The Regional Compromise: A Solution to the Debate between Local Community and National Standards for Evaluating Internet Obscenity Cases

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The Regional Compromise: A Solution to the Debate between Local Community and National Standards for Evaluating Internet Obscenity Cases

I. INTRODUCTION

It is clear that the Internet is not only a unique and sophisticated medium of expression, but also a troubling arena for the application of traditional legal theories and antiquated judicial precedent. Even the courts have recognized that "the Internet may fairly be regarded as a never-ending worldwide conversation.... As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intru-
sion.” Various commentators have also concurred with the sentiments of the Court: “Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.”

The importance of Internet speech requires clear, workable and effective standards for restricting obscenity.

To determine whether an image or other work is obscene, the factfinder must use a geographical reference group. The longstanding test for obscenity was espoused in Miller v. California and “contemporary community standards” governed obscenity. After Miller was handed down, courts, commentators and the public began to wonder: what is a “community”?

Although the majority of the Miller test remained static, the debate raged over the proper community reference, especially in Internet speech cases. The Ninth Circuit, in United States v. Kilbride, determined that a national standard should be used for Internet obscenity, stretching the “community” standard of Miller to a breaking point. Soon after Kilbride, the Eleventh Circuit, in United States v. Little, reaffirmed that a local community standard should remain the prevailing geographical reference. The circuits took opposite views, with thousands of square miles separating their respective standards.

Even with the divergence, the two standards share an alarming trait: both the national and local standards are inherently flawed when applied to the World Wide Web. For the local community standard, the inability of a publisher to restrict access to a certain geographical area may subject Internet sites to the most restrictive community possible. Also, the local standard lacks precision in its geographical bounds, leading to uncertainty in application. Finally, the local standard allows prosecutors to forum shop for the most restrictive venues.

2. Reno, 929 F. Supp at 883. The idea that the success of the Internet is mainly attributed to the unfettered chaos of the Internet itself was first introduced by one of the plaintiffs’ experts in Reno. Id. The court went beyond the testimony of the expert and coined one of the most recognizable quotes from the opinion, reproduced above in the body. Id.
4. Id. at 33 (emphasis added).
5. 584 F.3d 1240 (9th Cir. 2009).
6. Id. at 1254.
8. Id. at *2.
9. Kilbride, 584 F.3d at 1251.
10. Id. at 1247.
When considering the national standard, there are equally apparent and fatal flaws in the breadth of the geographical reference point. Primarily, the national standard fails to capture the local flare and connection that jurors use to effectively judge obscenity. Equally evident, a national standard is so expansive, that uncertainty inevitably ensues as jurors attempt to consider the views of the nation as a whole.

An ideal solution to the circuit split would be a mitigation of, and compromise between, the geographical spans of the respective standards. A regional standard, defined by the federal circuit in which the case is being tried, or in which the state court is located, should prevail as the defining standard for Internet obscenity.

II. LEGAL BACKGROUND: FROM HICKLIN TO LITTLE

Courts reviewing obscenity cases have attempted to keep pace with changing notions of morality, developing technologies and modes of expression, as well as varying views of members of the bench. The cases described below, standing solely for a sample of the immense case law behind obscenity and the debate between community and national standards, exemplify that the standards have remained vague and imperfect, but are accepted as the best options for courts.

A. Regina v. Hicklin (1867-1868)

One of the earliest reported and influential obscenity cases originated in front of the Queen's Bench, but was also transplanted across the pond into American courts. In Hicklin, an individual was indicted under the Lord Campbell's Act, which allowed the seizure and destruction of obscene works. Chief Justice Cockburn explained that the legality of obscene material depended on surrounding circumstances. Although medical textbooks, for instance, could be considered obscene and should be kept away from children, their content should still not

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11. United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913). Judge Learned Hand noted that the Hicklin test was “accepted by the lower federal courts until it would be no longer proper for [him] to disregard it” but also cautioned that the rule did not comport with contemporary moral standards. Kennerley, 209 F. at 120-21.
13. Id. at 367.
allow for indictment. Justice Cockburn espoused the standard for obscenity as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The test could be judged from the standpoint of young children and older individuals, the "most susceptible persons." Hicklin represented the narrowest locality used for obscenity evaluation.

