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As part of the system of obscenity regulation set forth in *Miller v. California*[1] and companion cases[2] and refined by subsequent Supreme Court decisions, the concept of contemporary community standards has received considerable judicial[3] and critical[4] attention. The attention generally has focused on whether to employ national or local standards[5] and on the constitutionality of using community standards of any kind.[6] The Court's own attitude has been clarified somewhat by two recent decisions[7] which indicate that community standards have little to do with geographic boundaries and are not "standards" in the usual meaning of the term.[8] It is the thesis of this Comment that the Supreme Court's current conception of community standards performs a valuable shielding function within the *Miller* system and, therefore, should be retained despite the term's inherent vagueness.

Part I summarizes the historical development of community standards in case law prior to 1973 and then describes the *Miller* mechanism for identifying "obscene" material. Part II analyzes the role of community standards in the *Miller* scheme, particularly with reference to the

1. 413 U.S. 15 (1973).

2. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. Twelve 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 497 (1973); Alexander v. Virginia, 413 U.S. 836 (1973) (per curiam).

3. The cases are too numerous to cite usefully. The Supreme Court alone has discussed community standards on numerous occasions since it first uttered the phrase in Roth v. United States, 354 U.S. 476, 489 (1957). *See* Pinkus v. United States, 98 S. Ct. 1808, 1810-16 (1978); Smith v. United States, 431 U.S. 291 (1977); Hamling v. United States, 418 U.S. 87, 104-06 (1974); Miller v. United States, 413 U.S. 15, 30-33 (1973); Jacobellis v. Ohio, 378 U.S. 184, 193 (1964); Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1962).

4. *See, e.g.*, Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion*, 7 SETON HALL L. REV. 543, 566-71 (1976); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 108-16 (1960); O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAW. 1 (1965); Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in Obscenity Law*, 56 N.C.L. REV. 1 (1978); Shugrue, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974); Note, *Community Standards, Class Actions, and Obscenity under* Miller v. California, 88 HARV. L. REV. 1838 (1975) [hereinafter *Class Actions*]; Note, *The Geography of Obscenity's Contemporary Community Standard*, 8 WAKE FOREST L. REV. 81 (1971).

5. *See* text accompanying notes 34-40 *infra*.

6. *See* Lockhart & McClure, *supra* note 4, at 112-14; Schauer, *supra* note 4.

7. Pinkus v. United States, 98 S. Ct. 1808 (1978); Smith v. United States, 431 U.S. 291 (1977).

8. *See* note 26 *infra*.

allocation of issues between questions of fact and questions of law.[9] The community standards concept is an essential element of the *Miller* scheme because it limits the scope of judicial control of the obscenity test and thus protects material against suppression. Offsetting this, however, is the creation of further uncertainty along the already blurred line separating speech from "nonspeech." This impairs the goal of giving fair notice to primary actors of what they legally may publish or distribute. The uncertainty, vagueness, and notice problems are discussed in Part III. The Comment concludes that, on balance, the community standards concept should be retained, particularly if the other benchmarks of the *Miller* test—serious value, the "hardcore" limitation, and the specificity requirement—can be articulated more precisely.

I

EVOLUTION OF "CONTEMPORARY COMMUNITY STANDARDS"

*A. The Pre-*Roth *Approach*[10]

The general subject of obscenity did not become a part of the Supreme Court's first amendment doctrine until the 1957 decision, *Roth v. United States*.[11] Earlier Supreme Court[12] and lower court[13] opinions had produced a widely accepted test for discerning obscenity that was developed through statutory[14] rather than constitutional analysis. The

9. Discussion will be confined to printed matter—books, magazines, newspapers, etc.—and films. Live performance, *see, e.g.*, California v. Larue, 409 U.S. 109 (1972), and broadcasting, *see, e.g.*, FCC v. Pacifica Foundation, 98 S. Ct. 3026 (1978), cases involve significant complications in obscenity doctrine that are beyond the scope of this Comment. *Pacifica*, in particular, broaches the new (for the Supreme Court) subject of permissible regulation of *nonobscene* sexually oriented material—material, in the words of Justice Stevens, that is "indecent but not obscene." *Id.* at 3030.

10. For a more detailed treatment of the history of obscenity law and the first amendment, see Schauer, *supra* note 4, at 3-13.

11. 354 U.S. 476 (1957). Doubleday & Co. v. New York, 335 U.S. 848 (1948), had raised the broad issue presented in *Roth*—whether and in what manner obscenity was subject to first amendment protection—but the Court divided four to four and produced no opinion.

12. *See, e.g.*, Swearingen v. United States, 161 U.S. 446 (1896); Grimm v. United States, 156 U.S. 604 (1895).

13. *See, e.g.*, United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. Wightman, 29 F. 636 (W.D. Pa. 1886). *See generally* F. SCHAUER, THE LAW OF OBSCENITY ch. 1 (1976).

