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## The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace

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# The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace

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## I. INTRODUCTION

Nine years ago, I explored<sup>1</sup> the First Amendment-based<sup>2</sup> problems posed by employing local community standards in Internet-based obscenity<sup>3</sup> cases. Under the test for obscenity articulated thirty-seven years ago by the United States Supreme Court in *Miller v. California*<sup>4</sup>—a test fashioned in a pre-Internet era when people typically had

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1. Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507 (2001).
  2. The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were expressly incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).
  3. Obscene expression is not protected by the First Amendment’s guarantee of free speech. See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989) (“We have repeatedly held that the protection of the First Amendment does not extend to obscene speech”); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”).
  4. In developing the current standard used for determining whether expression is obscene, the Supreme Court held that what is obscene must be measured by contemporary local community standards, observing that “it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” *Miller v. California*, 413 U.S. 15, 32 (1973). The Court reasoned:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

*Id.* at 30. With this in mind, the Supreme Court in *Miller* concluded that the test for obscenity should focus on whether the material at issue: (1) appeals to a pruri-

to venture out in public to visit adult bookstores or movie theatres, either to purchase or to view sexually explicit content<sup>5</sup>—local community standards are applied in determining whether content is obscene.<sup>6</sup> Conversely, the High Court in *Miller*, as Professor Debra

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ent interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) lacks serious literary, artistic, political or scientific value. *Id.* at 24.

5. Professor Mark Alexander observes, “Because *Miller* was decided in 1973, it lacks any apparent mechanism for dealing with the Internet, which was only initially conceived in 1969 and really expanded in just the last decade or so. *Miller* is built upon a real, physical world paradigm.” Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL’Y 977, 1006 (2002) (emphasis added).

Using local community standards in a world of brick-and-mortar distribution of sexually explicit adult content makes somewhat more sense than applying local community standards to a world in which people receive adult content in the privacy of their own homes, via the Internet or pay-per-view television, rather than venturing out into the local community. As John S. Zanghi wrote in a very early analysis of the issue:

A geographic definition of “community” makes sense when local law enforcement officials are regulating adult bookstores, XXX-movie theaters, peep-show parlors, and other physical entities. In those instances, the dissemination of pornography affects the “total community environment” and the “tone of commerce.” This premise, however, is less true when the adult material is obtained on-line in the privacy of one’s own home.

John S. Zanghi, “*Community Standards in Cyberspace*,” 21 DAYTON L. REV. 95, 112 (1995).

6. The “local” community for determining whether material is obscene may be based on a statewide standard, a more geographically specific standard, such as an area within a state, or even a non-geographic standard. See generally Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25, 35 (2004) (observing that the Supreme Court has “held that the community standards test for federal obscenity prosecutions was *local, not national, and not necessarily statewide*—the relevant geographic community could be smaller than an entire state”) (emphasis added).

The U.S. Supreme Court has agreed that “the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use.” *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). The Court in *Jenkins* added:

*Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of “contemporary community standards” as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

*Id.* at 157.

Burke writes, “rejected the requirement of a national community standard.”<sup>7</sup>

The result of the Court’s aging *Miller* decision is an uneven, confusing situation where the scope of protection for any item of sexually explicit expression—a DVD, magazine, or book, for example—varies from community to community. Why, after all, should the exact same adult movie or issue of a “girlie”<sup>8</sup> magazine be protected by a supposedly national constitutional guarantee of speech in one part of the country but not in another?<sup>9</sup> Alan Isaacman, the former attorney for adult periodical publisher Larry Flynt,<sup>10</sup> who successfully argued *Hustler Magazine, Inc. v. Falwell*<sup>11</sup> to the Supreme Court, once stated:

Something may be protected in Des Moines or in New York City and not in Salt Lake City or Mobile, Alabama. It doesn’t make sense to me that we’re all citizens of the same United States and that a citizen in one place is able to say something and have the protection of the national constitution while a citizen in another place in the country can be thrown in jail for saying the same thing.<sup>12</sup>

Obscenity pursuant to the *Miller* test thus operates under what constitutional scholar Mark D. Rosen dubs “a regime of multiple authoritative interpreters,”<sup>13</sup> with each local community interpreting for itself what is and is not obscene.<sup>14</sup>

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7. Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 109 (1996).
  8. See *Ginsberg v. New York*, 390 U.S. 629, 634 (1968) (using the phrase “‘girlie’ picture magazines” to describe non-obscene yet sexually explicit magazines at issue in the case).
  9. In the view of some scholars, “nonuniformity is antithetical to the very concept of constitutionalism.” Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1137 (1999). In general, “little judicial or scholarly attention has been directed to geographical constitutional nonuniformity as such.” *Id.* at 1135.
  10. Flynt and his flagship magazine, *Hustler*, have been described by one leading constitutional scholar as “notorious for their dedication to a vivid and perverse pornography.” Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 605 (1990). In somewhat stark contrast, First Amendment scholar and former University of Virginia President Robert O’Neil has called Flynt a “fascinatingly complex maverick” who reflects a “paradox of realism and idealism” when it comes to the First Amendment and his business interests. Robert M. O’Neil, *Preface*, 9 COMMLAW CONSPICUOUS 141, 142–43 (2001).
  11. 485 U.S. 46 (1988).
  12. Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview With Larry Flynt’s Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001).
  13. Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 995 (2002).
  14. See Yuval Karniel & Haim Wismonsky, *Pornography, Community and the Internet—Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMPUTER & TECH. L.J. 105, 107 (2004) (“Contrary to regular criminal offenses, which are evaluated against a state or international standard, American obscenity laws are

What is wrong with applying local community standards to Internet-based obscenity cases? Adult entertainment attorney Lawrence Walters<sup>15</sup> asserts that the *Miller* test is “based on some incoherent concept of local community standards that simply don’t exist anymore given the advent of the Internet”<sup>16</sup> and the fact that “all Internet communications are immediately accessible in all places in the United States, as soon as they are posted on the Web. They cannot be blocked from certain communities. That technology doesn’t exist.”<sup>17</sup> Other problems with applying local community standards to the Internet were summed up well by Brigham Young University Professor John Fee in a 2007 article:

Whereas the Supreme Court has held that obscenity is defined by reference to “contemporary community standards,” it is not clear whose community standard applies for purposes of Internet communication. Is it fair or necessary to hold a publisher on the World Wide Web to the most restrictive community standard in the nation? Or is it necessary for every community connected to the Web to lower its standards to those of the most tolerant locations? Does the Constitution require any particular geographic definition at all?<sup>18</sup>

The issue becomes how to resolve these queries in a manner that is not unduly restrictive of First Amendment speech rights. One solution is to dramatically reduce and shrink the local community in Internet cases to a “community of one.”<sup>19</sup> Attorney Frederick Lane, for

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*community-contingent offenses* where it is the standard of the relevant community that determines if a specific distributed pornographic material is obscene”).

15. Walters has “defended over 30 criminal obscenity cases during his career.” Qualifications and Experience: Lawrence G. Walters, Managing Partner, Walters Law Group, <http://www.firstamendment.com/qualifications/> (last visited Mar. 13, 2010).
16. Clay Calvert & Robert D. Richards, *A War Over Words: An Inside Analysis and Examination of the Prosecution of the Red Rose Stories & Obscenity Law*, 16 J.L. & POL’Y 177, 212 (2007) (quoting Walters).
17. *Id.* at 213–14.
18. John Fee, *Obscenity and the World Wide Web*, 2007 BYU L. REV. 1691, 1691 (2007).
19. Adult movie producer John Stagliano, who was facing federal obscenity charges in 2009, contends that “technology has advanced to the point where now we can make the community one person—an individual person” and “that there is a community of one through the Internet. That certainly is what I believe in politically and what certainly is the most healthy way for human beings to interact with each other.” Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233, 280 (2007) (quoting Stagliano). See Indictment, United States v. Stagliano, No. 08-093 (D.D.C. Apr. 8, 2008), available at [http://www.defendourporn.org/stagliano\\_indictment.pdf](http://www.defendourporn.org/stagliano_indictment.pdf); see also Press Release, U.S. Dep’t of Justice, Federal Grand Jury Charges Two Companies and Owner John Stagliano With Obscenity (Apr. 8, 2008), available at <http://washingtondc.fbi.gov/dojpressrel/pressrel08/wf040808.htm> and at [http://www.justice.gov/criminal/pr/press\\_releases/2008/04/04-08-08\\_ceos-obscenity-indict.pdf](http://www.justice.gov/criminal/pr/press_releases/2008/04/04-08-08_ceos-obscenity-indict.pdf) (noting that the Malibu, California-based Stagliano “and two companies owned by him have been charged by a federal grand jury in

instance, writes in *Obscene Profits* that “increasingly, the ‘local community’ that should be deciding whether a particular image or sexual conversation is unacceptable is the individual who is actually purchasing it.”<sup>20</sup> This option makes sense because “the purchase and consumption of pornography from the Internet dramatically reduces the visible effects of pornography on a community.”<sup>21</sup> The logic here is that because adult content today typically is received in the privacy of one’s own home via means such as the Internet, cable television, or Video on Demand services, no one else in the outside or surrounding “community” either sees it or is affected by it. Adopting a community-of-one standard, however, essentially reads the notion of community standards out of *Miller* such that it becomes “roadkill on the Information Superhighway.”<sup>22</sup>

An alternative approach I discussed in my 2001 article noted earlier involves:

scrapping the state-by-state notion of community standards and substituting a national community standard that strikes a middle ground somewhere between the values of West Hollywood, California where [Larry] Flynt’s<sup>23</sup> Hustler Hollywood emporium is situated and Provo, Utah where the wholesome-image Osmond family resides. Determining such a standard, however, would prove incredibly difficult, if not impossible.<sup>24</sup>

Adoption of such a national standard, of course, has both positive and negative points. Professor Mark Cenite, for example, writes that “a single national obscenity standard would limit burdens on content providers to know multiple local standards and limit the influence of the least tolerant community, but would raise objections that it would remove some police power traditionally granted to the states, which would be barred from imposing different standards.”<sup>25</sup> He adds that “a national average standard has the virtue of preventing the least tolerant community from controlling the entire medium, and giving

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Washington, D.C., with operating an obscenity distribution business and related offenses”).

20. FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* xxi (2000).

21. *Id.* at 288.

22. This phrase is borrowed from the title of a very early note on the subject of community standards in Internet-based obscenity cases. See Douglas C. Heumann, Note, *United States v. Thomas: Will the Community Standard be Roadkill on the Information Superhighway?*, 23 W. ST. U. L. REV. 189 (1995).

23. See generally Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM.LAW CONSPECTUS 159 (2001) (providing a profile of Flynt and his remarks drawn from an in-depth interview conducted by the authors with Flynt in December 2000 at the headquarters of his publishing empire in Beverly Hills, California).

24. Calvert, *supra* note 1, at 514 (emphasis added) (citation omitted).

25. Cenite, *supra* note 6, at 57.

the least tolerant community the same influence on the national average as the most tolerant community.”<sup>26</sup>

At long last, the scholarly debate that has filled reams of law journal pages about community standards in cyberspace<sup>27</sup> has been transformed into a real-world legal experiment. In its October 2009 opinion in *United States v. Kilbride*,<sup>28</sup> centering on an appeal filed by two men convicted of fraud and conspiracy to commit fraud in connection with a spamming business, the United States Court of Appeals for the Ninth Circuit squarely turned its back on the notion of local community standards on the Internet and held “that a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email.”<sup>29</sup> The unanimous three-judge panel, in an opinion authored by Judge Betty Fletcher, determined that this holding “follows directly from a distillation of the various opinions”<sup>30</sup> by the United States Supreme Court in *Ashcroft v. ACLU*.<sup>31</sup>

In that 2002 decision involving the constitutionality of the ill-fated Child Online Protection Act,<sup>32</sup> Justice Sandra Day O’Connor wrote a concurring opinion to express her “views on the constitutionality and desirability of adopting a national standard for obscenity for regula-

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26. *Id.* at 70.

