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Journal of Intellectual Property Law

Volume 11 | Issue 1 Article 7

April 2016

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JOURNAL OF INTELLECTUAL PROPERTY LAW

VOLUME 11 FALL 2003 NUMBER 1

ARTICLES

SANITIZING CYBERSPACE: OBSCENITY, *MILLER*, AND THE FUTURE OF PUBLIC DISCOURSE ON THE INTERNET

*John Tehranian**

I. INTRODUCTION

Upon hearing the obstreperous thump of a man incessantly pounding his bongo drums in the public park, writer Donald Barthelme once observed: "I hate bongo drums. I started to tell him to stop playing those goddamn bongo drums but then I said to myself, No, that's not right. You got to let him play his goddamn bongo drums if he feels like it, it's part of the misery of democracy, to which I subscribe."[1]

To be sure, the misery of democracy dictates that we tolerate viewpoints other than our own, that we let people play the bongo drums, however begrudgingly. But it is not merely for the misery of democracy that we protect the right of individuals to pound the drums. Bongos can add to the richness of public discourse. This simple but controversial proposition, as applied to obscenity jurisprudence, is the focus of this Article.

From its very inception, obscenity jurisprudence in the Supreme Court has had a troubled and "tortured history."[2] Nevertheless, the Court has desperately tried to enunciate a constitutional standard for obscenity that is consistent with the First Amendment and that enables communities to safeguard morals by

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[1] Donald Barthelme, *I Bought a Little City*, SIXTY STORIES 295, 296 (1982).

[2] Miller v. California, 413 U.S. 15, 20 (1973).

proscribing certain forms of sexually explicit speech—a goal that has proven quite elusive. Justice Potter Stewart preceded his infamous declaration, "I know it when I see it,"[3] with the concession that the obscenity category may be incapable of "intelligibl[e]" definition. Stewart's formulation of obscenity was, by his own admission, notoriously vague, and the ultimate constitutional standard adopted by the Supreme Court—the *Miller* test—has not fared much better.

Enunciated by the Court in 1973, the *Miller* standard has remained the definitive criteria for determining the constitutional permissibility of regulations against certain forms of sexually explicit speech. To proscribe a particular work without violating the First Amendment, a trier of fact must 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.[4]

If the work satisfies all three criteria, it falls outside of the protection of the First Amendment and can be censored by the state.

At the moment of its enunciation, the Supreme Court's modern obscenity standard came under fire. In his dissent in *Miller*, Justice Douglas argued that "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."[5] The problem with the *Miller* standard, however, is far graver than even Justice Douglas envisioned. From a libertarian perspective, the *Miller* standard clearly violates the notion of individual autonomy and the concept of a strictly limited government. But one need not fetishize the right to be left alone or embrace a Kantian vision of the First Amendment,[6] based on the "right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others,"[7] to find fault with the *Miller* standard. *Miller* runs afoul of

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[3] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[4] *Miller*, 413 U.S. at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

[5] *Miller*, 413 U.S. at 43-44 (Douglas, J., dissenting).

[6] *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Bobbs-Merill, 1969) (1959); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (Bobbs-Merrill, 1965) (expressing Kant's influential idea that the individual should be treated as an end, entitled to autonomy and dignity).

[7] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV.

a collectivist theory of the First Amendment,[8] which promotes the value of free speech in producing a public capable of self-government and democratic deliberation. By stark contract to the existing literature analyzing obscenity jurisprudence, the principal focus of this Article is the conflict between *Miller* and a collectivist vision of free speech.

The disjuncture between modern obscenity jurisprudence and the development of a rich public discourse is of particular importance with the increasing use of the Internet as an expressive medium. Regulation of content on the Internet is well under way, and the direction that obscenity jurisprudence takes will play a vital role in determining the richness of the public discourse in the cyberage. This Article casts a particular eye towards the recent wave of legislation seeking to regulate obscenity in cyberspace and towards two related Supreme Court decisions: *Ashcroft v. Free Speech Coalition*[9] and *Ashcroft v. American Civil Liberties Union*.[10] As an analysis of these recent cases demonstrates, obscenity jurisprudence threatens to stifle the richness of public discourse by miring itself in the same problematic standard that predated the cyberage: the *Miller* test. Consequently, it is especially important that the courts and Congress begin to reconsider the *Miller* standard and the very notion of obscenity regulation.

To this effect, Part II of the Article will attempt to deconstruct the Supreme Court's current obscenity standard by demonstrating its fundamental disjunction with the philosophical underpinnings of other First Amendment jurisprudence. As I will argue, the *Miller* test contradicts the crux of free speech doctrine by undermining the relative freedom of the realm of representation vis-à-vis the realm of action, by abandoning a harm-based analysis for the regulation of expression, by condoning viewpoint discrimination, and by violating a trust in the individual that is essential to constitutional democracy. Part III will then make a positive case against the *Miller* standard by subverting the test's tacit assumptions, by revealing its increasing lack of workability, and by demonstrating the failure of the *Miller* standard to conform to a collectivist theory of the First Amendment. As I will argue, the sexual is political; consequently, the *Miller* test threatens to remove vital matter from the public discourse. Finally, Part IV will demonstrate by examining the Supreme Court's recent jurisprudence on government regulation of Internet content why a re-examination of *Miller* is particularly critical at this time.

225, 233 (1992).

[8] *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS 268 (1995) (noting that Robert Post dubs the Meiklejohn/Fiss perspective on free speech the "collective" theory).

[9] 535 U.S. 234 (2002).

[10] 535 U.S. 564 (2002).

II. THE CONTRADICTIONS OF OBSCENITY LAW: *MILLER*'S INCONSISTENCIES WITH FIRST AMENDMENT JURISPRUDENCE

A. BETWEEN REPRESENTATION AND ACTION

The fundamental disjuncture of modern obscenity jurisprudence from several critical facets of First Amendment doctrine forms the crux of the negative case against the *Miller* standard. To begin with, obscenity laws are based upon the bizarre premise that sexually explicit expression is more dangerous than sexually explicit action. As such, obscenity jurisprudence topples traditional First Amendment values, which emphasize the importance of an expansive expressive realm.

The First Amendment upholds the Enlightenment ideal that freedom of expression is essential for the creation of a rich public discourse and for the development of a democratic citizenry. As such, traditional free speech jurisprudence has held that liberties in the realm of expression must remain broader than liberties in the realm of action. This notion is true with respect to all areas of expression, except for obscenity. While the law does prohibit certain forms of sexual conduct, the sphere of sexual representation is even more restrictive. As David Cole argues,

> Central to the First Amendment tradition is the notion that one has broader freedom in one's expression than in one's acts. When it comes to sex, however, the rule is reversed. While sexual conduct is far from unregulated, constitutional law permits more extensive regulation of the public representation of sexual behavior than of the behavior itself. As construed by the Supreme Court, the First Amendment not only fails to protect representations of *illegal* sexual conduct; it permits the state to criminalize the representation of sexual conduct that is itself legal to engage in.[11]

As a result, the law oddly suggests that there is something more dangerous about the representation of sex than the act of sex itself—a most perplexing premise indeed.

Far from representing an antiquated relic of Victorian times, this paradoxical notion has gained increasing expression in the law. In 1996, Congress passed the Child Pornography Prevention Act of 1996 ("CPPA"),[12] legislation that

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[11] David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 114 (1994) (emphasis in original).