14. The most notable, and perhaps most often used, obscenity statute was the Comstock Act, enacted in 1873. In its present form, 18 U.S.C. § 1461 (1978), it has been a frequently used basis for Supreme Court obscenity decisions. *See, e.g.*, Pinkus v. United States, 98 S. Ct. 1808 (1978); Hamling v. United States, 418 U.S. 87 (1974); United States v. Reidel, 402 U.S. 351 (1971); Roth v. United States, 354 U.S. 476 (1957). Section 1461 provides in relevant part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this

community standards concept made its first appearance in this context in an opinion by then District Judge Learned Hand in *United States v. Kennerly*:

> If there be no abstract definition such as I have suggested, should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?
>
> [I]t would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.[15]

This passage represents a reaction to the prevailing *Hicklin*[16] obscenity test that judged material on the basis of the effect of its most offending excerpts on the most vulnerable viewer. In time, the *Kennerly* formulation came to predominate; the *Hicklin* test largely had been discarded by the time of *Roth*.[17]

Though not framed in response to a first amendment argument, the *Kennerly* opinion presaged the functional role that "contemporary community standards" would later play in constitutional obscenity adjudication. First, Judge Hand saw the "average conscience" as an acceptably flexible reference point from which to view challenged materials. It freed literature from what he saw to be the dead hand of "mid-Victorian morality,"[18] represented by *Hicklin's* focus on the most sensitive person, while accommodating the legislatively perceived need for some regulation.[19] The *Roth* Court viewed the community standards concept as serving essentially the same role.[20] Second, in addition to allowing the precise standard to change over time, the *Kennerly* formulation made it more difficult to find material to be obscene. A judge or jury no longer could look to its "tendency . . . to deprave and cor-

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> section . . . to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offeuse, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C.A. § 1461 (West Supp. 1978).

The statute has been construed as reaching all "obscenity" as the term is defined by the Supreme Court; its scope thus extends to the constitutional limit of permissible regulation. *See, e.g.*, Marks v. United States, 430 U.S. 188 (1977).

15. 209 F. 119, 120-21 (S.D.N.Y. 1913).

16. Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).

17. *See* Roth v. United States, 354 U.S. at 489.

18. United States v. Kennerly, 209 F. at 120. Judge Hand's concern was that a standard not be temporally "frozen"—*i.e.*, that allowance for changing mores somehow be incorporated in the test.

19. This Comment will not take up the broad and extensively covered issue of the reasons for or wisdom of regulating obscenity. For a comprehensive collection of the major critical commentary, see Project, *An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 820 n.3 (1977).

20. *See* text accompanying notes 25-27 *infra*.

rupt those whose minds are open to such influences,"[21] which previously enabled the trier of fact to condemn any material that might offend some imaginable reader or viewer. Under *Kennerly*, the "average" sensibility had to be considered and, in theory, personal reactions put aside.[22] Third, Judge Hand recognized that, like the tort law concept of negligence, the term "obscenity" could not be generalized coherently, but could be discerned only in particular cases. This analogy was to appear again in the most recent Supreme Court obscenity opinions.[23]

Following a long and confusing excursus into evidentiary[24] and geographical limitations on the contemporary community standards factor of the constitutional obscenity test, the Court has attempted to reestablish the primacy of these three functions. Nonetheless, the interim period of doctrinal ambivalence left a lasting mark; confusion about the terms "community" and "standards" persists.

B. From Roth *to* Miller

Roth v. United States[25] established the theoretical foundation on which all subsequent constitutional obscenity adjudication is premised: that which is "obscene" is not "speech" and is, therefore, not protected by the first amendment.[26] The process of placing certain material in

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21. Regina v. Hicklin, L.R. 3 Q.B. at 371.

22. This note has been sounded repeatedly throughout the history of obscenity jurisprudence after 1957. *See, e.g.*, Pinkus v. United States, 98 S. Ct. 1808, 1813 (1978); Roth v. United States, 354 U.S. at 489.

23. *See* Pinkus v. United States, 98 S. Ct. 1808, 1813 (1978); Smith v. United States, 431 U.S. 291, 308 (1977); Hamling v. United States, 418 U.S. 87, 104-05 (1974).

24. *See* note 33 and accompanying text *infra*.

25. 354 U.S. 476 (1957).

26. This approach, called the "definitional" or "two-tiered" theory of obscenity, has been subject to voluminous comment. *See generally* Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Lockhart & McClure, *supra* note 4, at 19-30. The relative merits of the definitional theory and its chief competitor, the "variable obscenity" theory, *see* Lockhart & McClure, *supra* note 4, at 66-88; TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970), are beyond the scope of this Comment. An argument can be made that the Court has, on some occasions, implicitly moved in the direction of the variable obscenity theory, which explicitly evaluates material in the context of its purpose, manner of distribution, and audience in order to determine whether it is obscene. Variable obscenity was most noticeably suggested by several decisions of the 1960's. Examples include Stanley v. Georgia, 394 U.S. 557, 568 (1969) (state power to regulate obscenity does not extend to possession in the home of otherwise obscene material); Ginsberg v. New York, 390 U.S. 629, 638 (1968) (prurient appeal of material distributed to minors to be gauged not according to the "average person" but to "such minors"); Mishkin v. New York, 383 U.S. 502, 508-09 (1966) (where material was intended for or distributed to a clearly defined deviant group, prurient appeal to be evaluated not according to the "average person" but to members of that group); Ginzburg v. United States, 383 U.S. 463, 470-71 (1966) ("pandering" is relevant to the obscenity question in close cases).

