standards."[92] The *Jenkins* Court stated that, while "a [s]tate may choose to define . . . the standards in more precise geographic terms," it is not constitutionally required to do so, and the State can direct "jurors to apply

84. Jacobellis v. Ohio, 378 U.S. 184, 193 (1964).

85. Shiff, *supra* note 11, at 743 (quoting *Jacobellis*, 378 U.S. at 194–95).

86. Miller v. California, 413 U.S. 15, 33 (1973) ("People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."); *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting) ("I believe that there is no provable 'national standard' . . . ."); Deane, *supra* note 60, at 253 ("One of the principal disagreements between the Justices was whether a local or national standard should apply to the community standards test."). *But see* Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O'Connor, J., concurring in part) ("[A]doption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity."); *Manual Enter.*, 370 U.S. at 488 (setting out national standard for federal obscenity statutes).

87. WEAVER, *supra* note 32, at 10.

88. *Miller*, 413 U.S. at 31 (finding no error where jury instructions called for a local standard).

89. *Id.*

90. Hamling v. United States, 418 U.S. 87, 103–09 (1974).

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

92. *Id.*

'community standards' without specifying what 'community.'"[93] The cases demonstrate that a national standard is neither required nor unconstitutional if applied. Moreover, states may designate a statewide standard by statute, but they are not required to do so.[94]

2. *The Internet—Complicating the Considerations*

The emergence of the Internet has further complicated the identification of the relevant community and has magnified the potential for harm.[95] In the past, sellers of adult material could choose which communities were appropriate locations for retail operations or were safe distribution points.[96] In contrast, sellers operating on the Internet often have limited control over where their products end up.[97] Items posted on the Internet are immediately available for viewing and downloading by users around the world.[98] Since the Internet defies geographic boundaries, and it is still not possible for website operators to reliably and effectively limit access based on geographical location,[99] applying the community standards test could result in "individuals being prosecuted by the standard of the most restrictive community with access to the Internet."[100] Despite the potential for chilling Internet speech, the Supreme Court held in *Ashcroft v. American Civil Liberties Union*, that it does not violate constitutional requirements for a statute aimed at Internet regulation

93. *Id.*

94. *Id.*; *Hamling*, 418 U.S. at 103–09.

95. Nitke v. New York, 253 F. Supp. 2d 587, 603 (S.D.N.Y. 2003) ("While the community standards test was developed at a time when obscenity prosecutions were primarily local . . . and distributors chose the localities in which they mailed or displayed their material, online distribution is by definition nationwide."); Ackerman, *supra* note 11, at 41–42; Calvert & Richards, *supra* note 13, at 17 ("The concept of community in *Miller* is particularly problematic in the Internet Age, where material can be downloaded in any community . . . ."); Tehranian, *supra* note 37, at 19.

96. Shiff, *supra* note 11, at 749.

97. Boyce, *supra* note 7, at 347; Tehranian, *supra* note 37, at 19.

98. Tehranian, *supra* note 37, at 19.

99. Boyce, *supra* note 7, at 347 (citing ACLU v. Gonzales, 478 F. Supp. 2d 775, 807 n.13 (E.D. Pa. 2007)); Shiff, *supra* note 11, at 765 (citing Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 211–17 (1995)) ("Since the Internet lacks meaningful geographical boundaries, the 'contemporary community standard' is misplaced.").

100. Tehranian, *supra* note 37, at 18.

to rely on 'contemporary community standards' in determining whether the materials are obscene.[101]

An early Internet case, *United States v. Thomas*, illustrates a strong argument for a uniform standard, such as a national or "cyberspace" standard for Internet cases.[102] In *Thomas*, a husband and wife, operating an Internet bulletin board in California, were prosecuted after being caught in a sting operation.[103] A United States Postal Inspector, posing as an online customer, purchased a subscription from the defendants that provided access to download pornographic materials in Memphis, Tennessee.[104] The Government prosecuted the defendants in Tennessee, since that was where the materials were received, rather than in California, where the materials originated.[105] The trial court instructed the jury to apply Memphis community standards, resulting in convictions on charges of interstate transmission of obscenity.[106] The defendants in *Thomas* argued for a new definition of community for the Internet, such as a "cyber-community,"[107] based on "broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial."[108] The court declined to address the cyber-community issue, however, and focused instead on the fact that the defendants in this case had access to customer addresses and

101. Ashcroft v. ACLU, 535 U.S. 564, 593 (2002) (Kennedy, J., concurring) (holding that the use of "community standards" language by itself does not render the legislation unconstitutional, even though "[t]he Court of Appeals found that [the statute] in effect subjects every Internet speaker to the standards of the most puritanical community in the United States," but while "[t]he concern is a real one, . . . it alone cannot suffice to invalidate [the statute]"). *But see id.* at 603 (Stevens, J., dissenting) ("In the context of the Internet, however, community standards become a sword, rather than a shield.").

102. Kim & Paddon, *supra* note 33, at 75–80; Shiff, *supra* note 11, at 745–46.

103. Shiff, *supra* note 11, at 744–45 (citing United States v. Thomas, 74 F.3d 701, 704–05 (6th Cir. 1996)); Kim & Paddon, *supra* note 33, at 75–80.

104. Kim & Paddon, *supra* note 33, at 75–80.

105. *Thomas*, 74 F.3d at 701, 709 ("[I]t is well-established that 'there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent.'").

106. *Id.* at 711.

