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A Brief Comment on the Application of the "Contemporary Community Standard" to the Internet

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I. INTRODUCTION

A. The Law Must Parallel Scientific Advancement

Science and technology are, perhaps, inextricably linked. Advances in science are almost invariably accompanied by concomitant advances in technology.\(^1\) Advances in science and technology are, in turn, often accompanied by novel legal and ethical dilemmas and concerns.\(^2\) A society, through its body of laws, must continually strive to stay apace with human scientific and technological progress.\(^3\) The remarkable and rapid development of the Internet,\(^4\) together with Congress’ attempts to draft laws that

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1. For example, James Clerk Maxwell’s electromagnetic wave theory led to, *inter alia*, the development of the radio; the invention of vacuum pumps led to the development of the modern lightbulb; Wilhelm Conrad Roentgen’s discovery of x-rays in 1895 led to the use of x-rays for medical purposes; Alan Mathison Turing’s remarkable work in the field of computer theory led to the development of the modern computer; now, the telephone (Alexander Graham Bell) and the modern computer are used together (along with numerous other technologies) in multiplicity to comprise the structural components of the Internet.

2. An interesting example can be found in the recent success of scientists in their effort to clone multi-cellular organisms (remember Dolly the Sheep?). A divisive and troubling ethical concern arises when cloning is considered in regard to its application to humans.

3. For example, new laws were drafted to address telephone, radio, and television technologies. Some law pertaining to television was drafted, in part, by way of analogy to radio, based on the conceptual similarity of the two forms of communication. Recently, Congress has, in part by way of analogy to radio and television, attempted to develop a body of laws that will effectively address the legal and ethical concerns that accompany the Internet.

4. The “development” of the Internet is a product of many factors, including the number of global users, the number of computers that are “attached” to and
appropriately address the Internet, is an on-going example of this phenomenon.

The startling advances in science that have produced and contributed to Internet-related technologies have been paralleled by advancements in other fields of science. Recent progress in evolutionary biology, for example, has revolutionized the study of human social behavior. This Comment sets forth the argument, based in part upon a new scientific understanding of a narrow range of human behavior, that the *Miller v. California* "contemporary community standard" fails in its application to the Internet.

II. THE IMPORTANCE OF CONSIDERING ALL THE FACTS

A. The Metaphysicist Has No Laboratory

Carl Sagan, in his book *The Demon-Haunted World*, describes a response given by the physicist Robert W. Wood to a toast offered in celebration of physics and metaphysics. Metaphysics, at that time, was commonly understood to refer to a branch of learning that concerned itself mainly with a good deal of speculation and very little, if any, experimentation or scientific method. Sagan paraphrased Wood's response:

The physicist has an idea. The more he thinks it through, the more sense it seems to make. He consults the scientific literature. The more he reads, the more promising the idea becomes. Thus prepared, he goes to the laboratory and devises an experiment to test it. The experiment is painstaking. Many possibilities are checked. The accuracy of measurement is refined, the error bars reduced. He lets the chips fall where they may. He is devoted only to what the experiment teaches. At the end of all this work,
through careful experimentation, the idea is found to be worthless. So the physicist discards it, frees his mind from the clutter of error, and moves on to something else.
The difference between physics and metaphysics... is not that the practitioners of one are smarter than the practitioners of the other. The difference is that the metaphysicist has no laboratory. 9

B. My Father's Lesson

My father was for a brief period a commissioner in the rural North Carolina mountain county in which I was reared. The economy of the county was experiencing a good deal of growth, and the political leaders were confronted with many issues that were difficult to resolve. I was old enough at the time to understand the significance of the negative commentaries and occasional unflattering reports that appeared in our town's biweekly newspaper in regard to my father's sometimes unpopular stances on various political issues. My older sister and I would periodically review the paper just before dinner in an attempt to amass ammunition with which to blast my father while he attempted to enjoy his meal at the end of a long work day. We did this in subtle and passive revenge for the shadow of negative popularity we imagined was cast upon us by our less than brilliant father.

The onslaught would begin: “Dad... what were you thinking?” He would smile slightly, and without response would continue eating while he was bombarded with verbatim recapitulations of the opinions my sister and I had found in the newspaper and adopted as our own viewpoint in a matter of moments. She and I could not be blamed; after all, the viewpoints expressed in the paper were often highly intuitive and appealing on an emotional, rather than cognitive, level. After several “your food is going to get cold” admonishments from my mother, it was my father's turn to respond.

He would put his fork down deliberately, take his napkin out of his lap, slowly wipe his mouth, fold his napkin neatly, put it back into his lap, and engage us with a level stare before even saying a word. He enjoyed this period of utter silence and suspense—I suppose he used this few seconds to think about what he was going to say. He would raise his left hand, elbow still touching the table, and extend his index finger to indicate that he was about to begin. He always spoke carefully, and his words were

9. Id.
heavy with contemplation. "Yes," he would say, "that may be true. But what you have failed to consider is . . . ."

What I learned from my father consisted of two parts. First, he taught me that before one could honestly arrive at and adopt a particular belief or understanding in regard to a particular subject, one had to consider and carefully weigh all the relevant facts. Second, he taught me that all the relevant facts do not already exist as part of one's own intuition. Instead, a great deal of open-minded research was necessary to gather and assemble the facts. I have since learned that this system of scrutiny is invaluable if one plans to make a sincere attempt to discern an objective reality from the abundance of specious, spurious, and misleading information that is sure to exist on any subject.

