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BILLY JENKINS AND ETERNAL VERITIES: THE 1973 OBSCENITY CASES

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I. PROLOGUE

In July 1973, the Supreme Court of Georgia affirmed Billy Jenkins' conviction for exhibiting an obscene film in Albany, Georgia.[1] The film? *Carnal Knowledge.* Fortunately for Billy Jenkins, the United States Supreme Court has agreed to review his obscenity conviction,[2] which was upheld by the Georgia court only a few days after the Supreme Court decided a quintet of significant obscenity cases on June 21, 1973.[3] Billy's fate is uncertain, and predicting the outcome of cases pending before the Supreme Court is plainly imprudent. Because the Georgia court's opinion discloses knowledge of the Supreme Court's 1973 obscenity decisions[4] it seems unlikely that Billy's case will be summarily remanded to the state court for additional consideration. Despite the dissenting opinions filed with the Georgia court's decision, nothing suggests that the Georgia majority would change its mind regarding the obscene nature of the film *Carnal Knowledge.* Billy's case, then, may well be the first decision to apply the substance of the Court's recent obscenity cases, and scarcely any set of facts, real or imaginary, could better illustrate the significance of these obscenity decisions than *Jenkins v. Georgia.*[5]

II. OBSCENITY IN REVIEW: 1957-1973

Only 17 years ago, in the 1957 case of *Roth v. United States,*[6] a majority of the Supreme Court decided that obscene material

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1. Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973).
2. Jenkins v. Georgia, 94 S.Ct. 719 (1973).
3. The five cases are cited in full at note 18 *infra.*
4. 199 S.E.2d at 184-85.
5. 94 S.Ct. 719 (1973), noting probable jurisdiction.
6. 354 U.S. 476 (1957).

was not protected by the first and fourteenth amendments to the Constitution. Once the Court ruled that obscenity was an exception to the first and fourteenth amendments, a constitutional definition of obscenity was necessary to mark the boundary between that material which is protected by the Constitution and that which is not. So the Court, in the same decision, was compelled to formulate its first—but not its last—definition of obscenity. The Court's travail with obscenity was merely begun by *Roth* in 1957, to which the bewildering array of obscenity decisions following *Roth* attests.

For approximately ten years after *Roth*, until 1967, the Court's obscenity decisions were too frequently notable for the absence of a majority opinion, whether the issue was the definition of obscenity or some collateral problem arising from local, state and federal efforts to suppress obscene material. By 1967, the collective voice of the Court had become so fragmented that a policy of summary, *per curiam* reversals was adopted for obscenity convictions when at least five Justices, "applying their separate tests,"[7] found the challenged material protected by the Constitution. At best, the law of obscenity was reduced to disturbing uncertainty, which had its effects on the lower state and federal courts, legislative bodies, prosecutors and those persons engaged in the creation and commercial distribution of questionable or borderline material, including books, magazines, and films.

Probably the greatest uncertainty surrounding obscenity and the continuing vitality of the Court's 1957 *Roth* definition resulted from the Court's peculiar 1966 decision *re Fanny Hill*;[8] its 1967 *per curiam* opinion in *Redrup v. New York*, when the Court, in ill-concealed frustration, admitted that disagreement among the Justices apparently precluded decision by a majority or even substantial plurality opinion; and the Court's failure to decide whether questions of obscenity should be determined by national or lesser "contemporary community standards."[10]

In *Fanny Hill*, a plurality of three Justices, elaborating on the *Roth* definition of obscenity, declared that no book may be "proscribed unless it is found to be *utterly* without redeeming social value."[11] The *Fanny Hill* plurality also asserted that the element of social value may not be weighed against, nor canceled out by, the presence of "prurient appeal" and "patent offensiveness," which were the two elements later added to the *Roth* definition of obscenity.

7. Miller v. California, 413 U.S. 15, 22 n.3 (1973).
8. Memoirs v. Massachusetts, 383 U.S. 413 (1966).
9. 386 U.S. 767 (1967).
10. *E.g.*, Jacobellis v. Ohio, 378 U.S. 184, 192 (1964).
11. 383 U.S. at 419.

Justices Black and Douglas concurred in the result reached by the plurality,[12] but only because they believed that the Constitution prohibited government regulation of expression, whether obscene or not. While no majority opinion emerged from *Fanny Hill*, the plurality Justices plus Justices Black and Douglas commanded five of the nine votes. After *Fanny Hill*, it seemed that no material, regardless of its prurient appeal and patent offensiveness, could be found obscene unless it were utterly without redeeming social value. Many states responded by adding the *Fanny Hill* standard of "utterly without redeeming social value" to their statutory definition of obscenity,[13] a response dictated solely by the membership of the Supreme Court on the day *Fanny Hill* was decided, not by a majority opinion of the Court.

