



NOT IN MY BACKYARD

The Internet threatens to make US obscenity law unworkable, says **Marjorie Heins**

Robert and Carleen Thomas were happily operating the ‘Amateur Action Bulletin Board’ out of their California home in 1994 when legal hell descended in the form of a federal criminal prosecution for obscenity. The prosecution itself should not have come as a surprise: the US government, like its state and local counterparts, periodically launches campaigns against sexual material that it wants to ban (in this case, the material included online images of bestiality, sado-masochism, and oral sex). What was unusual was the venue the prosecutors chose for the trial: Tennessee, not California. They wanted the conservative community standards of America’s ‘Bible Belt’ to apply to the words and images that the Thomases had posted online.

US obscenity law is governed by a three-part legal test: whether the material in question is ‘patently offensive’ according to ‘contemporary community standards’; whether it appeals to the ‘prurient interest’ – again, as determined by community standards; and whether it lacks ‘serious literary, artistic, political, or scientific value’. Since the Internet can be accessed anywhere – and the Thomases’ bulletin board had been accessed by a government agent in Tennessee – the prosecutors argued the defendants could be subjected to the values and standards of Tennessee, not those of the larger – and decidedly more liberal – cyberspace community.

The courts agreed: the Thomases were convicted by a Tennessee jury and sentenced to prison (37 months for Robert and 30 for Carleen). But the question of what community standards should apply in the global medium of cyberspace continues to haunt that strange and anomalous corner of the law called obscenity.

Although US courts had assumed since the nineteenth century that ‘obscene’ speech can be prosecuted despite the seemingly absolute guarantee of the First Amendment (‘Congress shall make *no law* ... abridging the freedom of speech ...’), the Supreme Court did not directly address the issue until 1957. In *Roth v. United States* (a prosecution for distributing a racy literary magazine called *American Aphrodite*), libertarians argued that the First Amendment prohibits the government from censoring sexual speech. The Supreme Court was not prepared to go that far. Instead, it staked out a compromise position: sex is ‘a great and mysterious motive force in human life’, Justice William Brennan wrote for the Court, and hence, its portrayal in ‘art, literature, and scientific works’ is constitutionally protected. But the First Amendment does not ‘protect every utterance’. Material that lacks ‘even the slightest redeeming social importance’ is not

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the sort of thing that the First Amendment was designed to shield from government censorship.

But how are prosecutors, judges, and juries to decide what lacks ‘the slightest redeeming social importance’? According to Brennan’s opinion in *Roth*, they must consider whether, ‘to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest’. Basically, Brennan meant pornography, but that begs the question, since pornography may have considerable social importance to its viewers, readers, and creators. Essentially, the Supreme Court was making a moral judgment: pornography may have redeeming value to some, but not to *us*.

The *Roth* decision was nevertheless liberating, because it protected any material thought by a judge or jury to have ‘redeeming social importance’. In its wake, the unexpurgated *Lady Chatterley’s Lover*, among other classics, was finally published in the US. But the Supreme Court continued to wrestle with the question of how to distinguish obscenity from constitutionally protected speech about sex. The 1964 case in which Justice Potter Stewart famously proclaimed that he could not define obscenity, but ‘I know it when I see it’, dates from this tortured period.

‘Community standards’ was one of the primary sources of confusion. What exactly did it mean to find that the ‘dominant theme’ of a work ‘appeals to prurient interest’, according to ‘contemporary community standards’? In 1962, the Court compounded the dilemma by introducing another concept into obscenity law: ‘patent offensiveness’, which was also to be determined by ‘community standards’. Two years later, in the same case that produced Justice Stewart’s ‘I know it when I see it’, the Court reversed a judgment of obscenity against Louis Malle’s film, *Les Amants*, announcing that the community standards to be applied are national, not local, and that the courts must make their own constitutional judgment on whether they are violated. Finally, in 1966, the Court decided *Memoirs of a Woman of Pleasure (aka Fanny Hill) v. Massachusetts*; although there was no majority opinion, Justice Brennan, writing for a ‘plurality’ of three justices, announced a new three-part obscenity test: prurient appeal and patent offensiveness, both as measured by community standards, plus utter lack of redeeming social value.