27. Numerous articles have addressed the issue of how community standards should be defined in Internet-based obscenity cases. See, e.g., Yuval Karniel & Haim Wismonskey, *Pornography, Community and the Internet—Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMPUTER & TECH. L.J. 105 (2004); Gyong Ho Kim & Anna R. Paddon, *Cybercommunity Versus Geographical Community Standard for Online Pornography: A Technological Hierarchy in Judging Cyberspace Obscenity*, 26 RUTGERS COMPUTER & TECH. L.J. 65 (1999); and Robin S. Whitehead, “Carnal Knowledge” is the Key: A Discussion of How Non-Geographic Miller Standards Apply to the Internet, 10 NEXUS 49 (2005). The topic was particularly of interest to law students. See, e.g., Timothy S. T. Bass, Comment, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471 (1996); Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185 (1995); Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and The Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L. REV. 415 (1995); and Dominic F. Maisano, Note, *Obscenity Law and the Internet: Determining the Appropriate Community Standard After Reno v. ACLU*, 29 U. TOL. L. REV. 555 (1998).

28. 584 F.3d 1240 (9th Cir. 2009).

29. *Id.* at 1254.

30. *Id.* at 1255.

31. 535 U.S. 564 (2002).

32. After working its way up and down the federal court system over many years, the Child Online Protection Act finally was declared unconstitutional by a federal appellate court in July 2008, and the U.S. Supreme Court declined to hear the government’s appeal of that decision in January 2009. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

tion of the Internet.”<sup>33</sup> She contended that “a national standard is not only constitutionally permissible, but also reasonable,”<sup>34</sup> pointing out that “the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the views of adults in other parts of the United States.”<sup>35</sup> Similarly, Justice Anthony Kennedy authored a concurrence in *Ashcroft*, joined by Justices David Souter and Ruth Bader Ginsburg, observing that the variation in community standards across the nation “constitutes a particular burden on Internet speech.”<sup>36</sup>

The Ninth Circuit’s adoption of a national community standard for Internet obscenity cases was quickly hailed by adult entertainment attorney Greg Piccionelli, who represented defendant Jeffrey Kilbride during the appellate process, as “tremendously good news.”<sup>37</sup> Piccionelli emphasized that the Ninth Circuit became the “first court to unequivocally say, ‘It’s a national standard on the Internet; enough’s enough.’”<sup>38</sup>

After oral argument in *Kilbride* in June 2009, Piccionelli had expressed optimism for such a result, telling a reporter he was “hopeful”<sup>39</sup> the Ninth Circuit would take “the next logical step”<sup>40</sup> of “requiring that content transmitted by the Internet be judged by a national community standard.”<sup>41</sup> What makes the Ninth Circuit’s decision even more remarkable is that it stands in stark contrast with two other decisions from 2009, reached by federal judges sitting within other appellate circuits, rejecting a national community standard for Internet-based obscenity cases.<sup>42</sup>

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33. *Ashcroft*, 535 U.S. at 586 (O’Connor, J., concurring).

34. *Id.* at 589.

35. *Id.*

36. *Id.* at 597 (Kennedy, J., concurring). In addition, Justice Stephen Breyer wrote a separate concurring opinion in which he stated, “[A]dopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.” *Id.* at 590 (Breyer, J., concurring). In sum, Justices O’Connor, Kennedy, Souter, Ginsburg and Breyer wrote opinions suggesting they would be comfortable with a national community standard for Internet-based cases involving sexually explicit expression.

37. Mark Kernes, *It’s Official: Internet Community Standards are Now National*, AVN.COM, Oct. 28, 2009, <http://business.avn.com/articles/36633.html>.

38. *Id.*

39. Edward Duncan, *Shaffer-Kilbride Obscenity and CAN-SPAM Case Submitted for Decision After Oral Argument*, AVN.COM, June 15, 2009, <http://business.avn.com/articles/35587.html>.

40. *Id.*

41. *Id.*

42. See *United States v. Harb*, No. 2:07-CR-426 TS, 2009 U.S. Dist. LEXIS 16057, \*16 (D. Utah Feb. 27, 2009) (holding “that the *Miller* standard, while questioned in some case law, notably by the concurring Justices in *Ashcroft v. ACLU*, remains controlling authority as to the statutes allegedly violated in the present

This timely Article examines the ramifications of the Ninth Circuit's groundbreaking adoption of a national community standard for Internet-based obscenity cases. Part II initially provides an overview of the use of local community standards as adopted by the United States Supreme Court in *Miller*, and, in particular, it explores how the federal government historically and strategically has used those local standards advantageously over the years, including in Project PostPorn, to selectively pick venues for obscenity cases that increase the likelihood of convictions.<sup>43</sup> Indeed, this Article contextualizes modern-day obscenity forum shopping on the Internet by providing the most extensive and comprehensive law journal analysis yet published of the Project PostPorn operation that took place in the late 1980s and early 1990s. Part II also explores how the use of local community standards leads to self-censorship, affecting the business models of companies in the adult-content industry.

Part III explores the ramifications of the Ninth Circuit's *Kilbride* decision, including its likely impact on the future of Internet-based obscenity cases and the multitude of questions it raises and that courts must now address.<sup>44</sup> Part IV then concludes that the Ninth Circuit's experiment with a national community standard may provide the impetus for the Supreme Court to squarely address, in the context of an obscenity case, the viability of the *Miller* test in the age of the Internet.<sup>45</sup>

## II. FORUM SHOPPING, LOCAL COMMUNITY STANDARDS, AND SELF-CENSORSHIP: PICKING THE BEST VENUE TO PROSECUTE OBSCENITY CASES

*"They always have done that and they always will."*<sup>46</sup>

That is the response, when asked about government forum shopping in obscenity prosecutions, of Cincinnati-based attorney H. Louis Sirkin, who has represented numerous defendants, including *Hustler* magazine publisher Larry Flynt, in obscenity prosecutions and who successfully argued the virtual child pornography case of *Ashcroft v. Free Speech Coalition*<sup>47</sup> before the United States Supreme Court.

What is obscenity forum shopping? Why is it possible? The answers to these questions lie in a combination of judicial decisions, federal statutes, and prosecutorial strategies.

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case"); and *United States v. Extreme Assocs., Inc.*, Crim. No. 03-0203, 2009 U.S. Dist. LEXIS 2860, \*7-8 (W.D. Pa. Jan. 15, 2009) (declining the defendants' invitation to adopt a national community standard).

43. See *infra* notes 46-161 and accompanying text.

44. See *infra* notes 163-200 and accompanying text.

45. See *infra* notes 201-41 and accompanying text.

46. Richards & Calvert, *supra* note 19, at 266 (quoting H. Louis Sirkin).

47. 535 U.S. 234 (2002).

### A. Obscenity Forum Shopping: A Brief History of the Practice and the Abuse of Multiple-Venue Forum Shopping in Project PostPorn

At its most basic form, obscenity forum shopping is the practice of “prosecutors . . . bringing charges only in conservative communities, where they have a greater chance of empanelling a jury that will judge sexually oriented materials obscene.”<sup>48</sup> As adult entertainment attorney Herald Price Fahringer<sup>49</sup> expained nearly two decades ago, prosecutors “take you out into the conservative areas—the Bible Belt or somewhere—where they have the best chance.”<sup>50</sup>

Forum shopping in obscenity cases thus is not new but is, instead, “an old legal trick.”<sup>51</sup> In the late 1970s, forum shopping was evident in the obscenity case *United States v. Blucher*,<sup>52</sup> which was brought in Wyoming against an Oregon distributor.<sup>53</sup> The U.S. Court of Appeals for the Tenth Circuit observed:

The defendant distributor of published materials resided in Oregon, a state where the “community standard” seems more tolerant of varying personal habits than most. The record does not reflect that defendant ever resided, traveled through, or had any business contacts in the State of Wyoming prior to the time when an Oregon postmaster asked a Wyoming postmaster to use a false name and address to solicit by mail materials distributed by defendant. This communication between postmasters was made for no apparent reason other than a subjective judgment that a Wyoming venire would hold a more restrictive “community standard.”<sup>54</sup>

The federal government aggressively used forum shopping—in fact, it employed simultaneous, multiple-venue forum shopping—dur-

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48. Robert F. Howe, *U.S. Accused of ‘Censorship by Intimidation’ in Pornography Cases*, WASH. POST, Mar. 26, 1990, at A4.

49. Fahringer represented, among other adult entertainment industry clients, Reuben Sturman, who in the 1980s operated a massive distribution network for adult movies in the United States. See Gregory Stricharchuk, *Selling Skin: ‘Porn King’ Expands His Empire With Aid Of Businessman’s Skills*, WALL ST. J., May 8, 1985, at 26 (reporting Sturman’s retention of Fahringer and asserting that “by the mid-1970s Mr. Sturman had gained control of three Los Angeles companies that produced and distributed the two-minute films shown in the booths. The FBI’s 1977 report on pornography concluded that ‘Sturman has accomplished almost a total takeover’ of the peep-show business”). Fahringer also has represented Larry Flynt, the publisher of *Hustler* magazine. See Andrew Jacobs, *No Grimy Raincoat for Sex Shops’ Lawyer*, N.Y. TIMES, Nov. 3, 1996, at CY4 (“Herald Price Fahringer has a keen appreciation of the notion of ‘guilt by association.’ When he defended the publisher of *Hustler* magazine, Larry Flynt, against obscenity charges in Georgia two decades ago, Mr. Fahringer’s co-counsel took a bullet that Mr. Fahringer thinks was intended for him.”).

50. Howe, *supra* note 48, at A4.

51. Paul M. Barrett, *Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far From Their Bases*, WALL ST. J., July 27, 1990, at A5.

52. 581 F.2d 244 (10th Cir. 1978), *vacated*, 439 U.S. 1061 (1979).

53. *Id.* at 245.

54. *Id.*

ing its “Project PostPorn”<sup>55</sup> prosecutions against adult movie producers in the late 1980s and early 1990s. During this time, as the *Wall Street Journal* reported, the government “threaten[ed] two or more criminal trials in quick succession in geographically disparate, and often politically conservative, jurisdictions. Many defendants fold under such pressure, often agreeing to guilty pleas barring them not only from future criminal activity, but also from the sale of any kind of sexually explicit material.”<sup>56</sup> Project PostPorn marked “the first nationwide prosecution of distributors of mail-order pornography,”<sup>57</sup> and it targeted multiple individuals and companies from California<sup>58</sup> who were forced to defend themselves in other states. Project PostPorn was “a cooperative effort by the Justice Department, the National Obscenity Enforcement Unit and the Postal Inspection Service.”<sup>59</sup>

At that time, adult industry lawyers contended that federal agents went “into Bible Belt regions and initiated *obscenity* cases against California X-rated filmmakers in the belief that it [would] be easier to obtain convictions in conservative, rural America than in anything-goes Los Angeles.”<sup>60</sup> Project PostPorn was, as Professor Margaret A. Blanchard asserted in one of the very few law review articles ever to

55. Barrett, *supra* note 51, at A1.

56. *Id.* See Jim McGee, *U.S. Crusade Against Pornography Tests the Limits of Fairness*, WASH. POST, Jan. 11, 1993, at A1 (writing that the government’s “principal tactic against distributors of sexually explicit films, books and magazines was the use of simultaneous or successive indictments in conservative jurisdictions around the country,” with the hope “that distributors would simply give up and agree to whatever terms of future conduct the prosecutors dictated, when faced with the expense and logistics of defending against a number of federal charges in different places, all at the same time”).

57. Laurie Grossman, *Mail-Order Porn Targeted; U.S. Brings Charges Against Alleged Distributors*, WASH. POST, July 2, 1988, at A2.

58. The *Los Angeles Times* reported:

Those from Southern California who were charged in the case: David L. Coolidge of Yorba Linda, and Lejay Winkler of Los Angeles, both with Universal Products of Pomona; Richard Nathan of Hollywood, with TAO Productions and Curtis Dupont Video of Hollywood; Irwin Spector of Studio City, Mark Spector of Van Nuys and [James] Dost, all of Mail Mart Inc., Dynamite Distributors and Johnny’s Hardball Selections of North Hollywood; Robert Joe Garcia Easley Jr. and Jacquelyn L. Hunter, both of Van Nuys, of Diverse Industries in Van Nuys.

Eric Lichtblau, *8 in Southland Charged in U.S. Porno-by-Mail Case*, L.A. TIMES, July 2, 1988, at 18.

