1-1-2001

Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped

Clay Calvert

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol23/iss3/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped

by

CLAY CALVERT*

I. Here's to You, Mrs. Robinson: The Internet Holds a Place for Beckalynn.com.................................................................516
II. The Mainstreaming of Adult Entertainment: A Congress Out of Touch.............................................................524
III. Naturists, Nudists, and Child Supermodels: The Next Wave of Net-Based Problems........................................528
    A. Naturist/Nudist Photography........................................530
    B. Modeling......................................................................531
    C. Artistic Photography....................................................533
IV. Conclusion........................................................................536

* Assistant Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.
Introduction

Surely no members of the United States Congress have ever visited Larry Flynt's thriving business venture on Sunset Boulevard—a clean, well-lighted establishment that's about one-part latté bar, two-parts adult emporium. Had they bothered to step over the concrete-embedded handprints of Flynt, fellow pornographer Al Goldstein, and several now-aging porn stars and to walk inside the front door of Hustler Hollywood, they would have viewed a motto painted on an interior half-wall. It reflects a sentiment with which they clearly are not familiar: "Relax. It's Just Sex."

When it comes to sexual imagery on the World Wide Web, Congress is anything but relaxed. In fact, it seems to enact legislation at a relatively feverish pace. Its latest effort to attack smut in cyberspace came on December 15, 2000 — the final day before the congressional winter recess. That day, the House passed legislation that requires all schools and public libraries that receive federal aid for Internet service to use filtering technologies to screen out obscenity, child pornography and images deemed harmful to minors. Dubbed the Children's Internet Protection Act ("CIPA"), the legislation was buried as part of a massive appropriation act for the federal departments of Labor and Health and Human Services.

2. John Dorschner, Online Porn Trade Not As Sexy As It Seems, Ottawa Citizen, D7 (Aug. 14, 2000) (Goldstein publishes Screw magazine.).
4. This was the motto painted when the author visited the store on December 9, 2000.
5. See John Schwartz, Technology Briefing: Internet; Filtering Programs Contested, N.Y. Times (Dec. 19, 2000) (describing the decision of the American Civil Liberties Union to challenge the law's constitutionality).
6. See 106 Pub. L. No. 554 (incorporating H.R. 5666, which includes at Title XVII the "Children's Internet Protection Act").
Passage of the CIPA "produced vehement protest from educators and civil liberties groups,"8 with the American Civil Liberties Union vowing to take immediate action against the new law.9 This most recent legislation came despite an extensive report issued by a Congressionally authorized committee — the Child Online Protection Act Committee — that rejected mandatory filtering laws.10

If the recent judicial history of prior federal efforts to limit minors' access to sexually explicit images on the Internet is any indication, then the new filtering law faces a tough legal battle. In 1997, the United States Supreme Court declared unconstitutional on First Amendment11 grounds parts of the Communications Decency Act ("CDA").12 In June 2000, the Third Circuit Court of Appeals affirmed a lower court injunction that stopped enforcement of the Child Online Protection Act13 ("COPA") on the grounds that it "imposes an impermissible burden on constitutionally protected First Amendment speech."14

Obscenity and child pornography, of course, fall outside the scope of First Amendment protection.15 Both the CDA and the

---

11. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law... abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).
12. See Reno v. ACLU, 521 U.S. 844, 849 (1977) (affirming the district court's decision that provisions of the CDA regulating indecent and patently offensive Internet communications abridged the First Amendment protection of free speech).
15. See Miller v. Cal., 413 U.S. 15, 23 (1973) (observing that it "has been categorically settled by the Court that obscene material is unprotected by the First Amendment"); N.Y. v. Ferber, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of
COPA, however, were designed to restrict more than these two classes of unsheltered expression. Specifically, the CDA regulated patently offensive images conveyed by interactive computer services. The COPA, shifting terms slightly and limiting its application to commercial sites, made it a crime to knowingly make available to children on the World Wide Web material defined as "harmful to minors." It is not surprising that these laws were declared unconstitutional given that, as the United States Supreme Court recently put it, "it is rare that a regulation restricting speech because of its content will ever be permissible." Indeed, such regulations are subjected to a strict scrutiny standard of review, requiring not simply that the government prove a compelling interest such as protecting minors, but also that the statute designed to serve that goal restricts no more speech than is necessary to do so effectively. Thus, although Congress should have known better, it nonetheless went ahead with these two unconstitutional measures.

The supreme irony of Congress' failed efforts to restrict Web-based content protected by the First Amendment is that it simultaneously laid the groundwork for a judicial ruling that obscene speech — speech not currently protected by the Constitution — actually is immune from regulation if it is posted on the World Wide Web. That, at least, is the conclusion to be drawn from the Third Circuit Court of Appeals' June 2000 decision in ACLU v. Reno.

---

17. 47 U.S.C. § 231(a) (2000) (This statute also limited liability to situations in which this material was made available for commercial purposes.).
20. See Sable Commun. of Cal., Inc v. FCC, 492 U.S. 115, 126 (1989) (writing that "[s]exual expression which is indecent but not obscene is protected by the First Amendment").
21. 217 F.3d 162 (3d Cir. 2000).
In that case, the Third Circuit held that the COPA was unconstitutional because it gauged whether material on the Web was "harmful to minors" by an evaluation of "contemporary community standards." The appellate court reasoned that because "Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site," they would be required under the COPA to "abide by the most restrictive and conservative state's community standards in order to avoid criminal liability." This, in turn, deprives adults residing in more liberal communities of the right to view constitutionally protected material and, concomitantly, renders the reach and scope of the COPA unconstitutionally overbroad.

If the Third Circuit merely addressed the constitutionality of the COPA and its regulation of material dubbed harmful to minors, how does one conclude that the case lays the foundation for the end of modern obscenity law as applied to the Web? The answer to that question lies in the Third Circuit's decision to move beyond the issue squarely before it and to consider, in extensive dicta, the viability of the United States Supreme Court's three-part test for obscenity — a test originally fashioned back in 1973 in the context of the print medium of magazines — as put to use on the World Wide Web.

In Miller v. California, the United States Supreme Court set forth a test to assist the trier of fact in making an obscenity determination. Specifically, that test, which remains in effect today, asks:

(a) whether "the average person, applying contemporary community standards" 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.

If all three prongs of this so-called Miller test are met, then any

22. Id. at 166.
23. Id. at 176.
24. Id. at 166.
25. See id. at 177.
26. See Miller v. Cal., 413 U.S. 15, 24 (1973) (setting forth the Court's three-part legal standard for determining whether speech is obscene).
27. Id.
28. Id.
First Amendment protection for the work in question dissolves. The United States Supreme Court also made it clear that there was not to be a uniform national community standard, writing that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists.”

Congress exercised exceedingly poor judgment in 1998 when it chose to borrow from the aging Miller test and to incorporate the phrase “contemporary community standards” into the COPA legislation. This move, in particular, opened up the vein from which the Third Circuit in June 2000 would begin to draw the lifeblood from Miller.

