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RUNAWAY GRAND JURY: ACTIVISTS ATTEMPT TO REDEFINE OBSCENITY LAW IN KANSAS

Jill Barton*

I. INTRODUCTION: OBSCENITY DEBATE ARRIVES IN KANSAS

Phillip Cosby has spent the last several years trying to redefine obscenity and the First Amendment in his conservative-leaning state.¹ He believes pornography is a poison available at far too many establishments, including convenience stores, Halloween costume shops and video rental businesses, and that the accessibility of sexually explicit material has created a desensitized and even violent society.² Cosby has waged anti-pornography campaigns in his home state of Kansas before, and his current job as the Executive Director of the Kansas City chapter of the National Coalition for the Protection of Children & Families has provided him additional resources and the backing of a well-known Christian advocacy group.³ Through a yearlong campaign that included 140 speeches at community organizations and churches, Cosby has won over thousands of Kansas residents as supporters for his anti-pornography cause.⁴

With his supporters' help, Cosby successfully petitioned for grand jury investigations that indicted 20 business managers and owners across the state.⁵ He also called for criminal obscenity trials and new zoning laws that would eradicate communities of what he calls "SOBs" or "Sexually Oriented Businesses."⁶ Although charges have been dropped against several business owners, Cosby hopes that the remaining charges will stand and that sexually oriented business owners across Kansas will face trial and leave the state.⁷ In the process, Cosby and his supporters hope that Kansas juries will redefine community standards along more conservative lines and set an example that will lead to the banning of pornography in the rest of the nation.⁸

The biggest challenge for Cosby and his supporters is demonstrating that sexually explicit videotapes featuring girls who *appear* underage are legally obscene, despite the fact that the same material is widely available via the Internet, cable television, mail-order and other businesses. This note will examine the attempt in Kansas to redefine community standards and obscenity

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¹ See Mike Hendricks, *Crusader Is Area's New Point Man Against Porn*. KANSAS CITY STAR, Sept. 28, 2007, at A1; Steve Painter, *Proposed Ban Raises Questions Over First Amendment Rights*, THE WICHITA EAGLE, Feb. 22, 2006.

² Telephone Interview with Phillip Cosby, Executive Director, Kansas City Office, National Coalition for the Protection of Children & Families in Kansas City, Mo. (Jan. 3, 2008).

³ Phillip Cosby Biography, National Coalition for the Protection of Children & Families, <http://www.nationalcoalition.org/phillipc.asp> (last visited Jan. 3, 2008); About Us, National Coalition for the Protection of Children & Families, <http://www.nationalcoalition.org/aboutus/aboutus.html> (last visited Jan. 22, 2008).

⁴ Telephone interview with Cosby, *supra* note 2.

⁵ *Id.*

⁶ Phillip Cosby Biography, *supra* note 3.

⁷ Telephone interview with Cosby, *supra* note 2.

⁸ *Id.*

law, as set forth in U.S. Supreme Court jurisprudence. Section II outlines the history and development of obscenity law as it will apply to Kansas. Section III explains how anti-pornography advocates are using grand juries in their latest effort to shut down Kansas pornography businesses. Section IV shows how the community standards doctrine has evolved to gradually erase the distinction between conservative and liberal communities. This evolution demonstrates that the hallmark of the nation's obscenity test – community standards – has become unnecessary as technology helps to create a more national culture. The change further shows an overriding *national* desire to protect personal privacy and First Amendment rights over any concerns for developing a more conservative local standard.

II. OBSCENITY LAW IN AMERICA

The American tradition of holding people criminally liable for obscenity is rooted in English common law and dates back centuries.⁹ English courts of the seventeenth century believed that Christianity played a part in the country's common law, and as a result, people who shared information that was considered adverse to Christian values would be held criminally liable.¹⁰ Such a standpoint allowed early Christian leaders to impose their religious beliefs “upon an entire populace instead of protecting the values of many diverse groups.”¹¹ The view persisted in the United States throughout the 1800s, despite the adoption in 1791 of the First Amendment and its guarantees of freedom of speech and freedom of religion.¹² Nonetheless, as the country grew, Americans' varied interests and values gained more prominence, prompting courts to reevaluate obscenity law.¹³

Because of Americans' diverse interests, courts have spent decades debating how to determine when pornography falls outside the protection of the First Amendment. Supreme Court Justice John Marshall Harlan II noted in 1968 that defining obscenity has produced the greatest array of views among his U.S. Supreme Court colleagues and predecessors, and resulted in fifty-five separate opinions in thirteen cases.¹⁴

In 1964, the U.S. Supreme Court agreed to hear an appeal from the manager of a movie theater who was convicted for violating an Ohio law prohibiting the possession and exhibition of obscene materials.¹⁵ After watching the allegedly obscene movie – a French film entitled “Les Amants” or “The Lovers” – six justices found that the film was entitled to the protection of free expression guaranteed by the First and Fourteenth Amendments.¹⁶ The Court reversed the

⁹ Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 278-79 (2003).

¹⁰ *Id.* at 279.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Interstate Circuit v. Dallas*, 390 U.S. 676, 706 n.1 (1968) (Harlan, J., concurring).

¹⁵ *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Ohio Rev. Code Ann. § 2905.34 has been repealed.

