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IMAGINE A COMMUNITY: OBSCENITY'S HISTORY AND MODERATING SPEECH ONLINE

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Far before online platforms tried to imagine communities, the United States Supreme Court had to decide on how much their standards mattered. In this essay, Kendra Albert walks through the history of obscenity's community standards doctrine, arguing that the Supreme Court's debates and disagreements about how to regulate speech in that context presage more modern conversations over content moderation online. They sketch the community standards doctrine's history, from the dozens of cases of the 1950s-70s to how networked technologies from 1989 to the early 2000s exacerbated earlier debates about which community's standards matter, and how they should be applied. Albert then explains how shadow regulation by payment providers has supplanted the legal rules entirely, replacing theoretical community norms with corporate multinational risk, a move that parallels broader shifts in online speech.

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INTRODUCTION

In 2009, Facebook faced a conundrum. Five years old, it had become wildly popular. Although there was certainly what we would now call content moderation, Facebook did not have an externally facing set of rules that informed users about what was and was not allowed on the site.[2] When it published those rules for the first time, drafted, in part, by American lawyer Judd Hoffman, the team picked an auspicious name for them. Facebook's rules that governed speech online, across contexts and countries, were called "community standards."[3]

As Kate Klonick has argued in her work on online content moderation, the early decisions of platforms like Facebook had distinctly American values.[4] But even the document's name is a specific reference to American legal doctrine. In *Roth v. United States*, the Supreme Court, breaking from the Anglo-American legal tradition, adopted a test for what was legally obscene that was meant to provide safeguards against "constitutional infirmity."[5] The Court held that whether speech was legally obscene would be determined by "whether, to the average person, applying contemporary *community standards*, the dominant theme of the material, taken as a whole, appeals to prurient interest."[6] That is, in 1957, the courts officially found themselves deciding, or at least overseeing, what exactly the community found acceptable.

Facebook's term for its documents, whether intended to invoke the doctrine or not, invokes an amazing history. From the Supreme Court's split decisions (and basement movie shows) in the 1960s and '70s, up to the move to shadow enforcement and local prosecutions, scholars and jurists who write about community standards have predicted (and pre-litigated) current debates about how to regulate speech across communities and contexts. For anyone concerned with governance, which community or communities' norms to embrace, who composes that community, and how to know what they think are big questions in many online speech debates. Contemporary American courts reckoning with the community standards doctrine ask these same questions.

Unfortunately, they have thus far failed to answer them. It was seductive to imagine, as the justices did in the 1970s, that the

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[2] Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1599, 1620 (2018).

[3] *Id.*

[4] *Id.* at 1621.

[5] Roth v. United States, 354 U.S. 476, 489 (1957).

[6] *Id.*

right combination of reasoning would provide a workable standard that balanced free expression against the uncertain harms of sexually explicit material. When it became clear that this would not work, the Supreme Court left the work to juries, and, by extension, to the lower courts. In the 2000s, both free speech advocates and the Department of Justice took a bet that getting prosecutors out of the practice of speech regulation was good for producers of pornography.[7]

In this essay, I explore this history of the community standards doctrine, with a specific focus on how courts tried, and failed, to answer the questions of how communities should govern speech, and why decisionmakers invoke community at all. In part I, I provide a sketch of the doctrine's history, beginning with a summary of the back-and-forth in the years immediately after the Supreme Court first used the term. In part II, I look at how networked technologies from 1989 to the early 2000s exacerbated earlier debates about which community's standards matter, and how they should be applied, up until a decline in prosecutions led to doctrinal stagnation. Then in part III, I reflect on what went wrong with obscenity doctrine, and in part IV, how we've moved beyond considering communities at all, as uniformity now comes from payment providers, a much more unlikely and unaccountable source.

I. A TOUR THROUGH LATE 20TH CENTURY OBSCENITY DOCTRINE

United States obscenity law was never an area with particular doctrinal clarity, but its evolution through the late twentieth century has been subject to a number of twists and turns. Even prior to the introduction of "community standards", commentators dismissed both state and federal reasoning on the subject, noting that most definitions of what was obscene consisted of "strings of synonyms."[8] In the 1950s, state level censorship varied wildly, with a film censored in Kansas for its inclusion of language like the word "virgin."[9] That case made it up to the Supreme Court, but was reversed in a *per curium* opinion.[10] But in 1957, things changed. The Supreme Court took at least four obscenity cases that

[7] *See infra*, Part II.

