

B444. "A Virtual Web Community" The National Law Journal (January 19, 2004), p. 26.

A federal obscenity case about to be tried by the U.S. Attorney's Office for the Western District of Pennsylvania is of special interest, even for those who are unconcerned about the spread of violent pornography. How the jury will decide this case will speak volumes about a key question facing American society: What are the standards for determining right and wrong in an age in which community has increasingly thinned out and people are increasingly linked to the Internet-in the privacy of their homes? What is right and wrong in cyberspace? And, if there is not a community of "Netters," then who will provide the standards for deciding what-if anything-is obscene?

The case in Pennsylvania concerns Extreme Associates, Inc. and two of its executives, Robert Zicari (also known as Rob Black) and Janet Romano. They have been indicted on federal charges relating to the distribution by mail and over the Internet of obscene material. One film of theirs, entitled *Forced Entry: Director's Cut*, depicts the brutal rapes and murders of several women. The government also seeks forfeiture of Extreme Associates' domain name.

The reason that community standards enter the picture is that in the past the courts in different parts of the country found it difficult to agree on what is obscene. Hence, as of 1973, the courts have relied on a standard articulated by the U.S. Supreme Court in *Miller v. California*. The Miller test includes three elements, but the first among these is "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."

This test led pornographer Rob Black to argue that when a person purchases videos and downloads images in his own home, those actions do not involve the community. Hence, where would that community standard apply? Fred Lane, a lawyer and author of *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age*, supported this argument when he told 60 Minutes: "Obviously, if something's downloaded into the privacy of one's own home, it doesn't have that kind of impact on the community. So the question is, does the community still have the right to determine what people look at?"

I spend good part of my life studying communities; the notion that private homes are somehow outside of the community, not subject to its standards, has been vastly oversold. True, the Anglo-Saxon tradition and our laws view the home as one's castle. But castles have drawbridges and the community reserves the right to regulate what happens in the privacy of one's home. Feminists have been especially articulate in making this case, showing that the old adage that what happens in one's home is no one else's business has been used to shield husbands who beat up their wives. And it doesn't take a social activist to point out that when children are abused at home, this is still very much public business.

Home is not a vacuum

These arguments also apply to violent pornography. (I focus on violent pornography because social science studies provide strong evidence that gratuitous depiction of violence is harmful while the data about gratuitous depiction of sexual conduct are much more murky.)

This material is screened in homes in which, generally, people do not reside alone. True, some viewers will be sure to close the den door and limit the audience to themselves. However, others are much less circumspect. In these situations the ill effects on spouses

and, above all, impressionable children are the same as if the violent pornography had not been accessed by the Internet but purchased at a newsstand wrapped in brown paper or rented at a nearby store-which indeed would be covered by community standards. Moreover, even if this vile material is accessed only by one person at a time, to the extent that it incites him or her to violence, there is much public interest in curbing this access.

This brings the question back to how to apply the Miller test in cyberspace. I would be quite content to rely on social science data and to ban material that contains gratuitous violence (and hence meets the other parts of the Miller test: that "the work depicts or describes, in a patently offensive way, sexual conduct," and that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

However, if a community must be involved, I grant that in the age of the Internet it is difficult (although not impossible) to impose local standards. Hence the time has come to articulate some national standards, to be determined by national juries (sitting in federal cases), drawn from representatives from communities from various parts of the country. The standards they will come up with may well be too strict for some and too lenient for others, but so are the standards developed in earlier eras by local communities. And such national standards are preferable to letting anything go just because the violence-inducing material has reached people in one way rather than another.

We have federal laws against child pornography on the books and we enforce those laws; there is no reason I can see why we should not treat violent pornography in the same manner.