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I. INTRODUCTION

The revolution in information technology promises to forever change the ways in which people communicate and learn about the world.[1] Computers equipped with modems are becoming more affordable and thousands of high-speed networks link millions of computer users, creating the non-physical universe known as "cyberspace."[2] With relative ease, the average person can send and receive text, data, and graphics from across the globe. A valid concern exists, however, that neither the Framers of the Constitution nor modern courts and lawmakers have adequately protected the rights and liberties of computer users in cyberspace.[3] Some commentators suggest that this growth in information technology has created "new" legal problems, which courts and legislatures will soon need to address.[4] Of all the material being exchanged between computers, pornography best illustrates the difficulties associated with applying old rules and laws to the new world of cyberspace.[5]

Cyberspace provides an ever-increasing supply of pornographic images.[6] On-line pornography is currently subject to the same obscenity laws as adult book stores and video parlors. A valid question, however, exists as to whether

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1. *See* NICHOLAS NEGROPONTE, BEING DIGITAL (1995).

2. *Id.* at 180-81. Science fiction author William Gibson first coined the term "cyberspace" in his novel *Neuromancer*. EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 1 (1994). Cyberspace generally refers to the vast array of computer systems accessible from remote locations and the networks that connect them. *Id.* As described by Gibson in *Neuromancer*, Cyberspace was a hallucination created by computer systems that looked like a physical space, but had no correlation in physical reality. *Id.*

3. Al Gore, *Infrastructure for the Global Village*, SCI. AM., Sept. 1991, *reprinted in* SCI. AM., 1995 Special Issue: The Computer in the 21st Century, at 156.

4. *See* I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1053 (1994) ("[S]ome sort of legal solution tailored to the cyberspace problem will bring clarity and predictability to the rules attending cyberspace conduct . . . ."); *see also* Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, *in* IEEE COMPUTER SOCIETY, COMPUTERS, FREEDOM & PRIVACY 3, 3-12 (Jim Warren et al. eds., 1991). At the First Conference on Computers, Freedom & Privacy, Professor Tribe suggested that an amendment protecting the rights of computer users should be added to the U.S. Constitution. *Id.* at 12. The proposed amendment would read simply:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted or controlled.

Id.

5. *See generally* Randolph Stuart Sergent, Note, *Sex, Candor, and Computers: Obscenity and Indecency on the Electronic Frontier*, 10 J.L. & POL. 703 (1994) (examining the constitutional restraints upon governmental regulation of sexually-related speech in cyberspace).

6. *See, e.g.*, Philip Elmer-DeWitt, *Orgies On-Line. (Computer Network Sex)*, TIME, May 31, 1993, at 61; Glenn Gamboa & Roger J. Mezger, *Cybersmut Strikes the Internet: Electronic Obscenity Worries Many Parents and Raises Issue of Controls vs. Free Speech*, AKRON BEACON J., Apr. 11, 1995, at D1; Joel Garreau, *Bawdy Bytes: The Growing World of Cybersex*, WASH. POST, Nov. 29, 1993, at A1.

current obscenity law, which depends upon an evaluation of community standards, should be applied to computer pornography.[7] Given the global nature of the cyberspace community, it becomes impossible to ascertain local community standards.

This Article argues that the rapid growth of information technology will force the Supreme Court to reconsider certain aspects of obscenity law.[8] Section II discusses current obscenity law in the United States.[9] Section II also discusses the growth of "cyberporn" in the on-line world.[10] Section III examines the problems in applying current obscenity law to cyberporn.[11] Section IV offers a solution to these problems.[12] Finally Section IV concludes that the Supreme Court should adjust the definition of obscenity, because using local community standards to determine whether material is obscene is no longer workable.

II. BACKGROUND

A. Obscenity Law and Community Standards

1. Obscenity as Unprotected Speech under *Roth v. United States* [13]

Many people believe the terms "obscenity" and "pornography" are synonymous. The law, however, treats pornographic and obscene materials differently. Pornography generally refers to sexually explicit materials and receives protection under the First Amendment.[14] In light of the 1957 decision of *Roth v. United States*, however, obscenity does not enjoy First Amendment protection.[15] Since the *Roth* decision, the Supreme Court has struggled with creating a workable definition of obscene material.[16]

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7. *See, e.g.*, William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995); Mike Godwin, *Sex, Obscenity and the Supreme Court in Cyberspace*, L.A. DAILY J., Nov. 10, 1994, at 6; Hardy, *supra* note 4, at 1012.

8. This Article makes no attempt to argue either for or against the regulation of obscene material.

9. *See infra* notes 13-82 and accompanying text.

10. *See infra* notes 83-123 and accompanying text.

11. *See infra* notes 124-64 and accompanying text.

12. *See infra* notes 165-87 and accompanying text.

13. 354 U.S. 476 (1957).

14. *See* DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW 272 (1992). Pornography generally includes:

> (1) depictions, on film or in still pictures, of human genitalia, contact between genitals, anus, and mouth (in various combinations) or descriptions of such activities;
> (2) depictions or descriptions of homosexual intercourse;
> (3) depictions or descriptions of bestiality[; and]
> [(4)] depictions or descriptions of violence in connection with any of the above (for example, mutilation, binding and gagging, sexual penetration with implements, drawing of blood, infliction of pain).

Id.

15. *Id.* at 484.

16. DANIEL S. MORETTI, OBSCENITY AND PORNOGRAPHY: THE LAW UNDER THE FIRST AMENDMENT xi

Roth illustrates the Supreme Court's first attempt at defining the permissible scope of obscenity law and "remains the cornerstone of modern obscenity law."[17] Justice Brennan, writing for the majority, noted that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[18] Thus, the Court held that obscenity was not protected speech under the First Amendment.[19] After establishing that obscenity was not considered protected speech, the Court attempted to define obscenity.[20]

The Court held that obscene material "deals with sex in a manner appealing to prurient interest."[21] Justice Brennan's opinion, however, rejected the idea that allegedly obscene material could be evaluated by looking to isolated excerpts from the material, because such a narrow view might result in the restriction of otherwise constitutionally protected speech.[22] Justice Brennan also rejected the notion that obscene material was to be judged by the effect it had upon particularly susceptible persons.[23] The test the majority adopted became: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[24] Thus, *Roth* established a "two-tier" approach, excluding some utterances, but not others, when determining if material is obscene.[25]

(1984).

17. MORETTI, *supra* note 16, at 11. For the historical origins of American obscenity law, see generally FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 1-29 (1976).

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

19. *Id.* at 485. According to one commentator, "Justice Brennan reasoned that speech does not mean *any* utterance, and not *all* utterances are protected by the First Amendment." SCHAUER, *supra* note 17, at 35-36.

20. *Roth*, 354 U.S. at 487-89.

21. *Id.* at 487. The Court attempted to define "prurient interest" by looking to Webster's Dictionary, case law, and the Model Penal Code. *Id.* at 487 n.20. The Court finally concluded that a prurient interest was "a shameful or morbid interest in nudity, sex, or excretion, and [going] substantially beyond customary limits of candor in description or representation of such matters." *Id.* at 487 n.20 (quoting A.L.I. MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)).