[12] 18 U.S.C. §§ 2251, 2252, 2252A, 2256 (2000).

proscribed media *appearing* to depict children engaged in sexual activity.[13] Of course, child pornography has fallen outside of the realm of First Amendment protection ever since the Supreme Court's landmark decision in *New York v. Ferber*.[14] Noting the compelling state interest in the protection of minors[15] and the intrinsic and inextricable link between the creation of child pornography and the abuse of children,[16] the Court rationalized that crimes committed against real children during the creation of child pornography justified its flat restriction.

However, the CPPA sought to do something else altogether—it made the representation of sexual activity by performers who *appear to be* children criminally punishable.[17] Thus, it was not the direct exploitation of children used to make pornographic movies (a harm-based rationale for traditional anti-child pornography legislation) that Congress had hoped to remedy, but the very representation of such acts, whether real or not, simply because they manifested an evil idea.[18]

While the Ninth Circuit struck down the CPPA primarily on overbreadth and vagueness grounds,[19] four circuits upheld the Act.[20] It therefore took the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*[21] to ultimately strike down the CPPA as unconstitutional. The consequences of the CPPA, had it been held constitutional, are particularly disturbing. It would have been perfectly legal for a couple of majority age to engage in sexual conduct; however, if their sexual conduct were depicted in media of any kind and one of them appeared to be under the age of eighteen, their activity would have been criminally punishable. Moreover, such classic works as *Lolita* and *Romeo and Juliet* would have constituted prohibited content under the CPPA.

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[13] 18 U.S.C. § 2256(8)(C) (2000).

[14] 458 U.S. 747 (1982).

[15] *Id.* at 756-57.

[16] *Id.* at 759.

[17] 18 U.S.C. §§ 2256(8), 2256(11) (2000).

[18] Ironically, the decriminalization of virtual child pornography could actually reduce the demand for real child pornography. As Arnold Loewy argues,

>]I]f virtual child pornography is (or can be made) nearly identical to real child pornography and only the latter is unlawful, why wouldn't the pornographer sell only the former? Certainly most pornographers would love to avoid the risk of prison if their anticipated profit would not be compromised. And, from the consumer's perspective, a virtual picture would also shield him from prosecution.

Arnold H. Loewy, *Taking Free Speech Seriously: The United States Supreme Court and Virtual Child Pornography*, UNIVERSITY OF NORTH CAROLINA–CHAPEL HILL SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER Series No. 02-17, at 9 (Nov. 2002).

[19] Free Speech Coalition v. Reno, 198 F.3d 1083, 1096-97 (9th Cir. 1999).

[20] United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).

[21] 535 U.S. 234 (2002).

Despite the Supreme Court's ruling, the passage and enforcement of the CPPA signifies that, in the sexual realm, the law continues to seek to provide individuals with greater freedom of action than of expression.

B. THE ABSENCE OF A HARM-BASED ANALYSIS OF OBSCENITY

At the same time, the *Miller* test eschews the traditional harm-based analysis of other First Amendment jurisprudence. Unlike most areas of First Amendment law, where courts balance potential societal harms with the constitutionally protected interest in free speech, obscenity jurisprudence limits some sexually explicit speech on the grounds of basic offense to moral values and community standards. Ironically though, the Supreme Court has rejected the rationale of moral offense as the basis for regulating free speech in a number of other areas, including those where action is blurred by speech. Simply witness the flag burning cases[22] as well as *Cohen v. California*.[23]

Moreover, in other areas of unprotected speech such as malicious libel, perjury, imminent incitements to violence and lawlessness, some form of tangible, real-world harm justifies their proscription. Each of these proscribed forms of speech conflicts with some other constitutional value, be it the rule of law, the right to privacy, or the requirement of a fair trial. In the realm of child pornography, there is a blanket restriction on such material precisely because "creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive."[24] Thus, the regulation of the speech is directly based upon underlying criminal conduct with a proven victim.

However, the regulation of obscenity does not rest on the demonstration of real harm by the state. If any justification of sexually explicit speech is warranted, it lies in the tangible, real-world harm model advanced by Catherine MacKinnon and Andrea Dworkin in their work linking pornography to gender inequality and oppression.[25]

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[22] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding a Texas statute criminalizing the discretion of venerated objects, including the United States flag, unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration since "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); United States v. Eichman, 496 U.S. 310, 319 (1990) (holding the Federal Flag Protection Act of 1989 unconstitutional on similar grounds).

[23] 403 U.S. 15 (1971) (holding that the California statute criminalizing breach of peace was unconstitutional as applied to an individual who wore a jacket bearing the words "Fuck the Draft" in a courthouse corridor since, *inter alia*, mere word offense at the language used was not was not sufficient to warrant repression of the speech).

[24] *Ashcroft*, 535 U.S. at 254.

[25] *See, e.g.*, CATHERINE A. MACKINNON, ONLY WORDS (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); Catherine A.

The high irony of modern obscenity law and its disjuncture with other First Amendment jurisprudence can be summed up with the following sampling of case law: Nazis have a First Amendment right to terrorize the large Jewish community and numerous Holocaust survivors in Skokie, Illinois;[26] the Ku Klux Klan has a First Amendment right to spread invective, hate, and a message fundamentally at odds with the Fourteenth Amendment in Ohio and can freely advocate "revengeance" against blacks and Jews, so long as their words do not produce imminent lawless action;[27] and racists in St. Paul, Minnesota can burn crosses and display Nazi swastikas as a means to intimidate and drive away non-white members of the community since the city cannot pass an ordinance proscribing such behavior;[28] but in some communities, a museum curator cannot display a sexually explicit Robert Mapplethorpe photograph.

C. OBSCENITY AS A PROXY FOR VIEWPOINT DISCRIMINATION

Moreover, the *Miller* test inverts the traditional First Amendment view that disagreement with a point of view is a reason to protect speech, not to censor it. As David Cole argues, "ordinarily the fact that the majority finds particular speech offensive is a reason to protect it; when it comes to sexual expression, however, community offense is the justification for suppression."[29]

According to the *Miller* test, potentially obscene speech with serious literary, artistic, political, or scientific value is treated differently than speech without such value. Defining such value, however, is a tricky proposition. Typically, judicial and jury expeditions into this realm turn into proxies for viewpoint discrimination without any justifications for such viewpoint discrimination based on overriding harms.[30] Offense to community standards is a mere proxy for viewpoint disagreement, and this is a violation of the bedrock principle: that one cannot proscribe speech based on a disagreement with its message.[31] For example, in

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MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R-C.L. L. REV. 1 (1985); Catherine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

[26] Nat'l Socialist Party v. Village of Skokie, 434 U.S. 1327 (1977); *see also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978).

[27] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[28] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). *But see* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (drawing a sharp distinction between regulation of speech and conduct and enabling states to issue more severe criminal penalties for racially-motivated acts of violence).

[29] Cole, *supra* note 11, at 115.

[30] *See* Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993); William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

[31] Texas v. Johnson, 491 U.S. 397, 414 (1989).

both *Texas v. Johnson*[32] and *Cohen v. California*,[33] offense to passers-by was not recognized as a sufficient reason to suppress speech, even when it involved something as emotionally invective as the burning of the flag or desecrating the hallowed grounds of the judiciary. In fact, the statutes at issue in both *Cohen* and *Johnson* were struck down precisely because they invoked viewpoint discrimination under the vague guise of moral offense. One would logically imagine that with respect to sexually explicit material, the prohibition against viewpoint discrimination would apply with equal vigor. However, this is simply not the case.