107. Kim & Paddon, *supra* note 33, at 79–80 (discussing "virtual communities" that consist of "netizens" and exist online, with members spread throughout the world but connected by these communities).

108. Shiff, *supra* note 11, at 745 (citing *Thomas*, 74 F.3d at 711).

could have prevented transmission into Tennessee.[109] The Sixth Circuit affirmed the convictions, holding that "juries are properly instructed to apply the community standards of the geographic area where the materials are sent."[110]

B. Proving the Standard—Should the Material at Issue "Speak for Itself"?[111]

In obscenity prosecutions, the State is not obligated to provide proof of the community standards.[112] Juries are presumed to already know the prevailing community standards.[113] In *Kaplan v. California*, the Supreme Court held that once the State has admitted the materials at issue into evidence, there is no constitutional requirement that the prosecution provide expert testimony "or for any other ancillary evidence of obscenity."[114] The allegedly obscene material "can and

109. Roman A. Kostenko, *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 CLEV. ST. L. REV. 105, 127 (2001).

110. *Thomas*, 74 F.3d at 711 (citing *Miller*, 413 U.S. 15, 30–34); Shiff, *supra* note 11, at 745–46 (explaining how local standards can lead to forum shopping to insure convictions).

111. United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969) ("Simply stated, hard core pornography . . . can and does speak for itself.").

112. Feldschneider v. State, 195 S.E.2d 184, 185 (Ga. Ct. App. 1972) (finding sufficient evidence to uphold obscenity conviction even though prosecution did not produce any evidence defining community standards because "jurors are entitled to use their own common sense") ("They most likely knew what 'contemporary community standards' are as regards the comic book in evidence, both in Clarke County and in other parts of the State of Georgia, and of the United States."); WEAVER, *supra* note 32, at 61. *But see* United States v. Klaw, 350 F.2d 155, 168 (2d Cir. 1965) (holding that motion for directed verdict of acquittal should have been granted because jurors had "absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient"); United States v. Various Articles of Obscene Merch., 565 F. Supp. 7, 8–9 (S.D.N.Y. 1982) (holding movie *Deep Throat* and other materials were not patently offensive in civil case tried before judge where State did not offer evidence of community standards and community survey reports on pornography indicated widespread acceptance of the material).

113. WEAVER, *supra* note 32, at 69. *But see* Illinois v. Nelson, 410 N.E.2d 476, 479 (Ill. App. Ct. 1980) (reversing conviction where survey data was improperly excluded, explaining that "in this case, . . . [where] most of the jurors had lived all their lives in the community of Rockford, did not read a paper from any other community within the State of Illinois and read few national magazines, it appears that the jurors would have little practical experience on which to base their opinion of what the state-wide community standard might be").

114. Kaplan v. California, 413 U.S. 115, 121 (1973). *But see* WEAVER, *supra* note 32, at 62–63 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973)) (discussing two rare, but potential exceptions in cases where the material at issue is not admitted into evidence or cases that involve extremely unusual material that are considered "directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge . . . .").

does speak for itself" and is considered to be the best evidence of whether it is obscene.[115]

In some civil administrative hearings, where there was no right to trial by jury, however, a few courts have held that where the State did not provide any evidence defining the community standards, the issue could not be decided and the State failed to meet its burden of proof.[116] For instance, in *Golden Dolphin No. Two, Inc. v. State*, the judge held that the prosecution failed to prove that a live show was obscene since the State did not present any evidence on the contemporary community standards.[117] To avoid this potential result, States sometimes do provide evidence of the community standards.[118] Usually, however, the prosecution has no burden to prove this element for the jury.[119]

While the prosecution has little motivation to provide evidence to define the relevant community standards, such evidence can be critical to the defendant's case and should be allowed whether the prosecution submits such evidence or not.[120] The Supreme Court has held that the "defense should be free to introduce appropriate expert testimony."[121] In his concurrence in *Smith v. California*, Justice Frankfurter stated that "'[t]here is a right of one charged with obscenity . . . to enlighten the judgment of the tribunal . . . regarding the prevailing literary and moral community standards.'"[122]

115. *Paris Adult Theatre I*, 413 U.S. at 55–56; *Wild*, 422 F.2d at 36 ("Simply stated, hard core pornography . . . can and does speak for itself."). *But see Klaw*, 350 F.2d at 167 (explaining that jurors had "impermissibly broad freedom to convict" because they had no more evidence to determine obscenity than the magazines themselves).

116. Golden Dolphin No. 2, Inc. v. State, 403 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1981). *But see* City of Miami v. Fla. Literary Distrib. Corp., 486 So. 2d 569, 573 (Fla. 1986) (holding that trial judges can apply their own knowledge of the community standards where an obscenity case is tried before a judge and not a jury).

117. *Golden Dolphin No. 2, Inc.*, 403 So. 2d at 1374.

118. WEAVER, *supra* note 32, at 63–65 (explaining that the Supreme Court generally disfavors expert testimony in obscenity cases, but sometimes it is wise to utilize it to offset defendant's expert witnesses).

119. *Id.* at 64.

120. Illinois v. Nelson, 410 N.E.2d 476, 479 (Ill. App. Ct. 1980) (finding reversible error where trial court refused to admit defendant's evidence because while "[t]he State does not have the burden of introducing any evidence as to what the state-wide community standard is . . . that cannot justify a court in denying the defendant the right to introduce the best evidence he can gather on this issue.").