22. *Roth*, 354 U.S. at 489.

23. *Id.* at 488-89.

24. *Id.* at 489. The *Roth* decision is the first time the Court used the term "contemporary community standards." Frederick F. Schauer, *Obscenity and the Conflict of Laws*, 77 W. VA. L. REV. 377, 379 (1975). Before the *Roth* decision, however, the concept of contemporary community standards and other elements of the *Roth* test had been applied by many lower courts. United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913); Commonwealth v. Isenstadt, 62 N.E.2d 840, 842 (Mass. 1945); Bantom Books, Inc. v. Melko, 96 A.2d 47, 47 (N.J. Super. Ct. Ch. Div. 1953).

25. In other words, certain utterances are excluded from First Amendment consideration. SCHAUER, *supra* note 17, at 39 n.39 (citing Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1). According to Schauer:

> By excluding obscenity, however defined, from the definition of speech, the Supreme Court established the theoretical basis for the continuing validity of obscenity laws without the necessity of entering the debate as to the effects of obscenity and without the necessity of modifying obscenity law to meet other changes in First Amendment theory.

Id. at 39.

2. Modifying the *Roth* Test

After *Roth*, the Supreme Court began to narrow obscenity law restrictions, "leading to the ultimate result of limiting obscenity regulation only to hard-core pornography."[26] In 1962, the Court announced its decision in *Manual Enterprises, Inc. v. Day*.[27] Justice Harlan, joined only by Justice Stewart, narrowed the *Roth* definition of obscenity by holding that material must be deemed "patently offensive" before applying the "prurient interest" test.[28]

Two years later, in *Jacobellis v. Ohio*,[29] the Court again limited the scope of obscenity regulation. Justice Brennan, joined only by Justice Goldberg, stated that material may be deemed obscene only if it is "utterly without redeeming social importance, [but] . . . material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."[30] Justice Brennan also addressed the issue of community standards and, hoping to develop a uniform definition of obscenity, stated that a national standard should be used for judging obscenity.[31]

In 1966, the Court again limited the scope of obscenity regulation in the case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.[32] Justice Brennan, joined by Chief Justice Warren and Justice Fortas, held that obscenity should be evaluated by using a three-part test.[33] First, "the dominant theme of the material taken as a whole [must appeal] to a prurient interest."[34] Second, the material must be patently offensive.[35] Third,

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26. SCHAUER, *supra* note 17, at 41. It was difficult, however, for the Court to come to a true consensus on evaluating obscene material. The Court's difficulty with defining obscenity can be summed up best by Justice Stewart's famous quote in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964): "I shall not today attempt further to define the kinds of material I understand to be [obscene]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."

27. 370 U.S. 478, 479 (1962).

28. *Id.* at 482 (indicating that the material must be "so offensive on [its] face as to affront current community standards of decency").

29. 378 U.S. 184, 185 (1964).

30. *Id.* at 191.

31. *Id.* at 195. Justice Brennan was concerned that "a standard based on a particular local community would have the 'intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.'" *Id.* at 193 (quoting *Manual Enterprises, Inc.*, 370 U.S. at 488). Although a national standard was admittedly difficult to determine, an "overwhelming majority of lower courts which faced the problem after *Jacobellis* employed a national definition of contemporary community standards." SCHAUER, *supra* note 17, at 119.

32. 383 U.S. 413 (1966).

33. *Id.* at 418.

34. *Id.*

35. *Id.*

the material must be "utterly without redeeming social value."[36] Under the *Memoirs* standard, it was believed that the most difficult element for a prosecutor to prove was that the material be "utterly without redeeming social value,"[37] since nearly all material possesses *some* social value.[38] Therefore, after *Memoirs*, it was difficult for anything to be held obscene.[39]

3. *Miller v. California* [40] Sets the Standard

In the 1973 case of *Miller v. California*, a majority of the Supreme Court finally agreed upon a new definition of obscenity.[41] The Court held that allegedly obscene material must be evaluated by applying a three-part test:

> (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.[42]

Miller is significant for several reasons. First, the *Miller* test does not require material to be "*utterly* without redeeming social value" to be obscene.[43] Rather, the material must lack serious literary, artistic, political, or scientific value. Second, the Court gave two "plain examples" of patently offensive material: (1) "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;" or (2) "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[44] Third, the Court held that state statutes regulating obscene materials must be limited to hard-core pornography.[45] Thus, the definition of hard-core pornography must be specifically defined in the state statute.[46]

Miller is probably most significant for "its approval of the concept of *local* community standards as the guideline by which the obscenity *vel non* of a given work is to be measured."[47] Chief Justice Burger, writing for the majority, rejected the notion that the community standards to be applied were

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36. *Id.*
37. SCHAUER, *supra* note 17, at 43.
38. MORETTI, *supra* note 16, at 19.
39. *Id.*
40. 413 U.S. 15 (1973).
41. *Miller* was the Court's first majority opinion dealing with the definition of obscenity since *Roth*, decided 16 years earlier. *Id.* at 22.
42. *Id.* at 24 (citations omitted).
43. *Id.* at 24-25.
44. *Id.* at 25.
45. *Id.* at 27.
46. *Id.*
47. Schauer, *supra* note 24, at 377.

national standards.[48] Chief Justice Burger reasoned that state obscenity prosecutions based upon a national community standard "would be an exercise in futility,"[49] and further noted that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[50] Obscenity, therefore, must be judged according to the accepted local community standard.

4. Post-*Miller* Decisions

The *Miller* Court rejected the notion that a national standard could ever be developed, but the Court failed to delineate the size or definition of the local community that was to be considered. The Supreme Court attempted to clarify this issue in some later cases. In *Hamling v. United States*,[51] the Court held that although a state could proscribe obscenity in terms of a "statewide" standard, such a standard was not constitutionally required.[52] In addition, the Court held that jurors sitting in obscenity cases may draw upon knowledge of their own community to decide what conclusion "the average person, applying contemporary community standards" would reach in a given situation.[53]

In *Smith v. United States*,[54] the Court held that states could "impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case."[55] In addition, states may add a geographic dimension to obscenity regulation through zoning laws.[56] The *Smith* Court also clearly stated that a jury must apply "contemporary community standards" to determine whether material appeals to the prurient interest and is patently offensive.[57] Moreover, the Court held that the issue of which community standards apply in a case could not be defined legislatively.[58]

5. When the *Miller* Test Does Not Apply

At least three situations exist where courts do not typically apply the *Miller* test. First, *Miller* will not be applied in situations concerning the private

48. *Miller*, 413 U.S. at 30-34.

49. *Id.* at 30. "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." *Id.* at 31-32.

50. *Id.* at 32.

51. 418 U.S. 87 (1974).

52. *Id.* at 105.

53. *Id.*

54. 431 U.S. 291 (1977).

