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Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard

Timothy S. T. Bass†

Debate has raged recently over the regulation of pornography in cyberspace,¹ and various articles document the abundance of pornographic images available through computer networks.² The conviction of two cyberspace distributors of pornography has fomented dispute about the application of current legal standards to the new medium.³ Despite the fact that many cyberspace users argue for retaining an environment free of regulation,⁴ critics of cyberporn influenced Congress to enter the debate last year,⁵ and Congress recently passed tough restrictions on obscenity and indecency that would make both cyberspace users and service providers liable.⁶

This Comment addresses whether the current legal standard that defines obscene expression should apply to cyberspace. To determine what is obscene, the Supreme Court created the doctrine of local community standards,⁷ under which juries apply the standards of a local community to determine whether material falls within the constitutionally unprotected category of ob-

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¹ See Sex on the Internet, Economist 18 (Jan 6, 1996).
³ See Couple Guilty of Sending Pornography by Computer, LA Times A10 (July 29, 1994).
⁴ See Internet Battles Study of On-line Pornography, Patriot Ledger 16 (July 17, 1995); Reaction To CompuServe Access Limits Upset Internet Enthusiasts, Milwaukee Journal Sentinel 1 (Dec 30, 1995); and Alan Goldstein, CompuServe Blocks Internet Sex Access, Dallas Morning News 1D (Dec 29, 1995).
The Court created this standard partly to allow different geographical regions to adopt different definitions of obscenity. If, in the new medium of cyberspace, the standard restricted the diversity of obscenity definitions among jurisdictions, it would frustrate this policy justification for creating the local community standard.

In cyberspace, more conservative communities could restrict expression nationwide. Using currently existing technology, a person in the most conservative jurisdiction in the country can download obscene material from anywhere in cyberspace, so prosecution might occur in such jurisdictions, and juries would apply the local standard. Conservative jurisdictions could thus set the obscenity standard for all material accessible in cyberspace.

Nevertheless, this Comment argues for retaining the local community standard in cyberspace. Applying the standard to cyberspace would not violate non-speech constitutional rights of individuals, and retaining the standard would also serve most of its original policy goals. One such goal would be undermined: since cyberspace is a worldwide, uniform network, application of the local standard in cyberspace would defeat the Court’s policy of allowing diversity of obscenity definitions among jurisdictions. Nevertheless, this policy argument does not have the persuasive power of a constitutional argument. Furthermore, policy arguments in favor of the local community standard in cyberspace counterbalance the lost diversity of standards. Finally, the alternatives to the local standard would cause more policy problems.

This Comment proceeds in Part I with an outline of the current legal doctrine of obscenity and its underlying policy. Part II addresses the implications of applying current law in cyberspace and concludes that no non-speech constitutional arguments preclude applying the standard, that several policy goals of the standard support applying it, and that only one policy criticism has any validity. Part III provides additional arguments for retaining the local community standard. First, it

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8 Id.
9 Id at 33. This Comment does not treat the effect of the diversity policy, diverse standards, as a constitutional right in itself, but rather as a policy justification for a standard that defines the contours of First Amendment rights.
10 See United States v Thomas, 1996 US App LEXIS 1069, *23 (6th Cir) (citing United States v Peraino, 645 F2d 548, 551 (6th Cir 1981)) (suggesting that the community-standards test might result in prosecutions of defendants from liberal jurisdictions in conservative jurisdictions).
argues that the standard would provide economic incentives to invest in technology that would allow greater diversity among jurisdictions. Then, it suggests that retaining the local standard might provide the greatest freedom of expression when measured across all media. Lastly, Part IV shows that alternatives to the local community standard would fail to meet the policy objectives of the obscenity doctrine to a greater extent than the local standard.

I. CONSTITUTIONAL AND STATUTORY RULES GOVERNING OBSCENITY

This Part first describes the legal framework and some of the policy underlying the local community standard. It then outlines the relevant federal statutes and venue rules that protect communities affected by obscene materials. Finally, it demonstrates how the obscenity doctrine has weathered constitutional challenges regarding due process notice requirements and privacy rights.\[11\] It argues that, to the degree that applying local standards to cyberspace does not violate these constitutional rights, policy issues are dispositive.

A. The Role of Local Community Standards in Defining Obscenity

Local standards partly define obscenity. Miller v California set out the current test for what constitutes obscene material subject to state regulation. To determine whether material is obscene, the jury must consider:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (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

\[11\] To read an obscenity exclusion into the First Amendment, one must assume an implicit historical rejection of obscenity "as utterly without redeeming social importance." Roth v United States, 354 US 476, 484 (1957). This Comment focuses exclusively on the impact of cyberspace on the obscenity doctrine and does not address alternative interpretations that would extend First Amendment protections to obscenity. It will also not address whether the standards of contemporary society require broader protections. Note, however, that if recent legislative initiatives are a measure of majoritarian sentiment, contemporary standards seem to support regulation of cyberspace.
work, taken as a whole, lacks serious literary, artistic, political, or scientific value.\footnote{12}

The jury uses its local standard only in the first two parts of the Miller test.\footnote{13}

Local community standards also have specific limitations. Jurors must gauge the local standard based on the average person in the community of the indictment.\footnote{14} Additionally, juries cannot exercise "unbridled discretion in determining what is 'patently offensive.'"\footnote{15}

B. Policy Goals Underlying the Local Community Standard

Four significant policies underlie the local community standard: (1) administrability of settling on a workable standard; (2) lack of alternative administrable standards; (3) federalism values; and (4) diversity of obscenity standards. The local community standards doctrine may promote the same policies in the new medium of cyberspace, and, to the extent the doctrine meets these criteria, the same policies support its application in cyberspace.