Ginzburg has been reaffirmed several times, Pinkus v. United States, 98 S. Ct. 1808, 1815 (1978); Splawn v. California, 431 U.S. 595, 598 (1977); Hamling v. United States, 418 U.S. 87, 130

the unprotected cateogry—obscenity—was a constitutionally sensitive task for which the *Hicklin* test was inadequate. In its stead, the *Roth* Court substituted a functional equivalent of Judge Hand's *Kennerly* formulation: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[27]

Two other aspects of the *Roth* decision are notable. First, the justification for according obscenity no first amendment protection was its total lack of "redeeming social importance."[28] Whatever values the first amendment was designed to safeguard, obscenity furthers none of them.[29] The *Roth* test was, in effect, a proxy rule for identifying valueless, and only valueless, sexually-oriented material. There was, therefore, no need for the government to monitor "value" *per se*, because in theory, the test itself would place worthy matter beyond governmental reach.[30]

Second, Justice Harlan's concurring and dissenting opinion made it evident that no formulation was to be trusted totally to perform the delicate separation between speech and nonspeech. Appellate review

(1974), as has *Mishkin*, Pinkus v. United States, 98 S. Ct. at 1813; Hamling v. United States, 418 U.S. at 128-30. *Ginsberg* has been affirmed by negative implication, Pinkus v. United States, 98 S. Ct. at 1812. But, in *Miller*, the Court emphatically announced its continued adherence to the definitional *theory*. 413 U.S. at 23. Justice Stevens' opinion in Young v. American Mini Theatres, 427 U.S. 50 (1976), a suit challenging a zoning ordinance, suggested that sexual material could be regulated, even if not obscene by *Miller* standards, where the governmental intrusion was less than that of a criminal sanction. In his dissent in *Smith*, Justice Stevens stated that *Young* "expressly rejected [the] premise that all nonobscenity is equally immune from any governmental restraint and that all obscenity is equally vulnerable. 431 U.S. 291, 316 (1977). Only three Justices in *Young*, however, joined the "variable obscenity" portion of his opinion. Further, the obscenity of the films involved in the *Young* litigation was not at issue. Whatever the eventual fate of the Stevens approach, it seems unlikely that the present Court explicitly will move away from *Miller*'s commitment to the definitional doctrine. *Ginzburg*, *Mishkin*, and *Ginsberg*, on the other hand, make pronounced variations in the community standard in particular factual situations. What further effect those cases might have on the definitional approach will not be specifically discussed.

27. Roth v. United States, 354 U.S. at 489.

28. *Id.* at 484.

29. Justice Breunan, who authored the *Roth* opinion, implied that the Court was espousing the view that only "ideas" were of sufficient value to merit first amendment protection:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene. . . . It has been well observed that such utterances are of no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72) (emphasis in original). This conclusion—that there is "value" only in the political or intellectual pursuit of truth—is borne out in the language of other Supreme Court opinions. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50, 54 (1976). The existence of the community standards criterion, as it is currently conceived by the Court, enables the factfinder in effect to substitute its own, possibly more expansive, view of what has "value." *See* text accompanying notes 64-66 *infra*.

30. Roth v. United States, 354 U.S. at 489 (1957).

of the materials themselves was necessary to determine whether the test had produced the correct result.[31] The definitional approach to obscenity initiated in *Roth* focused on whether the material appealed to an average person's prurient interest. The two key components of the "prurient appeal" inquiry—"community standards" and "average person"—were intended to dispel the worst tendencies of *Hicklin* and shield anything of value. It was uncertain, however, whether these components would sufficiently shield material of "value."[32]

Although prurient appeal was the core of the *Roth* inquiry, the Court, in subsequent opinions, seized on "the community" as a crucial, and conceptually isolable component of the constitutional test. Justice Frankfurter stated in one case that it was violative of due process not to require evidence of the community standards to be applied at trial.[33] Three years later, *Manual Enterprises v. Day*[34] launched the persistent debate over whether the relevant "community" was the nation or some smaller geographic unit. Justice Harlan, in an opinion joined only by Justice Stewart, argued that a federal statute[35] should have a nationally uniform construction and thus that the standard applied should be the same everywhere. He did not attempt to articulate such a standard for future application by lower courts, however. Nor was such an attempt made two years later in *Jacobellis v. Ohio*,[36] in which Justice Brennan, in a plurality opinion, argued for a national standard on the theory that "it is, after all, a national Constitution we are expounding."[37] He reasoned that film, book, and magazine distributors would be unwilling to test local variations resulting from differing community standards, whose presence therefore would inhibit the creation and dissemination of protected expression.[38] Again, only one Justice, Justice Goldberg, joined the opinion. Chief Justice Warren, joined by Justice Clark, argued that desirable diversity within the nation and the nonexistence of a national level of tolerance to sexually oriented material called for the use of a more local community standard.[39] Justice Harlan wanted a

31. *Id.* at 496-98 (Harlan, J., concurring and dissenting). The scope of appellate review of the "constitutional fact" of obscenity is discussed in Part II *infra*.