Congress should have foreseen the problems with using this terminology in drafting the COPA. Why? Because the United States Supreme Court, in its 1997 decision in Reno v. ACLU striking down the CDA, wrote that the CDA’s inclusion of a community standards “criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.” This, in turn, opened the door for the Third Circuit Court of Appeal’s death-knell statement in June 2000 that Miller “has no applicability to the Internet and the Web.”

Although dicta, the Third Circuit’s proclamation regarding the unfitness of the Miller obscenity test for Web-based sexual expression is blunt and powerful. The current law of obscenity simply does not work in cyberspace due to the technological limitations of the Web. The Third Circuit, it should be noted, did not conclude that Miller is unsuitable for all purposes or for all media. Indeed, the Third Circuit was “satisfied that Miller’s ‘community standards’ test continues to be a useful and viable tool in contexts other than the Internet and the Web under present technology.” Miller may, in other words, furnish the right obscenity test for some forms of media but provide the wrong analysis for others.

The Third Circuit’s findings on Miller, thus, remind one of the Supreme Court’s conclusion over twenty years ago in Federal

29. Id. at 30.
30. Reno, 521 U.S. at 844.
31. Id. at 877-78.
32. ACLU, 217 F.3d at 180.
33. Id.
Communications Commission. v. Pacifica Foundatopm et al.  In that case, it declared that the radio broadcast of George Carlin's 12-minute "Filthy Words" monologue during the middle of afternoon was like a pig in the parlor. Today, the Miller test is like a pig in the cyberspace parlor. It may be the appropriate test in some contexts, but it is woefully out of place on the Internet and the Web.

The Third Circuit elaborated that its "concern with COPA's adoption of Miller's 'contemporary community standards' test by which to determine whether material is harmful to minors is with respect to its overbreadth in the context of the Web medium." Unlike what the appellate court called a "brick-and-mortar outlet" and "telephone or postal mail pornographers," Web publishers of adult images do not have the technological ability today to foreclose access based on the geographic location of the Web user. To avoid liability, then, Web publishers would be forced to either stop publishing altogether or to adopt the standards of the community in the United States that is least tolerant of sexually explicit expression. The Third Circuit was simply unwilling to allow "the most puritan of communities" to dictate the speech that is accessible to everyone.

Much as the United States Supreme Court has adopted a medium-specific First Amendment jurisprudence, the Miller standard thus may now prove to be a medium-specific obscenity test. All that is left is for a court to take up the issue of whether Miller provides a viable and workable standard for measuring obscenity on the Internet and the Web. If the Third Circuit's analysis is correct, however, Miller can only be salvaged only by either future technological innovations or by making some dramatic legal

---

35. Id. at 750.
36. ACLU, 217 F.3d at 177.
37. Id. at 175.
38. Id. at 176.
39. Id. at 175.
40. Traditionally, there have been distinct print and broadcast models of regulation. See Thomas G. Krattenmaker & L.A. Powe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 Yale L.J. 1719, 1721 (1995) (describing the print and broadcast models); Reno, 521 U.S. at 868 (The United States Supreme Court has observed that "some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers.").
41. ACLU, 217 F.3d at 181 (The Third Circuit wisely observed that a "community standards" challenge to Miller as applied to the Internet could be rendered moot if "developing technology" eventually makes it possible for a Web site operator to screen out visitors from different geographical locations.).
42. Id. at 166 (The Third Circuit observed that "in light of rapidly developing
modifications.

These adjustments might entail scrapping the state-by-state notion of community standards and substituting a national community standard that strikes a middle ground somewhere between the values of West Hollywood, California where Flynt's Hustler Hollywood emporium is situated and Provo, Utah where the wholesome-image Osmond family resides. Determining such a standard, however, would prove incredibly difficult, if not impossible.

An alternative, of course, is to abandon Miller altogether and to develop, in its place, a new, Web-specific test for obscenity. Perhaps even more useful — but certainly a more controversial option — would be for the government simply to exempt the Internet and the Web from obscenity laws. This move would allow law enforcement officials to concentrate their efforts on more grave Web-based problems such as the prosecution of cases involving child pornography — a category of speech distinct from obscenity — and technological advances, what now may be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

43. See Dan Egan, Spotlight on Marie Osmond's 'Perfect' Life Turns Hot, Salt Lake Trib., A1 (Feb. 6, 2000) (describing the “the famous singing and dancing Osmond family,” calling Marie Osmond “a veritable Utah princess,” and quoting one Hollywood entertainment columnist for the proposition that the Osmond family embodies “a basic decency, a primal goodness”); City Council Puts Off Decision on Road Opposed By Donny Osmond, Associated Press State & Local Wire (Sept. 7, 2000) (available in Lexis, News Library) (Donny Osmond lives in Provo where, in late 2000, he was doing battle with the City Council over a proposed road that allegedly would increase traffic and noise in his gated community, The Woods.).

44. A cursory review by the author of this article of police and court-related stories from newspapers across the United States during just a three-month period — March through May 2000 — suggests that the receipt and transmission of child pornography on the Internet is a serious problem. See e.g. Nathan Collins, Teen Girl Caught In Porn Sting, Detroit News, Metro 5 (May 5, 2000) (describing the case of a 17-year-old Michigan girl arrested and accused of distributing over the Internet sixteen images of minors having sex with other kids, adults and animals); Henry K. Lee, Pleasanton Coach Faces Child Porn Charges, S.F. Chron., A20 (Mar. 21, 2000) (describing the case of a Northern California man charged with two counts of child pornography related to downloading more than fifty lewd images of children in a two-month period in 1999 and possessing child pornography); Russell Lissau, Woman Arrested on Charges of Child Porn, Chicago Daily Herald, 1 (May 9, 2000) (describing the case of an Illinois woman who was accused of sending pornographic images of young children having sex with adults to computer users in California); Pawtucket Man Sentenced In Child-Pornography Case, Providence J.-Bull., 10A (May 20, 2000) (describing the case of a Rhode Island man who was sentenced to 33 months in federal prison for possessing images on his computer of children engaging in sexually explicit activity); Lesley Rogers, Ex-UW Official to Stand Trial In Porn Case, Wis. St. J., 3B (May 17, 2000) (describing the case of a former University of Wisconsin-Madison assistant dean accused of using a University computer to download “thousands of files of pictures of adults having sex with children”); Rosa Maria Santana, Strongsville Man Charged with Having Web Child Porn, Plain Dealer, 3B (May 19, 2000) (describing the
the eradication of sexual predators (called "travelers") who prey on minors in Internet chat rooms.\footnote{46} In these two areas, it clearly is \textit{not} just sex; it is a matter of abuse of children, and we cannot, as that motto inside Hustler Hollywood might have it, just relax about it. As one United States postal inspector put it, the Internet is "a child molester's dream."\footnote{47} Perhaps these are the problems — Web-based child pornography and child solicitation\footnote{48} — on which we should exert our legal efforts, rather than spending time attempting to resuscitate an out-dated Miller obscenity standard.\footnote{49} The number of online child-sex cases opened by the FBI more than doubled from 1998 to 1999.\footnote{50} \textit{That} is a growing problem\footnote{51} worthy of increased Congressional attention and law enforcement efforts.