[8] *See* William B Lockhart & Robert C McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 323 (1954*). See also* WHITNEY STRUB, OBSCENITY RULES: ROTH V. UNITED STATES AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION 130 (2014).

[9] STRUB, *supra* note 8, at 149.

[10] STRUB, *supra* note 8, at 149.

term, an unthinkable number now, when the court has not taken a single case in years.[11] The biggest, the blockbuster, was *Roth*.[12] Samuel Roth, a New York-based bookseller, had been engaged in an effort to overturn obscenity laws for years, across a number of court cases.[13] He did not succeed. The Supreme Court, 6-3, affirmed his conviction for violation of the federal Comstock Act.[14]

In his majority opinion, Justice Brennan articulated a test that would haunt the Supreme Court for decades to come. Obscene material was to be judged on "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[15] Dismissing concerns that obscenity laws were too vague, the Court noted that "the Constitution does not require impossible standards," and that juries reaching different conclusions as to the same material was a part of the consequences of the jury system.[16]

The subsequent years proved to test the Court's commitment to that premise. Obscenity cases poured into the court.[17] And because in a *Roth* concurrence, Justice Harlan created something that has become known as the "constitutional facts" doctrine - insisting that reviewing courts must view the materials in question for themselves, rather than relying on trial courts, these obscenity cases were different from others that the court might handle.[18] In THE BRETHREN, Bob Woodward and Scott Armstrong describe a phenomenon known as "movie day," where the justices would gather in the basement to view films that were exhibits in obscenity cases under consideration for appeal.[19] Justice Hugo Black showed himself to be a man of principles, even beyond his First Amendment absolutism. He did not attend, saying he would pay for his porn.[20]

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[11] Butler v. Michigan, 352 U.S. 380 (1957); Roth v. United States, 354 U.S. 476 (1957); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) and Alberts v. California, which was consolidated with Roth.

[12] Consolidated with Alberts, which was a California state case.

[13] For a history of Roth's struggle with obscenity law, *see* STRUB, *supra* note 8, at 49-70.

[14] *Roth* at 494.

[15] *Id.* at 489. Scholars have argued that such an assertion, far from being a summary of existing cases, went beyond them. *See, e.g.*, Lockhart & McClure, *supra* note 8, at 50-53.

[16] *Roth* at 491 fn 29.

[17] STRUB, *supra* note 8, at 202 (discussing the cases arriving in the Supreme Court and conflict over how to handle them).

[18] *Roth* at 498.

[19] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 198 (2005).

[20] *Id.*

One source of these cases was confusion over what exactly "community standards" meant. The Brennan *Roth* opinion is, as far as we know, the first to use that phrase.[21] Although earlier judges had definitely sought to understand how community members might view the materials at issue, often using the phrase "community norms", the concept remained difficult to assess.[22] Some lower and state courts took "community standards" to mean some sort of national standard-an assessment of what a reasonable person would believe was acceptable across the country.[23] Others interpreted it more locally[24], and some commentators drew on Judge Learned Hand's *Kennerly* decision (cited by the decisions that the Supreme Court cited in *Roth*) to argue that the meaning was actually temporal rather than geographical.[25] The Supreme Court did not help. In cases in the next 10 years, different configurations of justices produced different explanations of community standards, and obscenity more generally.[26] In *Jacobellis*, Justice Brennan stated that a national standard was appropriate, although only one other justice joined his opinion.[27] And then in *Memoirs v. Massachusetts*[28] from 1966, a three-justice plurality seemed to drop community standards altogether.[29]

Then, cases where decisions were produced began to be the exception. Between 1967 and 1973, the Court began to reverse lower courts on obscenity convictions and remand without an

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[21] Frederick F. Schauer, *Reflections on Contemporary Community Standards: The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 6 (1978).

