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## Let's Talk About Sex: How Societal Value Evolution Has Redefined Obscenity

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## Let's Talk About Sex: How Societal Value Evolution Has Redefined Obscenity

### Abstract

This Note seeks to examine the evolution of sex and sexuality in the media, by critically examining how the prevalence of sex and more recently the prevalence of topics and issues related to sexuality in television, literature, electronic media, and art have and continue to impact societal views and notions on obscenity. This Note will also examine the Miller test for obscenity, and the long term effects of societal value evolution on the application of the Miller test. This Note concludes by positing that at some point, the line between what is deemed sexually offensive and what is socially acceptable will become so blurred that the Miller test will no longer be definitively able to differentiate between the two, ultimately rendering it inapplicable.

### Keywords

sex, obscenity

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*Note*

**Let's Talk About Sex:  
How Societal Value Evolution Has  
Redefined Obscenity**

*Kamilah Mitchell\**

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\* J.D., Pace University School of Law (2014), B.S., Spelman College (2009). Thank you to God first and foremost. Many thanks to my family, friends, mentors, teachers, and classmates for all of their continued support and love. Thank you to my faculty adviser Professor Noa Ben-Asher, for all of her feedback and insight as I was writing this Note. A very special thanks to my PIPSELF family, for extending an amazing opportunity to me this past year. Lastly, thank you to Timothy Jones, the love of my life, for encouraging me and supporting me these many years. Without you all, I would not be here.

**Abstract**

This Note seeks to examine the evolution of sex and sexuality in the media, by critically examining how the prevalence of sex and more recently the prevalence of topics and issues related to sexuality in television, literature, electronic media, and art have and continue to impact societal views and notions on obscenity. This Note will also examine the *Miller* test for obscenity, and the long term effects of societal value evolution on the application of the *Miller* test. This Note concludes by positing that at some point, the line between what is deemed sexually offensive and what is socially acceptable will become so blurred that the *Miller* test will no longer be definitively able to differentiate between the two, ultimately rendering it inapplicable.

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**INTRODUCTION**

SEX. Arguably, no other singular word has the ability to describe one of the most fundamental aspects of what it is to be human, while simultane-

ously maintaining an air of tabooism, shame, embarrassment, secrecy, and repression. Whether because of religion, the viewpoints of society at the time, or ignorance, throughout the ages sex has endured a certain level of taboo because of its consistent association with impurity and immorality. Within the last twenty to thirty years, however, topics on sex and sexuality have taken center stage, and society has done away with the days of silence and conservatism. Society has come a long way, from frowning upon pre-marital sex to sexual education becoming a mandatory requirement in most upper level public school systems.<sup>1</sup> The sex discussion has become pervasive and society's viewpoints ever more radical.

This Note seeks to examine the evolution of sex and sexuality in the media, and how this evolution has transformed societal notions of what is and what is not considered obscene. It will critically examine how the prevalence of sex and more recently the prevalence of topics and issues related to sexuality in television, literature, electronic media, and art have and continue to impact societal views and notions on obscenity.

Additionally, this Note seeks to examine the *Miller* test for obscenity. The Note posits the theory that there are fundamental issues with the *Miller* test, namely that the community standards criteria conflicts with societal viewpoints and values because specified communities are in no way reflective of society's viewpoints as a whole. This Note seeks to examine the long term effects of societal value evolu-

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<sup>1</sup> GLADYS MARTINEZ, JOYCE ABMA & CASEY COPEN, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NCHS DATA BRIEF NO. 44, EDUCATING TEENAGERS ABOUT SEX IN THE UNITED STATES 1 (2010).

tion, (i.e., the norms and values and what is deemed socially acceptable and what is not deemed socially acceptable) on the application of the *Miller* test. That is, whether at some point, the line between what is deemed sexually offensive and what is socially acceptable may become so blurred that the *Miller* test will no longer be definitively able to differentiate between material that is obscene and material that is not obscene, ultimately rendering it inapplicable.

### I. LITERATURE

Perhaps one of the most readily available aspects of the media which illustrates the drastic shift in society's views on sexuality is literature. The most infamous book to date, collectively recognized and associated with obscenity is John Cleland's *Fanny Hill - Memoirs of A Woman of Pleasure*.<sup>2</sup> Published in England in 1749, the book chronicles the sexual dalliances of Francis Hill, and her rise from English prostitute to reformed high society woman.<sup>3</sup> Arguably one of the most prosecuted books in history, *Memoirs* was banned in Europe<sup>4</sup> and upon making its grand entry into the United States, became the subject of countless litigious actions,<sup>5</sup> most notably the trilogy of actions from the Superior Court of Massachusetts up through the Supreme Court of the United States.

In *Attorney General v. A Book named "John*

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<sup>2</sup> Katy Steinmetz, *Fanny Hill, by John Cleland*, TIME (Mar. 28, 2012), [http://content.time.com/time/specials/packages/article/0,28804,2110281\\_2110282\\_2110290,00.html](http://content.time.com/time/specials/packages/article/0,28804,2110281_2110282_2110290,00.html).

<sup>3</sup> *Att'y Gen. v. A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'*, 206 N.E.2d 403, 404 (1965).

<sup>4</sup> Steinmetz, *supra* note 2.

<sup>5</sup> *John Cleland's Memoirs*, 206 N.E.2d at 404.

*Cleland's Memoirs of a Woman of Pleasure*" the Supreme Judicial Court of Massachusetts applied the then test for obscenity set forth by the Supreme Court in *Roth v. United States*.<sup>6</sup> In applying the three part *Roth* test<sup>7</sup>, the Court found that the book appealed to the prurient interest for its "series of episode involving Lesbianism, voyeurism, prostitution, flagellation, sexual orgies, masturbation, fellatio, homosexuality, and defloration . . ."<sup>8</sup> Convinced that *Memoirs* violated both local and community standards because its graphic content went "substantially beyond customary limits of candor in describing or representing such matters,"<sup>9</sup> the Court held the book to be obscene.

In an interesting turn of events, the Supreme Court reversed the Massachusetts Court, holding that *Memoirs* was entitled to First Amendment protection.<sup>10</sup> In so holding, the Supreme Court reasoned that the Massachusetts Court misapplied the *Roth* test with regard to the "social value" criterion;<sup>11</sup> spe-

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<sup>6</sup> *Id.* at 404.

<sup>7</sup> *Id.* (stating the test enumerated in *Roth*: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.") (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). Under this definition, as elaborated in subsequent cases, 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. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Att'y Gen. of Mass.*, 383 U.S. 413, 421 (1966).