55. *Id.* at 303.

56. *Id.*

57. *Id.* at 302 ("[C]ommunity standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness.").

58. *Id.*

use of obscene materials in one's home.[59] Second, situations involving child pornography do not apply the *Miller* test.[60] Third, the *Miller* test is inapplicable in cases dealing with dissemination of pornographic materials to minors.[61]

In *Stanley v. Georgia*,[62] the Supreme Court held that individuals may possess obscene material in the privacy of their own homes.[63] Justice Marshall, writing for the Court, noted that an individual has the constitutional right to "receive information and ideas," and to be free, except in limited circumstances, "from unwanted governmental intrusions into one's privacy."[64] The Constitution strictly guards the privacy of the home. As Justice Marshall stated:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[65]

This protection, however, does not extend beyond the home.[66] The Supreme Court has held that states can prohibit transportation, distribution, and receipt of obscene materials.[67] In addition, states may regulate the exhibition of obscene films in a commercial theater open to the adult public.[68]

The *Miller* test also does not apply to child pornography. Any material portraying minors in a sexually explicit fashion is considered to be child pornography.[69] Anyone under the age of eighteen is a minor according to the federal child-pornography statute.[70] The Supreme Court has held that the material does not have to be legally obscene to be classified as child pornogra-

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59. *See infra* notes 62-68 and accompanying text.
60. *See infra* notes 69-77 and accompanying text.
61. *See infra* notes 78-82 and accompanying text.
62. 394 U.S. 557 (1969).
63. *Id.* at 558-59.
64. *Id.* at 564.
65. *Id.* at 565.
66. United States v. Orito, 413 U.S. 139, 140 (1973). Orito was charged with violating 18 U.S.C. § 1462 in that he "knowingly transport[ed] and carr[ied] in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans-World Airlines and North Central Airlines, copies of [specified] obscene, lewd, lascivious, and filthy materials." *Id.* at 140. The Supreme Court held that the Constitution protects certain privacy rights of the home, but does not extend this protection to certain activities conducted outside the home, such as the transportation of obscene materials through interstate commerce. *Id.* at 142.
67. *Id.* at 141.
68. Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973). The petitioners were owners and managers of "adult" movie theaters in Atlanta. *Id.* at 50. The petitioners brought this cause of action to uplift an injunction prohibiting them from exhibiting, in their adult movie theater, two films depicting sexual conduct, "Magic Mirror" and "It All Comes Out in the End." *Id.* at 51-52. The Georgia Supreme Court held the films were "hard-core pornography" that left "little to the imagination." *Id.* at 52. The United States Supreme Court vacated and remanded the case stating that the state of Georgia may regulate allegedly obscene material if Georgia law meets First Amendment standards. *Id.* at 69-70.
69. New York v. Ferber, 458 U.S. 747, 753 (1982).
70. 18 U.S.C. § 2256 (1988).

phy.[71] Rather, material that involves the *visual* depiction of children may be prohibited.[72] Sexually explicit text should be analyzed under the *Miller* test to decide if it is obscene.[73]

Child pornography differs from merely obscene material. The *Miller* test allows certain adult materials to be declared obscene, because the materials exceed certain moral bounds. Child pornography is illegal because the legal system believes that the process of producing child pornography leads to the sexual abuse of the children depicted.[74] Moreover, the Supreme Court has also refused to provide protection for the possession of child pornography. In *Osborne v. Ohio*,[75] the Court distinguished the *Stanley* exception for the possession of obscene material.[76] As the Court noted, state legislatures enact statutes prohibiting child pornography "in order to protect the victims of child pornography; [the legislatures] hope to destroy a market for the exploitative use of children."[77] Thus, the mere possession of child pornography strengthens this illegal and destructive industry.

In *Ginsberg v. New York*,[78] the Court held that states may bar the distribution of adult materials to children that is not obscene as to adults.[79] Justice Brennan, writing for the majority, quoted an earlier case that held that certain material, which may be legally distributed to adults "is not necessarily

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71. *Ferber*, 458 U.S. 747.

72. 18 U.S.C. § 2252 (1988). Section 2252 provides:

(a) Any person who -

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if -

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce by any means including by computer or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if -

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

Id.

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

74. *See Ferber*, 458 U.S. at 756-57.

75. 495 U.S. 103 (1990).

76. *Id.* at 109.

77. *Id.*

78. 390 U.S. 629 (1968).

79. *Id.*

constitutionally protected from restriction upon its dissemination to children."[80] The Court held that the state may adjust "the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests' of such minors."[81] Thus, materials that were not obscene when viewed by adults could be obscene if viewed by minors.[82]

B. Cyberporn

1. What is Cyberspace?

Cyberspace involves the high-speed movement of digital data across the globe; it is the way in which millions of computer users interact with each other.[83] The mechanics behind cyberspace are relatively simple. Millions of personal computers are connected by modems to commercial on-line services, private bulletin board systems, and the Internet. This connection creates the perception that no physical distance exists between two computers—even if the machines are thousands of miles apart. Unlike a normal telephone call, however, immense amounts of data can be transferred at the same time. Thus, any material that can be stored in a computer-readable format can be transmitted in cyberspace. Probably the three most important components of cyberspace are commercial on-line services, private bulletin board services, and the Internet.[84]

a. Commercial On-Line Services

Most Americans first enter cyberspace through a commercial on-line service. The most popular of these services include CompuServe, Prodigy,

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80. *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y.), *appeal dismissed*, 385 U.S. 12 (1966)).

81. *Id.* at 638 (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966); *Bookcase, Inc.*, 218 N.E.2d at 671). According to the Court, the definition of obscenity may vary from one group of people to another. The Court's reason for its decision was clearly stated: "Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." *Id.* at 636 (quoting *Bookcase, Inc.*, 218 N.E.2d at 671).

82. *But see* SCHAUER, *supra* note 17, at 89. Schauer believes that "[t]he *Ginsberg* test is still a test for obscenity, albeit modified, and if material does not meet each of the three tests, it may not be prohibited, even for minors."

83. One commentator has eloquently described cyberspace as "a region without physical shape or form. It exists, like a standing wave, in the vast web of our electronic communication systems. It consists of electron states, microwaves, magnetic fields, light pulses and thought itself." David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 81 (1993) (citing Mitchell Kapor & John P. Barlow, *Across the Electronic Frontier*, July 10, 1990, *available over* Internet, by anonymous FTP, at FTP.EFF.ORG (Electronic Frontier Foundation).

