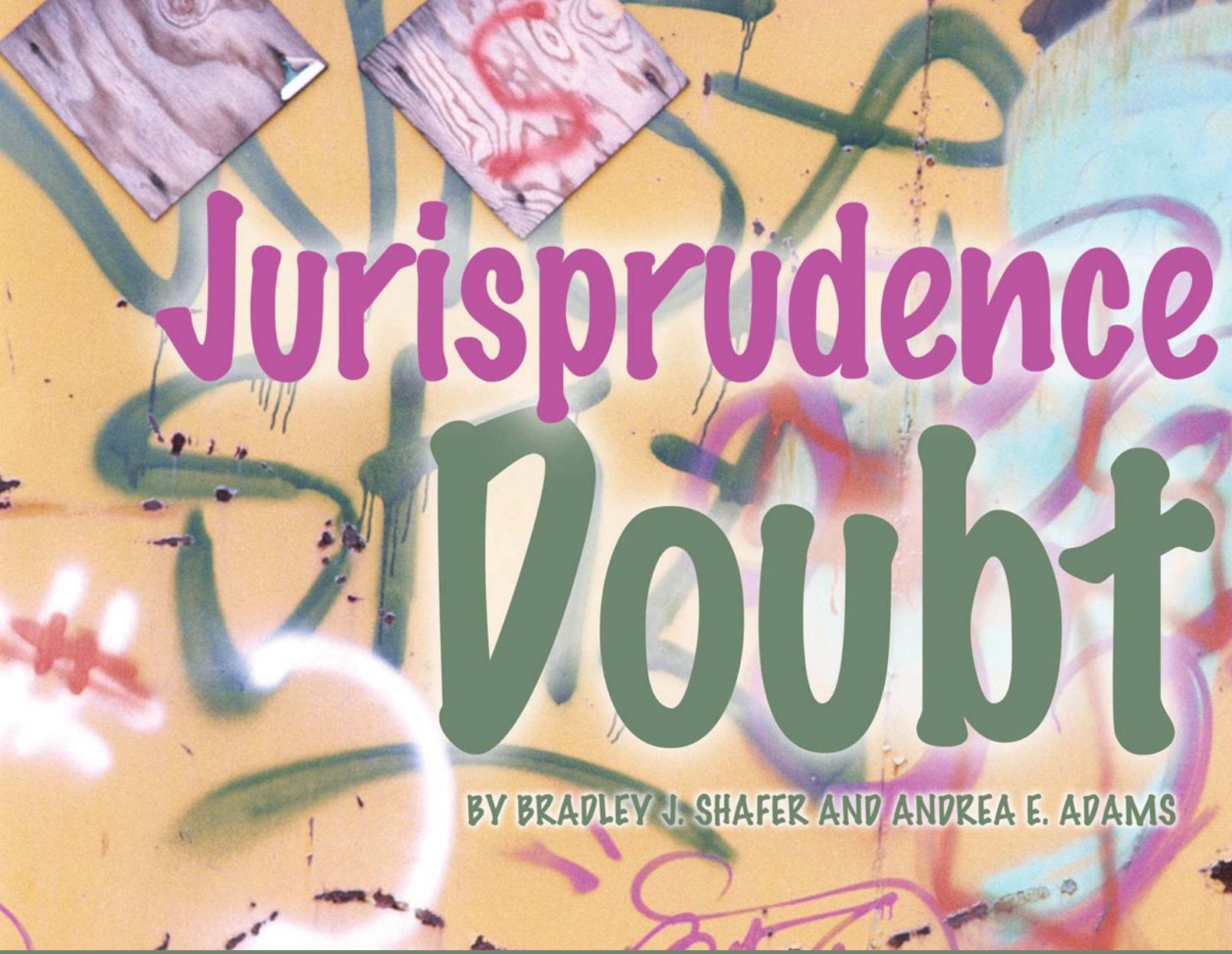

Jurisprudence Doubt

BY BRADLEY J. SHAFER AND ANDREA E. ADAMS

Obscenity, Indecency, and Morality at the Dawn of

"Liberty finds no refuge in a jurisprudence of doubt."