Whichever option ultimately is chosen, the bottom line is that Congress and technology have paved the way for the end of Miller as
we know it, at least as it has any bearing on divining what is obscene on the Web. Part of the remainder of this article provides further evidence that Miller's time has passed, outstripped by new technology and new beliefs, including a mainstreaming of adult pornography in the United States that dilutes the value of the test.

In particular, Part I examines one of the first high-profile cases to expose flaws with the Miller test as applied to the Web. Next, Part II explores the mainstreaming of adult pornography — a change fueled by new technologies such as the Web and DVDs — and how that, in turn, impacts the viability of Miller. Part III then shifts away from a focus on problems with the Miller test to investigate new, untapped issues involving sexual imagery in cyberspace. It suggests a nascent dilemma involving the potential exploitation of children on the Web that does not fit neatly into either of the unprotected speech categories of obscenity or child pornography. However, that has seemingly been ignored by Congress and state legislative bodies. Finally, the article concludes that Congressional obsession with regulating sexual images on the Web has caused the almost-certain demise of the Miller test's applicability and has led it to ignore other, perhaps more pressing, problems.

I
Here's to You, Mrs. Robinson: The Internet Holds a Place for Beckalynn.com

Tammy Robinson is a thirty-one-year-old, unemployed mother of three young children — ages five, ten, and twelve — who lives today near Tampa, Florida. She looks, as one reporter put it, "like a PTA mom."

Back in 1999, however, when Robinson lived in nearby Lakeland, she gained fame as anything but a PTA mother. In fact, she

52. See infra nn. 56-106 and accompanying text.
53. See infra nn. 107-133 and accompanying text.
54. See infra nn. 134-184 and accompanying text.
55. See infra n. 185 and accompanying text.
56. Robinson, born on April 2, 1970, was thirty-one years old when this article was originally presented as a paper on April 13, 2001. See <http://polksheriff.org/briefings/news/1999/trobinson.jpg> (accessed Jan. 25, 2001) (featuring Robinson's date of birth on her official Polk County Sheriff's Office mug shot following her March 2, 1999 arrest).
58. Mike Brassfield, All Eyes Are Watching Pornography Suit, St. Petersburg Times, 1B (June 26, 2000).
acquired notoriety not as Tammy Robinson, but as “Becka Lynn” — an alias that she used (and continues to use) on the Web site on which she posts and sells nude photographs of herself. In March of 1999, she and her husband, Herbert, were arrested by the Polk County Sheriff’s Office and jailed on obscenity charges based on the site’s contents. The charge was wholesale promotion of obscenity, a third-degree felony in Florida punishable by up to five years in prison. Ironically, the Robinsons were arrested after Tammy complained to sheriff’s deputies that she had received threats over the Internet as a result of her Web site.

The official news release issued by the Polk County Sheriff on March 2, 1999, describes the circumstances surrounding the Robinsons’ arrest this way:

Investigators with the Sheriff’s Office Computer Crimes Unit and the State Attorney’s Office discovered that that the couple operated an ongoing business in which they distributed obscene materials (photographs) of themselves performing various sex acts. The photographs were transmitted to an Internet network, which then distributed the photographs to paying customers. Investigation revealed that at least four juveniles (living in the Robinsons’ neighborhood) may have been exposed to obscene materials as a result of the Robinsons’ activities. The Robinsons are being booked into Polk County Jail this evening on $25,000 bond each. The investigation is continuing and additional charges may be filed.

With that, Tammy Robinson went from cyber sex-kitten to Polk County jailbird. The arrest, with its saucy mix of sex and new technology, captured extensive media attention. The Dan Rather-

60. Keith Morelli, Woman Raises Cash Online For Nude Web Site Fight, Tampa Trib., Fla./Metro 1 (May 8, 1999).
61. Brassfield, supra n. 58, at 1B. The relevant Florida law provides that “[a]ny person who knowingly wholesale promotes any obscene matter or performance, or in any manner knowingly hires, employs, uses, or permits any person to wholesale promote or assist in wholesale promoting any obscene matter or performance, if guilty of a felony of the third degree.” Fla. Stat. § 847.07 (2000).
62. Morelli, supra n. 60.
hosted CBS television news magazine, *48 Hours*, featured a segment on Tammy Robinson's case. She appeared on the television entertainment magazine *Extra*, which described her life and business this way: "When the kids leave for school, Tammy starts stripping under [W]eb cams for net surfers." Robinson was also featured on television's *Fox Files*, *Court TV*, and *Oprah*. Even small town newspapers like *The Decatur Daily* in Decatur, Alabama opined on her case.

High-profile, novel obscenity cases are nothing new for Florida or for testing the scope of *Miller*. The prosecution of the rap group 2 Live Crew in the early 1990s for the album *As Nasty as They Wanna Be* marked the first time that a federal court of appeals was asked "to apply the *Miller* test to a musical composition, which contains both instrumental music and lyrics." Although a district court judge in that case concluded the recording was obscene, the Eleventh Circuit Court of Appeals reversed on grounds that the judge, simply by listening to the work and in the face of expert testimony to the contrary, could not conclude that it had no serious artistic value.

Like the 2 Live Crew case, Tammy Robinson's legal battle to be as naked as she wants to be is also novel. It marks one of the first Web-site obscenity cases involving adult images, rather than child pornography. More important than whether, in fact, the case is the first of its kind, however, is that it forces one to consider the

---


66. *Id.*


72. *See Susan Barbosa, Internet Porn Trial on Hold*, Ledger (Lakeland, Fla.), B3 (Nov. 10, 2000) (citing the view of Frederick Lane, an expert on Internet pornography, regarding the seminal status of the case).

73. In 1996, the Sixth Circuit Court of Appeals considered an obscenity case involving the posting of sexual images on an electronic bulletin board. *U.S. v. Thomas*, 74 F.3d 701, 704-05 (6th Cir. 1996). In *ACLU*, however, the Third Circuit Court of Appeals distinguished electronic bulletin boards at issue in *Thomas* from "the Web as a whole." 217 F.3d at 176. The Third Circuit commented that "no federal court has yet ruled on whether the Web/Internet may be constitutionally regulated in light of differing
meaning of "contemporary community standards" as applied to images posted on Web sites. The question is simple: which community's standards control? Arriving at an answer, however, is not so easy. Multiple possibilities exist.

Is the proper community Polk County, the geographic area that sweeps up the town of Lakeland where Robinson lived and transmitted the offending images? It clearly is not a pornography-friendly area, with the Polk County Sheriff, Lawrence Crow, reportedly shutting down more than 100 sex-oriented businesses in the past decade. In fact, another couple — Nicole Weeks and Patrick Gilmer — also faced obscenity charges in Lakeland for posting adult pornography on the Internet. Those charges were dropped in March 2000 when the couple agreed to a number of conditions, including closure of their Web site and a pledge not to be connected with any sexually oriented businesses.