¹⁶ *Id.* at 195-97.

manager's conviction.¹⁷ In the opinion, Justice Potter Stewart declared that the Court was "faced with the task of trying to define what may be indefinable."¹⁸

Stewart's words describing the difficulty of drawing hard lines to define obscenity have often been repeated:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that.¹⁹

In a dissenting opinion, Chief Justice Earl Warren agreed that developing a definition of obscenity was not an easy task but argued that the Court needed to balance free speech with the desire "to maintain a decent society."²⁰ A year later, Supreme Court Justice Hugo Black described his frustration over the Court's attempt to define the gray area of obscenity, describing it as an "irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read."²¹

In both cases, the Court fell back on the vague test for obscenity it developed in 1957 in *Roth v. United States*: whether an average person who applies contemporary community standards would consider the material in question to predominantly appeal to a prurient interest.²² The Court refined the test nearly two decades later in *Miller v. California* when it added two more requirements.²³ To find a work obscene, not only must the average person consider the material to have prurient appeal, but a work must also lack "serious literary, artistic, political, or scientific value," and describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law."²⁴

With this test, the Court allowed communities to set their own standards for what they deemed obscene, and expected that the standards set by liberal cities such as New York and San Francisco would be far different from the standard set in conservative-leaning communities in Kansas.²⁵ In *Miller*, Chief Justice

¹⁷ *Id.* at 187.

¹⁸ *Id.* at 197 (Stewart, J., concurring).

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* at 199 (Warren, C.J., dissenting).

²¹ *Mishkin v. New York*, 383 U.S. 502, 516-17 (1966) (Black, J., dissenting).

²² 354 U.S. 476, 489 (1957).

²³ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁴ *Id.*

²⁵ See Mike Godwin, *Virtual Community Standards: BBS Obscenity Case Raises New Legal Issues*, ELECTRONIC FRONTIER FOUNDATION, Nov. 1994, available at http://w2.eff.org/Censorship/?f=obscen_virtcom_stds_godwin.article (last visited Jan. 2, 2008); David L. Hudson Jr., *Pornography & Obscenity Overview*, FIRST AMENDMENT CENTER, July 17, 2007, available at <http://www.firstamendmentcenter.org/speech/adultent/topic.aspx?topic=pornography> (last visited Jan. 3, 2008).

Warren Burger wrote that different communities are constitutionally allowed to determine their own community standards relating to obscenity.²⁶

To require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility. . . . Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.²⁷

But since the *Miller* decision thirty-five years ago, the community standards doctrine has revealed few differences among communities. Cosby and other conservative activists in Kansas want to prove otherwise, and they have taken on the opportunity offered in *Miller* as a challenge. By calling for stricter standards in the state's obscenity law, they are betting that a jury of their peers will agree with their conservative viewpoint and put "violators" out of business.

III. KANSAS GRAND JURIES

Cosby recently led his anti-pornography effort in the Kansas City suburb of Johnson County. The group won its first victory in Johnson County in the summer of 2007 when it collected enough signatures to convene a grand jury to investigate whether certain businesses were selling obscene material.²⁸ Cosby and his wife, Cathy Cosby, a program director for the coalition's regional office, decided which businesses to target by visiting several establishments and looking for indecent material on the shelves.²⁹ From there, they started the petition drive that allowed them to call the grand jury.³⁰

Kansas is one of six states with a law allowing citizens to call for a grand jury if they collect signatures from slightly more than two percent of voters in a county.³¹ In an interview, Cosby said that the law in Kansas gives citizens the power to enforce laws, as opposed to other states, such as Missouri, which allows only judges and other officials to call grand juries.³² "In Missouri, the process is owned by elected officials or judges. In Kansas, the process is owned by the people. Personalities come into play in Missouri, whereas in Kansas they have no way to not have a grand jury once they are asked to," Cosby said.³³ Conservative

²⁶ *Miller*, 413 U.S. at 30.

²⁷ *Id.* at 30-33.

²⁸ Diane Carroll, *Despite Indictment, Shop Says It Always Follows the Law*, KANSAS CITY STAR, Sept. 27, 2007.

²⁹ Telephone interview with Cosby, *supra* note 2.

³⁰ Telephone interview with Cosby, *supra* note 2.

³¹ KAN. STAT. ANN. § 22-3001 (2006); *see* Diane Carroll, *Grand Jury Probe Adds Fuel to Abortion Debate*, KANSAS CITY STAR, Dec. 10, 2007, at B1.

³² Telephone Interview with Cosby, *supra* note 2.

³³ Telephone Interview with Cosby, *supra* note 2.

Kansas activists also recently used the unusual law to call for a grand jury on the divisive issue of abortion, alleging that Planned Parenthood of Overland Park violated several Kansas laws, including requirements for parental notification and waiting periods.³⁴

Cosby believes that finding support among Kansans on conservative issues is not difficult. “The people know, they intuitively know, we’re in danger. When I show them that the laws are there and this is the way you can have your day in court, finding citizens that care is not difficult.”³⁵ Nonetheless, these same citizens who will speak out about the country’s allegedly eroding values might not agree to take the next, aggressive step of allowing the government to regulate what American citizens can possess in the privacy of their own homes.

