



Judicial Erosion of Protection for
Defendants in Obscenity Prosecutions?:
When Courts Say, Literally, Enough is Enough
and When Internet Availability
Does Not Mean Acceptance

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I. INTRODUCTION

The ramped-up prosecutorial assault on sexually explicit adult content during the administration of former President George W. Bush, after a dearth of such actions during the administration of President Bill Clinton and then-U.S. Attorney General Janet Reno,¹ is well documented.² For instance, in 2005 the United States Department of Justice created the Obscenity Prosecution Task Force, a unit that is “dedicated exclusively to the protection of America’s children and families through the enforcement of our Nation’s obscenity laws.”³ The move, in the authors’ opinion, was one part public relations strategy and one part prosecutorial overkill, as the Justice Department had already created the Child Exploitation and Obscenity Section (CEOS) fewer than twenty years prior to enforce “federal criminal statutes relating to the exploitation of children and obscenity,”⁴ with the CEOS trumpeting itself as “the nation’s experts”⁵ in obscenity⁶ issues. Nonetheless, the seemingly

¹ See Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (attributing to Mary Beth Buchanan, then the United States Attorney for Western Pennsylvania, the proposition 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’”); Joe Mozingo, *Obscenity Task Force’s Aim Disputed*, L.A. TIMES, Oct. 9, 2007, at B1 (describing the Bush administration’s anti-obscenity efforts that have “reversed years of neglect by the Clinton administration,” and quoting Bryan Sierra, a Justice Department spokesperson for the proposition that “[t]here was a lack of enforcement for nearly a decade”).

² The Justice Department, under the Bush administration, “devoted new attention to areas important to conservative activists, such as sex trafficking and obscenity, according to the department’s own performance and budget numbers.” Dan Eggen & John Solomon, *Justice Dept.’s Focus Has Shifted—Terror, Immigration are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1. Under Bush’s lead, the “Justice Department has begun aggressively policing adult pornography as well, a change from the Clinton administration, which pursued almost no such cases.” Shannon McCaffrey, *Justice Department Cracks Down on Adult Porn Industry*, PHILA. INQUIRER, Apr. 4, 2004, at A10.

For instance, the number of obscenity prosecutions brought during President George W. Bush’s first term in office was double the number brought under President Bill Clinton’s term. Paula Reed Ward, *Federal Obscenity Case, Filed 5 Years Ago, Has Stalled*, PITT. POST-GAZETTE, Aug. 26, 2008, at A-1.

³ U.S. Dep’t of Justice, Obscenity Prosecution Task Force, <http://www.justice.gov/criminal/optf> (last visited Feb. 22, 2010).

⁴ U.S. Dep’t of Justice, Child Exploitation & Obscenity Section, <http://www.justice.gov/criminal/ceos> (last visited Feb. 22, 2010).

⁵ *Id.*

duplicative Task Force was created, as the *Los Angeles Times* reported, “after Christian conservative groups appealed to the Bush administration to crack down on smut.”⁷

But this move alone was not the only indicia of the Bush administration’s heightened efforts to attack sexually explicit movies made by and for adults. In particular, there was also substantial evidence that two United States Attorneys were dismissed during the Bush administration, at least in part for refusing to bring obscenity prosecutions when given directives to do so from the then-newly created Obscenity Prosecution Task Force.⁸

Several of the high-profile obscenity cases brought during President Bush’s administration have ended, resulting in either convictions⁹ or guilty pleas.¹⁰ Other

⁶ Obscenity is one of the narrow categories of speech that is not protected by the First Amendment’s guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”). While the High Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), held that there is a right to possess obscene material in the privacy of one’s own home, there is not a “correlative right to receive it, transport it, or distribute it.” *United States v. Orito*, 413 U.S. 139, 141 (1973).

⁷ Scott Glover, *Trial to Gauge What L.A. Sees as Obscene*, L.A. TIMES, June 8, 2008, at A1.

⁸ See OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 201–220 (2008), available at <http://www.justice.gov/oig/special/s0809a/final.pdf>. The Special Report examines the removal of Daniel Bogden from his position as United States Attorney for Nevada, and concludes that “the primary reason for Bogden’s inclusion on the removal list was the complaints by [Brent] Ward, the head of the Department’s Obscenity Prosecution Task Force, about Bogden’s decision not to assign a Nevada prosecutor to a Task Force case.” It also examines the removal of Paul Charlton from his position as United States Attorney for Arizona, and notes that “[w]hile it is not clear to what extent Charlton’s alleged failure to assist the Task Force was a factor in his removal, we believe it played a part in [Chief of Staff of the Justice Department D. Kyle] Sampson’s decision to put him on the list.”

See also Mark Silva & Andrew Zajac, *Bush Takes Tough Line on Firings*, CHI. TRIB., Mar. 21, 2007, at 1 (reporting how, in an email, “Brent Ward, the head of a Justice Department anti-pornography task force, complained to a department colleague he had ‘sat in a meeting with [prosecutor] Paul Charlton in Phoenix and heard him thumb his nose at us’ with a reluctance to take on obscenity cases. Ward also complained about another fired prosecutor, Daniel Bogden of Nevada”); Scott Wilson, *Obama Nominates Fired U.S. Attorney*, WASH. POST, Aug. 1, 2009, at A3 (discussing President Barack Obama’s nomination of Daniel G. Bogden to be the United States Attorney for Nevada three years after he was dismissed from that position and noting how “[a]t least one senior Justice Department political appointee also complained that Bogden was insufficiently aggressive in pursuing obscenity cases in Nevada”).

⁹ Most notably, a federal jury in June 2008 in Tampa, Fla., convicted veteran adult producer Paul Little, who is also known by the stage name of Max Hardcore, of multiple counts related to the transportation and distribution of obscene movies via the Internet and U.S. Mail. See Press Release, U.S. Dep’t of Justice, Federal Jury Convicts California Producer and His Adult Entertainment Company of Obscenity Crimes (June 5, 2008), available at http://www.justice.gov/criminal/ceos/Press%20Releases/MDFL_Little_Conviction_06-05-08.pdf (describing the outcome in the case of *United States v. Little*). The United States Court of Appeals for the Eleventh Circuit upheld Little’s multiple convictions in February 2010, although it vacated his sentence and remanded the case for re-sentencing because the district

Bush-initiated obscenity prosecutions remain pending during the administration of President Barack Obama and under current U.S. Attorney General Eric Holder's leadership, including the case against John Stagliano, a Malibu-based adult movie mogul who was indicted in April 2008 by a federal grand jury all the way across the country in Washington, D.C.¹¹

court "erred when it considered pecuniary gain derived from sales of the DVDs outside the Middle District of Florida." *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 25 (11th Cir. Feb. 2, 2010).

Just a few months after Little's conviction and while still on the clock of President Bush, a federal jury in West Virginia convicted Loren Jay Adams, 46, of Martinsville, Ind., of six counts of selling and distributing obscene films in West Virginia. *See* Press Release, U.S. Dep't of Justice, Indiana Man Convicted of Obscenity Violations by Federal Jury in West Virginia (Oct. 1, 2008), *available at* <http://www.justice.gov/usao/wvn/press/press08/october/adams.html> (describing the conviction of Adams and adding that "[i]n an indictment returned by the grand jury on May 20, 2008, and unsealed upon his arrest, Adams was charged with transporting obscene matters through the U.S. mail and transportation of obscene matters for sale or distribution by means of interstate commerce in February 2008.").

¹⁰ The highest profile plea came in March 2009 in the long-running case of *United States v. Extreme Associates, Inc.*, No. 03-0203, 2009 U.S. Dist. LEXIS 2860 (W.D. Pa. Jan. 15, 2009), when Robert Zicari and Janet Romano, owners of a now out-of-business adult movie company Extreme Associates, Inc., "pleaded guilty before United States District Judge Gary L. Lancaster to a felony charge of conspiracy to distribute obscene material through the mails and over the Internet," more than five years after being indicted in the Western District of Pennsylvania in August 2003. Press Release, U.S. Attorney's Office, Western District of Pennsylvania, Extreme Associates and Its Owners, Robert Zicari and Janet Romano, Plead Guilty to Violating Federal Obscenity Laws (Mar. 11, 2009), *available at* http://www.justice.gov/usao/paw/pr/2009_march/2009_03_11_01.html. The movies in question were often graphic, as the government's press release stated:

In connection with the guilty plea, the court was advised that Zicari and Romano, through Extreme Associates, Inc., mailed obscene films entitled "Force [sic] Entry—Director's Cut," "Cocktails 2—Directors Cut," and "Extreme Teen #24" to the Western District of Pennsylvania. Forced Entry portrays the rape and murder of three women, who are slapped, hit, spit upon and generally abused and degraded throughout graphic portrayals of forced sex acts. In Cocktails #2, women engage in sex acts with multiple partners while a bowl, placed in front of the women, is filled with various bodily liquids.

Id.

¹¹ *See* Press Release, U.S. Dep't of Justice, Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity Violations (Apr. 8, 2008), *available at* <http://www.justice.gov/opa/pr/2008/April/08-crm-280.html> (describing the indictment targeting Stagliano and two of his companies, Evil Angel Productions, Inc. and John Stagliano, Inc.).