The local community standard represented a workable solution to an administratively costly doctrine.\footnote{16} The Miller standard, which has endured twenty-three years, ended sixteen years of disagreement creating "concrete guidelines to isolate 'hard core' pornography."\footnote{17}

The Miller Court considered the local community standard more administrable than its alternative—a national standard.


\footnote{14} Smith v United States, 431 US 291, 304 (1977). The jury also must use a reasonable person standard under the third part of the Miller test, further limiting the effect of the local standard in the first two parts of the test.

\footnote{15} Jenkins, 418 US at 160 (reversing jury finding of obscenity). Obscenity doctrine also addresses a narrow subset of pornography. Miller, 413 US at 18-19, n 2. The legal definition of obscenity means obscene material that deals with sex, a subset of the lay definition. Id. Additionally, courts have ruled that certain material, for example, mere nudity, may not be regulated as obscene. See United States v Baranov, 293 F Supp 610, 615 (SD Cal 1968), rev'd on other grounds, 418 F2d 1051 (9th Cir 1969).

\footnote{16} See Paris Adult Theatre I v Slaton, 413 US 49, 92 (1973) (Brennan dissenting) (noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.").

\footnote{17} Miller, 413 US at 29.
The Court rejected fixed, uniform national standards as unworkable.\(^\text{18}\) The Court also reasoned that "it would be unreasonable to expect local courts to divine"\(^\text{19}\) a national standard and that "[t]o require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility."\(^\text{20}\)

The local community standard also supports federalism and local autonomy by balancing federal, state, and local regulation. The Miller Court imposed federal limits on the scope of state regulation.\(^\text{21}\) On the other hand, Miller did not "propose regulatory schemes for the States,"\(^\text{22}\) but instead, the Court stated that such regimes "must await [states'] concrete legislative efforts."\(^\text{23}\) Miller also carved out an integral role for local juries in defining the limits of state regulations.\(^\text{24}\) Applying the local community standard to cyberspace material would preserve the political voice of the various local constituencies.

Additionally, the Court created a local rather than a national standard at least partly to allow for diversity of obscenity definitions.\(^\text{25}\) A national standard might chill expression in more liberal jurisdictions.\(^\text{26}\) On the other hand, the Court also recognized that a local standard might impede dissemination of materials to a particular area if sellers feared testing the local standard.\(^\text{27}\)

C. Federal Statutes\(^\text{28}\) Regulating Obscenity

Of the six federal statutes that regulate obscenity, only 18 USC § 1465 and 47 USC § 223 seem to apply to cyberspace.\(^\text{29}\)

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\(^{18}\) Id at 30 (noting that "[t]hese are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.").

\(^{19}\) Id at 32 (quoting Jacobellis v Ohio, 378 US 184, 200 (1964) (Warren dissenting)).

\(^{20}\) Id at 30 (second emphasis added).

\(^{21}\) Miller, 413 US at 23-24.

\(^{22}\) Id at 25.

\(^{23}\) Id.

\(^{24}\) See notes 13-14 and accompanying text.

\(^{25}\) Miller, 413 US at 33.

\(^{26}\) Id.

\(^{27}\) Id at 32, n 13.

\(^{28}\) By one account, Florida is the only state with a statute that explicitly deals with computer pornography. Henry J. Reske, Computer Porn a Prosecutorial Challenge: Cyberspace Smut Easy to Distribute, Difficult to Track, Open to Legal Questions, 80 ABA J 40 (Dec 1994).

\(^{29}\) See 18 USC §§ 1461, 1462, 1464, 1465, 1468; 47 USC § 223 (1994). Sections 1461, 1464, and 1468 clearly do not cover cyberspace because they regulate particular media.
Congress recently amended 47 USC § 223 to apply to cyberspace. Uncertainty in the law reflects the recent technological developments and the public debate about cyberspace regulation.

Title 18 U.S.C. § 1465 prohibits the transport of obscene materials in interstate commerce for sale or distribution. In United States v Thomas, the Sixth Circuit upheld a conviction under Section 1465 for sending obscene images through cyberspace. The Court held that the statute's language and intent included the use of computer systems to transport materials.

Title 47 U.S.C. § 223(a) prohibits engaging in obscene communications via telephone. Section 223(b)(2) prohibits indecent communications that are knowingly made available to people under age eighteen. Congress recently passed amendments to Section 223 to cover obscene and indecent images and other com-

Section 1461 prescribes only the use of the mails for distribution of obscene materials, and cyberspace communications occur through telephone lines which Congress regulates separately from the postal service. See 18 USC § 1461. Section 1464 prohibits only radio broadcasts of obscene or indecent language. 18 USC § 1464. Section 1468 prohibits only distribution of obscene matter over cable television. 18 USC § 1468. Section 1462 prohibits the transport or import of obscene materials in interstate commerce by means of an express company or common carrier. 18 USC § 1462. The Tenth Circuit has held that "common carrier" in this context does not include telephones and that the statute prohibits only "tangible articles and not the intangible communication of telephone messages." United States v Carlin Communications, Inc., 815 F2d 1367, 1371 (10th Cir 1987). See also Bruce A. Taylor, National Law Center for Children and Families, letter to Representative Henry Hyde (July 28, 1995) (proposing amendments that add the phrases "telephone facility" and "any communications" to Sections 1462 and 1465 to make them applicable to cyberspace).


31 This Comment will not address whether obscenity laws could impose liability on bulletin board operators, an issue which addresses scienter requirements and not whether the local community standard should apply. The current law requires knowledge of the obscene nature of the communications.


