

Cyberspace Cases Force Court to Reexamine Basic Assumptions of Obscenity and Child Pornography Jurisprudence

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Two cyberspace cases from the Supreme Court's 2001 Term forced the justices to reexamine basic constitutional assumptions underlying the obscenity and child pornography doctrines. In *Ashcroft v. Free Speech Coalition*, the Court struck down a federal ban on "virtual" child pornography in the 1996 Child Pornography Prevention Act (CPPA) as a "textbook example" of why the law permits facial challenges to overbroad statutes. It found that a prohibition of images that "appear to be a child" engaging in sexual conduct where no actual children were involved prohibited a substantial amount of protected expression and violated the First Amendment.¹ Meanwhile, in *Ashcroft v. ACLU*, the Supreme Court reversed a decision of the United States Court of Appeals for the Third Circuit to enjoin enforcement of the Child Online Protection Act (COPA), successor to the ill-fated Communications Decency Act (CDA). The Court rejected the court of appeals' reasoning that the borderless nature of the Internet rendered unconstitutional restrictions on expression deemed "harmful to minors" where legal liability is on the basis of "community standards." It remanded the case to the lower court to further explore the meaning of obscenity law in the Internet age.²

Both cases tackled issues that go to the heart of the Court's complicated rulings governing the regulation of sexually oriented speech. *Ashcroft v. ACLU* reopened questions at the center of the Court's more than four-decade-long struggle to establish a workable standard for

¹122 S. Ct. 1389, 1398–99 (2002).

²122 S. Ct. 1700 (2002).

regulating obscenity. Although COPA applied a “variable obscenity” test for material considered “harmful to minors,” that legal standard is based essentially on the same analytic factors that define obscenity for adults. Obscenity law had been relatively settled since the 1973 decision in *Miller v. California*, in which the Court reaffirmed that the “patent offensiveness” and “prurient appeal” of sexually oriented materials should be determined by reference to contemporary community standards. But the decision in *Ashcroft v. ACLU* revived the debate that raged on the Court before *Miller*, about which kind of standards—and which community—should govern obscenity determinations. It directed the court of appeals to address the legal conundrums that plagued the Supreme Court in the years before *Miller*.

Ashcroft v. Free Speech Coalition, on the other hand, reaffirmed the traditional conception of child pornography—that such material is illegal because actual children are abused in its production. Congress had sought to extend the concept of child pornography to include images of “virtual” children, thus removing the direct link to child abuse, but the Court held that such an expansion of the child pornography concept would outlaw speech that traditionally has been protected by the First Amendment. The decision immediately prompted legislative efforts to adopt a new version of the virtual child pornography ban, thus ensuring a prolonged debate over the permissible scope of the prohibition.

By touching on core issues that define the essential nature of obscenity and child pornography, these two cases breathed new life into disputes about which kind of speech may be excluded from First Amendment protection and how courts should draw the line between protected and unprotected speech. In *Ashcroft v. ACLU*, the debate will continue in the court of appeals, which must decide whether COPA survives constitutional scrutiny and under what standard. With *Ashcroft v. Free Speech Coalition*, on the other hand, the judicial debate ended with the Court’s April 16, 2002, decision, at least for now. Legislation introduced immediately after the decision ensures that the constitutional arguments over child pornography will continue in Congress and, eventually, in the courts.

Protected versus Unprotected Speech

To understand these issues and their significance, it is necessary to review the development of obscenity and child pornography as

categories of speech that are unprotected by the First Amendment. Despite the seemingly absolute command of the First Amendment that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” the Supreme Court has held that the restriction of certain categories of speech does not present a constitutional problem. This is because, as Professor Alexander Meiklejohn explained, the First Amendment “does not forbid the abridgement of speech [but] it does forbid the abridging of *freedom of speech*.”³ The Court sketched the general contours of the exclusions from constitutional protection in a 1942 case in which it identified “certain well-defined and narrowly limited classes of speech” that included “the lewd and obscene, the profane, the libelous and the insulting or ‘fighting’ words.”⁴ But this categorical approach to First Amendment protection obscures a deeper complexity: Restricting unprotected speech may not present a “constitutional problem,” as the Court put it, but determining what expression may be heaped into these exclusions certainly does.

The law of defamation illustrates this point. It has long been recognized that the publication of libelous statements constitutes a tort for which courts may order a remedy, but in 1964 the Supreme Court decreed, in *New York Times v. Sullivan*, that the First Amendment sharply constrains what expression may be considered defamatory. This constitutional oversight of state tort law is necessary, according to the Court, because freedom of expression needs “breathing space” to survive.⁵ Consequently, it erected formidable constitutional hurdles against any recovery in a defamation action by public officials. And in the years since 1964, the Supreme Court and lower courts have developed a rich and complex body of First Amendment law that extends both substantive and procedural protections in all libel cases.

The Quest for a Workable Obscenity Test

Much of the same legal development has occurred in the other categories of “unprotected” speech, and the law governing obscenity

³ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO GOOD GOVERNMENT* 19 (1948) (emphasis added).

⁴*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572 (1942).

⁵*N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–272 (1964).

is no exception. When the Supreme Court in 1957 reaffirmed the concept that obscenity is beyond the First Amendment's protection, it also ruled that the question of whether a particular work is obscene necessarily implicates constitutional law. In distinguishing protected from unprotected speech involving sexual matters, the Court noted that "sex and obscenity are not synonymous" because sex is "a great and mysterious force in human life [and] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."⁶

Accordingly, the First Amendment presumptively protects sexually oriented expression unless a court determines that the average person, applying contemporary community standards, would find that the dominant theme of the material taken as a whole is patently offensive and appeals to the prurient interest. The Court in *Roth* noted that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees."⁷ It subsequently clarified that no expression could be declared obscene, and therefore placed outside the First Amendment's protective umbrella, unless it is found to be "utterly without redeeming social value."⁸

Over time, however, the analytic tools that make up the obscenity test proved to be far more slippery than the ones used to define other categories of unprotected speech. In defamation actions involving public officials or public figures, for example, the wronged party must prove that the defendant published a false statement of fact about the plaintiff that injured his reputation, *and* that it was published with reckless disregard of whether or not it was true. Although no test involving language can be applied with mathematical precision, it is much easier to determine whether a purported "fact" about a person is false and published in the face of actual doubts about its truth, than it is to evaluate whether a work is "prurient" according to community standards or that it lacks any social importance.

⁶*Roth v. United States*, 354 U.S. 476, 487 (1957).

⁷*Id.* at 484, 489. See *Manual Enters., Inc. v. Day*, 370 U.S. 478, 486–487 (1962).

⁸*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 418–419 (1966).

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The Court has characterized the separation between obscenity and constitutionally protected expression about sex as a “dim and uncertain line.”⁹ Not surprisingly, where—and even whether—the line should be drawn has generated a great deal of disagreement. Two justices, William O. Douglas and Hugo Black, never accepted the proposition that obscenity was beyond constitutional protection.¹⁰ Douglas wrote that the obscenity standard on the basis of an appeal to the “prurient interest” was an exercise in thought control, and he concluded that “[a]ny test that turns on what is offensive to the community’s standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment.”¹¹

Although Justices Black and Douglas represented a distinctly minority view, there was hardly consensus among those in the majority. Justice Harlan noted that the 13 obscenity cases at the Supreme Court between 1957 and 1968 produced a total of 55 separate opinions, and that the quest to find a coherent test for obscenity had only “produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.”¹² Justice Potter Stewart took the position that only “hard core pornography” could be suppressed,¹³ while others concluded that material short of the hard core could be banned, so long as it was patently offensive and lacked any redeeming value.¹⁴ Another view, advanced by Justice Harlan, was that the federal role was limited to restricting hard-core pornography, while the states had greater latitude to regulate books on the basis of “offensive” portrayals of sex.¹⁵

⁹ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

¹⁰ E.g., *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Black, J., and Douglas, J., concurring).