This article argues that the lasting legacy of the Bush administration's "historical"¹² crackdown on obscenity will not be measured by the sheer number of convictions or guilty pleas it garnered in its efforts to rein in what some perceived as the proliferation of harder, more aggressive content on the World Wide Web¹³ in the prosecutorial vacuum that existed during Bill Clinton's eight years in the Oval Office.¹⁴ Indeed, this article contends that the real damage done to the First Amendment¹⁵ speech rights of those who produce sexually explicit content featuring consenting adults—not child pornography, which is a very different type of content that falls outside the scope of the First Amendment¹⁶—has taken place in the past

¹² See Luiza Chwialkowska, *Crackdown on Pornography Is Being Launched by Bush*, N.Y. SUN, Sept. 15, 2003, at 1 (writing that "[t]he Bush administration is launching a 'historical' crackdown on makers and distributors of material deemed to be obscene, after nearly a decade without prosecutions under federal obscenity laws . . .").

¹³ E.g., Donna M. Hughes, *The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children*, 13 HASTINGS WOMEN'S L.J. 127, 129 (2002) (contending that "[a]s a result of the huge market on the web for pornography and the competition among sites, the pornographic images have become rougher, more violent, and degrading").

¹⁴ United States Attorney for the Western District of Pennsylvania Mary Beth Buchanan suggested in a 2003 press release regarding the prosecution of Extreme Associates, Inc. and its owners that adult content proliferated during the Clinton administration, stating the "lack of enforcement of federal obscenity laws during the 1990s has led to a proliferation of obscenity throughout the United States, such as the violent and degrading material charged in this case." Press Release, U.S. Dep't of Justice (Aug. 7, 2003) available at http://www.justice.gov/criminal/ceos/Press%20Releases/WDPa%20Zicari%20indict%20PR_080703.pdf. During a 2003 hearing before the Senate Judiciary Committee, U.S. Senator Orrin Hatch (R.-Utah) and "witnesses from the Department of Justice criticized the Clinton administration, saying enforcement was lax and helped foster a Wild West atmosphere in Internet porn." Lisa Friedman, *Internet Cutting L.A. Role in Porn*, L.A. DAILY NEWS, Oct. 16, 2003, at N4.

¹⁵ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁶ The U.S. Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. See *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) (writing that "we have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and "we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (providing that "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children*") (emphasis added). Under federal statutory law, child pornography is defined as:

two years at the level of the judiciary. As this article illustrates, federal prosecutors recently have coaxed very favorable rulings to their side on critical issues that cut to the heart of the aging—some scholars and attorneys would say outdated,¹⁷ particularly its use of community standards to assess Internet-transmitted material¹⁸—test for obscenity articulated by the United States Supreme Court in 1973 in *Miller v. California*.¹⁹

Part I of this article explores rulings by two different federal courts that dramatically impact the longstanding and explicit requirement under *Miller* that, as the Supreme Court put it, any work must be “taken as a whole”²⁰ by the fact finder in determining whether or not it is obscene. Part II then shifts to another aspect of *Miller* now facing scrutiny before the courts, as it examines recent cases and rulings affecting the ability of defendants in obscenity prosecutions to effectively use Internet-based searches and search engines, such as Google and Yahoo, when trying to demonstrate what the local “contemporary community standards”²¹ are in any given case. Specifically, Part II, which includes exclusive e-mail correspondence conducted by the authors of this article with a defense attorney who attempted to use

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (2008).

¹⁷ See Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 3 (2007) (asserting that the test for obscenity created by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), “is concurrently confusing and out of touch with recent technological, social and legal developments”); Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 22 (2005) (arguing that the United States Supreme Court test for obscenity created in *Miller* should be overruled); Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 60 (2005) (arguing the *Miller* test’s use of contemporary community standards renders it an anachronism when applied to disputes involving content on the Internet).

¹⁸ Professor Mark Alexander, for instance, has observed that “because *Miller* was decided in 1973, it lacks any apparent mechanism for dealing with the Internet, which was only initially conceived in 1969 and really expanded in just the last decade or so.” Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL’Y 977, 1006 (2002).

¹⁹ 413 U.S. 15 (1973).

²⁰ *Id.* at 24.

²¹ *Id.*

such an approach, explores how such attorneys might effectively try to use what is known as a comparables argument with Internet resources. Finally, the conclusion suggests it is finally time for the Supreme Court to hear an appeal in an obscenity prosecution involving Internet-disseminated content in order to address the continued viability of *Miller* in the digital era.

II. CONSIDERING A WORK AS A WHOLE: ARE “REPRESENTATIVE PORTIONS” OF A MOVIE ENOUGH?

This part of the article is divided into four sections. The first section provides an overview, based on both case law and a review of the scholarly literature, of the taking-the-work-as-a-whole requirement in modern obscenity law in the United States. The second and third sections of this part then examine and analyze two different cases in which that requirement appears to have been watered down, if not completely obliterated. Importantly, these two sections point out problems with these decisions, particularly as they negatively impact the First Amendment rights of defendants in obscenity prosecutions. Finally, the fourth section sets forth a pro-and-cons balancing analysis for evaluating the relative utility of allowing the prosecution to show only parts of adult movie DVDs rather than showing them in their entirety.

A. Taking a Work as a Whole in Obscenity Law

Although the Supreme Court held more than a half-century ago that “obscenity is not within the area of constitutionally protected speech or press,”²² the Court’s current version of the legal test for determining when content is or is not obscene—a test that replaced an earlier high court formulation in *Memoirs v. Massachusetts*²³—was articulated in 1973 in *Miller v. California*.²⁴ In a fractured decision that has been analyzed by several legal scholars²⁵ and criticized by two in a relatively recent law

²² *Roth v. United States*, 354 U.S. 476, 485 (1957).

²³ 383 U.S. 413 (1966). In *Memoirs*, the high court held that, in light of its earlier decision in *Roth* and subsequent cases, for any work to be deemed obscene

three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. at 418.

²⁴ 413 U.S. at 15 (1973).

²⁵ A complete review of the development of obscenity law in the United States, the *Miller* test, and the criticism of *Miller* are beyond the scope of the article, which focuses on recent decisions affecting the judicial implementation of specific aspects of the *Miller* test. Several important articles have already been written on these topics. See, e.g., Bret Boyce, *Obscenity and*

journal article as “the most vague law that any American citizen has ever been required to interpret,”²⁶ Chief Justice Warren Burger delivered the opinion of the Court that spelled out a conjunctive,²⁷ three-part test for fact-finders to use in deciding whether a speech-product is obscene.²⁸ That test asks the fact-finders to resolve three questions:

1. Does the work in question, when taken as a whole and viewed from the perspective of the average person in light of contemporary community standards, appeal to a prurient interest in sex?
2. Does the work depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law?
3. Does the work, when taken as a whole, lack serious literary, artistic, political, or scientific value?²⁹

Both the first and third prongs of the *Miller* test, as set forth above, explicitly require that a work be considered and evaluated as a whole, while the second part does not.³⁰ This work-as-a-whole requirement, in fact, dates back long before *Miller*, with the Court noting in *Roth v. United States*³¹ in 1957 that the “proper standard”³² for obscenity requires it; the earlier standard “allowed material to be judged merely by

Community Standards, 33 YALE J. INT’L L. 299, 311–325 (2008) (tracing the history of obscenity law in the United States, including a review of the *Miller* test); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 17–21 (1986) (reviewing the U.S. Supreme Court’s obscenity jurisprudence; contending that “obscenity is another area of the law where the Court has tinkered for years without ever producing a cogent doctrine;” and noting that “the lack of significant change in the Court’s obscenity doctrine, announced in 1973 in *Miller v. California*, is due less to a final resolution of issues by the Court than to the Court’s decision simply to stop tinkering with the test”); and Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25 (2004) (reviewing the *Miller* test and, in particular, the difficulty of applying its use of contemporary community standards on the Internet).

²⁶ H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 531 (2003).

²⁷ See Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 100 (1996) (describing *Miller* as defining “a new conjunctive test for obscenity,” as it requires the government to prove all three prongs in order to win an obscenity case).

²⁸ *Miller*, 413 U.S. at 24 (setting forth three-part test).

²⁹ *Id.*

³⁰ See James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1174 (1993) (observing that “the part of the test not relying on the work as a whole” is the part evaluating “patently offensive sexual depictions”).

³¹ 354 U.S. 476, 476 (1957).

³² *Id.* at 489.

the effect of an *isolated excerpt*.³³ The Court in *Roth* “rejected the previously accepted proposition that obscenity could be judged on the basis of an isolated, detached, or separate excerpt from a larger work because it was unconstitutionally restrictive of the freedoms of speech and press.”³⁴ Indeed, it observed one year prior to *Miller* that “a reviewing court must, of necessity, look at the *context of the material*, as well as its content.”³⁵ And as one federal court put it, “though *Roth* has been overtaken by *Miller*, the ‘taken as a whole’ requirement survives in the statement of, and thus in applying, the newer *Miller* standard.”³⁶

In a very recent obscenity opinion, U.S. District Judge Gary L. Lancaster interpreted the taken-as-a-whole requirement to mean that “we must view the *context and manner* in which the material has been *created, packaged, and presented by the author to the intended audience* in order to decide what the work ‘as a whole’ is for purposes of the *Miller* test.”³⁷ Showing a jury one scene from an adult movie, without the surrounding “context,”³⁸ clearly fails to present the work as it was “created”³⁹ by the producer and designed to be “presented”⁴⁰ to the intended audience. As illustrated later in this article,⁴¹ many adult movies today do have plots and storylines, silly though they may seem to most observers; taking one scene out of such a plot-driven movie to show in isolation to a jury is not the way such a movie was intended to be watched by its producer. Indeed, allowing jurors to consider only a single scene from a movie represents a return to the isolated-excerpt standard squarely rejected by the Court more than a half-century ago in *Roth*.⁴²

When an issue of a magazine is seized by law enforcement officials because they think it is obscene, courts have held that it is the entire issue of the magazine—articles, photos, letters, and all other content, taken collectively and in the aggregate—that constitutes the work that must be evaluated as a whole.⁴³ When a musical composition is evaluated for whether it is obscene, the entire album, including both

³³ *Id.* at 488–89 (emphasis added).