During all this time, Justices Hugo Black and William O Douglas, the Court’s two consistent First Amendment champions, argued that there is no basis – logical, textual, or historical – for carving out an exception to

the protection of the First Amendment for obscenity simply because some sexual material is offensive to judges, prosecutors, or other arbiters of mainstream morality. In 1973, Justice Brennan finally came around to their point of view. He realised, he wrote, that judgments about prurience, patent offensiveness, and social value necessarily vary ‘with the experience, outlook, and even idiosyncrasies of the person defining them’. In the 15 years since *Roth*, the Court had struggled with various formulae, Brennan said, but ‘although we have assumed that obscenity does exist and that we “know it when [we] see it”, we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech’.

Brennan’s change of heart came in a series of cases that the Court, now led by the conservative, Nixon-appointed Chief Justice Warren Burger, used as vehicles for recasting obscenity law in a mould more congenial to prosecutors. The lead case, *Miller v. California*, made two major changes: it substituted a more onerous requirement of ‘serious literary, artistic, political, or scientific value’ for its previous standard, which protected any speech about sex unless it is ‘utterly without redeeming social importance’; and it affirmed the criminal conviction that was at issue in the case, even though the trial judge had instructed the jurors that in considering prurience and patent offensiveness, they should apply the ‘contemporary community standards of the State of California’ instead of the national standard mandated by the *Fanny Hill* case and others.

Chief Justice Burger explained the Court’s new acceptance of state or local community standards as a form of deference to an idealised vision of small-town America. ‘It is neither realistic nor constitutionally sound,’ Burger wrote, ‘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.’

But where did Burger get the idea that First Amendment protection for speech should change depending on locale? And was he even right, as an empirical matter, to assume that people holed up all winter in freezing Maine were not consuming pornography just as avidly as those in jaded New York? Running through Burger’s opinions in *Miller* and its companion cases is, rather, a concern with public, commercial exploitation of sex. Burger did not want Main Street, USA overrun with porn shops. But it was still startling to think that constitutional rights could depend on where in

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the US one happened to be when publishing, distributing, or displaying sexual material.

The 1973 decision in *Miller v. California* was an attempt by the Supreme Court to get out of the business of reviewing every naughty book or film that had been found obscene by a judge or jury; but initially, things did not work out as planned. Just one year later, the Court found itself again in the screening room, overturning a Georgia jury's verdict that the Mike Nichols film *Carnal Knowledge* was obscene. The justices unanimously ruled that the film was not 'patently offensive' according to contemporary community standards.

Could puritanical localities impose their standards on all of cyberspace?

The Court also now announced (in another case decided the same day) that 'community standards' can be either national or local. That is, 'a juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes', but 'our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of law'. This bit of slippery reasoning seemed to create what lawyers call a 'one-way ratchet': the people of Maine or Mississippi can impose a rigorous local standard on sexual speech because, as Chief Justice Burger wrote in *Miller*, they should not have to tolerate the laxity of Las Vegas or New York; but the people of Las Vegas and New York do not necessarily get to benefit from their more robust environment, because the courts do not have to specify any 'precise geographic area' when instructing juries on what 'community standard' means.

And so matters stood, with minor refinements of obscenity law, for the next generation. In 1984, for example, apparently recognising that sex is, after all, a healthy pursuit, the Court announced that 'prurient interest' means only an appeal to 'shameful or morbid' appetites, not 'normal sexual responses'. Local juries would now get to decide what is healthy or unhealthy in the bedroom.