In 1967, a year after *Fanny Hill*, in a *per curiam* reversal of a state obscenity conviction in *Redrup v. New York*[14] the Court observed that no claim was made that the state's obscenity statute reflected "a specific and limited" concern for juveniles,[15] nor was it suggested that the challenged material had been published in a manner "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."[16] These cryptic observations caused additional uncertainty. Was a majority of the Court now prepared to hold that "consenting adults" were to be allowed access to obscene material, and that the scope of permissible regulation of obscenity under the Constitution was limited to protecting juveniles and the sensibilities of adults who wished to avoid obscene material?

A final uncertainty pervading the law of obscenity and dating from the *Roth* decision was whether the question of obscenity was to be decided by reference to local, state or national standards when the definition adopted by the Court required that an average person, applying contemporary *community* standards, find that the dominant theme of the material taken as a whole apepals to prurient interest.[17] What community? A conscientious jury might well reach different results when instructed to decide contemporary community standards by reference to an average person residing in the United States, residing in a particular state, or residing in a particular region, county or town within a state. Again, the Supreme Court was either unwilling or unable to resolve this collateral but important question by majority opinion.

Thoughtful students of the Court are likely to assert that the

12. *Id.* at 421 (Black, J., concurring), 424 (Douglas, J., concurring).
13. *E.g.*, CAL. PENAL CODE § 311 (West 1970); GA. CODE ANN. § 26-2101 (1972); TEX. PENAL CODE § 43.21 (Vernon 1974).
14. 386 U.S. 767 (1967).
15. *Id.* at 769.
16. *Id.*
17. Roth v. United States, 354 U.S. 476, 489 (1957).

preceding discussion raises only a few of the problems, uncertainties, or unanswered questions flowing from the *Roth* decision. This assertion is accurate. Admittedly, the foregoing catalog of "obscenity problems" is not exhaustive, nor was it so intended. But the purpose of this paper is to consider some problems in the law of obscenity, not all problems, and to consider how these problems were resolved by the Court's 1973 obscenity decisions.

III. THE 1973 OBSCENITY DECISIONS

In June, 1973, the Supreme Court decided five obscenity cases, each by a majority opinion.[18] Perhaps the reappearance of a "majority" in this perplexing area of constitutional law is alone sufficiently momentous to make the decisions significant, even without considering the substance of the decisions. After a long period of uncertainty, a judicial decision offering tantalizing visions of certainty might be embraced with relief simply for that reason. But even five majority opinions in the 1973 obscenity decisions are less certain than one might suppose, for as Chief Justice Burger, who wrote for the majority in each case, observed: "[t]his [obscenity] is an area in which there are few eternal verities."[19] Considering the history of obscenity litigation before the Court in the years from 1957 to 1973, few would fault his assessment.

Whether one applauds or condemns the 1973 obscenity decisions, the majority did not overrule any well-settled precedent, but simply resolved some open questions in an intensely controversial area of constitutional law. How long these answers endure in the form selected by the majority is simply another unanswerable question. Evaluating the 1973 obscenity decisions by reference to the majority Justices explains nothing. The relevant inquiry is what was decided, not who decided it.

Of the five 1973 obscenity decisions, *Miller v. California*[20] seems the most important and is therefore discussed at length in this paper. Among the four remaining 1973 obscenity decisions are *United States v. 12 Reels of Film*[21] and *United States v. Orito*,[22] which presented questions concerning the power of Congress to prohibit importation or interstate transportation of obscene material. Although the Court held in *Stanley v. Georgia*[23] that possession of obscene material for personal use in the privacy of the home could

18. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 Reels of Film, 413 U.S. 123 (1973); and United States v. Orito, 413 U.S. 139 (1973).
19. Miller v. California, 413 U.S. 15, 23 (1973).
20. 413 U.S. 15 (1973).
21. 413 U.S. 123 (1973).
22. 413 U.S. 139 (1973).
23. 394 U.S. 557 (1969).

not be made a crime, the Court in subsequent cases,[24] of which 12 *Reels of Film* and *Orito* are the latest, has ruled that the *Stanley* "exception" to criminal statutes proscribing the possession or distribution of obscene material does not extend to importation or interstate carriage of obscenity for personal use. The somewhat puzzling effect of *Stanley* and its progeny is that privacy of the home prevents state intrusion to seize or punish for the possession of obscene material for personal use, but that collectors and purveyors of obscenity for personal use are without lawful means to bring the obscene material within the privacy of the home.[25] In another decision, *Kaplan v. California*,[26] the Court held that a book consisting solely of written descriptions of sexual conduct could be found obscene. Although one picture may be worth a thousand words, obscene words alone are not protected by the first amendment. Finally, in *Paris Adult Theatre I v. Slaton*,[27] the Court held that the prosecution need not present "expert" evidence on the question of obscenity when the challenged material itself is placed in evidence, and that a state, as a permissible exercise of its police power, may prohibit the exhibition of obscene films to so-called "consenting adults." For some *Paris Theatre* may seem the most important of the five 1973 obscenity decisions, but if judgments on relative importance are possible, *Miller v. California*[28] prevails over *Paris Theatre* because *Miller* provides a new definition of obscenity.