Admittedly, some theorists have disputed the claim that the obscenity standard is a mere proxy for viewpoint discrimination. As they argue, anti-obscenity laws adhere to the notion of viewpoint neutrality since they attack the harm caused by the speech, not the viewpoint contained in it.[34] However, two observations shatter this illusion. First, as noted above, obscenity law is peculiar in that it allows the proscription of the representation of an act, when the underlying act itself remains legally permissible. Thus, barring a twisted argument that representation of an action is more harmful than the action itself (a truly illogical proposition), the current obscenity standard clearly does not consistently target an underlying harm.

Second, the harm described in the obscenity standard is an offense to community morality, which represents nothing more than community disagreement with the message sent through the allegedly obscene speech. As Justice Stewart argued, the constitutional guarantee of free speech "is not confined to the expression of ideas that are conventional or shared by the majority."[35] But unfortunately, the *Miller* test confines sexually explicit free speech to just that—conventional messages shared by the majority. By emphasizing local community standards, prurient interest, and a remarkably subjective test for value, the *Miller* test essentially allows judges and juries to cloak their viewpoint disagreement with a sexually explicit speech product in the guise of the obscenity construct.

In the time since *Miller*'s enunciation, the Supreme Court has tacitly acknowledged some of the shortcomings in *Miller* by attempting to remove local standards from the third prong of the *Miller* test. In *Pope v. Illinois*,[36] for example, the majority gently tweaked the *Miller* test by arguing that the literary, artistic, political, or scientific value of a work should be judged by a reasonable person standard,

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[32] *Johnson*, 491 U.S. at 409-10

[33] 403 U.S. 15, 21-22 (1971).

[34] *See* Kagan, *supra* note 30, at 878 (noting that a number of observers have made such a point). *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 212 (1987); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 612 (1986).

[35] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

[36] 481 U.S. 497 (1987).

not by the standards of the local community in question.[37] As even the state of Illinois conceded in the proceedings, however, this alteration makes little difference in the *Miller* analysis: An individual juror's view of a reasonable person standard will inextricably be tied with what she thinks members of her community would find valuable.[38]

Voltaire's famous mantra, "I disapprove of what you say, but I will defend to death your right to say it,"[39] encapsulates a cornerstone principle of First Amendment jurisprudence. Obscenity law, as epitomized by the *Miller* test, completely inverts this notion. As the *Miller* test dictates, a defendant has no right to certain forms of sexually explicit speech precisely because a juror disapproves of and takes offense to what he says.

D. THE RIGHT TO VOTE AT THE POLLING BOOTH, THE RIGHT TO VOTE IN THE MARKETPLACE OF IDEAS

Finally, the obscenity doctrine betrays any faith in the ability of individuals to make decisions for themselves, another core principle of our constitutional democracy and the First Amendment. As the ultimate tool of democracy, the First Amendment ensures a robust public debate in order to facilitate individual self-determination and sovereignty by the people. However, while our constitutional democracy trusts individuals to make political decisions through the exercise of the franchise, the obscenity standard does not trust individuals to vote properly in the marketplace of ideas. As James Branit argues, "For a popular majority or a court to say to an individual that she may not speak or listen to a certain type of speech because that speech does not express valuable ideas is to prevent that individual's self-fulfillment."[40]

Censorship is more insidious, however, than even Branit suggests: It also handicaps the ability of individuals to make decisions for the body politic and prevents them from practicing their skills in electing what to read and what not to read. As Meiklejohn concludes,

> [T]he authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government. It is "reserved

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[37] *Id.* at 500-01.

[38] Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1580 (1988).

[39] S.G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 199 (1907), *quoted in* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 63 (1976).

[40] James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J. L. & PUB. POL'Y 429, 430 n.9 (1986).

> to the people," each deciding for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention.[41]

It is paradoxical to trust citizens to vote and decide on the political fate of their nation but not to allow them to select the kind of arts and literature to which they desire to expose themselves. Indeed, the daily practice that we, as citizens, obtain in exercising our freedom in the economic marketplace and in the marketplace of ideas—as expressed through arts and literature—prepares us for the biennial exercise of our freedom at the voting booth.

III. OBSCENITY AND SOCIAL STRUCTURE: A COLLECTIVIST REFUTATION OF THE *MILLER* TEST

As Part II demonstrates, the *Miller* test is fundamentally at odds with several basic cornerstones of First Amendment jurisprudence. Together, these contradictions form a significant negative case against continued use of the *Miller* standard. The case against *Miller*, however, is much more compelling than this. As an examination of the link between social structure and obscenity jurisprudence suggests, *Miller* does something much more insidious and damaging than merely violating Kantian freedoms: *Miller* diminishes the richness of public discourse by silencing voices at the margins and by empowering local communities to exercise a crippling heckler's veto.

A. THE SEXUAL IS POLITICAL

1. Rich Public Discourse, Broadly Understood. Wordsworth once stated that a writer had not really achieved greatness until he or she was attacked as incomprehensible and pathetic. Wordsworth may well have added obscene to the list. Much of the art we now consider to be part of the literary canon suffered through a period of popular revulsion replete with cries of obscenity and calls for censorship. Despite this humbling history of censorship gone awry, *Roth*, *Miller*, and their progeny carry a tacit assumption that sexually explicit works are not worthy of the full protection of the First Amendment. Even when declared non-obscene, sexually explicit speech has faced significant constraints.[42] Following the theory that the First Amendment exalts political and public policy discourse, some

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[41] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262 (1961).

[42] *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996); F.C.C. v. Pac. Found., 438 U.S. 726 (1978); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970).

members of the Court have even subscribed to the notion of sexually explicit expression as low value speech vis-à-vis core, political speech. Harry Kalven, Jr., for example, claimed, "The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres."[43] However, Kalven takes too limited a view of the communicative impact of arts and literature in developing the voter-citizen and in shaping values that eventually translate into politics. As even Alexander Meiklejohn eventually acknowledged, forms of literature and art can give voters "the knowledge, intelligence, sensitivity to human values [and] capacity for sane and objective judgment which, so far as possible, a ballot should express."[44]

Indeed, works falling into the category of obscenity as defined by *Miller* can contribute to public debate and discourse and, as such, deserve core First Amendment protection. Chief Justice Burger wrote in the *Miller* majority opinion, "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[45] However, Burger's conception that obscene material is inevitably motivated by commercial exploitation is far too narrow and uninformed; it ignores the impact that allegedly obscene material can have in leading the way "toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."[46] Moreover, Burger and Kalvens' views are subverted by the simple observation that the *sexual is political.*

2. Sex, Civilization, and the Law. Our puritanical roots as a nation and our large stake in the careful divide between the public and private spheres may cause us to deny the essential truth to the claim that the sexual is political. Sexuality is an inherent part of life, however, and inextricably finds itself tangled with political matters. After all, the most politicized and hotly debated topics of the day often

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[43] Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16 (1960).

[44] Meiklejohn, *supra* note 41, at 256.