Once Cosby’s group successfully established a grand jury, anti-pornography advocates took further action in August 2007, when a man who gave his name as Sean O’Cleary rented four pornographic videos from Hollywood at Home Movies and Magazines in Overland Park and promptly turned them over to authorities.³⁶ The grand jury, on Sept. 25, 2007, indicted the video store and three other businesses, including a Priscilla’s store that is part of a chain by the same name.³⁷ Charges against Hollywood at Home and Priscilla’s are still pending, but prosecutors dropped all counts against the other two businesses.³⁸ In exchange, the two businesses agreed to remove the allegedly offensive material: Gringo Loco, a convenience store in Olathe, agreed to stop selling a DVD called “Babysitter #18,” and Spirit Halloween agreed to move four allegedly obscene costumes away from where children could see them.³⁹

Cosby has not only had success in Johnson County. Although most of his victories do not get past the earliest stages of litigation, he has had similar triumphs convening grand juries in several other Kansas counties, including neighboring Wyandotte County.⁴⁰ Cosby’s efforts began in his rural hometown of Abilene in 2004, when a grand jury indicted the Lion’s Den, an adult business that eventually chose to have a trial by judge, rather than a jury.⁴¹ “I think they [the defendant] knew the handwriting on the wall – that it’s a very conservative area and they didn’t stand a chance if they had a jury trial.”⁴² Nonetheless, a

³⁴ Carroll, *supra* note 31. More recently, the Kansas Supreme Court ruled that the grand jury could continue its investigation of one doctor who performed late-term abortions, but the court limited the grand jury’s power to subpoena patient medical records. *Kansas Court Limits Grand Jury’s Power in Abortion Case*, CHICAGO TRIB., May 7, 2008, at 5.

³⁵ Telephone Interview with Cosby, *supra* note 2.

³⁶ Justin Kendall, *The Sex Police*, PITCH, Oct. 25, 2007, available at <http://www.pitch.com/2007-10-25/news/the-sex-police/> (last visited Jan. 3, 2008).

³⁷ Diane Carroll, *Obscenity Indictment Dismissed Against Olathe Convenience Store*, KANSAS CITY STAR, Dec. 20, 2007, at B5.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Carroll, *supra* note 28.

⁴¹ Telephone interview with Cosby, *supra* note 2.

⁴² Telephone interview with Cosby, *supra* note 2.

judge dismissed all charges against the Lion's Den on September 7, 2005.⁴³ Cosby blamed the loss on legal technicalities – not on a failed argument about community standards in his conservative county.⁴⁴ Similar “technicalities” will likely frustrate the group's efforts in Johnson County. For example, the Kansas law on which the coalition bases its current claims has been ruled unconstitutional because it is overbroad.⁴⁵

That ruling not only impacted the Lion's Den case, but it will also impact future Kansas obscenity cases unless lawmakers enact a new law that passes muster with the state Supreme Court. In 1990, the Kansas Supreme Court held in *State v. Hughes* that the statute prohibiting the distribution of an allegedly obscene device “is impermissibly overbroad when it impinges without justification on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders.”⁴⁶ The court also held that the statute infringes on citizens' personal privacy rights.⁴⁷ Additionally, the court found that the *Miller* decision established the prevailing, general assumption that an “obscene item will be a book, movie, or play, rather than a device.”⁴⁸

Despite losing legal battles in the Lion's Den and *Hughes* cases, Cosby and other anti-pornography advocates have tried to bring attention to the issue in other ways. For example, in 2003, protestors spent 100 days picketing outside the Lion's Den.⁴⁹ Protestors also took down the license plate numbers of trucks and cars outside, and then called the companies that owned the trucks and family members of patrons to air their concerns about the store.⁵⁰ The store fought back in response, suing the Dickinson County Board of Commissioners and arguing that an ordinance restricting its location and operating methods is unconstitutional on First, Fourth and Fourteenth Amendment grounds. The federal district court found for the county on all claims in 2005, but the United States Court of Appeals for the Tenth Circuit reversed that decision on July 10, 2007.⁵¹ It remanded for trial the First Amendment claim, holding that a question remained whether the commissioners “reasonably relied on studies analyzing the secondary effects of adult businesses on surrounding communities in passing the ordinance.”⁵²

⁴³ David Clouston, *Judge Dismisses Obscenity Charges Against Abilene, Kan., Adult Bookstore*, SALINA J., Sept. 8, 2005.

⁴⁴ *Id.*

⁴⁵ KAN. STAT. ANN. § 21-4301 (1986); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990).

⁴⁶ 792 P.2d at 1031.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Kendall, *supra* note 36; Sharon Montague, *Ellsworth, Kan., Porn Shop Trial Moves Forward*, SALINA J., June 10, 2004.

⁵⁰ Kendall, *supra* note 36.

⁵¹ *Abilene Retail # 30, Inc. v. Bd. of Comm'rs*, 492 F.3d 1164, 1167, 1174-75 (10th Cir. 2007).

⁵² *Id.*

The rural pornography superstore remains in business not only in Abilene but in more than two dozen locations across the country.⁵³ The store's success in the courtroom and the community demonstrates that anti-pornography advocates face an uphill fight. Even if conservative advocates can beat similar challenges and the pending criminal cases proceed to trial, a significant question remains over whether Kansas juries – and juries elsewhere if this effort goes national – would agree to revise the definition of pornography along more conservative lines.

IV. THE INTERPRETATION OF “COMMUNITY STANDARDS” IN KANSAS AND BEYOND

A. Applying the *Miller* Test: Evidence of Community Standards

The *Miller* test gives juries a role in determining which materials should be protected and which should be deemed legally obscene in their jurisdiction by allowing them to develop their own standards. The test has often been used to push for regulations that aim to preserve community standards and more conservative values.⁵⁴ Scholars also have criticized it as unpredictable and unworkable.⁵⁵

Forecasting how juries will define community standards has proved impossible. For instance, a jury in Provo, Utah, which some community members claim is the most conservative area in the country,⁵⁶ cleared the owner of a movie rental store after defense attorneys presented evidence showing that hotel guests in the area viewed pornographic, pay-per-view movies at disproportionately high rates.⁵⁷ To fight the charges, the defense team recorded the movies available at a major hotel chain in the city and showed that they were at least as obscene as those sold by the defendant.⁵⁸ Defense attorney Randy Spencer argued that criminal charges should not be filed against his client, a sole proprietor, when some of the nation's biggest corporations were selling the same materials at significantly higher rates.⁵⁹

⁵³ Lion's Den Store Locations, http://www.lionsdenadult.com/store_locations/Lions_Den_locations.html (last visited Jan. 7, 2008).