32. Dissenting in *Roth*, Justices Black and Douglas took the view, which they ever afterward maintained, that any regulation of obscenity was constitutionally forbidden. 354 U.S. at 508 (Douglas, J., dissenting).

33. Smith v. California, 361 U.S. 147, 164-67 (1959). Apart from the challenged materials themselves, evidence of community standards or, indeed, of "obscenity" in general, is clearly not now a constitutional requirement. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

34. 370 U.S. 478 (1962).

35. 18 U.S.C. § 1461. *See* note 14 *supra*. None of the other *Manual Enterprises* opinions mentioned the community standards issue.

36. 378 U.S. 184 (1964).

37. *Id.* at 193.

38. *Id.* at 192-96.

39. *Id.* at 200-01.

national standard for federal statutes but would have permitted the states to use local standards.[40]

The Supreme Court did not take up the community standards issue again until *Miller* in 1973, but between 1962 and 1971 the *Roth* test underwent a confused transformation in other respects. *Manual Enterprises* added a new substantive element to the test: "patent offensiveness."[41] More importantly, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*[42] added another: utter lack of "redeeming social value."[43] What had been the *goal* of the *Roth* obscenity test—to identify material lacking social value—became a separate inquiry within that test.

C. Miller: *The Current Obscenity Test*

Following *Memoirs*, the Supreme Court postponed for seven years its attempt to formulate a definite first amendment obscenity doctrine. During this period, the Court issued a series of silent per curiam reversals whenever at least five Justices, applying their separate tests, found challenged materials to be protected by the first amendment.[44] Finally, in the 1973 decision of *Miller v. California*,[45] a majority of the Court, for the first time since *Roth*, agreed on a single formulation:

> (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

40. *Id.* at 203. *See also* Manual Enterprises v. Day, 370 U.S. 478, 488 (1962). A breakdown of the state and federal courts that apply each geographical standard is presented in F. SCHAUER, *supra* note 13, at 119 n.19.

41. 370 U.S. at 482 (magazines containing photographs of nude males not obscene because not "so offensive on their face as to affront current community standards of decency"). Justice Harlan's opinion was later adopted as a constitutional decision, *see* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 418 (1966); Jacobellis v. Ohio, 378 U.S. 184, 191-92 (1964), though it was a statutory interpretation of 18 U.S.C. § 1461. *See* note 14 *supra*. The requirement of patent offensiveness as a separate element of the test had been suggested earlier in the obscenity definition of the Model Penal Code: "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." MODEL PENAL CODE § 251.4 (P.O.D. 1962) (emphasis added). Note the similarity between the last clause of this quotation and the excerpt cited earlier, text accompanying note 15 *supra*, from Judge Hand's opinion in Kennerly v. United States 209 F. 119 (S.D.N.Y. 1913). The usefulness of patent offensiveness as an obscenity criterion has been severely criticized in Schauer, *supra* note 4.

42. 383 U.S. 413 (1966).

43. *Id.* at 419.

44. *See, e.g.*, Redrup v. New York, 386 U.S. 767 (1967); Miller v. California, 413 U.S. 15, 21 n.3 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting) (listing the 31 reversals).

45. 413 U.S. 15 (1973).

literary, artistic, political, or scientific value.[46]

Part (a) is simply the *Roth* test slightly restated. *Miller* makes it apparent, however, that *Roth's* prurient appeal test, by itself, is not sufficiently selective as a "proxy rule"[47] to separate valuable material from the obscene.[48]

Part (b) contains three hurdles to an ultimate finding of obscenity. First, the "patently offensive" requirement is carried over from *Memoirs*. Second, the material must portray " 'hard-core' sexual conduct."[49] *Miller* provided some "plain examples" of what this might be:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[50]

Third, the prosecution must occur under a statute that specifies which hardcore conduct may not be depicted or described and that provides sufficient detail, either by statutory wording or prior judicial construction,[51] to give fair warning to primary actors.

Finally, part (c) replaces the exacting "no redeeming social value" test from *Memoirs* with a "serious value" standard under which criminal liability[52] was intended to be expanded, assuming that the applica-

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46. *Id.* at 24 (citations omitted).

47. *See* text accompanying notes 29-31 *supra*.

48. "At a minimum, *prurient, patently offensive* depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection." 413 U.S. at 25 (1973) (emphasis added).

49. *Id.* at 27. This limitation had been presaged in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), by Justice Stewart who contended that it represented the first amendment limit. His famous "perhaps I could never succeed in intelligibly [defining what kinds of material are hardcore pornography], but I know it when I see it . . .," *id.*, amounts to little more than an acknowledgement of the familiar tenet of even the earliest cases, that "obscenity" could not meaningfully be generalized into a fixed category. *See* text accompanying note 23 *supra*. The hardcore limitation was predicted by Professor Kalven in 1960. *See* Kalven, *supra* note 26, at 43.