³⁴ *United States v. Extreme Assoc., Inc.*, No. 03-0203, 2009 U.S. Dist. LEXIS 2860, at 4 (W.D. Pa. Jan. 15, 2009).

³⁵ *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (emphasis added).

³⁶ *United States v. Miscellaneous Pornographic Mags.*, 526 F. Supp. 460, 465 n.8 (N.D. Ill. 1981).

³⁷ *Extreme*, 2009 U.S. Dist. LEXIS 2860, at 5 (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *infra* notes 76–80 and accompanying text.

⁴² See *supra* text accompanying notes 31–34 (addressing the Court’s rejection of the isolated-excerpt approach).

⁴³ See *Penthouse Int’l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1367–70 (5th Cir. 1980) (involving hard-copy issues of adult magazines such as OUI, PENTHOUSE, PLAYBOY, AND HUSTLER; finding that precedent “require[s] us to treat each magazine as a separate work that is to be taken as a whole;” and rejecting the argument “that each article and pictorial presentation is a ‘work’ and a magazine is merely a conglomeration of these works resulting in a ‘volume’”).

lyrics and music—text and sound, as it were—must be considered.⁴⁴ Most importantly for the cases at the center of this article, when the members of the U.S. Supreme Court consider whether a movie is obscene, they watch the entire movie, as they did with the 1971 Jules Feiffer movie starring Jack Nicholson and Ann-Margret, *Carnal Knowledge*, in *Jenkins v. Georgia*,⁴⁵ one year after *Miller*. Likewise, when a court in Virginia deemed the oft-prosecuted⁴⁶ 1970s adult movie THE DEVIL IN MISS JONES to be obscene, Judge James M. Lumpkin wrote that the court has “viewed it from beginning to end.”⁴⁷

More recently, the Supreme Court, in 2002, held that there is “an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.”⁴⁸ Writing for the majority in *Ashcroft v. Free Speech Coalition*,⁴⁹ Justice Anthony Kennedy added: “Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is *part of the narrative*, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.”⁵⁰

Thus, as recently as 2002, the U.S. Supreme Court reinforced the idea that the government cannot wrench out a scene or two from a movie when it attempts to prove the movie is obscene. For lower court judges, like those described in Sections B and C below, to ignore this “essential First Amendment”⁵¹ rule less than a decade later is for them to boldly contravene precedent.

An important point here is that one small item, standing alone in a much more lengthy work, is not likely to be determinative of whether or not the work as a whole is obscene. As the Supreme Court opined in 1972, “a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.”⁵²

⁴⁴ Luke Records, Inc. v. Navarro, 960 F.2d 134, 136 (11th Cir. 1992).

⁴⁵ 418 U.S. 153 (1974). The court describes its own viewing of the film in some detail. *Id.* at 161.

⁴⁶ See, e.g., Dyke v. Georgia, 209 S.E.2d 166, 170 (Ga. 1974) (concluding that “the film, ‘Devil in Miss Jones,’ is obscene as a matter of constitutional law and fact”); Commonwealth v. Capri Enter., Inc., 310 N.E.2d 326 (Mass. 1974) (involving a Massachusetts obscenity prosecution of a corporate defendant for showing THE DEVIL IN MISS JONES); Sioux Falls v. Mini-Kota Art Theatres, Inc., 247 N.W.2d 676 (S.D. 1976) (affirming the obscenity conviction of the corporate owner, a Sioux Falls movie theatre, for showing THE DEVIL IN MISS JONES).

⁴⁷ Commonwealth v. “The Devil in Miss Jones”, 3 Va. Cir. 436, 442 (Va. Cir. Ct. 1973). Judge Lumpkin’s apparent utter disgust with having to fulfill this full-length viewing requirement is almost palpable in his opinion, as he writes that “if there are moral values in ‘The Devil in Miss Jones,’ then no movie could ever be obscene, no matter the sexual gymnastics, provided a ‘moral message’ were shown before or after the aforesaid gymnastics.” *Id.* at 444. He concludes his opinion with this memorable last sentence: “The activities depicted in ‘The Devil in Miss Jones’ are, to use the plainest language at hand, low-down, common, trash.” *Id.* at 446.

⁴⁸ Ashcroft v. Free Speech Coal., 535 U.S. 234, 248 (2002).

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.*

⁵² Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

This quote taps into what is known by courts as “the ‘sham exception’ to the taken-as-a-whole” requirement,⁵³ referring to the idea that adding into a work a random dose of textual material that may have literary value, or simply may be innocuous, will not necessarily save an otherwise obscene work. As Justice Kennedy might put it, as noted above, the content must fit “the narrative”⁵⁴ and not just be dumped in outside of that storytelling framework or structure.

For instance, one court held that attaching a political letter to a mailing that was otherwise comprised of what the court called “obscene pictures”⁵⁵ did not save the mailing as a whole from being deemed obscene.⁵⁶ As another court put it, “an obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details.”⁵⁷

Serious news articles with political value have helped to save issues of sexually-explicit HUSTLER magazine from being deemed obscene when it comes to the third prong of *Miller* that asks whether the work, taken as a whole, has serious literary, artistic, political, or scientific value. As one court put it when considering an issue of HUSTLER:

The November 1996 *Hustler* magazine contains a serious, non-sexual article entitled “Washington’s Worst Congressman Headline Acts in Capital Hill’s Hall of Shame”. This article is a criticism of more than a dozen members of Congress that *Hustler* magazine judges to be the worst congressmen. This article is clearly one that constitutes political speech and saves this issue from obscenity.⁵⁸

This provides a prime example of why feminist University of Michigan legal scholar Catharine MacKinnon “criticizes the ‘work as a whole’ requirement as legitimating pornographic publications like *Playboy*.”⁵⁹ This perspective should come as little surprise to those familiar with MacKinnon’s views, as a review of the literature reveals that she has written that in pornography women are “humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed.”⁶⁰

⁵³ *United States v. Merrill*, 746 F.2d 458, 464 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985).

⁵⁴ *Ashcroft*, 535 U.S. at 248.

⁵⁵ *Merrill*, 746 F.2d at 464.

⁵⁶ *Id.*

⁵⁷ *Flying Eagle Publ’n, Inc. v. United States*, 285 F.2d 307, 308 (1st Cir. 1961).

⁵⁸ *Brouette v. Sgt. Starns*, 161 F. Supp. 2d 1021, 1026 (D. Ariz. 2001). The judge in this case seemed to find it particularly important that all issues of HUSTLER included such non-sexual editorial content. *Id.* at 1025–26.

⁵⁹ Lindgren, *supra* note 30, at 1173.

⁶⁰ CATHARINE A. MACKINNON, *ONLY WORDS* 17 (1993).

B. United States v. Adams

In July 2009, in *United States v. Adams*,⁶¹ the United States Court of Appeals for the Fourth Circuit gutted the taken-as-a-whole requirement and held that it was sufficient for prosecutors to merely show “representative portions”⁶² of the adult videos at issue in the case.⁶³ Rather than requiring the videos to be shown to jurors in their entirety, the Fourth Circuit ruled it was sufficient that a federal agent “testified that he had viewed each movie in its entirety, summarized the remainder of the films for the jury, and stated that the unplayed portion of each showed sexual acts similar to those contained in the excerpts.”⁶⁴ The court also found it significant that the federal agent read aloud the defendant’s “website’s descriptions of the films to the jury, and testified that the descriptions accurately detailed the content of each movie.”⁶⁵ Taken together, this was, according to the appellate court, all that was required “despite the jury’s failure to view the films in their entirety.”⁶⁶ The three-judge panel found “that the Government presented evidence sufficient to support the jury’s conclusions that, taken as a whole, the films appealed to prurient sexual interests and lacked serious literary, artistic, political, or scientific value.”⁶⁷

There are several problems with the Fourth Circuit’s opinion, aside from the obvious fact that the court upheld an obscenity conviction in which the prosecution failed to satisfy its duty, as established in *Miller*, to show the works in question in their entirety. The most obvious problem is determining what precisely constitutes a “representative” portion of a work such as a DVD. The term itself likely would be fraught with void for vagueness problems if it were used as part of a statute.⁶⁸ Is there, for instance, a minimum (or maximum) percentage of time or length of the

⁶¹ No. 08-5261, 2009 U.S. App. LEXIS 16363 (4th Cir. July 24, 2009).

⁶² *Id.* at 3.

⁶³ The three videos at issue in the case were DOGGIE3SOME, ANAL DOGGIE AND HORSE and FISTING 1. *Id.* at 3–4. Fisting, as defined by adult entertainment industry veteran Joy King, refers to “[i]nserting the entire hand into a vagina or anus.” JOY KING, GET INTO PORN: AN INDUSTRY INSIDER’S GUIDE TO BECOMING A PORN STAR 98 (2009).

⁶⁴ *Adams*, 2009 U.S. App. LEXIS 16363 at 4.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 4.

⁶⁸ The United States Supreme Court recently described the void for vagueness doctrine, in the process of considering the constitutionality of a federal statute targeting a particular type of sexual content, as:

an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

United States v. Williams, 553 U.S. 285, 304 (2008).

