
NOTES

TWO NATIONS, ONE WEB: COMPARATIVE LEGAL APPROACHES TO PORNOGRAPHIC OBSCENITY BY THE UNITED STATES AND THE UNITED KINGDOM

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INTRODUCTION	2121
I. OBSCENITY LAW IN AMERICA	2122
A. <i>What Is Obscene?</i>	2122
B. <i>Who Is Obscene?</i>	2126
C. <i>When and Where Is It Obscene?</i>	2130
D. <i>So What?</i>	2132
II. OBSCENITY IN THE UNITED KINGDOM	2135
A. <i>Basic Similarities Between U.S. and U.K. Obscenity Laws</i>	2136
B. <i>Changing U.K. Obscenity Laws: Why and How?</i>	2138
C. <i>What Changed?</i>	2140
III. PORN IN THE U.S.A.....	2142
A. <i>Fixing Community Standards</i>	2143
B. <i>Fixing the Who and the When</i>	2145
C. <i>The Value of Regulation</i>	2146
CONCLUSION.....	2148

INTRODUCTION

Modern American obscenity law has developed over a period of approximately fifty years.¹ The foundation of the law is built around a single test, the “community standards test,” which tasks a trier of fact with gauging whether given materials would be considered obscene by the standards of the average member of the community in which they are made available.² If that trier of fact deems those materials obscene, then the producer or distributor of

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¹ See *Roth v. United States*, 354 U.S. 476, 484 (1957).

² *Id.* at 489.

such materials may face fines or imprisonment.³ The application of the community standards test has been refined, but never fully clarified.⁴ Thus, questions debated at the test's first official implementation by the Supreme Court in the 1950s are still in question today: What types of materials actually fall within the scope of obscenity? What is the proper definition of the "community" from which we should draw our standards? What role should individual privacy rights play? How do political pressures impact the application of obscenity laws? More recently, how should this standard apply following technological advances, like the internet, which have expanded the volume and variety of potential obscenity available in any given place at any given moment? This Note examines the underlying issues in U.S. obscenity law that raise these questions, yet primarily focuses on the impact of the internet on modern obscenity law in the United States and the United Kingdom.

Part One examines these basic questions and explores their complexities. Part Two introduces and examines recent changes in U.K. law that address many of these same questions. Effective in 2009, the Criminal Justice and Immigration Act 2008 sharpened the United Kingdom's definition of obscenity by imposing a strict liability offense for possession of "extreme pornography."⁵ Until this change, U.K. and U.S. obscenity laws were very similar,⁶ but this new Act imposes greater individual responsibility on consumers of such depictions, and also provides a far more precise definition of the prohibited materials. Part Three attempts to reconcile the tensions in U.S. law with the changes in U.K. law. The discussion focuses on the divergence in the laws and the consequence, if any, such divergence could, or should, have on American obscenity law.

I. OBSCENITY LAW IN AMERICA

A. *What Is Obscene?*

The often-quoted words "I know it when I see it"⁷ perhaps best encapsulate the current state of obscenity law in the United States. This simple phrase, embedded in a plurality opinion, carries with it many of the conflicts and

³ See 18 U.S.C. §§ 1460-1466 (2006).

⁴ See *Miller v. California*, 413 U.S. 15, 30-34 (1973).

⁵ See Criminal Justice and Immigration Act, 2008, c. 4, § 63(1) (Eng.).

⁶ See *infra* Part II.B.

⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The full quote is:

[U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id.

inconsistencies that continue to plague American obscenity law. Beginning in 1957, the Supreme Court first adopted the “community standards” test, defining obscenity by “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁸ Materials that appeal to prurient interests are those “having a tendency to excite lustful thoughts.”⁹ If a trier of fact deems the material obscene, then it falls outside the protections of the First Amendment, as speech “utterly without redeeming social importance.”¹⁰

This community standards and prurient interest formulation reflects the official adoption of an approach widely used in a survey of lower court opinions.¹¹ In the span between *Roth* and *Jacobellis*, though, the evolution of the community standards test was minimal, and, even today, has not developed much beyond the plain meaning of the language. In effect, “I know it when I see it” can still be paraphrased and unpacked as: “I know it when I see it, and someone else will know it when they see it, but what they see and what they know may or may not be what I see and what I know, and that’s okay.”

In review of the standards set forth in *Roth*, the Court was self-conscious of the community standards test’s shortcomings, describing it as “not perfect,”¹² and admitting, “we think any substitute would raise equally difficult problems, and we therefore adhere to that standard.”¹³ Likewise, the dissent in *Jacobellis*

⁸ *Roth v. United States*, 354 U.S. 476, 489 (1957).

⁹ *Id.* at 487 n.20.

¹⁰ *Id.* at 484. The underlying assertion that obscenity should not be protected by the First Amendment is itself a topic of considerable debate. Some “argue that the very definition of obscenity used in *Roth* focuses on controlling thoughts – something that should be beyond the reach of the government.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1017 (3d ed. 2006) (citing David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral First Amendment*, 123 U. PA. L. REV. 45, 82 (1974)). Conversely, others argue that the “community should be able to determine its moral environment.” *Id.* at 1018 (citing HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* 170-71 (1969)). Still others contend that the “major argument for excluding obscenity from First Amendment protection is that it causes antisocial behavior, particularly violence against women.” *Id.* (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58 (1973); Catharine R. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52, 54 (1985)).

¹¹ *Roth*, 354 U.S. at 489 n.26. See generally Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT’L L. 299 (2008) (providing a thorough treatment of the development of obscenity law in the United States, and discussing the *Hicklin* test imported from England, which the lower courts had refused to apply, instead replacing it with the community standards test here adopted by the Supreme Court).

¹² *Jacobellis*, 378 U.S. at 191 (Brennan, J., Plurality Opinion). There are a number of obscenity cases from this period, many of which take slightly different approaches to obscenity, some of them even proposing alternative tests, but none of them claiming great clarity in application, or to actually solve the problem. In this regard, *Jacobellis* serves as a fairly typical restatement of *Roth*.

¹³ *Id.*

observed the flaws inherent in the test, but accepted it.¹⁴ The uneasy compromise the Court struck with the community standards test mirrors the uneasy compromise that is itself the community standards test. In his dissent in *Jacobellis*, Chief Justice Warren framed the basic problem facing a court or legislature when addressing obscenity: “[W]e are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.”¹⁵ It is this tension that has driven the development – or lack of development – of obscenity law in America.

When the Supreme Court revisited the issue in the landmark case of *Miller v. California*,¹⁶ it affirmed the substance of the *Roth* decision, refined and restated the generally agreed upon applications of the community standards test, added some additional prongs to the test, but did little to address the fundamental tensions in the law. The Court acknowledged that “[a]part from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power.”¹⁷ *Miller* was a landmark case, more because its majority opinion finally clarified the formulation of *Roth* than because it added anything new to the debate:

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate “hard core” pornography from expression protected by the First Amendment.¹⁸

¹⁴ *Id.* at 200 (1964) (Warren, C.J., dissenting) (“For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it – at least until a more satisfactory definition is evolved.”).

¹⁵ *Id.* at 199. The Chief Justice continued by describing the ways in which obscenity is an especially delicate problem, even when contrasted with other areas of law which depend on very generally defined terms:

[N]either courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity. In other areas of the law, terms like “negligence,” although in common use for centuries, have been difficult to define except in the most general manner. Yet the courts have been able to function in such areas with a reasonable degree of efficiency. The obscenity problem, however, is aggravated by the fact that it involves the area of public expression, an area in which a broad range of freedom is vital to our society and is constitutionally protected.

Id.

¹⁶ 413 U.S. 15 (1973).

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 29.

Miller, then, served as a partial ratification, and a revision, of ambiguous doctrine, yet left the landscape no more certain than it was with the *Roth* decision in 1957.