<sup>11</sup> *Id.* at 419.

cifically they addressed the fact that a book need not be “unqualifiedly worthless before it can be deemed obscene.”<sup>12</sup> This ruling stood for the proposition that if a book has some literary and social value, however de minimis that value may be, it is enough to place the book within the protections of the First Amendment.<sup>13</sup>

In rendering *Memoirs* obscene, it is evident that the Massachusetts judiciary felt compelled to do so because they believed the book went beyond the bounds of what was socially acceptable at the time. Indeed they noted this fact stating “we hold *Memoirs* to be such an affront to current community standards as to constitute ‘patent offensiveness’ . . . . We would reach this result whether we applied local community or national standards.”<sup>14</sup>

Present day literature presents an interesting contradiction, however. The evolution of society’s valuation on sex has had an interesting impact on the works that are produced by authors, but also on the judiciary’s attempts to censor sexually explicit literature. For example, consider the recent success that author E.L. James has enjoyed in relation to her erotica novels, more commonly referred to as the *Fifty Shades of Grey* trilogy. The novels have gained notoriety for their graphic erotica scenes involving many of the same themes<sup>15</sup> which were present in

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Att’y Gen. v. A Book Named ‘John Cleland’s Memoirs of a Woman of Pleasure,’* 206 N.E.2d 403, 405 (1965).

<sup>15</sup> The *Fifty Shades* trilogy includes themes of voyeurism, flagellation, bondage, discipline, dominance, submission, and sadomasochism. Linda Bloom, *What’s So Special About Fifty Shades of Grey? It’s Not Just About the Sex*, HUFFINGTON POST (Apr. 9, 2013, 2:27 PM), <http://www.huffingtonpost.com/linda->



*Memoirs*. In fact, the books have enjoyed international success, selling 65 million copies worldwide,<sup>16</sup> becoming the fastest selling paperback book ever,<sup>17</sup> and catapulting previously relatively unknown author E.L. James to international fame.

Contrasted with *Memoirs*, not only have there been no challenges brought against the *Fifty Shades* novels to get them banned or to have them rendered obscene, but the aforementioned statistics surrounding the *Fifty Shades* trilogy suggests that society, far from deeming sexually explicit works that delve into topics like those in *Memoirs* obscene, find them to be fascinating and interesting. The fact that the *Fifty Shades* trilogy is lauded rather than the subject of litigation lends further credence to the notion that works that would have been deemed obscene by society nearly 50 years ago, are now a topic of interest and discussion.

## II. TELEVISION

Likewise, television presents a perfect example of society's ever changing and consistently progressive views on sex and sexuality. Sex on television has endured a lengthy evolution to get to its current state where simulated oral sex between both adults and teenagers is common place<sup>18</sup> and televi-

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bloom-lcsw-and-charlie-bloom-msw/fifty-shades-of-grey\_b\_3038504.html.

<sup>16</sup> *Id.*

<sup>17</sup> Kirsten Acuna, *BY THE NUMBERS: The '50 Shades of Grey' Phenomenon*, BUS. INSIDER MAG. (June 27, 2012, 5:30 PM), <http://www.businessinsider.com/by-the-numbers-the-50-shades-of-grey-phenomenon-2012-6?op=1>.

<sup>18</sup> *Study Reveals 70 Percent of TV Shows Contain Sexual Content*, LUBBOCK AVALANCHE-J. (Nov. 10, 2005), [http://lubbockonline.com/stories/111005/nat\\_111005043.shtml](http://lubbockonline.com/stories/111005/nat_111005043.shtml).

sion shows tackle issues concerning lesbian, gay, bisexual and transgendered individuals.<sup>19</sup> To place this evolution in context, it is necessary to examine the history of sex on television.

From the outset, sex as portrayed on television and in films was incredibly reserved and conservative. For example, in the late 1940s and early 1950s, only actors that were married on and off screen shared a bed on screen,<sup>20</sup> so as to uphold the notions of wholesomeness and to maintain an image of marital fidelity and morality. Any references to sex or intimacy were scarce, and carefully designed to maintain an image of wholesomeness and decency. For example, when the screenwriters chose to write pregnancy into the script, the actors were not allowed to use the term “pregnancy.”<sup>21</sup> Notwithstanding the fact that these actors were married off screen, and did indeed procreate with one another, the use of the term “pregnancy” was considered too harsh and offensive. Instead the actors were made to use the

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<sup>19</sup> Sophie Laubie, *Gay Parents on TV: Why the ‘New Normal’ Is No Longer Just the Nuclear Family*, HUFFINGTON POST (Dec. 7, 2013, 3:51 AM), [http://www.huffingtonpost.com/2013/12/07/gay-parents-tv\\_n\\_4402297.html](http://www.huffingtonpost.com/2013/12/07/gay-parents-tv_n_4402297.html). More recently, popular Netflix series *Orange is the New Black* garnered rave reviews from the Gay & Lesbian Alliance Against Defamation (GLAAD) for its prominent feature of a transgendered woman as a standout character. Natalie Meier, *Laverne Cox and “Orange is the New Black” Get Rave Reviews*, GLAAD BLOG (Jul. 16, 2013), <http://www.glaad.org/blog/laverne-cox-and-orange-new-black-get-rave-reviews>.

<sup>20</sup> *The History of Sex on Television*, EXTRA (Aug. 13, 2010), [http://www.extratv.com/2010/08/15/the-history-of-sex-on-television/#first\\_married\\_couple\\_on\\_tv\\_to\\_share\\_a\\_bed](http://www.extratv.com/2010/08/15/the-history-of-sex-on-television/#first_married_couple_on_tv_to_share_a_bed).

<sup>21</sup> *A Brief History of Sex on TV: I Love Lucy*, TIME, [http://content.time.com/time/photogallery/0,29307,2045043\\_2231128,00.html](http://content.time.com/time/photogallery/0,29307,2045043_2231128,00.html) (last visited May 25, 2014).

term “expecting” and phrases like “she has a bundle of joy on the way” to express the pregnancy.<sup>22</sup>

The conservatism in television programming was merely a mirror for the attitudes and societal norms at that time. In the 1950s, a woman’s place was in the home tending to her children and husband, and premarital sex was frowned upon so much so that most young women who became pregnant before marriage were sent away to live with relatives or placed in homes for promiscuous girls.<sup>23</sup> With these views being dominant in that era, it is hardly surprising that the television shows of the time refused to use the term “pregnancy,” much less had any significant or overt references to sex.

In a somewhat surprising turn, the reservations of television programming in the 1940s and 1950s continued throughout the 1960s and 1970s. It is often noted that the 1960s brought about a sexual liberation and revolution due to the advent of readily available birth control pills,<sup>24</sup> however this was not evidenced in the popular television shows of that era. For example, *Leave It to Beaver* and *The Brady Bunch*, two of the most popular television shows of the 1960s and 1970s respectively, contained no overt references to sex,<sup>25</sup> with the only physical interaction

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<sup>22</sup> *Id.*

<sup>23</sup> *Mrs. America: Women’s Roles in the 1950s*, PBS AM. EXPERIENCE, [http://www.pbs.org/wgbh/amex/pill/peoplevents/p\\_mrs.html](http://www.pbs.org/wgbh/amex/pill/peoplevents/p_mrs.html) (last visited May 25, 2014).