121. WEAVER, *supra* note 32, at 63 (quoting Kaplan v. California, 413 U.S. 115, 121 (1973)).

122. Rebecca Dawn Kaplan, *Cyber-Smut: Regulating Obscenity on the Internet*, 9 STAN. L. & POL'Y REV. 189, 192 (1998).

Defendants have attempted to introduce many types of evidence to establish the "contemporary community standards."[123] Although courts sometimes allow such evidence, trial judges wield wide discretion in this area.[124] And, even though exclusion of this type of evidence can cripple the defense, the Supreme Court has upheld convictions where evidence was excluded, ruling that any resulting error was harmless.[125]

1. Introducing the Experts—Explaining the Standard

One type of evidence that can be helpful to both the prosecution and the defense in obscenity cases is expert witness testimony.[126] Trial courts only allow expert testimony if the witness qualifies as an expert in the field and the information the witness provides is either something the layperson would not know, or it is at least "helpful" to the jurors in understanding the standard.[127] While there is not a particular field that produces an "obscenity expert," a wide variety of individuals representing many fields have qualified as experts to provide insight into community standards, such as psychiatrists, psychologists, sociologists, ministers, and even police officers.[128]

In *Paris Adult Theatre I v. Slaton*, the Supreme Court registered disapproval of the use of expert testimony in obscenity cases, stating that "[t]his is a not a subject that lends itself to the traditional use of expert testimony."[129] However, in *Miller*, issued on the same day as

123. *See* WEAVER, *supra* note 32, at 61–77 (explaining different types of defense evidence commonly used such as comparable materials, public opinion surveys, experts, etc.).

124. *Id.* at 63 (explaining that the defense can "introduce both expert and non-expert evidence on community standards"); Boyce, *supra* note 7, at 350.

125. Boyce, *supra* note 7, at 350 (citing Hamling v. United States, 418 U.S. 87, 104–10 (1974)).

126. Showcase Cinemas, Inc. v. State, 274 S.E.2d 578, 580 (Ga. Ct. App. 1980) (upholding conviction on state obscenity charges in case where prosecution introduced expert witness testimony on community standards); WEAVER, *supra* note 32, at 63–65.

127. Sordillo, *supra* note 82, at 634–35.

128. Belleville v. Family Video Movie Club, Inc., 744 N.E.2d 322, 325 (Ill. App. Ct. 2001) (allowing certified sex therapist with a Ph.D. in sex research to testify as expert witness for the defense); *Showcase Cinemas*, 274 S.E.2d at 580 (finding sufficient evidence presented as to community standards where clinical psychologist testified as expert witness for the State, and expert witness in "psychology, social theory and design and a graduate of numerous theological institutions and a teacher of sexology and sexual dysfunctioning [sic]" testified for one of the defendants); WEAVER, *supra* note 32, at 66; Sordillo, *supra* note 82, at 634–35.

129. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973).

Paris Adult Theatre I, the Court found no constitutional violation where the State's expert witness was a police officer who had conducted a statewide survey on community standards.[130] Most modern courts allow expert evidence to prove the community standards as long as the testimony is "relevant and not misleading to the jury."[131] In *Illinois v. Nelson*, the court held that expert witness testimony was properly excluded since it was not helpful because the data was "clear and self-explanatory so that the jurors should have no difficulty interpreting the results without expert aid."[132]

2. *Surveys and Opinion Polls—Asking the Community*

Surveys and opinion polls provide another source of insight into the standards of the community.[133] While potentially useful to both parties, survey evidence is usually offered by the defense.[134] For the prosecution, commissioning a poll is a strategic decision that must be carefully considered.[135] Given that the State is not required to present evidence of the community standards, the prosecution runs the risk that the results could indicate community acceptance of the material.[136] In such a case, the survey could then become exculpatory evidence benefiting the defense.[137] However, proponents of prosecutorial use of survey evidence have advised that a carefully crafted and conducted survey could be used for years across multiple

130. Miller v. California, 413 U.S. 15, 31 n.12 (1973) (holding no constitutional error where the expert witness was a police officer who had many years of experience dealing with obscenity cases, had testified in other prosecutions, and had conducted an extensive survey).

131. Sordillo, *supra* note 82, at 637–638.

132. Illinois v. Nelson, 410 N.E.2d 476, 479 (Ill. App. Ct. 1980).

133. WEAVER, *supra* note 32, at 71–72 (discussing need for prosecutors to more frequently use survey evidence); Sordillo, *supra* note 82, at 640–641.

134. WEAVER, *supra* note 32, at 72. *See* Sordillo, *supra* note 82, at 645 (explaining that survey evidence can backfire for the prosecution if it reveals acceptance of the materials in the community, but the defense faces no such risk).

135. Sordillo, *supra* note 82, at 645.

136. FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 135 (Bureau of National Affairs, Inc. 1976); Sordillo, *supra* note 82, at 645.