⁵⁴ Karl A. Groskaufmanis, Comment: *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1263, 1266-67 (1988).

⁵⁵ See Joseph T. Clark, *The “Community Standard” in the Trial of Obscenity Cases – A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U.L. REV. 13, 17, 21-22 (1993); Susan Elkin, Casenote: *Taking Serious Value Seriously: Obscenity, Pope v. Illinois, and an Objective Standard*, 41 U. MIAMI L. REV. 855 (1987).

⁵⁶ See, e.g., Stephen and Eiko Madsen's blog site, <http://www.xanga.com/MadseninJapan/604022814/utah-county-the-most-conservative-county-in-the-united-states.html> (last visited July 14, 2008).

⁵⁷ Timothy Egan, *EROTICA INC. – A special report; Technology Sent Wall Street Into Market for Pornography*, N. Y. TIMES, Oct. 23, 2000 at A1.

⁵⁸ *Id.*

⁵⁹ *Id.*

Prosecutors faced similar difficulties in Cincinnati in 1990, when jurors were asked to decide whether the director of an arts center should be convicted of pandering obscenity in the nation's first obscenity trial involving an arts center exhibition.⁶⁰ The charges centered on seven sadomasochistic photos in a 175-photo exhibit.⁶¹ The defense team presented a series of experts that testified to the brilliance and seriousness of the work by artist Robert Mapplethorpe, and jurors decided on an acquittal.⁶² One juror described the panel's decision: "We had to go with what we were told. It's like Picasso. Picasso from what everybody tells me was an artist. It's not my cup of tea. I don't understand it. But if people say it's art, then I have to go along with it."⁶³ Another juror said the prosecution failed to come up with any credible witnesses and that testimony by a single sociologist or psychologist could have swayed the jury to convict.⁶⁴

Similarly, Florida prosecutors went after the rap group 2 Live Crew in 1990 over allegedly obscene song lyrics.⁶⁵ African-American scholar Henry Louis Gates Jr. testified for 2 Live Crew and argued that the lyrics should be taken as parody and that rap has significant roots in African-American culture.⁶⁶ Additionally, defense attorney Bruce Rogow argued in his opening statement that the group's "art" cannot be considered obscene, despite any preconceived notion among jurors.⁶⁷ "This is not guitar music. This is not violin music. This is not piano music. But this is serious art, even though it may be different."⁶⁸ Nonetheless, the government won a lower court victory under Florida's obscenity law.⁶⁹ The Eleventh Circuit, however, overturned the decision because the group's rap music was considered to have some social value despite its explicit and degrading lyrics.⁷⁰

More recently, a Pittsburgh grand jury found in 2005 that a California business violated the United States Supreme Court's obscenity test with its video and Internet images of simulated rape and murder.⁷¹ The grand jury found that businesses must follow community standards not only where products are made, but also in any place where they can be seen.⁷² A federal judge in Pittsburgh dismissed the obscenity charges, finding that the obscenity statutes were

⁶⁰ Isabel Wilkerson, *Obscenity Jurors Were Pulled 2 Ways*, N.Y. TIMES, Oct. 10, 1990, at A12.

⁶¹ Wilkerson, *supra* note 59.

⁶² Wilkerson, *supra* note 59.

⁶³ Wilkerson, *supra* note 59.

⁶⁴ Wilkerson, *supra* note 59.

⁶⁵ Carole Tanzer Miller, *Legal Action Hinges on Defining Obscenity*, NEWS & OBSERVER, Oct. 28, 2007, at A25.

⁶⁶ Sara Rimer, *In Rap Obscenity Trial, Cultures Failed to Clash*, N.Y. TIMES, Oct. 22, 1990, at A12; Sara Rimer, *Obscenity or Art? Trial on Rap Lyrics Opens*, N.Y. TIMES, Oct. 17, 1990 at A1.

⁶⁷ Rimer, *supra* note 65.

⁶⁸ Rimer, *supra* note 65.

⁶⁹ *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990).

⁷⁰ *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138 (11th Cir. 1992).

⁷¹ The Associated Press, *Charges Dismissed Against California Porn Business*, (Jan. 25, 2005) available at <http://www.firstamendmentcenter.org/news.aspx?id=14742>.

⁷² *Id.*

unconstitutional. The government appealed and argued before the Third Circuit that it should prevail to protect “adults, children, morality, the order of society and the proliferation of obscenity.”⁷³ In opposition, the attorney representing Extreme Associates, H. Louis Sirkin, argued that because people are entitled to have obscenity in their homes, it follows that they should be able to purchase obscene materials: “In order for me to exercise my right to liberty, I have to be able to get it.”⁷⁴ Within two months, the Third Circuit rejected his argument, reinstated the charges, and remanded for a new trial.⁷⁵ But a question remains whether the charges would be subjected to differing interpretations of community standards in Pennsylvania as opposed to California.