59. *Project PostPorn Stops Smut Peddlers*, PR NEWswire, July 1, 1988, available on LexisNexis Academic News database.

60. John Johnson, *Into the Valley of Sleaze: Demand Is Strong, but Police Crackdowns and a Saturated Market Spell Trouble for One of L.A.’s Biggest Businesses*, L.A. TIMES MAG., Feb. 17, 1991, at 10 (attributing this assertion to “John Weston, a Beverly Hills attorney who has represented members of the hard-core film industry”).

mention it, “aimed at ruining the business of mail-order operations selling sexually explicit—but not obscene—merchandise.”<sup>61</sup>

Significantly, the federal government did not deny its strategic use of forum shopping in Project PostPorn. Brent Ward, the United States Attorney for Utah in 1985, wrote a letter at the time to then-U.S. Attorney General Edwin Meese outlining the strategy of forum shopping simultaneously in multiple venues:

The heart of this strategy calls for multiple prosecutions (either simultaneous or successive) at all levels of government in many locations. If thirty-five prosecutors comprise the strike force, theoretically thirty-five different criminal prosecutions could be instigated simultaneously against one or more of the major pornographers. . . . I believe that such a strategy would deal a serious blow, to the pornography industry. . . . This strategy would test the limits of pornographers’ endurance. I believe the targeted companies would curtail their operations and withdraw from and refrain from entering geographical markets in which they could not find community acceptance.<sup>62</sup>

Furthermore, Patrick Trueman, then-director of the Justice Department’s Child Exploitation and Obscenity Unit,<sup>63</sup> stated in 1991 that “no one should be able to locate in one part of the country and decide that since the community standards are different there that

61. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 821 (1992). The author could locate only one other law journal article that even referenced “PostPorn.” See Patrick Ingram, Note, *Censorship by Multiple Prosecution: “Annihilation, by Attrition if not Conviction,”* 77 IOWA L. REV. 269, 271 n.22 (1991) (identifying the companies that were indicted in multiple venues in “Project PostPorn”).

62. *United States v. P.H.E., Inc.*, 965 F.2d 848, 850 (10th Cir. 1992). Ward “cast himself as a crusader against pornography,” and Meese named Ward as “a leader of a group of US Attorneys engaged in a federal anti-pornography campaign.” Max Blumenthal, *The White House’s Porn Plot Against Prosecutors*, NATION, Mar. 20, 2007, available at <http://www.thenation.com/doc/20070402/blumenthal>. More recently, Ward was named director of the Justice Department’s Obscenity Prosecution Task Force and became part of the controversy surrounding the firing of more than a half-dozen U.S. Attorneys in 2006. See Steve Tetreault, *No Answers Foreseen in Probe of Federal Prosecutors’ Firings*, LAS VEGAS REV.-J., Oct. 4, 2008, at 1B (describing the controversy and identifying Ward as “a former U.S. Attorney in Utah who had been appointed to direct an Obscenity Prosecution Task Force”).

63. This unit of the U.S. Department of Justice:

prosecutes individuals who violate federal law by sexually exploiting children and enforces the federal obscenity laws. CEOS works in conjunction with the 93 United States Attorney Offices around the country to prosecute individuals who commit crimes in violation of federal statutes that encompass the sexual exploitation of children though the possession, receipt, distribution or manufacture of child pornography, the sexual abuse of children, and the trafficking of children for sexual activity.

Citizen’s Guide to United States Federal Exploitation Laws, Child Exploitation and Obscenity Section, U.S. Department of Justice, <http://www.justice.gov/criminal/ceos/citizensguide.html> (last visited May 10, 2010).

they are not violating the law.”<sup>64</sup> As the *Los Angeles Times* noted in response to Trueman’s statement, “California pornographers should no longer feel invincible just because they are based in a laid-back town like Los Angeles.”<sup>65</sup>

In the early 1990s, for example, the federal government used forum shopping when it targeted “a shipment of sexually explicit videotapes from a California company to a Dallas distributor who was cooperating with a police department vice squad investigation.”<sup>66</sup> As David Berg, a Houston attorney who has handled numerous First Amendment cases, wryly remarked at the time, “What they’re doing is *forum shopping*. They don’t like the standards in California where the property is located but they do like the property, so they pick out Dallas. According to Dallas community standards, the Psalms of David are obscene.”<sup>67</sup>

North Carolina-based adult movie and novelty company Adam & Eve,<sup>68</sup> which is owned by P.H.E., Inc.,<sup>69</sup> was charged with obscenity in Utah after being acquitted of the same charges in its home state<sup>70</sup> and in Washington.<sup>71</sup> As the *Wall Street Journal* reported, Adam & Eve was indicted in September 1990 “by a federal grand jury in Utah for mailing allegedly obscene films and magazines and related advertisements. The indictment, based on mailings in 1986, is part of Project PostPorn, a federal crackdown on mail-order distributors of adult films and publications.”<sup>72</sup> The government’s forum-shopping battle

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64. Johnson, *supra* note 60, at 11.

65. *Id.* at 10–11.

66. Dianna Hunt, *Dallas Obscenity Case May Cost Porno Supplier*, HOUS. CHRON., Aug. 11, 1991, at 6A.

67. *Id.*

68. The company today calls itself “America’s oldest sex toy company.” Adam & Eve, <http://www.adameve.com> (last visited May 10, 2010). In terms of adult movies, Adam & Eve boasts of producing “over 100 titles a year including MILF, amateur and anal sex porn movies,” including the movie *Pirates* (2005). *Id.*

69. See PHE, Inc. v. U.S. Dep’t of Justice, Civ. No. 90-0693(JHG), 1993 U.S. Dist. LEXIS 15492, \*1 (D.D.C. Oct. 26, 1993) (describing PHE, Inc. as doing business as “Adam & Eve (‘PHE’), a North Carolina corporation which engages in mail order distribution of sexually oriented magazines and videotapes, and its President and principal stockholder, Philip D. Harvey (‘Harvey’)”).

70. *Sex-Oriented Firm Sues U.S. for Harassment*, S.F. CHRON., Mar. 27, 1990, at A2 (reporting that the company “was acquitted in 1987 after North Carolina brought charges. The company said it was told by federal agents in February to expect indictments soon in Utah and Kentucky”).

71. Nat Hentoff, *Bush Justice Department Knows About Vengeful Prosecutions*, LAS VEGAS REV.-J., Jan. 15, 1993, at 7B (reporting, “the Adam & Eve company—which sells adult sexual material only by mail order—had been found not guilty by a North Carolina jury,” and noting that after this failure, “the national obscenity hit squad went after Adam & Eve in Utah, figuring that community standards there would at last bring this company its just and bitter deserts”).

72. Jill Abramson & Wade Lambert, *IRS, Newhouse Kin Settle Dispute over the Estate of Firm’s Founder*, WALL ST. J., Sept. 21, 1990, at B7.

with Adam & Eve, which was at the time a mail-order company, is chronicled in a relatively recent book by the company's founder, Philip D. Harvey.<sup>73</sup>

In 1992, Harvey scored a major victory against the government's use of simultaneous forum shopping before the United States Court of Appeals for the Tenth Circuit in *United States v. P.H.E., Inc.*<sup>74</sup> The Tenth Circuit faced the question of whether the government's multi-district forum shopping strategy of Project PostPorn "activate[d] the constitutional precept that a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful."<sup>75</sup> The appellate court emphasized that the case "presents an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this indictment is only a part, designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights."<sup>76</sup> Harvey contended that Project PostPorn:

violates the rights secured by the First Amendment, because these officials are using the weight of the government's prosecutorial powers to disrupt the distribution of sexually oriented materials, at least some of which are protected by the First Amendment. The indictment is said to be part of a larger strategy of multiple prosecutions designed in part to drain their financial resources.<sup>77</sup>

Harvey further argued that "the actual act of going to trial under a pretextual prosecution has a chilling effect on protected expression."<sup>78</sup> Focusing on the likely "vindictiveness"<sup>79</sup> of the government's prosecutorial strategy, the Tenth Circuit concluded that Harvey had satisfied his "burden of showing that the indictment is the tainted fruit of a prosecutorial attempt to curtail PHE's future First Amendment protected speech."<sup>80</sup> In reaching this conclusion, the appellate court emphasized that "the state may not use the agents and instrumentalities of law enforcement to curb speech protected by the First Amendment."<sup>81</sup>

Harvey's ultimate victory for the First Amendment and defeat of the government's abusive forum shopping strategy in Project

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73. PHILIP D. HARVEY, *THE GOVERNMENT VS. EROTICA: THE SIEGE OF ADAM & EVE* (2001).

74. 965 F.2d 848 (10th Cir. 1992).

75. *Id.* at 853.

76. *Id.* at 855.

77. *Id.* at 854.

78. *Id.* at 856.

79. *Id.* at 860.

80. *Id.*

81. *Id.* at 856.

PostPorn, however, came at a high price. In particular, he spent \$3 million on legal fees in his battles against the federal government.<sup>82</sup>

In another case from that same era, a Connecticut-based distributor of adult videos called Pak Ventures, Inc. was targeted by the federal government for obscenity prosecutions in Alexandria, Virginia; the Eastern and Western Districts of North Carolina; and the Middle and Southern Districts of Alabama.<sup>83</sup> Elsewhere, three men from Chicago, Illinois, including the owner of the Bijou Theater, were indicted in Tennessee and Utah.<sup>84</sup>

All totaled, by using its approach of forum shopping in multiple, geographically-dispersed venues at the same time, Project PostPorn by April 1990 had “piled up convictions in 15 states, including Illinois, with fines totaling more than \$3 million. In six instances, prison terms were included in sentences.”<sup>85</sup>

With this historical overview of forum shopping and its pro-prosecutorial uses—perhaps, abuses—in obscenity cases in mind, the next section explores how the use of local community standards facilitates this practice, including today on the Internet.

## **B. Community Standards, Continuing Offenses, and the Facilitation of Obscenity Forum Shopping**

George Washington University Professor Dawn Nunziato writes that “*Miller* makes clear that obscenity is to be judged by a local community standard, in particular, that of the average member of the community, to assess whether the expression at issue, taken as a whole, appeals to the prurient interest.”<sup>86</sup> She adds, “*Miller* affirmatively establishes that local communities enjoy the prerogative to determine what sexually-themed expression is to be deemed obscene within their communities. In addition, *Miller* grants local communities the autonomy to determine what sexually-themed expression is to be deemed protected within their communities.”<sup>87</sup>

Why use local communities in the first place? Frederick Lane asserts that:

the theory behind *Miller* is that since local communities are the ones that have to deal with the allegedly deleterious effects of the public display and

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82. Nick Gillespie, *Pornocopia Deluxe: Behind the Triumph of Erotica*, REASON, Dec. 2001, at 78, 79.

83. Robert F. Howe, *Distributor Pleads Guilty In Va. Obscene Video Case; Firm's Owner Agrees to Pay \$800,000 Fine*, WASH. POST, Mar. 28, 1990, at B1.

84. Maurice Possley, *20 Indicted in Mailing Pornography*, CHI. TRIB., July 2, 1988, at 5.

85. Linda P. Campbell, *Federal Unit Aims at Pornographers*, CHI. TRIB., Apr. 6, 1990, at 5.

86. Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1539 (2007).