34 Id at *14-*16. But see Carlin, 815 F2d at 1371 (differentiating between telephone communications and physical objects and holding that Section 1465 does not extend to dial-a-porn telephone messages since it does not cover intangible articles).

35 47 USC § 223 (1994). It also forbids those who control telephone facilities from knowingly permitting the use of those facilities for obscene communications. Id. Where there is a commercial purpose, liability attaches "regardless of whether the maker of such communication placed the call." Sable, 492 US at 123, n 4 (quoting 47 USC § 223(b)(1)(A)). See also id at 123-26 (upholding prohibition of obscene calls under Section 223).

36 47 USC § 223(b)(2). Restricting access by prescribed methods, however, provides a defense to a charge under this Section. 47 USC § 223(b)(3).
OBSCENITY AND THE LOCAL STANDARD

Communications transmitted or made available in cyberspace. Courts could uphold the recent amendments that go beyond current obscenity laws and restrict access to indecent materials if these provisions use the least restrictive means. Courts have permitted regulation of pornography that goes beyond obscenity law in radio, broadcast television, and cable television. The FCC also may restrict access by minors to dial-a-porn if they employ the "least restrictive" means that minimize interference with adult access to those services.

D. Venue Rules under Federal Obscenity Statutes Promote a Policy Goal of the Obscenity Doctrine

In protecting the community affected by the obscene expression, current venue rules further a policy goal underlying regulation of obscenity. Limiting venue in federal cases would undermine this goal.

Courts allow venue for obscenity prosecutions in either the district of dispatch or of receipt. Congress made violations of the federal obscenity statutes continuing offenses to allow prosecution in the jurisdiction where the materials are received.

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38 One commentator argues that the similarity of cyberspace to dial-a-porn services justifies less stringent regulation of cyberspace. Comment, Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age, 15 Loyola LA Enter L J 415, 435 (1995). This argument ignores the indecency regulation of dial-a-porn.


41 See United States v Bagnell, 679 F2d 826, 829, 832 (11th Cir 1982) (holding that venue proper in either district of dispatch or of receipt for charges under 18 USC §§ 1462, 1465); United States v Thomas, 613 F2d 787, 792 (10th Cir 1980) (noting that government can prosecute mailing of obscene materials in either district of dispatch or of receipt); Reed Enterprises v Corcoran, 354 F2d 519, 521 (DC Cir 1965) (noting that Congress permitted venue in any district through which material passed in order to facilitate successful prosecution). The "district of dispatch" refers to the geographical district in which the defendants upload the materials to cyberspace, and the "district of receipt" refers to the geographical district where the recipients download the materials.

42 Amending Section 1461 of Title 18 of the United States Code, Relating to the
since "[the] main evil to be combatted is the harm done to those who are exposed to obscene material at the point of receipt."43

E. Obscenity Doctrine Prevails over Constitutional Fair-Notice44 Challenges

Courts have rejected fair-notice challenges to obscenity regulations based on the intent requirement.45 The Miller Court held that its definition of obscenity would not violate due process requirements of fair notice.46 A defendant who knows the "character and nature of the materials" meets the intent requirement under federal statutes,47 and there is no need for the defendant to know the law that will apply.48 Under the local community standard, prosecutors thus need not show that the defendant knew which jurisdiction's law would apply to the downloading of the defendant's materials from cyberspace.

Mailing of Obscene or Crime-Inciting Matter, S Rep No 1839, 85th Cong, 2d Sess 2 (1958) (stating purpose of amendment is to make mailing of obscene material a continuing offense). The Sixth Amendment requires that prosecution occur in a "district wherein the crime shall have been committed . . . ." US Const, Amend VI.

43 S Rep No 1839 at 3 (cited in note 42). Courts rarely grant motions for transfer of venue in obscenity cases. A transfer motion would require a showing "such as intentional overreaching by the government." United States v McManus, 535 F2d 460, 464 (8th Cir 1976). Courts limit these motions partly because prosecutions in the community affected by the obscene material are reasonable. Bagnell, 679 F2d at 832. Additionally, the jury in that district can apply its local community standards more easily. See United States v Germain, 411 F Supp 719, 729 (SD Ohio 1975); United States v Slepicoff, 524 F2d 1244, 1249 (5th Cir 1975); Thomas, 1996 US App LEXIS 1096 at *19 (noting that "the effects of the Defendants' criminal conduct reached the Western District of Tennessee, and that district was suitable for accurate fact-finding.").

44 The Due Process Clause of the Fourteenth Amendment requires that criminal laws provide fair notice of "what the State commands or forbids." Lanzetta v New Jersey, 306 US 451, 453 (1939).


46 Miller, 413 US at 27.

47 Hamling, 418 US at 123.

48 Id (noting that "[t]o require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.").
F. Constitutional Privacy Rights Do Not Significantly Limit the Obscenity Doctrine

Courts have rejected privacy-rights challenges to laws that control obscenity outside the home. Privacy rights have some theoretical but little practical importance in the regulation of obscene material. Privacy rights protect possession of obscene materials in the home, but this protection "[does] not create a right to receive, transport, or distribute obscene material . . . ." Once materials leave the home in either public or private transport, privacy rights are no longer relevant.

II. OPERATION OF THE LOCAL COMMUNITY STANDARDS IN CYBERSPACE

This Part discusses the legal implications of applying local community standards to cyberspace material. It argues that the application of local standards to cyberspace would not violate the two relevant constitutional doctrines of fair notice and privacy rights. The Comment then focuses on policy goals of the obscenity doctrine. It argues that applying local community standards in cyberspace would accomplish most of the policy goals underlying the doctrine.