[45] Miller v. California, 413 U.S. 15, 34 (1973). Indeed, Burger was not troubled by the potential chilling effect of the *Miller* standard on all forms of sexual speech, arguing that there was no

> threat to genuine First Amendment values to have commercial porno-peddlers feel some unease. For me the First Amendment was made to protect commerce in *ideas*, but even at that I would go a long way concerning *ideas* on the subject that has had a high place in the human animal's consciousness for several thousand years. In short a little "chill" will do some of the "pornos" no great harm and it might be good for the country.

BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 203 (1979) (emphasis in original).

[46] Meiklejohn, *supra* note 41, at 257.

involve issues of sexuality,[47] running the gamut from sex education, anti-gay legislation, and anti-pornography measures to attacks on sexually-themed art, debates over homosexuality in the military, and political rhetoric over family values in national campaigns. In invalidating a state ban on a movie based on *Lady Chatterley's Lover*, Justice Stewart wrote that the First Amendment "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[48] This stance can be rationalized through the simple observation that the sexual is indeed political and that sexual expression can contribute to robust public debate.

Without delving too deeply into sociology, psychology, or philosophy, it is instructive to point out the work of several authors in demonstrating this link and the relevance of this work to the modern obscenity doctrine. Freud's masterpiece, *Civilization and Its Discontents*, asserts the view that sexual repression and sublimation are necessary in order to build and maintain a civilization.[49] It is intriguing to note that current obscenity jurisprudence conforms to the Freudian model of sexual repression by vigorously policing the public/private split and carefully monitoring the flow of sexually explicit material into the public arena. Curiously, obscenity in the home is immune from suppression,[50] but obscenity in any other context remains subject to state regulation. Here, as David Cole points out, "the Court's sexual speech doctrine functions less to permit the suppression of sexual expression than to permit its repression from the visible 'public' sphere, just as, in Freud's view, the psyche banishes unwelcome sexual thoughts to the unconscious, but cannot extinguish them altogether."[51]

Michel Foucault's *The History of Sexuality* further uncovers the links among power, politics, and the construction of sexuality. As he argues, sexuality

> is the name that can be given to a historical construct: not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistances, are linked to one another.[52]

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[47] Cole, *supra* note 11, at 122.

[48] Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

[49] SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 64-74 (James Strachey ed. & trans., 1961).

[50] *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (asserting that individuals have a First Amendment right to the private possession of obscene materials and that the state cannot criminalize that possession).

[51] Cole, *supra* note 11, at 161.

[52] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 105-06 (Robert

Foucault points to the transformation in attitudes toward homosexuality from ancient Greek civilization to contemporary society, noting the vast changes and the accompanying political forces behind these changes.[53] The sexual is inextricably political and sexually explicit material (obscene to some) can constitute a part of the rich public discourse by calling attention to and deconstructing sexual norms and notions of propriety that form the underpinnings of the political order of our society.

At this point, it is important to limit the scope of my argument. This Article does not seek to claim that all sexually explicit material currently deemed obscene is philosophically transcendent and enriching of the public discourse—far from it. As Cass Sunstein correctly points out, "[m]any forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids."[54] Nevertheless, it does not necessarily follow that they "do not qualify for top-tier First Amendment protection."[55] Indeed, the First Amendment dictates that the state must allow some garbage to enter the public sphere so that voters can determine for themselves what materials will help in their quest to become fully actualized citizens and human beings. Hence, in the area of incitement speech, both civil rights groups advocating conscientious objection to segregation laws in the South and Ku Klux Klansmen denouncing the notion of racial equality both enjoy a similar right to their speech, so long as they do not cross the line and advocate imminent lawlessness.[56] As repulsive and repugnant as the views of Klan may be, without providing some leeway for the littering of the public sphere, the state would suppress countless works of social import and would damage the scope and vitality of public discourse.

As the Supreme Court determined in *Schneider v. State*,[57] a municipal ban on the public distribution of leaflets represented a violation of the First Amendment, despite the community's interest in minimizing litter cost. "We are of the opinion that the purpose to keep the streets clean . . . is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."[58]

Simply put, *litter is a price we pay for the First Amendment.* As Justice Black noted in his famous dissent in *Feiner v. New York*,[59] the state has an obligation to protect

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Hurley trans., Vintage Books 1990) (1978), *quoted in* Cole, *supra* note 11, at 158.

[53] 2 MICHEL FOUCAULT, THE USES OF PLEASURE: THE HISTORY OF SEXUALITY (Robert Hurley trans., Pantheon Books 1986) (1984).

[54] Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807-08 (1993).

[55] *Id.*

[56] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[57] 308 U.S. 147 (1939).

[58] *Id.* at 162.

[59] 340 U.S. 315 (1951).

an unpopular speaker from a heckler's veto, even when the cost of that protection outweighs the cost of stopping the speaker. Cass Sunstein takes this argument one step further, maintaining that citizens of any healthy republic *should* be exposed to materials that they would not seek out, particularly in the information age.[60] The digital revolution has provided individuals with the ability to perfect customization of the content to which they are exposed.[61] Despite the clear benefits to the individual Internet user, such hyper-customization can constitute a corrosive social force by increasing social fragmentation and limiting the exposure of citizens to diverse points of view, including those to which they stand diametrically opposed.[62] At worst, exposure to material that one would not ordinarily seek may create some mild discomfort and irritation; however, it also advances social pluralism and opposes anti-democratic tendencies toward insularity. Thus, while sexually explicit material may offend the morals of some, this is a cost society must bear in order to protect the diversity of the marketplace of ideas and to ensure the robust public debate necessary for a functioning democracy.

3. Behind the Green Door: A Case Study. A simple example of obscenity regulation may help to illustrate the crux of my argument in this Section. As a means to denounce the obscenity standard, one could point to attempts to ban Nathaniel Hawthorne's *The Scarlet Letter*,[63] James Joyce's *Ulysses*,[64] or countless other works now considered part of the literary canon.[65] Abundantly cited in countless law review articles, those works have become rallying cries for the anti-*Miller* brigade. It has almost become truistic among the American cognoscenti and legal elite to state that such works are entitled to First Amendment protection, and any attempt by a local community standard to deny them such protection is unconstitutional.[66]

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[60] CASS SUNSTEIN, REPUBLIC.COM 9 (2001).

[61] NICOLAS NEGROPONTE, BEING DIGITAL 153 (1995).

[62] *See* SUNSTEIN, *supra* note 60, at 53. At the same time, of course, the Internet can serve as a democratic tool in non-democratic countries by allowing users to access ideas that authoritarian governments have successfully suppressed in other media and in democratic countries by allowing groups with "rooms of their own" or private spaces in which they can develop and harness their political message.

[63] *See* Lockhart & McClure, *supra* note 30, at 325 (stating, "In 1851, Nathaniel Hawthorne's *The Scarlet Letter* was bitterly attacked as an immoral book that degraded literature and encouraged social licentiousness"); ALBERT MORDELL, NOTORIOUS LITERARY ATTACKS 122 (1926) (describing the attack on Hawthorne's *The Scarlet Letter*).

[64] *See* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934) (holding that James Joyce's *Ulysses* was not obscene within the meaning of the Tariff Act of 1930).

[65] For a seminal example of that argumentative strategy, see Lockhart & McClure, *supra* note 30.