87. *Id.* at 1540.

sale of sexually explicit materials (lower property values, increased crime, effect on public morals, etc.), it should be the local communities—the points of sale for the pornography—that decide whether a particular movie, book or magazine is in fact obscene.<sup>88</sup>

As applied to the Internet, however, the use of local community standards gives immense power to the communities that are least tolerant of sexually explicit speech, especially when an obscenity prosecution can take place wherever the material is downloaded.<sup>89</sup> Professor Debra Burke explains that:

applying the standard of the geographic community of the recipient is problematic because it is difficult for the sender to appreciate the standards for patent offensiveness of a distant community, or even to block access to would-be recipients in less tolerant communities. As a result, *the application of the least tolerant community standards is the safest route and might emerge as the single, lowest common denominator standard.*<sup>90</sup>

Forum shopping of Internet-based obscenity cases gained legal traction in 1996 when the United States Court of Appeals for the Sixth Circuit reasserted in *United States v. Thomas*,<sup>91</sup> in the context of a case involving the dissemination of images on a computer bulletin board, “the general principle that, in cases involving interstate transportation of obscene material, juries are properly instructed to apply the community standards of the geographic area where the materials are sent.”<sup>92</sup> The appellate court in *Thomas* upheld use of the community standards of Memphis, Tennessee, where the material at issue was downloaded by a United States Postal Inspector, even though it was uploaded from the defendants’ home in Milpitas, California.<sup>93</sup> Forum shopping paid off, as the defendants were convicted in Memphis, some 1800 miles away from Milpitas.<sup>94</sup>

88. LANE, *supra* note 20, at xx.

89. Professor John Tehranian observes that:

by grounding obscenity standards at the local level—whether by local jurors applying local standards or by local jurors purportedly applying national standards—the *Miller* test enables the most restrictive county in the most restrictive of states to dictate the kind of speech products available throughout the national, or even international, market. In short, *Miller’s* community standards test represents a heckler’s veto of the grandest order by providing a local sovereign with an unwarranted level of power to wield on the minds and thoughts of individuals outside of its jurisdiction.

John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. L. 1, 19 (2003).

90. Debra D. Burke, *Thinking Outside the Box: Child Pornography, Obscenity and the Constitution*, 8 VA. J.L. & TECH. 11, ¶ 51 (2003) (emphasis added).

91. 74 F.3d 701 (6th Cir. 1996).

92. *Id.* at 710–11.

93. *Id.* at 704–06.

94. See LANE, *supra* note 20, at 128 (indicating that “the conviction of the Thomases in Memphis, 1800 miles from Milpitas, was of great concern to civil libertarians”).

This outcome should come as no surprise. By adopting a contemporary community standards requirement in *Miller*, the High Court, as Professor Keith Whittington observes, “invited new difficulties by allowing federal ‘forum shopping’ for obscenity prosecutions.”<sup>95</sup> The federal government can forum shop because, as one federal appellate observed, “it is well established that the use of common carriers to ship obscene materials and the interstate shipment of such materials are *continuing offenses that occur in every judicial district which the material touches*.”<sup>96</sup> Thus, “there is no constitutional impediment to the government’s power to prosecute pornography dealers in any district into which the material is sent.”<sup>97</sup>

Under federal statutory law:

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a *continuing offense* and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.<sup>98</sup>

This provision “authorizes federal obscenity cases to be venued in either the sending jurisdiction, receiving jurisdiction, or any jurisdiction through which the mailed obscene material moves.”<sup>99</sup> The federal government, in other words, “may elect to bring obscenity charges against a defendant in either the district of dispatch or the district of receipt without running afoul of the due process clause.”<sup>100</sup>

Obscenity, under federal statutory law, is one of those federal offenses involving the transportation of materials.<sup>101</sup> The ramification of this, as one federal appellate court noted, is that it “may result in prosecutions of persons in a community to which they have sent material which is obscene under that community’s standards though the community from which it is sent would tolerate the same material.”<sup>102</sup> This holds true even if the defendant in an obscenity prosecution did not initiate the contact with a law enforcement recipient-purchaser located in another state.<sup>103</sup>

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95. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 793 n.92 (2002).

96. *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982) (emphasis added).

97. *Id.*

98. 18 U.S.C. § 3237 (2009) (emphasis added).

99. *United States v. Katz*, Crim. No. 96-20027-001, 1997 U.S. Dist. LEXIS 24046, \*3 (W.D. La. Jan. 16, 1997).

100. *Id.*

101. *See* 18 U.S.C. § 1462 (2009) (targeting the importation and transportation of obscene content via “any express company or other common carrier or interactive computer service”).

102. *United States v. Peraino*, 645 F.2d 548, 551 (6th Cir. 1981).

103. *United States v. Feig*, No. CR-91-133S, 1992 U.S. Dist. LEXIS 10967, \*20 (W.D.N.Y. July 9, 1992) (holding that “even though the government initiated the

### C. Current Instances of Forum Shopping in the Age of the Internet

The federal government's high-profile obscenity prosecutions, launched during the administration of President George W. Bush and involving three southern California-based adult movie companies, each exhibit the hallmarks of forum shopping. They are described below, in addition to a case of forum shopping involving an Ohio-based adult movie distributor.

#### 1. *United States v. Extreme Associates, Inc.*<sup>104</sup>

This case saw the California husband-and-wife duo of Robert Zicari and Janet Romano and their company, Extreme Associates, Inc., hauled into court more than 1750 miles away in Pittsburgh, Pennsylvania. Extreme Associates was “the highest-profile producer that the Department of Justice ha[d] gone after in more than 10 years.”<sup>105</sup> The company and its owners were “charged with mailing three video tapes to an undercover United States postal inspector in Pittsburgh and delivering six digital video clips over the Internet to that same undercover postal inspector”<sup>106</sup> after “the inspector ordered the video tapes through Extreme Associates’ publicly available website and accessed the video clips after purchasing a monthly membership to the members only section of Extreme Associates’ website.”<sup>107</sup> The district court held that “the relevant community for both the video tape charges and the digital video clip charges will be those areas within the jurisdiction of the Pittsburgh Division of the United States District Court for the Western District of Pennsylvania.”<sup>108</sup>

Given that southern California is the home of the adult movie industry in the United States—the San Fernando Valley, where many adult film companies are located, is known as “Porn Valley”<sup>109</sup>—it is not surprising that blue-collar-stereotyped Pittsburgh<sup>110</sup> would be

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contact with defendants in this case, venue is proper in this district because defendants shipped the allegedly obscene videocassettes here”).

104. *United States v. Extreme Assocs., Inc.*, Crim. No. 03-0203, 2009 U.S. Dist. LEXIS 2860 (W.D. Pa. Jan. 15, 2009).

105. G. Beato, *Xtreme Measures*, REASON, May 2004, at 24, 29.

106. *Extreme*, 2009 U.S. Dist. LEXIS 2860, at \*1–2.

107. *Id.* at \*2.

108. *Id.* at \*10.

109. See Brad A. Greenberg, *Frisky Kitty Battle Lands in Judge’s Lap*, L.A. DAILY NEWS, July 17, 2006, at N1 (writing that the San Fernando Valley is “known to some as *Porn Valley* since it is home to most of the nation’s pornography industry”) (emphasis added); Sharon Mitchell, *How to Put Condoms in the Picture*, N.Y. TIMES, May 2, 2004, at Section 4, 11 (describing “the San Fernando Valley—or ‘*Porn Valley*’—where much of the sex-film industry is based”) (emphasis added).

110. Cf. Rob Rossi, *Penguins Out to Defy the Ordinary*, PITT. TRIB.-REV., Nov. 22, 2009, available at [http://www.pittsburghlive.com/x/pittsburghtrib/sports/penguins/s\\_](http://www.pittsburghlive.com/x/pittsburghtrib/sports/penguins/s_)

perceived as a more conservative and, in turn, more favorable venue for an obscenity prosecution.<sup>111</sup> In fact, former United States Attorney Mary Beth Buchanan,<sup>112</sup> who prosecuted the *Extreme Associates* case,<sup>113</sup> has openly acknowledged that “the case could have been brought in any district in which the product was sold,”<sup>114</sup> but the Western District of Pennsylvania, “may be considered by some to be more conservative.”<sup>115</sup>

## 2. *United States v. Little*<sup>116</sup>

This case, which currently is on appeal to the United States Court of Appeals for the Eleventh Circuit, centers on the prosecution of Altadena, California-based adult movie producer Paul Little in Tampa, Florida. The indictment charged Little “and MaxWorld Entertainment Inc., with five counts of transporting obscene matter by use of an interactive computer service and five counts of mailing obscene matter.”<sup>117</sup> Attorney H. Louis Sirkin, who represented Little’s corporate entities during the trial, explained that “the thing that most people don’t realize about Tampa is that, as free spirited as the city of Tampa may be, the Middle District of Florida generally is pretty conservative.

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654456.html (quoting David Morehouse, president of the Pittsburgh Penguins hockey team, for the proposition, “I really thought we’d wrap ourselves in *this combination of working-class, BLUE-COLLAR toughness* qualities about PITTSBURGH that fans around the world associate with the Steelers”) (emphasis added).

111. See Laurie P. Cohen, *Internet’s Ubiquity Multiplies Venues to Try Web Crimes*, WALL ST. J., Feb. 12, 2007, at B1 (writing that “venues count: Pittsburgh and St. Louis, for example, are viewed by lawyers as much more legally conservative than, say, Boston and San Francisco”).
112. Buchanan stepped down from her post in November 2009. See Paula Reed Ward, *U.S. Attorney Takes a Bow*, PITT. POST-GAZETTE, Nov. 17, 2009, at A1 (describing the conclusion of Buchanan’s “eight-year tenure” as the U.S. Attorney for the Western District of Pennsylvania, during which she “became a darling of the Bush administration and thrust herself into the spotlight, often to her advantage—and sometimes not”).
113. See Paula Reed Ward, *Guilty Plea in Porn Case*, PITT. POST-GAZETTE, Mar. 12, 2009, at B1 (reporting that “U.S. Attorney Mary Beth Buchanan prosecuted the case here after undercover postal inspectors ordered videos from Extreme Associates and had them mailed to Pittsburgh”).
114. Cohen, *supra* note 111, at B2.
115. *Id.*
116. *United States v. Little*, No. 8:07-cr-170-T-24 MSS, 2008 U.S. Dist. LEXIS 61187 (M.D. Fla. July 28, 2008).
117. Press Release, U.S. Dep’t of Justice, *Producer Paul Little Indicted on Obscenity Charges* (May 31, 2007), available at <http://tampa.fbi.gov/dojpressrel/2007/obscenitycharges053107.htm>. In particular, the indictment alleged “that Little, through MaxWorld Entertainment, Inc., distributed films that met the U.S. Supreme Court’s standards for obscenity through the U.S. mail to an address located in the Middle District of Florida” and that they transmitted “over the Internet through their Web site five obscene video clips which were promotional trailers of the full-length feature films available through MaxWorld Entertainment Inc.” *Id.*

You've got Polk County, Tarpon Springs, Bradenton, Clearwater and St. Petersburg. They're not very avant-garde."<sup>118</sup>

George Washington University Professor Jonathan Turley, commenting on the selection of Tampa as the venue for prosecution of Paul Little, observes that "the Bush Administration could have chosen any state in the Union, but engineered an indictment in Tampa—an open case of forum shopping for the most conservative jury pool that it could find."<sup>119</sup> The forum shopping was easy because "a postal inspector arranged for five DVDs to be sent to her at a Tampa post office box and the Justice Department found a web host in Tampa that carried some of the material."<sup>120</sup> Similarly, Sheri D. McWhorter, a labor attorney in Tampa, asserts that jurors in the Middle District of Florida "have a reputation of being more conservative, more trusting of authorities, than most."<sup>121</sup>

### 3. *United States v. Stagliano*<sup>122</sup>

This case involves an adult movie producer from Malibu, California, who is being charged in distant Washington, D.C. "with operating an obscenity distribution business and related offenses."<sup>123</sup> Defendant John Stagliano is "a former porn star and president of Evil Angel productions."<sup>124</sup> While the District of Columbia may be a liberal venue in which to bring an obscenity prosecution, it may have been selected, in the opinion of this Article's author, because Stagliano is a huge name within the adult industry<sup>125</sup> and the case would demon-

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118. Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543, 578 (2009).

119. Posting of Jonathan Turley to Res Ipsa Loquitur, James Madison Meets Max Hardcore: Florida Obscenity Case Could Force Review of Community Standards in Internet Age, <http://jonathanturley.org/2008/06/02/little-indiscretion-florida-obscenity-case-could-force-review-of-community-standards-in-internet-age> (June 2, 2008, 10:02 EST).

120. *Id.*

121. Art Levy, *Shopping for Verdicts*, FLA. TREND, Oct. 2008, at 80–81.

122. Indictment, *United States v. Stagliano*, No. 08-093 (D.D.C. Apr. 8, 2008), available at [http://www.defendourporn.org/stagliano\\_indictment.pdf](http://www.defendourporn.org/stagliano_indictment.pdf).