“portion” that must be viewed, relative to the entire length of the movie, in order to constitute a “representative” segment? In other words, is ten minutes out of a 90-minute movie a sufficient portion? Or, as the title of this article puts it, when is enough enough?

Likewise, what makes a federal law enforcement agent an expert in determining what constitutes a “representative” part of any movie, particularly if he or she is not well versed in adult movies?⁶⁹ Is any single segment of a full-length movie ever truly representative of the entire movie? While showing an explicit sex scene from an adult movie may indeed signal to jurors that the rest of the movie also has sex scenes, a single scene is not representative of the movie’s content.

Although Little’s movies⁷⁰ and many others do not have plots of any note,⁷¹ some adult videos today actually possess storylines, thin though they may be, and feature very different types of scenes that advance the story being told. For instance, the movie *Pirates II: Stagnetti’s Revenge*, which caused a stir in 2009 when shown on several college campuses,⁷² has been described as a “pornographic epic.”⁷³ Produced by Digital Playground, *Pirates II* “is a \$10 million homage to Disney’s ‘Pirates of the Caribbean’ trilogy, complete with computer-animated skeleton pirates.”⁷⁴ As a review by Jared Rutter of *Adult Video News* puts it:

Director/co-writer/co-producer Joone has gone the extra mile in terms of story, art direction, special effects and, most importantly, performance. And all without stinting on the sex. The 11 sex scenes are rather short, five or six minutes, and completely integrated into the story—the way they used to be in those big productions of porn’s Golden Age.⁷⁵

⁶⁹ This assertion may seem odd at first glance, but many adult publications, such as AVN and HUSTLER, routinely feature reviews of adult movies. It would seem that the people who do such reviews for a living and who watch hundreds of such movies in order to describe them for readers would be better qualified to determine what, if anything, is representative of an adult film.

⁷⁰ See *infra* text accompanying note 114 (describing the content of one of Little’s movies).

⁷¹ See Matt Richtel, *Lights, Camera, Lots of Action. What, You Want a Script, Too?*, N.Y. TIMES, July 8, 2009, at A1 (asserting that the “pornographic movie industry has long had only a casual interest in plot and dialogue” and contending that “moviemakers are focusing even less on narrative arcs these days. Instead, they are filming more short scenes that can be easily uploaded to Web sites and sold in several-minute chunks”).

⁷² See, e.g., Susan Kinzie & John Wagner, *At U-Md., XXX-Rated Show Goes On*, WASH. POST, Apr. 7, 2009, at B1 (describing the controversy when the movie was shown at the University of Maryland).

⁷³ Childs Walker, *Md. Balancing Rights, Politics and Porn*, BALT. SUN, Oct. 7, 2009 at 1A.

⁷⁴ Dave Larsen, *Pirate Porn Movie Sparks Campus Debates*, DAYTON DAILY NEWS (Ohio), Apr. 13, 2009, at A4.

⁷⁵ Jared Rutter, *Movie Review, Pirates II: Stagnetti’s Revenge* (Sept. 29, 2008), <http://www.avn.com/movies/75158.html> (last visited March 9, 2010) (on file with the Harvard Law School Library).

In addition, Hustler Video has produced and distributed a series of spoofs and parodies in the past two years, with tell-all titles such as WHO'S NAILIN' PAYLIN?,⁷⁶ THIS AIN'T THE MUNSTERS XXX,⁷⁷ and NOT THE BRADYS XXX.⁷⁸ The first of these movies is a political parody of an erstwhile Alaskan governor and Republican vice-presidential candidate,⁷⁹ while the last of these movies spoofs *The Brady Bunch* and is described on the back of the DVD box cover as follows:

Facing financial woes, Mike & Carol put the family on a budget. The kids take odd jobs to help save their house from bank foreclosure but when Marcia unwittingly applies for a job as a "figure" model, wild fun & sexual mayhem ensue when she discovers she's about to star in a porn movie!⁸⁰

⁷⁶ WHO'S NAILIN' PAYLIN? (Hustler Video 2008). The humorous, sex-filled parody of Sarah Palin was described this way by GQ magazine:

Take the "work" of another brunet actress, named Lisa Ann. She's the star of *Who's Nailin' Paylin?*, a Hustler movie advertised as "a naughty adventure to the wild side of that sexy Alaska governor." Ann, whose credits include *MILF Magnet 2* and *My First Sex Teacher #4*, plays Serra Paylin, a politician whose activities include "nailing the Russians." The script, proudly described by [Larry] Flynt as "very original and very explicit," opens with a "close up of a Moose head hanging on a wall." Before long, Paylin—wearing glasses, her governor's trademark updo, and not much else—finds herself in various compromising positions, saying things like "You betcha" and "It's okay to let the wolves run wild." (There was no equivalent Obama-inspired video at press time, though the furor over his topless shot in *People* suggests there's an audience.)

Jason Horowitz, *Drill, Baby, Drill*, GQ, Dec. 2008, at 162.

The movie received mainstream news media attention. See, e.g., John Ferguson, *Palin' Porn Star is Vice President*, DAILY RECORD (Glasgow), Oct. 13, 2008, at News 24 (describing the movie as featuring a porn star named Lisa Ann who plays a character "named 'Serra Paylin' in a thinly veiled attempt to distance her from Alaska governor Sarah Palin," and noting that the movie includes "a sex scene with two actors dressed as Russian soldiers"); Richard Johnson et al., *'Sexy' Sarah*, N.Y. POST, Oct. 27, 2008, at 10 (describing the star of the movie, Lisa Ann, as a "38DD-20-34 Palin-lookalike" who speculates that the real Sarah Palin, who she plays in the spoof, likely wears a "really cool sexy panty with a nice matching bra").

⁷⁷ THIS AIN'T THE MUNSTERS XXX (Hustler Video 2008). For more background on this movie, which parodies *The Munsters* television series, see the movie's official website at <http://www.aintthemunsters.com> (last visited March 6, 2010).

⁷⁸ NOT THE BRADYS XXX (X-Play 2007). The website for this movie, replete with a trailer, is available at <http://www.thebradysxxx.com> (last visited March 6, 2010). The movie is so popular that it actually has its own MySpace location, which is available at <http://www.myspace.com/thebradysxxx> (last visited March 6, 2010).

⁷⁹ See *supra* note 76 (describing the movie WHO'S NAILIN' PAYLIN?).

⁸⁰ NOT THE BRADYS XXX (X-Play 2007).

While all of the scenes in the movie feature sex, the sex is not always of the same variety, it takes place between different characters and it does, in fact, advance the plot, making it such that there really is no “representative” portion of the movie. It would be like telling a fan of James Bond movies that any two chase scenes in a specific Bond film are representative of the entire movie or that any two shoot-out scenes in a Western classic are representative of the entire content of the movie.

Secondly, divorcing and separating any single sex scene from the overall plot and context of a movie like NOT THE BRADYS XXX surely takes away whatever literary value—humor is a form of literature, although the late comedian Lenny Bruce found out the hard way that this is not always the case⁸¹—a movie might have. Some people might, for instance, take offense at NOT THE BRADYS XXX, but as the *New York Post* reports, the movie is a “spoof of the ‘70s sitcom”⁸² and its “sales are on fire.”⁸³ In early 2008, in fact, the movie was the hottest adult title in the nation in terms of video-on-demand (VOD) movies.⁸⁴ Such popularity suggests that there is, indeed, some literary value when the movie is considered in its entirety as a spoof, rather than as an isolated scene that is deemed “representative” by a prosecutor and thus parceled out from the larger plot and context.

Third, adult movie DVDs today sometimes feature content, like regular mainstream movie DVDs, that goes far beyond the actual movie itself. For instance, the DVD box cover for THIS AIN’T THE MUNSTERS XXX states that the DVD includes a: blooper reel, photo gallery, director’s commentary, laugh track option, photo slide show and behind the scenes “making of” featurette.⁸⁵ To truly consider the work as a whole—the entire DVD, replete with all of its content—a jury would need to watch such additional content, all of which is unique and different from the movie itself.

This is particularly important because, as First Amendment defense attorney Jeffrey Douglas points out, “extras often include behind-the-scenes shoots or the performers talking about it. When you see that for a very short amount of time, if you hadn’t figured it out before, you realize they’re making a movie, that this is fiction and that they are acting.”⁸⁶

⁸¹ See generally Ronald K.L. Collins, *Lenny Bruce & The First Amendment: Remarks at Ohio Northern University Law School*, 30 OHIO N.U. L. REV. 15, 18 (2004) (describing Bruce’s comedy and noting that “between 1961 and 1964, Lenny Bruce was busted for obscenity for routines he performed in comedy clubs in San Francisco, Chicago, Los Angeles, and New York”).

⁸² Richard Johnson et al., *Brady’ Bonanza*, N.Y. POST, Oct. 1, 2007, at 14.

⁸³ *Id.*

⁸⁴ See Joanne Cachapero, *‘Not the Bradys XXX’ Tops Hot Movies* (Mar. 4, 2008), http://www.xbiz.com/news/news_piece.php?id=90786 (on file with the Harvard Law School Library) (quoting James Cybert, director of business development for HotMovies.com, for the proposition that the movie “first set a new precedent for a VOD opening week. Now the movie has rocketed to No. 1 on the viewer popularity charts in just two weeks”).

⁸⁵ THIS AIN’T THE MUNSTERS XXX (Hustler Video 2008).

⁸⁶ Clay Calvert & Robert D. Richards, *The Prosecution of Max Hardcore: An Insider’s Look* (July 17, 2007), <http://business.avn.com/articles/5788.html> (on file with the Harvard Law School Library).