—Planned Parenthood of Southeastern Pa. v Casey[1]

American society seemed to some to be on the verge of crumbling when Janet Jackson exposed a breast due to a "wardrobe malfunction" during the halftime broadcast of the 2004 Super Bowl and FCC Commissioners may consider shock-jock Howard Stern to be their full employment plan.[2] In the uproar caused by these and other individuals, 66 ABC affiliates recently refused to broadcast—*on Veteran's Day, no less*—the Academy Award-winning film *Saving Private Ryan* for fear that the sexually-charged language of soldiers in combat might violate the "indecency" standards governing television broadcasts.[3] In addition, newly-appointed Attorney General Alberto Gonzales has announced that, of all the problems facing this country, the number four priority for his Justice Department will be a "crackdown" on obscenity.[4]

Perhaps no topic of the law has proven more troublesome for members of the Supreme Court to reach a consensus as that of the jurisprudence dealing with sex. In probably no other area of constitutional jurisprudence must an attorney or court so regularly apply the principles for determining the constitutional "holdings" of High Court decisions for which there is no majority opinion. As set forth in *Marks v United States,*[5] the precedent of such "plurality" rulings "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."[6] This is certainly a tenuous reed upon which to rest the protections of individual liberty, and can lead to this seemingly incredible result: The scope of protections afforded under the Bill of Rights may well turn upon the written opinion of but a single Justice.

An example of this can be seen in the area of nude dancing. In 1991, the Court addressed the application of the First Amendment to nude dancing in *Barnes v Glen Theatre, Inc.*[7] An opinion authored by Chief

of the 21st Century

Justice Rehnquist, but joined in only by Justices O'Connor and Kennedy, concluded that an Indiana public indecency statute prohibiting nudity in public places should be analyzed under the intermediate scrutiny test articulated in *United States v O'Brien,*[8] and could be justified upon the governmental interest in protecting societal order and morality.[9] Concurring in the judgment, Justice Scalia concluded that the statute should be upheld as a general law regulating *conduct* as opposed to expression, and was therefore not subject to First Amendment scrutiny "at all."[10]

The then-newest member of the Court—Justice Souter—also concurred, but opined that the constitutionality of the Indiana statute may be sanctioned "not on the possible sufficiency of society's moral views . . . but on the State's substantial interest in combating the secondary effects of adult entertainment establishments . . . ."[11] These "adverse secondary effects" were generally perceived to be increases in crime, decreases in property values in the surrounding areas, and the proliferation of urban blight.[12] Justice Souter furthermore concluded that prior case law had "establish[ed]" that such problems could be *presumed* to emanate from these types of businesses.[13]

In the years following, lower courts were presented with the "vexing task" of "reading the tea leaves of *Barnes.*"[14] Numerous courts came to the conclusion that Justice Souter's concurring opinion, *in which not a single other Justice joined,* indeed represented the constitutional "holding" of that decision under *Marks.*[15]

Apparently because of the fractured nature of its earlier ruling, the Court revisited this issue in *City of Erie v Pap's A.M.*[16] In reversing a decision of the Pennsylvania Supreme Court, which concluded that a municipal ordinance proscribing public nudity failed muster under the First Amendment, the United States Supreme Court was however, again, unable to reach a majority consensus.

Somewhat inexplicably, the Chief Justice and Justices O'Connor and Kennedy abandoned, without comment, their view in *Barnes* that such laws could be justified upon the protection of societal order and morality, and adopted, rather, Justice Souter's secondary effects approach.[17] While adhering to the application of the secondary effects doctrine, Justice Souter, this time concurring in part and dissenting in part, did something almost unheard of in Supreme Court lore: He *apologized* for his evidentiary "assumption" in *Barnes.*

> *"I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late."*[18]

Justice Souter's *mea culpa,* however, did little to further the understanding of this area of constitutional jurisprudence. There is *still* no consensus among five Justices regarding the legal standards to be applied to laws directed at nude, or indeed "topless," dance entertainment.[19] And for this reason, the odyssey of the *City of Erie* did not end there.

Upon remand, the Pennsylvania Supreme Court observed that it was "notable that the five Justices in the U.S. Supreme Court who agreed that the *O'Brien* test applied could not agree upon the precise evidentiary showing which would be required to satisfy that test."[20] Observing that federal precedent "has been fluid and changing and still is not entirely clear,"[21] the High Court of Pennsylvania concluded that its citizens "should not have the contours of their fundamental rights under [their state] charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."[22] That court then went on to hold that the *Erie* ordinance was subject to strict scrutiny[23] under the Pennsylvania Constitution, and was invalid under that analysis.[24]

Further complicating these matters is the fact that subsequent to the U.S. Supreme Court's decision in *Pap's,* the Court revisited the secondary effects doctrine in *City of Los Angeles v Alameda Books,*[25] and issued yet *another* plurality ruling. In reversing a summary judgment order that was entered against the City of Los Angeles regarding the constitutionality of its "adult" business zoning ordinance, the Court could not agree on the standards to apply under intermediate scrutiny.