50. 413 U.S. at 25. The patent offensiveness of these examples is probably by way of emphasis, rather than duplication, of the offensiveness finding under one of the other *Miller* criteria. *See* Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 A.B.A.J. 1261, 1263 (1973). This conclusion is buttressed by the fact that the "hardcore" determination is a question of law, whereas prurience and offensiveness are uniquely factual questions. *See* part II *infra*. For federal statutes, these examples have also become the list of proscribed conduct required under the *Miller* criterion of specificity. *See* United States v. Twelve 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 130 n.7 (1973). But they do not *exhaust* all hardcore portrayals, which also include that which is "sufficiently similar to such material to justify similar treatment." Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

51. Miller v. California, 413 U.S. at 24. Of course, a statute need not regulate all hardcore conduct portrayals. *Cf.* Smith v. United States, 431 U.S. 291, 302 (1978) (state obscenity laws need not reach to the constitutional limit).

52. *See, e.g.*, United States v. Harding, 507 F.2d 294 (10th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). The *Miller* Court was reacting in part to what it saw as the "virtually impossible" burden of proving a negative—the *Memoirs* "utterly without redeeming social value" formulation. Thus, the "serious" qualifier was added. Miller v. California, 413 U.S. at 22-24. Whether the Court intended the change to make a quantitative or qualitative distinction has not been settled.

ble statute reached the constitutional limit.[53]

The *Miller* formulation was set out as a three-part set of required "basic guidelines for the trier of fact,"[54] but it actually requires the factfinder to make five separate determinations: prurient appeal, patent offensiveness, hardcore conduct, specifically defined conduct (specificity), and serious value. Community standards enter into the first two of these. While *Miller* made significant doctrinal alterations in the obscenity formulation, changing the "value" component and adding the hardcore and specificity requirements, the chief importance of *Miller* and its progeny is that they altered the process of obscenity determination and the respective roles of the judge and jury. The role of community standards has been instrumental in accomplishing these changes and, in turn, has been affected by the changes, as discussed in Part II.

II

THE ROLE OF COMMUNITY STANDARDS UNDER *MILLER*

Community standards retain an important role in the process of determining whether particular matter is obscene under *Miller*. *Miller* and its progeny[55] have split the obscenity decision into two parts; one is left exclusively to the factfinder and the other exclusively to the lawfinder. The community standards concept accomplishes this division.

The Supreme Court has viewed the prurient appeal and patent offensiveness components of the *Miller* test as "essentially questions of fact."[56] Factfinders are entitled to determine community standards

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The Court has yet to apply the serious value test, though given a natural opportunity to do so in Jenkins v. Georgia, 418 U.S. 153 (1974), which involved a *de novo* review of the film *Carnal Knowledge* to determine its alleged obscenity. Although the record contained a considerable amount of critical acclaim for the movie, the Court chose to reverse the obscenity conviction on the ground that no "sexual conduct" was depicted. *See* text accompanying note 56 *infra*.

By setting out specific and exclusive *varieties* of value—literary, artistic, political, and scientific—the Court may have sought to check the anomalies raised by the prior use of "social value." *See, e.g.*, United States v. One Reel of Film, 481 F.2d 206 (1st Cir. 1973), in which the argument was made that the film *Deep Throat* had educational and psychological-release value. This sort of attack "saves" otherwise obscene material precisely because it is pornographic. As a result, perhaps, "educational" was omitted from the list of values. *But cf.* Leventhal, *supra* note 50, at 1264, in which Judge Leventhal argues that the Court must have intended the enumerated values to subsume "educational" worth.

53. Every federal obscenity law that has been before the Court has been so construed. *See, e.g.*, Smith v. United States, 431 U.S. 291 (1977) (construing 18 U.S.C. § 1461, *see* note 14 *supra*); Hamling v. United States, 418 U.S. 87 (1974); United States v. Orito, 413 U.S. 139 (1973) (construing 18 U.S.C. § 1462, penalizing movement of obscene material in interstate commerce); United States v. Twelve 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973) (construing 19 U.S.C. § 1305(a), civil statute authorizing destruction of imported obscene matter); United States v. Reidel, 402 U.S. 351 (1971); Roth v. United States, 354 U.S. 476 (1957). *See generally* F. SCHAUER, *supra* note 13, at 169-91.

54. 413 U.S. at 24.

55. *See generally* cases cited in note 2 *supra*.