A. MILLER V. CALIFORNIA

Briefly summarized, the *Miller* majority formulated a new definition of obscenity, holding that the trier of fact in an obscenity proceeding, civil or criminal, need not decide the question of obscenity by "national" standards. Obscenity is a class of sex material not protected by the first and fourteenth amendments to the Constitution, a description which states simply the substance of the Court's holding in *Roth*.[29] The majority in *Miller* might have avoided the task of formulating a new definition of sex material not protected by the Constitution if it had overruled *Roth* as an unfortunate aberration in constitutional jurisprudence. Had this been the result of *Miller*, obscene material would then receive the full protection of the Constitution, subject only to those narrow limitations generallly

24. United States v. Reidel, 402 U.S. 351 (1971), and United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).
25. If obscenity is an exception to the protection of the first amendment, private possession of obscene material for personal use is an exception to the exception to the first amendment.
26. 413 U.S. 115 (1973).
27. 413 U.S. 49 (1973).
28. 413 U.S. 15 (1973).
29. Roth v. United States, 354 U.S. 476 (1957).

applied to the exercise of first amendment rights, and which, for want of a better phrase, are adequately suggested by reference to the "clear and present danger" test.[30] But the Court in *Miller* did not overrule the primary holding of *Roth*, and obscenity remains beyond the protection of the first amendment. The *Miller* majority could not entirely avoid *Roth*, however, for once the Court had ruled in *Roth* that obscenity was not protected by the Constitution, it was necessary to provide a legal standard by which the obscene is distinguished from the non-obscene. Despite the majority's claim in *Miller* that is was merely formulating "standards more concrete"[31] than had been used since *Roth*, the "new" standard announced in *Miller* seems substantially more than a clarification or refinement of the *Roth* definition of obscenity. This evaluation of *Miller*, that it provides a new definition rather than a slight adjustment of the *Roth* definition, depends on the precise definition of obscenity first forumlated in *Roth* and the difference, if any, between it and the *Miller* definition.

Although the Court's first definition of obscenity proved wanting in the general fragmentation of opinions following *Roth*, the Court in *Roth* held that obscenity was to be decided by the answer to this question:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.[32]

Sixteen years later, in *Miller*, a different majority announced this definition of obscenity, phrased in queries to the trier of fact:

> [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[33]

The *Miller* Court's elaboration of the new definition discloses that the trier of fact must answer "yes" to each of the three queries comprising the new definition before the challenged material may be held obscene, for the component elements are conjunctive and a negative response to any of the three queries will place the

30. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).
31. 413 U.S. at 20, 29.
32. Roth v. United States, 354 U.S. 476, 489 (1957).
33. 413 U.S. at 24.

material beyond the state's regulatory authority and within the protection of the first amendment.[34]

For the sake of brevity and later reference, the three elements of the new *Miller* definition of obscenity are described hereafter as (1) the "prurient interest" test, (2) the "patently offensive" test, and (3) the "serious value" test. The first element of the *Miller* definition represents, in identical language, the *whole* definition of obscenity first offered in *Roth;* the second and third elements are new additions. Those who have followed the law of obscenity in the Supreme Court will have encountered the second and third *Miller* elements here and there in various opinions written by the Justices in the years between *Roth* and *Miller.* When the second and third elements are added to the *Roth* definition (which is also the first element of the new definition), they seem to limit the *Roth* definition. But adoption of the second and third elements together with the first in a conjunctive three-element definition makes each element a limitation on the others. Conceding that *Miller* has added new elements to the *Roth* definition of obscenity, do these additions only clarify *Roth,* or do they change the *Roth* definition? And if these new elements do change the *Roth* definition, how may the change in definition affect the uncertain line separating material which is protected by the Constitution and that which is not?

The second element of the *Miller* definition, that of "patently offensive sex conduct," limits the first element by excluding from suppression material which may appeal to the prurient interest but which does so, apparently, in a less vivid or obtrusive manner, with "taste" perhaps. The *Miller* majority illustrates by "plain examples" what is meant by the second element in these words:

(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.[35]

While the Court's examples disclose the activity which may be proscribed, the Court fails to illustrate the quality of representation or description separating the patently offensive from the patently inoffensive. Explicit representations or descriptions of sexual activities are not per se proscribed, but only those which are patently offensive. Because the crucial phrase "patently offensive" cannot be defined abstractly except by listing roughly equivalent synonyms, which are themselves abstract unless applied to a particular repre-

34. *Id.* at 24-26.
35. *Id.* at 25.

sentation or description of sex conduct activity, it seems that the "patently offensive" element remains a wholly personal judgment for each trier of fact, judge or juror.[36]

Considered without reference to the third element, the second element of the *Miller* definition of obscenity substantially restricts the *Roth* definition, for state law must specifically describe the sex conduct which may be the subject of an obscenity proceeding, civil or criminal. The law may not merely proscribe that which is "obscene;" the law must describe particular sex conduct which is obscene.[37] Of course the Court's examples do not purport to exhaust all "sexual conduct" that might be obscene; indeed, the line between sexual and non-sexual conduct is scarcely self-demonstrating. An unsually inventive legislature might well provide definitions of "sexual conduct" substantially exceeding in variety and scope the examples offered by the Court in *Miller*. To this extent, then, the second element of *Miller* modifies the *Roth* definition by casting upon legislatures and courts the burden of defining specific sexual conduct, and so provides an objective foundation for obscenity proceedings, a refreshing change from the largely subjective *Roth* definition.