Justice Kennedy provided a critical concurring opinion, demanding that a "proportionality" test be applied to determine if an ordinance supposedly justified upon a concern of adverse secondary effects passed constitutional muster. The analysis, he concluded, must "address how speech will fare under the City's ordinance,"[26] and a city "must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech *substantially* intact."[27] Municipalities, attorneys, and judges must now also attempt to divine the true "holding" of *Alameda Books* in assessing the constitutionality of "secondary effects"-based laws.

Recent events have rendered the law of obscenity and indecency equally confusing.

After 16 years of experimentation, the Supreme Court adopted a standard for obscenity in 1973 that still stands today. Illegal "obscenity" is to be distinguished from protected expression by evaluating, as set forth in *Miller v California:*[28]

- Whether the average person, applying contemporary community standards, would find the work, taken as whole, appeals to the prurient interest; and
- whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value.[29]

Although not explicitly set forth in *Miller,* the Court subsequently clarified in *Smith v United States*[30] that patent offensiveness, like prurient appeal, was also to be measured by "contemporary community standards."[31]

But which "community standards" should a jury or judge apply? The Court leaves that to state law. Here in Michigan, it is the entire adult state population.[32] Yet, in addition to the inherent vagueness of these standards and the difficulty in rationally applying them,[33] two developments since *Miller* have further confounded the concept of evaluating obscenity in light of localized community standards.

First, the Court concluded in *Pope v Illinois*[34] that the "serious value" prong of the obscenity test was not to be evaluated in accordance with community standards, but rather by reference to whether a *reasonable* person *generally* would find such value in the material.[35] More recently, the Court has observed that this equates to a *national* standard of value.[36] In determining whether certain expression meets the legal standard of obscenity, a judge or jury is now required to apply (at least in Michigan) *statewide* community standards with regard to two inquiries (prurient interest and patent offensiveness), and *national* standards for the third (serious value).

Second, the *Miller* Court never envisioned the Internet and the age of instant global communication. What community standard should be applied to a medium of expression that instantaneously extends to every point on the planet?

Fast Facts:

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That issue was confronted by the Supreme Court in *Ashcroft v ACLU,*[37] which resulted in a highly fractured plurality decision comprising five separate opinions. In ruling that inclusion of the concept of "community standards" did not *itself* render the Child Online Protection Act *facially* unconstitutional,[38] Justice O'Connor observed in concurrence that adoption of a *national* community standard was necessary for any reasonable regulation of Internet obscenity.[39] Justice Breyer expressed his belief that Congress's use of the word "community" in the statute was meant "to refer to the Nation's adult community taken as a whole, not to geographically separate local areas."[40] And Justice Kennedy, joined in by Justices Souter and Ginsburg, concluded, in basically assuming that a national community standard would apply for Internet regulation, that because the "actual standard applied is bound to vary by community,"[41] the lower court's entry of an injunction was warranted.[42]

What makes this apparent concession by a majority of the Justices—that obscenity on the Internet would have to be judged by nationwide attitudes—ironic is the fact that the Court explicitly stated in *Miller* that discerning a national community standard is "unascertainable" and "[un]realistic."[43]

If these standards are not amorphous enough, those that apply to the broadcast media provide even less guidance.[44] Licensed broadcasters are prohibited from transmitting not only obscene, but *indecent* materials—or at least between the hours of 6:00 a.m. and 10:00 p.m.[45] The FCC has defined the term "indecent" as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[46] Yet, "[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . ."[47] More to the point, however, is the question of which community standards are to be applied *here?* Should the fact that one or a few communities around the country find a program "indecent" preclude a national broadcast? Should the objections of a few counties prohibit a broadcast to the remainder of the state?[48]

Throwing all of the above into further disarray is the recent Supreme Court decision of *Lawrence v Texas,*[49] which invalidated the Texas anti-sodomy law in regard to homosexual conduct. While considering conduct that occurred inside a dwelling, the Court observed that:

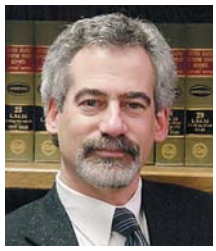
> *". . . there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."*[50]

Noting the "broad statements of the substantive reach of liberty under the Due Process Clause" found in the Fourteenth Amendment,[51] a majority of the Court concluded, for the first time, that objections based on *morality* are not a sufficient basis upon which to infringe liberty.[52] Indeed, this rejection lead Justice Scalia to observe in dissent that a variety of sexually-related laws, including obscenity regulations, were "called into question by today's decision . . . ."[53]