A. Applying Local Community Standards to Cyberspace Meets Constitutional Requirements

The local community standard as applied to cyberspace material would meet due process notice requirements. As in other

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49 "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." United States v Orito, 413 US 139, 142 (1973).
50 See id at 141-44; Thomas, 1996 US App LEXIS 1096 at *20-21. Some criticisms of using the local community doctrine for cyberspace material relate to privacy rights. These criticisms, however, may pertain to the doctrine as it applies to other media. They do not undermine the application of the doctrine to the new medium.
52 Id. See also Stanley v Georgia, 394 US 557 (1969).
53 Orito, 413 US at 140-42. Orito transported obscene materials for private purposes on a common carrier—a commercial airline. Id. "Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent." Id at 143.
54 This Comment takes a position on the constitutional issues and leaves a full exploration of those issues for a later date.
55 But see Comment, Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age, 15 Loyola LA Enter L J 415, 434 (1995) (cited in note 38) (arguing that applying the obscenity doctrine to
media, statutory intent requirements would satisfy the notice requirements. "'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.\(^{56}\) The Miller test meets this standard of providing notice,\(^ {57}\) and a sender of obscene material in cyberspace would satisfy the intent requirement if he or she knew the nature of the materials sent.

Some fair-notice criticisms of applying the local community standard in cyberspace pertain to the doctrine more generally.\(^ {58}\) For example, one criticism is that a defendant cannot know how a jury will apply the standard. In cyberspace the defendant might not know which community will receive the material or in which community he or she will face prosecution, and perhaps by knowing the particular community of prosecution the defendant could limit this uncertainty. Courts have not, however, considered uncertainty about jury discretion in obscenity cases a constitutional problem.

One might argue that making obscene material available in cyberspace differs from "purposefully" sending it through the mail, since the sender might not know the particular jurisdiction of download. Cyberspace obscenity is not necessarily the result of active dissemination or geographical targeting, since someone could post obscene material to a network to which geographically dispersed people have access.\(^ {59}\) For example, material might reside on the computer of a bulletin board operator, and the receiver of the obscene material might access it by calling the distributor's computer. Senders of obscene material, however, are probably aware that receivers in multiple jurisdictions can download the material. The sender then would have notice about the

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\(^{56}\) Roth v United States, 354 US 476, 491-92 (alteration in original) (quoting United States v Petrillo, 332 US 1, 7-8 (1947)).

\(^{57}\) Miller v California, 413 US 15, 28 n 10 (1973).

\(^{58}\) To the extent criticisms attack the obscenity doctrine generally, they fall outside the scope of a Comment on cyberspace.

\(^{59}\) See Comment, 15 Loyola LA Enter L J at 430 (cited in note 38). See also United States v Thomas, 1996 US App LEXIS 1069, *25-*26 (6th Cir) (noting that while some bulletin-board operators have no control over the locations of downloading, defendants had control and therefore had no First Amendment claim).
possibility of facing local laws, though he or she might not know the particular legal standards.

The application of the obscenity doctrine in dial-a-porn cases provides a counterargument to fair-notice criticisms, since as in cyberspace, dial-a-porn service providers do not know what jurisdiction will receive their transmitted phone messages. Additionally, in neither case do the transmissions constitute a purposeful sending. The Supreme Court has, however, upheld the prosecution of dial-a-porn service providers in the jurisdiction of the caller, so that the burden falls on the obscenity distributor to discover where calls originate and to tailor its services “to the communities it chooses to serve.”

Like fair-notice rights, privacy rights do not prevent the application of a local community standard in cyberspace. The Supreme Court has limited significantly the extent to which privacy rights protect obscene materials once they leave the home.

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60 See Miller, 413 US at 27. One commentator argues that the cyberspace receiver of obscene material is like a purchaser of a magazine in one state who then takes the magazine into another state, and that neither the magazine seller nor the cyberspace defendant should be subject to prosecution for sending obscenity into another jurisdiction. Comment, 15 Loyola Enter L J at 434 (cited in note 38). See also William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community, 30 Wake Forest L Rev 197, 211-13 (1995). Offering a magazine for sale in a specific geographical location differs from making material available on the Internet, however, because the Internet has no geographical boundaries and transmitters have reasonable warning that the material is available outside their own geographic location.


62 Id.

63 Byassee argues that there is a “poor fit” between cyberspace and obscenity statutes, whose purpose is to prevent obscene materials from passing through unwilling local communities, because cyberspace materials go directly from senders to the recipient’s home, where privacy rights limit the reach of obscenity regulations. Byassee, 30 Wake Forest L Rev at 203-10 (cited in note 60). See also Comment, 15 Loyola LA Enter L J at 437 (cited in note 38) (arguing that cyberspace materials have less impact on local communities than materials in other media). Byassee disregards Supreme Court rulings on privacy rights with regard to obscene materials. Byassee, 30 Wake Forest L Rev at 203-210.

64 See United States v Orito, 413 US 139, 141. See also notes 49-53 and accompanying text. This Comment does not address the physical distinction between cyberspace and other potentially obscene material since it assumes this distinction not to be relevant to the question at hand—whether local community or some other standard should apply in evaluating cyberspace material. Cyberspace material is transmitted as electronic impulses, series of “0s” and “1s,” and then appears as text or images after being processed by the receivers’ software. This fact, however, is unlikely to give rise to a legal distinction between cyberspace material and other physical substances, especially since the software to format electronic transmissions is widely available. Similarly, courts would be unlikely to distinguish obscene material carried in the form of a puzzle, particularly one that most people could put together. One might argue further that electronic transmissions might be
Privacy issues do not differ significantly in cyberspace from in other media. For example, both cyberspace and the mail bring material directly to the consumer's home, and privacy rights do not protect obscene material traveling through the mail once it leaves the home. Cyberspace similarly delivers material directly to the consumer's home. In United States v Orito, privacy rights did not shield the defendant's transporting obscene materials on commercial airlines for private purposes. Since courts have no technology-specific reason to apply a different privacy standard to cyberspace, privacy rights do not present a viable challenge to application of the local community standard to cyberspace.