137. SCHAUER, *supra* note 136 (citing Brady v. Maryland, 373 U.S. 83 (1963)); Sordillo, *supra* note 82, at 645.

trials, offering some protection in cases where courts require the State to provide evidence of the standard.[138]

Regardless of which party offers a survey, it must meet certain requirements to be admissible as evidence.[139] When determining whether to admit survey evidence, courts closely examine how precisely the poll touches on the specific issues involved.[140] Since a visual image may be patently offensive but a verbal description of that image may not have the same impact, courts have held that survey evidence is inadmissible where questions are too general and do not properly describe the material at issue.[141] For example, in *United States v. Pryba*, the court held that poll data was properly excluded because it was "not probative on whether the charged materials enjoy community acceptance" since the interviewees were not questioned "regarding the materials at issue or similar materials, but rather . . . [were asked about] their opinions on the viewing of 'nudity and sex,' defined broadly."[142] The court stated that "[c]ommunity acceptance is the touchstone of admissibility," explaining that data that does not actually show acceptance in the community is irrelevant.[143]

Survey questions must also be carefully crafted to ensure relevancy.[144] Also, if the sample size and selection are not based on reliable scientific methods, the evidence will be vulnerable to attack on reliability and validity grounds.[145] In *Illinois v. Nelson*, the appellate court held that exclusion of survey data compiled by an

138. WEAVER, *supra* note 32, at 72.

139. *Id.* at 71.

140. Sordillo, *supra* note 82, at 623.

141. State v. Midwest Pride IV, Inc., 721 N.E.2d 458, 467 (Ohio Ct. App. 1998) (rejecting survey as evidence of community standards because "not a single question in the survey describes the material alleged to be obscene or addresses any of the specific acts shown in the videotapes"); State v. Tee & Bee, Inc., 600 N.W.2d 230, 233 (Wis. Ct. App. 1999) (citing Kenosha v. C & S Mgmt., 588 N.W.2d 236 (Wis. 1999)) (excluding survey results because "survey respondents were not 'sufficiently apprised of the nature of the charged materials,' and, therefore, the survey results were irrelevant"); Sordillo, *supra* note 82, at 642–43 (citing United States v. Pryba, 678 F. Supp. 1225, 1227 n.3, 1229 (E.D. Va. 1988)).

142. United States v. Pryba, 678 F. Supp. 1225, 1229 (E.D. Va. 1988).

143. *Id.* at 1230.

144. Sordillo, *supra* note 82, at 642 (citing *Pryba*, 678 F. Supp. at 1225) (holding survey was irrelevant because pollster's "questions were not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials").

145. WEAVER, *supra* note 32, at 72.

expert in survey research was reversible error.[146] There, the court found that the survey questions were relevant in evaluating the community standards, explaining that "survey evidence may be the only way to prove degrees of acceptability."[147] Similarly, in *Belleville v. Family Video Movie Club, Inc.*, the court held that the trial court erred by excluding survey evidence that was gathered by a law clerk through extensive travel to stores statewide and reviews of similar movies offered throughout the state.[148]

In contrast, in *Pryba*, the court found that the survey data in that case, which was based on a "new approach to the study of community," was "unreliable, unfairly prejudicial, and confusing and misleading to the jury."[149] Finding a similar lack of scientific standards, in *People v. Thomas*, the court upheld the exclusion of survey evidence where the methods used could not be reviewed because the number of people polled and the manner used to select participants was not disclosed.[150] While surveys must be constructed with care, courts have held that "properly conducted opinion surveys may be useful in gauging community standards for the purposes of determining whether the materials at issue are obscene."[151]

3. Comparable Materials—What Else Is Out There . . . and, Is It Selling?

Defendants often try to show that comparable materials are readily available in an attempt to establish that such items are accepted in the community, but courts have consistently held that merely presenting examples of materials available for sale in the community is not

146. Illinois v. Nelson, 410 N.E.2d 476, 479 (Ill. App. Ct. 1980).

147. *Id.* at 479.

148. Belleville v. Family Video Movie Club, 744 N.E.2d 322, 331–32 (Ill. App. Ct. 2001).

149. *Pryba*, 678 F. Supp. at 1232 & n.12 (explaining that the methods used by the sociologist in the "ethnographical" study did not meet the rigorous standards required to be admissible as evidence and were "simply not science").

150. *Belleville*, 744 N.E.2d at 331 (citing People v. Thomas, 346 N.E.2d 190, 194 (Ill. App. Ct. 1976)).

151. *Pryba*, 678 F. Supp. at 1229 (citing United States v. Various Articles of Merch., 750 F.2d 596, 599 (7th Cir. 1984)).

sufficient.[152] A majority of courts apply a test developed in *Womack v. United States* to determine admissibility of comparable materials.[153] The *Womack* test requires that the defendant show: (1) the materials are actually "similar" to the material at issue in the trial, and (2) the comparison materials enjoy a "reasonable degree of community acceptance."[154]

In *State v. Brouwer*, the appellate court held that comparable materials offered by the defendant were properly excluded, even though similar to the materials at issue, explaining that "[w]hile we agree such evidence could be admissible in an obscenity prosecution, here [the defendant] tendered no proof the items offered enjoyed a reasonable degree of acceptance in the local community, such as expert testimony or cable, internet or satellite television provider subscription and sales records."[155] Finding a similar lack of proof of community acceptance, the court in *State v. Haltom* found no abuse of discretion where the trial court excluded video tapes that were available in stores and a hotel nearby.[156] The court held that the materials "demonstrate only that other videos are available in the community" but did not prove acceptance.[157]

Distribution figures for comparable materials have been held to be insufficient as evidence of acceptance, but courts have indicated that sales figures for comparable materials show demand and may be admissible to show acceptance.[158] Arguably, the fact that an industry generates billions of dollars in revenue reflects a certain level of

152. United States v. Kilbride, 507 F. Supp. 2d 1051, 1070 (D. Ariz. 2007) (stating that mere availability of comparable materials is not evidence of community standards); State v. Brouwer, 550 S.E.2d 915, 920–921 (S.C. Ct. App. 2001) (explaining that mere existence of comparable materials in community is insufficient as evidence of values); SCHAUER, *supra* note 136, at 134.