B. Roth v. United States (1957)

The Supreme Court, in Roth v. United States, dismissed the historically leading standard in Hicklin as an unconstitutional restriction on the constitutional freedoms of speech and of the press guaranteed by the First Amendment. Roth owned a business involved in the publication of books, magazines and other items. He utilized circulars and other mailed advertisements to solicit sales, but was indicted under the federal obscenity statute for the mailing of obscene materials. The Court was called upon to determine, for the first time that the issue was directly in front of the Court, whether obscenity was within the protected areas of speech and the press under the First Amendment.

The Court concluded that obscenity was outside of the constitutional protections of free speech and the press while also solidifying the standard for determining obscenity. Courts must consider "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court agreed with

14. Id.
15. Id. at 371.
16. Id.
17. Roth v. United States, 354 U.S. 476, 489 (1957). Also, obscenity was not determined by the entirety of the work, but the materials could be dismissed as obscene due to isolated portions. Hicklin, L.R. 3 Q.B. at 371.
18. Roth, 354 U.S. at 488-89. "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." Id. at 489.
19. Id. at 480.
20. Id. The federal obscenity statute made it illegal to mail, among other items, "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." 18 U.S.C. § 1461 (2010).
21. Roth, 354 U.S. at 481.
22. Id. at 485.
23. Id. at 490.
24. Id. at 489.
the lower court's reasoning that the standard was not judged by a specific segment of the community, nor by the young, old, highly prudish, uneducated or supremely educated. Community standards, according to the court, are determined by the effect on the "average person in the community." Roth broadened the standard locality to judge obscenity and moved away from the most susceptible citizens, but still used a vague "community" standard with the average person as the reference public.

C. Miller v. California (1973)

The Court reexamined the legal standards governing the "intractable obscenity problem" in Miller v. California. The Appellant was convicted under California obscenity law for causing five unsolicited "adult" advertising brochures to be delivered via the mail to a restaurant. Acknowledging the inherent dangers in any regulation of expression, the Court explained the locality that should be used as a reference. Justice Burger, writing for the majority, explained that the nation was too large and diverse to use a single standard across all fifty states, even if a consensus formulation could be found.

Overall, the majority concluded that use of a national standard "would be an exercise in futility." The Court observed that requiring residents of the Bible Belt or other conservative areas to accept the same standard as individuals from Las Vegas or New York would be unrealistic and constitutionally infirm. Mandatory uniformity would be absolute, as the Court noted, and could "strangle" diverse attitudes across the nation. The Court stated that a main goal of the obscenity standard, which is aptly accom-

25. Id. at 490.
27. 413 U.S. 15, 16 (1973) (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).
28. Id. at 16-18.
29. Id. at 23.
30. Id. at 30.
31. Id. Justice Burger continued: it would be unrealistic to require that the answer [in an obscenity case to] be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law.
32. Miller, 413 U.S. at 30.
33. Id. at 32.
34. Id. at 33.
plished by the "average person, applying contemporary community standards" formulation, is to avoid judging works on the beliefs of a particularly sensitive, or completely insensitive, individual.\textsuperscript{35} Miller definitively settled that obscenity would be judged on a local level.

D. \textit{Ashcroft v. American Civil Liberties Union (2002)}

In \textit{Ashcroft v. American Civil Liberties Union},\textsuperscript{36} some Justices began to express their displeasure with the local community standards governing general obscenity law. Specifically, the Court reviewed the Child Online Protection Act's use of the community standard to determine if the material was harmful to minors on the Internet.\textsuperscript{37} The Court noted that the Internet was a unique medium, which allowed for access to useful and remote information, but was also filled with sexually explicit and offensive material.\textsuperscript{38}

There were widespread concerns, as the Court highlighted, that website operators could not effectively limit access to their content on the basis of the geographic location of the site visitors.\textsuperscript{39} Such unfettered access could subject websites to review and legal scrutiny based on the most conservative regions around the nation.\textsuperscript{40} The Court was forced to decide whether the technological breadth and limitations of the Internet should affect the government's reliance on the community standard formulation.\textsuperscript{41}