Miller created a three part test to replace the single-pronged test in *Roth*.¹⁹ *Roth* only required that the trier of fact consider “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest.”²⁰ *Miller* expanded this formulation with two additional prongs: “(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”²¹ The Court essentially confirmed a few basic principles for the application of the community standards test, and more precisely defined its scope. Further, by adding additional prongs, the Court appears to have created a more stringent test for classifying obscenity. However, even while claiming to “agree[] on concrete guidelines to isolate ‘hard core’ pornography,”²² the Supreme Court’s formulation does little to clarify how to handle the hard cases with which courts struggled during the period between *Roth* and *Miller*. A trier of fact still faces the same decision upon review of given materials: do they see it, or don’t they?

In addition to these refinements, *Miller* also summarized and clarified some basic issues of how courts should apply the community standards test. First, it reiterated the widely-accepted position that materials deemed to be obscene are not protected by the First Amendment.²³ Second, where “obscenity” may appear to be a wide, blanket term that could encompass any manner of repugnant materials, the Supreme Court in *Miller* officially “confine[d] the permissible scope of such [state] regulation [of obscenity] to works which depict or describe sexual conduct.”²⁴ Third, the Court defined the term “community.” Historically, some argued that “community standards” are actually a national standard, while others argued that the term must necessarily

¹⁹ *Id.* at 24.

²⁰ *Id.* (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957))).

²¹ *Miller*, 413 U.S. at 24. Under part (b), the Court provides the following examples of possible state regulatory statutes:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 25.

²² *Id.* at 29.

²³ *Id.* at 23.

²⁴ *Id.* at 24.

be framed more narrowly.²⁵ In *Miller*, the Court determined: “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”²⁶ This sweeping rhetoric, well and good in 1973, proved itself especially flawed with the development of the internet and the subsequent decay of the fiction that Maine and Mississippi can be shielded from depictions of conduct “found tolerable” in Las Vegas, New York City, or anywhere else in the United States or the world.²⁷

Resolving this question of the proper definition of a community only further illustrates the finely tuned balance that the Court was struggling to achieve. Not only is the Court trying to balance, on one hand, “the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely,”²⁸ but also, on still another hand, the right of individual states within that nation to determine to which standards the individual citizens and residents of that state should be held in expressing themselves freely.

The answer to the question of what is or is not obscene, then, comes down to any number of vague and cliché phrases: “it is what the average person in a community thinks is sexually obscene and has no artistic or social merit whatsoever;” “I know it when I see it;” and “obscenity is in the eye of the beholder.” Yet all of these formulations serve only to underscore the fundamental point that obscenity cannot be more precisely defined without upsetting the carefully constructed balance among individual autonomy, community moral standards, various state governments, and the federal government. An examination of who may and may not be subject to prosecution under obscenity statutes further complicates this balance.

B. *Who Is Obscene?*

The law differs depending on who is in possession of the obscene materials and what that individual does with those materials. In *Stanley v. Georgia*,²⁹ the

²⁵ *Id.* at 32 n.13 (“[T]wo Justices argued that application of ‘local’ community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place.”) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964) (plurality) (Brennan & Goldberg, JJ., plurality opinion)). *But see Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting) (“I believe that there is no provable ‘national standard,’ and perhaps there should be none. . . . It is said that such a ‘community’ approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true.”).

²⁶ *Miller*, 413 U.S. at 32. The Court continued, stating “[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.” *Id.* at 33.

²⁷ See *infra* notes 66-81 and accompanying text.

²⁸ *Jacobellis*, 378 U.S. at 199.

²⁹ 394 U.S. 557 (1969).

Supreme Court addressed a state statute that prohibited individual possession of obscene materials, and found that it violated the First Amendment.³⁰ Even where “*Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment,”³¹ the Court held that the “mere private possession of obscene matter cannot constitutionally be made a crime.”³² The Court went on to distinguish the private possession of obscenity from the *Roth* line of cases, which dealt with production and distribution of obscenity.³³ Based on a governmental interest in “regulation of commercial distribution,”³⁴ the Court affirmed regulation in that context, yet was unable to find a concomitant interest in the regulation of individual possession, and so held the statute unconstitutional on privacy grounds.³⁵ The Court frames this right to privacy as “asserting the right to read or observe what he pleases – the right to satisfy his intellectual and emotional needs in the privacy of his own home.”³⁶

In contrast to the Georgia statute addressed in *Stanley*, federal obscenity statutes target the production, transportation, distribution, and sale of obscene material.³⁷ Prohibitions also extend to receiving materials with the intent to

³⁰ *Id.* at 559 (“Appellant argues . . . that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. . . . [W]e agree that the mere private possession of obscene matter cannot constitutionally be made a crime.”).

³¹ *Id.* at 560; see also CHEMERINSKY, *supra* note 10, at 1017 (discussing First Amendment protection of obscenity).

³² *Stanley*, 394 U.S. at 559.

³³ *Id.* at 559-68.

³⁴ *Id.* at 563.

³⁵ *Id.* (citing, inter alia, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (finding state statute prohibiting use of contraceptives to be an unconstitutional invasion of marital privacy)).

³⁶ *Stanley*, 394 U.S. at 565. This formulation of the asserted right may strike one as odd in the context of hardcore pornographic obscenity. The Court goes on to phrase the right a little more abstractly, and perhaps considerably more persuasively:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.

Id.

³⁷ 18 U.S.C. § 1465 (2006). The statute provides:

Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service . . . in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

Id.

sell,³⁸ as well as to the mailing of obscene materials.³⁹ The federal government derives the ability to regulate obscenity in this manner from the power to regulate interstate commerce.⁴⁰ Based on this power, from *Roth* up through the recent past, courts consistently upheld federal obscenity statutes: “[a]lthough the Supreme Court has recognized an individual’s right to privately possess obscene material [citing *Stanley*] . . . it has also rejected the argument that the right to possess obscene material creates a correlative right to receive it, sell it, transport it, or distribute it.”⁴¹

These federal statutes serve as a good baseline for the limits of acceptable state obscenity statutes, and courts have upheld them when distributors assert privacy challenges on behalf of individual consumers analogous to those recognized in *Stanley*.⁴² Dissenters in this line of cases argued “that proscribing distribution or private transportation of obscene materials evacuated the *Stanley* right of significant meaning.”⁴³ For these reasons, they argued, the statutes are overly broad.⁴⁴ One argument is that if what lies at the heart of the *Stanley* decision is the right to personal mental autonomy – freedom from government-imposed regulation of people’s thoughts – then, logically, *Stanley* should extend to one’s right to transport obscene materials across state lines. From this perspective, a general prohibition on the transportation of obscene materials is overly broad.⁴⁵

This odd distinction between rights to transport and distribute obscene materials and the right of individual autonomy to possess obscenity reveals just another of the complexities that underlies the problem. Courts and legislatures are prepared to assert and recognize a legitimate interest in protecting public morality and decency by regulating production, transport, and sale of obscene materials under the interstate commerce clause, yet unwilling to extend this interest to individual possession of obscene materials. Similarly, they are unwilling to recognize the interconnectivity of these principles. It is a curious law that permits private possession, yet not private transport or transfer.

³⁸ § 1466.

³⁹ § 1463.

⁴⁰ See *United States v. Orito*, 413 U.S. 139, 143 (1973) (“[T]he Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce” (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-64 (1973))).

⁴¹ *United States v. Little*, No. 8:07-CR-170-T-24MSS, 2008 WL 151875, at *1 (M.D. Fla. Jan. 16, 2008) (citing *United States v. Orito*, 413 U.S. 139, 141 (1973); *United States v. Twelve 200-Ft. Reels*, 413 U.S. 123, 128 (1973)).

⁴² See *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 155 (3d Cir. 2005) (finding “derivative standing to challenge the constitutionality of the federal statutes regulating the distribution of obscenity on behalf of its customers”).

⁴³ *Id.* at 157.

⁴⁴ *Orito*, 413 U.S. at 147 (Brennan, J., dissenting).

⁴⁵ *Id.* at 146 (Douglas, J., dissenting).