If one decides that the proper community standard is that of the Web site's point of origin, one can easily imagine Web publishers racing to move their operations to the community in the United States with the most progressive and tolerant attitudes about sex and sexual imagery. It would be, in essence, a race to the bottom, with Web publishers scurrying to set up shop in this area, wherever it might be. As the adult industry's concentration grew in this hypothetical area — let's call it Silicone Valley — it would necessarily push the standards of that area even more toward the liberal end of the spectrum, until almost anything goes.

Is the proper community the geographic location from where a Web surfer views or downloads the material? This was the standard that the Sixth Circuit Court of Appeals applied in United States v. Thomas. That case, however, dealt with an electronic bulletin board rather than a Web site — an important difference that allowed the Third Circuit in considering the constitutionality of the COPA to distinguish Thomas.

Until Web technology is developed that allows a site operator to

75. Bill Heery, Deal Ends Net Porn Case against Couple, Tampa Trib., Fla./Metro 5 (Mar. 18, 2000).
76. 74 F.3d at 711-12. The Thomas case "reveals the glaring shortcomings of the obscenity standard in the face of today's new communications." Jonathan Wallace & Mark Mangan, Sex, Laws, and Cyberspace 31 (Henry Holt & Co. 1996).
77. ACLU, 217 F.3d at 176-77.
know the geographic location from where someone is trying to enter the site, Web site operators offering sexually explicit images and literature would be forced to adopt the standard of the most restrictive and conservative community in the United States. This was, of course, the concern of the Third Circuit in *ACLU v. Reno.*

Self-censorship would be rampant under a point-of-download standard, with the likely impact of reducing “the U.S. population to viewing only what is fit for children.”

*Is the proper community standard based on a non-geographic notion of community, such as the community of individuals who visit pornographic sites on the Web at least once each month?* This would not only be a very large community, comprised of individuals from all across the United States, but, based on its Web-surfing proclivities, would also be a very tolerant community. Then again, what better community is there to judge how extreme sexually explicit matter may be than one comprised of the individuals who know it best? What’s more, the need for often-confusing expert testimony about survey and focus-group evidence on contemporary community standards would be eliminated.

The problem with all of these community-based possibilities is rooted in the extreme difficulty of defining “community.” This problem is compounded when one is dealing with the concept of community in the distinctly non-geographic domain of the World Wide Web. Perhaps, then, we simply should jettison the entire notion of community standards when considering sexually explicit matter posted on the Web.

Tammy Robinson, not surprisingly, echoes this sentiment: “The Internet is worldwide. Polk County has no right to regulate what’s on the Internet.”

Lawrence G. Walters, a First Amendment attorney from the Winter Park, Florida-based law firm of Wasserman &

---

78. *See supra* nn. 24 and 39 and accompanying text.
82. *Brassfield,* *supra* n. 58.
83. Walters organized and has chaired the Florida Bar’s First Amendment Law Committee and is a member of the First Amendment Lawyer’s Association. <http://www.1st-amendment.com/about.html> (accessed Jan. 19, 2001).
Walters that represents the Robinsons, contends that "there's no such thing as local community standards any more." He argues that the Internet, as well as modern satellite communications technologies and cable channels, have created a global community in which cities such as Lakeland cannot legitimately claim to have separate standards under the law. Thus, Walters asserts that "the Third Circuit hit it right on the head" in ACLU v. Reno regarding the unworkability on the Web of the Miller test with its community standards requirement.

Walters' beef with Miller goes beyond the community standards issue; he also contends that the word "prurient" in the Miller test is subject to a void for vagueness challenge. In a motion filed in the Tammy Robinson case, Walters argues that "[t]he problem with the term ‘prurient’ is that it may have been understandable in the pre-cold war days and even during the information age, but in the current post-information age it has fallen out of common usage." The motion adds that the word "prurient" is "foreign to today's society."

Beyond the issues of community standards and prurient interest, the Tammy Robinson case illustrates yet another problem with the Miller standard's application to Web sites. In particular, Miller requires that the prurient interest determination be made by considering the work "as a whole." What does this phrase mean when applied to a Web site? Certainly, a site may have a link or links to sexual images, but it may also have links to non-sexual content, be it images or prose. Is one to consider only a single Web page within a

84. The firm specializes in First Amendment issues. Its Web site can be found at <http://www.1st-amendment.com> (accessed Jan., 19, 2001). Tammy Robinson's dispute is not the only sexually-oriented case in which the firm has been involved. For instance, it has represented the owners of a Florida bondage club who were charged with lewdness and licensing violations. To Each His Own: Lawyers Listen to Fetish Fringe, ABA J., 14 (Feb. 2001).


86. Id.

87. Id.


91. Id.

92. Supra n. 26.
Web site in rendering the prurient interest decision? Wouldn’t this, however, be taking a part of the site in isolation, rather than considering the work as a whole? Wouldn’t it be akin to randomly reading one page out of context in the middle of a 230-page hard-bound novel? What, in other words, should constitute the whole work?

Consider Becka Lynn’s Web site. One initially enters a home page that includes a warning regarding its content and advises viewer discretion. Other than one photograph of Tammy Robinson in a fishnet top that reveals her breasts, there are no images — prurient or otherwise — on the opening page. The home page, however, features a link entitled “ENTER Becka’s Defense Site!!”

Clicking on this link connects one to a new page called “Becka Lynn, Nice and Naughty.” This page is similar to a mini jump station that, after some initial text in which Robinson describes herself as “just a country gal that loves to laugh,” includes multiple links to the inner contents of Robinson’s Web site. Some of these links transfer the Web surfer to sexual images of Robinson, but others do not. For instance, there is one link that reads “Click here to read Becka Lynn’s court papers.” Indeed, this turns out to be a deep link to a “Motion to Declare Obscenity Statute Unconstitutional” contained within the Web site of Robinson’s primary law firm, Wasserman & Walters. Should this content be included under the first prong of Miller’s admonition to judge the work as a whole?

Another link connects to a page called “Becka Lynn’s Lawyers.” In what must be more than a few male attorneys’ fantasies, the online porn queen writes, “Gosh I must be a lucky lady to have 2 of the most handsome and SINGLE attorneys representing

---

94. *Id.*
96. *Id.*
97. For instance, immediately below related teaser photographs, are links described as “The Farmer’s Daughter,” “Wild Side,” and “Becka Lynn’s Quarterback Sneak!” *Id.* The teaser photograph above the link to “The Farmer’s Daughter” shows Robinson, top pulled up above her breasts, holding a strategically placed garden vegetable. *Id.*
98. *Id.*
me in this case." This page — a page not connected to the Web site of her attorneys — contains brief biographical sketches of her attorneys, as well as a few pictures of them, including one of attorney Lawrence Walters with his arm around a smiling Robinson. There is nothing on this page that is remotely obscene under *Miller*.