<sup>24</sup> *Id.*

<sup>25</sup> Caley Murphy, *Sex Sells: An Analysis of Sexual Content on Prime Time TV over the Past 50 Years* (Apr. 30, 2012) (unpublished B.A. honors thesis) (on file with Carroll College Library), *available at* [https://www.carroll.edu/library/thesisArchive/MurphyC\\_2012final.pdf](https://www.carroll.edu/library/thesisArchive/MurphyC_2012final.pdf).

being limited to rare chaste kisses between the actors who portrayed the married couples on the shows.<sup>26</sup>

While the television programming of the 1960s and 1970s did nothing to substantially further the notion that society's viewpoint on sex and sexuality had changed, the 1980s and 1990s brought about the most dramatic of shifts. The days of separate beds and chaste kisses were replaced with men living with promiscuous women,<sup>27</sup> the first ever airing of a kiss between two women,<sup>28</sup> the first depictions of nudity and sexual content in prime time television,<sup>29</sup> the story of four single women in New York City and their trials and tribulations regarding sex and dating,<sup>30</sup> and an Emmy winning television show centered around the relationship lives of two openly gay men.<sup>31</sup> The television of the 1980s and 1990s not only reflected society's changing views on sex, but also introduced a previously taboo subject into prime time: homosexuality. The 1980s and 1990s evidenced

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<sup>26</sup> *Id.*

<sup>27</sup> See Todd Jacobs, *Top 10 Television Sitcoms of the 80s*, YAHOO (May 5, 2010), <http://voices.yahoo.com/top-10-television-sitcoms-80s-5957726.html> (noting the plot of *Three's Company*, in which John Ritter portrays a man pretending to be gay in order to live with two single women.).

<sup>28</sup> *The History of Sex on Television*, EXTRA (Aug. 13, 2010), [http://www.extratv.com/2010/08/15/the-history-of-sex-on-television/#first\\_televised\\_girlongirl\\_kiss](http://www.extratv.com/2010/08/15/the-history-of-sex-on-television/#first_televised_girlongirl_kiss).

<sup>29</sup> *Id.*

<sup>30</sup> Katie J.M. Baker, *Sex and the City Was Actually A Great Show, You Know.*, JEZEBEL (July 22, 2013, 12:00 PM), <http://jezebel.com/sex-and-the-city-was-actually-a-great-show-you-know-865569793>.

<sup>31</sup> Reid Wilson, *Will, Grace and A Decade of Change on Gay Rights*, NAT'L J. (Jun. 26, 2013), <http://www.nationaljournal.com/columns/on-the-trail/will-grace-and-a-decade-of-change-on-gay-rights-20130626>.

society's first foray into progressivism and acceptance, with shows prominently featuring gay and lesbian characters into the storylines.<sup>32</sup>

As the sexual content in television programming tends to most closely mirror the views of society during that time, it is not surprising that the 1980s and 1990s evidenced a dramatic viewpoint shift from the 1960s and 1970s. Approval for cohabitation between males and females was at an all-time high in the 1980s<sup>33</sup> and the viewing of X-rated movies climbed rapidly.<sup>34</sup> Society's attitude on issues such as premarital sex, sex education, birth control information for teenagers and engaging in skinny dipping saw dramatic shifts in favor of approval.<sup>35</sup> Furthermore, the days of women being creatures of the home had all but dissipated with more than thirty million women in the workforce in 1990,<sup>36</sup> and nearly 20% women having obtained a bachelor's degree or higher.<sup>37</sup>

Like the television programming of the 1980s and 1990s, the last and most current era of television has mostly closely mirrored society's views on sex and sexuality. Television shows pushed the envelope more than ever before, with nearly 80% of television shows including sexual content (averaging almost six

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<sup>32</sup> See generally *Sex and the City* (HBO television broadcast 1998-2004); *Will & Grace* (NBC television broadcast 1998-2006); *Soap* (ABC television broadcast 1977-1981); *Ellen* (ABC television broadcast 1994-1998).

<sup>33</sup> Tom W. Smith, A Report: The Sexual Revolution?, in 54 PUB. OPINION Q. 415, 417 (1990).

<sup>34</sup> *Id.*

<sup>35</sup> Smith, *supra* note 33 at 418-19.

<sup>36</sup> U.S. CENSUS BUREAU, WOMEN IN THE WORKFORCE at slide 2, [http://www.census.gov/newsroom/pdf/women\\_workforce\\_slides.pdf](http://www.census.gov/newsroom/pdf/women_workforce_slides.pdf).

<sup>37</sup> *Id.* at slide 9.

sex scenes per hour),<sup>38</sup> the advent of a television series devoted to chronicling the lives of teens who became pregnant and their journeys into motherhood,<sup>39</sup> the tackling of hard-hitting issues such as teens struggling with their sexuality and the epidemic of gay teen suicide,<sup>40</sup> shows popular amongst teenagers prominently featuring simulated oral sex among the main characters<sup>41</sup> and threesomes,<sup>42</sup> shows which chronicle the lives of teenagers prominently feature eroticized sex scenes and drug use,<sup>43</sup> and shows delving into the human sexuality fascination whilst prominently displaying nudity in every episode.<sup>44</sup>

Closely mirroring the 1980s and 1990s viewpoint shift, the 2000s were likewise one of the most dramatic decades to date. The social stigmas associ-

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<sup>38</sup> Murphy, *supra* note 25.

<sup>39</sup> Melissa Henson, *MTV's 'Teen Mom' Glamorizes Getting Pregnant*, CNN (May 4, 2011, 7:06 PM), <http://www.cnn.com/2011/OPINION/05/04/henson.teen.mom.show/>.

<sup>40</sup> Rory Barbarossa, *GLEE Tackles Gay Suicide*, FLA. AGENDA (Mar. 1, 2012), <http://floridaagenda.com/2012/03/01/glee-tackles-gay-suicide/>.

<sup>41</sup> Tim Graham, '90210' Oral Sex Episode: The 'Sarah Palin of TV Shows'?, NEWS BUSTERS (Sept. 5, 2008, 9:45 PM), <http://newsbusters.org/blogs/tim-graham/2008/09/05/90210-oral-sex-episode-sarah-palin-tv-shows>.

<sup>42</sup> A threesome is when three people engage in sexual intercourse together. See *A Brief History of Sex on TV: Gossip Girl*, TIME, [http://content.time.com/time/photogallery/0,29307,2045043\\_2231127,00.html](http://content.time.com/time/photogallery/0,29307,2045043_2231127,00.html) (last visited May 25, 2014).

<sup>43</sup> *Skins on MTV*, PARENTS TELEVISION COUNCIL, <http://www.parentstv.org/ptc/campaigns/skins/> (last visited May 25, 2014).