[22] *See*, *e.g.*, Parmelee v. United States, 113 F.2d 729, 731 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936) (L. Hand, J.); Commonwealth v. Isenstadt, 62 N.E.2d 840, 845 (Mass. 1945); State v. Becker, 272 S.W.2d 283, 286 (Mo. 1954); Adams Theatre Co. v. Keenan, 96 A.2d 519, 521 (N.J. 1953); Commonwealth v. Gordon, 66 Pa. D. & C. 101, 136 (Philadelphia County Ct. 1949) *aff'd sub nora*. Commonwealth v. Feigenbaum, 70 A.2d 389 (Pa. Super. Ct. 1950) (per curiam).

[23] *See*, *e*,*g.*, Meyer v. Austin, 319 F. Supp. 457, 466 (M.D. Fla. 1970); GC Theatre Corp. v. Munmiert, 489 P.2d 823, 826-27 (Ariz. 1971); State v. Gulf States Theatres, Inc., So.2d 547, 560 (La. 1972), vacated and remanded; 413 U.S. 913 (1973).

[24] *See*, *e.g.*, Price v. Commonwealth, 189 S.E.2d 324, 327 (Va. 1972); Jones v. City of Birmingham, 224 So.2d 922, 923 (Al. Ct. App. 1969) *cert. denied*, 396 U.S. 1011 (1970).

[25] Schauer, *supra* note 21, at 8.

[26] *See* Richard E. Shugrue & Patricia Zieg, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1973) (explaining how thirteen Supreme Court cases between 1957 and 1968 produced fifty-four separate opinions).

[27] 70 U.S. 478, 488 (1962). *See also* Schauer, *supra* note 21, at 118-19.

[28] 383 U. S. 413 (1966).

[29] *Id*. at 421.

opinion, a procedure that became known as "Redrupping," after *Redrup v. New York.*[30] Even this summary disposal of cases did not seem to stem the tide of obscenity prosecution problems. Justice Harlan called the problem intractable.[31] Something would have to give.

What gave was the court. In *Miller v. California*, the Supreme Court dispensed with the test laid down in *Roth*, a clear rejection of a national standard, and made explicit the previously implicit refusal to try for uniformity.[32] Chief Justice Burger admitted defeat, explaining that whether something fell within contemporary community standards was essentially a question 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."[33] The local community standard won because it was not possible to imagine what a national standard would be.[34] It just was not possible to summarize obscenity doctrine in a workable standard that covered Maine to Las Vegas.[35] And although by this point, some justices had determined that there was no workable way to distinguish obscenity from protectable speech; eliminating obscenity prohibitions entirely was not politically viable. Justice Brennan, who had written the opinion in *Roth*, had determined that it was not plausible to articulate a standard that separated pornography from obscenity and complied with constitutional requirements of fair notice.[36]

Miller marked a decline in obscenity as a single-minded focus of the Court. Although obscenity cases did not cease, the court became content with its punting of the hard questions to juries. As Brennan said in dissent in *Paris Adult Theater*, "[no] other aspect of

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[30] 413 U.S. 15, 22 fn 3. *See also* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS (1992), http://archive.org/details/girlsleanbackeve00degrrich (last visited Jan 31, 2023), Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 318 (2008).

[31] Interstate Circuit, Inc. v. Dallas, 390 U. S. 676, 704 (1968) (J. Harlan, concurring and dissenting).

[32] Miller v. California, 413 U.S. 15, 30 (1973).

[33] *Id.*

[34] *Id.* "To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility" (emphasis in original).

[35] Note that there was considerable political pressure on the court to regulate obscenity.

[36] As a friend of mine who preferred to remain anonymous put it, Brennan's dissent could be summarized as "I shall tinker no more with the machinery of little death."

the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards."[37] The court was done with disharmony, at least for the moment.

II. ENTER THE INTERNET

Between 1974 and the early 2000s, not much changed for community standards doctrinally.[38] But networked technologies were pushing on the weaknesses in the standards that justices had already highlighted, while removing justifications that had been used to argue for local standards.