¹¹ *Roth*, 354 U.S. at 512 (Douglas, J., dissenting).

¹² *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704–705 & n.1 (1968) (Harlan, J., dissenting).

¹³ E.g., *Ginzberg v. United States*, 383 U.S. 463, 497 (1966) (Stewart, J., dissenting); *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

¹⁴ *Memoirs*, 383 U.S. at 418 (Brennan, J., joined by Warren, C.J., and Fortas, J.); *Jacobellis*, 378 U.S. at 193–195 (Brennan, J., joined by Goldberg, J.).

¹⁵ *Roth*, 354 U.S. at 496–508 (Harlan, J., concurring in part and dissenting in part); *Interstate Circuit, Inc.*, 390 U.S. at 706 (Harlan, J., dissenting).

Notwithstanding the range of opinion on this doctrinal scale, the justices seemed to agree that the concept of obscenity could not be defined precisely. In describing the Court's efforts to "define what may be undefinable," Justice Stewart eschewed any attempt to come up with an intelligible formula for obscenity but added most famously (if unhelpfully) that "I know it when I see it."¹⁶ Somewhat less pithily, Justice Black wrote that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity.'"¹⁷ And Justice Brennan, the author of the *Roth* opinion, who later concluded that it was impossible to fashion a constitutional test for obscenity, agreed that "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."¹⁸ He wrote that the Court was "manifestly unable" to describe the obscenity concept in advance "except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."¹⁹

Justice Harlan, who would have accorded more latitude for the enforcement of state obscenity laws than for federal proscriptions, wrote that the Court in *Roth* erred in assuming that "'obscenity' is a peculiar genus of 'speech and press,' which is as distinct, recognizable, and classifiable as poison ivy is among other plants." Accordingly, he concluded that whether a particular book may be suppressed is not "a mere matter of classification, of 'fact,' to be entrusted to a fact-finder and insulated from constitutional judgment." Such determinations do not end with a jury verdict or trial court ruling because they involve "a question of constitutional judgment of the most sensitive and delicate kind." For that reason, Justice Harlan foresaw that "every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards."²⁰

¹⁶ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

¹⁷ *Ginzburg*, 383 U.S. at 480–481 (Black, J., dissenting).

¹⁸ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting, joined by Marshall, J., and Stewart, J.).

¹⁹ *Id.* at 84.

²⁰ *Roth*, 354 U.S. at 497–498 (Harlan, J., dissenting).

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Because of this need for ultimate constitutional review, a significant number of cases were presented to the Supreme Court for a final determination of obscenity, thus requiring the justices to examine the challenged material themselves. If at least five justices, applying their respective tests, decided that the material was not obscene, the conviction was reversed without opinion, typically with the unadorned statement: "The petition for a writ of certiorari is granted and the judgment of the [court below] is reversed."²¹ By 1964, Chief Justice Warren complained that most of the Court's obscenity decisions since *Roth* had been issued without opinion.²² Nevertheless, the practice became more prominent after the Court's 1967 decision in *Redrup v. New York*, in which the Court summarily reversed convictions in three consolidated cases.²³ The Court issued 31 similar reversals between 1967 and 1971, and countless other decisions denying review and upholding lower court convictions.²⁴

The practice was wholly unsatisfactory for many reasons, not the least of which is that it turned the justices into censors of last resort. Justice Harlan complained that the members of the Court were tied to "the absurd business of perusing and viewing the miserable stuff that pours into the Court."²⁵ Justice Brennan observed that the material may have varying degrees of social importance, but complained "it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity."²⁶ Justice Douglas, on the other hand, who never subscribed to the majority position that obscenity could be denied constitutional protection, always refused to look at the material because, he said, "I have thought the First Amendment made it unconstitutional for me to act as a censor."²⁷

But the Court's practice of subjecting salacious materials to final review caused a bigger problem than just ruffling judicial sensibilities. Regardless of whether it upheld convictions by denying review

²¹ *E.g.*, *Keney v. New York*, 388 U.S. 440 (1967) (per curiam).

²² *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting).

²³ 386 U.S. 767 (1967).

²⁴ *Paris Adult Theatre I*, 413 U.S. at 82 n.8 (Brennan, J., dissenting) (collecting cases).

²⁵ *Interstate Circuit, Inc.*, 390 U.S. at 707 (Harlan, J., dissenting).

²⁶ *Paris Adult Theatre I*, 413 U.S. at 92-93 (Brennan, J., dissenting).

²⁷ *Id.* at 71 (Douglas, J., dissenting).

of lower court rulings or reversing them without opinion, the summary review process provided no guidance to lower courts. Final decisions by the Supreme Court only resolved disputes between individual litigants without providing any doctrinal guidance. Justice Brennan wrote that “the practice effectively censors protected expression by leaving lower court determinations of obscenity intact even though the status of the allegedly obscene material is entirely unsettled until final review here.”²⁸ Accordingly, he found, “judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.”²⁹

The obscenity puzzle was further complicated by the need to decide which community dictated “community standards” for determining the patent offensiveness of sexual expression. Beginning with the 1957 *Roth* decision, Justice Harlan argued that local standards should govern state obscenity prosecutions, while national standards should apply in federal cases. He wrote that the same book “which is freely read in one State might be classed as obscene in another,” but he foresaw little danger to our system of ordered liberty “so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.” At the same time, Justice Harlan opposed a single national standard for obscenity, warning that “the dangers of federal censorship in this field are far greater than anything the States may do.”³⁰

The debate over community standards intensified as the Court began to apply the *Roth* standard in the 1960s. In *Manual Enterprises, Inc. v. Day*, the Court overturned a Post Office ruling that certain gay-themed magazines were “unmailable” under federal law. Following its own independent review of the magazines in question, the Court found that “the most that can be said of them is that they are dismally unpleasant, uncouth and tawdry,” but that such qualities were not sufficient to render them obscene. With respect to the applicable community, however, Justice Harlan’s plurality opinion applied a national standard of decency to the federal law because it covers “all parts of the United States whose population

²⁸ *Id.* at 93 (Brennan, J., dissenting).

²⁹ *Id.* at 84.

³⁰ *Roth*, 354 U.S. at 505–506 (Harlan, J., dissenting).

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reflects many different ethnic and cultural backgrounds.” The Court declined to rule on whether Congress could “prescribe a lesser geographical framework for judging this issue that would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency.”³¹

The issue was presented squarely two years later in *Jacobellis v. Ohio*, and a plurality again purported to reaffirm the holding of *Roth* that “the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.” Justice Brennan wrote that sustaining the suppression of a particular book or film in one locality “would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places.” Noting that “[i]t is, after all, a national Constitution we are expounding,” Justice Brennan pointed out that the Court “has explicitly refused to tolerate a result whereby ‘the constitutional limits of free expression in the Nation would vary with state lines.’”³²

Chief Justice Warren, however, disagreed, writing that “there is no provable ‘national standard’ and perhaps there should be none.” Joined by Justice Clark, he noted that the Supreme Court had been unable to articulate a national standard for obscenity “and it would be unreasonable to expect local courts to divine one.” The Chief Justice read *Roth* to endorse the application of local community standards, and reasoned that the Supreme Court should limit its role to determining whether lower courts had sufficient evidence before them to sustain an obscenity finding. Otherwise, he concluded, the Supreme Court would be required to review the contested materials and to sit as “Super Censor of all the obscenity purveyed throughout the Nation.”³³

After more than a decade and a half of doctrinal turmoil, the Court confronted the definitional problems involving obscenity and the community standards issue in *Miller v. California*. In upholding

³¹ 370 U.S. 478, 488–490 (1962).