56. Miller v. California, 413 U.S. at 30.

solely on the basis of their own knowledge;[57] thus, there is no appellate review of these decisions.[58] Moreover, the factfinder's conceptualization of a hypothetical "average person" is not subject to any mandatory geographical referent.[59] Thus, although an obscenity finding is reviewable on other grounds, the prurience and offensiveness components are effectively shrouded from appellate scrutiny.[60]

The three other components of the *Miller* test—hardcore conduct, specificity, and serious value—are questions of law. Before the factfinder is even permitted to review challenged material for prurience or offensiveness, the judge must find the material to be hardcore. Similarly, whether the work depicts or describes sexual conduct specifically proscribed by state law is solely a question of constitutional law and statutory construction.[61] And whether the work as a whole lacks serious literary, artistic, political, or scientific value is also a legal question,[62] although the appropriate means of assessing "serious value" has yet to be established.[63]

In sum, the *Miller* apparatus divides the obscenity issue into legal

57. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973), where the trial court, sitting without a jury, viewed the allegedly obscene films. *See also* text accompanying note 33 *supra*.

58. This is assuming that the material itself is placed in evidence, *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973), and that "deviant groups" are not involved. *See* Mishkin v. New York, 383 U.S. 502 (1966). Even where a "deviant" audience standard is involved, the evidentiary requirements appear to be minimal. *See* Pinkus v. United States, 98 S. Ct. 1808, 1814 (1978).

59. *Miller* held that a reference to a statewide community was constitutionally adequate to perform the moderating functions of objectivity, temporal flexibility, and attention to neither atypically sensitive nor callous persons. 413 U.S. at 34 (1973). *See* text accompanying notes 15-24 *supra*. Hamling v. United States, 418 U.S. 87, 102-10 (1974), though recognizing *Miller*'s disapproval of a national standard, held that a trial court's use of the phrase in jury instructions was harmless error, that the instructions had otherwise performed the proper moderating functions, and that refusal based on the error in the choice of standard to admit evidence relevant to a smaller community was constitutionally permissible. Jenkins v. Georgia, 418 U.S. 153, 157 (1974), approved a jury instruction that contained no geographical reference; geographical specification was not required. Smith v. United States, 431 U.S. 291 (1977), ruled that a state statute that left obscenity unregulated as to adults was not conclusive in the determination of the community standard. Thus, jury instructions have been the only real handle for judicial review. *See, e.g.*, Pinkus v. United States, 98 S. Ct. 1808, 1811 (1978) ("children" should not be among those groups—young and old, sensitive and insensitive, religious and irreligious—that jurors should be instructed to consider in arriving at their conception of "community standards").

60. Jenkins v. Georgia, 418 U.S. 157 (1974), was the first case following *Miller* in which the Supreme Court conducted a *de novo* review of challenged material. The view that *Jenkins* was a case of judicial redetermination of the offensiveness element, *see* Schauer, *supra* note 4, at 20, is not borne out by the language of the opinion. 418 U.S. at 161.

61. *See, e.g.*, United States v. Twelve 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 130 n.7 (1973).

62. *See* United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) (reversal required because jurors were instructed to determine serious value according to community standards). *See also* Smith v. United States, 431 U.S. 291, 305 (1977).

63. What *specific* interpolations are most appropriately to be made between the viewing of material and the conclusion regarding "value" is a matter for future jurisprudence. It may be that the Court feels none are needed as long as the *Roth* "proxy rule" for prurient appeal is a part of

and factual questions. The prurient appeal "proxy rule," which previously was the sole constitutional inquiry, has been relegated by the inscrutable community standards test to the uncertain status of a purely factual question that is not subject to direct judicial review.

The community standards concept, at least as the Supreme Court currently conceives it, provides a check on the legal question components of the *Miller* test. Because prurience and offensiveness are questions of fact, a jury[64] can counter the great power of trial court judges to determine that the challenged material is hardcore and lacks serious value.[65] The community standards concept thus protects expression by permitting the jury, as a representative of the community, and not only the judge, to be the final determiner of what is obscene.[66]

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the *Miller* test. If so, both the factfinder and the lawfinder are relatively free to apply their own perceptions of "value."

It has been suggested that a possible formulation of the offensiveness test asks whether the average person would be offended by the *availability* of the challenged materials, not by the materials themselves. *See* F. SCHAUER, *supra* note 13, at 133. This, if permitted, clearly accommodates much of the "variable obscenity" concept and invites a forthright "value" judgment. "Whether or not the question is put directly by the judge, indications are it is the question the jury may be answering." Levanthal, *Preface to An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 817 (1977).

64. Defendants in obscenity cases usually prefer judges to juries, however. *See* F. SCHAUER, *supra* note 13, at 267; Lockhart & McClure, *supra* note 4, at 109 n.596; O'Meara & Shaffer, *supra* note 4, at 10. This may be due to obscenity defendants' perception of judicial discomfiture with the community standards test and a concomitant hesitancy to ban or convict. *See* United States v. 2200 Paper Back Books, 565 F.2d 566, 570 (9th Cir. 1977), *Cf.* United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185, 189-91 (2d Cir. 1977) ("In reality, no judge or jury can be expected to determine 'community standards' with respect to Exhibit 8"). *See* Smith v. United States, 431 U.S. 291, 314 (Stevens, J., dissenting): "The best anyone can do is give his or her personal reaction to it. . . . The District Court will have to serve as a composite for a Southern District jury."