Justice Thomas, writing for the Court, concluded that the "unique characteristics" of the Internet did not mandate abrogating the community standard.\textsuperscript{42} The Court placed the responsibility on the publisher to follow the community standards of the areas in which his information is available, even if he distributes the work to every community across the country.\textsuperscript{43} If the publisher

\begin{align*}
\text{35.} & \quad \text{\textit{Id.} In the end, the Court definitively held that "obscenity is to be determined by applying 'contemporary community standards' . . . not 'national standards.'" \textit{Id.} at 37.} \\
\text{36.} & \quad 535 U.S. 564 (2002). \\
\text{37.} & \quad \textit{Ashcroft}, 535 U.S. at 566. \\
\text{38.} & \quad \textit{Id.} Justice Thomas, writing for the Court, explained that "individuals can access material about topics ranging from aardvarks to Zoroastrianism." \textit{Id.} Furthermore, anyone "can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis." \textit{Id.} \\
\text{39.} & \quad \textit{Id.} at 573. \\
\text{40.} & \quad \textit{Id.} \\
\text{41.} & \quad \textit{Id.} at 575. \\
\text{42.} & \quad \textit{Ashcroft}, 535 U.S. at 583. \\
\text{43.} & \quad \textit{Id.}
\end{align*}
desires to be judged only upon the standards of certain communities, then he needs to take the “simple step” of using a medium that allows targeting localities.\textsuperscript{44} The Court in \textit{Ashcroft}, judging a specialized offshoot of obscenity laws dealing with children, carried the local community standard into a new technological domain. Regardless of the span and uniqueness of the medium,\textsuperscript{45} the Court showed a willingness to cling to the traditional standard.\textsuperscript{46}

Multiple Justices, in separate opinions, expressed the antiquity and non-applicability of the local community standard formulation to Internet speech. Justice O'Connor, in a concurring opinion, determined that shifting the burden to the speaker to control the recipients, which was nearly impossible over the Internet, would “suppress an inordinate amount of expression.”\textsuperscript{47} Precedent, as described by Justice O'Connor, did not bar the Court's use of a national standard.\textsuperscript{48} Furthermore, the concurrence believed that a national standard was “not only . . . permissible, but also reasonable.”\textsuperscript{49} Justice O'Connor believed that the Internet allowed the exchange of nationwide dialogue, which would inform jurors of the views of adults across the nation, aiding them in applying a national standard.\textsuperscript{50}

Justice Breyer, in the second concurring opinion, also supported construing the statutory word “community” as covering the entire adult community of the nation as a whole.\textsuperscript{51} The dangers of a more local standard, Justice Breyer noted, would afford the most reserved and moderate sects in America a “heckler’s Internet veto” over the remainder of the country.\textsuperscript{52}

\begin{itemize}
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} \textit{Id.} at 595 (Kennedy, J., concurring). Justice Kennedy, joined by Justices Souter and Ginsburg, cautioned that the Court must be particularly attentive to the unique attributes of a new medium of expression when Congress attempts to abridge the freedom of expression. \textit{Id.}
  \item \textsuperscript{46} \textit{Id.} at 583-84 (majority opinion). The Court noted that the result, even though it occurred under a “material harmful to minors” statute, would yield substantially the same results under the normal federal obscenity statutes. \textit{Id.}
  \item \textsuperscript{47} \textit{Ashcroft}, 535 U.S. at 587 (O'Connor, J., concurring). Justice O'Connor wrote “separately to express [her] views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet.” \textit{Id.} at 586.
  \item \textsuperscript{48} \textit{Id.} at 587-88.
  \item \textsuperscript{49} \textit{Id.} at 589.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.} (Breyer, J., concurring).
  \item \textsuperscript{52} \textit{Ashcroft}, 535 U.S. at 590. Justice Breyer also found evidence in the legislative history of the Child Online Protection Act which supported a uniform standard that was national and adult. \textit{Id.}
\end{itemize}
Justice Stevens, in his dissenting opinion, stated that "community standards become a sword, rather than a shield" because a community who desires to silence a particular speaker not only eliminates the speech from their own area, but rids the entire Internet of the information in question. The dissent noted that the uniqueness of the Internet, coupled with the publisher's lack of geographical control over access to the information, mandated a new standard. The national standard for Internet obscenity, as expressly advocated by Justices O'Connor, Breyer and Stevens, was on its way to the forefront of obscenity jurisprudence for the Internet.