C. *United States v. Little*⁸⁷

The Fourth Circuit's July 2009 decision in *Adams* is not the only recent case where a federal court eviscerated the taken-as-whole requirement of *Miller*. In particular, during the 2008 obscenity trial of Southern California-based adult movie producer Paul Little in Tampa, Florida, U.S. District Judge Susan Bucklew ruled from the bench that the prosecution did not need to show in their entirety the five movies at issue in the case, simply stating, "I think it would be very difficult for the jury to sit through five of these."⁸⁸ Why did she think that?

According to an article in the *St. Petersburg Times*, "the judge said she doubted the jury could sit through such a volume of graphic and violent depictions."⁸⁹ Her decision stemmed, at least in part, from a note passed to her by one juror that asked, according to the *St. Petersburg Times*, "Your honor, would it be at all possible for clips to be shown to the jury instead of the movie in its entirety?"⁹⁰ There is no doubt that Little's movies are graphic.⁹¹ For instance, a review of the literature reveals that feminist scholar Gail Dines wrote that Little "became famous (and rich) for his particular style of pornography that specializes in extremely violent and degrading sex,"⁹² and journalist Mark Cromer contended that Little's "signature act is brutally unprotected anal sex."⁹³ But that does not mean, of course, that a jury should not be required to watch his movies in order to fairly consider whatever value they might possess, regardless of the descriptions by Dines and Cromer.

Bucklew apparently bought the prosecution's argument. According to Mark Kernes, the senior editor of the *Adult Video News* who covered the case in person:

Prosecutor Lisamarie Freitas argued that playing the entire movies would be repetitive, since similar sex acts appear throughout the material, and renewed her offer to let the defense play whatever

⁸⁷ For procedural context, see *United States v. Little*, 8:07-CR-170-T-24 (MSS), 2008 U.S. Dist. LEXIS 3292 (M.D. Fla. Jan. 16, 2008), *motion for a judgment of acquittal denied*, 2008 U.S. Dist. LEXIS 45639 (M.D. Fla. June 10, 2008), *motion for new trial denied*, 2008 U.S. Dist. LEXIS 61187 (M.D. Fla. July 28, 2008), *aff'd in part, rev'd in part*, No. 08-15964, 2010 U.S. App. LEXIS 2320 (11th Cir. Feb. 2, 2010).

⁸⁸ Mark Kernes, *The U.S. v. Max Hardcore: Inside the Controversial Director's Federal Obscenity Trial* (May 29, 2008), <http://business.avn.com/articles/30477.html> (on file with the Harvard Law School Library) (quoting Judge Bucklew).

⁸⁹ Kevin Graham, *Juror Asks to View Less Porn in Court*, ST. PETERSBURG TIMES (Fla.), May 30, 2008, at 3B.

⁹⁰ *Id.*

⁹¹ As one reporter who covered the trial put it, Little's movies make HUSTLER magazine publisher Larry Flynt "look like Walt Disney." Daniel Ruth, *Jury Delivers Oscar-Level Performance*, TAMPA TRIB., June 10, 2008, at Metro 1.

⁹² Gail Dines, *The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J.L. & FEMINISM 283, 286 (2006).

⁹³ Mark Cromer, *A Cold Equation*, LA WEEKLY, Apr. 30, 2004, at 23.

footage on the disks that the prosecution didn't play. She also claimed that the rules of evidence allowed "summaries" of documents to be presented during trial, with the full documents sent back to the jury room with the jury during deliberations.⁹⁴

In an interesting, pro-prosecution twist, Judge Bucklew refused a request from the defendant to identify the juror who passed the note asking not to view the movies in their entirety, so that the attorneys could question him or her about the request and determine whether the note reflected the views of only that juror or of other jurors.⁹⁵ She similarly rejected the request of defense attorney H. Louis Sirkin to force the prosecution to show the movies in their entirety, with Sirkin arguing to no avail that "that the law requires jurors to view the materials in their entirety to accurately and fairly judge whether the movies are obscene."⁹⁶

Little's defense attorneys felt it was unfair to let the prosecution show only clips of the movies for several reasons. First, in order to preserve an appeal on the issue of whether the prosecution should have shown the movies in their entirety, the defense felt compelled to try to show those portions of the movies that the prosecution failed to play for jurors. As defense attorney Jeffrey Douglas, who represented Little, put it:

The problem for us, in terms of preserving an appeal, is that we were asked to play chicken. If we hadn't shown the material on cross-examination, would we have waived the issue that the government failed to show it as a whole? In other words, if we didn't show it when we could show it, would we then be barred from arguing about it? The government's gamesmanship was rewarded.⁹⁷

Second, according to Douglas, forcing the defendant's attorneys to show the movies in their entirety makes the defendant look bad in the eyes of the jury because the defense—not the prosecution—appears to be forcing the jurors to watch graphic movies that they would most likely not want to view.⁹⁸ According to Douglas, the government admitted as much when a prosecutor told Judge Bucklew in open court:

⁹⁴ Kernes, *supra* note 88.

⁹⁵ Kevin Graham, *Defense Wants New Judge in Porn Trial*, ST. PETERSBURG TIMES (Fla.), May 31, 2008, at 4B. On appeal, the United States Court of Appeals for the Eleventh Circuit rejected the argument that this incident affected the outcome of the case, reasoning that "Appellants' argument that the note prejudiced their Sixth Amendment rights is based on nothing more than mere speculation, and as such we find no merit to this argument." *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 21 (11th Cir. Feb. 2, 2010).

⁹⁶ Graham, *supra* note 95, at 4B.

⁹⁷ Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543, 556 (2009).

⁹⁸ *Id.*

“It all turns on who the jury is going to blame. We don’t want them to blame us for seeing the whole movie. We want them to blame the defense.” That statement is such an astonishing confession. It has nothing to do with evidence—it’s all about gamesmanship. The judge should have stood up, with outrage, and said, “That is unethical. You should be ashamed of yourself. Your job description is not to get a conviction.”⁹⁹

Attorney H. Louis Sirkin, who represented Little’s business entities, concurs with Douglas’ assessment about the government’s gamesmanship in forcing the defense to show the remaining portions of the movies in order to preserve an appeal on that issue.¹⁰⁰ As Sirkin told one of the authors of this article and Professor Robert D. Richards:

Some people said that we shouldn’t have shown the movies. My attitude with that is, “Guys, look, we had the opportunity to show them—we had the right to show them. If we didn’t show them, then the appellate court’s going to say we waived the right to challenge it—when you had your chance to show them, you didn’t do it. You have no one to blame but yourself.”¹⁰¹

In summary, if one accepts the statements of both Douglas and Sirkin, then the prosecution in *United States v. Little* deliberately manipulated *Miller’s* taken-as-a-whole requirement in order to play a blame-game to curry favor with the jury. By not compelling the prosecution to show the movies in their entirety, from start to finish, Judge Bucklew forced defense counsel to show them to the jury in order to preserve an appeal to the United States Court of Appeals for the Eleventh Circuit, which heard oral argument in October 2009.¹⁰²

In February 2009, the Eleventh Circuit affirmed Little’s conviction on all charges, although it reversed Judge Bucklew on the question of damages, because she “considered pecuniary gain derived from sales of the DVDs outside the Middle District of Florida.”¹⁰³ The Eleventh Circuit rejected Little’s taken-as-a-whole argument, reasoning by a high-brow, artistic example that “if an art critic were asked to judge the quality of the Mona Lisa he would not consider the Louvre part of the work.”¹⁰⁴ The appellate court also rejected the argument that the prosecution had the burden of showing the movies in their entirety, observing that:

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *Id.* at 560.

¹⁰¹ *Id.*

¹⁰² See Mark Kernes, *Max Hardcore Appeal Argued Today* (Oct. 29, 2009), <http://business.avn.com/articles/36648.html> (on file with the Harvard Law School Library).

¹⁰³ *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 25 (11th Cir. Feb. 2, 2010).

¹⁰⁴ *Id.* at 14, n.11.

[t]here was sufficient evidence presented during the government's case-in-chief to meet the government's burden of proving obscenity in the DVDs. The government published excerpts of the DVDs to the jury as allowed by the district judge. We need not determine whether the excerpts alone would have been sufficient to meet the government's burden of proof because Appellants published the DVDs in their entirety during their cross examination of the government's witness. The evidence presented to the jury was sufficient to meet the government's burden of proving that the DVDs contained obscene material.¹⁰⁵

The irony here is rich: Little's attorneys, as noted earlier, only showed the movies in their entirety so as not to waive on appeal the argument that the government had the burden to show them. The appellate court then dodges the issue on the very ground that the jury did get to see them because Little's attorneys showed them on cross-examination.

D. Balancing the Interests: The Pros and Cons of a "Representative" Portion Approach Versus Taking the Work as a Whole

While the comments of both Jeffrey Douglas and H. Louis Sirkin strike at key problems with the approach taken by Judge Bucklew in *United States v. Little*, they fail to provide what might be considered a cost-benefit analysis for evaluating a judicial decision that allows prosecutors to show only a portion of the videos or content under prosecution in an obscenity prosecution. In other words, in the opinion of the authors, it is necessary to weigh the pros and cons of an approach in which, theoretically, the prosecution is permitted (as it was in *Adams*) to show jurors only a representative portion of an adult DVD.