123. Press Release, U.S. Dep't of Justice, Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity (Apr. 8, 2008), available at <http://washingtondc.fbi.gov/dojpressrel/pressrel08/wf040808.htm> and at [http://www.justice.gov/criminal/pr/press\\_releases/2008/04/04-08-08\\_ceos-obscenity-indict.pdf](http://www.justice.gov/criminal/pr/press_releases/2008/04/04-08-08_ceos-obscenity-indict.pdf) (noting that the Malibu, California-based Stagliano "and two companies owned by him have been charged by a federal grand jury in Washington, D.C., with operating an obscenity distribution business and related offenses").

124. Rong-Gong Lin II & Kimi Yoshino, *More Porn HIV Cases Disclosed*, L.A. TIMES, June 12, 2009, at A4, available at <http://articles.latimes.com/2009/jun/12/local/me-porn-hiv12>.

125. See Mike Weatherford, *A Worthy Experiment*, LAS VEGAS REV.-J., Jan. 18, 2008, at 6J (reporting that Stagliano's "sex video empire, Evil Angel, won 18 Adult

strate to federal lawmakers in the District that the government is actively pursuing an anti-obscenity agenda. A conviction of Stagliano in the heart of the place where lawmakers dole out dollars to the Department of Justice might, in turn, help to sustain funding for the Child Exploitation and Obscenity Section and the Obscenity Prosecution Task Force, which “is dedicated exclusively to the protection of America’s children and families through the enforcement of our Nation’s obscenity laws.”<sup>126</sup>

#### 4. *United States v. Harb*<sup>127</sup>

In another federal obscenity case initiated during the administration of President George W. Bush, two adult film distributors from Cleveland, Ohio, and their company, Movies By Mail, were hauled into court in Utah for shipping content into that state.<sup>128</sup> In particular, “court documents disclose[d] that Movies by Mail delivered 683 packages to addresses in the state of Utah during 2006; 149 of them to addresses in Salt Lake City.”<sup>129</sup> The defendants argued that “a national community standard, rather than a community standard should be applied, especially as they engaged in Internet-based retail.”<sup>130</sup> United States District Judge Ted Stewart, however, rejected this argument in February 2009, finding that “the *Miller* standard, while questioned in some case law, notably by the concurring Justices in *Ashcroft v. ACLU*, remains controlling authority as to the statutes allegedly violated in the present case.”<sup>131</sup> It appears that the forum shopping ultimately worked because in November 2009, “Sami Harb and Michael Harb, owners of now-closed Cleveland-based Movies by

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Video News awards, the porn industry’s version of the Oscars” in 2008 and noting his “Fashionistas” Las Vegas cabaret show).

126. Obscenity Prosecution Task Force, U.S. Department of Justice, <http://www.justice.gov/criminal/optf> (last visited May 10, 2010).
127. *United States v. Harb*, No. 2:07-CR-426 TS, 2009 U.S. Dist. LEXIS 16057 (D. Utah Feb. 27, 2009).
128. Press Release, U.S. Dep’t of Justice, Federal Grand Jury in Salt Lake City Charges Cleveland Men with Obscenity Violations (June 28, 2007), available at [http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_471.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html) (last visited Nov. 22, 2009) [hereinafter Salt Lake City Charges]. See Michael K. McIntyre, *Rock Hall Gets a Cash Bonus*, PLAIN DEALER (Cleveland, Ohio), June 18, 2007, at B1 (writing that “Sami R. Harb and Michael Harb, who operate Movies by Mail, an Internet sales business on Berea Road in Cleveland, were accused by the U.S. Department of Justice in Utah of one count of selling obscene material—to an adult”).
129. Salt Lake City Charges, *supra* note 128.
130. *Harb*, 2009 U.S. Dist. LEXIS 16057, at \*16.
131. *Id.*

Mail, were sentenced . . . to a year and day in federal prison after each pleaded guilty to one count of selling obscene material.”<sup>132</sup>

#### D. Coping with Local Community Standards Through Self-Censorship and Creative Business Models

The late Justice William Brennan, in his 1974 dissenting opinion in *Hamling v. United States*,<sup>133</sup> warned of the potential chilling effect on free speech posed by the adoption of local community standards:

National distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander. Because these variegated standards are impossible to discern, national distributors, fearful of risking the expense and difficulty of defending against prosecution in any of several remote communities, must inevitably be led to retreat to debilitating self-censorship that abridges the First Amendment rights of the people.<sup>134</sup>

The fact that self-censorship may occur, however, due to laws affecting the sale of sexually explicit materials does *not* violate the civil rights of the sellers of such products. The Supreme Court wrote twenty years ago in *Fort Wayne Books, Inc. v. Indiana*<sup>135</sup> that, in the face of tough penalties imposed by racketeering laws:

some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that “any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.”<sup>136</sup>

In other words, a little self-censorship may be inevitable and it is not necessarily a bad thing. Self-censorship on the part of the producers and distributors of adult entertainment content, due to *Miller’s* adoption of local community standards, can take shape in any one of three different ways:

- by not shipping content either into or through states perceived as having the most conservative community standards;<sup>137</sup>

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132. Tom Hymes, *Despite Young Daughter’s Illness, Harb and Cousin Get Jail*, AVN.COM, Nov. 19, 2009, <http://business.avn.com/articles/36809.html> (last visited Nov. 23, 2009).

133. 418 U.S. 87 (1974).

134. *Id.* at 144 (Brennan, J., dissenting) (emphasis added).

135. 489 U.S. 46 (1989).

136. *Id.* at 60 (quoting *Smith v. California*, 361 U.S. 147, 154–55 (1959)).

137. See David Landis, *Sex, Laws & Cyberspace; Regulating Porn: Does It Compute?*, USA TODAY, Aug. 9, 1994, at 1D (noting that “distributors of sexually oriented books, magazines and videos can avoid shipping to locales where they may face prosecution”).

- by making two or more versions of the same movie, with the softer version to be sold in less tolerant communities and the harder version to be sold in more tolerant communities;<sup>138</sup> or

- by shipping content anywhere and everywhere in the United States, but creating and crafting it in such a watered-down, soft-core way as to satisfy the standards of the least tolerant community in the United States.

These three modes or versions of self-censorship wrought by the use of local community standards are described separately below.

### 1. *Refusing to Ship Content into Conservative Venues*

The first self-censorship scenario is more than just speculative. For instance, most adult movie companies avoid shipping certain content into Utah.<sup>139</sup> Stephen Modde, vice president and general counsel for Conwest Resources, Inc., the company that operates Falcon Studios, a leading San Francisco-based producer of gay-themed adult movies, states, “We don’t ship to communities where we have encountered the wrath of the law.”<sup>140</sup> Elaborating in a 2006 interview, Modde explained:

We don’t ship to Tennessee and that goes back to an obscenity case in 1973. We don’t ship to Mississippi. We don’t ship to Salt Lake City. We used to not ship to Texas, but we are shipping there now. I have real difficulty. I asked [adult industry defense attorney] Greg Piccionelli and I’ve talked with other attorneys in the industry, asking “What’s this list?” Some companies have these huge lists that say we don’t ship here, here, and here. Our list is basically based on if we have encountered the law there. If we have, then we don’t ship.<sup>141</sup>

Others associated with the adult entertainment industry concur that they too do not ship material to or through certain states for fear of being subjected to prosecution under intolerant community stan-

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138. See Christopher Smith, *Is Utah Full of Prudes? Burgeoning Sex Businesses May Belie that Reputation*, SALT LAKE TRIB., Mar. 13, 1994, at A1, A4 (quoting Salt Lake City attorney Steve Cook, who represents topless dance clubs, for the proposition that “if you call a national place like Vivid Video from Salt Lake, Minneapolis and New York and ordered the same movie, you would get three completely different versions” and noting that “porn movies are edited for specific markets, and conservative Utah gets the least explicit versions”).

139. See Vince Horiuchi, *Cyberspace Tough Task, Smut Fighter Admits*, SALT LAKE TRIB., Feb. 11, 2001, at A4 (reporting that “legitimate X-rated video dealers on the Internet, for example, will not ship products to Utah”); Cheryl B. Preston, *Porn Report Incomplete*, DESERET NEWS (Salt Lake City, Utah), Mar. 5, 2009, available at <http://www.deseretnews.com/article/1,5143,705288840,00.html> (asserting that “many pornography companies will not ship into Utah because of its laws”).

140. Clay Calvert & Robert D. Richards, *Gay Pornography and the First Amendment: Unique, First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images*, 15 AM. U. J. GENDER SOC. POL’Y & L. 687, 707 (2007).

141. *Id.* at 708.

dards. For instance, Joy King,<sup>142</sup> of the adult movie company Wicked Pictures,<sup>143</sup> observes that:

there are unfriendly states that just don't want the product. Nobody is forcing anybody to watch porn. Nobody is forcing anybody to buy it, for God's sake. That always amazes me. But we're not going to ship into a state that clearly doesn't want us in there. There are certain counties in Texas and Utah. There's a prosecution in Dallas-Fort Worth right now. There have been a lot of cases. There are cases in places where you wouldn't even think there would be an issue—upstate New York and places like that. In Florida, more in the panhandle, since it's the South. And with legislators who have a conservative constituent, they have to do it and make them happy.<sup>144</sup>

Paul Little, the now-convicted pornographer<sup>145</sup> who is known by the name Max Hardcore within the adult industry,<sup>146</sup> stated quite bluntly prior to his indictment that “the smart money knows where not to ship and what not to do, like you don't put pissing, fist fucking, and pooping—I never did that anyway—or gagging a girl until she vomits in the U.S. version. There are some states that are particularly bad.”<sup>147</sup>

The bottom line is that some companies simply will not distribute their content into certain venues because their community standards are too conservative, and the companies do not want to risk criminal punishment under *Miller*.

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142. See Jennifer Steinhauer, *Sex Sells, So Legislator Urges State To Tax It*, N.Y. TIMES, May 26, 2008, at A11 (describing King as “vice president of Wicked Pictures and a member of the Free Speech Coalition,” the latter group being the trade association for the adult entertainment industry).

143. Wicked Pictures is “one of mainstream pornography’s largest distributors.” Justin Berton, *Art Mingles with Porn at Erotic Film Contest*, S.F. CHRON., Oct. 26, 2006, at B1.

144. Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 276 (2006).

145. See Ben Montgomery, *Pornographer to Serve Nearly 4 Years, Pay Fines*, ST. PETERSBURG TIMES (Fla.), Oct. 4, 2008, at B1 (reporting that “Tampa jurors convicted Little in June [2008] on 10 counts of selling obscene material on the Internet and 10 counts of shipping it to Tampa through the U.S. mail,” and adding that U.S. District Judge Susan C. Bucklew “sentenced the man known as Max Hardcore to 3 years and 10 months in federal prison for selling and distributing his messy, sometimes violent videos in Tampa.” The judge “made him forfeit three Web sites, fined him \$7,500, ordered him to face three years of probation after his prison sentence and fined his company, Max World Entertainment, \$75,000.”).

146. See, e.g., Ellen Gray, *CNBC Probes Ailing Porn Biz*, PHILADELPHIA DAILY NEWS, July 15, 2009, at Features 38 (reporting that Little’s “screen name is ‘Max Hardcore’”); Montgomery, *supra* note 145, at 1B (noting that Little is “known as Max Hardcore”).