Other government regulatory efforts are in clear contrast to the regulatory approach to obscenity. In the context of illegal drugs, regulation mostly treats possession of illicit substances on at least a similar level as transport and sale, and certainly does not provide a free pass for the possession of such substances in the privacy of one's own home.⁴⁶ Contrasted with this more consistent approach to drug regulation, the stance on obscenity reflects a sort of back-handed ban on obscene materials through the use of the interstate commerce clause. The message appears to be that the federal government may disapprove of obscene materials to protect and promote public moral decency by preventing obscenity from entering the stream of commerce. However, that same protected public may engage in private moral indecency at will. The two positions seem opposed to each other. Maybe it would be better to take a single, unified position: either obscenity is okay in both contexts, or it is not okay in either context.

Perhaps, then, there is something to be said for the dissenting view that a right to possess privately is worthless without related rights. "The right to read and view . . . literature and pictures at home is hollow indeed if it does not include a right to carry that material privately . . ." ⁴⁷ The issue in *Thirty-Seven Photographs* was one of private transport, but it seems unclear at what point a right is actually a legitimate and usable right if severed from other concomitant rights. For example, if the right to bear arms is arguably a fundamental right, as is privacy, would it be problematic if the Supreme Court categorically recognized the right to possess a firearm in the privacy of one's own home, yet allowed the federal government to deny a right to produce, distribute, transfer, or transport a firearm?⁴⁸ Where should the line be drawn between a fundamental right to privacy, as manifested in the private possession of obscene materials, and the associated rights to transport and effectuate possession of those materials?⁴⁹

Not only is it unclear what is and is not obscene, but the underlying rationale for who may be subject to fine and imprisonment by obscenity statutes seems

⁴⁶ See Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-971 (2006).

⁴⁷ *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 381 (1971) (Black, J., dissenting).

⁴⁸ Admittedly, there is a clear and basic difference between obscenity, which theoretically only harms oneself through private possession, and a firearm, which, theoretically, is regulated primarily for its potentially deleterious effects on others. However, in light of the regulation of "extreme pornography" in the United Kingdom, where the change in law was predicated upon the idea that certain types of violent materials encourage violent behavior against others, the connection is not as absurd as it may appear at first consideration. See *infra* notes 102-108 and accompanying text.

⁴⁹ The concept that the vindication of one right may be supported by other rights is deeply rooted in American jurisprudence. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.").

fundamentally in conflict with itself. The confusion continues, though. These uncertainties are only compounded by a further inconsistency: different presidential administrations take different stances on obscenity.

C. *When and Where Is It Obscene?*

An examination of recent presidential administrations reveals the uneven approaches. The Clinton Administration, for example, engaged in almost no obscenity prosecutions,⁵⁰ leading Mary Beth Buchanan, the United States attorney for Western Pennsylvania, in 2007 to assert “that the rarity of obscenity prosecutions during the eight years of the Clinton Administration meant that the pornography industry had come to believe that law enforcement had tacitly ‘agreed to an anything-goes approach.’”⁵¹ These comments occurred in the wake of the Obscenity Prosecution Task Force, established by Attorney General Alberto Gonzalez in 2005, which signaled the Bush Administration’s renewed interest in aggressively pursuing obscenity prosecutions.⁵² One demonstrative instance of the Bush Administration’s position on obscenity is the prosecution of Danilo Croce, a Brazilian lawyer residing in Florida who was indicted for his role as an officer of a corporation that distributed obscene films.⁵³ More recently, however, this vigor has faded

⁵⁰ Note that “obscenity prosecutions” refers only to adult obscenity, not the strict liability offense for the production and possession of child pornography. Prosecutions in that area have been relatively steady and pursued with equal vigor regardless of presidential administration. See Josh Gerstein, *Porn Prosecution Fuels Debate*, POLITICO (July 31, 2009), <http://www.politico.com/news/stories/0709/25622.html>.

⁵¹ Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (discussing prosecutorial efforts to successfully expand the definition of pornography to materials that are purely textual and contain no obscene images, as left open by the court in *Miller*, but under which convictions for purely textual convictions have thus far been blocked by courts).

⁵² See Gerstein, *supra* note 50.

Social conservatives railed against the Clinton Administration for not prosecuting adult obscenity and were disappointed when few such cases were brought in the early years of the Bush Administration. Things perked up a bit in 2005 when Attorney General Alberto Gonzales set up an Obscenity Prosecution Task Force, which ultimately focused on prosecuting fetish, bestiality and so-called fringe porn.

Id.

⁵³ See Jeffrey C. Billman, *Filth, or Free Speech?*, ORLANDO WEEKLY (Aug. 28, 2006), <http://www.orlandoweekly.com/features/story.asp?id=11017> (observing increased activity by the Bush Administration in obscenity prosecutions). The company with which Mr. Croce was affiliated, MFX Media, is perhaps best known for contributing to society the 2007 phenomenon “2 Girls, 1 Cup,” which worked its way into popular culture, and was itself a trailer for the longer work *Hungry Bitches*. The video leaked to the internet “features two women conducting themselves in fetishistic intimate relations, including defecating into a cup, taking turns ostensibly consuming the excrement, and vomiting it into each other’s mouths.” *2 Girls, 1 Cup*, WIKIPEDIA http://en.wikipedia.org/wiki/2_Girls_1_Cup (last modified August 17, 2010).

with the introduction of the Obama Administration, which now appears to be backing away from obscenity prosecutions.

The treatment of Barry Goldman across the transition from the Bush Administration to the Obama Administration reflects one representative example of this shift.⁵⁴ Goldman ran a website⁵⁵ with allegedly obscene material.⁵⁶ During a three-year period from 2006 to 2008, FBI agents conducted an investigation of the website and its content, as well as videos available for purchase through the website. In 2007, “the United States Attorney’s Office, Southern District of New York, declined prosecution of TP productions.”⁵⁷ Although FBI agents indicated that “New York was the logical jurisdiction” based on the “physical address of the office and location of the servers,”⁵⁸ the Bush Administration Department of Justice opted to pursue the case in an alternate jurisdiction. Agents had already requested movies be sent to Virginia in 2006, and then in 2007 and 2008 twice requested films be sent to Montana.⁵⁹ The case was subsequently brought in Montana court, but was “dismissed by a federal judge who called its initiation there ‘the epitome of venue shopping.’”⁶⁰ In 2009, the case resurfaced under the Obama Administration in New Jersey, returning close to where the case started, and where Goldman will probably receive far more favorable treatment.⁶¹

Under the community standards test as articulated by the Supreme Court, choice of venue is of paramount importance.⁶² If obscenity is defined by the sensibilities of an average member of a given community, then choosing which community’s standards to use is most of the battle.⁶³ The move by the Obama Administration to bring the case to New Jersey, rather than continuing to shop the case to other potentially favorable jurisdictions, has “fuel[ed] perceptions by some attorneys that the new administration is stepping back from the aggressive approach the Bush Administration took to prosecuting obscenity.”⁶⁴ However, while Goldman will likely receive a better deal in New Jersey, it is curious that the case resurfaced at all, leading some to speculate about the

⁵⁴ See Gerstein, *supra* note 50.

⁵⁵ Goldman ran <http://www.tortureportal.com>, which is now defunct. Josh Gerstein, *DOJ “Shopped” Porn Case to at Least 3 Offices*, POLITICO (Sept. 29, 2009), http://www.politico.com/blogs/joshgerstein/0909/DOJ_shopped_porn_case_to_at_least_3_offices.html.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Gerstein, *supra* note 50.

⁶³ *Id.* (“Venue ‘is everything in obscenity cases. It’s the whole ball of wax,’ said Larry Walters, an adult-industry defense lawyer.”).

⁶⁴ *Id.*

ultimate underlying motives of the Department of Justice and the Administration as a whole.⁶⁵

Shifting attitudes further compound the difficulties inherent in the doctrine. The community standards test is a manipulable standard, subject to different implementations by different administrations, and thereby further blurring the line between what types of conduct and materials are permissible. Essentially, the state of U.S. obscenity laws is unclear across the board. In regard to time, manner, and place, one cannot know at what time the government will pursue criminal action, what type of material will be deemed obscene, and where it will be deemed obscene.