153. *Brouwer*, 550 S.E.2d at 919 (citing Womack v. United States, 294 F.2d 204, 206 (D.C. Cir. 1964)).

154. *Id.* (citing *Womack*, 294 F.2d at 206) ("Although decisions from other jurisdictions are not entirely uniform, the vast majority of state and federal courts have concluded such evidence is admissible subject to the predicate test for admissibility found in *Womack v. United States*.") (citation omitted).

155. *Id.* at 921.

156. State v. Haltom, 653 N.W.2d 232, 239 (Neb. 2002).

157. *Id.* at 239.

158. *Brouwer*, 550 S.E.2d at 921 (citing Flynt v. State, 264 S.E.2d 669, 676 (Ga. Ct. App. 1980)).

acceptance within the community.[159] However, in *State v. Brouwer*, the court rejected a compilation of thirty photocopied cash register receipts showing purchases and rentals of sexually-oriented products, explaining that "such 'self-selected' evidence falls far short of the requisite showing to establish community acceptance."[160]

III. MEETING THE CHALLENGES —MAKING *MILLER* WORK IN THE INTERNET AGE

A. Which Community?—When in Cyberspace, Do as the "Netizens"[161] Do?

The legal standards that govern society must change to keep up with technology.[162] While many critics have called for an end to the use of the "contemporary community standards" test in obscenity cases, it is highly unlikely that *Miller* will be overturned any time soon.[163] As recently as 2002, in *Ashcroft v. ACLU,* a plurality of Justices on the Supreme Court agreed that *Miller*'s "contemporary community standards" test is applicable to the Internet.[164] Therefore, there is a pressing need to make the test function more fairly in the Internet Age.[165] In *Reno v. ACLU,* the Supreme Court described the Internet as a "unique and wholly new medium of worldwide communication."[166] Certainly, the Internet differs from other forms of

159. Calvert & Richards, *supra* note 13, at 9 (quoting defense attorney Paul Cambria) ("It's obvious that [pornography] is acceptable to a large number of people because they're spending literally billions of dollars on adult material. There is no greater barometer of acceptance than people taking their money and allocating it toward something like that.").

160. *Brouwer*, 550 S.E.2d at 921 n.7.

161. Kim & Paddon, *supra* note 33, at 79 (discussing "virtual communities" that consist of "netizens" and exist online, with members spread throughout the world but connected by these communities).

162. Handelman, *supra* note 48, at 737.

163. Robbins & Mason, *supra* note 5, at 531 ("When one attempts to apply the vague *Miller* standards to a real-life situation, the absurdity becomes glaring."). *See* Calvert & Richards, *supra* note 13, at 38; Yun, *supra* note 45, at 358.

164. Yun, *supra* note 45, at 371. *But see* Nitke v. New York, 253 F. Supp. 2d 587, 604 (S.D.N.Y. 2003) (citing Ashcroft v. ACLU, 535 U.S. 564, 586 (2002)) (O'Connor, J., concurring) (explaining that previous obscenity jurisprudence aimed at other forms of media should not bar an as-applied challenge to Internet obscenity statutes based on the community standards test).

165. *See* Kostenko, *supra* note 109, at 126–28 (discussing whether it still makes sense to apply a geographic standard given society's technological advances).

166. Reno v. ACLU, 521 U.S. 844, 850 (1997).

media and presents its own unique opportunities and challenges.[167] One such challenge involves identifying the relevant community in the context of applying obscenity laws.[168] Obscenity convictions can result in prison sentences and steep fines.[169] An inability to define the community is unacceptable because it prevents the defendant from effectively exercising the right to present evidence to prove the community standard.[170]

Since the Internet defies geographical boundaries, the "contemporary community standards" test must take on a different meaning when applied to the Internet.[171] To fulfill the goals of obscenity law, communities are supposed to be able "to protect themselves from exposure to objectionable materials."[172] Therefore, in Internet cases, the relevant community is really the cyber-community, since that is where the materials at issue are actually located.[173] Cyber-communities have been defined as "virtual communities" comprised of "netizens" who "congregate and visit virtual neighborhoods that are spread all over the world."[174] Obscenity on the Internet is invisible to those who do not travel on the Internet.[175] Therefore, it is only appropriate that courts apply the

167. *Nitke*, 253 F. Supp. 2d at 604 (explaining that Internet obscenity statutes have a greater potential to suppress protected speech than those obscenity statutes aimed at other forms of media); Ackerman, *supra* note 11, at 37–38.

168. Ackerman, *supra* note 11, at 41–43; Tehranian, *supra* note 37, at 19.

169. Roth v. United States, 354 U.S. 476, 479 nn.1–2, 492–93 (1957) (holding that the state criminal obscenity statute is constitutional); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (citing Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)) (discussing categories of unprotected speech and stating that criminal punishment for use of "epithets or personal abuse" would not offend the Constitution); Robbins & Mason, *supra* note 5, at 535 (discussing the potential penalties that accompany criminal obscenity convictions).

170. Sordillo, *supra* note 82, at 632 ("But when the community remains undefined, evidentiary problems may arise. How can the defense determine the extent and scope of evidence to put forward on community standards when he or she does not know what 'community' the jury has in mind?").