Pros of a Representative-Portion Approach: Two apparent advantages may be derived from employing a representative-portion methodology in obscenity cases: *judicial economy*¹⁰⁶ and *protecting jurors from offensive content*. The former benefit relates to the idea of saving scarce judicial resources—both time and money—by speeding up obscenity trials, since showing only portions of movies would make those cases go more quickly, thus freeing up prosecutors and judges to deal with other matters and, concomitantly, allowing jurors to return to their normal lives and jobs. The latter benefit relates to the idea that jurors should not be subjected to speech that might deeply disturb or offend them. Both of these interests are outweighed, however, by the interests of the defendant in an obscenity prosecution.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ The term is used here to the extent that it refers to "interests in economy and efficiency by conserving judicial resources and providing expeditious resolution of the disputes, thereby saving time, labor, and money." Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 737 (1995).

Cons of a Representative-Proportion Approach: The judicial-economy interest in speeding up an obscenity trial by one, two, or even three days seems trivial, if not completely irrelevant, when it is weighed against the long-term loss of liberty at stake for the defendant. Paul Little, for instance, is now serving a 46-month sentence in federal prison,¹⁰⁷ while Loren Jay Adams is serving a 33-month sentence.¹⁰⁸ To put it bluntly, it boils down to potentially saving a few days and dollars versus possibly losing one's freedom and liberty for several years.

It is impossible to know, of course, whether forcing the prosecution in *United States v. Little* to show each of the DVDs at issue, from start to finish, would have made any difference in the minds of the jurors. However, Little's attorney, Jeffrey Douglas, contended that showing only clips from the movies harmed the defendant's case and aided the prosecution.¹⁰⁹ Douglas asserted "that showing only portions of the films was a ploy by the prosecution to make the movies appear more jarring than they actually are."¹¹⁰ "If jurors watched the movies as they were intended to be seen, it would desensitize them and take some of the force out of the government's case."¹¹¹ Douglas contended in court to Judge Bucklew that "over a period of time, the shock is blunted." "That is part of the presentation. That is part of the DVD."¹¹² One scene, when taken alone, may be shocking to individuals never previously exposed to one of Paul Little's movies, but watching several of them, within the context of an entire movie, may lessen that initial shock and emotional blow jurors might experience. Indeed, the news media reported that jurors who watched what excerpts were shown to them "squirmed, diverted their eyes," and "shifted in their chairs."¹¹³ Whether, in fact, such apparent physical manifestations of shock may have

¹⁰⁷ Ben Montgomery, *Pornographer to Serve Nearly 4 Years, Pay Fines*, ST. PETERSBURG TIMES (Fla.), Oct. 4, 2008, at 1B (reporting that Judge Bucklew sentenced Paul Little "to 3 years and 10 months in federal prison for selling and distributing his messy, sometimes violent videos in Tampa. She also made him forfeit three Web sites, fined him \$7,500, ordered him to face three years of probation after his prison sentence and fined his company, Max World Entertainment, \$75,000"). According to an October 2009 letter that Little wrote to the editors of *AVN* magazine, he was confined at that time at the La Tuna Federal Correctional Institution, a low-security facility housing male inmates in Anthony, Texas. See Federal Bureau of Prisons, BOP: FCI La Tuna, <http://www.bop.gov/locations/institutions/lat/index.jsp> (last visited Feb. 22, 2010) (describing the La Tuna facility); Mark Kernes, *A Letter from Max* (Oct. 27, 2009), <http://business.avn.com/articles/36617.html> (on file with the Harvard Law School Library) (containing Little's description of the facility).

¹⁰⁸ *Ind. Man Gets 33 Months for Obscenity Violations*, ASSOC. PRESS STATE & LOCAL WIRE, Dec. 13, 2008, available at LexisNexis Academic (reporting that Adams was "sentenced to 33 months in prison for shipping obscene materials through the mail" and that he was ordered "to forfeit his Web site domain name and all copies of DVDs involved in the case").

¹⁰⁹ Kevin Graham, *Juror Asks to View Less Porn in Court*, ST. PETERSBURG TIMES (Fla.), May 30, 2008, at 3B.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Thomas W. Krause, *Jurors Watch Adult Video*, TAMPA TRIB., May 30, 2008, at Metro 1.

¹¹³ Ben Montgomery, *To the Jury, Obscene; To Him, a Day's Work*, ST. PETERSBURG TIMES (Fla.), June 8, 2008, at 1A.

dissipated over the course of watching the movies in their entirety may never be known.

As to the second interest, there is little doubt that some jurors might be offended by watching adult movies in their entirety, particularly those made by Paul Little that reportedly “feature[] scenes of vomiting and urination, showing women being forced to ingest various bodily fluids.”¹¹⁴ However, offensiveness is not the same thing as obscenity. The U.S. Supreme Court has made it clear that offensive speech generally is protected by the First Amendment.¹¹⁵

Potential jurors who take such umbrage to the content that they cannot watch an entire movie should simply be removed in defense challenges during *voir dire*.¹¹⁶ Indeed, the *Tampa Tribune* reported that during *voir dire* in *United States v. Little*, “several jury candidates said they would have trouble viewing such scenes, including a youth minister who said he struggled to overcome a pornography addiction and would have trouble if he had to watch those videos again.”¹¹⁷ Those jurors were, in fact, removed, as the newspaper noted that “although prosecutors objected to removing some potential jurors who said they would have difficulty watching the videos, U.S. District Judge Susan Bucklew granted defense challenges to their jury service.”¹¹⁸

The bottom line is that, when viewed collectively, the decisions in *United States v. Adams* and *United States v. Little* erode what, as recently as 2002, the United States Supreme Court called the essential First Amendment rule of requiring a work to be considered as a whole before it can be adjudicated obscene.¹¹⁹ As the *Little* case demonstrates, the judicial erosion of this rule works in favor of the prosecution and, concomitantly, against the First Amendment speech rights of defendants.

¹¹⁴ Elaine Silvestrini, *Filmmaker Receives 46-Month Sentence*, TAMPA TRIB., Oct. 4, 2008, at Metro 1.

¹¹⁵ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (opining that “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); see also *Cohen v. California*, 403 U.S. 15, 25 (1971) (observing that it is “often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”).

¹¹⁶ See generally R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY’S L. J. 751 (2009) (providing an excellent overview of the purposes of *voir dire*).

¹¹⁷ Elaine Silvestrini, *Jury Selected For Obscenity Trial Over X-Rated Films*, TAMPA TRIB., May 28, 2008, at Metro 3.

¹¹⁸ *Id.*

¹¹⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

III. OF COMPARABLES AND COMMUNITIES: THE VIABILITY OF INTERNET RESEARCH TO HELP OBSCENITY DEFENDANTS

The first prong of the *Miller* test requires jurors to apply contemporary community standards in making their obscenity determination,¹²⁰ with the High Court adding that jurors are not to consider a nationwide community but rather a more local one.¹²¹ As Professor Dawn C. Nunziato recently observed, “*Miller* makes clear that obscenity is to be judged by a local community standard.”¹²² The ramification of this decision about the scope of the community is, as Professor Stanton D. Krauss observed, that:

individual jurisdictions enjoy considerable discretion as to the selection of the “community” to be represented in this manner, and a number of different approaches are currently being taken. In some jurisdictions, the “community” whose standards are to govern the resolution of the selection questions is not specified by law. In others, juries are supposed to identify and express the views of a particular “community,” which may be the vicinage from which their members are drawn or some larger region, up to and including the state.¹²³

One method¹²⁴ defense attorneys sometimes use to demonstrate the contemporary standards of a given community¹²⁵ is what is known as a “comparables”¹²⁶ argument. A review of the paucity of legal literature on this particular facet of obscenity law reveals that the gist of the comparables argument is that “in determining whether materials are obscene, the trier of fact may rely upon the widespread availability of comparable materials to indicate that the materials are

¹²⁰ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹²¹ *Id.* at 30 (opining that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists”).

¹²² Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1539 (2007).

¹²³ Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 632–33 (1989).

¹²⁴ Another method of proving contemporary community standards—a method that is beyond the scope of this article—is to introduce survey evidence, presented by expert witnesses, about community standards. See *Asaff v. Texas*, 799 S.W.2d 329, 332–34 (Tex. App. 1990) (concluding the trial court judge erred in preventing the defendant in an obscenity case from introducing survey evidence relevant to the contemporary community standards of what type of sexually explicit content is tolerated in the community).

¹²⁵ Note that the prosecution “is *not* constitutionally required to introduce evidence of community standards.” *United States v. Various Articles of Obscene Merch.*, 709 F.2d 132, 135 (2d. Cir. 1983) (emphasis added).

¹²⁶ See Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 265 (1987) (defining this as an attempt to show that “similar sexually explicit material [is] available nearby” that is not being prosecuted).

accepted by the community and hence not obscene under the *Miller* test.”¹²⁷ Courts sometimes refer to the comparables argument as a “comparative evidence” argument.¹²⁸

A Georgia appellate court explained the relevance and theory of the comparables argument this way:

The rationale behind the admission of “comparative” evidence is to allow the defendant in an obscenity case the opportunity to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards, as represented by the comparable material and against which the challenged material is judged. The comparative material is tangible evidence of contemporary community standards.¹²⁹

In other words, if magazines that are *not* the subject of an obscenity prosecution and that are, instead, sold freely in the community are comparable and similar to those magazines that are targeted for prosecution, this would suggest that the community accepts the type of content being prosecuted and, in turn, that it must not be obscene. To lay the foundation to admit comparables evidence as relevant¹³⁰ to the case at hand, the defense must show that the works in question that are offered as comparable are, in fact, similar to those under prosecution and, in addition, that they enjoy “a reasonable degree of community acceptance.”¹³¹ The second part of this two-part test is critical; as a Missouri appellate court has observed, “evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance.”¹³² In a nutshell, availability does not equal acceptance, and acceptance is a prerequisite or necessary element to admissibility.