D. *So What?*

The purpose of this discussion is not necessarily to condemn the current state of obscenity law in the United States. As the courts have acknowledged, this is not a simple issue, and the competing priorities are complex. Perhaps the doctrine as developed is as clear as it can be while still recognizing each of those priorities. It is entirely possible that the courts have struck the correct balance between personal autonomy and a state's interest in moral decency. However, with the many inconsistencies now entrenched in American obscenity law, it seems unlikely that they have. The primary problem with obscenity is the fundamental uncertainty as to what is or is not obscene at any given time in any given place. From a constitutional standpoint, it seems strange to say first, that obscene material is not protected under one's First Amendment rights; second, that it is constitutionally protected as far as personal possession and a fundamental right to privacy; and third, that it is illegal to produce, distribute, transport, or receive obscene materials. With stakes as high as fines and imprisonment, a more coherent doctrine seems warranted.⁶⁶

Other factors further compound these basic uncertainties. Foremost, these problems arise sporadically depending on a given presidential administration's stance. Furthermore, the world is a more connected place than it was when the doctrine first emerged in 1957. First through the globalization of shipping, but even more profoundly through the internet, access to various forms of potentially obscene materials has drastically increased, raising problems for the community standards test. Assuming that the Supreme Court correctly defined a community as a state for the purposes of the community standards test, matters are complicated when a website in one state is simultaneously

⁶⁵ *Id.* (according to David Merchant, Goldman's public defender in Montana, it is "surpris[ing] to hear they re-indicted the case . . . [i]n New Jersey, everybody's going to shrug their shoulders and say 'Who cares?'").

⁶⁶ Warranted, perhaps, but certainly not constitutionally required. *See* *Roth v. United States*, 354 U.S. 476, 491-92 (1957) ("That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . .").

connected to every state. The internet has effectively brought about the Court's fears that a national standard for obscenity does not accommodate the variance in tolerance across states for prurient interests.⁶⁷

To repeat the Court's phrasing, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."⁶⁸ However, with increased technology and connectedness, the community standards of Maine or Mississippi may now effectively punish the people of Las Vegas or New York City for running a website that is not obscene where it is hosted, but only where it is potentially accessed.⁶⁹ Phrased another way, "[i]n the context of the Internet . . . community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web."⁷⁰ Or, still another way, the national community standard against which the dissent in *Jacobellis* argued, and which was officially rejected in *Miller*, now exists almost de facto depending on how the official, local "geographical" community standard is manipulated, undermining the theoretical basis for the doctrine that still stands largely unchanged. Therefore, while it is possible that the community standards test was once a good compromise between competing priorities, the contemporary world appears to have advanced beyond it.

In 2002, the Supreme Court addressed the problematic effects of the internet on U.S. obscenity doctrine, but only indirectly.⁷¹ The Third Circuit had held that "[the Supreme] Court's prior community standards jurisprudence 'has no applicability to the Internet and the Web' because 'Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.'"⁷² The Supreme Court, however, reversed the Third Circuit, finding that "we do not believe that the [internet] medium's 'unique characteristics' justify adopting a different approach."⁷³ The Court continued,

⁶⁷ See *Miller v. California*, 413 U.S. 15, 32 (1973).

⁶⁸ *Id.*

⁶⁹ See *Ashcroft v. ACLU*, 535 U.S. 564, 575-79 (2002) (holding that the Child Online Protection Act (COPA), 47 U.S.C. § 231 (1998), is subject to the community standards test despite the geographic breadth of the internet's reach). *But see* *United States v. Kilbride*, 584 F.3d 1240, 1246-55 (9th Cir. 2009) (responding to appellant's challenge to jury instructions defining obscenity on the basis of "contemporary community standards" by holding that "a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email").

⁷⁰ *Ashcroft*, 535 U.S. at 603 (Stevens, J., dissenting).

⁷¹ *Id.* at 575 (majority).

⁷² *Id.* (citing *ACLU v. Reno*, 217 F.3d 162, 180 (7th Cir. 2000) (discussing the constitutionality of COPA)).

⁷³ *Ashcroft*, 535 U.S. at 583 (choosing to apply the same approach to internet obscenity that reaches a national audience as print publications or dial-a-porn operators that are

“it is the publisher’s responsibility to abide by that community’s standards. The publisher’s burden does not change simply because it decides to distribute its material to every community in the Nation.”⁷⁴ This burden is the same whether the publisher is a traditional publisher or an internet publisher. “If 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.”⁷⁵

However, the Court divided on the question of the continued viability of a community standards test for internet obscenity. Justice O’Connor asserted that “adoption of a national standard is necessary . . . for any reasonable regulation of Internet obscenity.”⁷⁶ Essentially, she argued that jury instructions to jurors in any local community could be asked to contemplate a national attitude towards obscenity without raising constitutional problems, even if a juror’s ultimate judgment would be swayed by his or her own local experiences.⁷⁷ Justice Breyer also wrote separately to address the interplay between the community standards doctrine and the internet. He argued that the correct definition of “community” is actually a national one: “To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”⁷⁸

More recently, the Ninth Circuit interpreted the hesitation expressed by a majority of justices in *Ashcroft* to mean that the community standards should not, in fact, apply to internet obscenity.⁷⁹ Observing the split opinion on this subject, the court found that “[t]he divergent reasoning of the justices in and out of the majority in *Ashcroft* leaves us with no explicit holding as to the appropriate geographic definition of contemporary community standards to be applied here.”⁸⁰ The Ninth Circuit took the Supreme Court’s inability to agree on a “single rationale” as license to view the holding as “that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁸¹ Ultimately, the Ninth Circuit found that the fractured reasoning

similarly held to the community standards of each community reached by their national delivery of potentially obscene materials).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 587 (O’Connor, J., concurring in part and concurring in the judgment).

⁷⁷ *Id.* at 588-89 (“If the *Miller* Court believed generalizations about the standards of the people of California were possible, and that jurors would be capable of assessing them, it is difficult to believe that similar generalizations are not also possible for the Nation as a whole.”).

⁷⁸ *Id.* at 590 (Breyer, J., concurring in part and concurring in the judgment).

⁷⁹ *United States v. Kilbride*, 584 F.3d 1240, 1254 (9th Cir. 2009).

⁸⁰ *Id.* at 1253.

⁸¹ *Id.* at 1254 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

and distinctions of the court in *Ashcroft* “persuades us to join Justices O’Connor and Breyer in holding that a national community standard must be applied in regulating obscene speech on the Internet.”⁸² In effect, the Ninth Circuit has reverted to a pre-*Miller* understanding of community standards as applied to the internet. This reversion raises questions as to the continued vitality of the community standards test, and will likely lead to serious and principled review of the doctrine in the near future.

II. OBSCENITY IN THE UNITED KINGDOM

Part II examines the approach to obscenity adopted by the United Kingdom in the Criminal Justice and Immigration Act 2008.⁸³ The Act creates a strict liability offense for the possession of a narrow subset of materials defined as “extreme pornography,”⁸⁴ raising questions of whether a similar approach could ever take hold in the United States given constitutional protections for individual privacy.⁸⁵ This inquiry will attempt to discern first, if this approach makes more or less sense than the American approach; and second, if this approach could, or should, influence the United States in the future.

Like many countries, the United Kingdom has a long history of grappling with the problem of obscenity from the standpoints of societal and individual wellbeing. Judicial application of the 1857 Obscene Publications Act produced the *Hicklin* test, which was used in both the United Kingdom and the United States until rejected by the U.S. Supreme Court in 1957.⁸⁶ The *Hicklin* test focused on the susceptibility of those exposed to given materials, specifically “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences.”⁸⁷ The Obscene Publications Act of 1959 (“1959 OPA”) amended an earlier version of the OPA to “provide for the protection of literature” and “strengthen the law concerning pornography.”⁸⁸ However, in 2003, the United

⁸² *Id.*

⁸³ Criminal Justice and Immigration Act, 2008, c. 4 (Eng.).

⁸⁴ *See id.* at § 63(1).

⁸⁵ *See Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (upholding individual rights to possession of obscene materials in the privacy of one’s home). *But see* 18 U.S.C. § 2252 (2006) (imposing strict liability for the possession of child pornography).

⁸⁶ *See Boyce*, *supra* note 11, at 310-15 (discussing the preeminence of the *Hicklin* test and its ultimate failure both in the United States and the United Kingdom).