171. Nitke v. New York, 253 F. Supp. 2d 587, 603–05 (S.D.N.Y. 2003) (citing Ashcroft v. ACLU, 535 U.S. 564, 586 (2002) (O'Connor, J., concurring)); Boyce, *supra* note 7, at 347 (citing ACLU v. Gonzales, 478 F. Supp. 2d 775, 807 n.13 (E.D. Pa. 2007)); Shiff, *supra* note 11, at 765.

172. Shiff, *supra* note 11, at 750.

173. Kaplan, *supra* note 122, at 193 (discussing the application of a cyber-community standard to the Internet); Kim & Paddon, *supra* note 33, at 87.

174. Kim & Paddon, *supra* note 33, at 79.

175. Kaplan, *supra* note 122, at 193–97 (discussing the application of a cyber-community standard to the Internet). *But see* United States v. Extreme Assoc., Inc., 431 F.3d 150, 159–60 (3d Cir. 2005) (declining to make special exceptions under existing obscenity jurisprudence merely because case

standards of the cyber-community.[176] Using a "connection-based definition of community rather than a location-based one" enables online communities to determine their own standards just like a geographical community.[177] A uniform standard is needed for Internet cases to prevent prosecutorial forum shopping, self-censorship, and impermissible restrictions on protected speech.[178]

Despite strong arguments favoring a cyber-community standard, courts have indicated an unwillingness to apply such a standard, holding instead that juries are to judge the materials based on the standards of the community where the material is received.[179] It appears that a local, geographic definition of community will likely continue to be applied to determine whether materials posted on the Internet are obscene.[180] Fortunately, technological advances can provide new tools to help make even local application of the test function more effectively in the Internet environment.[181]

---

involves Internet transmissions since there are many other similarities to cases involving other forms of distribution and three of the charges involve items ordered online but sent through the mail).

176. Kaplan, *supra* note 122, at 193.

177. Kim & Paddon, *supra* note 33, at 87.

178. Calvert & Richards, *supra* note 13, at 17 (citing United States v. Extreme Assoc., Inc. 431 F.3d 150 (3d Cir. 2005)) (explaining prosecutorial forum shopping as in this case where the defendants were charged where the material was downloaded rather than where the material originated); Kim & Paddon, *supra* note 33, at 77–79 (explaining that the nature of the Internet could lead to an "impermissible chill on protected speech because . . . operators cannot select who gets the materials they make available on their bulletin boards"); Jeffrey E. Faucette, *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, 1168 (1995) (discussing how the application of community standards can lead to prosecutorial forum shopping and how the *Thomas* case may have led to Carnegie Mellon University's "hasty ban" of certain Internet newsgroups).

179. United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996) (quoting United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982)) ("[T]here is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent."); United States v. Little, No. 8:07-CR-170-T-24MSS, 2008 WL 151875, at *3 (M.D. Fla. Jan. 16, 2008) (rejecting argument that a worldwide standard must be applied in Internet cases and applying the standards of the community where the materials were downloaded); Calvert & Richards, *supra* note 13, at 17 (discussing forum shopping in United States v. Extreme Assoc., Inc., 431 F.2d 150 (3d Cir. 2005)); Kaplan, *supra* note 122, at 193–94 (explaining the need for a cyber-community standard).

180. *Thomas*, 74 F.3d at 709; *Little*, 2008 WL 151875, at *3 (rejecting worldwide standard for Internet cases).

181. Matt Richtel, *What's Obscene? Defendant Says Google Data Offers a Gauge*, N.Y. TIMES, June 24, 2008, at A1 (introducing Google Trends data, "[defendant's attorney] is trying to show both accessibility and interest in the material within the jurisdiction of the First Circuit Court for Santa Rosa County, where the trial is taking place").

B. "Searching" for the Standard—Proving the Community Values with Search Engine Data

Regarding evidentiary issues, there are two actions that can be taken to make *Miller* more workable. First, the State should be required to present evidence to prove the community standards.[182] Some courts have attempted to take this approach, but have been reversed, and under current law, the prosecution is under no obligation to present evidence to prove the community standards.[183] However, since the jury must determine whether the materials at issue violate community standards, those standards are an element of the offense, and the prosecution should be obligated to prove that element.[184] Even if the court does not provide much-needed clarification on determining the relevant community, forcing the State to prove this element will, in and of itself, trigger an identification of the community. The State will have to identify the community to prove the standard, so that would effectively switch the burden from the defendant to the prosecution, where the burden rightfully belongs.[185]

Second, the courts should allow either party to use new search engine tracking technology to illuminate the standards of the community. Regardless of how the court defines the community, new Internet technology can shed light on the true values of the community.[186] Two such technologies have been created to mine data

182. United States v. Klaw, 350 F.2d 155, 168 (2d Cir. 1965) (holding that motion for directed verdict of acquittal should have been granted because jurors had "absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest").

183. Miami v. Fla. Literary Distrib. Corp., 486 So. 2d 569, 570, 573 (Fla. 1986); Feldschneider v. State, 195 S.E.2d 184, 185 (Ga. Ct. App. 1972) (finding sufficient evidence to uphold obscenity conviction even though prosecution did not produce any evidence defining community standards because "jurors are entitled to use their common sense. . . . [t]hey most likely knew what 'contemporary community standards' are as regards the comic book in evidence, both in Clarke County and in other parts of the State of Georgia, and of the United States"); WEAVER, *supra* note 32, at 61–63.