One argument in favor of, or at least tempering concerns about, variability in local community standards was the ability of those who distributed potentially obscene material to tailor their liability based on where they sent things. The Comstock Act, the federal anti-obscenity law, targeted the mails.[39] And although the Court's decisions suggested that any jurisdiction through which material traveled was fair game for a prosecution, realistically, jurisdictional shopping often was done by the mailed-to location, rather than ones a work passed through.[40] Distributors, the story goes, could minimize their risk by not shipping the wrong kind of pornography to Maine or Mississippi.[41]

Of course, the definition of the relevant locality matters — and, the more specific a community is, the more potential variability distributors might face. In his blistering dissent in *Hamling* in 1974, Justice Brennan articulated the risk of potential chilling effects. "Because these variegated standards are impossible to discern," he wrote, "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

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[37] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

[38] S*ee* Boyce, *supra* note 30, at 337.

[39] 18 U.S.C. § 1461. The Comstock Act, named after anti-porn crusader Anthony Comstock, has recently been in the news again due to its ban on the mailing of abortion materials. Melissa Gira Grant, *Conservatives Are Turning to a 150-Year-Old Obscenity Law to Outlaw* Abortion, THE NEW REPUBLIC (Apr. 2023), https://newrepublic.com/article/171823/kacsmaryk-mifepristone-abortion-comstock-act.

[40] FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 127-28 (1976).

[41] Lest the reader think I stereotype needlessly by invoking these particular states, these are the Supreme Court's example jurisdictions.

people."[42] As other commentators have noted, it is uncanny how Brennan's concerns about the local standards construction in *Hamling* parallels what happened in the context of the Internet.[43]

That said, the Supreme Court's first substantive exploration of the conflict between the community standards doctrine and networked technologies predated the Internet. In *Sable Technologies v. FCC*, a dial-a-porn[44] service took aim at the Communications Act, claiming that the application of local community standards to their nationally available service violated the constitution.[45] The Court disagreed. Sable, it held, bore the burden of complying with federal law, even if doing so would require navigating the different communities with different local standards.[46] The fact that such methods would be convoluted or, frankly, potentially impossible, was not enough to create constitutional problems.[47] Brennan, once again, dissented.

In 2002, the question of how networked technologies should affect the community standards doctrine was back to the Supreme Court's docket.[48] In 1997, the Court had struck down the Communications Decency Act in *Reno v. ACLU*, finding that its prohibitions on sending indecent or patently offensive materials to minors violated the First Amendment.[49] In part, it cited the first prong of *Miller* as limiting the scope of the obscenity doctrine in a way that made it constitutional.

After *Reno*, Congress had passed the Child Online Protection Act (COPA)[50], which aimed at more narrowly (and hopefully constitutionally) restricting sexually explicit speech to minors. In a complex, split opinion in *Ashcroft v. ACLU*, the Supreme Court took up the question again, finding that the usage of

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[42] Hamling v. United States, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting).

[43] Mark Cenite, *Federalizing Or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standard*s, 9 COMM. L. & POL'Y 25, 39 (2004) (comparing Brennan to Kennedy in Ashcroft).

[44] Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 118, fn 1 (1989) (describing dial-a-porn as "[a] typical pre-recorded message lasts anywhere from 30 seconds to two minutes and may be called by up to 50,000 people hourly through a single telephone number.").

[45] *Id.* at 118.

[46] *Id.* at 125.

[47] *Id.* at 125 ("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.").

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

[49] Reno v. ACLU, 521 U.S. 844, 849 (1997).

[50] 47 U. S. C. § 223 et seq.

local community standards did not invalidate COPA.[51] The majority held that the constitutionality of the use of the local community standard did not depend on the ability to restrict speech to a particular audience. Even if networked technologies made it clear that purveyors of sexually explicit content could not effectively control the communities their works entered, the standard was still appropriate.[52]

A number of justices disagreed, albeit for different reasons. Stevens dissented, arguing that the networked technologies turned the community standards doctrine from a shield into a sword.[53] Justice O'Conner disagreed in her concurrence. She reasoned, that unlike in Sable or in the case of the mail, website owners could not restrict who saw what, making it more appropriate to apply a national standard.[54] Breyer came to similar conclusions on other grounds, noting that the legislative history had suggested that it should be a national adult standard, rather than a geographic one.[55]