The modern day debate over the geographical standard for judging Internet obscenity arose notably in the Ninth Circuit in United States v. Kilbride. In Kilbride, the defendants were indicted for their business of sending unsolicited bulk advertising e-mails, or "spam," to various addresses on behalf of adult-oriented websites. Circuit Judge Fletcher, writing for the court, noted that within the Miller test, no precise community is defined and jurors may draw on their personal knowledge of the "contemporary community" from which they originate. Evidence from outside of the immediate jurisdiction, the court highlighted, could help jurors refine their own sense of what community standards are, but the community standard used must ultimately be personal to the juror.

The Ninth Circuit relied on the growing dissatisfaction with the local standard and concluded that a national community standard should be used to judge Internet obscenity. Judge Fletcher stated that the lack of geographical control over the dissemination of messages could, as the Supreme Court wrote previously, create
constitutional concerns when a local standard was employed.\textsuperscript{61} Analyzing the Justices' divergent views in \textit{Ashcroft}, the Ninth Circuit concluded that a national standard had enough support from the highest arbiter to allow for application in Internet obscenity cases.\textsuperscript{62} The court in \textit{Kilbride} was able to bring a much needed change in an extremely unsettled area of the law.\textsuperscript{63} Courts, starting with \textit{Kilbride}, began to recognize that the Internet was an entirely new frontier for legal rules and obscenity determinations.

\textbf{F. United States v. Little (2010)}

The inter-circuit battle lines were quickly drawn the year following \textit{Kilbride} when the Eleventh Circuit decided \textit{United States v. Little}.\textsuperscript{64} In a per curiam opinion, the Eleventh Circuit concluded that the district court had not erred in employing a local community standard to judge Internet obscenity.\textsuperscript{65} The court recognized the differences of the Internet as a medium, but determined that the portions of the \textit{Ashcroft} opinion which advocated a more expansive geographical standard were simply dicta and not controlling.\textsuperscript{66} Overall, the panel followed the \textit{Miller} test's community standard and decided that the district court did not err in instructing the jury that the material should be judged by how "the average person of the community as a whole – the Middle District of Florida – would view the material."\textsuperscript{67} \textit{Little} split the circuits and highlighted the development of divergent views with respect to contemporary Internet obscenity standards.

\begin{itemize}
\item \textsuperscript{61} \textit{Kilbride}, 584 F.3d at 1251.
\item \textsuperscript{62} \textit{Id.} at 1253-54. Judge Fletcher concluded that because five justices in \textit{Ashcroft} agreed that a local standard to judge Internet obscenity generated serious constitutional concerns, but no such opposition was found for a national standard, then the national standard could control. \textit{Id.} at 1254.
\item \textsuperscript{63} \textit{See id.} at 1255. "Prior to our holding here, the relevant law in this area was highly unsettled with the extremely fractured opinion in \textit{Ashcroft} providing the best guidance." \textit{Id.}
\item \textsuperscript{64} \textit{Little}, 2010 WL 357933, at *1. Defendants in \textit{Little} were convicted under Internet obscenity statutes for producing, selling and marketing sexually explicit materials on their websites. \textit{Id.} at *1.
\item \textsuperscript{65} \textit{Id.} at *2.
\item \textsuperscript{66} \textit{Id.} at *3.
\item \textsuperscript{67} \textit{Id.} The court of appeals believed that the \textit{Miller} contemporary community reference locality should remain as the standard to judge all obscenity, regardless of the medium upon which the information was conveyed. \textit{Id.}
\end{itemize}
III. ANALYSIS: THE REGIONAL COMPROMISE—MITIGATING THE NATIONAL V. LOCAL DEBATE

A. An Overview of the Proposed Regional Standard to Judge Internet Obscenity Cases

Considering the inherent and overbearing flaws in the national and local community standards for Internet obscenity, as well as the static nature of obscenity standards in general, a new solution is required. Following Regina v. Hicklin in the late 1860's, few variations of the standards for obscenity have developed, aside from the polarization of views representing the local and national reference points. Obscenity law continues to struggle to keep up with changing technologies and only employs a limited arsenal of standards. Also, the practical difficulties of applying existing standards and the obvious legal downfalls of the national and local reference localities, with the main issues highlighted below, enhance the necessity for a new standard to evaluate obscene materials over the Internet.

The regional standard will help revolutionize obscenity law over the Internet and may also become a blueprint for obscenity over new mediums as technology outdates current modes of expression. The regional standard would show that changes in legal precedent, especially when law attempts to keep pace with technology, may be beneficial and not as daunting or dangerous as often thought.