³² *Jacobellis*, 378 U.S. at 194–195 (citation omitted).

³³ *Id.* at 200–203 (Warren, C.J., dissenting).

a conviction under state law, the Court articulated the current three-part test for obscenity: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁴ Although the decision was 5–4, it was the first time since *Roth* that a majority of the Court endorsed a test for obscenity.

The *Miller* majority abandoned the requirement that a work must be shown to be “utterly without redeeming social value,” but it also clarified that obscenity is limited to depictions of hard-core sexual conduct. Because of the greater agreement among the justices regarding the governing standard, the Court abandoned the “casual practice” of *Redrup v. New York* of issuing decisions without opinions in obscenity cases. It also reduced the need for judicial review of lower court decisions by classifying the “prurient interest” and “patently offensiveness” determinations as “essentially questions of fact” for juries to decide.³⁵

On the issue of community standards, the Court held that the Constitution does not require a national standard, finding 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.” The Court upheld a conviction on the basis of community standards of the state of California, and it found there cannot be “fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’” Describing a search for a national standard as “an exercise in futility,” Chief Justice Burger’s opinion for the Court emphasized that “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, assuming the prerequisite consensus exists.”³⁶ He noted that the First Amendment does not require “that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.” But he also acknowledged the converse

³⁴ *Miller v. California*, 413 U.S. 15, 24 (1973).

³⁵ *Id.* at 29–30.

³⁶ *Id.* at 20, 30–33.

proposition—that community reactions to literature in, say, rural Georgia or Tennessee, should not dictate what is acceptable in urban centers.³⁷

The four-justice minority in *Miller* distilled a different lesson from the history of disputes over the meaning of obscenity. Justice Brennan, author of the *Roth* majority opinion, wrote in another case decided the same day as *Miller*, “after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level.”³⁸ Justice Brennan was joined by Justices Stewart and Marshall (Justice Stewart evidently no longer of the opinion that he would know obscenity when he saw it). Justice Douglas also wrote separately to highlight his long-held belief that obscenity could not be excluded from First Amendment protection. The dissenters in *Miller* questioned the notion that obscenity questions could be resolved definitively by juries applying community standards. The role of appellate courts in making independent judgments in obscenity cases could be reduced, they reasoned, only by exposing “much protected, sexually oriented expression to the vagaries of jury determinations” thus leading to an “unprecedented infringement of First Amendment rights.”³⁹

Despite the sharp divisions between the majority and minority opinions, the *Miller* test for obscenity ushered in a period of relative doctrinal stability. The following year, in *Hamling v. United States*, the same majority applied its new obscenity test to a prosecution in California under federal law, and found that the community standards requirement did not require the “substitution of some smaller geographical area” any more than it called on jurors to apply hypothetical and unascertainable “national standards.” Rather than focusing on some “precise geographic area” as the relevant “community,” the Court held that the purpose of a community standards approach was to ensure “that the material is judged neither on the basis of each juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.”⁴⁰

³⁷*Id.* at 32–33 & n.13.

³⁸*Paris Adult Theatre I*, 413 U.S. at 84 (Brennan, J., dissenting).

³⁹*Id.* at 102.

⁴⁰*Hamling v. United States*, 418 U.S. 87, 103–107 (1974).

The Court also clarified that the “serious merit” requirement of the *Miller* test was not predicated on community standards. In *Pope v. Illinois*, the Court held that the test for serious literary, artistic, political, or scientific value did not hinge on the vagaries of local tastes, but instead must be judged by reference to the hypothetical reasonable person.⁴¹ Although all nine justices agreed (albeit in five separate opinions) that local standards should not dictate questions of merit, four took the position that the sale of obscene materials to adults could not be banned consistently with the Constitution. Once again, the key was community standards: “The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency,” Justice Stevens wrote in dissent. “In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors’ subjective reactions to the materials in question rather than by the predictable application of rules of law.”⁴²

Variable Obscenity: The “Harm to Minors” Standard

If the question of obscenity was not already sufficiently complicated, the Supreme Court added another level of complexity by creating a category of materials that could be classified as “obscene for minors” but not for adults. Under the variable obscenity standard (sometimes called “obscenity lite”), the Supreme Court has held that the government may designate some sexually oriented material as being “harmful to minors” and may limit the sale or display of such things as “girlie magazines” to children.⁴³ Such “variable obscenity” restrictions, however, are rather limited. The Supreme Court has held that it will not tolerate vague, open-ended restrictions on speech—not even for the benefit of minors—and that the government cannot “reduce the adult population . . . to reading only what is fit for children.”⁴⁴

⁴¹ 481 U.S. 497, 500–501 (1987).

⁴² *Id.* at 514 (Stevens, J., dissenting) (quoting *Smith v. United States*, 431 U.S. 291, 315–316 (1977) (Stevens, J., dissenting)).

⁴³ *Ginsberg v. New York*, 390 U.S. 629 (1968).

⁴⁴ *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957). See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73–74 (1983); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968).

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As this subspecies of obscenity has evolved, the Supreme Court has ruled that the three-part *Miller* factors should be used to determine what material is obscene for minors, but with a slight difference. Reviewing courts must determine whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest of *minors*, and whether the work lacks serious literary, artistic, political, or scientific value *for minors*. Over the years, courts have held that to meet this standard, the material must lack serious value for “a legitimate minority of normal, older adolescents.”⁴⁵ Under this approach, “if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not harmful to minors.”⁴⁶ Accordingly, the Supreme Court has indicated that regulation in this area is limited to “borderline obscenity” or to material considered to be “virtually obscene.”⁴⁷

However much the concept of variable obscenity might have been limited by this formulation, it necessarily added more ambiguity to the elusive concept of obscenity. A reviewing court must first resolve the question of how the average person can apply “community standards” to divine what material appeals to the prurient interest of the normal 17-year-old. The obvious rhetorical response (and probably the most accurate answer)—what doesn’t?—no doubt would fail to satisfy judicial standards of precision. The question of “serious merit” for minors is at least as difficult to answer because it suggests that material that has serious literary, artistic, political, or scientific merit for adults does not necessarily have the same value for teens at the threshold of majority.

Few courts have ever addressed this issue, but one Ohio court in the mid-1970s held that the books *One Flew Over the Cuckoo’s Nest* and *Manchild in the Promised Land* violated the state’s “harmful to juveniles” law. It found that the books “have no literary, artistic, political or scientific value whatsoever” and “were designed by the authors to appeal to the base instincts of persons and to shock others

⁴⁵ *Am. Booksellers Ass’n. v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989).

⁴⁶ *Am. Booksellers v. Webb*, 919 F.2d 1493, 1504–05 (11th Cir. 1990); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 528 (Tenn. 1993).