Ultimately, in part because of the sheer number of opinions, the holding of *Ashcroft* was narrow. The reliance on (local) community standards itself did not render the statute unconstitutional.[56]

The Supreme Court's indecision in *Ashcroft* did not go entirely unheeded. Federal obscenity prosecutions continued throughout the 2000s, and many of the defendants mounted robust challenges.[57] Many of these cases did not turn on the *Miller* test, up until the prosecution of Jeffrey Kilbride and James Schaffer. Kilbride and Schaffer were spammers, and in 2005, they were indicted for a variety of federal crimes, including transportation of obscenity, and convicted on all counts.[58] They challenged the jury instructions on the meaning of contemporary community

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[51] *Ashcroft* at 578.

[52] *Id.* at 580-582 (citing *Hamling* and *Sable* for the conclusion that varying local standards, even if targeting was not possible, did not make obscenity regulation unconstitutional).

[53] *Ashcroft* at 603 (Stevens, J., dissenting).

[54] *Id.* at 587 (O'Connor J., conc.) ("I agree with Justice Kennedy that, given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in Hamling and Sable, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression.").

[55] *Id.* 590 (Breyer, J. concurring in part and concurring in judgment).

[56] *Id.* at 586.

[57] *See* Jennifer Kinsley, *The Myth of Obsolete Obscenity*, 33 CARDOZO ARTS & ENTERTAINMENT L. J. 607, 615-623 (2015).

[58] United States v. Kilbride, 584 F.3d 1240, 1245 (9th Cir. 2009).

standards.[59] In 2009, the Ninth Circuit, interpreting *Ashcroft*, held that a significant enough number of justices endorsed the national community standard or noted that potential speech suppressing of applying local standards to speech as to mandate a national community standard for obscene speech on the internet, including speech distributed by email.[60]

Commentators have questioned the Ninth Circuit's interpretation of the Ashcroft decision, but whether it was right or not (it is probably not), it became the law of a significant portion of the country.[61] Although this ruling seems like it should have been ripe for appeal by the government, it had actually won – despite the Ninth Circuit's holding, the judges found that the decision to apply a local community standard as opposed to a national one was not reversible error. The conviction stood, even if the community standards doctrine had become even muddier.[62] Two years later, the Eleventh Circuit came out the opposite way. In an unpublished decision in the *U.S. v. Little* case, which involved a pornographer named Max Hardcore, the Eleventh Circuit held that the Ninth Circuit was wrong, that *Ashcroft* did not require a national community standard, and therefore that the district court had not erred in focusing on the community standard of the Middle District of Florida.[63]

The Eleventh Circuit certainly perceived that the problem was that the *Miller* test had not kept up with the times, stating that "[t]he problem we encounter today is due in part to the fact that the Court in the time of *Miller* could not envision the amorphous and viral nature of the internet."[64] But the Court's own opinions contradict this. Even in the 1970s, members of the Court understood that a local standard created issues when materials passed through multiple jurisdictions.[65] Little did not appeal the decision on the community standards. The Supreme Court never had the opportunity (nor is it clear that it had the will, at that point) to resolve

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[59] Rather fascinatingly, the defendants took issue with the application of national standards, not local standards, despite the position that most producers of sexually explicit content that national standards were more beneficial. *Id*. at 1247-48. Perhaps this is best understood as a "Hail Mary" appeal.

[60] *Kilbride* at 1254.

[61] *See, e.g.*, E. Morgan Laird, *The Internet and the Fall of the Miller Obscenity Standard: Reexamining the Problem of Applying Local Community Standards in Light of a Recent Circuit Split*, 52 SANTA CLARA L. REV. 1503, 1524 (2012).

[62] *Kilbride* at 1262.

[63] United States v. Little, 365 F. App'x 159, 162 (11th Cir. 2010).

[64] *Id.* at 163 fn. 9.

[65] *See, e.g.*, *Hamling* at 144 (Brennan, J. dissenting) (explaining the difficulty that national distributors would have complying with local standards).

the question opened up by the Ninth Circuit: should the nature of the Internet actually change how the community standards doctrine is applied? How should United States obscenity law deal with a question that has bedeviled scholars and social media platforms alike? Who gets to decide what is too risqué for the Internet?