On the other hand, some of the links from “Becka Lynn, Nice and Naughty” provide an entree to sexually explicit images. By clicking on a link called “Members Private Club,” one is promised by Robinson, quite bluntly, “See me NAKED!!” Not a member of this “Club,” the author is unable to describe the material there, but one may assume that it is sexual in nature. Finally, the “Becka Lynn, Nice and Naughty” page includes several banner advertisements for Florida radio stations, as well as one advertisement for what appears to be an “amateurs” sex site. Does a link to a Web site mean that the contents of that Web site also count, under current obscenity law, as part of Robinson’s site?

Tammy Robinson’s “Becka Lynn” Web site features both sexual and non-sexual material. The issues raised by the site and described above are threefold. The threshold issue is which parts of the site — which pages, links, images, and text — should constitute the work as a whole under the *Miller* test. The second issue involves a determination of which community’s standards should be used to consider and evaluate the nature of the whole work. Finally, the third issue is whether a reasonable person — a reasonable juror — would actually know what the severely underused word “prurient” means when evaluating that whole work.

And what was the resolution of these *Miller*-related issues in Tammy Robinson’s case? Unfortunately, they were never fully litigated. The case settled in early February 2001. The criminal obscenity charges against Tammy Robinson and her husband were dropped in exchange for their promise never to operate a similar Internet business in Polk County. In addition, the Robinsons dismissed a federal civil rights suit they had filed against the Polk County Sheriff’s Office, alleging that their arrest was

---

101. *Id.*
102. *Id.*
103. *Id.*
105. *Id.*
While this Part of the article uses the Tammy Robinson case to illustrate problems with the application of the *Miller* test on the Web, the next Part suggests that the test simply may have worn out its welcome, given apparently shifting attitudes and beliefs about adult entertainment content in the United States. In particular, the mainstreaming of pornography suggests that the concept of "average person" used in *Miller* hinders the application of that test at a time when average tastes seem to value much of the sexually explicit adult content that circulates today.

II

The Mainstreaming of Adult Entertainment: A Congress Out of Touch

While Congress seems obsessed with regulating sexual imagery on the Internet, vast numbers of Americans seem equally obsessed with viewing those images. A quick look at the numbers bears this out. The adult entertainment industry is a $10 billion-a-year business in the United States alone. About one in four regular Internet users — approximately 21 million Americans — visits one of the more than 60,000 sex sites on the Web at least once each month, far more than the number that bother to visit official, government-run Web sites.

In 1998, revenues for online pornography were $1 billion, and are estimated by a Standard & Poor’s accounting report to grow to $3 billion by 2003. Cyber-porn star Danni Ashe alone brings in $7 million annually with her “growing empire of adult entertainment.”

The adult video market continues to thrive as well, despite some siphoning off of its market to the Internet. For instance, the Vivid Entertainment Group, a Van Nuys, California-based producer of adult content, reports that its revenues increased from $32 million in

106. *Id.*
107. *Supra* nn. 5-7, 16-19 and accompanying text.
109. *Id.*
112. The segment of the adult entertainment industry truly hurt by the Internet is magazines. See Mary K. Feeney, *Consumers Choosing Internet, Cable TV over Adult Magazines*, Star Trib. (Minneapolis, Minn.), 1E (Jan. 17, 2001) (describing the decrease in recent years in the sale and circulation of *Penthouse* and *Playboy* magazines).
1998 to $60 million just a year later in 1999.\textsuperscript{113} The new frontier of adult DVDs is growing in leaps and bounds, with the largest mail-order and online retailer — Adult DVD Empire — supposedly selling about 30,000 DVDs at $24 to $30 apiece each month.\textsuperscript{114} Even Fortune 500 companies such as General Motors, Echostar and AT&T now have stakes in the adult entertainment industry.\textsuperscript{115}

Business ventures such as Hustler Hollywood thrive in a climate that is more tolerant than before. As Larry Flynt observed, “There aren’t people going into our stores in raincoats. These are erotic boutiques where anyone can feel comfortable shopping.”\textsuperscript{116} In fact, when Flynt and his brother Jimmy showed up in January 2001 to the official celebration of their new store in Monroe, Ohio, “the atmosphere was akin to a small-venue rock concert.”\textsuperscript{117} No protestors or picketers, by the way, bothered to attend.\textsuperscript{118}

What does all of this mainstreaming of so-called adult content mean for the viability of Miller today? The test, as noted earlier, employs an “average person” standard.\textsuperscript{119} It is clear, as the data above regarding the size and growth of the adult entertainment industry suggest, that average tastes now sweep up pornography and are increasingly tolerant. This, in turn, affects the usefulness of Miller and the ability of obtaining a conviction under this worn-out standard.

For instance, in October 2000, a jury near St. Louis, Missouri took just two-and-a-half hours of deliberations to decide that two videos — Anal Heat and Rock Hard — were not obscene despite the prosecutor’s arguments that the videos were the equivalent of illegal drugs.\textsuperscript{120} What might be surprising to some is that it was a jury comprised of twelve women and no men that reached this decision after watching the videos, which depicted anal, oral and vaginal sex among women and between men and women.\textsuperscript{121} One juror

\begin{itemize}
  \item Andrew Blankstein, Porn Company IPO May Raise Eyebrows along with Cash, L.A. Times, C1 (July 1, 2000).
  \item Karen Kaplan, Pushing Porn on DVDs, L.A. Times, A1 (Jan. 9, 2001).
  \item Mike Pearson, Adults These Days, Denver Rocky Mountain News, 3D (Jan. 14, 2001).
  \item Booth Moore Curtis, News, Trends, Gossip and Stuff to Do; Want a Sex Toy with Your Coffee? L.A. Times, 2 (Dec. 6, 1999).
  \item Id.
  \item Miller, 413 U.S. at 24.
  \item Michele Munz, Jury Finds Explicit Videos from Store are Not Obscene, St. Louis Post-Dispatch, 1 (Oct. 27, 2000).
  \item Id.
\end{itemize}
commented after the case that the jury easily reached agreement that neither tape was obscene.\textsuperscript{122}

Even the attitudes of judges about what is obscene under \textit{Miller} today may be in a state of flux, if not fermentation. The Third Circuit Court of Appeals — the same court that ruled on the COPA — applied the \textit{Miller} obscenity test in October 2000 to a collection of naturist and nudist magazines and concluded that the magazines' photographs of nude minors and teenagers engaging “in activities typical of children”\textsuperscript{123} such as swimming, riding bicycles and building sandcastles did \textit{not} appeal to a pure interest in sex and were \textit{not} patently offensive.\textsuperscript{124} The appellate court even found that the magazines:

qualify for First Amendment protection because of their political value. The term “political” here is broad enough to encompass that which might tend to bring about “political and social changes.” Nudists are members of an alternative community, and the magazines champion nudists’ alternative lifestyle, which lifestyle the nudist community may feel is in danger of being curtailed by government regulation. ... [P]ublications presenting a visual depiction of an alternative lifestyle, a depiction with a decidedly Utopian flavor, have political value similar to the political value of articles criticizing government regulation of that and other lifestyles.\textsuperscript{125}