But even if a state legislature or court incorporates in its list of defined "sexual conduct" the "patently offensive" qualification, this part of the constitutional definition of obscenity remains largely subjective, a question of judgment for the trier of fact. When this second element of the *Miller* definition, combining objective and subjective sub-elements, is added to *Roth*, the *Roth* definition is altered by significantly constricting the category of material to which the 1957 definition might theoretically have applied. Although the material, taken as a whole, may appeal to the prurient interest (*Roth*), it may not be held obscene unless it also contains patently offensive representations or depictions of sexual conduct specifically defined by law (*Miller*). The second element of *Miller* seems to enlarge the category of material that may claim first amendment protection under the theoretical reach of the earlier *Roth* definition.

Does the third element of the *Miller* definition, the "serious value" test, change or merely clarify the *Roth* definition? When

36. What is "patently offensive" is essentially a question of fact. *Id.* at 30.

37. The specifically described sex conduct that may invite an obscenity prosecution must be found within the statute, as written or *authoratively construed.* 413 U.S. at 24, 27. Hence, failure to specifically describe the forbidden sex conduct within the statute may be rectified by state judicial construction, allowing the statute to be applied to certain sex conduct not defined by statute. Until the statute is rewritten by the legislature, courts may safely construe the general words "lewd" and "obscene" to mean the specific sex conduct provided as examples by the majority in *Miller*. See text accompanying note 35 *supra*. If the United States Supreme Court may, under the first amendment, construe the general words of the federal obscenity statutes to reach at least the examples of sex conduct provided in *Miller*, surely the state courts may do likewise. United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973).

compared to the usual formulation of the *Roth* definition, *Miller's* third element, like the second, *appears* to restrict the theoretical limits of *Roth*, so that material appealing to the prurient interest and containing patently offensive representations or depictions of sexual conduct specifically defined by law may nevertheless claim first amendment protection if it is found to have "serious literary, artistic, political or scientific value." Whether *Miller's* third element restricts or enlarges the category of material theoretically within the usual *Roth* definition of obscenity depends largely on the Court's explanation for holding in *Roth* that obscenity was not a class of expression protected by the Constitution. In *Roth*, the Court said: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[38] Later, in *Fanny Hill*,[39] three Justices declared that allegedly obscene material could not be suppressed unless it were found "*utterly* without redeeming social value,"[40] and that the "social value" of challenged material was not to be weighed or balanced against its prurient interest and patent offensiveness. Three Justices dissented in *Fanny Hill*, and all disagreed with the plurality's assertion that material with redeeming social value, however slight, could not be found obscene under the Constitution. Rejection of the conjunctive redeeming social value test expressed by the *Fanny Hill* plurality reached majority proportions in 1973, for the Court in *Miller* specifically rejected the *Fanny Hill* plurality test and substituted the third element of the *Miller* definition.

If the *Roth* definition of obscenity rests on the explicit premise that material cannot be found obscene unless it is utterly without redeeming social importance, as surely it does, why should it be objectionable to make that explicit premise a part of the constitutional test when the issue of obscenity is presented to the trier of fact? A direct answer to this question is not found in *Miller*. The majority does indicate that requiring the prosecution to prove a negative, that the challenged material is utterly without redeeming social value, is virtually impossible under American standards of proof in criminal proceedings.[41] Since the majority in *Miller* replaces the "redeeming social value" test with another negative test, that the challenged material *lacks* serious value, it seems the majority is not genuinely concerned with a negative burden imposed on the prosecution. Moreover, an obscenity prosecution is always essentially negative, regardless of definitional elements, for the prosecution, civil or criminal, always seeks to establish that the chal-

38. Roth v. United States, 354 U.S. 476, 484-85 (1957).
39. Memoirs v. Massachusetts, 383 U.S. 413 (1966).
40. *Id.* at 419.
41. 413 U.S. at 22.

lenged material is *not* protected by the Constitution. That this burden is composed of both affirmative and negative elements is hardly surprising. Proving a negative, as an abstract question of evidence, is obviously a much different problem than proving that allegedly obscene material is utterly without redeeming social value, where the negative burden may involve nothing more than disagreement between witnesses for the prosecution and the defense. Mindful of the typical obscenity proceeding, where the challenged material is physically present in the court for all to examine, the Court's reason for rejecting the *Roth* "redeeming social value" test is singularly unpersuasive.