III. Morality and Biology Considered

A. Are We Thinking Clearly?

It cannot be disputed that issues in regard to sex and morality, at least in some cultures, may engender strong emotional responses in those persons who consider such issues. It is also clear that emotional thinkers are not always logical thinkers. Indeed, an emotional reaction to a question or issue may occasionally produce a "right" answer, but it will seldom produce a well-considered answer. More often, issues that are addressed emotionally, rather than cognitively, "arise[] subjectively rather than through conscious effort", and are likely to express a personal bias developed at least in part through personal experience. Judges, and certainly juries, are not immune from this process of


12. Consider, for example, the Salem Witch Trials, which clearly reflected (among other things) the strongly intuitive, yet bizarre and wholly unfounded belief by many people that their neighbors were capable of flight unassisted by machinery. Consider also the intuitive belief, based largely on basic human chauvinism, of the Roman Catholic Church (circa the 16th century), in a geocentric model of the universe. These were clearly emotionally-laden issues. Without a doubt, little (if any) logical analysis or scientific method was employed by the persons effectuating the punishments in either of the above examples. This lack of willingness to rationally consider the relevant data in these cases came at a tremendous cost. I concede these are examples of drastic irrationality that are not prevalent in our legal system, but I submit that the process of
obscurring truth or clouding objective reality by virtue of personal biases rooted in an emotional response to an issue. This seems to be especially true in regard to issues related to human sexuality, when we are especially subject to emotional vagaries and moral predisposition. When this occurs, logic, pragmatism, and detached consideration are replaced with subjective reactionism.

B. Our Biological Heritage

"No serious student of human behavior denies the potent influence of evolved biology upon our cultural lives. Our struggle is to figure out how biology affects us, not whether it does."

According to one scientist, single-celled organisms first engaged in sexual reproduction (as opposed to "asexual", meaning reproduction by a single organism by itself, such as is done by amoebae) just short of a billion years ago. Clearly, it is understating the case a bit to say that many acts of reproduction have emotional thought obscuring logical consideration is more common than we would like to admit.

13. Richard A. Posner, Sex and Reason 2 (1992) (stating in regard to Barnes v. Glen Theatre, Inc., 50 U.S. 560 (1991): “It will be apparent to anyone who takes the trouble to read these opinions that nudity and the erotic are emotional topics even to middle-aged and elderly judges and also that the dominant judicial, and I would say legal, attitude toward the study of sex is that 'I know what I like' and therefore research is superfluous.”).

14. I include in this category issues relating to obscenity, pornography, human sexual relations, etc. The issues dealt with herein do not apply to any aspect of child pornography.

15. “Subjective reactionism” may be defined as a type of mental process that occurs when one experiences a sudden emotional reaction to a particular stimulus.

16. This section heading is not intended to relate to or detract in any way from possible religious theories. See Stephen Jay Gould, Dorothy, It’s Really Oz, Time, Aug. 23, 1999, at 59 (“No scientific theory . . . can pose any threat to religion—for these two great tools of human understanding operate in complementary (not contrary) fashion in their totally separate realms: science as an inquiry about the factual state of the natural world, religion as a search for spiritual meaning and ethical values.”).


taken place since that time. It is likely that between 100,000 and 200,000 generations of our ancestors have been the product of reproduction (and reproduced themselves) since the time of Australopithecus anamensis, one of Homo sapiens' earliest ancestors.\(^\text{19}\) It is at least arguable that none of the sexual activity that occurred during most of that period (i.e., until recently) could be described as the product of immoral, prurient, or lascivious tendencies.\(^\text{20}\) The reason: modern Homo sapiens continue the sexual practices that brought our species to this point in time.\(^\text{21}\) It was only with the advent of sexual mores\(^\text{22}\) in society that a division (not a bright line) developed between what was considered "normal" behavior and what was believed to be "deviant". Only with the emergence of sexual mores did society begin to categorize different sexually-related behaviors into what was thought to be "morally good" and that which was "morally bad".\(^\text{23}\) Is it likely that sexual behavior of the type proscribed in some western societies began contemporaneously with the creation and development of modern sexual mores, or did the creation of modern sexual mores classify behavior that had long been a part of our physiology?

I assert that the latter is true: Homo sapiens, like Homo neanderthalensis and Homo erectus, our evolutionary predecessors, engaged in sexual behavior due to an instinct that provided arguably the fundamental ingredient necessary for our perpetuation as a species.\(^\text{24}\) This does not imply, however, that the orga-

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\(^{20}\) In fact, the better approach is to describe human sexual behavior in biological terms. For example, "sex hormones can activate sex behaviors, partly by facilitating activity in the medial preoptic area and other parts of the hypothalamus. Dopamine acts at D\(_1\) receptors to increase sexual arousal and at D\(_2\) receptors to stimulate orgasm. Interference with dopamine synapses suppresses sexual behavior . . . ." and so on. James W. Kalat, Biological Psychology 312 (6th ed. 1998).

\(^{21}\) See Steven Pinker, How the Mind Works 471-72 (1997) ("In foraging cultures, young men make charcoal drawings of breasts and vulvas on rock overhangs, carve them on tree trunks, and scratch them in the sand.").

\(^{22}\) See generally Posner, supra note 13, at 37-69 (providing a summary of the development and evolution of sexual mores throughout history).

\(^{23}\) Admittedly, this is a gross oversimplification of what was in fact a very complex process that evolved with vast differences across many different cultures.

\(^{24}\) See Carl Sagan & Ann Druyan, Shadows of Forgotten Ancestors 142-155 (1992) ("[T]he advantages that sex confers on future generations seem to be so
isms that engaged in sexual behavior understood reproduction to be the sole purpose of sexual activity. On the contrary, biology indicates that sexual activity and the birth of offspring may not have been causally associated by our earthly predecessors until relatively recently in human evolution. Consider "the Trobriand Islanders, who . . . hadn’t grasped the connection between sex and childbirth but, nonetheless, had managed to keep reproducing." If the purpose of sexual activity, as viewed by our ancestors, was not to reproduce, what was the purpose? 