The regional standard is defined by the federal circuit governing the locality in which the case is being tried. If the case originates in federal court, then the circuit to which an appeal would be taken defines the bounds of the regional standard. Otherwise, if the case begins in state court, the federal circuit in which the state is located should determine the boundaries for the region. The borders of the federal circuits stand as convenient, preexisting, well-known and workable bounds for the regional reference locality. The regional standard will mitigate the current issues with the regional and national standards and become an efficient, as well as effective, means to evaluate obscenity over the Internet.

B. Expanding the Local Community Standard

The local community standard, due mainly to its lack of geographical coverage, suffers from several obvious and fatal flaws. Such a restrictive geographical reference point not only subjects Internet sites to the moral judgments of the most restrictive com-
munities possible, but also is imprecise and allows prosecutors to forum shop. These three primary problems with the local community standard are directly mitigated and improved by the regional standard.

1. **The Most Restrictive Community Scenario**

With the local community standard, the publisher is left helpless when information is posted on the Internet. The structure of the Internet makes it nearly impossible to restrict access to a certain geographical area, which may subject Internet sites to the most restrictive communities around the country.\(^6^8\) It is possible, if not likely, that a posting originating in more liberal communities such as Las Vegas, Los Angeles and New York City, will be subjected to the more conservative views of areas such as the Bible Belt and portions of the Midwest United States. Such a “heckler’s Internet veto,” granted to the most reserved areas across the nation, is as dangerous as it is alarming.\(^6^9\)

A regional standard, when compared to the local community standard and its propensity to allow the most restrictive community in America to control information on the Internet, would help mitigate the power of such conservative minorities. It is a commonly known rule of statistical analysis, recognized by various courts, that small sample sizes distort results and are often less accurate.\(^7^0\) By increasing the geographical size of the reference locality used in Internet obscenity cases, the factfinder will inevitably be forced to consider an increased disparity in views, morals, backgrounds and experiences. A larger sample area will lessen the effects of an outlier region. Jurors are no longer instructed to consider only what their immediate neighbors may believe, but will have to base their decision on what the person in neighboring states and in other local cultures would generally think. The average person in a small local community standard may be unusu-

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\(^{68}\) *Kilbride*, 584 F.3d at 1251.

\(^{69}\) *Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring).

\(^{70}\) See, e.g., *Dendy v. Wash. Hosp. Ctr.*, 431 F. Supp. 873, 876 (D.D.C. 1977). With regard to disparate impact cases, the district court noted that:

> [t]o be persuasive, statistical evidence must rest on data large enough to mirror the reality of the employment situation. If, on the one hand, the courts were to ignore broadly based statistical data, that would be manifestly unfair to Title VII complainants. But if, on the other hand, the courts were to rely heavily on statistics drawn from narrow samples, that would inevitably upset legitimate employment practices for reasons of appearance rather than substance.

*Dendy*, 431 F. Supp. at 876.
ally conservative and narrow minded, but the average person from a larger regional standard will be more balanced and better adjusted to evaluate allegedly obscene material over the Internet.

By increasing the size of the geographical reference point, the most restrictive community scenario is effectively negated and a regional standard allows for a more accurate hypothetical average citizen to evaluate Internet obscenity cases.

2. Combating Uncertainty and Imprecision

The local standard also inherently lacks precision in its geographical bounds, leading to uncertainty in application by the fact-finder. Specifically, no “precise geographic area” is required when applying federal obscenity statutes to define the contemporary community. Jurors are permitted to consider the knowledge of the community in which they live, regardless of how large or small the juror considers their community to be.

It is conceivable that individual jurors will vary widely on what community to consider during their decision. One factfinder may use the consensus from their block-wide area, while another may consider the entire town or city. Other jurors may believe that their community encompasses one-half of the state, or possibly even three-quarters of the nation as a whole. By leaving the decision to the juror to define the localness of the community standard, the factfinder is creating an ad hoc standard during every case. The true community standard varies widely among jurors, leading to uncertain results in obscenity cases, as well as uncertainty in the minds of the factfinder.

A regional standard, clearly defined by the bounds of the federal court of appeals circuits, adds certainty and precision to the Internet obscenity cases. Although perfect precision and certainty is impossible, the new regional standard would be a significant step to a reliable and effective means for evaluation. The Internet already allows for widespread connectivity and hosts a broad forum for the exchange of ideas. The burden of requiring the factfinder to consider what the average person, shaped by the views of individuals a few states away, is not overly burdensome. With the

71. Kilbride, 584 F.3d at 1247.
73. Hamling, 418 U.S. at 104-05.
regional standard, every factfinder would have a uniform reference area, determined by distinct geographical boundaries.