<sup>44</sup> Scott Collins, *Showtime's 'Masters of Sex' Tackles Taboos*, L.A. TIMES (July 31, 2013), <http://articles.latimes.com/2013/jul/31/entertainment/la-et-st-tca-showtime-20130731>.

ated with premarital sex and speaking about sex openly of the earlier half of the century had all but dissipated. The 2000s saw nearly 50% of high school students engaging in sexual intercourse in 2011,<sup>45</sup> hundreds of thousands of babies being born to teenage mothers,<sup>46</sup> the advent of gay rights<sup>47</sup> (most notably the legalizing of same-sex marriage,<sup>48</sup> the overturning of *Lawrence v. Texas*,<sup>49</sup> and Defense of Marriage Act (DOMA) being ruled unconstitutional<sup>50</sup>), high schools making contraceptive methods readily available to their students,<sup>51</sup> and the abortion rights debate brought to the forefront of discussion.<sup>52</sup>

### III. CASE LAW REFLECTS THE SOCIETAL VIEWPOINTS ON SEXUALITY

While each era of television examined has

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<sup>45</sup> *Sexual Risk Behavior: HIV, STD & Teen Pregnancy Prevention*, CDC, <http://www.cdc.gov/HealthyYouth/sexualbehaviors/> (last updated Aug. 26, 2013).

<sup>46</sup> *Id.*

<sup>47</sup> *The American Gay Rights Movement: A Timeline*, INFOPLEASE, <http://www.infoplease.com/ipa/A0761909.html> (last visited May 25, 2014).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* *Lawrence v. Texas*, 539 US 558 (2003) was a notable Supreme Court case in which the Supreme Court of the United States ruled anti-sodomy laws unconstitutional.

<sup>50</sup> *Id.* The Defense of Marriage Act (DOMA) was enacted in 1996 and was a federal law which allowed states to refuse to recognize same-sex marriages granted under the laws of other states.

<sup>51</sup> Keri J. Dodd, *School Condom Availability*, ADVOCATES FOR YOUTH (Feb. 1998), <http://www.advocatesforyouth.org/publications/449>.

<sup>52</sup> *History and Debate of Abortion*, DEBATE.ORG, <http://www.debate.org/abortion-debate/> (last visited May 25, 2014).

closely mirrored the societal views on sexuality during the relevant period, so too have the seminal obscenity cases. In the 1940s and 1950s for example, of the eight obscenity cases heard by the United States Supreme Court, only two considered whether or not the challenged material was in fact obscene.<sup>53</sup> Notwithstanding the fact that majority of the remaining cases were resolved in favor of finding an obscenity violation, the material challenged in the two aforementioned cases concerned materials which were thought to violate societal notions on decency and morality.<sup>54</sup> Furthermore, the challenged material was in fact resolved as being obscene.<sup>55</sup> The remaining cases focused specifically on the legality of state statutes which forbid the publication and dissemination of obscene materials,<sup>56</sup> and while there was no real legal analysis done as to determine whether the materials in these cases were in fact obscene, almost overwhelmingly the statutes were upheld as valid regulations on obscenity.

Furthermore of the cases which did delve into whether or not the challenged material was obscene,

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<sup>53</sup> See *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 US 684 (1959); *Roth v. United States*, 354 U.S. 476 (1957).

<sup>54</sup> *Id.*

<sup>55</sup> Note that the challenged material in *Kingsley International Pictures Corporation v. the Regents of the University of the State of New York* was actually found not to be obscene but instead an assault on morality and an incitement to sexual impurity. *Kingsley*, 360 U.S. at 686-87.

<sup>56</sup> See *Hannegan v. Esquire*, 327 U.S. 146 (1946); *Winters v. New York*, 333 U.S. 507 (1948); *United States v. Alpers*, 338 U.S. 680 (1950); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Butler v. Michigan*, 352 U.S. 380 (1957); *Roth v. United States*, 354 U.S. 476 (1957); *Smith v. California*, 361 U.S. 147 (1959).



one of them set forth the first universally recognized test for obscenity. In *Roth v. United States*, the issue concerned whether or not certain photographs and mailings were properly considered obscene under the standards set forth by the trial court judge.<sup>57</sup> In finding that the trial court judge had indeed applied the correct standards, the Supreme Court set forth the following test for obscenity: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>58</sup> The Court ultimately held the mailings of Mr. Roth to be obscene and upheld the constitutionality of the federal statutes which outlawed them.<sup>59</sup>

Notwithstanding the fact that *Roth* set forth the first universally recognized test for obscenity, it is important to note the outcome of the case. Namely, that the challenged material, which included certain pornographic photographs was held to be obscene. Here is a prime example of societal norms reflected in the cases brought before the judiciary. The 1940s and 1950s, if nothing more reflected an era of conservatism with a high emphasis placed upon the sanctity of marriage<sup>60</sup> and family life.<sup>61</sup> Not surprisingly, in reflecting society’s attitudes and value system, the one case which addressed the issue of whether or not the material was in fact obscene, dealt with an assault on the aforementioned value system. The fact remains, though, that as society’s

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<sup>57</sup> *Roth*, 354 U.S. at 480.

<sup>58</sup> *Roth*, 354 U.S. at 489.

<sup>59</sup> *Roth*, 354 U.S. at 492.

<sup>60</sup> *Mrs. America: Women’s Roles in the 1950s*, *supra* note 23.

<sup>61</sup> *The Pill and the Sexual Revolution*, PBS AM. EXPERIENCE, [http://www.pbs.org/wgbh/amex/pill/peoplevents/e\\_revolution.html](http://www.pbs.org/wgbh/amex/pill/peoplevents/e_revolution.html) (last visited May 25, 2014).

values have evolved, so too has the subject matter of obscenity cases put before the judiciary, as is seen with the cases in the present day.

As with the cases brought before the judiciary in the 1940s and 1950s, the subject matter of the cases in the 2000s evidenced the dramatic changes of society's views on sex and sexuality. From the outset of the twenty-five cases dealing with obscenity heard by the Supreme Court between 2000 and 2013, eight cases sought a determination of whether or not the challenged material was in fact obscene. The subject matter of those cases dealt mostly with whether certain depictions could be considered child pornography and therefore rendered obscene.<sup>62</sup> Depictions of minors engaged in sexually explicit acts is a far cry from the mailings of erotica books and pictures, but again, the sentiments and views on sex and sexuality had shifted greatly between the 1940s and 1950s and present day.

Furthermore, the outcome of the cases evidenced the change in viewpoints as well. In *Roth v. United States*, the mailings of erotica books and pictures were held to be obscene and in violation of federal obscenity statutes.<sup>63</sup> However in *Ashcroft v. Free Speech Coalition*, sexually explicit photos that depicted what appeared to minors engaged in sex acts were held not to be obscene because the photos were not actually produced using children.<sup>64</sup> It is hard to imagine a more ripe example of material appealing to the prurient<sup>65</sup> interest than sexually ex-

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<sup>62</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>63</sup> *Roth v. United States*, 354 U.S. 436 (1957).