B. Applying Local Community Standards to Cyberspace Upholds Policy Objectives

Several of the policy arguments underlying the obscenity doctrine support its application to cyberspace materials. The standard would continue to promote the administrability goals and federalism policy issues supporting the local community standard. Perhaps most importantly, however, the standard also allows affected communities to regulate obscene material.

The Miller Court adopted the local community standard as an administratively workable and less costly solution to the problem of defining obscenity. There is no reason the guidelines would not work as well in cyberspace as in other media, because the technology does not affect the ability of the jurors to know their own community's standards. Applying the doctrine to cyberspace would thus continue to serve the administrability objective.

The local community standard also serves the federalism objectives of the obscenity doctrine. The Miller doctrine allows states and, indirectly, local communities to set their own stan-
dards about the type of pornographic material they tolerate. Since the local community standard may allow one community to impose its standard on another in cyberspace, one could argue that only the most conservative community would have the ability to set its own standard in cyberspace under this approach. With other media, individuals might solve the problem of finding themselves in a community that does not match their tastes by moving to a different jurisdiction, but people do not have this option in the context of cyberspace. On the other hand, blocking the distribution of obscene material through cyberspace has a limited impact, since people can still distribute obscene material through other media that do not reach conservative local communities as an alternative to distributing that material through cyberspace. Individuals will retain the option of seeking communities that are more or less restrictive with regard to other media.

The local interest in preserving regulatory autonomy provides a strong policy argument. The majority of the local community should have some rights against the national majority. Although cyberspace is not within a specific geographical territory, the autonomy interest applies equally well to cyberspace as to other media, some of which, like phone lines, also do not have a specific geographical territory. Moreover, local geographical authorities cannot establish or police boundaries as easily in cyberspace, so geographical regions are more susceptible to an influx of obscene material through cyberspace than through traditional media. The difficulties of enforcement increase the need for local autonomy to set more stringent restrictions on obscene material.

Whether the local or national majority has a greater interest in dictating obscenity standards is to some extent a political judgment. Recent legislative initiatives indicate that the majoritarian process favors more conservative legislation for cyberspace.

The one clear advantage of a local standard is that technology may develop that will preserve the local autonomy of all communities, whether liberal or conservative, by selectively blocking access to objectionable cyberspace material in the con-
servative jurisdictions only. If courts overturn the Miller standard and impose a more liberal standard on conservative communities, local communities will lose some autonomy to determine their own standards. In that case, conservative local communities would not have the option of preserving their autonomy through technology, since the development of screening devices most likely would not occur in the absence of legislation restricting obscene expression.

The right of the local community to protect itself from perceived harms provides the strongest argument in favor of applying the standard to cyberspace. This argument cuts two ways, however, with cyberspace communications: conservative jurisdictions have an interest in setting conservative regulations, but liberal jurisdictions have an interest in setting liberal regulations. On the one hand, under a liberal national standard, conservative citizens could not regulate their own environment. On the other hand, under the conservative nationwide regime that results from the local standard, citizens cannot choose to live in or express themselves in more liberal jurisdictions. Due to the impact of conservative standards on other communities under current technology, regulating obscene expression within the community would effectively regulate it outside the community. The more liberal jurisdiction, however, would preserve a perceived right of expression rather than limit a perceived harm from expression.

A counterargument to the local standard might focus on the incentives resulting from the discretionary nature of the local rule. Overdeterrence might occur in all media. Ex ante uncertainty about juries might result in censoring of material that a jury would not find obscene. In order to avoid prosecution and convic-

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70 See notes 82-83 and accompanying text.
71 Additionally, conservative local communities might face greater collective action problems than the users or distributors of obscene material in developing technology. This could result from greater numbers or from lack of familiarity with the technology and lack of a profit motive.
72 One might argue that more conservative regulation should prevail in three out of four possible states of the world. Where both a real harm from obscenity occurs and the free expression rights exist, conservative regulation should prevail. Clearly, where there is harm but no rights, conservative regulation should prevail. One could argue that where there is no harm and no rights, conservative regulation should prevail since it permits sovereignty without infringing rights. Perhaps courts should impose more liberal regulation only on more conservative jurisdictions where the rights exist and no harm occurs. This reasoning implies that, if we cannot know whether the right exists or the harm occurs, and there are equal probabilities of both existing, courts should favor the standard that would be correct in three out of four possible states.
tion, expression might be chilled to a greater degree than would be true under a clear and explicit rule. Uncertainty about where receivers will download cyberspace material might exacerbate the overdeterrence problem with the local community standard. If people do not know where a prosecution might occur, they might tend to overestimate their potential liability and reduce their expression more than necessary.

The validity of the overdeterrence argument depends on empirical evidence. As a result of a recent pornography prosecution in Germany, CompuServe blocked more than two hundred bulletin boards that provided potentially contraband material. This action did not necessarily represent overdeterrence. CompuServe simply complied with German standards and shut down the newsgroups that German authorities specifically identified. Since CompuServe's technology could not block by geographic region, its customers outside Germany also had to comply with German standards.

C. Application of Local Community Standards to Cyberspace Conflicts with the Policy Objective of Diversity among Jurisdictions

As some writers have pointed out, cyberspace technology raises a new issue regarding the community standard: the most conservative community might dictate obscenity for the whole country. Courts, however, have not always made diversity an overriding policy objective.