3. **Avoiding Prosecutorial Forum Shopping for a More Favorable and Restrictive Locality**

The local standard allows prosecutors to forum shop, which could allow them to select the most restrictive community available, or otherwise, a forum inconvenient for the defendants. In federal criminal cases, such as prosecutions for obscenity, "the government must prosecute an offense in a district where the offense was committed." When dealing with Internet obscenity cases, the offense could be considered as committed at any location of the country, as long as Internet access is present. With such a vast area of liability, prosecutors have unfettered access to practically any forum and the danger of forum shopping is enhanced significantly. The differences between forums are often immense, especially when the most restrictive community scenario is considered.

Courts have noted that venue rights must be taken seriously to avoid "unfairness and hardship on the accused" as well as avoidance of the undesirable "forum-shopping by federal prosecutors." Forum shopping creates uncertainty, hardship and inequality for trials, and also undermines the search for justice in prosecutions. Venue is such an important concept, and forum shopping so dangerous, that "[q]uestions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy . . . ."

The regional standard would help lessen the sharpness of the forum shopping weapon that prosecutors may use under the local standard. By expanding the reference area to eliminate the polarities, mainly the most and least restrictive communities balancing each other out, the incentive to forum shop is drastically reduced. This argument dovetails closely with the search for certainty and

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75. See supra Section B(1) (regarding the problems with the most restrictive community scenario).
76. FED. R. CRIM. P. 18. Although convenience of the defendant is a consideration for venue, id., if a prosecutor is able to forum shop, the government may still be able to pick an inconvenient location without violating the rule because the defendant's interests are only one consideration. See id.
77. United States v. Miller, 111 F.3d 747, 749 (10th Cir. 1997) (citing United States v. Johnson, 323 U.S. 273, 276 (1944)).
78. Miller, 111 F.3d at 749 (quoting United States v. Johnson, 323 U.S. 273, 276 (1944)).
precision, as well as the avoidance of the most restrictive community detailed above. Without an "easy" forum to utilize, federal prosecutors will more readily choose forums that make more legal sense, such as the home state or circuit of the accused. Disparities among the regions will inevitably remain, but differences will be miniscule when compared to the gap between the most restrictive and most liberal localities around the nation.

Considering the well-supported dangers of prosecutorial forum shopping, the regional standard's elimination of the incentive and benefit to forum shop in Internet obscenity cases brings a much needed change to Internet obscenity jurisprudence. Guilty defendants under the regional standard will be incarcerated and fined because of culpability, not because of a favorable locality discovered by prosecutors.

C. Refining the National Standard

The national standard was primarily introduced to overcome concerns that publishers on the Internet lack geographical control over the dissemination of their messages, which could leave them open to liability in every conservative corner of the nation.\textsuperscript{79} Even though such an expansive standard addresses the concern, it also raises equally alarming problems. The standard eliminates the local color that aids jurors in evaluating allegedly obscene materials. Also, such a broad reference area leads to the same uncertainty as was inherent in the local standard.

1. Retaining Local Color

The national standard fails to capture the local flare of the regions involved, which jurors often use to effectively judge obscenity. The factfinder is not some mythological being able to abstractly judge cases under a standard that is unfamiliar. Every juror brings with him or her a wide variety of experiences, backgrounds, moral views and attitudes. Although obscenity, even under a regional standard, should be judged on what the average individual in the reference area would believe, the individual and local flare that jurors are familiar with allow them to figure out what exactly the average is. The larger the reference locality becomes, the less important the individual juror's experiences become. Factfinders will rely less on their own experiences when a national standard is
involved and will make an attempt to figure out what the nation believes as a whole. Under the national standard, no longer is the material judged on a standard averaged over neighboring states, but the average is spread across a vast and unfamiliar area.

The regional standard, although clearly more expansive than the local standard, mitigates the reluctance of jurors to apply their own backgrounds to the case. Jurors are more familiar with a concretely described region than they would be with an abstract and large national reference area. The regional standard again plays the mitigation game, pulling factfinders away from the temptation to only apply their own views under a local standard, while not intimidating them out of an effective adjudicating tool of using personal experiences by imposing an extremely large standard. The regional standard will retain the local flare of a region and the jurors individually, which is often vital in a factfinder's ability to effectively determine issues in dispute and to judge what the average person in the region would believe.