Great that, provided the costs were not too high, selection for improved sexual hardware must soon have been up and running, along with whatever new software was required to stiffen a resolve for sexual congress". See also, Allman, supra note 17, at 111 ("[N]ew research by evolutionary psychologists reveals that our most fundamental sexual behaviors have been shaped by the constant negotiation and renegotiation of the different evolutionary goals and desires of males and females. It is a battle that has raged for millennia . . . . The debate over everyday sexual behaviors involving marriage rights, sexual mores, double standards, jealousy . . . and control over a woman’s reproduction may seem to be modern-day phenomena, but all these behaviors have a deep-seated, evolutionary legacy that stretches back to the time of our ancient ancestors.").

25. Richard A. Posner, Overcoming Law 345 (1995) ("Human beings reached their present state of biological development before they understood the mechanics of reproduction. Selection was therefore in favor not of reproductive activity per se but of sexual activity and some affection and caring for offspring.").

26. Wright, supra note 19, at 388.

27. Id. See also, James W. Kalat, Biological Psychology 312 (6th ed. 1998) ("[I]n most cases the motivation for the sex act is simply that it feels good . . . . [A] mother rat licks her babies all over shortly after their birth, providing them with stimulation that is essential for their survival. But the mother presumably does not know the value of the licking for the young; she licks them because she craves the salty taste of the fluid that covers them. She licks them much less if she has access to other salty fluids . . . . In short, animals need not understand the ultimate function of their reproductive behaviors; they have evolved mechanisms that cause them to enjoy and therefore perform those acts.").

28. In 1999, is reproduction the primary "purpose" of sexual behavior? If we, as self-consciously aware organisms, able to causally connect remote events, still do not view (with a few possible exceptions) reproduction as the sole reason for sexual behavior, is it plausible to suggest that one million years ago the situation was different?
anticipate loving the consequences."29 Without a dominant sexual impulse,30 our species would not have survived the four million-year period of human ancestry evidenced by fossil record.31 Can it be seriously argued that sexual impulses are not a powerful, and perhaps predominant, part of our biology?

C. Does An Understanding of Human Biology Exist in the Law?

Evidence of an understanding of our vast biological heritage, and the scientific theory that accompanies it, has not often surfaced in the law, even at its highest levels.32 A failure to appreciate and apply such an understanding is pronounced in cases in which sexually related topics are being addressed. Consider, for example, Justice Brennan's opinion in Roth v. United States,33 one of the first cases to address obscenity laws, in which he describes sex as "a great and mysterious motive force in human life [which] has indisputably been a subject of absorbing interest to mankind

29. Wright, supra note 19, at 388 (emphasis added). See also Posner, supra note 13, at 3 (providing an overview for an economic theory of sexuality, and noting that "sexual desire, including gender preference, is rooted in our biological nature . . ."); Pinker, supra note 21, at 44 ("Sexual desire is not people's strategy to propagate their genes. [It is] people's strategy to attain the pleasures of sex, and the pleasures of sex are the genes' strategy to propagate themselves.").

30. See Pinker, supra note 21, at 471-72. Pinker, director of the Center for Cognitive Neuroscience at the Massachusetts Institute of Technology, states: "the male sexual mind is . . . easily aroused by a possible sex partner—indeed, by the faintest hint of a possible sex partner . . . The male of the human species is aroused by the sight of a nude woman, not only in the flesh but in movies, photographs, drawings, postcards, dolls, and bit-mapped cathode-ray-tube displays."

31. Posner, supra note 13, at 89 ("[S]exual reproduction increases the probability that a species will survive.").

32. See Stephen Jay Gould, Justice Scalia's Misunderstanding, in Bully for Brontosaurus 448-460 (1991) (arguing that Justice Scalia, in Edwards v. Aguillard, 482 U.S. 578 (1987), incorrectly defined evolution as "the search for life's origin—and nothing more", when in fact "[e]volution is not the study of life's ultimate origin as a path toward discerning its deepest meaning. Evolution, in fact, is not the study of origins at all"); and noting that "Scalia's recent dissent in the Louisiana 'creation science' case rests upon his error in discussing the character of evolutionary arguments. . . . [T]he dissenting argument rests, in large part, upon a misunderstanding of science.").

33. 354 U.S. 476 (1957). Roth was a seller of books, magazines, and photographs. On the trial court level, he was convicted by a jury of mailing "obscene circulars" and an "obscene book". The Supreme Court affirmed the conviction.
through the ages; it is one of the *vital problems* of human interest and public concern." Although it is little more than a philosophical aside, Brennan’s divagation paints a picture of the ideological springboard from which the Court leapt in assessing the constitutionality of laws proscribing obscenity. In an attempt to disambiguate the term “obscenity”, the Court tellingly describes obscene material as “material which deals with sex in a manner appealing to prurient interest.” “Prurient interest” is thus defined as “‘a shameful or morbid interest in nudity, sex, or excretion’.” On the trial court level, the judge in *Roth* gave the following jury instruction: “The words ‘obscene, lewd and lascivious’ as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts.” The Supreme Court found this instruction appropriate. Chief Justice Warren argued that the petitioners were “plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.” The Court’s stance in *Roth*, while representing perhaps the viewpoints of many, reveals a rather base understanding of human sexuality. The Court seems to suggest that sex is a “particularly dangerous instinct, in need of careful control (if not repression).” There is little question that the Court has applied, at least in cases relating to obscenity law, a moral standard in assessing laws that address sexual behavior, as opposed to a standard that appropriately considers our biological heritage. This is not really all that surprising, given that to this day, the teaching of evolutionary biology has been suppressed in the United States. Yet, the legal profession is among the most