84. CAVAZOS & MORIN, *supra* note 2, at 2-4. While corporate networks are generally considered to be part of cyberspace, such networks have a limited impact on other parts of cyberspace. Byassee, *supra* note 7, at 200 n.14. Corporate networks normally provide electronic mail and job-related information to employees, but often do not offer connections beyond their own group. *Id.*

America Online, GEnie, and Delphi.[85] These services usually offer free software and trial memberships to entice people to join. Ordinarily, subscribers open an account with the service and obtain access to the host computer system. Each on-line service provides a wide variety of features and services.[86] These services include electronic mail (e-mail),[87] collections of software and games, comprehensive databases, and news and information services. In addition, most on-line systems allow subscribers to post messages on bulletin boards and communicate in real-time chats with other subscribers. Many subscribers spend hours interacting with the service and each other, developing an electronic community among subscribers.

b. Private Bulletin Board Systems

Private Bulletin Board Systems (BBSs), similar to commercial on-line services, allow users to access some basic services from a remote computer.[88] Most BBSs, however, are operated as a small business or hobby, having only a small number of users.[89] The system operator (sysop) allows BBS users to connect to the host computer.[90] The user then reads messages from other users or types a new message to be read by other users. Most BBSs focus on a single topic or area of interest. Whatever the user's interest, a BBS probably exists that caters to it.[91] Many BBSs serve as simple repositories for computer files, allowing users to upload or to download files.[92] Some files are "shareware

85. As of the end of March 1995, there were 7.3 million commercial on-line subscribers, up 47% in a year. Peter H. Lewis, *Shootout at the On-Line Corral*, N.Y. TIMES, Apr. 18, 1995, at C8. According to one observer, the commercial on-line services will "break the 10 million mark before the end of the year." *Id.*

86. Most commercial on-line systems provide a basic level of services for a standard monthly fee. Some systems allow subscribers to access premium services for an additional hourly fee.

87. E-mail allows subscribers to communicate with each other. The sender needs only to know the intended recipient's name and address in order to deposit a message in the recipient's mailbox. Messages become available when the recipient goes on-line. Most commercial on-line services now allow subscribers to send and to receive messages from non-subscribers, sometimes at an additional fee.

88. BBSs started out as the on-line world's version of ham radio in the 1970s. *See* Katie Hafner, *Online on a Shoestring*, NEWSWEEK, Mar. 6, 1995, at 75.

89. It only takes three items to run a bulletin board: (1) a computer; (2) bulletin board software; and (3) a modem. Loundy, *supra* note 83, at 82; *see also* Hafner, *supra* note 88, at 73. BBSs are often more successful if they have software that makes the host system look like a sophisticated on-line service. *Id.* at 75. Generally, there are no access charges since the system operator is running the board as a hobby. CAVAZOS & MORIN, *supra* note 2, at 3. Some sysops, however, may require users to provide new files not yet available on the BBS in order to receive full access to the BBS's services. Byassee, *supra* note 7, at 200 n.13.

90. Access to the BBS may be by direct dial or through a network. *See* Loundy, *supra* note 83, at 83.

91. Experts estimate that there are 60,000 BBSs in operation in the United States. Hafner, *supra* note 88, at 75. As Ralph Nader has pointed out, "the personal computer bulletin board is the lowest-entry-barrier mass communications system in history." CAVAZOS & MORIN, *supra* note 2, at 4 (citing T.R. Reid & Brit Hume, *Bulletin Boards Make for Cut-Rate Media Moguls*, CHI. TRIB., Dec. 8, 1991, at C8).

92. *See* Hafner, *supra* note 88, at 75.

programs" that allow users to test certain software before buying.[93] Other files consist of games, text, pictures, or even sounds.

c. The Internet

Computer networks are defined as collections of interconnected systems that can exchange information between each other.[94] Networks allow a user on a remote computer to send e-mail messages and to transfer files to another remote computer. The most vital computer network in the world is the Internet.[95] Often called a "network of networks,"[96] the Internet is the "largest, richest, and most diverse region in cyberspace."[97] Indeed, one commentator claims that "[u]ntil something better comes along to replace it, the Internet *is* cyberspace."[98]

The Internet commenced in 1969 as an experimental network of the United States Department of Defense.[99] Since the purpose of the Internet was to link large government computers, the designers developed a communication's protocol enabling various computers to speak the same language.[100] "Today, the Internet combines networks of academic, military, government, and commercial entities from the United States" and across the globe.[101] Probably the most interesting feature of the Internet is its decentralization in a technical sense and in its governance.[102] The Internet is technically decentralized, because no central location exists through which all electronic information must flow.[103] Similarly, the Internet has no central organizing body; it operates through informal agreements between its users.[104] No one owns the

93. *Id.* ("Some who roam around inside BBSs are the junkyard dogs of cyberspace. They spend hours on end rummaging for software to download, then store programs by the hundreds.").

94. CAVAZOS & MORIN, *supra* note 2, at 4.

95. *Id.*

96. *Id.*

97. Byassee, *supra* note 7, at 200. Today more than 30 million people in more than 160 countries have at least e-mail access to the Internet. Philip Elmer-DeWitt, *Welcome to Cyberspace*, TIME, Spring 1995 (Special Issue: *Welcome to Cyberspace)*, at 9.

98. Elmer-DeWitt, *supra* note 97, at 9.

99. Richard Wagner, *Inside CompuServe*, *available on* CompuServe, at GO INTERNET.

100. *Id.*

101. *Id.* As time went by, tools were developed to make it easier for all the systems to communicate with each other. *Id.* For example, Telnet is a tool that allows a user to log onto remote computers and allows a user to execute software programs available on the remote system as though it were located on the user's system. *Id.* USENET is a system of discussion groups which focus on a single subject. *Id.* File Transfer Protocol (FTP) allows files to be transferred between computers on the Internet. *Id.* E-mail programs send messages back and forth between users. *Id.* Gopher is a program that allows a user to browse Internet resources. *Id.* The World Wide Web (Web) allows the user to browse the Internet via a graphical interface. *Id.* By 1994, the Web had replaced Gopher as the Internet's most popular information retrieval tool. Byassee, *supra* note 7, at 202 n.22.

102. *See* Byassee, *supra* note 7, at 200-01.

103. *Id.* at 200.

104. *Id.* at 201.

Internet, and "[i]t is run like a commune with 4.8 million fiercely independent members (called hosts)."[105]

The Internet's growth rate is astounding. The Internet population is estimated to be increasing ten percent per month.[106] All of the commercial on-line services are providing better Internet access for their subscribers.[107] Also, many BBSs are joining the Internet.[108] This growth should continue as government and industry combine to develop the hardware and software needed to construct the "information superhighway."[109]

2. Pornography in Cyberspace

Pornographic materials thrive in cyberspace.[110] Several reasons exist for this phenomenon. First, many sysops are looking for a quick way to get their systems off the ground by providing pornographic computer files, which may result in a financial windfall.[111] According to one commentator, "[s]ome of the biggest success stories so far in online services cater mainly to the adult market."[112] Most likely, many of these sysops will cease to disseminate adult materials once they are able to provide the services that they really want to offer.[113] Nevertheless, others are only in the Internet for the money and will continue to provide on-line adult materials until they face serious legal problems.