65. *See, e.g.*, United States v. One Reel of 35MM. Color Motion Picture Film Entitled "Sinderella," 491 F.2d 956, 959 (2d Cir. 1974). The court of appeals held that the trial judge, trying the case without a jury, was entitled to appraise local contemporary standards as he believed they might exist and to apply them to the challenged film. In this case the court reasoned: "For some reason films quite obviously obscene are being allowed, permitted or tolerated by local law enforcement agencies. . . . [This animated puppet cartoon] could at best only produce a brief community smirk . . . [and] should be banned."

This is especially important in view of the *Miller* Court's attempt to minimize the Supreme Court's role in reviewing obscenity determinations. *See* Note, *Class Actions, supra* note 4, at 1839-40, which argues that *Miller* was in large part the Court's reaction against what it saw to be an undesirably "top-heavy" number of summary reversals, casting it "in the role of an unreviewable board of censorship for the 50 states, subjectively judging each piece of material brought before [the Court]." Miller v. California, 413 U.S. 15, 21 n.3 (1973).

Whatever the Court's motivations may have been, it is clear that the *Miller* system places great reliance on factfinders. The use of the term "subjectively" in the quoted passage may simply be a casual use of language. It may be, on the other hand, an expression of the Court's belief in its own inability to carry out the "objectivity" function of the community standards test. *See* text accompanying notes 20-22 *supra*.

66. This may help to account for the results of a recent extensive study of the effects of *Miller* on the availability of sexually explicit material, success of prosecutions, and perceptions of prosecutors of the relative ease of convictions. Project, *An Empirical Inquiry into the Effects of* Miller v.

III

COMMUNITY STANDARDS PROBLEMS UNDER *MILLER*

A. Geographical Uncertainty

Much of the commentary critical of the *Miller* Court's concept of contemporary community standards has been spawned by the awkward and hesitant manner in which the Court has attempted to extricate itself from the residue of the geographical debate of the 1960's. The Court hedged as it rejected the "national standards" approach and implicitly approved the "balkanization" of obscenity adjudication. The Court's emphasis on the geographical reference point for community standards has invited confusion. The belief that various "community standards" exist in different places[67] like different species of fauna has engendered a considerable body of complex tangential issues of change of venue, conflicts of law, and the ability of jurors to discern the contours of a "standard" in a place far from their residence.[68] But on a functional level, the confusion has been exaggerated. If the jury is not required to define the community standards that it applies, it is probably not necessary to specify the geographical community from which the jury derives its undefined standards.[69]

B. Vagueness and Notice Problems

The absence of a fixed definition and specification of community standards, both substantively and geographically, contributes to problems of vagueness and notice. Perhaps the most persistent quarrel with the Supreme Court's obscenity tests has been that they are fatally vague.[70] In his dissent in *Paris Adult Theatre I v. Slaton*,[71] Justice

California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 858, 877, 891-915 (1977). This study indicates that, as a practical matter, *Miller's* impact has been insignificant and, in fact, more pornography is available than prior to 1973. These findings were unexpected in the wake of the Court's expectations that the "serious value" test represented an expanded ability to convict under obscenity laws.

67. *See* Miller v. California, 413 U.S. 15, 30 (1973): "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."

68. *See, e.g.*, Haim v. United States, 554 F.2d 474 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 275 (1977); Reed Enterprises v. Clark, 278 F. Supp. 372 (D.D.C. 1967), *aff'd*, 390 U.S. 457 (1968) (per curiam); Schauer, *Obscenity and the Conflict of Laws*, 77 W. VA. L. REV. 377 (1975); Shugrue, *An Atlas for Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974); Comment, United States v. MacManus—*Transfer of Venue and the Contemporary Community Standards Test in Federal Obscenity Prosecutions*, 52 N.Y.U. L. REV. 629 (1977).

69. Of course, it may be imaginatively helpful for a juror to have some locale in mind in order to come up with the "average" person, as opposed to a personal, subjective judgment.

70. A law is unconstitutionally vague under the due process clause of the fourteenth amendment if it provides a reasonably intelligent person with no knowledge of what conduct the law prohibits. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court* 109 U. PA. L. REV. 67 (1960). In the first amendment area, vagueness is seen as especially pernicious because it causes the public to err on the side of caution and forgo protected expression.

Brennan, author of the chief opinions in *Roth*, *Memoirs*, *Ginzburg v. United States*,[72] and *Ginsberg v. New York*[73] concluded that obscenity was intrinsically vague as a concept and thus constitutionally unworkable. Since then, Justices Stewart and Marshall, and Justice Stevens in criminal cases, consistently have joined him in this view.

Prior to *Miller*, challenges on vagueness grounds were met with brief rebuffs.[74] Having made an explicit move toward providing greater certainty in the specificity requirement in *Miller*, the Supreme Court stated in *United States v. Twelve 200-Ft. Reels of Super 8MM. Film*[75] that the *Miller* examples of the types of expression that may be proscribed were sufficiently precise linguistically to provide fair notice to primary actors.[76]

Whatever the relative precision of the other components of the *Miller* test, the community standards concept has never been defended as being sufficiently clear. Rather, the Supreme Court's attitude has been that the specificity requirement satisfies the demands of both the first amendment and the due process clause.