34. Id. at 487 (emphasis added).
35. Id. at 487.
36. Id. at 488 n.20 (the Court, in a footnote, quoting the Model Penal Code definition of “prurient interest”) (emphasis added).
37. Id. at 486.
38. Id. at 492.
39. Id. at 497 (Warren continued: “I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.”).
40. Daniel A. Farber, The First Amendment 131 (1998) (noting that “[l]ike the drug dealer, the Court seems to think, the seller of obscene works is triggering a response which his customers cannot fully control and which will undermine their ability to function as responsible members of the community.”).
42. See Sagan, supra note 8, at 263 (“Under the guise of ‘creationism,’ a serious effort continues to be made to prevent evolutionary theory—the most
learned of all professions. Indeed, the most considered, pragmatic, and analytical persons belong to the legal profession. If we, as members of the legal profession, readily employ moral and emotional responses or judgment in lieu of a detached consideration of sexual issues in light of established biological principles—principles that are "as well confirmed as anything we know—surely as well as the earth's shape and position"—it is likely that the juror will also fail in this respect. The average juror is likely to utilize only the most rudimentary of tools—tools that have their genesis in our collective morality and are fueled by emotional reaction—in discerning what is sexually acceptable behavior, and what is shameful and should be punished. Remarkably, this is exactly what jurors are asked to do when instructed by the court to apply the "contemporary community standard" to questions of obscenity.

IV. THE EVOLUTION OF THE COMMUNITY STANDARDS YARKSTICK

In *Roth v. United States*, the "contemporary community standards" test to determine whether material should be considered obscene was given judicial approval by the Supreme Court. The community standards test asks "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." It is helpful, in attempting to discern the full import of the community standards test, to consider the trial court's jury instruction on the community standard (with which the majority in *Roth* agreed): "[You] determine its impact upon the average person in the community... You may ask yourselves does it offend the common conscience of the community by present-day standards."

Several years later, the Supreme Court modified and augmented the obscenity standard in *Memoirs v. Massachusetts*. In *Memoirs*, the Court enunciated a three-part test for obscenity that

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44. 354 U.S. 476 (1957).
45. Id. at 489.
46. Id. at 490 (Brennan, J., quoting the jury instruction given to the jury by the trial court judge).
incorporated the community standards test from \textit{Roth}. Material was to be considered "obscene" if it could be established that "(a) the dominant theme of the material taken as a whole appeal[ed] to a prurient interest in sex; (b) the material [was] patently offensive because it affront[ed] contemporary community standards relating to the description or representation of sexual matters; and (c) the material [was] utterly without redeeming social value." \textsuperscript{49}

The Supreme Court, six years after \textit{Memoirs}, further modified this tripartite test for obscenity in \textit{Miller v. California},\textsuperscript{50} a case in which the defendant was convicted at the trial court level of mailing unsolicited material that a jury found to be "obscene." The \textit{Miller} test states:

(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.\textsuperscript{51}

The Court chose to abrogate the "utterly without redeeming social value" component of \textit{Memoirs},\textsuperscript{52} and added that sexually explicit material might avoid being defined as obscene if it contained "serious" literary, artistic, political, or scientific value.\textsuperscript{53}

The \textit{Miller v. California} test for obscenity found application in \textit{Jenkins v. State of Georgia}.\textsuperscript{54} Jenkins was convicted in a jury trial for the distribution of "obscene" material.\textsuperscript{55} The crime: showing the movie \textit{Carnal Knowledge} in an Albany theater.\textsuperscript{56} In reversing

\begin{itemize}
  \item \textsuperscript{48} Id. at 418.
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} 413 U.S. 15 (1972).
  \item \textsuperscript{51} Id. at 24 (Burger, C.J., quoting in part \textit{Roth}, 354 U.S. at 489) (citation omitted).
  \item \textsuperscript{52} Id. at 24-25 ("We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of \textit{Memoirs v. Massachusetts}, (citation omitted); that concept has never commanded adherence of more than three Justices at one time.").
  \item \textsuperscript{53} Id. at 24 (emphasis added) ("At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.").
  \item \textsuperscript{54} 418 U.S. 153 (1974).
  \item \textsuperscript{55} Id. at 154.
  \item \textsuperscript{56} Id. at 154. (\textit{Carnal Knowledge} was directed by Mike Nichols, director of, \textit{inter alia}, \textit{The Graduate}, \textit{Regarding Henry}, \textit{The Birdcage}, and \textit{Primary Colors}. The movie starred Jack Nicholson, Candice Bergen, Art Garfunkel, Ann-Margret.)
\end{itemize}
the conviction, the Supreme Court further defined the periphery of the contemporary community standard set forth in *Miller*. The Court held that "the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community . . . . *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came . . . ."58

In *Smith v. United States*,59 in regard to a conviction under a federal statute that proscribed the mailing of obscene materials, the Supreme Court stated: "[W]e must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be . . . ."60 Quoting *Hamling v. United States*,61 the Court reiterated its position that community standards should be derived from what the juror perceives is the community standard of obscenity for his or her local community: "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes . . . ."62

Almost ten years later, in *Pope v. Illinois*,63 a case involving an obscenity conviction, the Supreme Court softened the community standard somewhat by asserting that while prurient appeal and patent offensiveness should still be gauged by the local community yardstick, whether a work has serious value outside of any obscenity should not.64 Justice White stated, "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a *reasonable person* would find

(who received a Best Supporting Actress Academy Award Nomination for her role in this movie), Rita Moreno, and Carol Kane).