In some senses, this turned out to be an academic question. Although obscenity prosecution certainly did not end, as Jennifer Kingsley points out in her article *The Myth of Obsolete Obscenity*, federal obscenity prosecutions that did not involve child sexual abuse material or allegations of harm to minors did trail off.[66] Under President Barack Obama, the Obscenity Task Force (the part of the Department of Justice that was responsible for cases against producers of pornography) wound down, finishing up the already indicted cases but not filing new ones.[67] With the affirmance of the sentence of Ira Isaacs in 2014, the last of those federal prosecutions was over.[68] States absolutely continued to prosecute their own obscenity cases, but many of these focused on local businesses where the question of what the appropriate community was much less fraught.[69]

III. DOCTRINAL DIFFICULTIES

Before discussing what community standards say about online speech, it is worth directly critiquing obscenity. Nowadays, First Amendment classes that I am familiar with spend little attention on the doctrine. Theories of the First Amendment devote little time or energy to explaining why this category of speech should be unprotected, and scholars have argued that there is no justifiable distinction between sexual and political speech.[70]

Although many areas of the law ultimately backend to a jury, this is uncommon when it comes to free speech law. After all, what the First Amendment covers is supposed to be a floor, consistent across the country. The point of the obscenity doctrine was to carve out a category of speech from the reach of the First Amendment, and

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[66] *See* Kinsley, *supra* note 57, at 637.

[67] Josh Gernstein, *Holder Accused of Neglecting Porn*, POLITICO (Apr. 16, 2011), https://www.politico.com/story/2011/04/holder-accused-of-neglecting-porn-053314.

[68] United States v. Isaacs, 565 Fed. Appx. 637, 639 (9th Cir. 2014). For more on the Isaacs case, *see* Kinsley, *supra* note 57, at 627.

[69] *Id.* at 627-638.

[70] *See, e.g.*, David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 122-23 (1994).

now that category of speech was wildly variable.[71] As Fredrick Schauer puts it, "Of course tastes and desires vary, but this variation is normally expressed in terms of varying legislative solutions, not in varying degrees of constitutional protection."[72]

Despite the intervening years, the test has not improved much from the 1970s. In the modern day, obscenity remains defined by the *Miller* test, which turns on whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[73] If all three criteria are met, the material is legally obscene, and the government can engage in content-based regulation of it without meeting the bar of the First Amendment.

Courts and commentators generally agree that the First Amendment protects most pornography, and that many artistic works that previously bore a questionable relationship to the doctrine (for example Ulysses) receive protection.[74] But as discussed above, there is much left to the jury, or to the parties, including what the community, and what a prurient interest is. The questions are relevant in all cases, but for pornography, where it may be harder to convince a jury of the underlying social value, they are especially relevant.

The definition of prurient interest, the thing that juries are meant to apply community standards to, is functionally defined in terms of deviance. In *Brockett v. Spokane Arcades, Inc*., the Court split "normal, healthy sexual desires" from "a shameful or morbid interest in nudity or sex", finding the first was not a prurient interest but the second was.[75] Such a definition brings along with it all of the biases and harms to minority groups that constitutional floors are theoretically meant to prevent.[76] This concern is not merely

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[71] Schauer, *supra* note 21, at 22. *See also* United States v. Roth, 237 F.2d 796, 822-23 (2d Cir. 1956) (Frank, J., concurring) ("Was it the purpose of the First Amendment, to authorize hundreds of diverse jury-legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of diverse statutes interfering with freedom of expression?").

[72] *Id.*

[73] *Miller*, citations omitted.

[74] *Compare* United States v. One Book Called Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933) and United States v. One Book Entitled Ulysses, 72 F2d 705 (2d Cir. 1934), *with* 5 A.L.R.3d 1158 § 10.5 (2022) (summarizing doctrine and collecting cases).

[75] 472 U.S. 491, 498, 504 (1985).