While the Supreme Court may have created the local community standard partly to permit greater expression in communities more tolerant than the national average, its application to cyberspace would have the opposite effect. "[T]he most conservative, 'Bible-Belt' state may wind up dictating the obscenity laws of all other states as the lowest common denominator of sexual acceptability."  

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75 Meyer, Portland Oregonian at E5 (cited in note 73).
76 See Comment, 15 Loyola LA Enter L J at 433-34 (cited in note 38); Byassee, 30 Wake Forest L Rev at 210 (cited in note 60).
77 Miller, 413 US at 32 n 13.
78 Comment, 15 Loy LA Enter L J at 433-34 (citation omitted) (cited in note 38). See also Note, The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Fright-
If each cyberspace user must govern her speech in accord- ance with the most restrictive of these communities, then either much will remain unexpressed, or, more likely, the virtual community will restrict access of the members of those restrictive jurisdictions to entire [sic] conversational subjects or to membership in the community itself. Either alternative substantially chills the free expression of, and exchange about, topics for which significant controversy exists.79

In sum, the effect of applying the local standard to cyberspace might be a mix of: (1) conservative community standards chilling expression in permissive communities, and (2) networks limiting access to cyberspace conversations, thus chilling expression in less permissive communities.80

Courts, however, have not always given the policy objective of diversity among jurisdictions primary importance. In several instances courts, by applying local standards to other media that span multiple communities, have not preserved strict diversity among jurisdictions. Dial-a-porn services may face prosecution in any district,81 and, to a lesser degree, television and radio broadcasting also reach multiple jurisdictions and may face the local community standard in each jurisdiction.82

When deciding whether to overturn the local community standard, courts will need to weigh the several goals that the standard promotes against the diversity goal that it hinders. The local standard achieves administrability, federalism, and local autonomy goals that were integral to the rationale of the original doctrine. The fact that the courts have not always promoted strict

79 Byassee, 30 Wake Forest L Rev at 210 (cited in note 60).
80 Technology for scrambling or blocking indecent material has not yet developed though a consortium of companies has formed for that purpose. See Jared Sandberg, U.S. Cracks Down on On-Line Child Pornography, Wall St J A3 (Sept 14, 1995). One author notes that “the Internet is presently impossible to censor for purely technical reasons.” Comment, 15 Loyola LA Enter L J at 418 (cited in note 38). Additionally, due to the anonymity of bulletin boards, prosecutors might have difficulty finding the person who uploads obscene materials. “[T]he BBS operator may be unaware of the distribution of potentially obscene material due to the automatic operation of his software.” Id at 422.
81 Sable, 492 US at 126 (noting that “[i]f Sable’s audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.”).
82 See Carlin Communications, Inc. v FCC, 837 F2d 546, 561 (2d Cir 1988) (holding that 47 USC § 223(b) “does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.” (citations omitted)).
diversity, particularly in the area of dial-a-porn services, may imply that this objective has less value than others. The following section will discuss other policy objectives, left unstated by the Miller Court, that support retaining local standards.

III. TWO ADDITIONAL POLICY ARGUMENTS IN SUPPORT OF THE LOCAL COMMUNITY STANDARD

Two additional arguments support retaining the Miller standard. First, markets may well be better equipped than courts to promote diversity objectives. The local rule creates proper incentives because service providers and others may want to invest in developing technology to avoid the local standards of more conservative communities. Second, even if local standards restrict expression in cyberspace, they might allow more expression when considering the aggregate impact on all media.

A. Local Standards Create Appropriate Economic Incentives

An economic analysis provides an argument in favor of the local community approach. One might start with the premise that the legal rule should spur useful technological innovation. A rule which invalidates the community standard will not create incentives for innovation. Without the local community standard, conservative communities would need to promulgate regulations to develop technologies that would block obscene materials from the entire community. Additionally, local majorities probably would face greater transaction costs than obscenity distributors in organizing and investing in such technology development since distributors are likely to be fewer in number and have more unified objectives in promoting their business interests. On the

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84 R.H. Coase maintains:

Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast. But as we have seen, the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts directly influence economic activity.

other hand, the local community standard would spur investment in finding technology to permit jurisdictionally-oriented access.

One might counter that courts should not take an economic perspective when addressing First Amendment issues. For one, market prices for computer technology might undervalue obscene expression. Additionally, judges do not have economic expertise. The Supreme Court, however, has given some indication that economic considerations for prohibited expression questions are proper. In *Sable Communications of California, Inc. v FCC*, the Court indicated that a provider of dial-a-porn services could face local obscenity standards in the communities where callers lived. The Court stated that "[w]hile Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages." The *Sable* Court restricted additional expression at the market costs, and it did not address the possibility that the market might undervalue obscene expression. If the Court, however, had not imposed the costs on the dial-a-porn providers, those whose regulatory zeal the Court frustrated would have paid. Under the current regime, the market can monetize at least a portion of the costs for delivering potentially obscene dial-a-porn materials. On the other hand, the market could not monetize as directly the psychic costs of a more liberal dial-a-porn obscenity regime.

Similarly, the local community rule would create economic incentives for cyberspace obscenity providers. The recent CompuServe case provides a testament to this theory.