Another commentator asserts that access to sexual materials is so prevalent in cyberspace, because "you can go anywhere you want to go online while in the privacy of your own home."[114] Users may explore any type of sexually deviant area without the embarrassment of entering an adult pornography store or acknowledging their behavior to neighbors.[115] According to one observer, "[c]ybersex is, at bottom, simply old sexual fantasies in a new electronic bottle."[116]

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105. Elmer-DeWitt, *supra* note 97, at 9.

106. NEGROPONTE, *supra* note 1, at 6.

107. Lewis, *supra* note 85, at C8; *see also* Lawrence M. Fisher, *CompuServe to Buy Spry, an Internet Company*, N.Y. TIMES, Mar. 14, 1995, at D2.

108. Hafner, *supra* note 88, at 76. Many of the smaller sysops, however, cannot hook up to the Internet because the links require an expensive, dedicated high-speed phone line. *See id.*

109. *See* CAVAZOS & MORIN, *supra* note 2, at 10; *see generally* Gore, *supra* note 3, at 156-59.

110. *See* Hafner, *supra* note 88, at 76.

111. LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 244-48 (1995) (discussing the use of pornographic materials by struggling sysops). In fact, many sysops acknowledge that they have little choice but to carry "adult" files. Hafner, *supra* note 88, at 76. The porn files generate calls, and many users insist on them. *Id.* One sysop tried to remove all his adult files, but after an outcry from users, the sysop restored them. *Id.*

112. ROSE, *supra* note 111, at 248.

113. *Id.* at 247.

114. David Hoye, *Online Sex Sells But Local Officials Warn There are Limits*, PHOENIX GAZETTE, Feb. 27, 1995, at C1.

115. *Id.*

116. Gerard van der Leun, *Twilight Zone of the Id*, TIME, Spring 1995 (Special Issue: *Welcome to*

Various types of pornographic materials and activities are available in cyberspace. Graphic files are probably the most popular and the most readily available form of adult materials.[117] Digitized images of pornography are created either by using graphics software or by scanning an existing photograph and storing it in a graphic computer file.[118] Computer users who have "viewer" programs can display the full-color pornographic images.[119] The images can be downloaded from a BBS or an on-line service dedicated to providing adult materials.[120] In addition, the images may be sent through e-mail or through a message base.[121]

Sexually explicit text may also be found on-line. For example, many BBSs post sexually explicit narratives.[122] Often, these narratives take the form of very short erotic stories, which are organized into forums based on sexual preference. Other BBSs provide sexually explicit text files which may be downloaded by users. These files may be viewed with a text editor or word processor, allowing users to modify the sexually explicit text to suit the users' desires. Along with the services provided by the BBSs, many users send sexually explicit e-mail messages to one another. Furthermore, almost all of the networks provide some form of "hot chat" capability, offering users the opportunity to communicate sexually explicit text in real-time.[123]

III. APPLYING CURRENT OBSCENITY LAW TO CYBERPORN

The legality of adult materials in cyberspace has just recently become a topic of interest, because more users are coming across hard-core pornography on the Internet or on adult BBSs.[124] In addition, families are being hooked into cyberspace.[125] This accessibility raises new concerns for parents who want to prevent their children from finding pornography on the Internet.[126] This concern has caused ambitious state and federal law enforcement officials to pursue obscenity convictions for hard-core cyberporn.

Cyberspace), at 36.

117. CAVAZOS & MORIN, *supra* note 2, at 90. One sysop grossed $3.5 million in 1992 from computer users paying $9 an hour to connect to his database of pornographic digital images and film loops. Elmer-DeWitt, *supra* note 6, at 61.

118. CAVAZOS & MORIN, *supra* note 2, at 90.

119. *Id.*

120. *Id.* at 91. In a recent poll of the best BBSs, three of the top 10 were explicit "adult" systems. Elmer-DeWitt, *supra* note 6, at 61.

121. CAVAZOS & MORIN, *supra* note 2, at 91.

122. *See* Elmer-DeWitt, *supra* note 6, at 61.

123. *See* van der Leun, *supra* note 116, at 36-37. Many users believe that "hot chat" allows them to meet new people. Users believe that cybersex gives then the opportunity to experience, to a certain extent, alternative lifestyles that the users would never dream of trying in real life. *Id.* at 37.

124. CAVAZOS & MORIN, *supra* note 2, at 89.

125. Gamboa & Mezger, *supra* note 6, at D1.

126. According to a Newsweek poll taken February 16-17, 1995, 85% of those polled are concerned about pornography being too available to young people on the Internet. Peter McGrath, *Info "Snooper-Highway,"* NEWSWEEK, Feb. 27, 1995, at 61.

For example, two employees of Lawrence Livermore Laboratories allegedly stored adult images on laboratory computers accessible through the Internet.[127] The employees were later fired, and then indicted, based on their actions.[128] Furthermore, a twenty-year-old sophomore at the University of Michigan, who published an erotic short story on the Internet, was indicted on charges of interstate transmission of a threat.[129] Also, officials at Carnegie-Mellon University claim that they must censor sex-related newsgroups on the Internet to avoid potential criminal charges under Pennsylvania's obscenity laws.[130] Similar actions will likely be taken in the future, as these cases tend to have a high-profile.[131] Problems exist, however, when old rules and laws are applied to cyberspace.

A. Which Laws Apply?

Most states have statutes regulating obscene material. While state obscenity laws differ from state to state, all statutes are based on the states' police power to regulate for the public's health, safety, and general welfare.[132] The statutes are directed at purveyors of pornography and generally prohibit

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127. Rose, *supra* note 111, at 245; *see also Two Employees At Nuclear Lab Face Pornography Charges*, WASH. POST, Aug. 19, 1994, at A20. Lawrence Livermore Laboratories is a nuclear weapons laboratory. *Id.* One of its computer technicians stored 91,000 photographs in a lab computer system. *Id.* The photos depicted nude women, adults having sex, and child pornography. *Id.* Moreover, the computer technician was allowing people outside the laboratory access to the pornographic images via the Internet. *Id.* The technician was charged with using a computer for purposes his employer did not intend, a felony. *Id.* Another lab employee was charged with infractions relating to the misuse of lab computers, a lesser charge. *Id.*

128. ROSE, *supra* note 111, at 245.

129. *See* Megan Garvey, *Crossing the Line on the Info Highway*, WASH. POST, Mar. 11, 1995, at H1. The student's first-person fictional account dealt with sexual torture and murder. *Id.* It was later learned that the student's fictional victim shared the name of a Michigan classmate. *Id.* Investigators also discovered that the student had written some e-mail to a friend indicating he might have an interest in actually committing such a crime. *Id.* A federal judge later dismissed the criminal charges against the student because the government became entangled in what should have remained a university disciplinary case. Jim Schaefer & Maryanne George, *Internet Author's Charges Dismissed - Judge Criticizes Prosecutors in U-M Case*, DETROIT FREE PRESS, June 22, 1995, at 1A.