⁴⁷ *Virginia v. Am. Booksellers Ass’n.*, 484 U.S. 383, 390 (1988).

for the purpose of effectuating sales.”⁴⁸ It is not known how the Supreme Court would evaluate the Ohio court’s analysis under the current rule that “harmful to minors” material must be “virtually obscene,” but Justice O’Connor’s partial dissent in *Reno v. ACLU* provides some insight into at least one view. Joined by Chief Justice Rehnquist, she observed that although “discussions about prison rape or nude art . . . may have some redeeming education value for adults, they do not necessarily have any such value for minors.”⁴⁹ Which material falls into this “merit gap” between expression of value for adults but unfit for minors remains a mystery.

***Ashcroft v. ACLU* and the Online Obscenity Puzzle**

The Child Online Protection Act was the second effort by Congress to enact restrictions on Internet speech to shield children from sexually oriented expression. The first attempt, the ban on “indecent” material in the CDA, ended with a near unanimous Supreme Court decision invalidating the restriction. The Court unanimously struck down a provision of the CDA that prohibited the display of “indecent” materials online, and voted 7–2 to void a provision that banned the transmission of indecent information to a minor. It held that the Internet receives the full protection of the First Amendment, and that the CDA’s prohibitions were both vague and overly broad. The Court unfavorably contrasted the CDA’s indecency standard, borrowed from the FCC’s restrictions on vulgar language on the radio, with the three-part test for obscenity.⁵⁰

In response, Congress adopted COPA in 1998. In doing so, it sought to avoid the same fate for the new law by making it narrower than its predecessor. Unlike the CDA, COPA does not apply to all sexually oriented information on the Internet, but prohibits making “any communication for commercial purposes” over the World Wide Web that “is available to any minor and that includes any material that is harmful to minors.” COPA covers material that “depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual

⁴⁸Grosser v. Woollett, 341 N.E.2d 356, 360–361, 367 (Ohio C.P. 1974).

⁴⁹*Reno v. ACLU*, 521 U.S. 844, 896 (O’Connor, J., concurring in part, dissenting in part).

⁵⁰*Id.* at 872–874.

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contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast.” Incorporating the variable obscenity standard, the Act requires a finding that the average person, applying contemporary community standards, would find that the material taken as a whole would appeal to the prurient interest or minors, and that it lacks “serious literary, artistic, political, or scientific value for minors.”⁵¹

Despite this somewhat narrower focus compared with the CDA, Judge Lowell A. Reed of the U.S. District Court for the Eastern District of Pennsylvania issued a preliminary injunction blocking enforcement of COPA. The court found that plaintiffs were likely to succeed on the merits of their constitutional claim—that the law would burden constitutionally protected speech, that it would chill online speech in general, and that the government had failed to demonstrate that COPA is the least restrictive means of serving its purpose.⁵²

On appeal, the United States Court of Appeals for the Third Circuit affirmed the decision, but did so for reasons not found in the district court order and not argued by the parties. Instead, the court of appeals focused on the futility of applying “contemporary community standards” to a global medium. The court found that “web publishers are without any means to limit access to their sites on the basis of the geographic location of particular Internet users.” Accordingly, that First Amendment analysis was affected dramatically by “the unique factors that affect communication in the new and technology-laden medium of the web.”⁵³

The court distinguished the way obscenity law applies to other technologies, noting that publishers can choose not to mail unsolicited sexually explicit material to certain locales and phone-sex operators can refuse to accept calls from particular communities. Because the court found that “the Internet ‘negates geometry’” and a Web publisher “will not even know the geographic location of visitors to its site,” it reasoned that application of a First Amendment standard on the basis of community standards “essentially requires that

⁵¹47 U.S.C. § 231(e)(6).

⁵²ACLU v. Reno II, 31 F. Supp.2d 473 (E.D. Pa. 1999). *See also* ACLU v. Reno II, 1998 WL 813423 (E.D. Pa. 1998) (issuing temporary restraining order).

⁵³ACLU v. Reno II, 217 F.3d 162, 174–175 (3d Cir. 2000).

every Web publisher subject to the statute [must] abide by the most restrictive and conservative state's community standards in order to avoid criminal liability."⁵⁴ It held that "this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of the likelihood of unconstitutionality of the entire COPA statute."⁵⁵ The court based its holding entirely on the likely unconstitutionality of "community standards" in the Internet context.

The court of appeals made clear that its critique of the "harmful to minors" standard applies equally to the test for obscenity. It stated that *Miller v. California* "has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications." It further noted that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations."⁵⁶

The Supreme Court Weighs In

The Third Circuit's decision set the stage for a comprehensive review of the jurisprudence governing obscenity, and the Supreme Court did not shy away from this task. By a vote of 8-1, the Court reversed the court of appeals and remanded the case for further proceedings, keeping the injunction in place in the interim. Although ostensibly a very narrow ruling that affected only the Third Circuit's rationale, the Court's decision in *Ashcroft v. ACLU* opened a new chapter in the ongoing debate over obscenity. The five separate opinions recalled the doctrinal conflicts of the 1960s with some justices embracing local standards for obscenity, others endorsing national standards (as interpreted by local juries), and still others remaining undecided or choosing none of the above. It leaves to the court of appeals the unenviable task of deciding whether COPA lives or dies and fashioning a rationale that will garner majority support on a fractured Supreme Court.

Finding a majority view in *Ashcroft v. ACLU* is a daunting task. Although five justices signed onto various portions of the opinion

⁵⁴ *Id.* at 169, 175.

⁵⁵ *Id.* at 174.

⁵⁶ *Id.* at 179-180.

of the Court, the only point on which they could agree was that “COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.”⁵⁷ Beyond that one point of agreement, there was a significant division over how community standards should apply to the Internet.

Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, took the hardest line, reasoning that jurors may draw on their personal knowledge of their own communities for which the law does not specify a particular geographic area. If, as a result, speakers on the Internet must conform to varying local standards, so be it. Those who fear draconian local enforcement can simply avoid using the Internet as a means of communication. As Justice Thomas put it, “[I]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” In this view, unreasonable local standards are moderated by the “serious merit” criterion, which enables appellate courts to set “a national floor for socially redeeming value.”⁵⁸

Justices O’Connor and Breyer each wrote separately to express their disagreement over which community standard to apply. Although both concurred in the judgment of the Court, they argued that the Constitution requires the use of a national standard to judge speech on the Internet. Otherwise, Justice Breyer wrote, “the most puritan of communities” would have “a heckler’s Internet veto affecting the rest of the nation.”⁵⁹ He cited language from COPA’s legislative history for support that Congress intended to employ an “adult” standard rather than a “geographic” standard for determining which material is “suitable for minors.” Justice O’Connor similarly expressed some concern that the use of local community standards “will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases.” She suggested that *Miller* allowed the application of local standards but did

⁵⁷ 122 S. Ct. 1700, 1713 (2002) (emphasis in original).

⁵⁸ *Id.* at 1710, 1712 (citation omitted).

⁵⁹ *Id.* at 1716 (Breyer, J., concurring).

not mandate their use, and disputed the Court's earlier conclusion that a national standard is "unascertainable."⁶⁰

Although Justices O'Connor and Breyer expressed concern about applying local community standards to Internet speech, both acknowledged that jurors inevitably would base their assessments of a national standard to some extent on their local perceptions. They found the prospect of such inherent regional variations to be constitutionally acceptable "in a system that draws jurors from a local geographic area."⁶¹ Their two concurring opinions suggested that applying a national standard on remand might be sufficient to cure any constitutional defects in COPA.