A more satisfying explanation for rejecting the *Roth* "redeeming social value" test is that the *Miller* majority found the standard unacceptably broad because purveyors of pornography would seek to rely upon it and conscientious triers of fact might heed it, thus exonerating material which ought to be proscribed, especially when "expert" evidence offered by the prosecution and the defense was contradictory on the issue of *any* redeeming social value. The *Miller* majority also declares that no more than three Justices had ever adhered to the "utterly without redeeming social value" test as part of the constitutional definition of obscenity.[42] This assertion appears incorrect, for *Roth* was a majority opinion and the "utterly without redeeming social value" standard was an explicit justification for holding obscenity beyond the protection of the first amendment in *Roth*. Finally, in a footnote, the *Miller* Court rejected, as a constitutional standard for obscenity, the ambiguous *Roth* test of "social importance."[43] With all respect for the majority in *Miller*, and recognizing the unenviable task confronting the Court in defining a class of expression not protected by the Constitution, and conceding that "social importance" or "social value," is ambiguous, the Court's new test of lacking "serious literary, artistic, political, or scientific value" is scarcely less ambiguous than the test it replaces. The word "serious" is ambiguous; it requires a wholly subjective reaction by the individual who must make the assessment. Unless the defense admits that the challenged material is not "serious," only personal and subjective judgments govern this issue. Similarly, using the words "literary, artistic, political, or scientific" as additional limitations in the "serious value" of the challenged material invites the same subjective and personal judgments concerning what these words mean and what they exclude.

Reliance upon these wholly subjective elements as part of the constitutional definition of obscenity is the ineluctable consequence

42. *Id.* at 25.
43. *Id.* at 25 n.7.

of construing the first amendment to protect only that expression which has "value" or "importance."But "value or importance" to whom? A court may apply neutral principles to distinguish protected expression from unprotected conduct,[44] and a court may limit the circumstances under which protected expression is allowed by neutral considerations of time, manner, and place,[45] all without judging the value or importance of any particular expression. Indeed, a court may even proscribe expression that poses a clear and present danger without judging the value or importance of that expression.[46] But limiting the protection of the first amendment to expression that has value or importance introduces a mischievous and subjective standard which could destroy the first amendment. When freedom of expression means only freedom to express what others may judge to have value or importance, the freedom enjoyed is purely contingent, which seems the precise status of obscenity under the first amendment.

If the *Miller* definition of obscenity excites concern for the future of the first amendment, recall that *Miller* is merely a continuation of a process of limiting the protection of the first amendment begun 17 years ago in *Roth*. Considered together, *Roth* and *Miller* are merely representative of more disturbing anomalies in first amendment jurisprudence: Expression undeniably "important" may be proscribed if it threatens a "clear and present danger," but expression wholly lacking "importance" may be proscribed even when no "clear and present danger" is readily perceived.[47] Although the *Miller* majority rejected, and apparently overruled, the "utterly without redeeming social value" test upon which the *Roth* definition of obscenity was explicitly predicated, and for reasons which seem upon examination unpersuasive, the question remains, does the third element of the *Miller* definition of obscenity significantly change the *Roth* definition?

No obvious answer emerges from *Miller*, for the difference between material "utterly without redeeming social importance (or value)" and material which "lacks serious literary, artistic, political or scientific value" seems largely a question of nuance. An elaborate discussion of nuances is more likely to confuse than to clarify any question, and the law of obscenity seems no exception. Perhaps the new *Miller* element will have a practical impact on obscenity

44. *E.g.*, United States v. O'Brien, 391 U.S. 367 (1968).
45. E.g., Adderley v. Florida, 385 U.S. 39 (1966).
46. *E.g.*, Feiner v. New York, 340 U.S. 315 (1951).
47. The most obvious "clear and present danger" likely to arise from exposure to so-called hard core pornography is the commission of overt sex crimes, but there seems to be no data demonstrating a cause-and-effect relationship between exposure to hard core pornography and sex crimes. See Mr. Justice Brennan's dissenting opinion in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 107-13 (1973).

litigation at the trial level by easing slightly the "virtually impossible" burden borne by the prosecution under the now discredited *Roth* element; perhaps conscientious triers of fact will find the *Miller* standard less difficult to apply; perhaps the class of material protected by the first amendment will not be further diminished with the *Miller* element substituted for that of *Roth*. But witnesses who before *Miller* testified that challenged material was not without *some* redeeming social importance will probably now be able to testify that the same material is not lacking in serious literary, artistic, political, or scientific value.

Whatever the test, it remains wholly subjective, finally a question of personal judgment and individual opinion. As if to underscore this point, the *Miller* majority offers as its *only* example of the "serious value" element, medical books that "for the education of physicians . . . necessarily use graphic illstrations and descriptions of human anatomy."[48] So they do, but has any prosecutor, trial judge, or layperson ever thought for a moment that legitimate medical books could be found obscene under any definition of the term? Although the majority in *Miller* concludes that only "hard core pornography" is excluded from first amendment protection,[49] this characterization adds little to the new definition of obscenity. Pornography, as the Court explains, is sex material, and hard core pornography is sex material which is found obscene by applying the three definitional elements announced in *Miller*.