<sup>64</sup> *Ashcroft*, 535 U.S. at 234.

<sup>65</sup> Prurient as defined by Merriam-Webster's Dictionary means marked by or arousing an immoderate or unwholesome interest or desire. *Prurient Definition*, MERRIAM-WEBSTER

plicit photos depicting persons appearing to be minors engaged in sex acts, regardless of whether the material was created using minors or not, and yet the Supreme Court found them not to be obscene.

The change in the subject matter of the cases put before the judiciary, along with the evolution of societal values and notions on sex appears to occur concurrently. Furthermore, society's views at the time seem to be reflected in the outcomes of the seminal obscenity cases. During the 1940s and 1950s, when societal views on sexuality were very conservative, the seminal obscenity case found the challenged material to be obscene. However in present day, where society's views on sex and sexuality are arguably more liberal, one of the seminal obscenity cases found the challenged material not to be obscene. Furthermore, the decision in *Ashcroft* adds support to the notion that the obscenity line comes ever closer to being obsolete. If simulated child pornography falls within the protections of the First Amendment, a startling question is left in its wake: is anything really obscene anymore?

#### **IV. ELECTRONIC MEDIA: THE INTERNET & VIDEO GAMES**

Perhaps the notion that the obscenity doctrine is becoming obsolete due to society's views on sex and sexuality finds the most support in the advent of electronic media. Never before has sexually explicit material become as readily available as it is today through the Internet. Certainly material which appeals to the prurient interest is not more than a few key strokes and a mouse click away.

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DICTIONARY, <http://www.merriam-webster.com/dictionary/prurient> (last visited May 25, 2014).

For example, in *Miller v. California*, the Supreme Court, in an attempt to further give the lower courts guidance as to what may be deemed obscene material, gave the following example: “patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>66</sup> A simple search on Google using the terms “masturbation” and “lewd,” brings up over 5 million related sites,<sup>67</sup> with some sites brazenly displaying their sexually explicit content.<sup>68</sup> The advent of the internet has availed access to virtually any type of potentially offensive material, from crush videos<sup>69</sup> to child pornography.<sup>70</sup>

With such easy availability of such material to anyone, it would be very difficult, if not wholly impossible, to bring obscenity challenges for every website which contained material found to be in potential violation of the *Miller* test. Not to mention the more obvious fact, easy and readily available access to the material evidences society’s ever changing notions on sex and sexuality once again.

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<sup>66</sup> *Miller v. California*, 413 U.S. 15, 25 (1973).

<sup>67</sup> I performed a search on my computer and nearly 4 million related sites were returned. Search Results, GOOGLE, <http://www.google.com> (search “masturbation AND lewd” without quotes).

<sup>68</sup> “Gorgeously-Lewd Footage Hardcore Masturbation by Hot Girls,” and “Taiwan pretty girls at home masturbation lewd” are a few of the website titles displayed, enticing users to enter their sites. *Id.*

<sup>69</sup> I performed another Google search on my computer for “Crush Videos” and nearly 105,000 related sites were returned. Search Results, GOOGLE, <http://www.google.com> (search “crush videos”).

<sup>70</sup> I performed another Google search on my computer and nearly 32 million related sites were returned. Search Results, GOOGLE, <http://www.google.com> (search “child pornography”).

Furthermore, society's ever evolving and changing viewpoints are evidenced quite prominently in video games; most notably with the release of the popular video game series *Grand Theft Auto*. Outside the overarching themes of larceny and violence,<sup>71</sup> the most recent game in the series has been lauded for its realistic and blatant depictions of sex.<sup>72</sup> *Grand Theft Auto V* includes various depictions of sexual activity. In fact, in the synopsis of the game provided by the Entertainment Software Rating Board (ESRB), it was noted that the following sexually explicit material is found prevalently throughout the game:

implied fellatio and masturbation; various sex acts that the player's character procures from a prostitute – while no nudity is depicted in these sequences, various sexual moaning sounds can be heard. Nudity is present, however, primarily in two settings: a topless lap dance in a strip club and a location that includes male cult members with exposed genitalia . . . . Within the game, TV programs and radio ads contain instances of mature humor: myriad sex jokes; depictions of raw sewage and feces on a worker's body; a brief instance of necrophilia . . . .<sup>73</sup>

In an attempt to make the game more realistic with respect to the soliciting of prostitutes for sex, players have the ability to pay the prostitutes for their services,<sup>74</sup> and subsequently contact them for additional

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<sup>71</sup> *Grand Theft Auto V*, ENT. SOFTWARE RATING BOARD, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=33073>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> The game allows players to pay \$50 for oral sex, and \$100 for sexual intercourse. WikiGameGuides, *Grand Theft Auto 5* –

encounters.

The reason that *Grand Theft Auto V* evidences society's evolving notions on sex and sexuality is not because the game contains such sexually explicit material, but because the public demand for the game is astonishing. The release of *Grand Theft Auto V* has been lauded by Forbes.com as the "biggest entertainment launch in history,"<sup>75</sup> with the game making more than one billion dollars in sales after being on the market for just three days.<sup>76</sup> Additionally, while the game's mature rating is meant to establish that the game is marketed to more mature audiences, the reality is that the majority of the game's player demographic is made up of young males,<sup>77</sup> some as young as age 8.<sup>78</sup>

While the game has only been on the market for a short period of time,<sup>79</sup> its sexually explicit

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*How to Get a Prostitute*, YOUTUBE,

<http://n4g.com/news/1356227/gta-5-how-to-get-a-prostitute> (last visited May 26, 2014).

<sup>75</sup> Erik Kain, *'Grand Theft Auto V' Crosses \$1B In Sales, Biggest Entertainment Launch In History*, FORBES (Sept. 20, 2013, 1:22 PM),

<http://www.forbes.com/sites/erikkain/2013/09/20/grand-theft-auto-v-crosses-1b-in-sales-biggest-entertainment-launch-in-history/>.

<sup>76</sup> *Id.*

<sup>77</sup> John S. Dickerson, *Grand Theft Auto V Sales Set Record – Why Are We Surprised When Virtual Violence Becomes Reality*, FOX NEWS (Sept. 19, 2013),

<http://www.foxnews.com/opinion/2013/09/19/grand-theft-auto-v-sales-set-record-why-are-surprised-when-virtual-violence/>.