Justice Kennedy, on the other hand, was far less positive about the law's prospects. Joined by Justices Souter and Ginsburg, he wrote that there is a very real likelihood that COPA is overbroad and cannot survive a facial challenge. He suggested that the Court should proceed cautiously in light of Congress's attempt to fashion a narrower law than the CDA, and, for that reason, the Third Circuit's community standards rationale "stated and applied at such a high level of generality" could not be sustained. Nevertheless, Justice Kennedy explained that a range of concerns may invalidate COPA's variable obscenity standard, including the variation in community standards, the question of what constitutes the work "as a whole" on the Internet, and the type and amount of speech restricted by COPA, among other factors.

Such questions, he reasoned, are interrelated and require comprehensive review by the court of appeals. Justice Kennedy stressed that such review must give special weight to the Internet's unique status, because "when Congress purports to abridge the freedom of a new medium, [courts] must be particularly attentive to its distinct attributes, for 'differences in the characteristics of new media justify . . . differences in the First Amendment standards applied to them.'" Despite "grave doubts that COPA is consistent with the First Amendment," Kennedy concluded that the Court should await a more thorough analysis by the Third Circuit.⁶²

⁶⁰ *Id.* at 1714–15 (O'Connor, J., concurring).

⁶¹ *Id.* at 1716 (Breyer, J., concurring); *Id.* at 1715 (O'Connor, J., concurring).

⁶² *Id.* at 1718–22 (Kennedy, J., concurring) (citations omitted).

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The sole dissenter was Justice Stevens, author of the Court's opinion in *Reno v. ACLU*. In his view, it is "quite wrong to allow the standards of a minority consisting of the least tolerant communities" to regulate access to the World Wide Web. In its original form, Justice Stevens noted that the community standards formulation "provided a shield for communications that are offensive only to the least tolerant members of society." Before *Roth* infused obscenity determinations with First Amendment considerations, courts judged such cases by the presumed impact of sexually oriented material on the most vulnerable members of society. After *Roth*, courts asked whether the *average* person, rather than the most sensitive, would find that material patently offensive, considering contemporary community standards. In the Internet context, however, Justice Stevens found that "community standards become a sword rather than a shield" because "[i]f a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web."⁶³

Acknowledging that COPA was an improvement over the CDA, Justice Stevens nevertheless concluded that the changes were insufficient to cure the law's constitutional deficiencies. The elements of COPA's "harm to minors test" did not narrow the law sufficiently, he concluded, because the "patently offensive" and "prurient interests" elements of the standard depended on a community standard. The requirement that the material be "in some sense erotic" similarly did not narrow its scope, because "[a]rguably every depiction of nudity—partial or full—is in some sense erotic *with respect to minors*."⁶⁴ Similarly, the "serious value" prong of the test did not narrow the scope of COPA, because it requires juries to determine whether the material has serious value for minors. Accordingly, Justice Stevens concluded that the community standards analysis alone was sufficient to doom COPA.

In sum, the Court in *Ashcroft v. ACLU* not only declined to decide whether COPA violates the First Amendment, it also provided no clear guidance for how the court of appeals should answer that ultimate question. The only point of clarity was that eight justices were dissatisfied with the Third Circuit's initial attempt. On remand, the appellate court must craft a decision that will survive Supreme

⁶³*Id.* at 1722–23 (Stevens, J., dissenting)

⁶⁴*Id.* at 1725 (emphasis in original).

Court review by parsing the five separate opinions. Three justices (Thomas, Scalia, and Chief Justice Rehnquist) clearly support the law and approve using local community standards to define obscenity; one justice (Stevens) clearly opposes the law because of its reliance on local community standards; three justices (Kennedy, Souter, and Ginsburg) are deeply skeptical of the law and are wary of imposing local standards on a global medium; and the two remaining justices (Breyer and O'Connor) may support the law if it employs a national standard for variable obscenity.

The Third Circuit could look to earlier Supreme Court decisions for guidance, but will find no definitive answers there. The current divisions on the Court largely replicate the debates that took place between 1957 and 1973, the tumultuous period between the decisions in *Roth* and *Miller*. While *Miller's* three-part obscenity test settled, at least for a time, how obscenity should be determined, *Ashcroft v. ACLU* reopened the old controversies and raised new questions of how to define and enforce a "variable obscenity" standard for a medium that does not respect geographic boundaries.

The Problem of Child Pornography

Although the Court last term left many unanswered issues regarding obscenity, it faced squarely and answered clearly some fundamental questions involving what, for most people, is a far more difficult subject—the problem of child pornography. Like obscenity, child pornography is a category of communication that is unprotected by the First Amendment. The Supreme Court has approved laws that ban the creation, distribution, or even the mere possession of material that depicts the sexual exploitation of children.⁶⁵ Unlike the judicial dispute in the obscenity cases, however, there is no disagreement about whether child pornography should be outlawed, because the focus of the law is on the child abuse committed in its production. As Justice Kennedy explained in *Ashcroft v. Free Speech Coalition*, the rationale for treating child pornography as unprotected speech is "based upon how it [is] made, not on what it communicate[s]."⁶⁶

⁶⁵ *Osborne v. Ohio*, 495 U.S. 103 (1990); *Ferber v. New York*, 458 U.S. 747 (1982).

⁶⁶ 122 S. Ct. 1389, 1401 (2002).

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Because the purposes to be served by the laws are distinct, the respective tests for obscenity and child pornography are quite different. In *Ferber v. New York*, the Supreme Court noted that in child pornography cases the usual test for obscenity is “adjusted” in several respects. First, if the material depicts a minor engaged in sexual conduct there is no requirement that it appeal to the prurient interest of the average person. Second, the material need not be considered as a whole. Third, the “serious merit” of a work cannot save it to the extent it contains child pornography.⁶⁷ As the Court noted, “[i]t is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.” It added that “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.”⁶⁸

This stricter standard of liability has been upheld because of the government’s interest in protecting children from actual sexual abuse. At the same time, however, the Supreme Court has stressed that the First Amendment limits the range of conduct that can be prohibited. In *Ferber*, the Court stated that the government’s interest was limited to prohibiting “sexual conduct by children below a specified age,” and it noted that “descriptions or other depictions . . . which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection.” It suggested that a person could avoid the reach of child pornography laws by using “a person over the statutory age who perhaps looked younger,” or by depicting a “[s]imulation outside of the prohibition.”⁶⁹

Congress Targets High-Tech Kiddy Porn

As in the case of obscenity, technological advances prompted changes in the law prohibiting child pornography. In 1996 Congress passed the Child Pornography Prevention Act of 1996 (CPPA) to restrict “high-tech kiddie porn” by prohibiting the possession, sale, receipt, or distribution of computer-generated images that “appear to depict minors engaging in sexually explicit conduct.” The law

⁶⁷ *Ferber*, 458 U.S. at 764–765.

⁶⁸ *Id.* at 761–762 (citation omitted).

⁶⁹ *Id.* at 763–765.

also targeted “pandering,” defined as advertising, promoting, or distributing any sexually oriented image “in such a manner that conveys the impression” it depicts a minor engaging in sexually explicit conduct.⁷⁰ A separate section of the law prohibited the creation of child pornography using “morphed” images of actual children. Even before the passage of these amendments, federal law prohibited the distribution of actual child pornography by computer, and a number of individuals had been convicted for their online activities.⁷¹

Unlike the Supreme Court’s rationale in *Ferber* that child pornography laws exist to protect children who are exploited in the production of sexually explicit materials, the CPPA was predicated on the assumption that computer-generated child pornography could be used as “a tool of incitement for pedophiles and child molesters, and a tool of seduction for child victims” even if it does not involve the use of children in its production. The Senate Report on the legislation described computer-generated images “which appear to depict minors engaging in sexually explicit conduct” as being “just as dangerous to the well-being of our children as material produced using actual children.”⁷²

By expanding federal child pornography law to prohibit images that do not depict actual humans, the CPPA created significant tensions with the Supreme Court’s jurisprudence in this area. The new focus on depictions of “virtual children” having sex severed the direct link between the law and child abuse and strained the constitutional boundaries articulated in *Ferber*. Accordingly, Congress sought to reduce the constitutional friction by indicating in the legislative history (but not in the law’s text) that the CPPA did not prohibit nonobscene images of adults engaging in sexually explicit conduct “even where a depicted individual may appear to be a minor.”⁷³ This attempt to keep faith with *Ferber*, however, undermined the CPPA’s internal logic. If minors may be seduced

⁷⁰18 U.S.C. §§ 2256(8)(B), 2256(8)(D).