Justice Scalia may be correct. Recognizing the admonitions of the majority in *Lawrence,* a district court in Pennsylvania recently declared the federal obscenity statutes

unconstitutional as applied to distribution meant for in-home viewing.[54] In the case of *United States v Extreme Associates,*[55] the court noted that *Lawrence* could reasonably be interpreted "as holding that public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality."[56] More importantly, the outcome of the case confirms that the liberty rights found in the substantive component of the Due Process Clause may well protect that which the First Amendment does not.[57]

What this all means remains to be seen. But these confusing, and in some ways indecipherable standards will certainly keep lawyers, judges, and juries busy for years attempting to distinguish constitutionally protected speech from suppressible expression. And this "dim and uncertain line"[58] will continue to energize those pro-censorship activists who are, in H. L. Mencken's phrase, "haunted by the fear that someone, somewhere is having fun."[59] ◆



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Footnotes

1. 505 US 833, 844 (1992).
2. Radio stations broadcasting his program have been fined over $2 million by the FCC since 1990. This has lead Stern to announce that he will be "jumping ship" to satellite radio which, until now, is not subject to FCC regulations. *New York Times,* October 7, 2004, A1.
3. *New York Times,* November 21, 2004, Sec. 2, p 1. The FCC subsequently ruled, however, that because of its "context," *Saving Private Ryan* would not indeed violate such indecency standards. *New York Times,* March 2, 2005, E2.
4. *New York Times,* March 1, 2005, A14.
5. 430 US 188 (1977).
6. Id. at 193, citing *Gregg v Georgia,* 428 US 153, 169 n 15 (1976).
7. 501 US 560 (1991).
8. 391 US 367 (1968). This evaluates whether the regulation at issue is within the government's constitutional power; whether the regulation furthers an important or substantial governmental interest; whether the governmental interest is unrelated to the suppression of free expression; and whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. Id at 377.
9. *Barnes,* 501 US at 569. This conclusion was based in part on the earlier decision of *Bowers v Hardwick,* 478 US 186 (1986), where the Court upheld the constitutionality of an anti-sodomy law as applied to homosexual conduct. *Bowers* was, however, subsequently overruled in *Lawrence v Texas,* 539 US 558 (2003), where a majority specifically *rejected* the moral disapproval of homosexual activity as a legitimate governmental basis to justify the criminalization of such conduct. See further discussion, infra.
10. *Barnes,* 501 US at 572 (Scalia, J., concurring).
11. Id. at 582 (Souter, J., concurring).
12. See, e.g., *Barnes,* 501 US at 582–586 (Souter, J., concurring); *Renton v Playtime Theatres, Inc,* 475 US 41, 50–51 (1986); and *Young v American Mini Theatres, Inc,* 427 US 50, 54–55 (1976).
13. *Barnes,* 501 US at 583–586 (Souter, J., concurring).
14. *Triplett Grille, Inc v City of Akron,* 40 F3d 129, 133–134 (CA 6, 1994).
15. See, e.g., *Triplett Grille,* 40 F3d at 134; *International Eateries of Am, Inc v Broward County,* 941 F2d 1157, 1160–61 (CA 11, 1991), cert denied, 503 US 920 (1992).
16. 529 US 277 (2000).
17. 529 US at 290–301 (plurality).
18. Id. at 317 (Souter, J., concurring in part and dissenting in part).
19. Particularly in light of the fact that Justice Souter's opinion in *Pap's* is both a partial concurrence and a *dissent,* the admonition of the Sixth Circuit in *Triplett Grille* is even more relevant when attempting to ascertain the true holding in *Pap's*: "Admittedly, the *Marks* rule is less useful where, as here, no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment." 40 F3d at 134.
20. *Pap's AM v the City of Erie,* 812 A2d 591, 609–610 (Penn 2002).
21. Id. at 611.
22. Id. (clarification added).
23. Regulations enacted for the purpose of restraining expression on the basis of its content are presumptively invalid. *Renton v Playtime Theatres, Inc,* 475 US 41, 46–47 (1986). Such a content-based regulation is subject to strict scrutiny, and in order to pass constitutional muster, it must be necessary to a compelling state interest, and must be narrowly drawn to achieve that end. *Widmar v Vincent,* 454 US 263, 270 (1981). In this context, narrow tailoring requires that the government choose the "least restrictive means to further articulated interest." *Sable Communications of California, Inc v FCC,* 492 US 115, 126 (1989).
24. *Pap's AM,* 812 A2d at 611–613.
25. 535 US 425 (2002).
26. *Alameda Books,* 531 US at 450 (Kennedy, J., concurring).
27. Id. at 449–450 (emphasis added).
28. 413 US 15 (1973).
29. Id. at 24. These standards are in the conjunctive, and all three must be met before expression is found to be beyond the protections of the First Amendment. See, e.g., *Book Friends, Inc v Taft,* 223 F Supp 2d 932, 936 (SD Ohio 2002), citing, *Reno v ACLU,* 521 US 844, 873 (1997).
30. 431 US 291 (1977).
31. Id. at 300 n 6, quoting, *Roth v United States,* 354 US 476, 489 (1957). See also, *Pope v Illinois,* 481 US 497, 500 (1987); and *Ashcroft v ACLU,* 535 US 564, 576 n 7 (2002).
32. See MCL 752.36(1) ("'Contemporary community' means the customary limits of candor indecency *in this state* at or near the time of the alleged violation of this act") (emphasis added). Cf., MCL 722.674(a)(b) (material that is alleged to be obscene as to minors, or in the language of the statutory scheme "harmful to minors," is to be evaluated by the community standards of "the *county* of which the matter was disseminated") (emphasis added).
33. See, e.g., Bradley J. Shafer, *Sex, Lies, and Videotape; In Critique of the* Miller *Test of Obscenity,* 70 Mich BJ 138–45 (Oct 1991); and Bradley J. Shafer, *Patent Offensiveness: The Black Hole of* Miller, 10 Thomas M. Cooley Law Review No. 1, 1–69 (1993).
34. 481 US 497 (1987).
35. Id. at 500–01 & n 3.
36. See *Reno v ACLU,* 521 US at 873; and *Ashcroft v ACLU,* 535 US 564, 579 (2002).
37. 535 US 564 (2002).