[66] *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971) (taking his argument to its logical conclusion and announcing quite honestly that *Ulysses* falls

But instead, I have chosen to defend a much more ordinary piece of pornographic smut that no one would place in the literary pantheon. The work in question is a film entitled *Behind the Green Door*, a mundane pornographic work made in 1972.[67] One of the first widely distributed, sexually explicit movies, *Behind the Green Door* generated $25 million in gross revenues for its producers, San Francisco's Mitchell Brothers.[68] Along with other sexually explicit works such as *Deep Throat*, the film was shown during the early 1970s in many alternative theaters and even on many university campuses, epitomizing the Zeitgeist of the sexual revolution. In fact, the film was screened in its entirety at the Yale Law School.[69] At the same time, the film was the subject of numerous obscenity prosecutions, most prominently in the South.[70]

Though otherwise insignificant, the movie contains a pivotal scene where a stately and independent white female, played by former Hollywood actress and Ivory Snow Girl Marilyn Chambers, has sex with a tribally-decorated African male. The image was radical for the early 1970s and would still be radical today. Putting the image into context, it is critical to note that it was not until 1967 that the Supreme Court declared laws against interracial marriage unconstitutional.[71] Meanwhile, it was only in 1968 that American network television broadcast the first interracial kiss. The kiss, featured on the science fiction series *Star Trek*, generated a storm of controversy by showing Caucasian Captain James T. Kirk locking lips with African-American Lieutenant Uhura.[72]

Even to this day, the mainstream media shy from depictions of interracial relationships for fear of offending audiences.[73] For example, in February 1993,

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outside of the sphere of constitutional protection).

[67] BEHIND THE GREEN DOOR (Mitchell Bros. 1972).

[68] *Porn in the USA*, DAILY VARIETY, Aug. 13, 1986, at 27.

[69] *See* Ralph Gregory Elliot, *The Private Lives of Public Servants: What Is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 824 (1995) (reviewing JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994)). As an aside, one can only wonder who among the early 1970s Yale Law student body, which included Bill Clinton, Hillary Clinton and Clarence Thomas, attended the screenings.

[70] See, for example, *Ballew v. Georgia*, 435 U.S. 223 (1978), which involved the November 1973 criminal prosecution of Claude Davis Ballew, the manager of the Paris Adult Theater, for screening *Behind the Green Door* in the Deep South.

[71] *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that miscegenation statutes adopted by Virginia to prevent marriages solely on the basis of racial classification violated the Equal Protection clause and Due Process clause of the Fourteenth Amendment).

[72] *Star Trek: Plato's Stepchildren* (CBS television broadcast, Nov. 22, 1968). It is quite interesting to note that the show's writers cleverly couched the scene in the context of coercion and a dream-like sequence in order to dampen the audience's shock. As the storyline of the episode goes, powerful telekinetic forces gained control over the show's characters and dictated their "illicit" actions. Nevertheless, protests ensued against the series.

[73] *See, e.g.*, THE PELICAN BRIEF (eschewing any interracial romance between Julia Roberts and

Pulitzer Prize-winning novelist Art Spiegelman created a furor with his call for a reconciliation between the Jewish and African-American communities in New York: On the cover of the Valentine's Day issue of the *New Yorker*, Spiegelman broke a number of social taboos by depicting a Hasidic man kissing an African-American woman.[74] By contrast, *Behind the Green Door* broke the taboo against miscegenation with gusto back in 1972, thereby presenting a vision that it was acceptable for whites and African-Americans to socialize at the most primordial of levels. Precisely because of its status outside of mainstream American culture, its underground distribution, and its appeal to consumers not in the Moral Majority, the pornographic industry was able to take on a subject shunned by Hollywood and the broadcasting industry.

A cursory examination of *Behind the Green Door* and its depiction of interracial sex may reveal little contribution to an enriched public discourse. Upon closer examination, however, the link is imminently clear. Racial integration lay at the heart of political debate in the United States during the 1950s, 60s and 70s. While desegregation of the public sphere is a first step in eradicating racial boundaries, true racial equality can only come about with a transformation in individual beliefs and social patterns in the private sphere. Indeed, true racial integration will not exist until socialization in the private sphere takes upon a racially neutral character.

Consequently, *Behind the Green Door* provides a prime example of how the *Miller* standard enables states and local communities to manipulate the First Amendment exception for obscenity as a means to suppress ideas and prevent challenges to the dominant social and racial paradigm. As Gey argues, "the suppression of pornography [enables] the state [to] certify and enforce a moral code that reinforces and justifies the political status quo."[75] Use of obscenity regulation as a means to enforce a hegemonic moral code is inconsistent with the notion of a free society aspiring to republican ideals of citizenship.

Denzel Washington when both the plot and the original book called for such a romance); *The Dating Game* (syndicated television broadcast) (matching whites with whites, African-Americans with African-Americans, Asians with Asians, and so on). *See generally* Glenn Lovell, *Interracial Romances. In Hollywood, Love Is Still a Mostly Segregated Thing*, ATLANTA J. CONST., Sept. 16, 1994, at P11. To be fair, however, some improvement has been made in this arena in recent years.

[74] For an account of this incident, see *Racial Theme of New Yorker Cover Sparks Furor*, L.A. TIMES, Feb. 9, 1993, at 12. Spiegelman meant the cover as a Valentine's Day card to New York City. As he later recalled, "It was amusing that in a week in which 90 percent of the other magazines on the stands had all these S&M covers, because that seems to be very dominant in our culture right now, what got people most upset weren't whips and chains, but two people kissing." Arthur J. Maginda, *Out of the 'Maus' Trap?*, BALTIMORE JEWISH TIMES, Jan. 20, 1995, at 43. Spiegelman's quotation reveals the danger of a vague obscenity doctrine based on a notion of community offense.

[75] Gey, *supra* note 38, at 1565.

By banning *Behind the Green Door*, the state is perpetuating the centuries-old taboo against miscegenation and reinforcing the moral underpinnings of the racial segregation system. As a result, the state resorts to the *Miller* standard, which so generously relies on community offense, to effect its code of racial oppression and subjugation. Indeed, it is not surprising that obscenity prosecutions against distributors of *Behind the Green Door* came mostly from the South, the region of the country most embroiled in racial strife. Ironically, it is *Behind the Green Door*'s value as a political work that makes it so susceptible to censorship through the *Miller* test. The film's direct challenge to sexual separation between the races was the very thing that made it offensive to bigoted Americans everywhere, repugnant to numerous community standards, and ultimately capable of being proscribed as obscenity. To the juries that found the movie legally obscene, there was no serious value to the content precisely because it showed a black man having sex with a white woman, a representation wildly offensive to traditional American values. Despite the wealth of law review literature on the subject of sexually explicit films and specifically on *Behind the Green Door*, authors have neither bothered to deconstruct the motives for prosecution under obscenity laws nor have they challenged the traditional view that ordinary pornography makes no contribution to an enriched public discourse.