⁷¹*E.g.*, *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) *cert. denied.*, 517 U.S. 1157 (1996); *United States v. Can.*, 921 F. Supp. 362 (E.D. La. 1996); *United States v. Maxwell*, 42 M.J. 568 (A.F. 1995).

⁷²S. REP. 104–358, 19 (1996).

⁷³*Id.* at 21.

using computer-generated images that appear to be minors, they certainly could be seduced through the use of constitutionally protected materials depicting youthful looking adults. The question posed by the CPPA was whether the courts would accept the government's argument that the indirect link between sexual abuse and computer-generated images of virtual children could support the law.

Reaffirming First Principles: *Ashcroft v. Free Speech Coalition*

The Court in *Ashcroft v. Free Speech Coalition* directly addressed this question and rejected the government's attempt to extend the concept of child pornography to include images of imaginary children. Justice Kennedy's majority opinion explained that CPPA's prohibition of virtual child pornography exceeded the logic of *Ferber*, which identified the state's interest as "protecting the children exploited by the production process."⁷⁴ The litigants in the case did not challenge the CPPA provisions targeting "morphed" images of actual children, and the Court did not address that issue. With respect to the other CPPA restrictions, however, it was unwilling to expand the categories of unprotected speech to include "virtual" child pornography, and it held that the law violated the First Amendment.

In contrast to actual child pornography, the Court pointed out that CPPA prohibits speech "that records no crime and creates no victims by its production." It rejected the government's claim that computer-generated images are "intrinsically related" to child abuse, finding that the causal link is "contingent and indirect." The First Amendment distinguishes between speech and conduct, and it sharply limits the government's ability to regulate speech on the basis of its "bad tendency" to encourage misconduct. Consequently, the Court found that the CPPA could not be justified by arguments that virtual child porn promotes the bad thoughts of pedophiles. Justice Kennedy stressed that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."⁷⁵

⁷⁴122 S. Ct. 1389, 1396, 1401 (2002).

⁷⁵*Id.* at 1403.

Nor could the law rest on the argument that pedophiles might use virtual pornography to lure and seduce children. The majority pointed out that “many things, innocent in themselves . . . such as cartoons, video games, and candy . . . might be used for immoral purposes, yet we would not expect those to be prohibited because they might be misused.”⁷⁶ Again, conduct is the key. If an adult supplies a minor with obscene materials or solicits a child to engage in sex, that behavior can be punished without imposing any restrictions on speech. The Court cited its precedents relating to incitement to highlight the principle that the government cannot suppress speech “because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”⁷⁷

The majority opinion also emphasized the significant First Amendment impact of the CPPA. Its discussion outlined the distinctions between obscenity and child pornography, pointing out that the latter category does not require the government to show that the material to be prohibited, when taken as a whole, appeals to the prurient interest or is patently offensive. Nor must a prosecutor demonstrate that the material lacks serious literary, artistic, political, or scientific value. Images that satisfy the requirements of the CPPA can be proscribed, regardless of the way in which they are presented, including possibly “a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse.” Because child pornography enables the criminalization of speech without regard to its merit, Justice Kennedy pointed out that well-regarded depictions of teenage sexuality could be banned, including performances of *Romeo and Juliet*, or contemporary films such as *Traffic* or *American Beauty*.⁷⁸

The Court’s holding does not impair the government’s ability to prohibit obscene depictions of child pornography—virtual or real—so long as the material falls within the three-part *Miller* test. The majority suggested that “[p]ictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not,” although it also noted that images of “what appear to be 17-year-olds engaging in sexually

⁷⁶ *Id.* at 1402.

⁷⁷ *Id.* at 1403 (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)).

⁷⁸ *Id.* at 1400.

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explicit activity do not in every case contravene community standards.”⁷⁹

The *Free Speech Coalition* decision generated four opinions, but provided far more clarity than the decision in *Ashcroft v. ACLU*. Four justices (Stevens, Souter, Ginsburg, and Breyer) joined Justice Kennedy’s majority opinion, providing a clear rule on the limits of the child pornography doctrine. Justice Thomas issued an opinion concurring in the result, but indicating that he might withdraw support for the ultimate finding if the government in a future case could demonstrate technical advances in virtual imaging that hamper its ability to prosecute actual child pornography.⁸⁰ Justice O’Connor concurred in part and dissented in part, disagreeing with the majority’s rejection of a ban on computer-generated child pornography. She agreed that the possible application of CPPA restrictions to images produced using youthful-looking adults was overly broad and that the ban on pandering material that “conveys the impression” it is child pornography was invalid, but took the position that the government could prohibit virtual child pornography to the extent it is “virtually indistinguishable” from the real thing. Justice O’Connor shared Justice Thomas’s view that advances in computer technology could thwart enforcement efforts, and suggested that a narrowing construction to the law would assuage concerns that a ban on virtual child pornography might be too vague or selectively applied.⁸¹

Only Chief Justice Rehnquist, joined by Justice Scalia, dissented outright. The opinion did not address directly the majority’s central premise that *Ferber’s* child pornography standard derives from the need to stop actual child abuse, but defended the CPPA with the argument that the law was carefully crafted to target only hard-core depictions of child sexuality. The dissenters suggested that the majority should have deferred to congressional findings regarding advances in technology and should not have granted a facial challenge without first attempting to interpret the law more narrowly. The Chief Justice (in a paragraph not joined by Justice Scalia) noted that CPPA’s legislative history indicated that Congress did not

⁷⁹*Id.* at 1396, 1400.

⁸⁰*Id.* at 1406–07 (Thomas, J., concurring).

⁸¹*Id.* at 1407–11 (O’Connor, J., concurring in part and dissenting in part).

intend to apply the law to depictions produced with young-looking actors, and, in any event, the danger of overly broad enforcement was remote. The dissent discounted the risk to contemporary films identified by the majority, noting that if the CPPA could be applied “to reach the sort of material the Court says it does, then films such as *Traffic* and *American Beauty* would not have been made the way they were.”⁸²

Where Do We Go from Here?

Whatever else may be said of the Court’s decisions in these two cases, it is clear that they are not the final word on the thorny issues of obscenity and child pornography. The decision in *Ashcroft v. ACLU* remanded the case to the Third Circuit, thus perpetuating the debate that the Supreme Court did not resolve. *Ashcroft v. Free Speech Coalition* effectively answered the legal question before the Court, but provoked a political reaction that inevitably will test the resilience of the majority’s reasoning.

Virtual Child Pornography: The Sequel

The ink was scarcely dry on the *Free Speech Coalition* opinion when Attorney General John Ashcroft announced the introduction of new legislation to replace the CPPA. Two weeks after the Court’s decision, the attorney general unveiled H.R. 4623, the Child Obscenity and Pornography Prevention Act of 2002. The bill, crafted by the Justice Department to respond to the Supreme Court, was introduced in the House of Representatives by Rep. Lamar Smith and 69 cosponsors. It quickly passed the House and was referred to the Senate.