57. *Id.* at 157.

58. *Id.* at 157 (The Court also stated: "What *Miller* makes clear is that state juries need not be instructed to apply 'national standards'.").


60. *Id.* at 302.

61. 1974 U.S. 87 (1974) (*Hamling* involved a conviction for mailing and conspiring to mail what was purportedly an obscene brochure).


64. In *Pope*, the Court expounded on a seed first planted in *Smith v. United States*, 1977 U.S. 291, 301 (1977) ("Literary, artistic, political, or scientific value . . . is not discussed in terms of contemporary community standards.").
such value in the material, taken as a whole."\textsuperscript{65} While this circum-
scription appears to allow a broader moral spectrum to be consid-
ered by a jury in its assessment of whether a particular material
is obscene, it is arguable that a typical juror’s perception of his or
her local community standard will not differ dramatically if at all,
from the same juror’s perception of how a hypothetical reasonable
person would view the material in question.\textsuperscript{66}

That a jury must consider how a hypothetical “reasonable per-
son” would feel about a particular material seems to suggest that
the jury may receive some type of “expert” testimony in regard to
questions of value (literary, artistic, etc.). For example, a museum
curator might be allowed to introduce evidence of artistic form or
appeal in certain paintings depicting nudity or sexual acts. Or a
college English professor could provide evidence to a jury that Wil-
liam Butler Yeats’ \textit{Leda and the Swan} had high literary merit. It
is possible that this type of “expert” testimony may, in some rare
instances, override a jury’s response to a particular material. Yet,
“because the record never discloses the obscenity standards which
the jurors actually apply, their decision in these cases are effec-
tively unreviewable . . . .”\textsuperscript{67} Arguably, if a jury is sufficiently
moved by emotional response or allegiance to conventional social
values, the “literary, artistic, political, or scientific value” arm of
the \textit{Miller} test will have negligible impact.

The contemporary community standard, as it now exists,
requires individual jurors to make a subjective judgment in regard
to whether a particular material is obscene by applying a fictional
standard that the jurors intuitively presume corresponds to the
common conscience of the local community. The community stan-
dard appears anachronistic and profoundly antiquated when con-
sidered in regard to the advances in evolutionary biology detailed
above. This temporal infirmity becomes particularly salient in
light of another recent product of science and technology: the
Internet.

\textsuperscript{65} 481 U.S. at 500-501 (emphasis added).
\textsuperscript{66} \textit{See Smith v. United States}, 431 U.S. 291 (1977) (Stevens, J., dissenting)
(discussing at length the difficulty of applying hypothetical standards to a subject
as amorphous as obscenity).
\textsuperscript{67} \textit{Smith v. United States}, 431 U.S. 291, 315-316 (1977) (Stevens, J.,
dissenting).
V. A UNIQUE AND NEW MEDIUM OF WORLDWIDE COMMUNICATION

A. What is the Internet, and How Does it Work?

The Internet is comprised of a global network to which millions of computers, at any given time, may be connected. It is a world-wide system of communication that operates with no centralized point of origin or operation. Any person with a computer, a modem, and the appropriate communications software may access the Internet, and thereby send information to and receive information from anywhere else in the world where there exists Internet service. As of 1998, more than 70 million people in the United States had used the Internet. Using the Internet, one may retrieve information stored on computers throughout the world on virtually any topic, often including text, pictures, graphics, videos, or recordings of sounds and spoken language, among other visual and auditory stimuli. "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought."

B. Attempts to Regulate the Internet

In 1996, Congress passed the Communications Decency Act of 1996 ("CDA") which represents Title V of the Telecommunications Act of 1996. The clear purpose of the Act, although the potential effect of the statute was certainly much broader, was to eliminate the likelihood that minors would be able to retrieve material deemed "indecent" or "patently offensive" from the Internet.


69. Id. at 830 (finding 1).
70. Id. at 832 (finding 11).
71. Id. at 832 (finding 12).
73. Thus, a person in Buies Creek, North Carolina could access and view documents via the Internet from computers located in New York City, Paris, or Tierra del Fuego.
76. See 47 U.S.C.A. § 223(a) (prohibiting, in effect, the knowing transmission of obscene or indecent material to another one knows is less than 18 years old via a telecommunications device).
Under the "patently offensive" section of the statute, an auditory or visual stimulus was to be "measured by contemporary community standards." Almost immediately after the CDA was signed into law by the President, a constitutional challenge to the CDA was brought by numerous plaintiffs, including the American Civil Liberties Union, America Online, Inc., Apple Computer, Inc., CompuServe Incorporated, Microsoft Corporation, Wired Ventures, Ltd., and a host of others. The Supreme Court, in *Reno v. American Civil Liberties Union*, found the content-based restrictions on speech in the CDA facially overbroad, and therefore unconstitutional under the First Amendment.

Congress’ next attempt to protect minors from potentially harmful material on the Internet, the Child Online Protection Act ("COPA"), contains provisions similar to the CDA. For example, 47 U.S.C.A. § 231(a)(1) of COPA declares that whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes material that is harmful to minors shall be subject to criminal and civil penalties, including considerable fines (up to $50,000 per day of violation) and imprisonment. "Material that is harmful to minors" is defined as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that . . . the average person, applying contemporary standards, finds to be patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication" may be subject to imprisonment or a fine.

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77. *See* 47 U.S.C.A. § 223(d) (prohibiting, in effect, the knowing transmission of patently offensive material to another one knows is less than 18 years old via a telecommunications device).