[76] Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379 (2008). For a broader discussion of heteronormativity and prurience, see STRUB,

theoretical - in the 1970s, the Court held that the focus on "abnormal" sex made a ban on materials appropriate, grouping together rape, BDSM, and queer sex into the prurient category.[77] State court obscenity cases into the 1990s found material that would be unlikely to be scandalous if they involved male and female participants to be legally obscene when involving two men.[78] As depictions of queer relationships are being decried as inherently sexual and not appropriate for children[79], it is long past time to reconsider a First Amendment doctrine that inherently creates a hierarchy of relationship types under the guise of what is "normal" or "healthy."

The definition of "community" fares little better under modern day scrutiny. In *Hamling*, which the Court decided the year after *Miller*, the justices rejected the idea of the national standard, but explained that the judge did not need to explain to a jury exactly what the actual geographical community was.[80] Furthermore, no expert witnesses or testimony was necessary, and it likely was not even desirable.[81] The materials would speak for themselves, and the jury would speak for a vaguely articulated "community", which was left undefined. In that years that followed, the community in "community standards" became a way to get around the inherent instability of the doctrine. But with modern day doctrinal developments, it becomes clear that the "community" allows courts to avoid the reality that obscenity is a First Amendment doctrine designed to do exactly what justices have decried in other contexts – have the state decide "good speech" from "bad speech" based on preference for certain speakers and messages.

Faced with the fundamental political impossibility of actually overturning obscenity law, the Supreme Court punted in 1957.[82] And punted in 1973.[83] And punted again in 1989[84], and

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supra note 8, at 183, MARC STEIN, SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM *GRISWOLD* TO *ROE* 27 (2010).

[77] Ward v. Illinois, 431 U.S. 767, 771-72 & nn.3-5 (1977).

[78] 596 N.W.2d 304 (Neb. 1999).

[79] Melissa Gira Grant, *Happy Banned Book Week! Schools Are Increasingly Going After LGBTQ Books*, NEW REPUBLIC, Sep. 2022, https://newrepublic.com/article/167823/banned-book-week-lgbtq-schools (last visited Apr 24, 2023).

[80] *Hamling* at 104 ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.").

[81] *Id.*

[82] *Roth*, 354 U.S. at 489.

[83] *Miller*, 413 U.S. at 30.

[84] *Sable Commc'ns of California, Inc.*, 492 U.S. at 125.

maybe in 2002.[85] Handing a set of instructions to juries became a way to resolve a problem of the system's own making. Alleviating its consequences now means revisiting the normative assumptions embedded in Roth and its progeny, and perhaps reconsidering whether obscenity should be outside the reach of the First Amendment altogether.

IV. SHADOW REGULATION AND THE RISE OF THE (MULTI)NATIONAL STANDARD

Although the doctrine has largely faded from scholarly focus, and federal prosecutions for adult consensual material have dried up, obscenity was not (and is not) dead. Even beyond state level prosecutions, perceptions of what constitutes obscenity, often a far cry from the actual material that was held legally obscene in the 2010s, have come to shape the production of pornography and sexually explicit materials of all types.[86] In the absence of any sort of positive rights or non-discrimination guarantees, not prosecuting sexually explicit speech may make it not criminal, but it is subject to the same market logic as everything else.

Payment providers exercise a huge amount of standardized control over online platforms that sell sexually explicit materials.[87] Pornography producers and porn platforms received lists of allowed and disallowed words and content – from "twink" to "golden showers," to how many fingers a performer might use in a penetration scene.[88] Rules against bodily fluids other than semen, even the appearance of intoxication, or certain kinds of suggestions of non-consent (such as hypnosis) are common.[89] These obligations

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[85] It is less clear that the Court fully punted in 2002 because changing the community standard doctrine as applied to the Internet would have resolved the core tension without needing to eliminate obscenity law. *Ashcroft*, 535 U.S. at 583.

[86] *See* Zahra Stardust, Danielle Blunt, Gabriella Garcia, Lorelei Lee, Kate D'Adamo & Rachel Kuo, *High Risk Hustling: Payment Processors, Sexual Proxies, and Discrimination by Design*, 26 CUNY L. REV. 57, 66, 90-93 (2023) (discussing how notions of obscenity shape pornography and the experiences of sex workers online).