147. Richards & Calvert, *supra* note 19, at 277.

2. *Tailoring Content for Particular Communities: From X to XXX and Everything In Between*

The second form of self-censorship—editing out content to create multiple versions of the same movie<sup>148</sup>—demonstrates how adult movie enterprises must adapt their business models to cope with local community standards. As adult producer Paul Little states, “We have to consider the market. I make two different versions. I make a world—or European—version and I make a U.S. version.”<sup>149</sup>

Some companies, in fact, make even more than two versions. During an exclusive in-person interview, Michael Klein, current president of Larry Flynt’s adult-content empire LFP, Inc.,<sup>150</sup> distinguished between the four different versions of movies—X, XX, XX-1/2 and XXX—that Hustler TV markets to cable providers and hotels.<sup>151</sup> Klein explained, “X is the softest, so you’re not going to really see any actual penetration, there will be no ejaculation, and there are no extreme close-ups. It’s as soft as you’re going to get. It’s a little bit harder than what you’ll find on HBO or Showtime late at night.”<sup>152</sup> He added that “XX shows a little bit more—basically almost everything, except for extreme close-ups, ejaculation and anal sex,”<sup>153</sup> while “XX-and-a-half is basically everything except for anal sex,”<sup>154</sup> and “XXX is everything,”<sup>155</sup> with the critical caveat that “we don’t show any S&M. We don’t show anything degrading to women—no violence whatsoever in the movies. Obviously, we not only never have anyone under age, but we never have anyone portraying someone under age. That is not allowed.”<sup>156</sup>

Klein explained how this business model, which is driven by the fact that there is not a national uniform community standard under *Miller*, makes sense for cable operators:

The cable company decides what they’re going to offer to you on the VOD or pay-per-view platform. Obviously the XXX is going to perform the best, but not a lot of operators will do it right now, although it is more and more. When you get into the world of VOD and they feel more comfortable with the ability

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148. See *supra* note 137 and accompanying text.

149. Richards & Calvert, *supra* note 19, at 277.

150. See LFP, Inc. Company Profile, Yahoo! Finance, <http://biz.yahoo.com/ic/48/48039.html> (last visited May 10, 2010) (identifying Michael H. Klein as president of LFP, Inc.).

151. Interview with Michael Klein, then-President of LFP Broadcasting LLC & President of LFP Internet Group LLC, in Beverly Hills, Cal. (June 30, 2006). The interview was conducted by the author, along with Professor Robert D. Richards of the Pennsylvania State University, at *Hustler’s* headquarters, located at 8484 Wilshire Boulevard, Beverly Hills, Cal. It was recorded on audiotape.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

of people to block out—it's even easier with the VOD platform—you find more and more of the XXX going out. The next is going to be the XX-and-a-half more than the XX, and XX is going to perform a hell of a lot better than X.<sup>157</sup>

The same holds true in the hotel industry, as Klein provides options to those entities, noting that:

even in the hotel marketplace, you'll find certain hotels that will show X, certain hotels will show XX-and-a-half, certain hotels are going to show XXX. We do deals with a number of the hotel companies and we go to the hotel general managers and ask, "Which version do you want?" And the hotel decides.<sup>158</sup>

Thus, the bottom line is that *Miller's* use of local community standards drives some companies either to edit out or simply not to shoot footage of particular sexual acts in order to create multiple versions of movies that, they hope, will satisfy the various community standards across the country.

### 3. *Softening Content to Satisfy the Least Tolerant Community*

In its 1989 decision in the dial-a-porn case, *Sable Communications of California v. FCC*,<sup>159</sup> the United States Supreme Court squarely rejected the argument, advanced by a company "offering sexually oriented prerecorded telephone messages,"<sup>160</sup> that a federal law banning obscene telephone messages "places message senders in a 'double bind' by compelling them to tailor all their messages to the least tolerant community."<sup>161</sup> The fact that adult-content providers like Sable Communications must expend money to tailor their content to various communities is simply irrelevant for First Amendment purposes, as the Court opined:

While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make. There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.<sup>162</sup>

This means, of course, that companies that cannot afford to tailor their sexually explicit messages to all of the possible communities into which they might flow have only one real option if they want to reduce their risk of an obscenity conviction—to tailor their content to the

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157. *Id.*

158. *Id.*

159. 492 U.S. 115 (1989).

160. *Id.* at 117–18.

161. *Id.* at 124.

162. *Id.* at 125–26.

standard of the least tolerant community in the United States. This amounts to the least tolerant community dictating what the rest of the country may read and view, at least with regard to content produced by those companies that cannot afford to produce multiple versions of their material.

With this review of the government's past and present forum shopping practices in mind, along with the adult entertainment industry's efforts to cope with *Miller's* use of local community standards, this Article now examines the issues raised by the adoption of a national community standard in *Kilbride*.

### III. THE RAMIFICATIONS OF *KILBRIDE* AND THE QUESTIONS IT RAISES FOR PROSECUTORS AND COURTS

This Part of the Article is divided into three sections and explores the ramifications of the *Kilbride* opinion's adoption of a national community standard for Internet-based obscenity cases. Section III.A addresses whether the adoption of a national community standard will slow or otherwise deter federal obscenity prosecutions. Section III.B then examines the myriad problems left unresolved by the Ninth Circuit's opinion and the ramifications of those problems. In particular, Section III.B raises more than a half-dozen different questions that courts must now wrestle with in light of *Kilbride*. Finally, Section III.C speculates on how *Kilbride* might affect the adult entertainment industry in terms of the sexually explicit content that it produces.

#### A. Will a National Community Standard Slow Obscenity Prosecutions?

"The really bad stuff is on the Internet. That's what the government has got to decide if they want to go after. Here we do what we call vanilla sex. The real heavy stuff is out there on the Internet."<sup>163</sup>

If Larry Flynt, publisher of *Hustler* magazine, really is correct in his assertion about the type of sexually explicit content that circulates on the Internet,<sup>164</sup> then it is doubtful the adoption of a national community standard, standing alone, would bring obscenity prosecutions targeting Internet material to a screeching halt.

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163. Richards & Calvert, *supra* note 19, at 281 (quoting Larry Flynt) (emphasis added).

164. Flynt is not the only person to hold this viewpoint. See Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive* *Lawrence*, 15 *GEO. MASON L. REV.* 611, 622 (2008) (writing that the Internet provides "immediate access to the most disturbing forms of porno-violence").

Nonetheless, government attorneys Benjamin Vernia and David Szuchman of the Child Exploitation and Obscenity Section<sup>165</sup> of the U.S. Department of Justice openly speculated in an official government bulletin, some five years before the Ninth Circuit handed down its decision in *Kilbride*, that “a lower court could try to impose a national standard, which could *greatly impact any obscenity prosecution*.”<sup>166</sup> They observed that the “emerging view that distributors on the Internet are helpless to control the vast extent of distribution *could precipitate an unfavorable judicial attitude toward the government’s selection of venue in judicially conservative districts*.”<sup>167</sup>

Attorney Eric P. Robinson, writing for the Citizen Media Law Project at Harvard Law School,<sup>168</sup> believes that the “Ninth Circuit opinion likely will make prosecutors think twice before proceeding with obscenity charges in the Internet content. And, with the Internet forming new social norms of sex and privacy, they also are probably less likely to succeed.”<sup>169</sup>

All of this suggests that adopting a uniform, national community standard may deter the federal government from its past and current practices of forum shopping. On the other hand, the Federal Communications Commission’s adoption of a non-local community standard<sup>170</sup> for determining whether an over-the-air broadcast is

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165. See CEOS Mission, Child Exploitation and Obscenity Section, U.S. Department of Justice Website, <http://www.justice.gov/criminal/ceos/mission.html> (last visited Nov. 27, 2009) (stating that this section of the criminal division of the U.S. Department of Justice “prosecutes violations of federal law related to producing, distributing, receiving, or possessing child pornography, transporting women or children interstate for the purpose of engaging in criminal sexual activity, traveling interstate or internationally to sexually abuse children, and international parental kidnapping”).

166. Benjamin Vernia & David Szuchman, *Prosecuting Web-based Obscenity Cases*, U.S. ATT’YS BULL., Mar. 2004, at 1, 6 (emphasis added).

167. *Id.* (emphasis added).

168. See About the Citizen Media Law Project, Citizen Media Law Project, <http://www.citmedialaw.org/about/citizen-media-law-project> (providing that “[t]he Citizen Media Law Project (CMLP) is jointly affiliated with Harvard Law School’s Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media at Arizona State University” and describing its mission as providing “legal assistance, education, and resources for individuals and organizations involved in online and citizen media. We also provide research on free speech, newsgathering, intellectual property, and other legal issues related to online speech”).

169. Posting of Eric P. Robinson to Citizen Media Law Project Blog, “*I Know It When I See It. The View from Where?*,” <http://www.citmedialaw.org/blog/2009/i-know-it-when-i-see-it-view-from-where> (Nov. 9, 2009).

170. See Keith Brown and Adam Candeb, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1512 (2005) (referring to “the FCC’s national community standard”).

indecent<sup>171</sup> has not stifled or otherwise hindered that agency's aggressive efforts to crack down on such content in recent years.<sup>172</sup> Indeed, Professor Mark Cenite confirms, "The FCC has opted for national community standards for assessing broadcast indecency."<sup>173</sup> In its 2001 policy statement on indecency, the FCC observed that "[t]he determination as to whether certain programming is patently offensive is *not a local one* and does not encompass any particular geographic area. Rather, the *standard is that of an average broadcast viewer or listener* and not the sensibilities of any individual complainant."<sup>174</sup>

In summary, a national community standard, standing alone, might slow the federal government's obscenity prosecutions, but other factors are at play. For instance, will the administration of President Barack Obama and U.S. Attorney General Eric Holder continue the crackdown on obscenity launched during the administration of President George W. Bush, or will there be a return to the hands-off approach to adult content favored under the leadership of President Bill Clinton?<sup>175</sup> It may be that, given the state of the economy and the

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171. The FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary *community standards for the broadcast medium*, sexual or excretory organs or activities." FCC Consumer Facts: Obscene, Indecent and Profane Broadcasts, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Nov. 28, 2009) (emphasis added).

172. See generally Nadine Strossen, *Constitutional Law and Values—Version '08 (Not Necessarily an Upgrade)*, 53 N.Y.L. SCH. L. REV. 735, 736 (2008/2009) (describing the FCC's "dramatic new crackdown on broadcast 'indecency' in the wake of the infamous 'wardrobe malfunction' at the televised 2004 Super Bowl game" and adding that "[t]he FCC has been imposing record-breaking fines on broadcasters even for the fleeting, spontaneous use of a single four-letter word in a clearly non-sexual context") (footnotes omitted).

173. Cenite, *supra* note 6, at 41.

174. FED. COMM'N'S COMM'N, POLICY STATEMENT, FILE NO. EB-00-IH-0089, IN RE: INDUSTRY GUIDANCE ON THE COMMISSION'S CASE LAW INTERPRETING 18 U.S.C. § 1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY 4 (Apr. 6, 2001), available at <http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf> (emphasis added) (citation omitted).

175. The Justice Department, during the administration of George W. Bush, "devoted new attention to areas important to conservative activists, such as sex trafficking and obscenity, according to the department's own performance and budget numbers." Dan Eggen & John Solomon, *Justice Dept.'s Focus Has Shifted—Terror, Immigration are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1. Under Bush, the "Justice Department has begun aggressively policing adult pornography as well, a change from the Clinton administration, which pursued almost no such cases." Shannon McCaffrey, *Justice Department Cracks Down on Adult Porn Industry*, PHILA. INQUIRER, Apr. 4, 2004, at A10; see Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (attributing to Mary Beth Buchanan, then-United States Attorney for Western Pennsylvania, the proposition that "the rarity of obscenity prosecutions during the eight years of the Clinton administration meant that the pornography industry had come to believe that law enforcement had tacitly 'agreed to an anything-goes approach'");

wars in Afghanistan and Iraq, Obama and Holder simply decide there are other, more important issues on which to focus rather than targeting sexually explicit content made by adults for adults.

## B. How Will a National Standard be Determined?

When the United States Supreme Court handed down its ruling in *Miller v. California*<sup>176</sup> in June 1973, it warned that a national community standard was “unascertainable.”<sup>177</sup> The Court added, “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.”<sup>178</sup> The Court reasoned that “[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.”<sup>179</sup>

The unanswered questions that courts—including, one hopes, the Supreme Court on a petition for a writ of certiorari—must now address, in light of *Kilbride*, are:

- Is a national community standard now ascertainable, more than thirty-five years after *Miller*?
- Does the advent of the Internet justify strangling the diversity of views that the high court apparently valued in *Miller*?
- Is the legal system now ready—ironically so, in an era of digital convergence of media—to go down a medium-specific path in obscenity cases where a national community standard applies to cases involving adult content conveyed via the medium of the Internet, but local community standards continue to apply to adult content conveyed in the traditional print medium (magazines and books) and on both the broadcast and cable media?
- Why should the exact same adult movie be judged by a national community standard if it is conveyed, purchased and viewed on the Internet, but by a local community standard when it is purchased at a bricks-and-mortar adult bookstore and viewed at home on a DVD player? Does it make sense, in other words, to embrace a situation where the same product is subject to different community standards—

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Joe Mozingo, *Obscenity Task Force's Aim Disputed*, L.A. TIMES, Oct. 8, 2007, available at <http://articles.latimes.com/2007/oct/09/local/me-obscene9?pg=2> (describing the Bush administration's anti-obscenity efforts that have “reversed years of neglect by the Clinton administration” and quoting Bryan Sierra, a Justice Department spokesperson, for the proposition that “there was a lack of enforcement for nearly a decade. One of the things we saw in that period was a proliferation of obscene material”).