B. LOCAL COMMUNITY STANDARDS: THE RACE TO THE BOTTOM

Several dangers to social structure also emerge from the grounding of the *Miller* test in local community standards. First, as the case of *Behind the Green Door* reveals, leaving it up to community standards to determine what represents obscenity is a bit like allowing local community standards to determine whether separate is really equal. In the case of *Behind the Green Door*, negative feelings about racial integration formed the basis for the offense to community standards needed to substantiate an obscenity charge. More generally, relying on a small community jury or the mostly elderly, white, and male judiciary to determine what constitutes obscenity and what speech products individuals can and cannot access is a dangerous game prone to viewpoint discrimination. As Justice Scalia has noted, it is "quite impossible"[76] to come up with an objective test to determine literary or artistic value: "Just as there is no use arguing about taste, there is no use litigating about it."[77]

Second, as cyberspace theorists have vigorously asserted, the increasing globalization of information flows and the growth of the Internet make the use

[76] Pope v. Illinois, 481 U.S. 497, 504 (1987) (Scalia, J., concurring).
[77] *Id.* at 505.

of local community policing standards obsolete.[78] As the argument goes, the *Miller* community standard has grown increasingly difficult to apply in recent years with the explosion of the Internet as the dominant and most efficient means for disseminating pornographic material. Indeed, there is a legitimate fear that the continued use of a community standard test will result in individuals being prosecuted by the standard of the most restrictive community with access to the Internet, thereby chilling speech throughout cyberspace. After all, as the Supreme Court held in *Sable Communications of California, Inc. v. FCC*,[79] "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."[80]

Cybertheorists have framed this objection to the community standards doctrine as an example of technology rendering the law obsolete, and courts have begun to adopt this logic. For example, in *Ashcroft v. American Civil Liberties Union*,[81] the Third Circuit ruled that the Supreme Court's prior community standards jurisprudence "has no applicability to the Internet and the Web" because "Web publishers are currently without the ability to control the geographic scope of the recipients of their communications."[82] The problem with local community standards, however, is hardly as novel as the courts and theorists claim and hardly the product of features unique to the Internet.[83] Indeed, back in 1954, Lockhart and McClure noted the dangerous impact of differing community standards on the national marketplace of ideas by using the old-fashioned example of book distribution.[84] As they pointed out, most of the publishing in the United States occurs in New York.

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[78] For a general consideration of free speech issues on the Internet, see Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995).

[79] 492 U.S. 115 (1989).

[80] *Id.* at 116.

[81] 217 F.3d 162 (3d Cir. 2000), *vacated*, 535 U.S. 564 (2002), *and cert. granted*, 124 S. Ct. 399 (U.S. Oct. 14, 2003) (No. 03-218).

[82] *Id.* at 180.

[83] As an aside, a disproportionate amount of work by cyberlaw theorists has dealt with the issue of pornography online and its potential censorship. As James Boyle quips,

> This is rather like thinking that the most important feature of the industrial revolution was that it allowed the mass-production—and then the regulation—of pornographic magazines. Given the magnitude of the changes occurring, and the relatively small differences between pornography on-line and pornography anywhere else, a more trivial emblematic concern would be difficult to find.

James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 89 (1997).

[84] Lockhart & McClure, *supra* note 30, at 389-90.

> But whether the publisher is in New York, or in some other state, prosecution of the publisher in the state of publication gives that one state the power to limit the books that will be available throughout the entire United States. Furthermore, apart from nation-wide control of reading material by the state of publication, censorship in an important area of distribution sometimes causes out-of-state publishers to revise or reject manuscripts before publication, thereby interfering on a national scale with freedom to read.[85]

Thus, individuals hoping to engage in national distribution of a speech product must kow-tow to the most stringent community's standards lest they be prosecuted for violation of obscenity laws.

Admittedly, however, the growth of the Internet has magnified the problem with an obscenity doctrine rooted in community standards. In cyberspace, it takes little effort to engage in national or even international distribution. In fact, anything posted on the World Wide Web becomes immediately accessible to users around the globe. By grounding obscenity standards at the local level—whether by local jurors applying local standards or by local jurors purportedly applying national standards—the *Miller* test enables the most restrictive county in the most restrictive of states to dictate the kind of speech products available throughout the national, or even international, market. In short, *Miller*'s community standards test represents a heckler's veto of the grandest order by providing a local sovereign with an unwarranted level of power to wield on the minds and thoughts of individuals outside of its jurisdiction. As Lockhart and McClure rightfully concluded more than thirty-five years ago, "The right of citizens of the United States to choose what they shall read should not be at the mercy of the courts of any one or a few states. Literature is international in scope, and should never be controlled by narrow, local standards."[86]

C. OBSCENITY AND VOICES AT THE MARGINS

Finally, and perhaps most importantly, the obscenity doctrine presents a hegemonic and unitary vision of the transmission of ideas that views the white male elite discourse as the sole means of expression protected under the First Amendment. As a result, the obscenity doctrine has become a dangerous mechanism for the Moral Majority to silence the voices of those at both the sexual and racial margins of society.

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[85] *Id.*

[86] Lockhart & McClure, *supra* note 30, at 390.

As Owen Fiss argues, egalitarian considerations play a vital role in any First Amendment analysis, for there is a need to "enhanc[e] the power of the poor, put[] them on a more nearly equal political footing with the rich, thus giv[e] them a fair chance to advance their interests and enact measures that will improve their economic position."[87] Though this passage refers to Fiss's call for electoral campaign reform, the logic carries over to other First Amendment issues. As Fiss puts it, "At the core of my approach is a belief that contemporary social structure is as much an enemy of free speech as is the policeman."[88] In its current form, obscenity doctrine contains a tremendous class, race, and sexual bias.

The obscenity doctrine presumes that the transmission of ideas cannot come in a sexually explicit modality. This erroneous assumption can be traced all the way back to the modern founder of First Amendment jurisprudence, Zechariah Chafee. As he noted, the true explanation for the crimes of obscenity and libel

> is, that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.[89]

Consequently, there is a dominant belief that worthwhile ideas come only in a single form—the Queen's English. The imperialistic and anti-egalitarian consequences of such a vision are alarming.

Different socioeconomic groups, different cultural groups, and different sexual groups express themselves in different ways. Rap music, for example, is the sound of the street. It may lack eloquence to an upper-middle class, educated white male from New England, but that does not mean that it lacks content. To millions of individuals confronting the harsh realities of ghetto life every day, the sexually explicit and violent themes of rap music not only form a cathartic outlet for their pain, suffering, and anger, but also carry a weighty protest against the failed promises of the American Dream. Unfortunately, however, rap's lack of subjective eloquence is frequently conflated with a lack of content. As a result, rap music has come under heavy fire and suffered from obscenity prosecution. For example, the African-American rap group 2 Live Crew found itself convicted

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[87] OWEN M. FISS, THE IRONY OF FREE SPEECH 11 (1996).

[88] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986).

[89] ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 170-71 (1920).

of violating a Florida obscenity statute for a concert performance,[90] and an Alabama record store owner was prosecuted for selling a 2 Live Crew record.[91]

Obscenity jurisprudence's recognition of a single modality for the transmission of ideas also leaves little room for the constitutional protection of much contemporary art. As Amy Adler persuasively argues, "serious value is no longer a coherent standard in the face of recent developments in art,"[92] especially in the Postmodern movement which seeks to subvert embedded notions of seriousness and value. Yet again though, the obscenity doctrine enables censorship of individuals at the margins of society by placing their art outside the sphere of constitutional protection.