⁸⁷ *Queen v. Hicklin*, (1868) 3 L.R.Q.B. 360, 371.

⁸⁸ Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, Introduction (Eng.). The 1959 OPA was modified and amended by a number of other acts following 1959: Obscene Publications Act, 1964 (Eng.), Criminal Justice Act, 1967 (Eng.), Courts Act, 1971 (Eng.), Criminal Law Act, 1977 (Eng.), Cable and Broadcasting Act, 1984 (Eng.), Police and Criminal Evidence Act, 1984 (Eng.), Cinemas Act, 1985 (Eng.), and the Broadcasting Act, 1990 (Eng.). *See* Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66 (Eng.), *available at*

Kingdom began developing an additional check on obscenity in the Criminal Justice and Immigration Act to match shifting trends in society and technology.⁸⁹ This 2008 Act, effective in relevant part as of January 26, 2009, introduced a new offense for the possession of extreme pornography.⁹⁰

A. *Basic Similarities Between U.S. and U.K. Obscenity Laws*

In contrasting modern day U.S. approaches to obscenity with those in the United Kingdom, the basic historical similarities are relevant. Not only did both countries use the *Hicklin* test for many years, but even in divergence after their ultimate rejections of the *Hicklin* test, both countries took similar steps in reform.⁹¹ As discussed, the United States developed a vague community standards test, which targeted producers and distributors of obscenity rather than individual possessors.⁹² Likewise, the 1959 OPA in the United Kingdom created a relatively vague definition of obscenity and targeted only those who published obscene materials, not those who possessed those same materials.⁹³ The definition utilized in the 1959 OPA was:

For the purposes of this Act an article shall be deemed to be obscene if its effect or . . . the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.⁹⁴

In comparison, the key language in the United States was, and essentially remains, “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”⁹⁵ The language is not identical, yet the effect of the text appears quite similar. In determining whether a given article “tend[s] to deprave and corrupt” or “appeals to prurient interest,” both formulations of the obscenity definition leave much to the imagination and give little guidance to a trier of fact in determining what is or is not obscene. Although the language of the 1959 OPA does not mention a community standards test, one can guess that reasonable individuals from different locales in the United Kingdom could

<http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1128038>. The relevant language quoted, though, is from the Obscene Publications Act of 1959.

⁸⁹ Criminal Justice and Immigration Act, 2008, c. 4 (Eng.).

⁹⁰ *Id.* at § 63.

⁹¹ See *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (describing the *Hicklin* test and the American jurisprudential movement away from it); *Cf.* Obscene Publications Act 1959, 7 & 8 Eliz. 2, c. 66 (Eng.) (amending and strengthening the previous laws concerning pornography).

⁹² See *supra* Parts I.A. and I.B.

⁹³ See Obscene Publications Act 1959, 7 & 8 Eliz. 2, c. 66, § 1(1) (Eng.).

⁹⁴ *Id.*

⁹⁵ *Roth*, 354 U.S. at 489.

differ broadly on whether or not an article would “tend to deprave and corrupt” in a wide range of “relevant circumstances.”

A further similarity between the two approaches is the specific activity the standards target for punishment. The 1959 OPA focused on “any person who, whether for gain or not, publishes an obscene article”⁹⁶ and imposed fines or imprisonment on those in violation of the Act.⁹⁷ Likewise, the U.S. cases following the adoption of the community standards test refused to impose liability on a person who merely possessed pornography in their homes; it instead targets producers, distributors, and transporters of obscenity.⁹⁸ Without examining the underlying reasons for the distinction recognized by both the United States and United Kingdom between production or distribution on the one hand and personal possession on the other, it is curious that both countries found it expedient to permit private possession of obscenity, even while taking a contrary stance against its publication.

A final key similarity is the exception for works that may have social value in addition to being prurient or corruptive forces. This exception is found both in the reformulation of the community standards test in *Miller* and in the 1959 OPA. *Miller* phrased the exception as a third prong of the test in determining if materials are obscene; it asks “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁹⁹ The 1959 OPA phrases the exception so that “[a] person shall not be convicted . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.”¹⁰⁰ The concern about stifling works of social value reflects a backlash to the *Hicklin* test utilized in both countries in the 1950s.¹⁰¹

In 2003, however, the United Kingdom expanded on the framework of the 1959 OPA and began work on the Criminal Justice and Immigration Act 2008, altering its obscenity law. These changes introduce a new approach to regulation of obscenity not yet found in American law; it may bear consideration as the United States continues its discourse on obscenity and seeks its own regulatory solutions.

⁹⁶ Obscene Publications Act, 1959, § 2(1).

⁹⁷ *Id.* at § 2(1)(a)-(b) (describing the liability of one who publishes an obscene article).

⁹⁸ *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (“[W]e agree that the mere private possession of obscene matter cannot constitutionally be made a crime.”).

⁹⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁰⁰ Obscene Publications Act, 1959 § 4(1) (Eng.).

¹⁰¹ *See Boyce, supra* note 11, at 311-12 (discussing the application of the *Hicklin* test).

B. *Changing U.K. Obscenity Laws: Why and How?*

The changes in U.K. obscenity law were sparked by the 2003 murder of Jane Longhurst by Graham Coutts.¹⁰² Coutts claimed that the strangulation occurred during consensual sex, yet “the jury ruled Coutts strangled Miss Longhurst for his own sexual gratification.”¹⁰³ At trial, “[e]vidence . . . showed Coutts had spent hours viewing violent images before and after killing Miss Longhurst.”¹⁰⁴ Furthermore, “Coutts said he had been using the internet to look for images involving asphyxial sex and strangling for about eight years.”¹⁰⁵ Typical examples involve “staged photos and video of usually nude women appearing to be strangled, suffocated, hanged and drowned.”¹⁰⁶ Following the trial, other grisly details aside, Jane Longhurst’s mother asserted, “I feel pressure should be brought to bear on internet service providers to close down or filter out these pornographic sites, so that people like Jane’s killer may no longer feed their sick imaginations and do harm to others.”¹⁰⁷ Ms. Longhurst’s sentiments were echoed by a juror after the case, who noted the difficulties inherent in such a crackdown: “Yes, the police are going to struggle because these websites come from all over the world but it has got to be possible, whether it’s the provider who is the one who is responsible or what.”¹⁰⁸

The United Kingdom’s initial response to the murder of Jane Longhurst indeed targeted the websites directly.¹⁰⁹ Seeking international support, U.K. authorities “invited foreign law enforcement agencies to discuss ways of clearing the internet of such material.”¹¹⁰ However, where there is a general consensus regarding the impropriety of child pornography, there is no such consensus regarding adult pornography. According to BBC crime correspondent Neil Bennett, “[a]ttitudes towards what kind of material should be illegal differ around the world, and the resources for policing it are

¹⁰² Chris Williams, *Violent porn crackdown: Possession loophole to be closed*, THE REGISTER (Aug. 30, 2006), http://www.theregister.co.uk/2006/08/30/pornography_possession_laws/.

¹⁰³ *MP calls for violent porn ban*, BBC NEWS (Feb. 9, 2004) http://news.bbc.co.uk/2/hi/uk_news/england/berkshire/3471441.stm.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Declan McCullagh, *Necrobabes.com leads to murder conviction*, C-NET POLICE BLOTTER (June 21, 2007) http://news.cnet.com/Police-Blotter-Necrobabes.com-leads-to-murder-conviction/2100-1047_3-6192232.html.

¹⁰⁷ *MP calls for violent porn ban*, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ *U.K. police seek web porn crackdown*, BBC NEWS (Feb. 5, 2004), http://news.bbc.co.uk/2/hi/uk_news/3460855.stm (“U.K. police are contacting other forces worldwide in an attempt to close down on websites with sexually violent content.”).