<sup>78</sup> *Id.*

<sup>79</sup> The game was released on September 17, 2013. *Grand Theft Auto V Is Coming 9.17.2013*, ROCKSTAR GAMES (Jan. 31, 2013, 10:00 AM),

<http://www.rockstargames.com/newswire/article/48591/grand-theft-auto-v-is-coming-9172013.html>.

themes coupled with the public's uncanny demand resulting in extreme popularity tend to not only establish society's views on sexuality and sex, but also tend to establish society's fascination with the topics. The days of conservatism and shyness have been replaced with intrigue and liberation. No less than thirty years ago, the material included in *Grand Theft Auto V* would have been ripe for an obscenity challenge; it would be difficult to imagine a better example. The game's blatant sexually explicit content could easily have been viewed as a violation on societal values and views on immorality, sex and sexuality during an earlier time. And yet in current times, such material is not challenged as obscene, but rather in apparent heavy demand by society. The reality is astounding and further lends support to the notion that the line between obscene material and material that is universally accepted by society, has and continues to become ever closer to being blurred.

## V. ART

"Congress shall make no law . . . abridging the freedom of speech or of the press . . ." <sup>80</sup> It is through these words that countless types of expression have found the mechanism through which they can be, and indeed are, afforded protection from censorship. Not surprisingly, art, which has been defined as the expression or application of human creative skill,<sup>81</sup> has also found a home in the protections of the First Amendment.<sup>82</sup> As an initial matter, the

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<sup>80</sup> U.S. CONST. amend. I.

<sup>81</sup> *Definition of Art*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/us/definition/american\\_english/art](http://oxforddictionaries.com/us/definition/american_english/art) (last visited May 25, 2014).

<sup>82</sup> *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

embodiment of art may be found in many mediums and expressed through several forms, making it somewhat difficult to categorize.

As questions regarding what types of art would be protected under the First Amendment became increasingly more prevalent, the Supreme Court issued a series of opinions addressing these questions, serving as a means for clarification and direction.<sup>83</sup> Perhaps one of the most infamous cases in this series was *Texas v. Johnson*, in which the Supreme Court proclaimed that non-verbal as well as verbal forms of expression are protected under the First Amendment;<sup>84</sup> and it is through this holding that the most abstract forms of art have found protection from censorship.

Through the First Amendment, the broadest protection of an artist's ability to create works has been developed. Indeed, the First Amendment can be construed as providing a broad latitude for artists to express their ideals and opinions without fear of censorship.<sup>85</sup> And indeed, many believe some of the best art is produced when its creator is free and unencumbered by societal and governmental restraints.

Not all forms of art are protected though. One very prevalent art form which is not afforded protection under the First Amendment is art that is classified as obscene.<sup>86</sup> The purpose of the First Amendment and its necessity to preserve public discourse through the free exchange of ideals and expression,

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<sup>83</sup> See e.g. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1972); *Hamling v. United States*, 418 U.S. 87 (1974).

<sup>84</sup> *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

<sup>85</sup> See JESSICA L. DARRABY, ART, ARTIFACT, ARCHITECTURE, AND MUSEUM LAW 37 (2012).

<sup>86</sup> *Miller*, 413 U.S. at 23.



contrasted with the fact that the First Amendment inhibits public discourse by excluding certain forms of expression from protection, remains a very interesting and perplexing contradiction.

In *Texas v. Johnson*, the Supreme Court aptly noted that the “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>87</sup> Art, in and of itself, is perhaps one of the best examples of expression which may be deemed offensive or disagreeable, and yet like its predecessors has been subject to the same inhibitor of obscenity.

Obscene art, if nothing more, creates public discourse, whether positive or negative. This class of art evokes and upsets certain sensibilities in the society at large, which in turn stimulates healthy conversation regarding these sensibilities. For example, the Contemporary Arts Center’s exhibition of the late Robert Mapplethorpe’s work garnered a great deal of attention, most notably resulting in a judicial proceeding.<sup>88</sup> The Museum faced an overwhelming amount of criticism for its exhibition of Mapplethorpe’s photos, which included seven photos of men in sadomasochistic poses,<sup>89</sup> however, the fact remains that the exhibition generated public discourse regarding the display of those photos. Further, Andres Serrano’s “Piss Christ” also garnered a substantial amount of public attention.<sup>90</sup> Some argued that the

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<sup>87</sup> *Texas*, 491 U.S. at 414.

<sup>88</sup> *Contemporary Arts Center v. Ney*, 735 F.Supp 743, 745 (1990).

<sup>89</sup> *See, e.g., City of Cincinnati v. Contemporary Arts Center*, 566 N.E.2d 207 (1990).

<sup>90</sup> Jennifer Schuessler, *Who’s the Shockingest of Them All?*, N.Y. TIMES (Oct. 5, 2012),

work was offensive and an attack on religious sensibilities,<sup>91</sup> while others have praised his work as being “a disturbing and challenging artistic statement, which explores how spiritual belief has been exploited and spiritual values debased.”<sup>92</sup>

Is not this type of public discourse the very kind that the First Amendment seeks to protect? Does not the First Amendment seek to foster discussion on such topics? Does not obscene art garner attention, which in turn generates debate, thus stimulating the intellectual state of the country? The answer to these questions is that the very category of art which has been outlawed serves the fundamental purpose of the First Amendment quite clearly and distinctly. Despite this seemingly apparent contradiction in the purpose of the First Amendment and the fact that certain types of art must pass a test largely based on specified community standards to obtain first amendment protection, the fact remains that not all art is afforded First Amendment protection.<sup>93</sup>

## **VI. THE CATEGORICAL EXEMPTION OF OBSCENITY FROM FIRST AMENDMENT PROTECTION**

The government has offered several explanations for not allowing obscenity to fall within any constitutionally protected category of speech. The

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[http://www.nytimes.com/interactive/arts/art-shock.html?\\_r=0](http://www.nytimes.com/interactive/arts/art-shock.html?_r=0).

<sup>91</sup> Elissa Hunt, *Andres Serrano 'Piss Christ' Triggers Religious Fury and Court Battle in 1990s Trials*, HERALD SUN (Mar. 6, 2013, 6:38 PM), <http://www.heraldsun.com.au/news/law-order/andres-serrano-piss-christ-triggers-religious-fury-and-court-battle-in-1990s-trials/story-fnat7dag-1226591823318>.

<sup>92</sup> GRANT H. KESTER, *ART, ACTIVISM AND OPPOSITIONALITY: ESSAYS FROM AFTERIMAGE* 126 (1998).

<sup>93</sup> *Id.*

main reasons being that the government has a significant interest in protecting minors and unwilling passerby from being exposed to obscene materials,<sup>94</sup> that the government has a legitimate interest in protecting and preserving societal mores and values,<sup>95</sup> and lastly that obscenity “utterly lacks any redeeming social importance.”<sup>96</sup> The fundamental notion is that these interests outweigh any benefit (and indeed the argument that there is no benefit) that obscenity may have on society, and as such it is subject matter upon which regulation is important and proper.