This is a point that the United States Supreme Court recognized when considering the relevance of comparables evidence in obscenity cases in *Hamling v. United States*.¹³³ It wrote that:

¹²⁷ Joan Schleaf, Note, *United States v. Various Articles of Obscene Merch.*, 52 U. CIN. L. REV. 1131, 1132 (1983).

¹²⁸ See *Flynt v. Georgia*, 264 S.E.2d 669, 673 (Ga. Ct. App. 1980).

¹²⁹ *Id.* at 674.

¹³⁰ Under the Federal Rules of Evidence, relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401 (2009).

¹³¹ *Flynt*, 264 S.E.2d at 675.

¹³² *Missouri v. Cooley*, 766 S.W.2d 133, 139 (Mo. Ct. App. 1989) (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir. 1971)).

¹³³ 418 U.S. 87 (1974).

[T]he defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating.¹³⁴

Akin to the three-part test in *Miller* itself, a successful comparables argument requires three foundational elements be present with the proffered evidence: *similarity* or “reasonable resemblance”¹³⁵ of content; *availability* of content; and *acceptance*, to reasonable degree, of the similar, available content.

What this triad suggests is that mere *availability* of similar content does not mean *acceptance* of it. As one court put it in a pre-*Miller* obscenity case in Michigan, “the fact of the *presence* of other magazines in Wayne County does not necessarily mean that they are *tolerated* by the average person in the local community or in the nation.”¹³⁶ The bottom line, as the United States Court of Appeals for the Ninth Circuit wrote more than thirty years ago, is that “there are foundational requirements for admissibility of such evidence that have evolved as logical indicia of its materiality and relevance.”¹³⁷ There thus is no obligation for a judge to admit comparables evidence, as “a jury can sufficiently rely on their own experiences and judgment to determine community standards.”¹³⁸

Can a high-tech comparables argument be used successfully today, with adult material readily available on the World Wide Web? The Internet raises new issues about the use and viability of comparables arguments when nearly any and all varieties of sexual content are obtainable via the World Wide Web anywhere in the United States via search engines like Google and Yahoo. The *New York Times* brought the issue, which might be thought of as comparables in cyberspace, to public attention in June 2008 when it pointed out that “the defense in an obscenity trial in Florida plans to use publicly accessible Google search data to try to persuade jurors that their neighbors have broader interests than they might have thought.”¹³⁹

¹³⁴ *Id.* at 125.

¹³⁵ *United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978).

¹³⁶ *Wayne County Prosecutor v. Doerfler*, 165 N.W.2d 648, 659 (Mich. Ct. App. 1968) (emphasis added).

¹³⁷ *Pinkus*, 579 F.2d at 1175.

¹³⁸ *United States v. Ragsdale*, 426 F.3d 765, 776 (5th Cir. 2005).

¹³⁹ Matt Richtel, *What's Obscene? Defendant Says Google Data Offers [sic] a Gauge*, N.Y. TIMES, June 24, 2008, at A1.

The article noted that Florida-based defense attorney Lawrence Walters¹⁴⁰ planned “to show that residents of Pensacola are more likely to use Google to search for terms like ‘orgy’ than for ‘apple pie’ or ‘watermelon’”¹⁴¹ in an attempt “to demonstrate that interest in the sexual subjects exceeds that of more mainstream topics—and that by extension, the sexual material distributed by his client is not outside the norm.”¹⁴² In brief, Walters’ argument was that people in the community actually *seek out* comparables on the Internet, not simply that the comparables are *available* to them on the Internet. However, the case against Clinton Raymond McCowen described in the *New York Times* article was settled out of court,¹⁴³ thus leaving the viability of such a search-for-comparables approach untested. But, as Walters told the *Washington Post*, the key benefit of using Google to help determine community standards in such a seeking-out-comparables approach is that “what we really do in our bedrooms is much different than what we admit to doing.”¹⁴⁴ In other words, the theory appears to be that information culled from Internet-based searches for adult content conducted in the quiet and cloistered confines of one’s own home better illustrates actual community standards than evidence of what is available for rent or sale at a traditional bricks-and-mortar adult bookstore where people must go out in public to make purchases.¹⁴⁵ As Professor Ann Bartow recently observed, the Internet allows adult content to arrive “discreetly into the homes of conventional consumers.”¹⁴⁶ It thus would seem to take much more moxie to go out in public and to walk into an adult store than it would to watch or shop for that same content on the Internet from the privacy of one’s bedroom.¹⁴⁷

¹⁴⁰ As described on his firm’s website, Walters:

[I]s the managing partner of Walters Law Group, a boutique law firm concentrating in First Amendment, Internet and Gaming law. Mr. Walters has developed a[] noteworthy reputation for representing the interests of the online entertainment community, as well as other more traditional industries. He has practiced law for over two decades, and is recognized as a national expert on legal issues pertaining to Free Speech and the Internet.

Walters Law Group—First Amendment Lawyer—Qualifications & Experience, <http://www.firstamendment.com/qualifications/> (last visited Mar. 10, 2010).

¹⁴¹ Richtel, *supra* note 139, at A1.

¹⁴² *Id.*

¹⁴³ Monica Hesse, *The Google Ogle Defense: A Search for America’s Psyche*, WASH. POST, July 3, 2008, at C1.

¹⁴⁴ *Id.*

¹⁴⁵ *Cf.* Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 10–17 (2007) (discussing how privacy on the Internet has affected notions of obscenity among members of the public).

¹⁴⁶ Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 809 (2008).

¹⁴⁷ *E.g.*, FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* xvi (2000) (“the potential privacy of talking to a phone sex operator or watching an adult movie in one’s own living or hotel room has made it a much

The Fourth Circuit's July 2009 opinion in *United States v. Adams* is important not only because it claws away at the taken-as-a-whole requirement in *Miller*, as discussed in Part I, but also because it is the first federal appellate court opinion to rule on the admissibility and relevance of Internet-based searches in an attempt to demonstrate community standards. Defendant Loren Jay Adams, who was being prosecuted in federal court in West Virginia where he had shipped his content, "intended to call a computer systems administrator who would testify that, by entering the terms 'fisting' and 'bestiality' into search engines, he found thousands of articles, movies, links, and photos devoted to these terms, which were available to anyone in the Martinsburg, West Virginia area with Internet access."¹⁴⁸

Adams' theory here was that "by introducing testimony of the availability of like materials on the Internet, [he] sought to demonstrate that such materials were 'accepted' in the Martinsburg community, and therefore did not appeal to the prurient sexual interest."¹⁴⁹ For instance, the search term "bestiality" potentially would be relevant because two of the movies in question in *United States v. Adams* "depicted women engaging in sexual acts with dogs and a horse."¹⁵⁰

Affirming the decision of the trial court judge in excluding this evidence, however, the Fourth Circuit focused its attention on the fact that availability/accessibility of content on the Internet in a community does not equal acceptance of that content. The appellate court thus agreed with the lower court finding "that the testimony Adams wished to present regarding the accessibility of comparable materials online was not relevant to the determination of contemporary community standards."¹⁵¹

It is important to note here that the evidence Adams was attempting to introduce was very different, in a critical way, from the evidence that attorney Lawrence Walters wanted to introduce in the now-settled case of Clinton Raymond McCowen in Pensacola, Florida, discussed above. In particular, Adams' Internet-based evidence only dealt with the accessibility of Internet material via search engines in a community, while Walters wanted to do more. In particular, he wanted to demonstrate that the Internet search engines in an identified community were actually used by members of that community to search for specific material. As he told *The New York Times*, Walters wanted to show that residents of Pensacola "are at least as interested in group sex and orgies as they are in apple pie."¹⁵²

Walters' intended comparables approach thus might be simplified into the following formula:

more palatable activity for millions of people, most of whom would never have considered going to an adult movie theater either by themselves or with a spouse or friend").

¹⁴⁸ *United States v. Adams*, No. 08-5261, 2009 U.S. App. LEXIS 16363, at 5 (4th Cir. July 24, 2009).

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.* at 7-8.

¹⁵² Richtel, *supra* note 139, at A1.

access + actively seeking out = acceptance

In this formula, the access to sexually explicit content that is provided by the Internet to a given community is actually used by the members of that community. The active searching for content, in turn, demonstrates the community's acceptance of material that is sought out, particularly when it is sought out far more than other terms (i.e., "apple pie" with benign meanings). At least that seems to be the logic.

In email correspondence with attorney Lawrence Walters that was specifically generated and collected by the authors for exclusive use with this article, Walters explained, in much more detail than did *The New York Times* article, about his *McCowen* strategy:

Google Trends¹⁵³ information showed helpful comparisons by geographic area. It showed that 'orgies' were [sic] searched more often in Pensacola than 'apple pie' for example.

While that was a good start, we wanted the actual statistical numbers underlying these comparisons from Google. The actual numbers were not part of the charts provided by the Google Trends software. We wanted to be able to show that X-Thousand people looked for orgies in September, [sic] 2006, versus X-Thousand people who looked for apple pie. That was the nature of the information sought by the subpoena . . . We never sought any personally identifiable information regarding the Google users. It was enough that they were listed as being from Pensacola—which was within the relevant 'community' as determined by the court. Therefore, there was never any concern over privacy rights. No private information would need to be produced in order to show users looked for one subject versus another.¹⁵⁴

Two potential problems, however, with the Walters approach come to mind: first, the feasibility, upon either force of subpoena or voluntary disclosure, of obtaining community-specific data from search-engine companies; and second, the privacy expectations of the members of the community whose search histories (even though not perhaps personally revealed) are disclosed in the aggregate.