The foregoing discussion of the "patently offensive sex conduct" and "serious value" elements of the *Miller* test for obscenity suggests that the class of material theoretically within the reach of the *Roth* definition has been restricted rather than enlarged by *Miller* because the "patently offensive sex conduct" test requires objective definition of the proscribed sexual conduct; the "patently offensive" qualification, while still subjective, nevertheless imposes some standard on a conscientious trier of fact, requires something more than appeal to prurient interest, and may provide an additional basis for trial court rulings that challenged material is not obscene as a matter of law. The impact of the *Miller* "serious value" element in terms of restricting or enlarging the class of materials theoretically within the reach of the *Roth* definition is less clear. *Miller* replaces one subjective test with another subjective test not substantially different than that replaced, unless it be that the *Roth* test of "utterly without redeeming social importance" suggests a quantitative subjective test while *Miller* suggests a more qualitative subjective test. If this were all *Miller* decided,

48. 413 U.S. at 26.
49. *Id.* at 27, 29, 35, 36.

it might be possible to conclude that *Miller* had restricted the *Roth* definition of obscenity, though the question is not free of doubt.

Announcing a new definition of obscene material might seem quite enough for a single majority opinion, but an additional question in the law of obscenity was answered in *Miller*. *Roth* first held that reference to "contemporary community standards" was critical in deciding an issue of obscenity, and this part of the *Roth* definition is perpetuated as the first element of the *Miller* three-element definition of obscenity. Although the "contemporary community standards" element remains a part of the constitutional test for obscenity, *Miller* holds that these contemporary community standards are not "hypothetical and unascertainable" national standards.[50] *Miller* provides at least a partial answer to a question unanswered since *Roth* was decided in 1957: What is the relevant community whose contemporary standards should be considered in deciding the issue of obscenity? Eliminated from constitutional relevancy, at least for state obscenity litigation, is the *largest* community whose contemporary standards might have been considered controlling—the community encompassed by the national boundaries of the United States of America, or American society at large.[51] Once the Court excludes the largest community, the national community, another question arises: What is the *smallest* community whose contemporary standards might be considered under the constitutional definition of obscenity? Nothing in the *Miller* opinion suggests an answer. In *Miller*, the trial court instructed the jury to apply "contemporary community standards of the State of California,"[52] and the appellant urged error before the Supreme Court for failure to instruct one national standards. The *Miller* majority concluded its discussion of relevant community standards by declaring that the trial court's instruction was "constitutionally adequate."[53]

Under the circumstances of the *Miller* case, the Court was certainly not required to decide anything more than it did concerning the relevant community standards. State standards had been applied during trial and the appellant argued that national standards were required by the Constitution. There was simply no need to decide whether reference to the contemporary standards of a smaller community than the state was "constitutionally adequate." Certainly smaller communities than a state are available for reference, including regions within the state, and specific counties, cities, towns, villages, precincts, wards, and even smaller communities, if such there are. Of course the Court might have limited the relevant

50. *Id.* at 31.
51. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964).
52. 413 U.S. at 31.
53. *Id.* at 34.

community to the state if it had chosen to do so, but it did not. Doubtlessly the question will arise in the future, perhaps during the 1973-74 Term in *Jenkins v. Georgia*.[54]

What reasoning supports the Miller rejection of national community standards, and what are the potential first amendment consequences of this holding? In rejecting national community standards, the Court explains that issues touching "prurient interest" and "patent offensiveness" are essentially questions of fact. Invoking abstract national community standards was deemed unrealistic and futile because citizens of different states are diverse in their tastes, a diversity that should not be "strangled by the absolutism of imposed uniformity." By requiring the trier of fact to apply contemporary community standards as an average person, insures that challenged material will not be judged by its possible impact upon the most sensitive or least sensitive person in the community.[55] Because the first amendment applies to the states through the fourteenth amendment, it is not surprising that the appellant in *Miller* should assert that first amendment limitations on state power to suppress obscenity be applied uniformly throughout the United States. After all, the first amendment binds all the states, the line between obscene and non-obscene material is a first amendment question, and so the standards by which challenged material is found within or beyond first amendment protection should be national, too. If this analysis represents the substance of the appellant's argument in *Miller*, the Court answered obliquely by shifting emphasis from questions of law to questions of fact. Certainly issues of "prurient interest," "patent offensiveness," and "serious value"[56] are questions of fact, but they are facts that determine whether challenged material is or is not protected by the first amendment.