130. ROSE, *supra* note 111, at 245-46; *see also* Jeffrey E. Faucette, Note, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155 (1995) (discussing the potential legal liabilities faced by Carnegie Mellon University for providing access to sexually explicit newsgroups); Philip Elmer-DeWitt, *Censoring cyberspace: Carnegie Mellon's attempt to ban sex from its campus computer network sends a chill along the info highway*, TIME, Nov. 21, 1994, at 102. In October 1994, administrators at Carnegie Mellon University in Pittsburgh learned that some of its computers contained pornographic images. The administrators were particularly upset that some images of bestiality had already been declared obscene by a Tennessee court earlier that summer. Fearing prosecution, the academic council quickly voted to shut down those areas of the computer system relating to sex (the "sex" Usenet newsgroups). That decision however caused quite a stir on campus. Carnegie Mellon was one of the first universities to join the Internet and now the administration was going to censor the university's newsgroups. In addition, the ACLU and the Electronic Frontier Foundation argued against the censorship. Within a week after making its decision, the faculty senate voted to restore all the newsgroups relating to sex.

131. CAVAZOS & MORIN, *supra* note 2, at 90.

132. *See* ROSE, *supra* note 111, at 248. *See generally* SCHAUER, *supra* note 17, at 192-205 (discussing state obscenity laws).

the "promoting" of obscene material.[133] The definition of promoting is interpreted broadly and may "include manufacturing, selling, transferring, distributing, mailing, giving, lending, exhibiting, and advertising."[134] The state laws are normally used to regulate obscenity in adult bookstores and peep-show parlors, but some commentators believe that courts could extend laws to regulate on-line obscenity.[135]

At least three federal obscenity statutes exist that may also be applicable to cyberspace activities.[136] The first federal statute that bans child pornography in 18 U.S.C. § 2252. The wording of the statute clearly indicates that it is applicable to computer pornography.[137] The second federal statute that may be applicable to cyberspace activities is 18 U.S.C. § 1465. This law prohibits the interstate transportation of obscene material for sale or distribution.[138] The statute is broad enough to encompass on-line activities involving adult materials.[139] The third federal law that may be applicable is 47 U.S.C. § 223(b), which is essentially aimed at the telephone "dial-a-porn" industry.[140] This statute makes it a federal offense to make obscene comments over the telephone lines.[141] The language of this statute is also broad enough to prohibit

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133. CAVAZOS & MORIN, *supra* note 2, at 97.

134. *Id.* at 97-98.

135. *Id. But see* ROSE, *supra* note 111, at 249. According to one commentator:

> Sometimes, however, [state] laws are very specific to certain media in which the targeted materials may be contained, such as books or videotapes. In that case, the same adult content contained in a digital file may not be covered by [state] law. System operators should be careful before exploiting any such gap in coverage. Pornography statutes are frequently reworked in many states to reflect new media, as well as slight shifts in community values and Supreme Court pronouncements.

Id.

136. 18 U.S.C. §§ 1465, 2252 (1988); 47 U.S.C. § 223(b) (1988). All of the state and federal statutes prohibiting obscenity are still subject to the limits created by the Supreme Court in the First Amendment. Thus, courts must apply the *Miller* test for activities arising under the anti-obscenity statutes. Nevertheless, the application of "local community standards" to on-line obscenity raises some serious issues.

137. See *supra* note 72 for the text of 18 U.S.C. § 2252(a)-(b). Thus, knowingly uploading or downloading child pornography is prohibited. *See generally* CAVAZOS & MORIN, *supra* note 2, at 101; ROSE, *supra* note 111, at 256-57.

138. 18 U.S.C. § 1465. The statute provides in pertinent part:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

Id.

139. *See* CAVAZOS & MORIN, *supra* note 2, at 98 ("Users who dial up out-of-state BBSs should be aware of this statute (as should the sysops of these systems)."). The language of the statute is very broad. Section 1465 only states that it is illegal to transport obscene material across state lines. Since on-line material travels through the phone lines across state lines, this statute should be applicable to cyberspace. In fact, federal prosecutors have already used this statute to convict two BBS operators from California for on-line obscenity. *See infra* notes 136-44 and accompanying text (discussing the Thomas case).

140. *See* ROSE, *supra* note 111, at 249.

141. Section 223(a)(1)(A) provides: "Whoever in the District of Columbia or in interstate or foreign communication by means of telephone makes any comment, request, suggestion or proposal which is

obscene activities in cyberspace.[142] In case this statute is applied narrowly and found not broad enough to include on-line obscenity, the Senate Commerce Committee has recently approved a proposal to ban "smut" in cyberspace.[143] The measure would amend 18 U.S.C. § 223 by "changing the word - 'telephone' to 'telecommunications devices' and widening criminal liability to anyone who 'makes, transmits, or otherwise makes available any comment, request, suggestion, proposal, image or other communication' that is found 'obscene, lewd, lascivious, filthy or indecent.'"[144]

All of the state and federal statutes prohibiting obscenity are still subject to the limits created by the Supreme Court under the First Amendment. Thus, courts must apply the *Miller* test for activities arising under the anti-obscenity statutes. Nevertheless, the application of "local community standards" to on-line *obscenity* raises some serious issues.

B. The Problem with Applying the Miller *Test to Cyberporn*

A recent federal obscenity conviction of a California couple best illustrates the "community standards" problem.[145] On July 28, 1994, a jury found Robert and Carleen Thomas guilty of transmitting obscenity through interstate telephone lines in violation of 18 U.S.C. § 1465.[146] The Thomases operated a computer bulletin board system called "Amateur Action," which made sexual pictures available to subscribers. Subscribers could download computer files or order photographs and videotapes from the BBS.

The case developed when a postal inspector, located in Memphis, Tennessee, subscribed to Amateur Action under a fictitious name.[147] The postal inspector then downloaded graphic computer files containing explicit sexual material. According to the indictment, the files contained images of bestiality, oral sex, incest, and sadism.[148] The Thomases were charged with six counts of using "a facility and means of interstate commerce, that is a

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obscene, lewd, lascivious, filthy, or indecent; . . . shall be fined not more than $50,000 or imprisoned not more than six months, or both."

142. *See* ROSE, *supra* note 111, at 249. This statute is used to prohibit obscenity transmitted over telephone lines. Since on-line obscenity is transmitted over telephone lines, it seems as though this statute would be applicable. The Exon amendment was met with angry protests from critics, who have started electronic petition drives in cyberspace. *See* Edmund L. Andrews, *Senate Committee Backs a Ban on Computer Nets*, N.Y. TIMES, Mar. 24, 1995, at A1.

143. *See* Andrews, *supra* note 141, at A1.

144. *Hobbling the Internet*, WASH. POST, Feb. 26, 1995, at C6; S. 314, 104th Cong., 1st Sess. (1995) (a comprehensive overhaul of the nation's communications laws).

145. United States v. Thomas, L.A. TIMES, July 29, 1994, at A10 (W.D. Tenn., Jul. 28, 1994). This is the first criminal prosecution involving the distribution of obscene materials via a computer bulletin board system. Byassee, *supra* note 7, at 204 n.32.