In practice, obscenity law enforcement has become an effective mechanism to purge the transmission of ideas that society does not like—ideas that are non-white, non-heterosexual, and non-traditional. Thus, obscenity law has become a powerful tool for the dominant social structure to silence its critics. It is hardly a coincidence that ethnic and sexual minorities have been the most prominent targets of obscenity law enforcement in the United States over the past several years. Gay and lesbian artists such as Robert Mapplethorpe, David Wojnarowicz, Todd Haynes, Marlon Riggs, John Fleck, Holly Hughes, and Tim Miller as well as African-American musicians such as 2 Live Crew have borne the brunt of the prosecutions.[93] These are precisely the groups who receive the least exposure and voice through the mainstream media. Yet, when they express themselves and educate the public about the issues important to them, they are prosecuted under the guise of obscenity law. In recent years, these voices at the margins have found limited refuge in the anarchic realm of cyberspace, but there is little reason to doubt that the new wave of legislation regulating cyberspace will be used to silence these voices once again.

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[90] A federal trial judge found the music legally obscene, but the judgment was ultimately reversed by the Court of Appeals. *See* Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992) (holding that sheriff failed to carry his burden, even by a preponderance of the evidence, that music recording was obscene by *Miller* standards).

[91] Though a municipal judge found the defendant guilty, he was ultimately acquitted. MARJORIE HEINS, SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS 77 (1993).

[92] Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1362 (1990).

[93] *See* Cole, *supra* note 11, at 133-35.

IV. THE EMERGING BATTLE OVER SEXUALLY EXPLICIT CONTENT IN CYBERSPACE: *ASHCROFT V. AMERICAN CIVIL LIBERTIES UNION* AND THE CHILD ONLINE PROTECTION ACT

With the enunciation of the *Miller* test in 1973, the Supreme Court hoped to extricate itself from the tortuous task of obscenity regulation by enunciating an ostensibly clear standard upon which lower courts could rely.[94] In part, the Supreme Court was successful, dramatically reducing the number of obscenity cases in its docket in the decades that followed *Miller*.[95] With the emergence of the Internet as the most powerful tool for economic, political, and social change that the world has ever known, however, the calls for careful regulation of the medium have grown increasing forceful. In the arena of obscenity, Congress has begun to respond to these calls, seeking to sanitize cyberspace for the American public with such statutes as the Communications Decency Act ("CDA"),[96] the Child Pornography Prevention Act ("CPPA"),[97] and the Child Online Protection Act ("COPA").[98] Each of these efforts directly implicates the *Miller* doctrine, and as the Supreme Court's opinion in *Ashcroft v. American Civil Liberties Union*[99] reveals, the *Miller* test may dictate the shape of discourse on the Internet in the coming years. Thus, a reexamination of *Miller* is of particular importance at this historic juncture.

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[94] In part, some of the Justices had apparently grown tired of infamous weekly screenings of pornography on their regular calendars. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 198-200 (1979). As Chief Justice Burger argued, "[i]n the long run this Court cannot act as an efficient Super Censor, and the sooner we leave the problem to the states the better off we and the public will be." *Id.* at 201. Of course, leaving the problem to the states has its own dangers.

[95] Following a rash of cases clarifying the Court's obscenity jurisprudence in the immediate wake of *Miller*, *see, e.g.*, *Smith v. United States*, 431 U.S. 291 (1977); *Ward v. Illinois*, 431 U.S. 767 (1977); *Splawn v. California*, 431 U.S. 595 (1977); *Erznozik v. Jacksonville*, 422 U.S. 205 (1975); *Hamling v. United States*, 418 U.S. 87 (1974); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), few cases involving obscenity issues made it to the Court in the intervening years between *Miller* and the recent wave of cyberspace-related cases. Some notable exceptions, however, include *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), *Pope v. Illinois*, 481 U.S. 497 (1987), *New York v. Ferber*, 458 U.S. 747 (1982), and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

[96] 47 U.S.C. § 223 (2000).

[97] 18 U.S.C. § 2256 (2000).

[98] 47 U.S.C. § 231 (2000).

[99] 535 U.S. 564 (2002).

A. BACKGROUND

With *Ashcroft v. American Civil Liberties Union*,[100] COPA became the first major online content-regulation statute to successfully withstand Supreme Court scrutiny.[101] As the Supreme Court's opinion in *ACLU* indicates, *Miller* is alive and well, and its application to cyberspace threatens to dramatically constrict the richness of public discourse on the vibrant Internet.

COPA's stated goal is to protect minors from harmful (allegedly) commercial content on the World Wide Web.[102] In so doing, the Act carefully mirrors the language of the *Miller* test but with one significant change: COPA judges content from the viewpoint of an adult ascertaining the appropriateness of material for a minor. Thus, online content may be proscribed under COPA if it (1) appeals to the prurient interest of minors, (2) deals with patently offensive sexual conduct with respect to minors, and (3) lacks value for minors.[103] The statute then provides a series of affirmative defenses to those subject to prosecution. A potential defendant can avoid the civil and criminal penalties contained in COPA by demonstrating that she made a good faith effort to restrict access by minors to the harmful content by utilizing credit card requirements, digital certificates, and other related technology.[104]

Initially, the Third Circuit[105] held that COPA's reliance on local community standards to determine whether material on the World Wide Web was "harmful to minors" violated the First Amendment. As the Circuit noted, COPA thereby imposed "an impermissible burden on constitutionally protected First Amendment speech."[106] The Supreme Court reversed that decision, however, and held that the use of community standards to identify material harmful to minors did not render COPA facially unconstitutional.[107] The Supreme Court thereby reaffirmed the vitality of the *Miller* standard and its reliance on local community

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[100] *Id.*

[101] The overall constitutionality of the statute, however, was not before the Supreme Court. Rather, the Supreme Court only found that reliance on local community standards to regulate Internet content was not facially unconstitutional.

[102] *See* 47 U.S.C. § 231(a)(1) (2000) (noting that COPA prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors").

[103] 47 U.S.C. § 231(e)(6) (2000).

[104] 47 U.S.C. § 231(c)(1) (2000).

[105] ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), *vacated*, 535 U.S. 564 (2002), and *cert. granted*, 124 S. Ct. 399 (U.S. Oct. 14, 2003) (No. 03-218).

[106] *Id.* at 166.

[107] 535 U.S. 564, 566 (2002).

standards to determine obscenity.[108] As the Court argued, the Internet is not fundamentally different enough from prior forms of communication to warrant a unique standard for regulation of its content.

B. SANITIZING CYBERSPACE: COPA, EXPRESSIVE FREEDOM, AND THE RICHNESS OF PUBLIC DISCOURSE ON THE INTERNET

Although the Court reversed the Third Circuit by a vote of eight to one, there was a vigorous debate over one particular red-herring issue: whether a national or local community standard should apply for determining if online content is harmful to minors. Specifically, Justices O'Connor and Breyer advocated a national standard to avert the broad chilling effect that would result from the local standards of the most restrictive community.[109] By contrast, Justices Thomas, Scalia, and Rehnquist downplayed the chilling effect of the local community standard.[110] As they carelessly suggested, communicators will simply have to rely on other media—media where the reach of the message can be geographically limited by the communicator—in order to avoid having their speech judged by the least tolerant community.[111] Only Justice Stevens, in his dissent, noted the irrelevance and futility of this debate since jurors "instructed to apply a national, or adult, standard will [still] reach widely different conclusions throughout the country."[112] Moreover, given the profoundly subjective nature of what constitutes offensive and harmful content, determining a national community standard is impossible. Thus, communicators on the World Wide Web will still have to adjust their message to conform to the standards of the least tolerant communi-

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[108] On remand, the Third Circuit again found COPA to be unconstitutional for failing to pass strict scrutiny. That decision was appealed to the High Court, which granted certiorari this fall. ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 399 (U.S. Oct. 14, 2003) (No. 03-218).