¹¹⁰ *Id.*

insufficient in many countries.”¹¹¹ BBC News Online technology correspondent Mark Ward expanded these difficulties to their logical conclusion: “[E]ven if you can get one ISP to take a site down, there is so much competition to host sites around the world that it will probably appear on another before long.”¹¹² Nevertheless, the United Kingdom urged other countries, notably the United States, to take down offensive websites.¹¹³ Two websites in particular, visited by Coutts, were hosted in the United States.¹¹⁴ While sympathetic, the United States took no action due to constitutional impediments.¹¹⁵

Unable to effectively control the sources of obscenity, the United Kingdom turned to an alternative mechanism for limiting obscenity. The difficulty of policing the global internet by any single country, or group of countries, is central to the larger policy questions in any discussion of obscenity. Unsurprisingly, the issue predominated in the debate leading up to the adoption of the Criminal Justice and Immigration Act 2008. “[T]he global nature of the Internet means that it is very difficult to prosecute those responsible who are

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *US and UK crack down on web porn*, THE GUARDIAN (Mar. 9, 2004), <http://www.guardian.co.uk/technology/2004/mar/09/usnews.internationalnews>.

¹¹⁴ The two sites are currently non-operational. HANGINGBITCHES, <http://hangingbitches.com> (last attempted visit May 9, 2010); DEATH BY ASPHYXIA, <http://deathbyasphyxia.com> (last attempted visit May 9, 2010). Coutts also visited another site, NECROBABES, <http://necrobabes.com> (last visited May 9, 2010). Although NecroBabes no longer hosts content, the front page of the site contains a brief mission statement regarding “very politically incorrect fantasies” and censorship: “The material we produce is fanciful, even cartoonish in many regards; there is nothing realistic about it. Our viewers know this. Far from normalizing violence, it relegates it squarely into the realm of fantasy.” *Id.* The message also observes the posited connection between the pornography and crime and dismisses it as attributable to the idiosyncrasies of individual consumers, not the material itself: “It is not the absence or presence of such fantasies that drives people to acts of violence or not, it is the absence or presence of a conscience.” *Id.* And, it appeals to logic “[T]here is no evidence for such a link between those who commit acts of rape and violence and their consumption of pornography other than the fact that many people who commit acts of violence also consume pornography. Many dentists also consume pornography. Does pornography also lead to dentistry?” *Id.*

¹¹⁵ *US and UK crack down on web porn*, *supra* note 113 (“The spokesman noted the legal implications of a crackdown were ‘more complicated’ than banning child pornography, for example, because of the first amendment in the US, which establishes freedom of expression.”). More recently, U.K. political figures have urged the United States to take down other websites that they find problematic. See Deborah Summers, *Harman urges Schwarzenegger to ‘terminate’ prostitute website*, THE GUARDIAN (Sept. 30, 2009), <http://www.guardian.co.uk/politics/2009/sep/30/harriet-harman-arnold-schwarzenegger-prostitution>.

mostly operating from abroad.”¹¹⁶ Proposed legislation would “strengthen the criminal law in respect of possession of a limited category of extreme material featuring adults . . . to reduce the demand for such material and to send a clear message that it has no place in our society.”¹¹⁷ The focus of the new law, then, is to target possession of a narrow band of “violent and abusive” or “extreme” pornographic material to “mirror the arrangements already in place in respect of child pornography.”¹¹⁸

C. *What Changed?*

The Criminal Justice and Immigration Act 2008 is a freestanding act that serves to bolster the prior existing 1959 OPA. The 2008 Act differs from the 1959 OPA in two key ways. First, the Act shifts the focus from production and publication of obscene materials to individual possession by making it an “offence for a person to be in possession of an extreme pornographic image.”¹¹⁹ This new criminal offense is in clear contrast with the 1959 OPA, which deals with publication and production, not possession.¹²⁰ Similarly, the 2008 Act differs from the analogous U.S. laws, which also do not prohibit possession in any way on privacy grounds.¹²¹

Second, the Criminal Justice and Immigration Act 2008 provides a far more precise definition of prohibited material. The Act begins by incisively defining “extreme pornographic image” as “an image which is both – (a) pornographic, and (b) an extreme image.”¹²² More helpful, the statute defines “pornographic” as material “of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.”¹²³ Most helpful, and a departure both from the 1959 OPA and U.S. law, the Act attempts to provide statutory definitions of the exact types of material that an “extreme image” encompasses.¹²⁴ An extreme

¹¹⁶ PARLIAMENTARY UNDER SECRETARY OF STATE PAUL GOGGINS & SCOTTISH EXECUTIVE MINISTER FOR JUSTICE CATHY JAMIESON, CONSULTATION: ON THE POSSESSION OF EXTREME PORNOGRAPHIC MATERIAL, 2005, at I [hereinafter CONSULTATION]. Note that the reasoning and arguments found in this Scottish Consultation largely mirror the tone and tenor of a later document produced by the Ministry of Justice and addressed to England and Wales. See generally MINISTRY OF JUSTICE, POSSESSION OF EXTREME PORNOGRAPHIC IMAGES AND INCREASE IN THE MAXIMUM SENTENCE FOR OFFENCES UNDER THE OBSCENE PUBLICATIONS ACT 1959: IMPLEMENTATION OF SECTIONS 63-67 AND SECTION 71 OF THE CRIMINAL JUSTICE AND IMMIGRATION ACT 2008, CIRCULAR NO. 2009/01.

¹¹⁷ CONSULTATION, *supra* note 116.

¹¹⁸ *Id.*

¹¹⁹ Criminal Justice and Immigration Act, 2008, c. 4, § 63(1) (Eng.).

¹²⁰ Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 2 (Eng.).

¹²¹ See *supra* Part I.A. and Part I.B.

¹²² Criminal Justice and Immigration Act, 2008 § 63(2)(a)-(b).

¹²³ § 63(3).

¹²⁴ § 63(6)-(7).

image must be “grossly offensive, disgusting or otherwise of an obscene character,”¹²⁵ and falls into one of four sub-categories of obscenity:

- (a) an act which threatens a person’s life,
- (b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).¹²⁶

Additionally, “a reasonable person looking at the image [must] think that any such person or animal was real.”¹²⁷

Taken together, then, the definition of an extreme pornographic image is an image that can “reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal” that is “grossly offensive, disgusting or otherwise of an obscene character” and depicts one of four specific acts, which a “reasonable person . . . would think . . . was real.”¹²⁸ Individual possession of such an extreme pornographic image is a crime,¹²⁹ while publication of such materials, or anything else that “tend to deprave and corrupt persons,” remains a crime under the 1959 OPA.¹³⁰

The Scotland Consultation explains the rationalization for creating a freestanding offense to cover a separate subclass of obscene materials, rather than merely adding the crime to the already extant 1959 OPA. If the possession offense were added to the 1959 OPA, “it would cover a wide range of material and there are difficulties in squaring the purpose of the OPA with a simple possession offence.”¹³¹ More practically, “[t]his proposal would significantly extend the scope of the OPA . . . but would not achieve the clarity which would help individuals to identify material which was clearly illegal, when making personal decisions about viewing pornography.”¹³² Therefore, the Consultation favored the creation of a freestanding offense to avoid confusion between materials prohibited by the 1959 OPA and individual possession of extreme pornographic images, while still maintaining the OPA’s broad flexibility to target publishers and distributors.¹³³ Of additional concern was the possibility that the 1959 OPA could, over time, be narrowed to only

¹²⁵ § 63(6)(b).

¹²⁶ § 63(7)(a)-(d).

¹²⁷ *Id.*

¹²⁸ § 63(3), (6)-(7).

¹²⁹ § 63(1) (“It is an offence for a person to be in possession of an extreme pornographic image.”).

¹³⁰ Obscene Publications Act, 1959, § 1(1).

¹³¹ CONSULTATION, *supra* note 116, at 12.

¹³² *Id.* at 13.

¹³³ *Id.* (“*Option three*, (our preferred option) would preserve the flexibility of the OPA . . . to deal with the publication of a range of material and to develop a new, free-standing offence for possession of the limited categories of material described above.”).

prohibit publication of the new possession offense's narrow class of materials, thereby undercutting the effectiveness of the OPA.¹³⁴

The essence of the Criminal Justice and Immigration Act 2008 is to create a new offense for the possession of a small class of extreme pornographic images.¹³⁵ By default, publishers and distributors are also guilty of possession of such images if they distribute them, "since they would necessarily also possess it."¹³⁶ The actual effect on every day activities of U.K. citizens is minimal, however, as the scope of the Act is narrow.