Because community standards are so uncertain, prosecutors have broad discretion when deciding how far to go in enforcing obscenity laws and are often allowed to “discriminatorily enforce obscenity laws.”⁷⁶ Richard T. Bryant, the attorney for Hollywood at Home in Overland Park, stated that is exactly what happened to his client.⁷⁷ Making an argument similar to that from the Provo case, Bryant has argued that the videos sold by Hollywood at Home are no worse than those available on cable television or pay-per-view channels.⁷⁸ Once a jury sees such evidence, he says that jurors will decide, “we may not want to rent these, they may not be our favorite movies, but we don’t want to have people telling us what we’re going to watch in the privacy of our own homes.”⁷⁹ These arguments will be compelling to jurors who hold any reservations about the government intruding into the personal lives of American citizens. They also will be persuasive in allowing defense attorneys to argue that technology has allowed a national culture to develop in this county, eliminating any need for a different community standard to be found in Kansas.

A Kansas jury’s decision will hinge on how jurors balance their beliefs on privacy and personal freedom against any conservative views they might hold. Because jurors are allowed to use their own discretion when defining the legal standard for obscenity, they could determine the community standard based solely on their personal opinions.⁸⁰ But this potential variable has not produced dramatically different results across the nation. Historically, testimony from experts in the fields of psychiatry, psychology, sociology and religion has helped demonstrate to juries whether the material in question would offend the average community member.⁸¹ Such experts might not be able to offer empirical data, but they can attest to their local community standards based on their longstanding

⁷³ Paula Reed Ward, *3d Circuit to Decide Video Porn Boundaries*, PITTSBURGH POST-GAZETTE, Oct. 20, 2005, at B1.

⁷⁴ *Id.*

⁷⁵ *U.S. v. Extreme Assocs., Inc.*, 431 F.3d 150 (3d Cir. 2005); *see also* Rimer, *supra* note 65.

⁷⁶ Donovan W. Gaede, Comment, *Constitutional Law – Policing the Obscene: Modern Obscenity Doctrine Re-evaluated*, 18 S. ILL. U. L. J. 439, 451 (1994).

⁷⁷ Jack Weinstein, *Not Guilty Plea on Obscenity Charges*, OLATHE NEWS, Oct. 11, 2007.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Clark, *supra* note 55, at 17, 21-22.

⁸¹ Clark, *supra* note 55, at 19.

professional experience.⁸² Still, judging from the Provo, Utah, and Cincinnati, Ohio, cases, prosecutors will have a hard time convincing jurors that the community standard in Kansas should be more conservative than the same standard in the rest of the nation.

For the prosecution's case, some testimony or evidence about the *local* community's standards will be crucial to establishing that a work in question is obscene. The United States District Court for the Central District of California found that a defendant's books could not be considered obscene because prosecutors did not present any evidence of the contemporary community standard, despite a judge's warning that such testimony was needed.⁸³ The district court judge told the prosecuting attorney during trial that he had limited experience judging whether material was obscene but that the standards in Los Angeles "may well tolerate" the books sold by the defendant.⁸⁴ Without any such evidence, the court found for the defendant.⁸⁵

Traditionally, both the government and the defendant will offer expert testimony on contemporary community standards.⁸⁶ In a Massachusetts case, the state supreme court reversed a lower court's conviction of the defendant, holding that the trial judge erred by refusing expert testimony on the artistic value of a film alleged to be obscene.⁸⁷ The court reasoned that expert testimony on the matter is "relevant and important to a defense" and essential to "enlighten the judgment of the . . . jury . . . regarding the prevailing literary and moral community standards and to do so through qualified experts."⁸⁸ In addition, allowing such evidence is necessary to protect a defendant's due process rights.⁸⁹

In obscenity trials, expert testimony is one way to introduce comparative evidence that would arguably demonstrate that a particular work is – or is not – obscene by comparing it to other material already found acceptable in a community.⁹⁰ Such evidence is the strongest for the defense when attorneys can show the material strongly resembles the allegedly obscene work and "enjoys a reasonable degree of community acceptance."⁹¹ Some courts have found that allowing expert testimony about a movie, for example, would benefit the judiciary because admitting the films into evidence could unnecessarily delay trials and jury deliberations.⁹²

⁸² Clark, *supra* note 55, at 19.

⁸³ *United States v. 2200 Paper Back Books*, 565 F.2d 566, 571 (9th Cir. 1977).

⁸⁴ *Id.* at 569.

⁸⁵ *Id.*

⁸⁶ Gayle Wintjen, *Update on the Law: Twenty-five Years Later: Constitutional Law – Obscenity and the First Amendment – Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 25 NEW ENG. L. REV. 875, 884 (1991).

⁸⁷ *Commonwealth v. United Books, Inc.*, 453 N.E.2d 406, 411 (Mass. 1983).

⁸⁸ *Id.* at 412.

⁸⁹ *Id.*

⁹⁰ Wintjen, *supra* note 86 at 884.

⁹¹ Wintjen, *supra* note 86 at 884.

⁹² Wintjen, *supra* note 86 at 884.

Courts have been mixed in their decisions on whether to admit comparative evidence in obscenity cases. United States Supreme Court Justice Harlan has argued that defendants in obscenity cases have a constitutional right under the Fourteenth Amendment's due process guarantees to bring in comparative evidence from their communities.⁹³ Still, some jurisdictions have held that comparative evidence is not permissible under any circumstances.⁹⁴ But a 1983 decision in *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*⁹⁵ distinguished earlier holdings, finding that in obscenity cases, a jury can determine patent offensiveness by considering whether similar materials are easily accessible.⁹⁶

This result could mean that materials would never be considered legally obscene if they are distributed in an area where similar pornographic materials exist: "Once members of a community allow obscene materials into their midst, they never will be able to use the *Miller* test to eradicate them."⁹⁷ If courts in Kansas – or any other state – follow the *Schedule No. 2102* decision from the Second Circuit, prosecutors would face the nearly impossible task of establishing that Kansas residents cannot obtain pornographic videos by other means.