146. See *supra* note 138 for the text of the statute.

147. Byassee, *supra* note 7, at 204.

148. *Id.* at 204 n.35 (citing Indictment, Counts 2-7, *Thomas* (No. CR-94-20019-G)).

combined computer/telephone system, for the purpose of transporting obscene material in interstate commerce" in violation of 18 U.S.C § 1465.[149]

The Thomases attempted to have the case moved from Tennessee to California.[150] The district court judge, however, denied their pre-trial motions. The judge noted that the trial should take place in Tennessee, because Memphis was "affected by the distribution of the allegedly obscene material."[151] In obscenity prosecutions, venue is proper either in the district from which the material was mailed or in the district in which it was received.[152] In addition, the jury would have to evaluate the allegedly obscene material "according to the community standards of the Western District of Tennessee."[153]

Two significant problems exist, however, with applying contemporary community standards to allegedly obscene materials from cyberspace. First, the Supreme Court has held that "community" should be defined in geographic terms—in other words, neighborhoods, counties, or states.[154] The *Miller* Court recognized that different communities have different moral standards, and the Court wanted to allow each community to choose its own rules relating to obscenity.[155] A geographic definition of "community" makes sense when local law enforcement officials are regulating adult book stores, XXX-movie theaters, peep-show parlors, and other physical entities.[156] In those instances, the dissemination of pornography affects the "total community environment" and the "tone of commerce."[157] This premise, however, is less true when the adult material is obtained on-line in the privacy of one's own home.

Cyberspace is filled with thousands of new virtual, on-line communities.[158] Little or no impact on the *local* community transpires when pornography is disseminated over the phone lines.[159] Only digital information has been transmitted—no pornographic books or movies are involved.[160] Outside the recipient's home, no "object" causes harm as it travels through the community. In addition, on-line material is "pulled" into the community, as

149. *Id.* at 205 (citing Indictment, Counts 2-7, *Thomas* (No. CR-94-20019-G)). The Thomases were also charged with three counts of violating 18 U.S.C. § 1462, one count of conspiracy in violation of 18 U.S.C. § 371, and a count seeking forfeiture of their business under 18 U.S.C. § 1467. *Id.* (citations omitted). Robert Thomas was also charged with one count of violating the federal child pornography statute. *Id.* (citation omitted). Thomas was acquitted on the child pornography count. *Id.* at 206.

150. *Id.* at 206.

151. *Id.* at 207 (quoting Order Denying Motion for Transfer, *Thomas* (No. CR-94-20019-G)).

152. *Id.*

153. *Id.* (quoting Order Denying Motion for Transfer, *Thomas* (No. CR-94-20019-G)).

154. *See* Miller v. California, 413 U.S. 15 (1973).

155. ROSE, *supra* note 111, at 251.

156. *See* Sergent, *supra* note 5, at 732.

157. *Id.* (citing Paris Adult Theater I v. Slaton, 413 U.S. 49, 58 (1973)).

158. *See, e.g.*, Howard Rheingold, *The Virtual Community*, UTNE READER, Mar.-Apr. 1995, at 61-64 (discussing communities in cyberspace).

159. Byassee, *supra* note 7, at 209.

160. *See* NEGROPONTE, *supra* note 1, at 11-20 (discussing the transformation in information technology from atoms to bits).

opposed to being "pushed" into the community.[161] Computer users request and download the computer files into their own private computer. BBS operators may be unaware that downloading has occurred; it may occur overnight due to the automatic operation of the software. In the case of adult book stores, however, the material is pushed into the community, even if the community does not want the material.

A second problem with community standards is that a nationally accessible BBS with adult material is subject to prosecution in all states to which the material has been disseminated.[162] This enables federal prosecutors to forum shop for the most favorable location in obtaining a conviction.[163] Thus, the Thomases were subject to prosecution in Tennessee, even though their BBS was located in California, which is a more lenient jurisdiction regarding obscenity.

Large on-line services operate in nearly every community in the United States. It is impossible for these services to have knowledge of the community standards of every town in America. In addition, one can use Internet addresses anywhere in the world. It would be impossible therefore, for users to determine the geographic location of various services, as well as, other users. The address is more like a social security number than a street number—it is a "virtual" address.[164]

Because of forum shopping and varying community standards, system operators may choose to eliminate adult materials and activities from their systems. Thus, the application of community standards to cyberspace results in a massive chilling effect. The time may be near for a major revision of the concept of community standards.

IV. MODIFYING THE "CONTEMPORARY COMMUNITY STANDARDS" REQUIREMENT

Taking into account technological innovations, the Supreme Court should reconsider its emphasis on applying local community standards in obscenity prosecutions. When *Miller* and its companion cases were decided, obscene material generally involved only pornographic books, films, and magazines.[165]

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161. *See id.* at 83-85.

162. One commentator stated, "To be precise, the government may bring the indictment either in the district of origin or the district of receipt. However, indictment in the district of origin would not change the community standards which apply because the offense is based on the presence of the allegedly illegal materials in the community after leaving the sender's home." Byassee, *supra* note 7, at 209 n.61 (citing United States v. McManus, 535 F.2d 460, 464 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977)).

163. According to a legal scholar, "[g]uilt or innocence should not, and do not normally, turn on where the prosecution occurs, but this is the inevitable result when a major substantive element of the offense must, by definition, vary from place to place." SCHAUER, *supra* note 17, at 128.

164. NEGROPONTE, *supra* note 1, at 166.

165. In addition to Miller v. California, 413 U.S. 15 (1973), the Supreme Court also decided the following obscenity cases: United States v. Orito, 413 U.S. 139 (1973); United States v. 12 200-Foot Reels

Since these materials were displayed and sold in public facilities, the Supreme Court believed that it was logical to let each local community or state determine whether material was obscene.[166]

For example, in *Paris Adult Theatre I v. Slaton*,[167] the Court noted that "[t]he States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions."[168] The Court further noted that the state had a legitimate interest in stopping the flow of commercialized obscenity, even when the state could enforce effective safeguards against exposure to minors and passersby.[169] The state's interest included "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[170]

The world, however, has changed, and computers and cyberspace are becoming a central part of our society. Pornographic or obscene material can flow straight into the home without ever actually being in the community itself. On-line obscenity is not sold in stores on local street corners; it is viewed strictly in the home. Moreover, in *Stanley v. Georgia*,[171] the Court clearly stated that the United States Constitution protects the rights of citizens to possess obscene materials in their own homes.[172] The Court stated that "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."[173] Thus, to protect the constitutional right established in *Stanley*, it may be time for the Court to abandon the geographic aspects of contemporary community standards and remove the word "community" from the *Miller* test. The key word should be "contemporary," not "community." The trier-of-fact should consider the "contemporary standards" of "society at large" without any geographic limitations.[174]

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of Super 8 mm. Film, 413 U.S. 123 (1973); Kaplan v. California, 413 U.S. 115 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

166. *See, e.g., Paris Adult Theatre I*, 413 U.S. 49 (holding that the state of Georgia could regulate allegedly obscene materials exhibited at an adult movie theater, as long as the obscenity statute met the First Amendment standards).