184. Patterson v. New York, 432 U.S. 197, 204–205 (1977) (quoting *In re* Winship, 397 U.S. 358, 364 (1970) ("The Due Process Clause 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'").

185. *Id.*

186. Miguel Helft, *Google's New Tool Is Meant for Marketers*, N.Y. TIMES, Aug. 6, 2008, at C4 ("The collection of search queries that people type into Google has been called a 'database of intentions' since it is a window into what people are interested in and, sometimes, what they are interested in buying.").

from Google's powerful and popular search engine.[187] The tools, Google Trends and Google Insights, allow a view into the public's online searching habits by "graphically display[ing] the most popular search terms" and allowing "user[s] [to] compare multiple terms' popularity over time."[188] Raymond McCowen proposed to introduce Google Trends data at his criminal obscenity trial, but since that time, Google has released a new tool.[189] Google Insights is a powerful new extension of Google Trends, offering even greater ability to analyze the data by allowing users to "slice the data into finer geographic areas than with Trends . . . ."[190] Since both tools can evaluate information in the aggregate for cities, states, or nations, the information can be assessed for virtually any community the court chooses.[191]

From an evidentiary perspective, those tools can easily meet the requirements for admissibility in obscenity cases. First, since the technology is new, information technology professionals can be brought in as expert witnesses to explain how the tools work, which will meet the requirements of either explaining something a layperson would not normally understand without assistance, or if the jury is particularly computer-savvy, the testimony would most certainly be helpful until the technology is in wide-spread usage and is no longer "new."[192] Also, the data from the tools can be analogized to surveys or opinion polls, but with fewer relevancy issues. Where survey questions must be carefully crafted to ensure the actual issues are reflected in the questions,[193] the Google queries are "crafted" by the searchers themselves, and have "been called a 'database of intentions' since [it provides] a window into what people are interested in."[194]

187. Michelle Conlin, *The Best of 2006: Ideas: The Concepts That Are Reshaping the Business World—And All of Our Lives*, BUS. WK.., Dec. 18, 2006, at 96; Helft, *supra* note 186; Hesse, *supra* note 34.

188. Helft, *supra* note 186; Hesse, *supra* note 34.

189. Helft, *supra* note 186.

190. *Id.*

191. *Id.*

192. Sordillo, *supra* note 82, at 634–35.

193. WEAVER, *supra* note 32, at 71; Sordillo, *supra* note 82, at 640–641.

194. Helft, *supra* note 186.

While some may argue that interpretation of the searchers' intentions presents a problem, Google Insights provides clarification by differentiating between terms so that "[u]sers can slice the data by categories to distinguish, for example, searches for Apple the company and apple the fruit."[195] According to Google Trends, Pompano Beach, Florida ranked in the top five cities whose residents routinely search "salacious" topics[196] and "people are at least as interested in group sex and orgies as they are in apple pie."[197] Arguably, the mere fact that a term is searched reflects, at a minimum, interest in the subject. And, since a certain number of searches are required before the data will register, a reasonable sample size is assured.[198]

Additionally, search engine data illuminates the standard by providing access in an objective way, allowing the necessary insight without concerns about a lack of candor that can sometimes pose a problem on surveys.[199] Especially in cases involving sensitive topics such as pornography and sex, sometimes there will be "jurors sitting on a jury panel who will condemn material that they routinely consume in private."[200] These tools provide that insight without self-reporting of the interviewees and the lack of candor that can accompany polls and surveys.[201]

In the Internet equivalent of an evidentiary offering of comparable materials, a defense attorney in a federal obscenity trial brought in a computer and ran standard Google searches to show the jury the broad array of pornographic material that is available on the

195. *Id.*

196. Michael Mooney, *Google Trends Reveals South Florida's Penchant for Salacious Searches*, MIAMI NEWS TIMES, July 17, 2008, *available at* 2008 WLNR 13651625.

197. Richtel, *supra* note 181 (quoting Raymond McGowen's defense attorney).

198. Steve Adams, *Popularity Contest: New Google Tool Allows Businesses to Gauge Interest by City*, PATRIOT LEDGER, Aug. 5, 2006, at 36 ("Now Google Trends enables visitors to enter any search term that generates a significant amount of traffic and receive a list of the ten cities or regions where the term is queried most frequently.").

199. Richtel, *supra* note 181 (quoting defense attorney) ("[W]e can show how people really think and feel and act in their own homes . . . .").

200. *Id.*

201. *Id.* (defense attorney commenting on how jurors sometimes condemn material during a trial that they consume in the privacy of their own homes).

Internet.[202] He then ran searches for well-known sports figures to show, that by comparison, there are far more pornographic sites than sites discussing other popular interests.[203] While the court allowed the demonstration, the searches did not sway the jury, as convictions were returned on all counts.[204] Those searches, however, merely showed that similar materials were available on the Internet, without reflecting acceptance of those materials.