Even so, the new possession offense marks a shift in the treatment of obscenity in the United Kingdom. Given the similar backgrounds of the U.S. and U.K. approaches to obscenity, as well as the inconsistencies and contradictions endemic to the current U.S. system, it bears consideration whether the United Kingdom's new direction – incremental a step as it may be – is a good idea, and if the United States should consider a similar direction in the future. The remainder of this Note is devoted to exploring the viability and desirability of potential changes to the U.S. approach to obscenity.

III. PORN IN THE U.S.A.¹³⁷

One threshold question which this discourse will not begin to resolve is the ongoing question in American jurisprudence: should the United States look outside its own laws for solutions? The inquiry is particularly pointed where, as here, the issue is intertwined with a constitutional question. In *Lawrence v. Texas*¹³⁸ in 2003, the Supreme Court cited not only the European Court of Human Rights in overturning *Bowers v. Hardwick*,¹³⁹ but also referenced U.K. lawmaking efforts, including "[a] committee advising the British Parliament [that] recommended in 1957 [the] repeal of laws punishing homosexual conduct."¹⁴⁰ Justice Scalia, however, critiqued such reliance on foreign authorities, explaining that "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct."¹⁴¹

¹³⁴ *Id.* ("Option two would offer greater clarity by limiting the material to be covered . . . [but] there would be a mismatch between the purpose of the OPA and the amendment.").

¹³⁵ Criminal Justice and Immigration Act, 2008, c. 4, § 63(1) (Eng.) ("It is an offence for a person to be in possession of an extreme pornographic image.").

¹³⁶ CONSULTATION, *supra* note 116, at 13.

¹³⁷ Research shows this section heading is not as clever as initially hoped, as, regrettably, it is also the title of a 1985 pornographic film featuring an underage Traci Lords. *See Traci Lords Biography*, THE BIOGRAPHY CHANNEL, <http://www.thebiographychannel.co.uk/biographies/traci-lords.html> (last visited Aug. 22, 2010).

¹³⁸ 539 U.S. 558 (2003).

¹³⁹ 478 U.S. 186 (1986).

¹⁴⁰ *Id.* at 572-73.

¹⁴¹ *Id.* at 598 (Scalia, J., dissenting).

In this instance, the question is whether foreign precedent that would impair a constitutional right – the private possession of extreme pornographic images – should be considered. Conversely, in *Lawrence*, the question was one of expanding existing constitutional protections based partially on the weight of foreign precedent.¹⁴² Despite the distinction, this prior consideration of foreign law seems relevant to the discussion. Even so, a critic of this discourse could assert that the unique constitutional character of the United States does not warrant even cursory consideration of U.K. practices in evaluating U.S. rights and policies regarding obscenity.¹⁴³

A. *Fixing Community Standards*

A common facet of both the U.S. and U.K. systems is the vague definition of obscenity as applied to producers and publishers of pornographic materials. A line exists between non-obscene pornography and obscene pornography, but there is little guidance on where that line is to be drawn. In the United States, this uncertainty is compounded by the question of whether and when the line is to be drawn at all, as dictated by the agendas of different presidential administrations.¹⁴⁴ The hallmark of the community standards test is that the same obscene material may be considered obscene in one U.S. community, but not obscene in another.¹⁴⁵ This uncertainty leads to a Schrödinger's Porn¹⁴⁶ paradox: the exact same depiction is at once both obscene and not obscene.

The adoption of a national standard for obscenity presents one possible solution. The *Kilbride* case, discussed above, is a step in this direction in the

¹⁴² *Id.* at 572-73 (majority).

¹⁴³ See Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 GEO. L.J. 433, 451 (2010) (“The consideration that is particular to the United States is a notion of a special American exceptionalism . . .”). There is a long history of American exceptionalism, characterized by “isolationism and hostility, or indifference to aspects of international law.” *Id.* at 452 (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1482 (2003)). Consider also, in the context of constitutional interactions between the United States and the United Kingdom, that the United Kingdom does not have a written constitution. See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 393 n.6 (2009) (“The United Kingdom still lacks a written – or, more accurately, a codified – constitution . . .”).

¹⁴⁴ For further discussion in this vein, see *supra* Part I.C.

¹⁴⁵ See *Roth v. United States*, 354 U.S. 476, 489 (1957).

¹⁴⁶ A reference to a classic paradox in quantum mechanics:

Schrödinger's Cat: A cat, along with a flask containing a poison . . . is placed in a sealed box If an internal Geiger counter detects radiation, the flask is shattered, releasing the poison that kills the cat. The Copenhagen interpretation of quantum mechanics implies that after a while, the cat is *simultaneously* alive and dead. Yet, when we look in the box, we see the cat *either* alive or dead, not both alive and dead.

Schrödinger's Cat, WIKIPEDIA (last modified Aug. 11, 2010), http://en.wikipedia.org/wiki/Schrödinger's_cat.

context of internet obscenity.¹⁴⁷ Perhaps it would make sense not only to adopt this standard for the internet, but also for obscenity generally. Although this approach would run counter to the original conception of the community standards test, in which the Supreme Court thought it improper to bind one locale to the moral standards of another, such an approach would go a long way towards creating a more consistent standard in the modern world.

In the interest of consistency, however, an alternative approach would be to borrow the statutory definition of “extreme pornography” from the U.K.’s Criminal Justice and Immigration Act 2008. Rather than using a single fixed definition for possession, the United States could conceivably generate a precise list of the depictions that are not permissible in any context – possession, production, transportation, etc. The United Kingdom shied away from this route in part because of its desire to create an individual possession offense and concern about confusion between the two standards.¹⁴⁸ If the aim were simply to create a fixed standard to guide pornographers in what is not permissible to produce and transport, then this concern would be largely alleviated. The larger concern, and one which the United States also faces, is that of inflexibility. The advantage of the vague community standards test currently in place is that any newly created, especially offensive, materials will not require a change in law to proscribe. Loss of flexibility aside, however, it does not seem an insurmountable task to compile an exhaustive list of obscene depictions to ban and to have little fear that cutting-edge scientists in porn laboratories the world over would develop groundbreaking new types of filth to circumvent the statutory definitions.

There appear to be two viable options, then, for addressing the community standards problem: either create a fixed definition of obscene materials or expand the definition of a community to encompass the whole nation. The second option seems a logical outgrowth of the always-on, always-connected, modern world with the growth of the internet. The community standards test of *Roth* and *Miller* simply no longer functions in today’s society; one cannot draw a principled line between geographic communities that are constantly connected to a global information system. The adoption of a national test, however, may suffer from the same defect as the current version of the standard because any local jury will necessarily be influenced by the community standards of its locale. Thus a national community standard may replace one fiction with another. Instead of local communities implementing a local standard, there will be a national community implementing local standards. The first option would replace the vague language employed by the community standards test with a statutory definition of obscenity, providing the most content guidance to producers for production and distribution. Either

¹⁴⁷ See *supra* notes 79-82 and accompanying text (discussing the development and application of U.S. obscenity law).

¹⁴⁸ See *supra* notes 131-134 and accompanying text (discussing the rationale for creating an individual possession offense).

approach would be at least an incremental step in the right direction by drawing a more principled line between the pornographic and the obscene. As it stands right now, and as jurists noted in both *Ashcroft* and *Kilbride*, the community standards test as presently articulated is inadequate due to its failure to keep pace with the realities of modern technology.¹⁴⁹

B. *Fixing the Who and the When*

Assuming a more consistent standard is adopted, either a single broad community standard or a fixed statutory definition of obscenity, the next question is to whom the standard should be applied. Although it may seem difficult to muster much sympathy for the common smut peddler, there may be some value in applying obscenity laws equally – or at least more equally – to possessors as well as purveyors of obscene pornography. Foremost, it would eliminate the double standard under which the government punishes the production and sale of obscenity but permits private possession.