Even conceding that "national" community standards are elusive and abstract, allowing the trier of fact to decide the question of obscenity by reference to state or lesser geographic community standards is scarcely less elusive or abstract. It also obscures the core problem in the use of an "average person—contemporary community standards" test for deciding the question of obscenity. The problem is not so much what standard might be articulated but rather the process by which the standard is illuminated by the contending parties in an adversary proceeding. Assuming that the trier of fact is conscientious and seeks to conform judgment to law, as instructed by the court, how does any judge alone or panel

54. 94 S.Ct. 719 (1973), noting probable jurisdiction.
55. Miller v. California, 413 U.S. 15, 30-34 (1973).
56. Although the majority in *Miller* indicates that the element of "serious value" is a proper question for the trier of fact, 413 U.S. at 24, the "serious value" element is not included in the Court's rejection of "national" community standards, *id.* at 30-34. The possible significance of this ommission is discussed in the text accompanying notes 81-85 *infra*.

of jurors divine the contemporary standards of the relevant community? In a village of 100, a town of 10,000, a city of 100,000, a metropolis of 1,000,000, or a state of 10,000,000?

Regardless of the number of witnesses presented by either side, those witnesses can only provide reliable testimony concerning their personal "contemporary standards," and perhaps less reliably, the "contemporary standards" of their friends and associates. The prosecution and defense might provide both expert and lay evidence of equal weight on contemporary community standards, but the evidence, equal in weight, will be hopelessly contradictory. Other evidence may be equally unsatisfactory for illuminating contemporary community standards of "prurient appeal," "patent offensiveness," and "serious value." Even the fact that a specific book, film, or magazine has been a bestseller or broken records, been awarded prizes or nominated, or been the subject of favorable and serious critical review, none is necessarily conclusive on "contemporary standards," for the total audience may represent but a fraction of the population of the "relevant community." The "average person-contemporary community standard" test for the definition of obscenity requires an essentially subjective judgment by the trier of fact. True, a conscientious juror heeding a court's instructions should attempt somehow to judge the material as if the juror were an average person applying contemporary community standards, but it seems this element of the definition of obscenity really invites the trier of fact, jurors or judge, to apply their own standards. A jury, almost by definition, is composed of average persons, if there is such a creature in the law, and as an average person, each juror's subjective appraisal of contemporary standards is probably as valid as any other. If an appropriate number of jurors agree on their appraisal of "contemporary standards," then the material will be condemned or exonerated.

The crux of the problem, of course, is that there is no average person and there is no single contemporary community standard. Contemporary community standards are the individual standards of its inhabitants, and unless there exists a homogeneous community, "contemporary community standards" is in substance a phrase without meaning, deceptive and misleading, for the very diversity that typifies American society destroys the premise that a single or governing contemporary community standard exists. Considered as a definitional element of the constitutional test for obscenity, the words "average person-contemporary community standards" are words of art, whether the relevant community is national, state, or local. Of course words of art, though facially misleading, are not per se objectionable if all concerned appreciate what the words signify. If this critical analysis of the "average person-contemporary

community standards" definitional element of obscenity is accepted, that it means nothing more than inviting the trier of fact to apply his or her own standards, this scarcely requires an additional conclusion that the definitional element should be eliminated from the test for obscenity.

Although obscenity is not protected by the Constitution, this rule of law is not self-executing. A decision is required to separate the obscene from the non-obscene, and in the United States that decision is made at least initially by the trier of fact. The *Miller* majority's three-element test of obscenity compels a subjective decisional process by the trier of fact; "prurient interest, patent offensiveness, and serious value" are all subjective elements which the *Miller* Court has carefully blended into the constitutional definition of sex material not protected by the first amendment. It is now pointless, if not tedious, to assert that obscenity cannot be defined by anyone or by any court or by any legislature in a manner satisfying due process or the first amendment. The *Miller* majority was forcefully apprised of this position by the dissenting opinion of Mr. Justice Brennan.[57] Although Justice Brennan's argument might influence legislators, it did not persuade the *Miller* majority. Like it or not, the constitutional definition of obscenity does embody subjective questions which must be decided by the trier of fact. *Miller* holds that the trier of fact need not be instructed to make these subjective judgments by reference to imaginary, vague and formless national community standards. But it is submitted that divining contemporary community standards of a state or particular city is a similarly unrewarding exercise if it is supposed they are less abstract, vague and imaginary than "national standards." State or local community standards may *seem* more manageable, but in truth they are not, if consensus or certainty on a single standard for the relevant community, nation, state, county, or town is sought.

Considering the new definition of obscenity and the contemporaneous rejection of the "national community standards" test, has not the Court in *Miller* ruled that the boundaries of the first amendment shall be defined by local attitudes? Since the Court held the first amendment binding on the states through the fourteenth amendment, no decision has intimated that first amendment questions arising in the states under the fourteenth amendment would or should be decided by lesser or different standards than the prevailing federal standards announced by the Supreme Court. Of course important constitutional questions decided by the Supreme Court

57. 413 U.S. at 47, referring to Justice Brennan's dissenting opinion in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-93 (1973).

may often depend upon facts decided locally, but the law of the Constitution, as announced by the Court, is merely applied to the facts and will be applied to the same or similar facts wherever they might arise in the future.