78. 47 U.S.C.A. § 223(a)-(d).

79. 47 U.S.C.A. § 223(d)(1)(B) (Anyone who knowingly "uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication" may be subject to imprisonment or a fine).


83. The World Wide Web, an informational mosaic created by computers linked to the Internet, is perhaps the most popular and widely accessible aspect of the Internet.

84. 47 U.S.C.A. § 231(e)(6).
community standards, would find . . . is designed to appeal to . . .
the prurient interest". The Child Online Protection Act, unlike
the Communications Decency Act, contains an additional require-
ment that a material in question “taken as a whole, lack[] serious
literary, artistic, political, or scientific value” before it can be
defined as “obscene”.

The American Civil Liberties Union and numerous web site
operators and content providers brought an action in federal dis-
trict court seeking to enjoin enforcement of the law and have
COPA declared unconstitutional under the First and Fifth
Amendments. The federal court granted the plaintiffs’ motion
for a preliminary injunction. This ruling is, as of this writing,
pending review by the Third Circuit Court of Appeals.

I include in this paper information pertaining to the CDA and
COPA, not to argue in favor of or detract from these legislative
efforts, but rather to indicate the possibility that future attempts
by Congress and various state legislatures to regulate the Internet
in regard to material designed for and consumed by adults, will,
like the Communications Decency Act and the Child Online Pro-
tection Act, contain provisions dictating that obscenity or inde-
cency be judged in part on the basis of a contemporary community
standard.

VI. APPLICATION OF THE CONTEMPORARY COMMUNITY STANDARD
To THE INTERNET

A. A Failure of Analogy

In Miller v. California, Chief Justice Burger conceded that a
“national standard” for determining what was obscene was not
possible to articulate: “I believe that there is no provable

1999), (finding 1) pending review, No. 99-1324 (3d Cir. Nov. 4, 1999).
88. Id.
89. In no way do I mean to suggest that child pornography should not be
forbidden, or that minors should have unbridled access to sexually explicit
material. I agree with the stated purpose of the Communications Decency Act
and Child Online Protection Act, in the sense that they attempt to prevent
minors from being reached by potentially harmful material. However, as the
Court noted in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), this
legislation was facially overbroad to the extent that it would have restricted or
made illegal many constitutionally protected forms of speech.
90. 413 U.S. 15 (1972).
"national standard" . . . . At all events, this Court has not been able to enunciate one . . . . Chief Justice Burger then stated, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." It is implicit in this statement that what may be legal and acceptable sexually explicit speech or behavior (such as operating an adult video store) in Tampa, Florida may be considered shameful, and even punishable, in West Jefferson, North Carolina. Although this disparate treatment across geographic areas is somewhat disconcerting, the community standard has, no doubt, been an attractive mechanism by which persons in a community could delimit the moral boundaries of the local adult bookstore, video store, newsstand, or dance club. Twelve people sitting as a jury in a "representative" capacity for the community have the paternalistic authority, in part under the mandate of the community standard, to determine that a particular work should no longer be available for anyone in the community to read or view.

On some level this is an appealing notion to many of us. Few of us would appreciate an adult bookstore moving in across the street from our home. Although the community standard has found employment in cases in which it had less than perfect application, many obscenity law convictions dealt with situations similar to that described above, in which a few persons in a local community wielded a law proscribing obscenity to fight moral degradation in the form of a newsstand selling filthy magazines or a

91. Id. at 32 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting)).
92. Id. at 32.
93. See Id. at 33 (The Court stated: "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.").
94. See Smith v. United States, 431 U.S. 291 (1977) (In Smith, petitioner was convicted of mailing what the jury determined to be obscene materials) (Stevens, J., dissenting: "In response to a request, [petitioner] mailed certain pictures and writings from one place in Iowa to another. The transaction itself offended no one . . . and violated no Iowa law. Nevertheless, because the materials proved 'offensive' to third parties who were not intended to see them, a federal crime was committed.").
theater offering adult cinema.\textsuperscript{96} The underlying theory of the community standard is that people should have some control over the type of establishments that may operate in their neighborhood. Even though use of the community standard often results in inconsistent prosecution of the obscenity laws, it is conceded that allowing the voice of the community to control is a fairly strong argument for the use of a community standard. Regardless, by virtue of the truly unique nature of the Internet, an analogy between the rural community and the “Internet community” cannot be supported.

A person in any town in America or the world may, via the Internet, access information stored on computers anywhere else in America or the world that are connected to the Internet. For example, a web site in Houston, Texas, which posts sexually explicit photographs, could be viewed via the Internet by a person in North Andover, Massachusetts or Nairobi, Kenya. This is a very different situation from a newsstand in a small town disseminating material that could negatively influence the total morality quotient of the town. Imagine that one person in North Andover inadvertently comes across the Houston web site and fails to close their Internet web browser before a shocking image appears on the computer screen. For purposes of the community standard, should the “community” be defined as the one person who was offended by the Houston web site? There is certainly no reason to believe that anyone else in that person’s locale (in this example, North Andover) was offended by the pictures posted in Houston. Does it make sense to include in the definition of “community” the actual geographic community of the singular offended person? Given the truly incomprehensible number of web sites currently available on the World Wide Web,\textsuperscript{97} and assuming that the person accessing the offending material did not access the material on purpose, is there any probability that this offending web site could or would be accessed contemporaneously by anyone else in that person’s community? Or should “community” be defined as the entire range of possible or potential receivers of any offending information? In the face of these questions, it becomes clear that

\textsuperscript{96} See, e.g., Pope v. Illinois, 481 U.S. 497 (1987) (Supreme Court reversed a jury decision that found obscene magazines purchased from an adult bookstore); Jenkins v. Georgia, 418 U.S. 153 (1974) (Supreme Court reversed a jury decision that found a movie shown in an Albany, Georgia theater obscene).