In terms of fairness, and general morality, a consistent position would level the playing field and send a message about what is and is not acceptable, assuming any manner of acceptability consensus could be reached. Further, if the premise for the regulation of obscenity is that obscenity harms individuals, or perhaps leads individuals to harm others, then it is a hollow regulation that targets U.S. production yet not possession, particularly when possessors may access obscenity hosted in other countries.¹⁵⁰ This problem prompted the United Kingdom to attempt to shut down foreign websites and, when thwarted, to target individual possession.¹⁵¹

Unless the notion of obscenity as harmful to the individual is dismissed, which seems unlikely, it is necessary to extend the scope of those targeted by regulations. If individuals desire obscene pornography, then they will get it, regardless of whether it is produced and distributed by U.S. entities.¹⁵² Resources expended on shutting down U.S. distributors will have limited impact on those who are accessing obscenity and potentially causing harm to themselves and others.

The problem is only compounded by inconsistent application of these standards by different presidential administrations.¹⁵³ As it stands, it is only slight hyperbole to call the on-again-off-again targeting of obscenity producers and distributors with a vague and malleable standard an erratic waste of resources. One solution would be to follow the U.K. law's lead, equating

¹⁴⁹ See *supra* Part I.D. (discussing the importance of the development of U.S. obscenity law).

¹⁵⁰ See discussion *supra* Part II.B.

¹⁵¹ See discussion *supra* Part II.B.

¹⁵² See discussion *supra* Part II.B.

¹⁵³ See discussion *supra* Part I.C.

possession of obscenity with the possession of child pornography.¹⁵⁴ The nation and the world have agreed child pornography is a serious offense for which prosecutions have remained steady across administrations.¹⁵⁵

The criminalization of obscenity possession would raise serious constitutional issues. However, if the same justifications for prohibiting possession of child pornography are applied more broadly to the possession of obscenity, then these constitutional challenges may not be insurmountable. The second concern would be the number and extent of resources the nation would need to devote to enforcement of these new rules if they were to be pursued with the same vigor as child pornography charges.

C. *The Value of Regulation*

The foregoing discussion has largely granted the premise that regulation of obscenity is a worthwhile pursuit. However, the current U.S. stance towards obscenity may or may not reflect that conclusion.¹⁵⁶ Given the inconsistency and ambivalence towards obscenity in the current U.S. approach, perhaps the more obvious conclusion is that obscenity is not so great a problem after all.¹⁵⁷ Prior to adopting the Criminal Immigration and Justice Act of 2008, the United Kingdom studied the impact of extreme pornography to verify the connection between viewing extreme pornographic images and harms the Act is aimed to correct.¹⁵⁸

A Ministry of Justice report summarizing the findings of those studies found “some harmful effects from extreme pornography on some who access it,” in particular the “increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences,” and that these increased risks were greater in the case of extreme pornography than non-extreme pornography.¹⁵⁹ The study also found that “[m]en who are predisposed to aggression, or have a history of sexual and other aggression were more susceptible to the influence of extreme pornographic material.”¹⁶⁰ These findings support the underlying impetus for the change in U.K. law following the murder of Jane Longhurst.

¹⁵⁴ Criminal Justice and Immigration Act, 2008, c. 4, § 63(1) (Eng.) (“It is an offence for a person to be in possession of an extreme pornographic image.”).

¹⁵⁵ See discussion *supra* Part I.C.

¹⁵⁶ See discussion *supra* Part I.C.

¹⁵⁷ See discussion *supra* Part I.C.

¹⁵⁸ MINISTRY OF JUSTICE, THE EVIDENCE OF HARM TO ADULTS RELATING TO EXPOSURE TO EXTREME PORNOGRAPHIC MATERIAL: A RAPID EVIDENCE ASSESSMENT (REA), 2007, at iii-v (discussing whether extreme images harms adults). See *generally* ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986).

¹⁵⁹ MINISTRY OF JUSTICE, *supra* note 158, at iii.

¹⁶⁰ *Id.*

There is, however, a conflicting study that ties the increased accessibility of internet pornography to a reduction in sexual crimes.¹⁶¹ Todd Kendall's examination of data reveals, contrary to prior studies, that "the arrival of the internet was associated with a reduction in rape incidence," but "had no apparent effect on other crimes."¹⁶² Increased access drastically reduced "pecuniary and non-pecuniary costs of accessing pornography."¹⁶³ The results of these findings "suggest that pornography and rape are substitutes," where other studies "do not allow for potential substitutability between pornography and rape."¹⁶⁴ The study posits that "potential rapists perceive pornography as a substitute for rape. With the mass market introduction of the world wide web in the late 1990s, both pecuniary and non-pecuniary prices for pornography fell."¹⁶⁵ Therefore, just as the U.K. study expounds the traditional view that any type of pornography increases likelihood of sexual violence, the Kendall study suggests the inverse: that access to pornography reduces incidence of rape.

Although Kendall's study does not make this argument, the logical extension of the finding that pornography reduces sexual violence may be that extreme pornography would reduce the incidence of even more extreme sexual violence. This result suggests that rather than regulating pornography and devoting more resources to potentially stricter definitions of obscenity, the United States would be better served by not regulating obscenity at all. Not only would there be no harm and no costs from regulation resulting in a net societal gain, but there might even be a beneficial effect from the deregulation of obscenity. This argument requires the acceptance of outlier cases, like Graham Coutts and Jane Longhurst and acknowledgement that no matter how great the access to extreme pornography, incidence of sexual violence cannot be reduced to zero. The underlying cause of such violence, though, may or may not be reliably traced back to the availability of extreme pornography.¹⁶⁶ On the other side, it is also possible that at some point, certain materials do cross a line¹⁶⁷ and begin causing harm to certain individuals; perhaps the United Kingdom has correctly identified this line with its Criminal Justice and

¹⁶¹ See generally Todd D. Kendall, *Pornography, Rape, and the Internet*, TODD KENDALL (last updated April, 2010), <http://www.toddkendall.net/internetcrime.pdf>.

¹⁶² *Id.* at 1.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 28.

¹⁶⁶ See *Girlfriend speaks out on strangler obsession*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-207849/Girlfriend-speaks-strangler-obsession.html> (last visited Aug. 23, 2010) (discussing the effects of "an ordinary film on the BBC" that triggered Graham Coutts's interest in asphyxiation, yet then crediting the internet with giving Coutts a medium through which to "explore and expand it").

¹⁶⁷ *Id.* (discussing Coutts's asphyxiation fetish).

Immigration Act 2008. The Kendall study confesses a shortage of data, but, even preliminarily, the indices do seem to bear further consideration.

CONCLUSION

United States obscenity law is antiquated. It has failed to keep pace with technology, and technology has now fully exposed the doctrine's underlying cracks. Always an uncomfortable compromise between a vague sense of morality and personal freedom, the community standards test fails in the face of the internet, which blurs any principled division of the United States into discrete communities. The Supreme Court has recognized the doctrine's impending obsolescence, and the Ninth Circuit is also pushing the doctrine towards a national community standards test, at least in the internet context.¹⁶⁸ Even if such a doctrinal shift occurs, though, the doctrine's underlying fallacy persists in that obscenity may be possessed without penalty, yet not created or distributed without consequences.

U.K. law has evolved recently, and its changes give clues as to how the United States might adapt not only to respond to the realities and challenges of the internet, but also to resolve the inherent tensions in U.S. law. By creating a strict liability analog to child pornography for the possession of extreme pornography, the United Kingdom made inroads against the traditional discord between possession and production. An extension of the rationales behind this change in U.K. law to American law could, in conjunction with a revised community standards test, clarify an area of law that has been at once inconsistently applied and also applied without consistency by various presidential administrations. Such consideration, though, raises two primary concerns. The first is whether the United States should even consider upsetting the traditional balance between morality and personal autonomy and whether the United States should look outside its own laws for how to re-strike that balance. The second is the possibility that any balance cannot, in any principled or practical way, be sustained in today's technological landscape. Further still, it is possible that the value of continued regulation is outweighed by the cost and confusion contained therein; perhaps the simplest, best solution is no regulation at all.

¹⁶⁸ See *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) ("We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, [or] whether the statute is unconstitutionally vague"); *United States v. Kilbride*, 584 F.3d 1240, 1250 (9th Cir. 2009) (discussing the necessity of having a national community standard).