176. 413 U.S. 15 (1973).

177. *Id.* at 31.

178. *Id.* at 32.

179. *Id.* at 33.

either national or local—depending on the medium through which it is conveyed?

- Although jurors in Internet-based obscenity cases may be instructed by judges to apply national community standards, will they actually be biased, however subtly, by the standards of their own local community, perhaps believing that other people “out there” must somehow be like them?

The Court’s observations in *Miller*, of course, suggest that it may prove much easier for a court to adopt a national community standard for Internet-based obscenity prosecutions than it is for judges and jurors to determine precisely what that standard actually is or how to measure it. The Ninth Circuit in *Kilbride* simply stated, “[W]e construe obscenity as regulated by [federal statutes] as defined by *reference to a national community standard when disseminated via the Internet*.”<sup>180</sup> Thus, the obvious question follows: how is a fact finder supposed to determine what this national community standard is?

The Ninth Circuit supplied little guidance on this question, but it did find that jury instructions with “references to ‘society at large’ and ‘people in general’ are . . . not objectionable.”<sup>181</sup> The appellate court in *Kilbride* also expressed the sentiment that it is an:

entirely logical proposition that evidence of standards of communities outside the district may in a court’s judgment help jurors gauge what their own sense of contemporary community standards are. Allowing jurors to consider such evidence is acceptable as long as jurors are properly instructed that they are to apply their own sense of what contemporary community standards are.<sup>182</sup>

This line of logic leads to more questions. Will a cadre of expert witnesses who are ready to testify about what community standards are in various communities throughout the United States now develop? Would the use of such experts on questions of community standards only further confuse jurors, or would it help them in divining a national standard?

Clearly, a juror living in a single community in one geographically isolated part of the country will need some assistance in determining what the national community standard is for obscenity on the Internet. For example, how can a hypothetical juror from Louisville, Kentucky, who has spent her entire life there, be expected to take into account the sexual values and mores of places like Austin, Texas; San Francisco, California; or anywhere else, for that matter?

It already is hard enough for jurors in obscenity cases to determine local community standards. As adult industry defense attorney Jeffrey Douglas has observed:

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180. *United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009) (emphasis added).

181. *Id.* at 1249.

182. *Id.*

Even in our very contemporary society where sexuality is better integrated into pop culture than any time in American history, still people do not casually sit around and talk about their sexual fantasies with one another. So asking the jury to know their neighbors' and complete strangers' degree of tolerance is ludicrous.<sup>183</sup>

Another question flows from a national standard for Internet-based obscenity cases: Will the use of Internet-based searches for adult-content on search engines like Google and Yahoo now become a viable means for determining what Internet community standards are? The *New York Times* brought this possibility to public light in June 2008 when it observed that "the defense in an obscenity trial in Florida plans to use publicly accessible Google search data to try to persuade jurors that their neighbors have broader interests than they might have thought."<sup>184</sup> The article noted that Florida-based defense attorney Lawrence Walters<sup>185</sup> intended "to show that residents of Pensacola are more likely to use Google to search for terms like 'orgy' than for 'apple pie' or 'watermelon'"<sup>186</sup> in an attempt "to demonstrate that interest in the sexual subjects exceeds that of more mainstream topics—and that by extension, the sexual material distributed by his client is not outside the norm."<sup>187</sup> Walters explained to a reporter from the *Washington Post* that the key revelation of using Google to help determine community standards in such a seeking-out-comparables approach is that "[w]hat we really do in our bedrooms is much different than what we admit to doing."<sup>188</sup>

The FCC's adoption of an average-broadcast-viewer standard for the indecency determinations<sup>189</sup> raises another possibility that will disturb prosecutors: if the national community standard for the Internet is to be judged by what is accepted on the Internet, then it is clear that a great deal of sexual content is widely accepted on the Internet. An organization called Enough is Enough<sup>190</sup> asserts that there were 1.3 million pornographic websites in 2003, 420 million por-

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183. Richards & Calvert, *supra* note 118, at 574.

184. Matt Richtel, *What's Obscene? Defendant Says Google Data Offers [sic] a Gauge*, N.Y. TIMES, June 24, 2008, at A1.

185. See *supra* note 15 (providing biographical background on Walters).

186. Richtel, *supra* note 184, at A1.

187. *Id.*

188. Monica Hesse, *The Google Ogle Defense: A Search for America's Psyche*, WASH. POST, July 3, 2008, at C1.

189. See *supra* notes 169–73 and accompanying text.

190. Enough is Enough describes itself as:

a non-partisan, 501(c)(3) non-profit organization, emerged in 1994 as the national leader on the front lines to make the Internet safer for children and families. Since then, EIE has pioneered and led the effort to confront online pornography, child pornography, child stalking and sexual predation with innovative initiatives and effective communications.

Enough is Enough, *Who We Are*, <http://www.enough.org/inside.php?id=E7A5VT6VM> (last visited Nov. 28, 2009).

nographic web pages by the end of 2004,<sup>191</sup> and more than 32 million daily pornographic search engine requests.”<sup>192</sup> What’s more, “AVN Media Network, an adult entertainment trade publication, report[ed] that U.S. online adult entertainment in 2006 reached \$2.8 billion of revenue, a 13 percent increase from 2005.”<sup>193</sup> It would seem that such data actually might be used to help jurors in Internet-based obscenity cases to better understand what the national standards are for content transmitted through that medium.

### C. How Will National Standards Impact the Adult Entertainment Industry?

As described earlier in this Article, some adult content providers today create multiple versions of the same movie due to the impact of *Miller’s* use of local community standards.<sup>194</sup> If, in light of *Kilbride*, a national community standard now will be used for cases involving Internet-transmitted adult content, will adult movie companies begin to create “Internet Only” versions of movies that supposedly aim at some national average?

The adult industry currently produces “cable versions”<sup>195</sup> of its content that “are edited to comply with the Supreme Court’s guidelines.”<sup>196</sup> They are “so named because many are available on late-night pay channels.”<sup>197</sup> Those versions, in fact, often seem tailored to the content of the least tolerant communities, as most distributors of adult movies “are generally fearful of sending anything but cable versions to Utah.”<sup>198</sup> As a general rule, “images of penetration and similar acts are edited out”<sup>199</sup> of cable versions.<sup>200</sup>

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191. Enough is Enough, Statistics Archives: Internet Pornography, <http://www.enough.org/inside.php?tag=stat%20archives#1> (last visited Mar. 8, 2010).

192. Enough is Enough, Statistics: Internet Pornography, <http://www.enough.org/inside.php?id=2UXKJWRY8> (last visited Mar. 8, 2010) (noting there are 372 such searches each second).

193. Benjamin Edelman, *Red Light States: Who Buys Online Adult Entertainment*, 23 J. ECON. PERSPS. 209, 210 (2009).

194. See *supra* subsection II.D.2 and accompanying text.

195. Robert W. Peters, Essay, *Information Superhighway or Technological Sewer: What Will It Be?*, 47 FED. COMM. L.J. 333, 337 (1994) (noting the existence of “so-called ‘cable versions’ of hardcore material”).

196. Phil Miller, *Sex, Rights & Videotape in Utah County*, SALT LAKE TRIB., Dec. 8, 1996, at B1.

197. *Id.*

198. *Id.*

199. Duane D. Stanford, *Adult Videos on Sale at a Convenience Store Near You; But is it Legal?*, ATLANTA J.-CONST., May 28, 2000, at Gwinnett Extra 1JJ.

200. See Tom Zucco, *Sex, Laws and Videotapes*, ST. PETERSBURG TIMES (Fla.), June 18, 1990, at 1D (“Sex may sell, but not all video stores sell sex. Some chains, such as Rent-A-Movie, offer cable versions of X-rated videos, or what they term Hard R-rated videos” which “are not as explicit as X-rated videos”).

An “Internet Only” version would not, however, be designed to satisfy the standard of the *least* sexually tolerant local community but would, instead, be geared toward some mythical national community. Estimating what this national standard is, along with the specific sexual acts that are permissible and impermissible under it, seems like an incredibly daunting and difficult task.

#### IV. CONCLUSION: A POTENTIAL SPLIT OF AUTHORITY BETWEEN THE NINTH AND ELEVENTH CIRCUITS WILL OPEN THE DOOR FOR HIGH COURT RESOLUTION

Despite all of the questions raised in Part III, the good news for freedom of expression advocates and for the adult movie industry, in particular, is that *Kilbride*'s implementation of a national standard will be more permissive of sexually explicit expression than that of the least tolerant local community in the United States. This is the natural and logical result if a national community standard represents the average of both tolerant and intolerant local communities.

But will the Ninth Circuit's holding gain traction in other federal appellate circuits or, for matter, with the United States Supreme Court if it ultimately hears *Kilbride*? Professor Bret Boyce points out that in *Ashcroft v. ACLU*<sup>201</sup>—the case that was relied on heavily by the Ninth Circuit to reach its finding in *Kilbride*<sup>202</sup>—“the various opinions suggest that a majority of Justices on the Court view the community standards test, at least in the context of the Internet, as highly problematic.”<sup>203</sup> The *Ashcroft* decision, however, was handed down in 2002, and since that time three Justices—William Rehnquist, Sandra Day O'Connor and David Souter—have left the Court. Justice O'Connor's departure is particularly problematic since she wrote a concurrence in *Ashcroft* expressing her position “on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet.”<sup>204</sup> If still on the Court, Justice O'Connor likely would grant a petition of certiorari in *Kilbride*, given her statement in *Ashcroft* that “I would prefer that the Court resolve the issue before it by *explicitly adopting a national standard for defining obscenity on the Internet.*”<sup>205</sup>

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201. 535 U.S. 564 (2002).

202. See *supra* notes 29–36 and accompanying text (describing the Ninth Circuit's reliance on *Ashcroft*).

203. Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 322 (2008).

204. *Ashcroft*, 535 U.S. at 586 (O'Connor, J., concurring).

205. *Id.* at 589 (emphasis added).

The Ninth Circuit often is considered to be liberal leaning and perceived (some argue wrongly)<sup>206</sup> to be prone to reversal by the nation's High Court.<sup>207</sup> Conversely, attorney David Cox asserted in a pre-*Kilbride* article that, even in Internet cases, “[m]ost conservative courts, [sic] will continue to instruct that the standard for obscenity is a local community standard.”<sup>208</sup> While it is true that Judge Betty Fletcher, the author of the Ninth Circuit’s *Kilbride* opinion, was an appointee of Democratic President Jimmy Carter, it is perhaps more remarkable that she—a person over the age of 85 years old—would be the one to cut new legal ground in a high-tech digital world.<sup>209</sup> On the other hand, Judge Fletcher “is known for being skeptical of authority”<sup>210</sup> and is considered by some court observers to be “a classic ‘activist’ judge.”<sup>211</sup> She was joined in the opinion by another Carter appointee, Judge Procter Hug, Jr.,<sup>212</sup> and by Judge Michael Daly Hawkins, an appointee of Democratic President Clinton.<sup>213</sup> Whether the fact that all three judges on the panel were appointed by Democrats is relevant in their decision-making in *Kilbride* is purely speculative.<sup>214</sup> It was, after all, Justice O’Connor, an appointee of Republican President Ronald Reagan, who called in *Ashcroft* for the adoption of a national community standard.<sup>215</sup>

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206. See Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 20 (2003) (asserting that “the media constantly generalizes and portrays the Ninth Circuit as a liberal court out of the mainstream. By any measure, this is simply wrong. Statistics show that the Ninth Circuit is not reversed more than the national average for Supreme Court reversal of lower courts”).
207. See Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 365 (2006) (suggesting that “[h]aving been branded with a reputation for reversals and an image for runaway liberalism, the Ninth Circuit’s decisions may now be subject to even closer scrutiny,” and asserting that “[t]he Ninth Circuit may in fact have been the most liberal circuit during the past twenty-five years”).
208. David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 J. TECH. L. & POL’Y 5, ¶ 55 (1999).
209. See Betty Binns Fletcher, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Nov. 26, 2009) (providing brief biographical information about Fletcher and listing 1923 as the year of her birth).
210. Nina Shapiro, *The Judge With No Limits*, SEATTLE WKLY., Aug. 19, 2009, available at <http://www.seattleweekly.com/content/printVersion/744151>.
211. *Id.*
212. Procter Ralph Hug, Jr., Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Nov. 26, 2009) (providing brief biographical information about Hug).
213. Michael Daly Hawkins, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Nov. 26, 2009) (providing brief biographical information about Hawkins).
214. Cf. Susan B. Haire, *Judicial Selection and Decisionmaking in the Ninth Circuit*, 48 ARIZ. L. REV. 267 (2006) (providing a quantitative examination of whether judges on the Ninth Circuit make decisions that are consistent with the policy views of the appointing administration).
215. See *supra* notes 33–35 and accompanying text.