\textsuperscript{97} It is no exaggeration that the number of web pages is currently in the millions and is rapidly growing.
the typical conception of "community" disappears when considered in regard to the Internet. Given the obvious fact that an obscenity charge cannot be based on only one person's opinion of a particular material, to punish a person for posting "offensive" material on the Internet on the basis of the contemporary community standard—after only one person is offended by it—effectively makes criminal the mere possibility that someone else might view the material and find it offensive.

In American Civil Liberties Union v. Reno, a federal district court expressed dissatisfaction with the applicability of the community standard under the Communications Decency Act. Subsequently, in Reno v. American Civil Liberties Union, the Supreme Court, in dictum, noted a similar concern: "[T]he 'community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message." Yet, the federal district court openly conceded that "the Government could punish [obscenity] on the Internet even without the CDA under a presently existing federal statute. The Supreme Court, in a footnote in Reno, also indicated that "transmitting obscenity . . . whether via the Internet or other means, is already illegal under federal law . . ." Who decides, then, in regard to the Internet, what is to be considered obscene? Under the contemporary community standard, it is the jury.

99. Id. at 877-878 (The Court stated: "If a speaker's content is even arguably indecent in some communities, he must assess . . . the risk of prosecution and the cost of compliance with the CDA. Because the creation and posting of a Web site allows users anywhere in the country to see that site, many speakers will no doubt censor their speech so that it is palatable in every community.").
100. 521 U.S. 844 (1997).
101. Id. at 877-878.
102. 929 F. Supp. at 865 (The court also stated: "The Government could also completely ban obscenity . . . from the Internet. No Internet speaker has a right to engage in [this form] of speech, and no Internet listener has a right to receive [it].").
104. 521 U.S. at 878 n.44 (The Court also noted: "In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity . . .").
B. The Vagaries of a Jury

The freedom of Americans to read, listen, view, speak, sing, or tell jokes should not be subject to the majority vote of anyone: not a jury, not a legislature, not even a plebiscite of all the people. The First Amendment is essentially an undemocratic—indeed antidemocratic—restriction on majority power. If any Americans wish to satisfy their intellectual, emotional, or artistic needs by exposing themselves to expression that all other Americans despise, that should be their right under the First Amendment.

1. A Question of Fact or Opinion?

There have been many instances throughout history in which one group of people has made a choice for others on the basis of emotional and subjective biases, beliefs, or understandings. When this occurs, the freedom of a few is necessarily compromised by the ad hominem conviction of those who achieve or are given the brief authority to govern. The framers of the Constitution were acutely aware of this danger, and consequently wrote into the Constitution that the “Trial of all Crimes . . . shall be by Jury.” The jury was to serve “first and foremost to protect the

105. Alan M. Dershowitz, First Amendment Loses in Obscenity Cases, in Contrary to Popular Opinion 81-82 (1992) (arguing that even though 2 Live Crew (a rap group) and the Cincinnati Contemporary Arts Center (displaying pictures taken by Robert Mapplethorpe, a photographer who depicted homoeroticism in his art) were acquitted of obscenity charges by juries, “these cases reflect a dangerous precedent: namely, that it is constitutionally permissible to subject controversial art to the vagaries of a jury.”).

106. Id. at 81. (Dershowitz qualifies this somewhat overstated assertion in the next paragraph, indicating that this principle of freedom does not apply to situations in which one party is harmed by another party’s assertion of his First Amendment rights: “No American has the right to exercise freedom of speech in a manner that directly harms another. But ‘harm’ does not include merely being offended by the knowledge that someone else is enjoying art or literature that offends you.”).

107. Examples of choices made on the basis of emotion and bias include the actions of the Roman Catholic Church in the 17th and 18th centuries, the suppression of Protestantism in England in the 16th century, the rise of Nazi Germany, human slavery, racism, the repression of classic genetic theory by Stalin and Khrushchev in the Soviet Union, and the repression of evolution and natural selection theories in this country. All of these sad failures of humanity were based on decisions made in the absence of logic and pragmatism.


people against the abuse of power by an arbitrary Crown.” 110 The jury, in one capacity, can serve as a safeguard against what may be unfair or unjust laws or actions brought against an individual by the State. Before one may be deprived of liberty by the State, “a jury drawn from ‘the same rank as the accused’” must, in essence, choose to enforce the law. 111 Similarly, in regard to criminal trials brought on the basis of laws that society universally views as necessary, 112 all jurors must agree that the defendant is guilty before he may be divested of his liberty. The jury, functioning as such, represents a symbolic and functional palisade that stands against repression and injustice imposed by the State or Federal Government.

Paradoxically, the jury also has the potential to act as an instrument of repression. The lines here are easily drawn. In a typical criminal trial, (i.e., not one in which obscenity is at issue), the jury’s determination of guilt is one of fact. Juries do not, or should not, convict on the basis of the reprehensibleness or moral quality of the conduct. The defendant either committed the crime, or not. The evidence presented to the jury is, in the court’s careful consideration, all the relevant data. The jury must carefully and objectively weigh all the facts, and then arrive at a conclusion based on this data. The results may not always be perfect; yet, this process of discerning fact is as close to the laboratory of the physicist as the law is likely to achieve. This process is markedly different from that which occurs in an obscenity law prosecution, which shares much more in common with the metaphysicist, who has no laboratory and makes only subjective determinations, than the physicist.