Each one of these arguments overlooks and grossly misinterprets the purpose of the First Amendment. The First Amendment serves as a catalyst to promote the exchange of ideas and public discourse.<sup>97</sup> As David Cole argues,

Ordinarily, attempts to regulate speech because of its content are subjected to exacting judicial scrutiny and require a compelling justification. When it comes to sexual expression, however, the state is not obliged to offer a compelling rationale, and the Court's decisions proceed by assertion rather than by logical reasoning.<sup>98</sup>

Further in *Terminiello v. City of Chicago*, the Supreme Court recognized such stating:

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<sup>94</sup> *People v. Neumayer*, 275 N.W.2d 230, 233 (1979).

<sup>95</sup> *Miller*, 413 U.S. at 20, 21.

<sup>96</sup> *Id.* at 20.

<sup>97</sup> JESSICA L. DARRABY, ART, ARTIFACT, ARCHITECTURE, AND MUSEUM LAW 37 (2012).

<sup>98</sup> David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 113 (1994).

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.<sup>99</sup>

Indeed the public interest in the First Amendment has been held to outweigh any other consideration,<sup>100</sup> however the First Amendment concerns regarding obscenity do not hold such weight.

### VII. OBSCENITY AND THE *MILLER* TEST

“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .”<sup>101</sup> This now infamous passage was written by Supreme Court Justice Stewart in recognition of the near impossibility in defining what obscenity is. Interestingly enough, elusive though it may be, the judicial system has made several whole-hearted, nevertheless confusing attempts to define obscenity, with the culmination of course being the landmark case *Miller v. California*.<sup>102</sup> Despite the best efforts of the Supreme Court, the elusiveness in the definition remains, in large part due to the fact

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<sup>99</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

<sup>100</sup> *Contemporary Arts Center v. Ney*, 735 F. Supp. 743, 745 (1990).

<sup>101</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>102</sup> *Miller v. California*, 413 U.S. 15 (1973).

that society's views on sexuality continue to progress and evolve.

Fundamentally, there is an issue of which types of speech qualify as obscene. Over the years the Supreme Court has found it difficult to define what obscenity is, making it impossible to decide which types of speech qualify. In 1973, however, the Supreme Court, in the landmark case *Miller v. California*, made its best attempt to set forth a three part test describing what types of speech qualify as obscene. The test consists of the following:

- (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.<sup>103</sup>

The purpose of this test was to bring clarification to the courts in solving the "intractable obscenity problem"<sup>104</sup> and to "formulate standards more concrete than those in the past."<sup>105</sup> The three prongs of the test sought to incorporate the necessary and relevant inquiries when determining whether a work

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<sup>103</sup> *Id.* at 24 (internal citations omitted).

<sup>104</sup> *Id.* at 16.

<sup>105</sup> *Id.* at 20.

has fallen outside the constitutional protections of the First Amendment. While the *Miller* test is arguably clearer than Justice Stewart's "I know it when I see it" definition for obscenity, the courts have remained decisive in the application of the test to subsequent obscenity issues.

For example the "community standards" prong of the test has brought about a considerable split among the courts, with some advocating that the prong should be one of a national standard<sup>106</sup> and some advocating that the standard should be restricted to the community in which the fact finder resides.<sup>107</sup> The split was recognized by Judge Gabrielli in *People v. Heller*:

The connotation of the term "community" appears to have brought about a great deal of hand wringing by concerned libertarians who have tended to interpret the term as meaning local or provincial so as to open the door to censorship by local authorities or even constables who would be free to form their own notions as to what constituted patently offensive material.<sup>108</sup>

In addition the courts have also had to deal with the undeniable reality that societal and community standards with respect to sexuality have and continue to evolve since the time in which the *Miller* test was enumerated. In *United States v. McCoy*, the court refused to find the fictional writings on child sex abuse by a Minnesota author obscene, stating: "in light of the evolution of community standards

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<sup>106</sup> *United States v. Palladino*, 490 F.2d 499, 502-03 (1974).

<sup>107</sup> *People v. Heller*, 33 N.Y.2d 314, 322 (1973).

<sup>108</sup> *Id.* at 322.

since the Court decided *Miller*, this Court is unprepared to conclude that the depraved fictional stories . . . are obscene.”<sup>109</sup> Further, the court stated “[w]hile many persons, including this Court, find the materials at issue depraved and disturbing, community standards have significantly evolved since *Miller*.”<sup>110</sup> *McCoy* was decided in 2009, nearly forty years after the *Miller* test was set forth. The unwillingness of the *McCoy* Court to find graphic descriptions of the sexual abuse, rape and assault of children obscene represents not only the recognition by the courts that societal views on sexuality continue to evolve but also an understanding that the standards enumerated in the *Miller* test must be amenable to this continuous evolution.

As viewpoints regarding sexuality may be viewed as progressive for society as a whole, they remain a problem and potential threat to the *Miller* test. Why? Well, put simply, at its core the test is meant to lessen the difficulty courts have faced in correctly identifying those works that are categorically exempt from First Amendment protection. This functions as a mechanism to protect an unwilling and unexpected passerby from being exposed to sexually explicit and offensive material.<sup>111</sup> The concern then becomes, how is it possible to correctly identify those works categorically exempt from First Amendment protection if the viewpoints of the very class the test is intended to protect constantly change with respect to what is sexually offensive. Some would seek to downplay this problem, claiming

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<sup>109</sup> *United States v. McCoy*, 678 F. Supp. 2d 1336, 1341 (2009).

<sup>110</sup> *Id.*

<sup>111</sup> *Miller*, 413 U.S. at 28.

that the viewpoint shift is a gradual and progressive change that has no real implication on the application of the test.

The statistical data regarding such viewpoints, however, presents a different story. Society's ever changing views on sexuality can be found across all forms of popular culture including television, film, music, literature and art. For example, society has gone from classifying homosexuality as a mental disorder in 1952<sup>112</sup> to legalizing gay marriage in nineteen states in present day.<sup>113</sup> In 2011, roughly 85% of the population approved of premarital sex.<sup>114</sup> Today nearly 80% of television shows include sexual content,<sup>115</sup> including graphic depictions of nudity,<sup>116</sup> as well as simulated oral sex acts between teenagers.<sup>117</sup> In 2011, 92% of the Top Ten Songs on Bill-

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<sup>112</sup> *Diagnostic and Statistical Manual of Mental Disorders*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/161092/Diagnostic-and-Statistical-Manual-of-Mental-Disorders-DSM> (last visited May 25, 2014).

<sup>113</sup> *Nineteen States with Legal Gay Marriage and Thirty-One States with Same-Sex Marriage Bans*, PROCON, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated May 21, 2014).

<sup>114</sup> *Premarital Sex: The Waiting Game*, ECONOMIST (Jan. 20, 2011), <http://www.economist.com/node/17956905>.