¹⁵³ See generally About Google Trends, <http://www.google.com/intl/en/trends/about.html> (last visited Mar. 10, 2010) ("With Google Trends, you can compare the world's interest in your favorite topics. Enter up to five topics and see how often they've been searched on Google over time. Google Trends also shows how frequently your topics have appeared in Google News stories, and in which geographic regions people have searched for them most.").

¹⁵⁴ E-mail from Lawrence G. Walters, former managing partner of Weston, Garrou, Walters & Mooney and current managing partner of Walters Law Group, Altamonte Springs, Fla., to Clay Calvert, Brechner Eminent Scholar in Mass Communication, University of Florida, Gainesville, Fla. (Aug. 18, 2009, 16:09:22 EST) (on file with the authors).

Walters, in fact, served Google “with a subpoena seeking more specific search data, including the number of searches for certain sexual topics done by local residents.”¹⁵⁵ In particular the subpoena duces tecum for trial filed by Walters and served on the record custodian for Google, Inc. in Sacramento, California, sought:

The actual number of user searches for the terms “orgy,” “bukkake,” “group sex,” “apple pie,” “ethanol,” and “watermelon” conducted by residents of Pensacola, Florida, and its surroundings during the past two (2) years. This data is believed reasonably available through Google, Inc.’s, “Google Trends,” search feature.¹⁵⁶

If the two potential hurdles suggested above are overcome—Walters, as noted above, contends that privacy is not an issue¹⁵⁷—then it seems that Walters’ Internet efforts to demonstrate community standards for actual searches for comparable content might have a chance of passing evidentiary muster.

A review of both federal and state cases reveals that the Fourth Circuit, in *Adams*, is not the only appellate-level court that considered the admissibility of Internet—based evidence on the issue of contemporary community standards. In *Burden v. Texas*,¹⁵⁸ the Texas Court of Criminal Appeals considered whether or not it was improper for the trial court judge to have excluded the testimony of an expert witness named Stanley Wilder in the 1996 obscenity prosecution of the owner of a Dallas adult video center.¹⁵⁹ Outside the presence of the jury:

Wilder testified that there were 225,000 sexually oriented Internet sites and that anybody with a computer and modem could access those sites. He testified that the Internet sites were available at the Dallas Public Library, but that he did not know of any efforts by library personnel to censor access to the Internet.¹⁶⁰

The Texas Court of Criminal Appeals began its review of the comparables doctrine by noting that while “comparable materials to the allegedly obscene material may be relevant to the issue of contemporary community standards,”¹⁶¹ they are not necessarily admissible as “the trial court has the inherent discretion to limit the quantum and quality of this evidence.”¹⁶² The court adopted a two-part evidentiary test for comparables akin to the one described earlier in this section, opining that:

¹⁵⁵ Richtel, *supra* note 139, at A1.

¹⁵⁶ Subpoena Duces Tecum for Trial at 1, *Florida v. McCowen*, No. 2007-CF-000823-A (Fla. Cir. Ct. filed June 18, 2008).

¹⁵⁷ *Supra* note 154.

¹⁵⁸ 55 S.W.3d 608 (Tex. Crim. App. 2001).

¹⁵⁹ *Id.* at 611.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 615.

¹⁶² *Id.*

[W]hen a defendant seeks to admit comparable materials in an effort to demonstrate contemporary community standards, the defendant must show: 1) there is a reasonable resemblance between the proffered comparable materials and the allegedly obscene materials; and 2) there is a reasonable degree of community acceptance of the proffered comparable materials.¹⁶³

Applying this rule, the Texas Court of Criminal Appeals determined that the exclusion of Wilder's Internet evidence was proper. Why? Because, as the court put it—and as the title of this article reflects—“the *availability* of similar materials through library computers does not show *acceptance*.”¹⁶⁴ The defendant's expert had “made no showing that the community accepted the images available through the library's computers, only that such images were available.”¹⁶⁵

Not only did the court in *Burden* find that the second prong of its two-part evidentiary test was not met, but also that the first prong was not satisfied. It wrote that the defendant's expert failed:

[T]o show a reasonable resemblance between many of the proffered images and the videotape. For example, a number of the Internet images that were shown to the court are just the banners of Internet sites. Most of these banners have no pictures and instead have only the name of the particular Internet site; no sexual activity is depicted.¹⁶⁶

Finally, during the 2008 trial of *United States v. Little* discussed earlier in Part I, Judge Susan Bucklew allowed the defense to use an in-court Google search engine demonstration conducted on behalf of the defense by George Scott.¹⁶⁷ As reported by Mark Kernes, a senior editor of *Adult Video News* who covered the trial:

Scott testified that he had conducted a number of Internet searches, which he recreated in the courtroom, using search terms related to the charged material. For instance, one Google search included “pissing,” “porn” and “video” and specifically excluded (as did all the searches) “trial,” “juror” and “Max Hardcore,” in order to eliminate all hits related to the current trial. That search brought up roughly 1.7 million pages, while “fisting,” “porn” and “video” brought up 1.98 million. By contrast, a search for Heismann trophy winner “Tim Tebow” and “video” brought up just 306,000 pages; “David Cook” plus “American Idol” plus “video” brought 1.5 million pages; and the big “winner,” “Rolling Stones,” brought up

¹⁶³ *Id.* at 616.

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Kernes, *supra* note 88.

2.1 million. Scott said he had performed similar searches at a university library and a public library in the area, and had gotten similar results.¹⁶⁸

Without issuing a written ruling, Judge Bucklew allowed this evidence into court, but, importantly, she specifically denied the request of Little's attorneys to instruct the jurors, at the close of arguments, "that the jury had a right to consider, as part of the 'community,' material available over the Internet."¹⁶⁹ This failure to instruct the jury that it could consider as relevant Scott's testimony and Google search essentially rendered nugatory all of his in-court testimony and presentation.

In summary, the use of a comparables argument in obscenity cases, in an effort to help identify contemporary community standards, has been allowed by courts in obscenity prosecutions involving traditional forms of media, like magazines and movies, provided that certain foundational steps of similarity, availability and acceptance are first satisfied when the defense counsel initially proffers the evidence. Courts only now are starting to consider the viability of Internet-based evidence concerning the availability and acceptance of content that can be searched for and downloaded on the Web in order to prove community standards.

When considering the viability of such searching-for-comparable evidence on the Internet, the 2009 appellate court opinion in *Adams* seems to have it correct that mere accessibility on the Internet does not also mean community acceptance. Likewise, the Texas appellate court in *Burden* also was correct in rejecting evidence when all that it proved was mere availability on the Internet. Just because something is "out there" does not mean that it has, as the courts have put it in traditional-media obscenity cases, "a reasonable degree of community acceptance."¹⁷⁰

In contrast, the approach that attorney Lawrence Walters intended to use in *McCoven* seems far more likely to win judicial approval. Why? It actually attempts to demonstrate the use and deployment of search engines in a given community for certain sexual content, with that use—especially when considered in comparison with the use of the same search engine in that same community for non-sexual, benign terms—seems to be probative of acceptance in the community. Unfortunately, that case settled before trial, so there are no judicial rulings on point.

IV. CONCLUSION

The *Miller* test is more than thirty-five years old,¹⁷¹ but developments and changes are now taking place in courtrooms that affect its continuing viability. In particular, this article has demonstrated that the taken-as-a-whole requirement may be in some jeopardy, as at least two courts—one in 2008 and one in 2009—have allowed

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Missouri v. Cooley*, 766 S.W.2d 133, 139 (Mo. Ct. App. 1989) (citing *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir. 1971)).

¹⁷¹ *Miller v. California*, 413 U.S. 15 (1973).

the prosecution to get away with only showing jurors selected portions of the works in question. The other change addressed here is driven by technology, with the Internet forcing judges to consider a new twist on the traditional comparables argument that defense attorneys sometimes use to prove contemporary community standards. Pro-prosecution rulings in this area have been handed down in both *Adams* and *Burden*. And while Judge Bucklew in *Little* allowed Internet-based search evidence to come into court, she refused to instruct the jury that it could—not even that it must—consider it as relevant of community standards.

This article has attempted to demonstrate the multiple problems that exist in allowing prosecutors to play or show only portions of a movie. It has argued that the *Adams*' proportionate-portion approach is unworkable and wrong. Conversely, it has suggested some courts are getting it right on the issue of Internet-based searches for comparables when they exclude evidence that merely shows that certain content can be found online by using a search engine in a given community. The traditional comparables requirements of similarity, availability, and acceptance require something more—something that attorney Lawrence Walters hoped to prove through Google's data on how many people in a given community actually sought out the material in question.

While the U.S. Supreme Court is no longer in the business of regularly hearing obscenity cases as it once was, it may be time for the Court to revisit the *Miller* test and to reassess the work-as-a-whole requirement and to consider whether Internet-based comparables arguments about contemporary community standards are viable in a digital online world the High Court never could have imagined when it adopted *Miller* back in 1973. Until such time, lower courts will be left to wrestle with these issues, with some seeming to clearly sidestep *Miller* on the taken-as-a-whole requirement in contravention of the high court's admonishment in 2002 that this was an essential rule of First Amendment jurisprudence.¹⁷²

¹⁷² See *supra* text accompanying note 47.