This is not the case with the Google Trends and Google Insights data. Originally created to help marketers track interest in their products and websites, these tools actually reflect access and interest, since Internet users actively engage the search engine and seek out the information reflected.[205] The information provided by these new technological tools is analogous to sales figures, rather than distribution figures, in that it reflects affirmative action that has been taken on the part of searcher seeking the material, as opposed to merely showing what material is available.[206] Unlike standard searches, the data from Google Trends or Google Insights can satisfy the *Womack* test for admissibility.[207] The proponent of the evidence can ensure that the searches are for "similar" materials to those at issue by actually viewing samples of the sites pulled down by particular search terms.[208] Acceptance is shown since searchers actively sought the material, rather than it merely being available with no way to gauge whether anyone accepted it or was even interested in it.[209]

Recognition of the value of Google search engine data is not new.[210] The Attorney General, in *Gonzales v. Google, Inc.*,

202. *Id.*
203. *Id.*
204. *Id.*
205. Helft, *supra* note 186.
206. Helft, *supra* note 186.
207. *See generally* State v. Brouwer, 550 S.E.2d 915, 918–21 (S.C. Ct. App. 2001) (explaining the *Womack* test).
208. *Id.* at 920 (explaining that to satisfy the first prong of the *Womack* test, "the materials being compared [must be] in fact 'similar' . . . .").
209. *Id.* (explaining that "[m]ere availability of similar material by itself" is not sufficient to establish acceptance in the community).
210. Gonzales v. Google, Inc., 234 F.R.D. 674, 678 (N.D. Cal. 2006).

subpoenaed Google for search engine data to show the effectiveness of parental filters.[211] The federal government sought a significant number of search queries entered by Google users and Google objected, fighting to protect the privacy of its customers.[212] Google has now created its own tools to allow the public to benefit from mining of its data without compromising the privacy of its users.[213]

CONCLUSION

Under current law, whether material is obscene is determined by applying the three-prong *Miller* test, which requires the trier of fact to apply contemporary community standards to two of the three prongs of the conjunctive test.[214] While there are compelling arguments against using the *Miller* test in Internet cases,[215] the courts seem to be favoring its application.[216] In light of this, three actions can be taken to make the *Miller* test operate more fairly and effectively in the Internet Age.

First, it is crucial that the relevant community be easily identifiable so the defense can exercise its right to present relevant evidence.[217] For Internet cases, the community should be a cyber-community rather than a geographic community, since the materials at issue are actually located in cyberspace.[218] If the relevant community is a cyber-community, then the allegedly obscene materials will be judged based on the community standards of the Internet.[219] Despite

211. *Id.* at 678–79.

212. *Id.* at 679.

213. *See generally* Helft, *supra* note 186; Richtel, *supra* note 181.

214. *See* discussion *supra* Part I.

215. *See* discussion *supra* Part II; Kim & Paddon, *supra* note 33, at 80 (quoting JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 32 (1st ed. 1996)) ("In defining community standard in *Miller*, the Supreme Court 'neither anticipated nor took into account the rapid advances in computer technology . . . [t]he rapid growth of national and global computer networks . . . [that] have allowed persons to interact without geographic constraints in a nonphysical universe called cyberspace.'").

216. *See* discussion *supra* Part II; United States v. Extreme Assoc., Inc., 431 F.3d 150, 160 (3d Cir. 2005) (declining to make special exceptions under existing obscenity jurisprudence merely because case involves Internet transmissions); Shiff, *supra* note 11, at 744–45 (citing United States v. Thomas, 74 F.3d 701, 704–05 (6th Cir. 1996)).

217. Sordillo, *supra* note 82, at 632.

218. *See* discussion *supra* Part III; Kim & Paddon, *supra* note 33, at 81.

219. Kim & Paddon, *supra* note 33, at 81.

strong arguments for such a standard, early cases reveal a reluctance to apply an Internet-based standard, as courts have chosen instead to apply the standards of the community where the material is sent or received.[220]

Second, regardless of how the court defines the community, the State should be required to prove the community standards.[221] Under current law, the State can choose to submit the materials at issue as the only proof of whether those materials are obscene.[222] Obscenity charges are serious criminal offenses with convictions resulting in prison sentences and steep fines.[223] Requiring the State to prove all the elements of a charge before taking away someone's liberty is a fundamental principle of our law under the Due Process Clause.[224] If the State alleges that the material violates a particular standard, then the State should have to prove exactly what that standard is.

And finally, new technologies should be utilized to help illuminate the community standards.[225] Currently, Google has two tools available that can shed light on the values and standards of almost any community by showing which terms the residents of the community are most commonly searching.[226] If the *Miller* test is going to continue to be applied, the court must be open to allowing new technology to provide valuable insight so that the test can function more effectively and fairly in the Internet Age.

---

220. *Thomas*, 74 F.3d at 709 (quoting United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982)) ("[T]here is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent."); United States v. Little, No. 8:07-CR-170-T-24MSS, 2008 WL 151875, at *4 (M.D. Fla. Jan. 16, 2008) (rejecting argument that a worldwide standard must be applied in Internet cases and applying the standards of the community where the materials were downloaded).

221. *See* discussion *supra* Part III; United States v. Klaw, 350 F.2d 155, 168 (2d Cir. 1965).

222. United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969) ("Simply stated, hard core pornography . . . can and does speak for itself."); SCHAUER, *supra* note 136, at 132.

223. Roth v. United States, 354 U.S. 476, 492–93 (1957) (holding that the state criminal obscenity statute is constitutional); Robbins & Mason, *supra* note 5, at 535 (discussing the potential penalties that accompany criminal obscenity convictions).

224. Patterson v. New York, 432 U.S. 197, 204 (1977).

225. *See* discussion *supra* Part III.

226. *See* Richtel, *supra* note 181.