167. 413 U.S. 49.

168. *Id.* at 57.

169. *Id.*

170. *Id.* at 58.

171. 394 U.S. 557 (1969). See *supra* notes 62-68 and accompanying text for a discussion of *Stanley v. Georgia*.

172. 394 U.S. at 557.

173. *Id.* at 568.

174. *See* Fredrick F. Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. Rev. 1 (1978) (arguing that history does not support the present use of the contemporary community standards concept and its use is irrelevant in defining obscene material). Regarding the addition of the phrase "contemporary community standards" in the *Roth* test, Fredrick Schauer wrote:

It seems unlikely that the Court was thinking of either local *or* national standards when it used the

Of course, some jurors may find it difficult to know what society-at-large considers to be obscene material today. Thus, expert testimony may play an important role in obscenity trials under this new standard.[175] Currently, expert testimony is not a constitutional requirement in obscenity trials. The Supreme Court has held that the prosecution does not have to present affirmative expert evidence that materials are obscene, since the obscene material themselves are the best evidence of what the materials represent.[176] The Court in *Kaplan v. California*, however, stated that "[t]he defense should be free to introduce appropriate expert testimony."[177] To determine "contemporary standards," the defense may be more likely to employ expert witnesses.[178] While no field or acknowledged area of expertise for contemporary standards of obscenity exists, this conclusion does not mean that one cannot be developed.[179] The expert testimony could include "expert" statistical or sampling testimony about what society-at-large believes.[180] Statistical experts could routinely poll the nation regarding its opinions on obscenity.[181]

Hopefully, eliminating geographic limitations on determining contemporary standards will eliminate the unpredictability of state or local standards and forum-shopping by the prosecution. In this way, BBS operators could predict how obscenity might be defined, and any potential chilling effects would be negated. Nevertheless, it is important to remember that there may exist some

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phrase "contemporary community standards." Historically the use of the concept had been in reference to the temporal, not the geographical, aspects of the words. It was a warning to judges and jurors to apply the standards of today's society, not the standards of the mid-Victorian era.

Id. at 8.

175. *See generally* SCHAUER, *supra* note 17, at 276-91 (discussing the use of expert testimony in obscenity cases). It is natural for jurors to apply their own standards in obscenity cases; thus, the admission of expert testimony may dissuade a juror from doing so. *Id.* at 286.

176. *Paris Adult Theatre I*, 413 U.S. at 56. "[Obscenity] is not a subject that lends itself to the traditional use of expert testimony." *Id.* at 56 n.6. "[I]ndeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony." *Id.* Jurors should draw upon their own knowledge of the view of the average person in their community. Hamling v. United States, 418 U.S. 87, 104 (1974).

177. Kaplan v. California, 413 U.S. 115, 121 (1973); *see also* Smith v. California, 361 U.S. 147, 166 (1959) (Frankfurter, J., concurring) ("Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude [expert testimony] in this case.").

178. It should be noted that in the pre-*Miller* days of national standards, expert testimony would have been necessary since the average juror would not have knowledge of the national standard. SCHAUER, *supra* note 17, at 285.

179. SCHAUER, *supra* note 17, at 286.

180. *See* Hon. Joseph T. Clark, *The "Community Standard" in the Trial of Obscenity Cases - a Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13 (1993) (discussing the use of social science evidence in obscenity prosecutions); *see also* Darlene Sordillo, *Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards*, 10 LOY. ENT. L.J. 619 (1990) (discussing what type of evidence is necessary to prove the standards of a given community in an obscenity case).

181. *See* Roderick A. Bell, *Determining Community Standards*, 63 A.B.A. J. 1202 (1977) (discussing polling techniques for determining community standards).

other methods of keeping on-line pornography and obscenity under control apart from obscenity prosecutions.[182]

Generally, critics attack on-line pornography, because they fear that children may find it while roaming through cyberspace.[183] While the Internet may have controversial aspects, it is not always easy to find on-line pornography.[184] Nevertheless, it might be possible for BBS operators to implement a rating system similar to the one used by the motion picture industry.[185] Thus, sexually explicit files could be rated "X." By adding an X-rating in the Internet address of computer files, software programs could be written that would allow computer users and sysops to lock access for children and others.[186] Unlike systems on the Internet, the commercial on-line services have even greater control over the content they carry. The services therefore can attempt to build safeguards into their systems.[187] All of the on-line services could work together to control who can access cyberporn.

V. CONCLUSION

It seems likely that the Supreme Court will maintain its two-tier approach to sexually-explicit materials. In other words, legislators and courts can declare certain materials obscene and unworthy of First Amendment protection. If that is the case, then the current definition of obscenity should be modified. The growth of cyberspace has changed the way in which we define community.[188]

The old obscenity laws were based on a local community's desire to regulate morality. Today, people communicate with each other on a global scale. Vast amounts of information may now be disseminated digitally. On-line adult materials *rarely ever* enter the community at large—they merely flow into the user's own private home. While adult book stores and peep-show parlors may "harm" a community, it is difficult to see how the same commu-

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182. *See, e.g.*, Sergent, *supra* note 5, at 734-36 (arguing that sexually-explicit materials might be regulated by requiring that they be located in a separate area of the information service).

183. *See* Gamboa & Mezger, *supra* note 6. Child pornography and dissemination to minors are very important issues in the regulations of cyberspace. A discussion of these topics, however, is beyond the scope of this Article.

184. Peter H. Lewis, *Helping Children Avoid Mudholes in Cyberspace*, N.Y. TIMES, Apr. 4, 1995, at C8. One writer "went out into the networks deliberately trying to find examples of extreme pornographic images, and hours later had found nothing that [he] could not have found more easily (and at higher photographic resolution) at a local adult bookstore." *Id.*

185. *See* Garrett W. Griggs, Editorial, *How About X Ratings on the Internet?*, N.Y. TIMES, Mar. 29, 1995, at A14.

186. *Id.*

187. Lewis, *supra* note 169. Prodigy, for example, allows parents to block children's access to Internet chat rooms, discussion groups, World Wide Web and Prodigy bulletin boards. Gamboa & Mezger, *supra* note 6, at D2. America Online will soon make an announcement regarding parental control of its new World Wide Web browser. *Id.*

188. Cyberspace will continue to grow at a rapid rate. According to one commentator, "[i]n the year 2000 more people will be entertaining themselves on the Internet than by looking at what we call the [television] networks today." NEGROPONTE, *supra* note 1, at 182.

nity is affected by adult computer files. Using local community standards to determine whether material is obscene is no longer workable. Juries must consider how society at large feels about the materials. If the main concern is that children may view the materials, then various mechanisms are available to limit their access. The improvements in information technology have once again brought the First Amendment into the realm of public debate. The Supreme Court should not be afraid to offer First Amendment Protection to on-line materials. The Court adjusted the definition of obscenity before, and can adjust it again.