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85 A market externality might exist, namely that some citizens might derive disutility from knowing that an obscenity parameter restricts free expression. Without transaction costs they might be willing to pay to avoid this disutility, and the payments could flow to those who suffer harm from unwillingly experiencing or simply knowing of obscene expression. The current regulatory environment of cyberspace might be a situation where a large, diffuse group faces a small group, like the Christian Coalition, that incurs relatively lower organizational costs. See Julian Dibbell, *Muzzling the Internet: Can This Congress Find a Way to Preserve Civil Liberties While Curbing Cyberporn? So Far, No.*, Time 75 (Dec 18, 1995) (discussing lobbying efforts of Christian Coalition); Edmund L. Andrews, *Bill Would Curb On-Line Obscenity*, NY Times A1, B12 (Dec 7, 1995) (cited in note 37) (discussing position of Christian Coalition on regulations). The Economic Theory of Regulation predicts that in such a situation the small group can extract value that exceeds market prices through political processes. See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J L & Econ 211 (1976).


87 Id.

88 The costs, however, might be reflected in voter anger on this or other issues.
CompuServe shut down over two hundred news groups to comply with orders from German officials.\(^8\) CompuServe has fewer than 200,000 customers in Germany, but all 4 million of its worldwide customers suffered the consequences of the German order.\(^9\) CompuServe reacted by starting to develop technology that will eventually tailor access by location\(^9\) since it would allow access to the banned news groups outside of Germany.\(^2\)

Applying local community standards to obscenity providers would probably have a similar effect. CompuServe differs since it connects its customers to newsgroups but does not provide pornographic material, but the example indicates that imposing local standards will lead to technological investment. Presumably, CompuServe believes it will reap a return on the investment by passing the costs on to customers, and, likewise, if providers of obscene material expect to pass costs on to their customers, they will invest in technology to limit geographic exposures.

B. Free Expression in the Aggregate

One might measure the effect of the local community standard on particular media or on all media together.\(^3\) In one scenario, courts would apply the same obscenity standard to all media. In aggregate, across all media, the local community standard might increase freedom of expression relative to other possible standards. For example, a national standard might impose re-

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\(^9\) Meyer, Portland Oregonian at E5 (cited in note 74).


\(^7\) Id.

\(^3\) “Courts that invoke the marketplace model of the first amendment [sic] justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.” Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1, 4 (1984) (critiquing the marketplace model). See also *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting) (enunciating the marketplace of ideas approach to the First Amendment). This Comment looks at aggregate free speech rather than the aggregate social benefits from free speech. The ideas are related in that if aggregate benefits are important, aggregate free speech may also be an important measure. Fifth Amendment Takings Clause jurisprudence provides another analogy. The destruction of one strand of a bundle of property rights is not a taking since “the aggregate must be viewed in its entirety.” *Andrus v Allard*, 444 US 51, 65-66 (1979). By analogy, restricting one avenue of obscene expression might not constitute a restriction of aggregate free expression.
strictions on communities that would have more liberal standards under a regime of local autonomy, but, even with conservative cyberspace restrictions, more liberal communities would preserve the freedom to express obscene material through other media. If the standard permits more free expression overall, it might be more attractive to advocates of free expression, even though it restricts expression in one particular medium.\textsuperscript{94}

At the worst, application of the local community standard to cyberspace material does not suppress potentially obscene expression generally, it only suppresses such expression in a particular medium. Other distribution channels still would face varying levels of regulation. Implementing a national standard in cyberspace, however, would not preserve the current distribution level of potentially obscene materials. Distributors could instead expose the most conservative localities to obscene material that such communities could regulate when distributed through other media.

Perhaps obscenity does not deserve national or even international circulation. Before the advent of cyberspace, it did not have this type of circulation as readily. Why are other media that were previously adequate for delivering obscene expression suddenly inadequate for that purpose with the growth of cyberspace?

One might argue that cyberspace expression deserves protection as another medium of expression for the uploader, a medium that is actually located in the geographic space of the upload. Cyberspace, however, is physically located in multiple geographic spaces: the upload and the download(s). Perhaps networks that distribute questionable material should limit access to geographic regions where local standards would not consider the material obscene. Then people in more restrictive communities would face the same restrictions as prior to the advent of cyberspace. The local community standard provides the right incentives for such technology to develop.

\textsuperscript{94} One could argue that another standard would promote more free expression while maintaining other policy goals of the local community standard. Courts could create a special, more liberal standard that applied only to cyberspace. Theoretically, this standard would preserve the current level of free expression in other media while allowing more free expression in cyberspace. This medium-specific standard, however, would encourage the distribution of obscene material through cyberspace to avoid more restrictive regulations in other media. Thus, a special cyberspace standard would render regulations of other media ineffective.
IV. LOCAL COMMUNITY STANDARDS ARE SUPERIOR TO ALTERNATIVES

This Part discusses how alternatives to local community standards would raise significant policy problems. Courts could base standards on national or cyberspace communities or on the community of dispatch, and the jury would apply the standard of the relevant community to determine whether material is obscene. Courts should not prefer any of these options to the local community standard since all of them fail to meet significant policy objectives.

A. Policy Problems with A National or Cyberspace Standard

Various formulations of a national standard would reduce diversity, the primary criticism of applying local community standards to cyberspace. Additionally, national standards either do not avoid the application of local community standards or are not administratively feasible.

A national standard would present the same diversity problems as the local standard. One commentator, Joanna H. Kim, suggests a national standard. Kim acknowledges but does not address in detail the Miller court’s criticisms of a national standard. Implementing a national standard would not preserve diversity among jurisdictions, and, in fact, the Court adopted the

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95 This Comment will not discuss elimination of the obscenity doctrine altogether. Justice Brennan has proposed elimination of the obscenity doctrine based, to a large extent, on the view that no standard could provide adequate notice, though he agrees that obscenity falls outside of First Amendment protection. Paris Adult Theatre I v Slaton, 413 US 49, 84-86 (1973) (Brennan dissenting). See also notes 44-53 and accompanying text (discussing fair notice requirements).