The Third Circuit thus not only stretched the reach and meaning of serious political value under the third prong of \textit{Miller} to a point certainly beyond what free-speech theorist Alexander Meiklejohn would have considered political speech,\textsuperscript{126} but it reversed the decision of the District Court that, less than a year before, had held that the

\textsuperscript{122.} \textit{Id.}
\textsuperscript{123.} \textit{Various Articles}, 230 F.3d at 655.
\textsuperscript{124.} \textit{Id.} at 655-58.
\textsuperscript{125.} \textit{Id.} at 658-59.
\textsuperscript{126.} Meiklejohn believed that “the principle of the freedom of speech springs from the necessities of the program of self-government.” Alexander Meiklejohn, \textit{Political Freedom: The Constitutional Powers of the People} 27 (1948). Under his theory of free speech, Meiklejohn limited the scope of First Amendment to political speech. Lee C. Bollinger, \textit{The Tolerant Society} 47 (Oxford U. Press 1986). Just as the Third Circuit in the \textit{Various Articles} case seems to expand the definition of political speech under \textit{Miller}, Alexander Meiklejohn later in his life was forced to broaden his own view of what speech was political. See Alexander Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 Sup. Ct. Rev. 245, 256-57 (observing many forms of communication that might be protected within the category of political speech including philosophy, science, art and literature).
same magazines were obscene under all three parts of that test. It should be noted that Third Circuit was the same appellate court that reached new heights of censorship when, in 1994, it concluded that nudity was not necessary to find that zoom-focused videotaped images of young girls in bikinis and underwear qualified as lascivious exhibitions of the genital and pubic area under federal child pornography laws. It appears that the times are, indeed, changing.

The recent decisions from both the all-woman jury in St. Louis and the Third Circuit Court of Appeals, along with the economic indicators noted at the start of Part II, indicate that Congress is out of step with the “average person” in its continued efforts to regulate speech that is neither obscene under Miller nor child pornographic. Although society may still agree that protecting children from sexually explicit images is important, all of the Web-based federal legislations to date also impact adults’ viewing rights. And while we often let economic forces determine what speech survives and flourishes in the metaphorical marketplace of ideas, Congress seems unwilling to do this on the very medium — the Internet — that the United States Supreme Court called a “new marketplace of ideas.”

The fact is that the World Wide Web may not only have helped to change our thoughts about what is or is not obscene simply by exposing Web surfers to quantities and varieties of images that were otherwise out of reach to most people, but that it gives many people what they want without having the stigma attached of entering an adult bookstore or theatre. As the director of Penthouse Online put it not too long ago, the Internet is “giving people what they want, which is sexual imagery. People have always wanted it — they always will want it. It’s a human drive.”

The pornography Genie is out of the bottle, traveling now in

127. 230 F.3d at 651-52.
128. U.S. v. Knox, 32 F.3d 733 (3d Cir. 1994), cert. denied, 513 U.S. 1109 (1995). The appellate court in Knox held “that the federal child pornography statute, on its face, contains no nudity or discernibility requirement that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad.” Id. at 737. It, thus, concluded that “we will not read a nudity requirement into a statute that has none.” Id. at 749.
130. Reno, 521 U.S. at 885.
131. Schwartz, supra n. 111.
cyberspace. It is time to allow marketplace forces — not the government — to try to put the Genie back in. If those forces don’t do it, the government should not intervene to correct marketplace flaws. It is time, more importantly, to focus on the twin problems of online sexual predators and child pornography — not obscenity — described earlier in the article. What’s more, as the next Part of this article suggests, there may be new, emerging problems with the sexual exploitation of children online — problems in addition to online sexual predators noted above — that largely have gone unnoticed amidst the failed CDA and COPA legislative efforts.

III

Naturists, Nudists, and Child Supermodels: The Next Wave of Net-Based Problems

While Congress was busy drafting ill-fated legislation such as the CDA and the COPA, it may have overlooked a potential new problem involving the sexual exploitation of children in cyberspace. This predicament involves images that do not appear to fit cleanly into the unprotected categories of either obscenity or child pornography. The images nonetheless seem, at least at first observation, to exploit the sexuality of children for the benefit of both prurient Web surfers and the operators of the Web sites on which they are displayed.

These images, straddling the fuzzy line that separates the legal from the illegal, may be classified for purposes of this article into three sometimes overlapping categories: 1) naturist/nudist; 2) modeling; and 3) artistic photography. It is the purpose of this Part of the article to introduce these categories, to suggest that they are subtly pernicious and thriving on the World Wide Web, and to imply that Congress is better off focusing on these problems than on reviving the Miller test. Before doing this, however, it useful to

132. Supra nn. 44-51 and accompanying text.
133. Id.
134. It should be emphasized that the author’s original research in this area was limited by the implications of the Fourth Circuit Court of Appeals’ decision in U.S. v. Matthews, 209 F.3d 338 (4th Cir. 2000). In that case, the appellate court refused to allow a journalist investigating child pornography and pedophiles on the World Wide Web to assert a First Amendment-based free press defense to charges of receiving and distributing child pornography. See generally Clay Calvert & Kelly Lyon, Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images? 89 Ky. L.J. 13 (2000-2001) (analyzing the Matthews decision and arguing that a legitimate-use defense should be allowed for journalists and academic researchers). In light of the holding in this case, the author never went beyond the free “teaser” photographs and into the credit-card
briefly describe the reasons why the speech that fits in these categories probably is lawful to distribute and possess in the United States.

It will be recalled from Part II that the Third Circuit Court of Appeals in October 2000 found that images of nude children engaged in supposedly everyday activities were not obscene under Miller. Although the decision in that case — United States v. Various Articles of Merchandise — was based on obscenity laws and not federal child pornography statutes, the appellate court nonetheless ruled that the images did not involve "lewd exhibitions of the genitals." Federal child pornography laws contain somewhat similar language that prohibits the "lascivious exhibition of the genitals or pubic area." The Third Circuit, in interpreting this language in United States v. Knox, held that while nudity is not required for there to be lascivious exhibition of the genitals, such an exhibition may exist "when a photographer unnaturally focuses on minor child’s clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." Other appellate courts agree that freeze framing and focusing on a partially clothed minor’s pubic area such that it becomes "the center of the image" may constitute a lascivious exhibition. Courts considering whether an exhibition is lascivious in a child pornography case also may apply the so-called Dost factors that take into account the focal point of the image, the setting of the image, the pose of the minor in that setting, the suggestive sexuality of the depiction, and the intent of the image to elicit a sexual response in the viewer.

What one can take from this mix of rulings is that while nudity by itself clearly does not constitute either obscenity or child pornography, nudity and non-nudity may amount to child pornography if the images in question zoom or focus in for an

---

access areas. The analysis, thus, is limited in scope.