[109] *See* Ashcroft v. ACLU, 535 U.S. 564, 586-89 (2002) (O'Connor, J., concurring); Ashcroft v. ACLU, 535 U.S. 564, 589-91 (2002) (Breyer, J., concurring).

[110] Ashcroft v. ACLU, 535 U.S. 564 (2002).

[111] This position goes against the grain of First Amendment jurisprudence in the area of content-neutral time, place, and manner regulations of public fora, which requires that regulators provide those who wish to engage in protected expression with an alternative means of communication. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that municipal noise regulation designed to ensure that music performance in band shell did not disturb surrounding residents, by requiring performers to use sound system and technician provided by city, did not violate free speech rights of performers). The Court's poorly reasoned suggestion that communicators simply rely on other media is particularly ironic in light of the Court's own admission that the Internet represents a unique medium for expression: "The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *See Ashcroft*, 535 U.S. at 566 (citing 47 U.S.C. § 230(a)(3)).

[112] *Ashcroft*, 535 U.S. at 607 n.3 (Stevens, J., dissenting).

ties, and these communities will possess a heckler's veto that casts a chilling effect on free speech in cyberspace.

Even more significantly, by focusing its attention on the debate over local versus national community standards, the Court ultimately failed to examine the more pressing and fundamental questions governing the regulation of obscenity and the future of public discourse on the Internet. For instance, the Court failed to fully recognize the overbreadth of the COPA regulatory scheme. In order to rationalize its decision to reverse the Third Circuit and deny the facial challenge to COPA, the Court needed to distinguish COPA from the CDA, which was struck down as unconstitutional in *Reno v. American Civil Liberties Union*.[113] In *Reno*, the Court condemned the CDA because the breadth of its coverage was "wholly unprecedented."[114] By failing to define the terms "indecent" and "patently offensive," the statute "cover[ed] large amounts of nonpornographic material with serious educational or other value."[115]

In *Ashcroft v. American Civil Liberties Union*,[116] however, the Court failed to recognize that the language of COPA suffers from similar shortcomings. Although COPA does not proscribe material that, taken as a whole, has literary, artistic, political, or scientific value, that value is judged only with respect to minors.[117] Consequently, non-pornographic material with serious educational and other value for adults would still be capable of proscription under the statute.

The deleterious impact of COPA on the richness of public discourse is demonstrated by examining the types of educational material that it might proscribe. Materials that some consider harmful to minors—including the dissemination of information on contraceptives, abortion, and sexual orientation—may be banned by COPA, particularly given the statute's loose definition of what constitutes a communication made for commercial purposes. COPA ostensibly regulates only commercial communications on the World Wide Web.[118] The statute provides, however, that a person "shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications."[119] Someone who is "engaged in the business" is then defined as a person who

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[113] 521 U.S. 844 (1997).

[114] *Id.* at 877.

[115] *Id.*

[116] 535 U.S. 564 (2002).

[117] 47 U.S.C. § 231(e)(6) (2000).

[118] *See* 47 U.S.C. § 231(a)(1) (2000) (noting that COPA prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors").

[119] 47 U.S.C. § 231(e)(2)(A) (2000).

> devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities *(although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).*[120]

With such an expansive definition of commercial activity and with the use of *Miller*'s community standards test, COPA could easily be used by the pro-life movement as a means to silence the activities of groups such as Planned Parenthood, which provides reproductive advice and sells contraceptives to minors. This possibility reveals the danger of an obscenity standard based upon the tenets of the *Miller* test because it would lead to a limiting of the public discourse on the important political issue of reproductive freedom. Moreover, it would regulate the vigorousness of this debate in the medium (the Internet) most conducive to communications with teenagers, the group arguably most in need of information on reproductive issues.

Despite this fact, the Court eschewed charges of overbreadth by proudly noting that the *Miller* standard, as incorporated in COPA, excludes material of serious value to minors.[121] As the Court confidently declared, the test for serious value is based upon a national standard, and " 'the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.' "[122] This problematic assertion fails to note how inherently subjective the notion of value is. One need look no further than the history of obscenity jurisprudence itself to recognize the error in this view. Across time, legal history is rife with examples of works that were condemned for lacking any redeeming value; many of these works are now considered seminal classics of the highest value. Across space, one community may view a work of art as utterly worthless and offensive while, at the very same time, another community may view that work of art as sublime and precious. It is therefore impossible for a national arbiter to reasonably determine the social value of the work.

Additionally, in its contemplation of COPA, the Court declined to determine if judgment by community standards, whether national *or* local, constitutes viewpoint discrimination per se and therefore renders the *Miller* standard an affront to other First Amendment jurisprudence. This is a vital point since proscribing speech for offending community standards is tantamount to condemning that speech because it expresses a viewpoint denounced in the

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[120] 47 U.S.C. § 231(e)(2)(B) (2000) (emphasis added).

[121] *See* Ashcroft v. ACLU, 535 U.S. 564, 579 (2002); *see also* 47 U.S.C. § 231(e)(6)(C) (2000) (codifying the *Miller* standard).

[122] *See Ashcroft*, 535 U.S. at 579 (quoting Pope v. Illinois, 481 U.S. 497, 500 (1987)).

community. In other words, *Miller*'s determination of offense to community standards is a direct proxy for what viewpoints a community condemns. Thus, any speech proscribed by the *Miller* test is being proscribed *precisely because* of the viewpoint it expresses. This is a startling violation of a bedrock principle in First Amendment jurisprudence.

Finally, in the *ACLU* decision, no Justice questioned why obscenity was even proscribed as a category in the first place, and no Justice addressed the fundamental disjuncture between modern obscenity law and the harm-based analysis of other First Amendment jurisprudence. Not surprisingly, the various opinions of the Court failed to analyze the impact of obscenity prosecution on social structure, the use of obscenity laws to silence minority viewpoints, or the importance of works deemed "obscene" to enriching the public discourse. Without that analysis, the deleterious impact of *Miller* remains shrouded in vague notions of offense, irrelevant debates over the use of national versus local community standards, and politically motivated cries to protect the children.

V. CONCLUSION

As this analysis of COPA reveals, it is high time to lay the *Miller* standard to rest. Perhaps it is time to address the real harms that may stem from certain forms of sexually explicit material and require a *Brandenburg*-like standard of direct and imminent incitement to lawlessness for their proscription.[123] With respect to pornography, it may be time to move toward a tort and criminal model of regulation that punishes actual offensive conduct related to pornography, not the speech itself.[124] Whatever the solution, the death knell of *Miller* must sound.

With its recent re-emergence, *Miller* threatens to have a profound role on the future of free expression on the Internet. By granting local communities a heckler's veto to censor speech nationwide and by acting as a mechanism for dominant powers to silence the voices of sexual and racial minorities, the test is fundamentally incompatible with First Amendment jurisprudence and has an adverse impact on the richness of public discourse. Quite simply, continued use of the *Miller* test undermines the very democratic and collectivist ideals that the First Amendment seeks to protect—in real space, cyberspace, and beyond.

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[123] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding Ohio criminal statute, which by its own words and as applied, purported to punish mere advocacy to violate the First and Fourteenth Amendments).

[124] *See* Branit, *supra* note 40, at 449-50 (describing civil and criminal models of punishing pornography).