38. The Court nevertheless kept in place a district court injunction because the Court of Appeals had not had an opportunity to evaluate *other* grounds that the district court had found to justify the entry of injunctive relief. *Ashcroft v ACLU,* 535 US at 585. On remand, the Third Circuit again found a likelihood of the law's unconstitutionality, and that ruling was affirmed by the Supreme Court. 322 F3d 240 (CA 3, 2003); and 124 S Ct 2783 (2004).
39. *Ashcroft v ACLU,* 535 US at 587 (O'Connor, J., concurring in part and concurring in the judgment).
40. Id. at 589 (Breyer, J., concurring in part and concurring in the judgment).
41. Id. at 596–97 (Kennedy, J., concurring).
42. The plurality opinion declined to speculate as to what community standards would be appropriate, and noted that such standards could remain *undefined* in jury instructions. 535 US at 576, citing *Jenkins v Georgia,* 418 US 153, 157 (1974).
43. *Miller,* 413 US at 31–32; and *Ashcroft v ACLU,* 535 US at 588 (O'Connor, J., concurring in part and concurring in the judgment).
44. The Court has long held that, because of its unique pervasiveness and accessibility to children, the broadcast medium is afforded the lowest levels of constitutional protections. See, e.g., *FCC v Pacifica Foundation,* 438 US 726, 750–51 (1978); and *Action for Children's Television v FCC,* 58 F3d 654, 657 (DC Cir 1995) (En Banc), cert. denied, 516 US 1043 (1996).
45. 18 USC 1464; and 47 CFR 73.3999.
46. *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 USC 1464,* 8 F.C.C.R. 704, 705 n 10 (1993). "This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation,* 56 F.C.C.2d 94, 98 (1975)." *Action for Children's Television,* 58 F3d at 657.
47. *Sable Communications of California, Inc v FCC,* 492 US 115, 126 (1989).
48. Cf, e.g., *Ashcroft v ACLU,* 535 US 590 (Breyer, J., concurring in part and concurring in the judgment) (noting in regard to Internet obscenity regulation that "[t]o read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation").
49. 539 US 558 (2003).
50. Id. at 562.
51. Id. at 564.
52. Id. at 571. Accord, id. at 582–85 (O'Connor, J., concurring).
53. Id. at 590 (Scalia, J., dissenting).
54. The actual in-home viewing of even legal obscenity has been long held to be constitutionally protected. *Stanley v Georgia,* 394 US 557 (1969). Getting it there, free from criminal sanctions, has been, however, another story.
55. 352 F Supp 2d 578 (WD Penn 2005).
56. Id. at 591. Cf., *United States v Clarence Gertman,* Criminal No. 3:04-CR-170-H, Memorandum Opinion and Order (ND Texas, February 2, 2005) (rejecting the analysis in *Extreme Associates* on a motion for reconsideration).
57. *Extreme Associates,* 352 F Supp 2d at 589.
58. *Bantam Books v Sullivan,* 372 US 58, 66 (1963).
59. Mencken, Henry Lewis, *The Vintage Mencken,* 233 (Alistair Cooke, ed., Vintage 1956).