135. Supra nn. 44-51 and accompanying text.
136. 230 F.3d 649 (3d Cir. 2000).
137. Id. at 657.
139. 32 F.3d 733 (3d Cir. 1994).
140. Id. at 750. In Knox, the appellate court observed that "the photographer has focused unnaturally on the genitals of the young girls in close-up shots which reveal the outer contours of the genitals through their tight bathing suits, leotards or underwear." Id. at 746 n. 11.
unnatural close-up shot of the pubic area making it the focal point of the image. Thus, one can assume that the nudist images that were held non-obscene by the Third Circuit in October 2000 in the Various Articles case also would be held non-child pornographic because, as the appellate court put it, the photographs of children “are primarily focused on children’s activities, not children’s body”\textsuperscript{143} and the genitals are “not the focal point of any of the photographs.”\textsuperscript{144} This clears the way for the possible constitutional protection of the three categories of images of minors — naturist/nudist, modeling, and artistic photography — described below. It is the purpose of these descriptions to call attention to content that may be considered exploitative of minors yet slip through the judicial and legislative cracks of the laws of obscenity and child pornography.

A. Naturist/Nudist Photography

One of the defendants in the Various Articles case decided in October 2000 was a New York-based company called Alessandra’s Smile.\textsuperscript{145} The company operates a Web site from which one can read descriptions and view free teaser photographs and drawings of the material that it sells.\textsuperscript{146} The home page, replete with a notice warning that “some of the materials on this site portray nudity of adults and/or minors,” promises both naturist and glamour videos, as well as photography and fine art.\textsuperscript{147}

After moving beyond this notice and entering the site, one finds a list of contents such as naturist videos, books and CDs.\textsuperscript{148} There are several links, including a specific connection to books and magazines on naturism.\textsuperscript{149} Some, albeit not all, of the teaser photographs for the books, magazines and videos available from Alessandra’s Smile feature images of minors either in the nude or in swimsuits. In none of the teaser photographs, however, do the genitals or pubic area of a minor appear to be the central point of the photographer’s focus. This suggests that these images would not be considered child

\begin{itemize}
\item \textsuperscript{143} Various Articles, 230 F.3d at 655.
\item \textsuperscript{144} Id. at 657.
\item \textsuperscript{145} Id. at 651.
\item \textsuperscript{146} Welcome to Alessandra's Smile, Inc. <http://www.alessandrasmile.com> (Feb. 4, 2001).
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Alessandra’s Smile Contents <http://www.alessandrasmile.com/contents.htm> (accessed Feb. 4, 2001).
\item \textsuperscript{149} Alessandra’s Smile Naturism Link <http://www.alessandrasmile.com/naturism.htm> (accessed Feb. 4, 2001).
\end{itemize}
pornographic, in line with the Third Circuit’s October 2000 determination that the naturist magazines *Jeunes et Naturels* and *Jung und Frei* that were shipped to Alessandra’s Smile did not depict lewd exhibitions of the genitals of minors or give the impression the subjects were sexually unchaste. The bottom line is that the Third Circuit’s decision may allow Web sites like Alessandra’s Smile that peddle naturist images of minors to thrive. Under the present laws of obscenity and child pornography, this may well be the result. Whether it should be the result, however, is raised here as an issue for legislative concern.

**B. Modeling**

One truly disturbing phenomenon on the Web is the explosion of sites dubbing themselves as homepages for teen (and even pre-teen) models. The models, inevitably and invariably, are young girls. The photographs that are viewed at no cost from the teaser and preview pages of sites, such as “Lil’ Amber” and “Our Little Angels” contain no nudity. The “models” often are depicted, instead, in swimsuits, leotards and other skimpy attire. There appear from these teaser photos, however, to be none of the zoom-focused shots of the pubic area that might constitute child pornography under the *Knox* decision. Typically, these Web sites contain “member” sections where one must pay to enter to view additional images; what the images in these sections reveal was not examined by the author due to legal concerns.

A collection of links to more than 35 so-called teen and pre-teen model sites, including “Lil’ Amber” and “Our Little Angels,” is easily accessed from a jump station called “Child Super Models.” This jump station describes itself as “a web site to promote models 7 thru [sic] 16 and there [sic] photographers.” The jump station also has a link stating, “If this is you add your link!” None of the links, however, appear to be those of professional modeling agencies that

---

150. *Various Articles*, 230 F.3d at 657.
153. The home page for “Our Little Angels” even carries this message: “I prefer photographing the children in ballet costumes, swimming costumes, and gymnastics costumes.” Id.
154. *Supra* n. 134 and accompanying text.
156. Id.
157. Id.
typically handle the portfolios of models.

While the sites linked to "Child Super Models" may not contain child pornography or other illegal content under current law, some clearly seem geared to appeal to a deviant Web surfer's sexual appetite. Consider a site called "Models 13-2-17" that is accessible from the "Child Super Models" jump station. The Web site describes itself on the linking banner as presenting "The hottest 13 to 17 year olds in the world!" Or contemplate the description on the banner for a site called "MXPhoto." It offers "The Hottest Teen Models on the Net." Another site called "Wolfgang Erler Photography" offers images of "German Dream Teens."

The issues raised by these teen and pre-teen model sites are whether they exploit the sexuality of minors for commercial gain, and, if they do engage in such exploitation, whether we need to reconsider and redraft our definitions of child pornography in the United States to include some of the images they offer. Although Congress attempted in 1996 to expand the definition of child pornography to include images that merely appear to be of minors engaged in sexual conduct, it was clear that nudity is not a requirement for images to constitute child pornography. The modeling sites artfully dodge the current child pornography designation by apparently not focusing on the pubic areas of the minors who appear in swimsuits and other tiny attire. It is suggested here that Congress should call for investigative research into sites like those described here in order to more fully and completely investigate their contents to determine whether child pornography laws should be revised to sweep up these sites. This may also entail revisiting and redefining the term "lascivious" within the relevant federal child pornography statute. Indeed, defining the term lascivious in child pornography statutes may be as difficult and

158. See id. (including a link to the "Models 13-2-17" Web site).
159. Id.
160. Id.
161. Id.
162. Id.
163. The constitutionality of this legislation — the Child Pornography Prevention Act (CPPA) of 1996 — will be decided by the United States Supreme Court later in 2001. Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), cert. granted, 2001 U.S. LEXIS 944 (2001); see also Biskupic, supra n. 15, at 3A (describing the Court's decision to consider the constitutionality of the CPPA).
164. Supra n. 128 and accompanying text.
165. See 18 U.S.C. § 2256(2)(E) (2000) (defining sexual conduct, in relevant part, as a "lascivious exhibition of the genitals or pubic area").
problematic as defining prurient interest in obscenity laws.\textsuperscript{166}

C. Artistic Photography

The third category of images of minors that probably comes the closest to constituting child pornography under current federal laws is described by the Third Circuit in the Various Articles case. In particular, the appellate court characterized the photographs of David Hamilton contained in a book called The Age of Innocence — a book that the government in that case did \textit{not} claim was obscene and that it stipulated was "regularly available for purchase in bookstores in New Jersey"\textsuperscript{167} — this way:

Hamilton's photographs depict pubescent girls, most of whom either have their breasts exposed or are fully nude. No photographs of male subjects appear in his works. Several aspects of these photographs make them sexually provocative: the majority of the photographs are in soft focus and the girls are often staring into the camera, unsmiling, with a sultry look; many of the photographs reveal girls in the process of taking off lingerie or other articles of clothing; some photographs are of nude or partially nude girls lying on beds; in some of the photographs, the girls are looking at their bodies in mirrors; some girls are lying or standing with their arms over their heads and their backs arched; in some photographs, the girls are touching their own breasts or sex organs; and a few of the photographs show two nude or partially nude girls kissing.\textsuperscript{168}

Not surprisingly, Hamilton's child-based erotica has been subject to indictment and prosecution in some jurisdictions.\textsuperscript{169} Other

\begin{flushright}
\textsuperscript{166} Supra nn. 88-91 and accompanying text.
\textsuperscript{167} Various Articles, 230 F.3d at 657.
\textsuperscript{168} Id. at 657-58.
\end{flushright}
jurisdictions, however, have declined to prosecute sellers of *The Age of Innocence* despite public pressure to the contrary.\(^{170}\) In late 1998, for instance, the district attorney of Cobb County, Georgia, concluded, after discussing the matter with the state's attorney general's office, that *The Age of Innocence* and another controversial photography book called *Radiant Identities* by Jock Sturges\(^{171}\) "did not meet any of the elements under child exploitation statutes."\(^{172}\)

This split of authority among district attorneys and courts breathes new life into the United States Supreme Court's 30-year-old dicta in *Cohen v. California*, which states that it is "often true that one man's vulgarity is another's lyric."\(^{173}\) Not only is the legality of books like *The Age of Innocence* in question, but the artistic value — the primary reason why free-speech advocates quickly come to the defense of these photographs and their photographers — is not agreed upon. For instance, Sarah Boxer, an art and cultural critic for *The New York Times*, bluntly calls *The Age of Innocence* "the essence of icky."\(^{174}\) She writes that Hamilton "certainly could be considered a dirty old man."\(^{175}\) The book, Boxer adds, "is full of photographs of girls in bed, looking dreamy and spent, with their fingers in their mouths or in their underpants. All look willing, and almost all have exactly the same small breasts."\(^{176}\)

The World Wide Web has allowed more people to reach the work of Hamilton and his ilk. For instance, Hamilton has an official Web site called, not creatively, *The David Hamilton Archives*.\(^{177}\) From the English-language version of the welcome page, Hamilton features this self-serving, but revealing, message:

---


\(^{171}\) Sturges' home was the subject in 1990 of an FBI raid during which the federal agents reportedly seized more than 100,000 negatives. David Allyn, *Nudity and the Censors*, Boston Globe, A23 (Mar. 11, 1998). A grand jury ultimately refused to indict in that matter. *Id.*

\(^{172}\) *Supra* n. 170.


\(^{175}\) *Id.*

\(^{176}\) *Id.*

A distinction must be made between eroticism and pornography; the media have blurred the disparity to an unforgivable degree. For those intelligent enough to recognize the difference, erotica will continue to hold a unique fascination. Social evils should not be confused with the pursuit of true beauty.\footnote{178}

The problem, from a legal perspective, that is suggested by Hamilton’s quotation has nothing to do with making a distinction between “eroticism and pornography.” Why? Neither of these concepts, unlike obscenity and child pornography, has a legal definition in the United States.

The real problem is that Hamilton’s work makes it very difficult, under current laws, to distinguish between illegal child pornography and protected art. In his so-called “pursuit of true beauty,” Hamilton, thus, has called our attention to the need to more precisely define child pornography. Indeed, the United States Supreme Court has never established what the First Circuit Court of Appeals recently called “a single one-size-fits-all constitutional definition of child pornography.”\footnote{179} “The line between child pornography and otherwise protected expression, the First Circuit added, “is not entirely tangle-free.”\footnote{180}

That Hamilton’s photography may not constitute illegal child pornography may be one of the reasons behind the proliferation of other supposedly “artistic” photography sites on the World Wide Web featuring nude images of minors. A Web search for the keyword “Lolita” using a standard search engine will bring up a number of such commercial sites.\footnote{181} The teaser photographs on these pages feature nude minors, clearly distinguishing them from the teen “modeling” pages described earlier in which the so-called models are in swimsuits and other abbreviated attire.\footnote{182} None of the minors in these teaser photos, however, appear engaged in sexual explicit conduct as defined by federal child pornography laws.\footnote{183} The content

\begin{itemize}
\item \footnote{178}{The David Hamilton Archives Welcome Page \url{http://www.hamilton-archives.com/newsite/html/eng/welcome/welcome.html} (accessed Feb. 8, 2001).}
\item \footnote{179}{\textit{U.S. v. Hilton}, 167 F.3d 61, 69 (1st Cir. 1999).}
\item \footnote{180}{\textit{Id.} at 70.}
\item \footnote{181}{See e.g. Lolitas Art \url{www.lolitas-art.com} (accessed Feb. 4, 2001); Lolitas Land \url{www.lolitas-land.com} (accessed Feb. 4, 2001); Lolita Dream \url{www.lolita-dreams.com} (accessed Feb. 4, 2001).}
\item \footnote{182}{Supra nn. 151-166 and accompanying text.}
\item \footnote{183}{See 18 U.S.C. § 2256(2)(A-E) (West 2000) (defining sexually explicit conduct for}
of the private membership pages for these sites was not explored by the author due to legal concerns.  

In summary, the World Wide Web today is clogged with new forms of expression that appear to exploit the sexuality of minors. This Part of the article has attempted to divide these images into three categories — naturist/nudist, modeling, and artistic photography — to help refine the questions they raise for potential revisions of child pornography legislation. Congress should order hearings and further research on the categories of speech described here in order to more fully investigate the nature and extent of the problem. The author’s own academic research in preparation of this article was limited to teaser photographs due to legal concerns and, thus, is necessarily incomplete.

IV  
Conclusion

Sexual imagery and cyberspace seem as if they will forever be intertwined. Congress, in turn, seems forever obsessed with regulating sexual imagery in cyberspace. This article has suggested that, in the process of attempting to regulate these images, Congress has: 1) unintentionally exposed problems with the application of current obscenity law standards on the World Wide Web; 2) ignored the reality that many Americans today seem to enjoy and consume sexually explicit adult content on the Web; and 3) overlooked nascent problems involving the sexual exploitation of minors through the production and distribution of images on the Web that do not fit neatly into either the current laws of obscenity or child pornography. It is on this third issue that Congress should now focus its attention. Miller’s time is up on the Web, and there are more pressing problems on the fringes of child pornography that must be addressed.

purposes of federal child pornography laws).

184. Supra n. 134.

185. See supra nn. 5-19 and accompanying text (describing recent federal efforts to regulate sexual expression on the Internet and Web).