B. Community Standards in *Miller*

Despite the added complexity in judging obscenity since the *Miller* decision, obscenity prosecutions have increased but have had little impact on regulating obscenity.⁹⁸ One survey from 1977 found that too much confusion exists over how to determine the contemporary standards of a community.⁹⁹ One issue is that *Miller* requires authorities to make "largely subjective evaluations of sexually explicit materials."¹⁰⁰

Although *Miller* gave communities power to decide what is obscene, the Court exempted broad categories of materials, reasoning that for a work to be legally obscene it must lack "serious literary, artistic, political, or scientific value."¹⁰¹ This rationale demonstrates that a large variety of works dealing with sexual conduct, such as pornographic magazines and movies, do not fall victim to

⁹³ Joan Schleeef, 52 U. CIN. L. REV. 1131, 1136 (1983) (citing *Smith v. California*, 361 U.S. 147, 171 (1959) (Harlan, J., concurring in part and dissenting in part)).

⁹⁴ *Id.* (citing *United States v. One Reel of 35mm Color Motion Picture Film Entitled "Sinderella,"* 491 F.2d 956, 958-59 (2d Cir. 1974).

⁹⁵ 709 F.2d 132 (2d Cir. 1983).

⁹⁶ See *U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 678 F.2d 433, 434 (2d Cir. 1982); Schleeef, *supra* note 93 at 1139.

⁹⁷ Schleeef, *supra* note 93, at 1141.

⁹⁸ P. Heath Brockwell, Comment, *Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 137 (1994) (citing Harold Leventhal, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Miller v. California*, 413 U.S. 15, 24 (1973).

the legal definition of obscenity.¹⁰² For instance, nudity alone cannot be found to be legally obscene under the *Miller* test.¹⁰³ The Court in *Miller* reasoned that the First Amendment was intended to protect the “unfettered interchange of ideas” to help bring about social change but not the “public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain.”¹⁰⁴ Additionally, the Court noted the importance of holding the First Amendment in high esteem: “to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”¹⁰⁵

Even those who disagree with the holding in *Miller* agree that the test has been generally accepted.¹⁰⁶ But United States Supreme Court Justice Antonin Scalia also has noted that the effects of applying the standard articulated in *Miller* have reached too far.¹⁰⁷ In a dissent, Scalia argued that communities that try to rid themselves of sexually oriented businesses “are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression.”¹⁰⁸ The conservative justice’s statement is a fitting commentary on the previous unsuccessful efforts of anti-pornography activists, and it appears to forecast their likely failure to establish a more conservative community standard in Kansas.

The guiding principles of *Miller* seem to protect a broad array of speech. Although the Court’s reasoning provides guidelines for how to determine whether a work is legally obscene, the Court has offered little direction in the way of how to establish the contemporary standards of a given community.

C. Are community standards any different in Kansas?

Cosby argues that Kansas community standards are more conservative than those in other parts of the nation. He believes Kansas residents who sit on juries in obscenity trials will likely have a more conservative view of what material is legally obscene because he was able to gather signatures from Kansas voters in his petition drive with such ease.¹⁰⁹ Kansas generally has been thought of as conservative stronghold in the Heartland. In *What’s the Matter with Kansas? How Conservatives Won the Heart of America*, author Thomas Frank described how his home state became overwhelmingly conservative in its politics and

¹⁰² David L. Hudson Jr., *Pornography & Obscenity Overview*, FIRST AMENDMENT CENTER, July 17, 2007, available at <http://www.firstamendmentcenter.org/speech/adultent/topic.aspx?topic=pornography> (last visited Jan. 3, 2008).

¹⁰³ *Id.* (citing *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974)).

¹⁰⁴ *Miller*, 413 U.S. at 35.

¹⁰⁵ *Id.* at 34.

¹⁰⁶ *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 251 (1990) (Scalia, J., dissenting).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Telephone interview with Cosby, *supra* note 2.

values.¹¹⁰ Kansas grabbed national headlines in recent years for debating whether evolution could be taught in public schools.¹¹¹ In addition, the state traditionally votes solidly in support of Republican presidential candidates.¹¹² Still, the state has elected and re-elected a Democratic governor in the last two races.¹¹³ The liberal influence in Kansas originates in suburban Johnson and Wyandotte counties. For instance, Johnson County voters have kept moderate Democrat Dennis Moore in his U.S. House of Representatives seat for five terms since electing him in 1998.¹¹⁴ The Kansas City suburbs in Kansas light up as a bright dot of blue surrounded by red in a map plotting the 2004 presidential election results.¹¹⁵

But most evidence points toward the state's conservatism. In 2005, one group of parents lobbied to remove some books regularly used in high school classrooms, complaining that they have vulgar and sexual language, including references to oral sex and bestiality.¹¹⁶ The books parents hoped to ban in Blue Valley Unified School District 229 included classics, such as *Beloved*, *One Flew Over the Cuckoo's Nest*, and *Leaves of Grass*.¹¹⁷ Republican activists pushed for the ban to be statewide and wanted it to be part of the state party's platform.¹¹⁸ The battle is ongoing. Supporters of the ban introduced House Bill 2200 in 2007 to ban materials from school they viewed as indecent.¹¹⁹ The bill passed the House, but did not reach the Senate.¹²⁰

If the pending obscenity cases go to trial in Johnson County, prosecutors and defense attorneys will likely consider such information when deciding how to describe the reach of First Amendment protections in Johnson County to a jury. Comparative evidence might help a jury determine the community's tolerance for certain types of material, such as data on local residents' Internet usage, magazine subscriptions, mail-ordered materials and consumption of pay-

¹¹⁰ Josh Chafetz, *Heartland Security*, N.Y. TIMES, June 13, 2004, at 17.