Contrary to assertions by the Supreme Court, 113 a criminal prosecution that focuses on whether a material or speech is obscene or licentious is not a question of fact. In the absence of any palpable standard, it can only be subjective. Justice Stevens, 110. Rakove, supra note 108, at 294 (discussing the origin of the jury system).
111. Id. at 297 (discussing the origin and evolution of the jury system).
112. For example, laws forbidding rape, murder, robbery, assault, battery, etc.
113. See Smith v. United States, 431 U.S. 291, 300-301 (1972) (“The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The Miller opinion indicates that patent offensiveness is to be treated in the same way.”) (footnote omitted) (emphasis added).
dissenting in *Smith v. United States*, argued that "[e]ven the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source [for obscenity]." Justice Stewart, in *Jacobellis v. Ohio*, illustrating the subjective and arbitrary nature of that which is obscene, stated, "I shall not . . . attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it.*" This is a superb indication of exactly how a jury, applying the community standard, is likely to attempt a classification of sexually explicit material: an abandonment of logical thought, an application of the subjective bias of personal morality, and subsequently a failure to apply a biological understanding of human sexuality. Justice Douglas, dissenting in *Miller v. California*, advocated a similar position: "Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts." Can we justify regulating Internet decency on the basis of the caprice of the average juror in any community that potentially can receive what may be to some—but not to others—offensive material?

Jury trials are, of course, subject in some cases to appellate review. However, given the fact that trial records do not indicate the obscenity standards actually applied by the jury, decisions in obscenity cases are "effectively unreviewable."
2. An Averaging of Morality

If a jury consisting of twelve people is asked to articulate their attitudes toward sex—in the presence of the other jurors—is it likely that the responses will be candid and forthright? Given the history of sexual repression in our society, it is much more probable that those persons holding more liberal and more conservative attitudes will compromise their beliefs to a degree, resulting in an averaging effect on the overall moral component of a given jury. The expression of individual jurors’ sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. This process is sure to result in an obscenity label being placed on the most extreme manifestations of human sexuality as set forth in a particular material. This same process of shrinking the left and right walls of the collective morality of the jury, magnified in effect by the jury’s attempt to apply the community standard of morality—an average in itself—may likely also result in the labeling as obscene that which is far less sexually explicit. In addition, if the statute upon which the prosecution is based contains language that purports to define what is to be considered “obscene” or “patently offensive”, e.g., “a lewd exhibition of the genitals or postpubescent female breast”, or “an actual or simulated normal or perverted sex act”, a more liberal juror who may not find the material or speech in violation of her personal code of morality may nonetheless be impelled to vote to convict if the statute appears to proscribe the behavior in question.

It is manifestly illogical to apply a local community standard to an Internet publication that potentially can reach every community in the world that has access to the Internet. Any attempt

122. Posner, supra note 13, at 15 (The “resemblance of human sexual behavior to that of other animals [has] made sex seem to many thoughtful observers in the Christian tradition part of our animal nature rather than part of our divine nature: part, that is, of the declension. It is only a small step to the view that sex is, at best, a necessary evil (necessary to the survival of the human race, and some early Christians thought that the survival of the race was too high a price to pay); to the correlative view that nonprocreative sex, like gluttony, is an unqualified evil . . . .”).

123. See Smith v. United States, 431 U.S. 291, 315 (1977) (Stevens, J., dissenting: “The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context.”).

124. Id.

to formulate a national or international standard of obscenity reveals that such a standard is entirely beyond definition. The contemporary community standard, in its vacuous subjectivity, becomes impotent in the face of science and the global society.

VII. Conclusion

A. The Internet as an Instrument of Freedom

"Government interference with adult consensual activities is unjustified unless it can be shown to be necessary for the protection of the liberty or property of other persons."126

For a court, by way of a jury's application of the "community standard", to apply to the masses, or only to a few, a morality to which a great many people in this country do not subscribe, in order to prevent the creation and distribution of sexually explicit material, is "community censorship in one of its worst forms."127

The Internet provides every adult who chooses to do so, even those who reside in a town that would embargo an adult bookstore or theater, an opportunity to explore or satisfy his or her sexuality through access to otherwise unavailable material. The Internet provides a way for consenting adults to communicate with other consenting adults on virtually any topic, regardless of geographical location. Such communication would be impossible, or at the very least, greatly restricted, by the application of the arbitrary and antiquated "community standard" that Congress has advocated in its two attempts at Internet regulation (the CDA and the COPA) thus far.

The law in regard to Internet obscenity should reflect a standard with precise definition that is applicable and understandable by men, women, and juries. The appropriate line should be drawn by virtue of whether a person is harmed by the manufacture, distribution, or viewing of the material in question.128 Evidence of harm to others is, in most cases, objectively verifiable.129 This standard, similar to that used in determining whether punishment is warranted in other crimes, would serve to eliminate the

126. Posner, supra note 13, at 3.
128. If no one is harmed by the creation, distribution, and/or viewing of a particular sexually explicit material, there is no practical justification in forbidding such material. For Congress, the state legislatures, and the various courts to do so is an unwarranted paternalistic expurgation.
129. The mere possibility that someone might view a particular material and be offended by it does not qualify as a "harm".
disparate and arbitrary application of the law across geographic areas. Requiring a standard of evidence that is quantifiable, and that appropriately takes account of human sexuality as now understood by evolutionary biological science, would place the court and jury closer to the laboratory, where a careful consideration of all the data takes place, and further from the application of the law by moral impulse and emotional reaction. For the court to exclude the “community standard” from all future Internet obscenity review would be an advancement in the cause of personal freedom for all Americans.

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