Then the Internet arrived, and with it a full-fledged revival of the community standards dilemma. Although the courts in Robert and Carleen Thomases' case managed to skirt the constitutional concerns raised by local community standards when applied to the Internet, because the Thomases had specific knowledge that a Tennessean had joined their group, a clash between small-town morality and global communication seemed inevitable. Could puritanical localities really impose their sexual standards on all of cyberspace?

Initially, the Supreme Court seemed decidedly hostile to such an outcome. America's first Internet censorship law, passed in 1996, criminalised any sexual speech online if it is available to minors and is 'indecent' — that is, 'patently offensive as measured by contemporary community standards'. Striking down the law in a 1997 case called *Reno v. ACLU*, the Supreme Court noted among its many faults that 'the "community standards" criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message'.

Congress quickly passed another, narrower law restricting online speech, but it did not address the problem of community standards. The 'Child Online Protection Act' or 'COPA', replaced the broad 'indecent' test with a less sweeping legal standard called 'harmful to minors' (also sometimes called *Miller Lite*, because it incorporates all three prongs of the *Miller v. California* definition of obscenity — prurience, patent offensiveness, and lack of serious value — and then applies them to adolescents and children). The American Civil Liberties Union soon filed a constitutional challenge to COPA on behalf of online publishers ranging from Philadelphia Gay News to Condomania.

Because the *Miller Lite* test, like *Miller* itself, turns on community standards, the question was now squarely presented: does the First Amendment permit a local 'contemporary community standard' for obscenity in cyberspace? A federal court of appeals, confronted with COPA, said No, because such a standard would force Internet speakers to self-censor valuable expression for fear of prosecution in the most conservative communities.

The government appealed to the Supreme Court, which now backed away from its initial recognition in *Reno v. ACLU* of the constitutional perils of allowing local standards to dictate speech online. Justice Clarence Thomas, writing for the Court, produced more of the slippery reasoning that

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has characterised obscenity law from the outset: the variability of community standards is not enough in itself to invalidate COPA, he said, because COPA has the additional limitations of prurient appeal and lack of serious value for minors. (The case went back to the lower courts, which invalidated COPA on other grounds. In January 2009, the Act was finally interred when the Supreme Court denied further review.)

When the right case comes along – which will not necessarily be soon – the justices of the US Supreme Court will presumably decide that applying local community standards is not really viable for the Internet. That is, ‘the people of Maine or Mississippi’ cannot expect to dictate what is morally permissible in a global medium. Indeed, in their first encounter with COPA, five justices joined in concurring opinions arguing that we need to return to a national standard.

An American national standard, of course, does not take account of the differing cultures that share the web, and imposing American sexual morality on the rest of the world is no more palatable than is censoring the entire Internet to please the Chinese government or, for that matter, purging the entire Internet of racist hate speech because it is illegal in Germany and France. Should sexual material from outside the US, therefore, be blocked to American viewers, if it is thought prurient and patently offensive by American ‘community standards’, in the same way that Internet access providers now block material from Chinese, French or other viewers in order to comply with these nations’ laws? The prospect is daunting, for most countries have laws against obscenity, each with its own peculiar definitions.

The rational answer is that obscenity laws in the US should be eliminated, as Justices Douglas and Black argued a half-century ago, because they have no justification under the First Amendment: moral offence is not the same as palpable harm, and societal fears about minors’ exposure to pornography have never been backed up by credible evidence that such exposure in itself distorts their sexual development. Good sex education, for young and old (and middle-aged), is a more effective and constitutionally palatable answer to concerns about pornography.

But rationality has never reigned in the highly charged sphere of obscenity law, and things are not likely to change, at least not judicially, now that the Internet offers instantaneous access to a universe of words and images, some of them admittedly horrible. (Homicidal racism is an example.) One possible future scenario is that the technology of the Internet will ultimately render obscenity laws ineffective and obsolete.

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Another, however, is that those who control online content – at this point, primarily corporate Internet access providers, portals, and search engines – will impose a private ‘community standard’ of their own. That would be an outcome that even the people of Maine and Mississippi might find unfortunate. □

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