Part of H.R. 4623 simply puts into statutory form Justice Kennedy’s observation that most images of young children engaged in sex acts could be considered obscene under the *Miller* test. Although it sets forth a detailed definition of the term “prepubescent child” and lists the sex acts for which depictions are proscribed, the legislation would add little—if anything—to existing obscenity law. Although it raises the question of whether the government may ban mere possession of virtual child pornography, in most circumstances materials covered by the proposed obscenity ban fall under the current federal obscenity statute.

⁸² *Id.* at 1412 (Rehnquist, C.J., dissenting).

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Otherwise, the provisions of H.R. 4623 seeking to restore the general prohibition of virtual child pornography, and to reimpose restrictions against pandering child pornography, represent a direct challenge to the majority opinion in *Free Speech Coalition*. The legislation seeks to prohibit depictions of children engaged in sexually explicit conduct, including computer-generated images that are “indistinguishable” from actual minors. It defines such imagery to be “virtually indistinguishable” from reality “in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is that of an actual minor engaged in sexually explicit conduct.” It excludes noncomputer-generated images from the definition of virtual child pornography, including drawings, cartoons, sculptures, or paintings depicting minors or adults.⁸³

Although this proposed rewrite of the standard for virtual child pornography is narrower than the CPPA’s prohibition on sexual imagery that “appears to be” of a child, it is far from certain that it would make a difference to a reviewing court if H.R. 4623 (or something like it) is enacted. The Court in *Free Speech Coalition* rejected the government’s argument that the CPPA was valid because the material prohibited by it is “virtually indistinguishable” from actual child pornography, and that such images are “part of the same market and are often exchanged.” The majority explained that the child pornography doctrine is concerned with the “production of the work, not its content.”⁸⁴ Thus, any attempt to ban child pornography on the basis of purely imaginary images of children faces an uphill battle.

Thus, while H.R. 4623 is faithful to the arguments presented in Chief Justice Rehnquist’s dissenting opinion and Justice O’Connor’s partial dissent, it cannot be reconciled with the *Free Speech Coalition* majority. What is missing from the proposed law is any recognition that the Court struck down CPPA’s ban on virtual child pornography precisely because it is virtual and not real. As Justice Kennedy put it, a prohibition of virtual child pornography “prohibits speech that records no crime and creates no victims by its production.” Such a law ignores the First Amendment’s “vital distinctions between words and deeds, between ideas and conduct.”⁸⁵

⁸³H.R. 4623, 107th Cong., §§ 3, 5, (June 26, 2002).

⁸⁴122 S. Ct. at 1401, 1404.

⁸⁵*Id.* at 1402, 1404.

Redefining Obscenity

Assuming Congress adopts a new ban on virtual child pornography, reviewing courts will face a relatively straightforward task of measuring the new law's constitutionality by the principles articulated in *Free Speech Coalition*. This job may be affected somewhat by changes in computer imaging technology, but such complications pale compared with the puzzle the Third Circuit must unravel in *Ashcroft v. ACLU*. That court has been tasked with resolving the disputes over the meaning of obscenity that fractured the Warren and Burger Courts, and to apply its findings to a borderless medium of communications.

It is possible that the court of appeals will try to tackle this assignment without reopening the argument over community standards. After all, the district court was able to enjoin COPA without getting into that issue by focusing instead on the overbreadth of the law, its chilling effect on protected expression, and its failure to employ the least restrictive means of protecting children. The litigants similarly avoided the community standards issue and did not brief it their first time before the Third Circuit, largely because they were unwilling to raise questions they could not answer. But despite the appeal of changing the focus of the inquiry away from the more difficult questions, that option probably is unavailable on remand since the Third Circuit teed up the community standards issue and the Supreme Court framed the renewed debate in the same terms.

For six of the nine justices in *Ashcroft v. ACLU*, the community standards question was central to their analyses. Justice Stevens wrote that the issue alone was sufficient to invalidate COPA, while Justices Breyer and O'Connor suggested that the law could be upheld only if the Court applied a national standard for variable obscenity. Justice Kennedy, joined by Justices Souter and Ginsburg, agreed that the court of appeals was correct to focus on the national variation in community standards, but wanted the court to reexamine that issue in light of other First Amendment concerns, such as COPA's overbreadth.

Even if a majority of the Court were not focused on the community standards issue, the prospects of success for a renewed argument based primarily on overbreadth are uncertain. Most members of the Court seemed skeptical of claims that COPA would restrict significant amounts of protected speech. The plurality headed by

Justice Thomas outlined language in COPA that “substantially limit[s] the material covered by the statute,” and noted that the “serious value” requirement would permit appellate courts to set a national floor for any material at risk.⁸⁶ Justice O’Connor wrote that the record on appeal failed to show substantial overbreadth and that COPA applied to a “narrow category of speech.”⁸⁷ She indicated that the serious merit requirement limited significantly the range of material covered by the law, a point Justice Breyer made during oral argument. He challenged ACLU’s counsel to give him a single example of a work that would have serious value for a 21-year-old but not for a 17-year-old, adding, “I can’t think of an example.”

But to recognize that the community standards issue will be a necessary (although nonexclusive) part of the ongoing debate over COPA is a long way from being able to predict how the issue may be resolved. It probably is safe to suggest that Justice Thomas’s *caveat netizen* approach, in which those who fear applying local notions of patent offensiveness should simply stay off the Web, will not gain added traction among the six justices who expressed concern about local standards. However, it is impossible to say whether a majority might opt for a national variable obscenity standard and what that might mean for the future of COPA.

One of the enduring questions of the Warren and Burger Court obscenity cases, left wide open by the Court in *Ashcroft v. ACLU*, is how a national standard could be applied. The Court in *Miller* described national standards as “unascertainable” and an “exercise in futility” that would subject conservative communities to racier material than they otherwise would permit while simultaneously restricting expression in more permissive locales. Justice O’Connor took issue with this conclusion, suggesting that the Internet has facilitated a national dialogue that has made potential jurors more aware of the views of other adults throughout the United States.⁸⁸ Others on the Court expressed doubt about this assumption. As Justice Scalia asked at oral argument, “Can a North Carolina jury decide what is obscene in Los Angeles or Las Vegas?” “What does a person raised all his life in North Carolina know about Las Vegas?”

⁸⁶ 122 S. Ct. at 1710.

⁸⁷ *Id.* at 1714 (O’Connor, J., concurring in part and concurring in the judgment).

⁸⁸ *Id.* at 1714–15.

But these questions sidestep a critical issue that the Court eventually must face—whether a final obscenity determination is a factual matter for juries to decide. Justice Brennan, among others, maintained that reviewing courts have an obligation to independently review challenged materials to ensure that constitutional protections are enforced. This position contributed to the recurring practice in the 1960s of requiring the justices to personally review allegedly obscene publications. Chief Justice Warren disagreed, arguing that no national standard was possible, and that juries could determine “patent offensiveness” and “prurient appeal” under local standards as matters of fact. Justice Harlan, squarely in the middle, argued that national standards should govern federal prosecutions, but that local obscenity standards, and the findings of state courts, should not be second-guessed by federal judges.