The vagueness of the community standards concept might be tolerable if the specificity requirement were taken seriously. *Ward v. Illinois*,[77] however, indicates that this may not be the case. In *Ward*, a defendant was convicted prior to *Miller* under a state obscenity statute that did not specifically proscribe the conduct for which he was convicted. He challenged the statute for vagueness. The Supreme Court simply held that under pre-*Miller* applications of the statute, he should have known that his conduct was subject to criminal sanction. The Court went on to state that the Constitution did not require that an obscenity statute include an exhaustive list of the types of material that it proscribes.[78] The opinion severely undercuts *Miller's* self-acclaim as the provider of public certainty in the obscenity area.[79]

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71. 413 U.S. 49, 73-114 (Brennan, J. dissenting).

72. 383 U.S. 463 (1966).

73. 390 U.S. 629 (1968).

74. *See, e.g.*, Smith v. United States, 431 U.S. 291, 312 (1977).

75. 413 U.S. 123 (1973).

76. The state statutes that the *Miller* Court offered as examples of the constitutionally required amount of statutory detail are considerably more precise than the *Miller* examples themselves, which apparently view "lewd exhibition of the genitals," for example, as falling within hardcore sexual conduct. Jenkins v. Georgia, 418 U.S. 153 (1974). Judge Leventhal's opinion in Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), represents perhaps the most precise line drawing yet done in the obscenity area. His review of the materials approved or condemned by the Supreme Court during the post-*Memoirs* period led to a standard that distinguished "imminent" and "ongoing" sexual activity, "single" or "dual" photos, etc. The Supreme Court has never been nearly as precise, even in construing federal statutes.

77. 431 U.S. 767 (1977).

78. *Id.* at 773.

79. *See id.* at 777 (Stevens, J., dissenting) (removal of the "cornerstone" of the *Miller* structure—the specificity requirement—hastened its downfall).

The Court also seems reluctant to require the same degree of statutory detail from Congress as *Miller* requires of state statutes.[80] Until it does so or is willing to supply its own language of conduct that may not be depicted, the specificity element of the Court's obscenity structure will not provide the solution to the vagueness and notice problems. Nor is the solution found in the serious value test. If anything, in its present status, that test contributes to the uncertainty and unpredictability of the definition of obscenity. The prospective indeterminacy of any judgment made under community standards, especially an undefined and unreviewed one, can be balanced only by almost hairline specificity in other parts of the *Miller* test. Such specificity is clearly lacking.

CONCLUSION

Putting aside the issue of whether any regulation of sexual expression is desirable, does the community standards concept, as applied in the *Miller* test, contribute to the Supreme Court's first amendment goal of properly fixing "the critical point in the compromise between candor and shame"?[81] Is it desirable to retain community standards as part of the *Miller* scheme?[82]

By giving the factfinder virtually unchecked discretion over the prurient appeal and patent offensiveness determinations, and thus the ability to undercut a lawfinder's opinion that challenged material is obscene, the community standards concept aligns the *Miller* structure in a way that does not seem unduly to impinge on expression and may even protect expression at the point of adjudication. The concept does, however, contribute to the nagging problems of vagueness and lack of fair notice to those actors whose activities have not yet reached the point of judicial scrutiny.

Abolition of the community standards concept certainly would reduce conceptual clutter, but it is the Supreme Court's own ambivalence, not merely the language of its opinions, that has created much of the confusion. The Court still can break off cleanly from the encrustations of the geographical debate[83] while retaining the cautionary value of the "community standards" instruction. And, at least to some ex-

80. The *Miller* examples are notably less precise anatomically than the state examples cited in the majority opinion. *See* 413 U.S. at 24 n.6.

81. *See* Kennerly v. United States, 209 F. 119, 120-21 (S.D.N.Y. 1913); text accompanying notes 15-24 *supra.*

82. Professor Schauer takes the position that the concept has no place in the definitional obscenity theory that is adequately served by the value and prurience tests, and indeed that "offensiveness" is itself a superfluous criterion which necessitated the community standards test. Schauer, *supra* note 4, at 14-23.

83. Smith v. United States, 431 U.S. 291 (1977), and Pinkus v. United States, 98 S. Ct. 1808 (1978), have taken long steps in this direction. Justice Blackmun stated in *Smith* that community

tent, the Court can offset the vagueness problems that are inherent in the community standards concept by sharpening the focus of the other elements of the *Miller* test, especially the serious value and hardcore conduct components and the specificity requirement. On balance, the community standards concept serves a useful role in the *Miller* framework that outweighs the problems created by it. The concept should, therefore, be retained.

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standards cannot legislatively be defined. *Pinkus* reemphasized the "reasonableness" analogy, though perhaps "protesting too much" at the same time. *Id.* at 1813-14.

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