<sup>115</sup> *Sex on TV 4: Executive Summary 2005*, KAISER FAM. FOUND. REP., <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/sex-on-tv-4-executive-summary.pdf>.

<sup>116</sup> Collins, *supra* note 44.

<sup>117</sup> Alice Park, *Sex on TV Increases Teen Pregnancy, Says Report*, TIME (Nov. 3, 2008), <http://content.time.com/time/nation/article/0,8599,1855842,00.html>.



board Music Charts were about sex.<sup>118</sup> The erotica novels by E.L. James, more commonly referred to as the *Fifty Shades of Grey* trilogy sold over 200,000 copies in its first week.<sup>119</sup> In 2013, the popular video game series *Grand Theft Auto V*, in which gamers can actively engage strippers and prostitutes for sex, became the biggest entertainment launch in history, garnering more than one billion dollars in sales in its first three days on the market.<sup>120</sup>

These examples indicate both a dramatic change in the way society views sex, but also a demand for sex by the masses. The evolution of society's viewpoint on sex is important in demonstrating the ability of society to become more accepting of things which in the past offended sensibilities and were taboo to speak about. As society becomes increasingly more accepting there becomes less of a compelling justification to protect society against that which offends. That is, the necessity of shielding an unwilling passerby from being exposed to certain material becomes less prevalent if the passerby becomes accepting (and demanding) of that material.

If the numbers are indicative of any type of unwavering trend, then changes in viewpoints will only continue to occur and in ever more dramatic fashion. The line between obscenity and what is socially acceptable continues to become increasingly more blurred, and as a result, the need for a test which categorically exempts sexually offensive speech becomes ever more questionable.

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<sup>118</sup> Dino Grandoni, *92% of Top Ten Billboard Songs Are About Sex*, WIRE (Sept. 30, 2011, 3:06 PM), <http://www.thewire.com/entertainment/2011/09/92-top-ten-billboard-songs-are-about-sex/43182/>.

<sup>119</sup> Acuna, *supra* note 17.

<sup>120</sup> Kain, *supra* note 75.

**VIII. THE PROBLEMS WITH THE *MILLER* TEST**

The most readily apparent problem with the *Miller* test is that it is inherently subjective. At the outset, the test itself does not specify which community the “contemporary standards” should be assessed in lieu of. Is the test referring to the national community standards, or a specific state’s community standards, or a specific town’s community standards? The recognition of the need for a definition regarding community standards was noted in the *Miller* opinion by Chief Justice Berger. He stated, “[i]t is in this context that we are called on to define the standards which must be used to identify obscene material . . . .”<sup>121</sup> Despite this acknowledgment, the standards remained undefined.

Opting instead to provide a more generalized analysis of what criteria should be used to determine obscenity, the Supreme Court articulated a few subjective examples of what may be deemed obscene. Those examples included:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.<sup>122</sup>

The examples, while informative, failed to address one of the main issues that Chief Justice Burger so readily proclaimed would be addressed in the opinion: the definition of which standards to apply when determining whether a work should be classi-

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<sup>121</sup> *Miller*, 413 U.S. at 20

<sup>122</sup> *Id.* at 25.

fied as obscene.

As the *Miller* opinion left the courts with minimal direction as to which contemporary standards to apply, subsequent case law emerged in an attempt to clarify which community standards to be used in assessing potentially obscene works. For example, in *Smith v. United States*, the Supreme Court noted “contemporary community standards must be applied by jurors in accordance with their own understanding of the tolerance of the average person in their community . . . .”<sup>123</sup> Further, in *Hamling v. United States*, Supreme Court noted:

Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene . . . . A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.<sup>124</sup>

While the subsequent attempts to clarify which community standards to use gave guidance and direction to the lower courts, they nevertheless did not solve the problem of the inherent subjectivity of the test. The glaring issue remains that community standards vary greatly from geographic region to geographic region. The Supreme Court has recognized this issue but has refused to adequately address it, instead noting “the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal

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<sup>123</sup> *Smith v. United States*, 431 U.S. 291 (1977).

<sup>124</sup> *Hamling v. United States*, 418 U.S. 87 (1974).

judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.”<sup>125</sup>

It seems apparent that the Supreme Court has refrained from enumerating which community standards to apply, and has further refused to specify any national standards for the application of the test, for the following reasons: (1) there is inherent difficulty in defining such standards and (2) in enumerating a standard the test would become more rigid and less flexible. Indeed, the Supreme Court noted those very facts stating “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.”<sup>126</sup> The fundamental issue with this rationale is that it fails to adequately take into account the harm that the lack of guidelines places on those against whom obscenity challenges are being brought.

In essence, the lacking definition of which communities’ standards will be applied allows for much too much subjectivity. When confronted with applying the *Miller* test to a specific type of material, the trier of fact has no direction in determining which contemporary standards to apply and is instead allowed to apply the standards of their specific community. While the Supreme Court subsequently refused the notion of articulating a national community standard in *Miller*, the fact remains that a national standard would serve to clarify some of the most ambiguous parts of the test, and also more ade-

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<sup>125</sup> *Miller*, 413 U.S. at 30.

<sup>126</sup> *Id.*

quately address the issue that applying contemporary standards of a particular community may in many cases, may not be reflective of society's views as a whole. The development of a national contemporary standard for assessing obscene works appears to be a more attractive option than allowing for the subjectivity of the local standards which currently is the precedent. The national standard would allow for less confusion in the application of the test, as well as greater fairness. A national standard, would arguably, create a mechanism of uniformity among the courts, while simultaneously allowing for works to be assessed against the back drop of society's standards and not those of a particular community. Allowing works to be assessed against society's standards is inherently fairer, because it takes into account multiple viewpoints and synthesizes them into a standard that is reflective of the majority, as opposed to looking specifically at the viewpoints of an isolated community.

To be sure, the development of a national standard would by no means be a perfect solution to the problem, however it would be more adequate in terms of addressing the concerns of subjectivity. The national standard would of course take care to take into account both liberal and conservative sensibilities. This necessity lies in the fact that a national standard advocating either more conservative sensibilities or more liberal sensibilities would have the overwhelming potential to have an astonishing number of material either rendered obscene or not obscene. The national standard approach, while not without its issues, remains a much more adequate option for giving courts and juries more adequate direction in the application of the *Miller* test.

**CONCLUSION**

The discussion of obscenity in relation to First Amendment protections remains an interesting and perplexing question that society will continue to struggle with as societal value evolution continues to progress. Without adequate attention being directed to the fundamental problems within the *Miller* test for obscenity, the issue will remain challenging and debatable. The inherent tension between evaluating challenged material under the factors set forth in the *Miller* test and within the context of society's views on sex and sexuality will continue to present issue for the judiciary as societal values continue to evolve and develop. Indeed, there very well may come a time when the *Miller* test will be rendered inapplicable because of the societal notions and viewpoints.