2. Shrinking the National Community

A national standard is so large and expansive, that uncertainty inevitably ensues due to the lack of relation between the factfinder and the reference area. The Supreme Court has observed that requiring residents in the most conservative areas of the nation to judge obscenity in the same manner as the most liberal areas would be unrealistic as well as constitutionally infirm.\textsuperscript{80} Mandatory uniformity would be absolute and unforgiving, as the Court noted, and could “strangle” diverse attitudes across the nation.\textsuperscript{81}

A national standard severs the intimate tie between juror and venue, which makes it difficult for the juror to determine exactly what sort of standard is required. When a juror is informed that he or she should employ a standard that encompasses only a few surrounding states, the juror’s mind is able to better comprehend the reference area in play. It is extremely difficult to require an individual in Missouri to take into account what the average person from a combination of Alaska, Hawai\textsuperscript{i}, Maine and Florida, as well as every other area of the nation, would believe. Application of the regional standard effectively shrinks the bounds that a factfinder's mind must roam to adjudicate the materials at issue.

\textsuperscript{80} Miller, 413 U.S. at 32.
\textsuperscript{81} Id. at 33.
When considering the breadth and difficulty in comprehending a nationalized standard, the regional standard would allow for a welcomed shrinking of the reference locality. It is difficult to even term a "community standard" as national in nature. Even though the national standard is an advance of sorts under traditional obscenity law, it is still substantially less equipped to evaluate obscenity over the sophisticated Internet medium when compared with the regional standard.

IV. Conclusion

Jurisprudence underlying Internet obscenity inherited many characteristics of general obscenity cases, but it has become glaringly obvious that a new standard is required. Obscenity law began with the standard espoused in Hicklin by the Queen's Bench, under which material could be judged by the most susceptible individuals, including women, children and the elderly. The Hicklin test was expressly abandoned by the Supreme Court in Roth, while Miller definitively determined that obscenity should be judged under "contemporary community standards" as determined on a local level.

In Ashcroft, three of the Justices believed that a national community standard was better suited for Internet obscenity. It was becoming obvious that when the Internet was involved, the standards for general obscenity may not be able to keep pace with such a revolutionary technology. With the issue still unsettled in the Supreme Court, the federal courts of appeals began making their own determinations regarding the standard for Internet obscenity. The Ninth Circuit, in Kilbride, sided with Justices O'Connor, Breyer and Stevens in Ashcroft and agreed that only a national standard should be used for adjudicating Internet obscenity cases. The circuits were decisively split, making the issue ripe for review by this nation's highest arbiter, when the Eleventh Circuit in Little determined that a local community standard should remain the prevailing geographical reference area, even for Internet obscenity.

82. Hicklin, L.R. 3 Q.B. at 371.
83. Roth, 354 U.S. at 488-89.
84. Id. at 488-89.
85. Miller, 413 U.S. at 33-34.
86. Ashcroft, 535 U.S. at 589 (Breyer, J., concurring).
87. Kilbride, 584 F.3d at 1250.
88. Little, 2010 WL 357933, at *3.
The debate over the appropriate standard for Internet obscenity is polarized, but distinct and glaring deficiencies are obvious for both the national and local community standards. The local community standard implicates the most restrictive community standard scenario, lacks precision as well as certainty, and allows for prosecutorial forum shopping. Equally evident and alarming, the national community formulation is often overbroad and unworkable due to its size, and also leads to uncertainty in application.

The regional standard, judged by the federal circuit in which the trial court is located, helps to mitigate the deficiencies of the current standards, while retaining their respective benefits. Although the regional standard suffers from the same lack of complete perfection, as does every legal standard available, it allows for a compromise between the current opposing community standards. Even with some circuits that contain outlying territories and states that may not be in the closest proximity, the regional standard still allows for a balance between the national and local standards and stands as a much needed advancement in Internet obscenity law. Reconciliation and middle-ground are commonplace in many areas of jurisprudence. The regional standard will revolutionize Internet obscenity and allow for a flexible standard to keep pace with an ever-changing technological medium, as well as new technologies to come.

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