Thus, the *Kilbride* decision may be heard by the Supreme Court if for no other reason than “[t]he Supreme Court watches the 9th Circuit like a hawk. In the term that ended in June [2009], the [Chief Justice John] Roberts Court reviewed 16 rulings from the 9th Circuit, compared to a handful or fewer from most Circuits.”<sup>216</sup>

Perhaps enhancing the odds of the case coming before the Supreme Court would be a possible split of authority between the Ninth Circuit in *Kilbride* and the Eleventh Circuit. This just might happen when the Eleventh Circuit hands down its decision in *United States v. Little*.<sup>217</sup> Oral argument before a three-judge panel of the Eleventh Circuit took place in *Little* in October 2009, with Paul Little’s lead attorney, H. Louis Sirkin, citing the Ninth Circuit’s decision in *Kilbride* when arguing “that the traditional legal framework for deciding what material is legally obscene tends to sweep in protected speech when applied to Web materials and movies purchased over the Internet.”<sup>218</sup> In response to this argument, Judge Charles R. Wilson reportedly:

sounded skeptical, *questioning whether a 9th Circuit decision immediately becomes the law of the land*. Sirkin responded that Supreme Court justices’ opinions supported an expansion of what constitutes a community for determining what’s obscene, but he allowed that those indications came in cases where the nation’s high court was splintered.<sup>219</sup>

In their brief to the Eleventh Circuit in *United States v. Little*, the attorneys for Paul Little argue that “[t]he federal obscenity statutes are . . . invalid as applied to the Internet because they effectively limit speech suitable for adults throughout the country based upon the community standards of the most puritanical region.”<sup>220</sup> They emphasize that while the use of community standards “makes sense when a speaker directly and purposefully communicates his message to or in a particular community, the term becomes unworkable when applied to Internet communications that can neither be directed at, nor limited to, a specific region.”<sup>221</sup>

Little’s attorneys argue that rather than applying the community standards of the Middle District of Florida, U.S. District Judge Susan Bucklew:

could have remedied the problem to some degree by instructing the jury to *apply an Internet community standard*. The Supreme Court has never man-

216. Shapiro, *supra* note 210.

217. See *supra* subsection I.C.2 and accompanying text (discussing the *Little* case).

218. Alyson M. Palmer, *Obscenity Case Tests Community Standards on the Internet*, FULTON COUNTY DAILY REP. (Ga.), Oct. 30, 2009, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202435052384>.

219. *Id.* (emphasis added).

220. Brief of Defendants-Appellants Paul F. Little and Max World Entertainment, Inc. at 26, *United States v. Little*, No. 08-15964-D (11th Cir. Jan. 20, 2009), 2009 WL 506653 [hereinafter Brief of Defendants-Appellants].

221. *Id.* at 27.

dated a particular geographic locality to which the standards are limited. To be sure, the Court has never required that the community in an obscenity prosecution constitute a defined geographic region, but has merely permitted it to be.<sup>222</sup>

As with the Ninth Circuit in *Kilbride*,<sup>223</sup> Little's attorneys rely heavily on the myriad opinions by the Supreme Court in *Ashcroft v. ACLU*<sup>224</sup> to support the proposition that a national community is appropriate for Internet-based cases. Counsel for Little point out that in *Ashcroft* "a majority of the justices . . . advanced a national community standard in Internet prosecutions."<sup>225</sup> Ultimately, Little's attorneys assert that because:

the works at issue here were accessed or ordered from the Internet, the community standard in this prosecution should have included cyberspace. The trial court's failure to instruct the jury to consider the Internet community in determining the obscenity *vel non* of the charged video clips therefore violates the First Amendment.<sup>226</sup>

If the Eleventh Circuit rejects this argument in *Little*—recall the apparent skepticism voiced by at least one judge during oral argument<sup>227</sup>—then a split of authority opens up between it and the Ninth Circuit in *Kilbride*, thus providing the Supreme Court with an ideal opportunity to take up the issue of whether a national community standard should be applied in Internet-based obscenity prosecutions.

222. *Id.* (first emphasis added) (subsequent emphasis omitted).

223. *See supra* notes 29–36 and accompanying text (describing the Ninth Circuit's reliance on opinions in *Ashcroft v. ACLU*, 535 U.S. 564 (2002)).

224. *Ashcroft*, 535 U.S. 564.

225. Brief of Defendants-Appellants, *supra* note 220, at 28. In particular, in his brief, Little pointed to the following statements by various justices in *Ashcroft* in support of a national community standard:

Justice O'Connor's statement that "adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity," *Ashcroft*, 535 U.S. at 587 (O'Connor, J., concurring); Justice Breyer's comment, "I believe that Congress intended to write the statutory word 'community' to refer to the Nation's adult community taken as a whole, not to geographically separate local areas. . . . To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation," *id.* at 589–90 (Breyer, J., concurring); Justice Kennedy's assertion that "[t]he national variation in community standards constitutes a particular burden on Internet speech," *id.* at 597 (Kennedy, J., concurring); and Justice Stevens's statement, "In the context of the Internet, however, community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web." *Id.* at 603 (Stevens, J., dissenting).

Brief of Defendants-Appellants, *supra* note 220, at 28–29.

226. *Id.* at 30.

227. *See supra* note 219 and accompanying text.

Attorney David Johnson, who specializes in digital media law,<sup>228</sup> believes the Ninth Circuit's *Kilbride* ruling will not stand up, writing that it will "certainly be appealed, and stands a better chance than many others of being taken by the Supreme Court. However, the Supreme Court is unlikely to take a sanguine view of the 9th Circuit's adoption of the 'national community standard' for Internet obscenity cases."<sup>229</sup> Johnson argues:

Strangling diversity of tastes and attitudes is exactly what the national standard for obscenity announced by the 9th Circuit would certainly do. The median obscenity standard it would call for juries to create would wind up restricting speech deemed acceptable by many communities, while forcing other communities to accept speech that they deem highly objectionable. Both are violations of the First Amendment guarantees on the protection of speech.<sup>230</sup>

George Washington University Professor Orin Kerr found unpersuasive the Ninth Circuit's approach of counting Justices in *Ashcroft*,<sup>231</sup> writing on *The Volokh Conspiracy* blog that "the Ninth Circuit is counting the number of Justices who had 'concerns.' Concerns are not positions. You can't count the number of Justices who had a particular thought and then say that the thought is somehow binding on the lower courts."<sup>232</sup> Kerr suggests that the nation's High Court grant a writ of a certiorari in the case, writing that the decision's "likely effect is to put a case on the Supreme Court's docket in the next year or two on whether Internet obscenity requires a different standard than traditional obscenity. That should be a fascinating case."<sup>233</sup>

Santa Clara University School of Law Professor Eric Goldman, on the other hand, calls the Ninth Circuit's conclusion in *Kilbride* "the only logical outcome for a communication medium without clear geographic authentication."<sup>234</sup> He suggests that this is the case because

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228. David D. Johnson, Main Bio, Jeffer Mangels Butler & Marmaro LLP, <http://jmbm.com/Lawyers/DavidJohnson> (last visited Nov. 23, 2009) (providing that Johnson "specializes in commercial and digital media law and complex litigation").

229. David Johnson's Digital Media Lawyer Blog, *U.S. v. Kilbride: 9th Circuit's Holding that Internet Obscenity Laws Should Be Governed by a National Standard Rests on Shaky Grounds*, [http://www.digitalmedialawyerblog.com/2009/11/us\\_v\\_kilbride\\_9th\\_circuits\\_hol.html](http://www.digitalmedialawyerblog.com/2009/11/us_v_kilbride_9th_circuits_hol.html) (Nov. 5, 2009).

230. *Id.*

231. *See supra* notes 29–36 and accompanying text.

232. Posting of Orin Kerr to Volokh Conspiracy, *Ninth Circuit Adopts National Standard for Internet Obscenity*, <http://volokh.com/2009/10/29/ninth-circuit-adopts-national-standard-for-internet-obscenity> (Oct. 29, 2009, 11:38 PM).

233. *Id.*

234. Posting by Eric Goldman to Technology and Marketing Law Blog, *Internet Obscenity Conviction Requires Assessment of National Community Standards—US v. Kilbride*, [http://blog.ericgoldman.org/archives/2009/10/internet\\_obsce.htm](http://blog.ericgoldman.org/archives/2009/10/internet_obsce.htm) (Oct. 30, 2009, 03:00 PM).

“cost and limitations of geographic authentication technology means that many Internet content publishers can’t steer their content into or away from a particular geography”<sup>235</sup> and because “this is especially true for publishing content by email because I know of no effective way to accurately authenticate the geography of most email recipients.”<sup>236</sup>

Such division among legal scholars about the importance and long-term impact of the Ninth Circuit’s ruling in *Kilbride* would seem to suggest the need for the Court to hear *Kilbride*. Indeed, *Kilbride* provides the Supreme Court with a prime opportunity to revisit the *Miller* test generally. Until that time, however, a couple of points seem clear. First, a national community standard for obscenity seems no easier to fathom than a local community standard and, in fact, may be more difficult to determine as jurors in one municipality must speculate about what people all over the country, from Alaska to Florida and everywhere in between, tolerate sexually. Second, myriad new questions, including those posed earlier,<sup>237</sup> are raised by *Kilbride* and will be sorted out in the coming years by courts across the country, some of which may choose to ignore *Kilbride* as little more than an outlier decision by the supposedly liberal leaning Ninth Circuit, and some of which may adopt its decision.

Finally, to bring this Article full circle to the question posed in its title, what seems apparent now is that while the federal government is free to continue forum shopping in Internet-based obscenity cases, it probably will not shop for any venue within the confines of the Ninth Circuit where it would be bound by a national community standard that is more tolerant than that of the least tolerant local community. In other words, it might still be business as usual for federal prosecutions: purchase the material while online in places like Pittsburgh (*United States v. Extreme Associates*),<sup>238</sup> Utah (*United State v. Harb*)<sup>239</sup> or Tampa (*United States v. Little*),<sup>240</sup> drag the defendants off of their home turf, and stay far away from the adult industry’s home-base of California.<sup>241</sup> It seems unlikely, given what appear to be far more pressing problems—like homeland security, the war on terrorism and a mortgage crisis—that the federal government would have the moxie to mount a modern-day Project PostPorn on the Internet targeting adult content. Regardless, it is now up to the Supreme

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235. *Id.*

236. *Id.*

237. *See supra* Part III.

238. *See supra* subsection II.C.1.

239. *See supra* subsection II.C.4.

240. *See supra* subsection II.C.2.

241. *See supra* note 109 and accompanying text (noting how southern California’s San Fernando Valley is known as “Porn Valley” due to the concentration of adult movie companies there).

Court to revisit the *Miller* test and resolve, once and for all, the precise nature of community standards on the Internet.