In light of this history, the current proposals invoking a national variable obscenity standard for COPA merely raise the same questions previously debated by members of the Court but do not resolve them. Although Justices O’Connor and Breyer implicitly reject Justice Brennan’s position that reviewing courts must resolve obscenity questions as a matter of constitutional law, they would require local juries to determine and apply a “uniform” national standard. In doing so, Justice Breyer acknowledged that regional variations inherent in the jury system would still exist, while Justice O’Connor noted that jurors asked to construe a national standard “will inevitably base their assessments to some extent on their experience of their local communities.”⁸⁹ Given these understandings, it is far from obvious that local variations in enforcement on the basis of the tacit application of local standards masked by jury determinations would be less significant than differences attributable to overtly applied (and more easily reviewable) local community standards. Although Justices Breyer and O’Connor echo former Chief Justice Warren’s call to rely on juries, they ignore his warning that it would be unreasonable to expect local juries to be able to divine a national standard.

If the Court ultimately tried to adopt a national standard for “harmful to minors” material on the Internet, the result would likely

⁸⁹ *Id.* at 1716 (Breyer, J., concurring in part and concurring in the judgment); *Id.* at 1715 (O’Connor, J., concurring in part and concurring in the judgment).

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create a legal fiction in which the standard was national as a matter of law but local in practice. The alternative would be to revive the Court's function as the final arbiter of the legal status of contested materials, a role it is unlikely to embrace. Neither option settles the long-standing disputes in the obscenity debate, and Justice Breyer addressed the issue by pointing to legislative history defining the relevant community nongeographically to encompass "the Nation's adult community taken as a whole" and asking jurors to apply the "reasonably constant" understanding of what material is unsuitable for minors.⁹⁰

Justice Breyer's concept of a national "adult community" begs the important questions of whether any kind of national adult consensus exists for expression that is "inappropriate for minors" and how this consensus may be determined. More important, it undermines the central assumption of both the Supreme Court and the Third Circuit that any ruling on the constitutionality of COPA's variable obscenity test applies equally to the *Miller* standard for adult obscenity. By focusing the inquiry on what the "adult community" considers to be "unsuitable," Justice Breyer accentuated the differences between obscenity under *Miller* and variable obscenity under COPA. This distinction may provide a touchstone for resolving the case on remand without the need to rewrite the law of obscenity, and it highlights an important point about community standards.

As the five majority justices in *Ashcroft v. ACLU* recognized, the concept of contemporary community standards articulated in *Roth* and reaffirmed in *Miller* was intended to replace a 19th century English standard that based obscenity on its presumed impact on the most sensitive or vulnerable members of society. When the Supreme Court infused obscenity law with First Amendment concerns, it used the community standards notion "to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."⁹¹ Despite the continuing disputes over the composition of the community, the guiding principle was clear that speech was not to be punished on the basis of a jury's perceptions of how certain speech may affect members of a vulnerable population.

⁹⁰*Id.* at 1715–16 (Breyer, J., concurring in part and concurring in the judgment).

⁹¹*Id.* at 1707–08 (quoting *Hamling v. United States*, 418 U.S. 87, 107 (1974)).

But the assumptions underlying variable obscenity, with its emphasis on “harm to minors” are just the opposite. Although the doctrine has been dressed up with the trappings of the three-part *Miller* test and its references to community standards, it essentially asks whether the expression at issue appeals to the prurient interest and lacks serious value *for minors*. Indeed, under Justice Breyer’s analysis of the issue, references to “community standards” are largely superfluous and simply confuse the issue. All that really matters under this conception of a national standard is what most adults think is bad for kids, and whether it has enough merit to outweigh the bad.

How such a thing might be determined is anybody’s guess. But by reducing the question to its essence, the constitutional issues surrounding COPA become clearer. The law seeks to impose restrictions on Internet speech on the basis of an evaluation of the likely impact of that speech on the vulnerable population of minors. Such an evaluation is difficult to reconcile with the original concept of community standards regardless of whether its implementation comes through local or national standards. And because the notion of community standards no longer provides a discernable limiting principle in a “harm to minors” analysis, the restrictions in COPA begin to resemble quite closely the CDA’s ban on “indecent” Internet speech. Indeed, the FCC’s indecency standard, rejected by the Court as hopelessly vague when applied to the Internet, applies in just this way: the Commissioners penalize indecent speech on the basis of their notions of a national standard for what is patently offensive for minors.

Although the *Ashcroft* plurality cited cases such as *Hamling v. United States* and *Sable Communications of California, Inc. v. FCC* to support the proposition that local community standards may be used to enforce federal obscenity laws, the same conclusion does not follow for regulating nonobscene speech such as the material covered by COPA. In *Sable*, for example, the Court upheld applying community standards to determine the obscenity of phone-sex services, but it invalidated restrictions on “indecent” dial-a-porn services as a violation of the First Amendment.⁹² Similarly, the Court in *Hamling* approved federal restrictions on sending obscene material

⁹²492 U.S. 115 (1989).

through the mails without requiring that community standards be on the basis of a precise geographic area. At the same time, however, the Court imposed a narrowing construction of the federal statute to make clear that it applied only to obscenity as defined in *Miller*, and not to material considered “lewd, lascivious, indecent, filthy or vile” as set forth in the law.⁹³ In sum, there are no precedents that provide clear guidance on how a national “harm to minors” law should be applied.

The Third Circuit must now determine whether COPA limits too much constitutionally protected speech for both minors and adults, and whether less restrictive alternatives forestall the need for such a law. The court is likely to focus on the importance of community standards, if only because of the litigation history and in response to the Supreme Court’s various views on the issue. If the court accepts Justice Breyer’s “adult community” concept, it must explain how to reconcile a community standards approach with a law that, by its nature, seeks to protect the vulnerable population of minors. If, on the other hand, the court defines the community geographically, it must explain how to determine a national standard, a feat that so far has eluded the Supreme Court. It seems unlikely that the court of appeals will attempt to apply local standards to the Web because a majority of the justices rejected that approach and because it is utterly inconsistent with the panel’s initial decision.

The court must also find a way to determine what sexually oriented material lacks serious literary, artistic, political, and scientific merit for minors. This inquiry will determine whether COPA restricts as much speech as the CDA’s “indecent” standard, or whether its reach is more limited, akin to adult obscenity under *Miller*. Justice Breyer’s suggestion at oral argument that everything that has serious merit for a 21-year-old is equally meritorious for older teenagers would merge the obscenity and variable obscenity doctrines. However, Justice O’Connor’s claim in *Reno v. ACLU* that nude art or discussions of prison rape may lack merit for minors implies that variable obscenity is much like the discredited indecency standard. This “merit gap” between the unconstitutional regulation of indecency and the valid regulation of obscenity is what COPA is all about. Yet no one has up to this point offered a satisfactory way

⁹³*Hamling*, 418 U.S. at 114.

of determining how much speech falls into this gap, or how it may be regulated without unduly restricting speech that is fully protected for adults.

Conclusion

New technology has prompted the Supreme Court to reexamine some of the basic assumptions of its First Amendment jurisprudence. In *Reno v. ACLU*, the Court held that the Internet deserves the strongest protections of the First Amendment. It was the first time that the Court has extended full constitutional immunity to a new communications medium without first applying a reduced level of protection. The Court is now exploring the limits of that conclusion, and in *Ashcroft v. ACLU* and *Ashcroft v. Free Speech Coalition* it examined the interplay of Internet and computer technology with its established doctrines of obscenity and child pornography. By viewing these issues through the lens of new technology, the Court reopened old disputes about the nature of protected and unprotected speech. These controversies are far from settled, and will continue in both the legislative and judicial arenas.