¹¹¹ John Fountain, *Kansas Puts Evolution Back Into Public Schools*, N.Y. TIMES, Feb. 15, 2001, at A18.

¹¹² Election 2004, President Results by State, USA TODAY, available at <http://www.usatoday.com/news/politicselections/vote2004/nationalelectionresultsbystate.aspx?oi=P&rti=G&cn=1&tf=1> (last visited Jan. 3, 2008).

¹¹³ Governor Kathleen Sebelius Biography, <http://www.governor.ks.gov/about/bio.htm>.

¹¹⁴ U.S. Representative Dennis Moore Biography, <http://www.moore.house.gov/bio/>.

¹¹⁵ Election 2004, Latest vote, county by county, USA TODAY, available at <http://www.usatoday.com/news/politicselections/vote2004/countymap.htm> (last visited Jan. 8, 2008).

¹¹⁶ Joel Mathis, *Ban on Obscenity in Schools Sought: Teacher Defends Controversial Literature*, LAWRENCE JOURNAL-WORLD (Dec. 5, 2005), available at http://www2.ljworld.com/news/2005/dec/05/ban_obsценity_schools_sought/.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Bill Could Put Limits on Book Choices: House Proposal Targets "Obscene" Material in Schools*, LAWRENCE JOURNAL-WORLD (Feb. 27, 2007).

¹²⁰ H.B. 2200, available at <http://www.kslegislature.org/bills/2008/2200.pdf>.

per-view movies.¹²¹ The availability of adult movies in hotels and at area businesses also would be relevant.¹²² For example, one 2001 study in Hamilton County, Ohio, which is “consistently portrayed as among the most conservative in America,” found that tens of thousands of residents buy pornography using transactions that are “quick, quiet and home-delivered.”¹²³ The same surprising results could be found in Johnson County and other Kansas communities that are largely considered to be conservative. Such evidence indicates that even conservative residents are unwilling to support more regulation of allegedly obscene material. It also points to the fact that the idea of a differing community standard is nonexistent as a national culture has developed.

Many experts argue that as times have changed so have communities’ views of what constitutes legally obscene material. Jennifer Bass of the Kinsey Institute for research in sex, gender and reproduction at Indiana University reports that there has been “an incredible increase in exposure to the material [which] loosens the buying patterns among people who might not normally have bought pornography.”¹²⁴ H. Louis Sirkin, who has represented famed pornographer Larry Flynt in addition to Extreme Associates, argues that “the concept of a local community standard” is no longer valid.¹²⁵ Anti-pornography advocates agree that some of the lines distinguishing liberal communities from conservative ones have been erased. Justice Scalia has noted that sexually oriented businesses now “flourish throughout the country as they never did before, not only in New York’s Times Square, but in much smaller communities via telephonic ‘dial-a-porn.’”¹²⁶

D. A Johnson County Jury

One starting point for distinguishing one community from the next is census bureau statistics. For Johnson County, census figures demonstrate that Johnson County is not the typical Kansas county. For example, the median household income in Johnson County is nearly \$70,000 annually, compared to about \$48,500 nationally and \$45,500 statewide.¹²⁷ The median value of a home in Johnson County is \$204,500 – higher than both the \$185,200 national median and the state median of \$114,400.¹²⁸ In addition, the rate of poverty among Johnson County families also is comparably low at 3.1 percent, while the rate is 9.8 percent nationally and 8.6 percent statewide.¹²⁹

¹²¹ Dan Horn, *Home Is Where the Porn Is: New Ways to Deliver Muddle ‘Community Standards,’* CINCINNATI ENQUIRER, May 13, 2001.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 251 (1990) (Scalia, J., dissenting).

¹²⁷ U.S. Census Bureau, 2006 American Community Survey, available at <http://www.census.gov/> (Select American FactFinder link, then search Kansas and Johnson County, Kansas).

¹²⁸ *Id.*

¹²⁹ *Id.*

One national study in 1995 found that income is generally directly related to a person's political views and that residents with higher incomes overwhelmingly vote for Republican candidates.¹³⁰ This means that wealthier residents would be more likely to share Republican candidates' more conservative values. But the study also noted that income has little, if any, impact on Republican strongholds in the Midwest, meaning that many residents in the heartland remain loyal to Republican candidates even if their incomes are atypical of Republican supporters.¹³¹

Other census statistics show that Johnson County is not as diverse as the rest of the nation. In the county, 88.4 percent of residents report being white, 3.8 percent black and 5.7 percent Hispanic or Latino, compared to national figures of 73.9, 12.4, and 14.8 percent, respectively, according to the U.S. Census Bureau's 2006 American Community Survey.¹³² In addition, there is some diversity within Johnson County. In the southwest corner of the county, Olathe residents have a median household income of \$70,728 and a median home value of \$187,900. In comparison, their counterparts in the city of Roeland Park, in the northeast corner of the county, have a median income of only \$61,750 and a low median home value of \$107,000. As a result, a jury could be made up of differing viewpoints and opinions.