96 “Community of dispatch” refers to the district in which defendants upload materials to cyberspace.


Miller rule partly to allow for greater diversity. On the one hand, the local standard would reduce diversity of obscenity standards for cyberspace expression, but the national standard would not alleviate that problem and even might reduce diversity in all media.

A national standard also would pose administrability problems that the local standard avoids. First, the jury in obscenity litigation would not have an inherent understanding of a national standard as it does with its own local standard, so both the prosecution and defense would need to call expert witnesses. At a minimum, informing the jury about standards that they do not understand necessarily would take time, and experts would probably charge fees, thus increasing litigation costs. Furthermore, it may be impossible to know or communicate a national standard to a jury. The Miller court created the local community standard partly to avoid such problems.

Courts might also use the standards of a community of cyberspace users. One would probably need to define a national versus international cyberspace community to avoid overstepping sovereign lawmaking power, though cyberspace extends beyond national boundaries. Since cyberspace communities come from the nation as a whole, they represent a form of national standard. Defendants would probably try to narrow the definition from the whole to a particular cyberspace community, since, almost by definition, a standard based on newsgroups that permit or encourage obscene materials would acquit in a prosecution for that same material. Thus, juries applying cyberspace stan-

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100 See id at 31-32; Paris, 413 US at 56, n6.
101 Although courts currently have discretion to admit expert testimony on local community standards, United States v Bagnell, 679 F2d 826, 833 (11th Cir 1982), the prosecution does not need to produce experts, and juries do not need to take the testimony of such experts into consideration. Hamling v United States, 418 US 87, 108 (1974); United States v Thomas, 1996 US App LEXIS 1069, *30-*34.
102 See Paris, 413 US at 56, n 6 (discussing expert testimony). One might argue that modern survey and other statistical techniques have improved the case for a national standard since 1973, when the Court indicated its doubts; but the argument would need to show the accuracy of such techniques.
103 See Comment, 15 Loyola LA Enter L J at 441 (cited in note 38) (noting that the community of cyberspace users is one option in defining national standard). See also Anne Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces, 104 Yale L J 1639, 1656, 1672 (1995) (noting that the virtual community standard is a possible solution to defining obscenity).
OBSCenity AND THE LOCAL Standard

dards might invalidate local laws. Also, a virtual community standard would shift the federalism balance away from local interests and would not recognize the regulatory rights of the community claiming to be harmed by the obscene material.

Following Miller, courts will disfavor as impractical forcing a local jury to discern and apply the standards of the cyberspace community or a subset thereof. Expert testimony on cyberspace standards also poses problems. The new and changing nature of cyberspace would make defining its standards even more difficult than the general national standard. Also, like the national standard, the cyberspace standard would not achieve diversity goals.

B. Policy Problems with a Community-of-Dispatch Standard

A community-of-dispatch standard would not meet the diversity-among-jurisdictions criticisms. The dispatch standard has the additional policy problem of ignoring the regulatory interest of the community of receipt.

Limiting venue to the jurisdiction of dispatch and requiring the jury in that district to follow its own standards would implement a community-of-dispatch policy. The jury would then apply the standards of the local community of dispatch.

The community-of-dispatch standard would not solve the diversity-of-standards problem since distributors of obscene material could move to the most permissive jurisdictions. The standards of that community would then dictate the standards for all communities. If such venue restrictions applied to all media, the new rule would reverse the obscenity doctrine completely; but even if the standard applied only to cyberspace, distributors could send obscene material through cyberspace and avoid stricter standards in other media. Limiting venue only for cyberspace material, therefore, effectively limits it for other media.

The community-of-dispatch standard creates an additional policy problem. It ignores the long-recognized regulatory interest

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105 One commentator suggests allowing venue only in "those jurisdictions in which the BBS operator stores the data, prior to the user's access." Comment, 15 Loyola LA Enter L J at 442 (cited in note 38). She argues that courts should revise venue rules since they have eroded due process standards as applied to cyberspace but does not cite any judicial support for this position. This Comment takes the position that the application of local standards in cyberspace would meet due process requirements. See notes 44-48 and accompanying text.

106 Tighter controls on prosecutorial forum shopping probably would not solve the problem. Even without forum shopping, venue would still be available wherever consumers accessed obscene material, including the most restrictive local communities.
of the community affected by the distribution. Since distributors of obscene materials could circumvent stricter regulations over other media, the communities would lose effective control over those media as well. Thus the dispatch-community standard is less satisfactory from a policy perspective than local standards.

CONCLUSION

Cyberspace provides a new medium for the distribution of obscene materials. In other media, juries apply local community standards to determine obscenity. Current cyberspace technology does not enable geographical blocking, so obscene material in cyberspace could face the test of the most conservative location. The local standard reflects the policy of allowing diverse standards among jurisdictions, but cyberspace technology, as currently developed, would undermine diversity.

On the other hand, applying local standards to cyberspace would not interfere with non-speech related constitutional rights. Additionally, the policy advantages of the local standard counterbalance the one diversity policy criticism. Alternatives to the local standard would pose relatively greater policy problems, particularly in the area of administrability.

The Supreme Court already retreated from the diversity policy when it upheld dial-a-porn obscenity prosecutions in the jurisdiction of the caller. One might thus predict, contrary to some commentators' views, that the Supreme Court will not overrule Miller as a result of the new technology. Finally, retaining the local standard would spur investment in technology that might permit providers of pornography to tailor their offerings geographically. While cyberspace should not impact the obscenity doctrine, one might expect obscenity rules to shape the evolution of cyberspace.