[87] *See* Patricia Nilsson & Alex Barker, *The Billionaire Who Took Down Porn*, FIN. TIMES (Jan. 19, 2023), https://www.ft.com/content/1add56d6-82d9-4d83-a6a6-a5cdff70def5.

[88] *Id.*

[89] *See* Sophie Ladder, *Site Restrictions*, https://docs.google.com/spreadsheets/d/1vuwKN-yuOJDlLiOa8CyCVA8BMpXg7knCZxS8YgFE98Y/edit (last visited May 21, 2023) (listing differences across porn sites in terms of moderation). Recent changes by Mastercard to aspects of their rules to platforms that sell adult content

from payment networks, like Mastercard or Visa, and payment providers, like MobiusPay, have existed for decades, but as obscenity became even more rarely enforced, they served as de facto regulatory requirements for the porn industry, and shaped what Americans of all communities get to see online.[90]

Some of the rules specifically reference concepts from obscenity law, whereas others refer to the brand reputation of the financial providers.[91] But, independent of their rationale, there is no underlying "community" or jury from which the rules enforced by financial providers derive. In fact, Mastercard's rules in particular adopt some elements of the test for obscenity, but do not reference either local law or community standards.[92] Rather, it might be best to call their standard multinational – as in the corporation.

Such private ordering is an example of what advocates call "shadow regulation."[93] It has effectively created a regime much closer to the national standard than the Supreme Court imagined. But these haphazard enforcement actions by companies involve few of the checks, balances, and other First Amendment protections that the enforcement by the legal system provided. The current state of the obscenity regulation is one uniform standard but without the requirement to engage in analysis of individual content, the comfort of a jury, or the transparency of judicial decisions. Although theoretically communities can set their own norms, the variance exhibited across communities has been limited when it comes to sexually explicit material.[94] There is perhaps an appearance of fragmentation, but a reality of uniformity, driven by non-judicial

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have revealed the power of payment providers in this space. *See* VAL WEBBER, THE IMPACT OF MASTERCARD'S ADULT CONTENT POLICY ON ADULT CONTENT CREATORS (Feb. 2022), https://www.researchgate.net/publication/358441297_The_Impact_of_Mastercard's_Adult_Content_Policy_on_Adult_Content_Creators.

[90] *Id.* Since obscenity law's prurient interest test is inseparable from a vision of normative "healthy" sexuality, which in turn is shaped by the types of erotic materials that people have access to, it is actually possible that shadow governance of the sale of adult materials by the banking systems changes the underlying law.

[91] *See* Mastercard Rule 5.12.7, MASTERCARD RULES (Dec. 13, 2022), https://www.mastercard.us/content/dam/public/mastercardcom/na/global-site/documents/mastercard-rules.pdf.

[92] *Id.* ("The Corporation considers the following to be in violation of the rule. . .the sale of a product or service, including an image, which is patently offensive and lacks serious artistic value. . .").

[93] *Shadow Regulation*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/shadow-regulation.

[94] Tumblr and iOS are good examples here. *See* Kishalaya Kundu, *Tumblr Forced to Censor Content to Remain on the App Store*, SCREEN RANT (Dec. 31, 2021), https://screenrant.com/tumblr-ios-content-restrictions-banned/. The problem, as usual, appears to be capitalism.

decision makers like credit card companies and online service providers.

Where the *Miller* test theoretically allowed for regional and community-based variation in what the First Amendment protects, the financial system's dominant hold over online speech has created surprising uniformity across cultures and contexts. It is no longer necessary to really interrogate what communities find appropriate, because it functionally does not matter unless it is more restrictive than the baseline. As Supreme Court justices across the decades predicted when looking at the community standards doctrine, local variation seems only to allow for more restrictions, but not fewer.[95]

This brings us back around to the starting point of this essay: Facebook's community standards, and their relationship to obscenity doctrine. Across both modern content-moderation and obscenity, the talismanic invocation of "community" provided cover for a decision-making process that lacked both predictability and accountability. But as the weaknesses in the system became more and more obvious due to time and technology, both systems have moved away from pretending that these imagined communities are in charge at all.

[95] *See Hamling* at 144 (Brennan, J., dissenting).