Results from the last presidential election also are instructive in predicting Kansans' values in the obscenity debate. In 2004, President George W. Bush won Johnson County by a large margin: 153,718 votes to 95,002 for Democrat John Kerry.¹³³ Bush won the state of Kansas by nearly the same margin – 62.2 percent. Such results indicate that a majority of Johnson County jurors have conservative leanings, but they hardly demonstrate that a jury would unanimously find that obscenity standards need to be more stringent than those in the rest of the nation. In fact, much of the evidence that can predict whether a community would decide an issue along liberal or conservative lines is inconsistent in Johnson County. Cosby has attempted to describe Johnson County as a bastion of ultra-conservatism with a group sense of morality. He appears to have put forth himself and a small group of anti-pornography activists to support the myth that such beliefs are widely held. But this myth will likely fall apart if his arguments reach a Johnson County courtroom because the evidence will reveal that Kansas has no more of a local community standard than Provo, Utah, or Cincinnati, Ohio.

The *Miller* decision and the development of the community standards doctrine has allowed the United States Supreme Court to stay out of the tricky obscenity debate for the last three decades. But the application of the community standards doctrine has demonstrated that it serves no valid purpose in the modern

¹³⁰ Gene Marlowe, *In Most Cases, Voters' Income Predicts Races*, TAMPA TRIBUNE, Aug. 27, 1995, at 1.

¹³¹ *Id.*

¹³² U.S. Census Bureau, *supra* note 127.

¹³³ Election 2004, USA TODAY, <http://www.usatoday.com/news/politicselections/vote2004/nationalelectionresultsbystate.aspx?oi=P&rti=G&cn=1&tf=1> (last visited Jan. 8, 2008).

obscenity test because even the most conservative communities have rejected the opportunity to develop their own stricter standards. Prosecutors across the nation have failed to establish that varying community standards exist.

Evidence of a "local" community standard is largely – if not entirely – influenced by the national culture and what's available nationally on television, in movie theaters and on the Internet. "Local" community standards do not appear to exist in today's society and thus, have become irrelevant to the contemporary obscenity debate. Whether materials are suitable for use in the privacy of one's home does not depend on geographic location. As the Court noted in *Miller*, "Obscenity – which even we cannot define with precision – is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process."¹³⁴ If the Johnson County, Kansas, obscenity cases reach a jury, any determination whether the materials involved are obscene should depend not on the community standard but on the remaining portions of the *Miller* obscenity test:

(a) whether the average person . . . would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹³⁵

Only by applying these more objective criteria can a jury satisfy the fairness and due process concerns conveyed by the Court in *Miller*.

V. CONCLUSION

The latest indictments in Johnson County are not the first time that anti-pornography activists have set their sights on America's heartland. In 1987, a chapter of the National Coalition Against Pornography spent \$200,000 to warn Kansas City residents of pornography's dangers in ads via radio stations, billboards and newspapers.¹³⁶ The group said its campaign was a prototype that it hoped to launch across the nation.¹³⁷ Similar to the current effort, the group targeted 200 outlets, including video stores, where it believed obscene materials were being sold. The group planned to keep track of law enforcement and judicial efforts to ensure that violators were punished.¹³⁸

Despite their efforts, then-District Attorney Dennis Moore in Johnson County announced that he believed serious, violent crimes, such as homicide,

¹³⁴ *Miller v. California*, 413 U.S. 15, 43-44 (1973).

¹³⁵ *Id.* at 39.

¹³⁶ William Robbins, *Kansas City Journal*; *Beachhead in a War on Pornography*, N.Y. TIMES, Nov. 2, 1987, at A16.

¹³⁷ *Id.*

¹³⁸ *Id.*

rape and robbery, were more of a priority than pornography.¹³⁹ Anti-pornography activists wrote a fury of letters to Moore, but it appears the group's actions had little, if any, lasting effect. The last news report to mention the efforts of a local chapter of the Coalition Against Pornography was in 1991.¹⁴⁰ Nevertheless, Cosby promises his anti-pornography battle will continue.¹⁴¹ He argues that times have changed, as demonstrated by the fact that he helped bring indictments against twenty sexually oriented businesses in the past several years. His vehemence stems from a belief that the sex industry is largely responsible for violent sex crimes, although studies have found that pornography bears no relation to sexual violence.¹⁴² In addition, no business targeted by Cosby has been convicted of a crime as a result of the grand jury investigations.¹⁴³

The coalition recognizes that its chances are slim in the upcoming legal battle. "The pornography industry is very wealthy. They have deeper pockets. They delay and delay and their motions can reach the state Supreme Court."¹⁴⁴ The group will face two formidable opponents in the upcoming legal battle, and it is likely to lose against both. First, Johnson County jurors are likely to follow their counterparts from the cases in Cincinnati and Provo, where despite the communities' conservative leanings, the need to protect privacy rights won out over a need to develop a local, more conservative community standard. And more importantly, the coalition will square off with the First Amendment, which has demonstrated that in case after case, protecting free speech and the free interchange of ideas are valued far above the idea of bending to the conservative beliefs of a particular minority group.

¹³⁹ *Id.*

¹⁴⁰ See Victor Volland, *Anti-Porn Group to Address Council*, ST. LOUIS POST-DISPATCH, Oct. 24, 1991, at 6A.

¹⁴¹ Telephone interview with Cosby, *supra* note 2.

¹⁴² See Steve Chapman, *Pornography a Catalyst of Sexual Violence? No*, CHICAGO TRIB., Nov. 4, 2007, at C7; John Connolly, *Experts Link New Study on Aggressive Sexual Behavior to Pornography Usage*, LIFESITE.NET, Dec. 4, 2007, available at <http://www.lifesite.net/ldn/2007/dec/07120406.html>.

¹⁴³ Mike Hendricks, *Crusader Is Area's New Point Man Against Porn*, KANSAS CITY STAR, Sept. 28, 2007.

¹⁴⁴ Telephone interview with Cosby, *supra* note 2.