In *Miller*, however, the definition of obscenity retains the "contemporary community standards" element but holds that the relevant community is not the nation but some lesser community. This formulation suggests that in state obscenity litigation, which remains subject to the first amendment, the facts are the law and the law is the facts. Have not the facts and the law of obscenity become synonymous and interchangeable? Certainly one extension of *Miller* is that obscenity is decided by answers to certain subjective questions, and when the trier of fact decides these facts, by less than national standards, the facts are the law and no federal first amendment question remains or may be asserted, except perhaps that the trier of fact failed to receive or answer the proper subjective queries. If this analysis is correct, then *Miller* is a remarkable decision. New York, Iowa, Oregon, and all other states enjoy (or suffer, as the case may be) the benefits of the same first amendment, yet *Miller* holds that exceptions to the protection of that constitutional provision may be determined by less than national standards.

Although deciding questions of constitutional magnitude by reference to less than a national standard seems a novel, if not startling interpretation of the first amendment, an argument that the Court's deference to less than national standards in obscenity litigation is itself unconstitutional can scarcely be maintained. The Supreme Court interprets the Constitution, and when a majority decides that the definition of material not protected by the first amendment may embody subjective personal judgments resolved by reference to less than a national community standard, as it did in *Miller*, the decision could not be unconstitutional. Novelty alone does not make a first amendment decision incorrect, but disagreement with the Court's interpretation of the Constitution is certainly legitimate. At the very least, it is submitted that the resolution of first amendment questions by reference to state or local standards should not be extended beyond the subject of obscenity. Additionally, the Court's rejection of national community standards for deciding questions of obscenity gives cause for disagreement.

In *Miller*, the majority equates the finding of facts in an obscenity proceeding with other situations where facts are decided by reference to local standards,[58] but no authority is cited for the

58. 413 U.S. at 30.

proposition that important questions of constitutional law may be decided locally by applying local or state standards. Each obscenity case *does* involve a constitutional question: Is the challenged material protected by the first amendment? Why should an American citizen who happens to live in Maine or Iowa have his individual and personal first amendment rights under the national constitution determined by the imaginary contemporary standards of his neighbors in Maine or Iowa? This result is justified in part by the majority's abhorrence of "strangling diversity by imposed uniformity."[59] As an abstract proposition, diversity is a desirable feature of American society, but should concerns for local or state diversity determine the protection accorded each citizen of the United States by the first amendment? Considering the favored position accorded to freedom of expression by many past decisions of the Court, national uniformity in the interpretation of first amendment rights is considerably more important than bending the Constitution to accommodate local attitudes and judgments on the prurient interest, patent offensiveness, and serious value of material concerned with sex. First amendment rights are individual rights and should be enjoyed to their full extent by each citizen wherever he resides, undiminished by the variables of local diversity and determined by a reliable national standard. And the only body capable of providing a reliable national standard for judging obscenity and simultaneously marking out, case by case, the boundaries of the first amendment is the United States Supreme Court.[60]

Rejection of national community standards as the required constitutional guide for the trier of fact in obscenity proceedings suggests that the majority in *Miller* may be seeking to define more precisely the Court's role in reviewing state obscenity cases by circumscribing or denying its own authority to pass independent judgment on the nature of material found obscene in the states. To be sure, the majority in *Miller* does not expressly declare what its future role shall be in obscenity cases tried in conformance with the *Miller* definition of obscene material, and a footnote warns that assumptions on this subject are "pure speculation."[61] Although

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59. *Id.* at 33.

60. The *Miller* majority does observe in a footnote that the use of so-called "national community standards" might operate to proscribe material which would be otherwise acceptable locally, but obscene under national standards. Hence, the "potential for suppression seems at least as great in application of a single nationwide standard as in allowing distribution in accordance with local tastes . . ." 413 U.S. at 32 n.13. Perhaps the Court's observation is not without foundation, but practical considerations suggest that what is theoretically possible is unlikely to occur. Prosecutors may not prosecute in areas where standards are more "permissive" than imaginary national standards, nor may local juries convict. In any event, the first amendment should accord identical protection for expression anywhere in the United States, so exceptions to that protection should be determined nationally as well. Deference to "local tastes" under the first amendment diffuses responsibility, especially the ultimate constitutional responsibility of the Supreme Court to delineate the boundaries of the first amendment for all citizens of the United States. Fin-

the precise rols of the Court in reviewing obscenity cases remains unclear, rejection of so-called national community standards for deciding the issue of obscenity may nevertheless provide some indirect illumination on this issue.

Earlier in this paper it is asserted that deciding the question of obscenity at trial with the aid of instructions to apply an "average person-contemporary community standards" test is not much of a test at all, regardless of whether the relevant community is local, state, or national. But even if conscientious triers of fact are unable to determine with any degree of certainty the contemporary standards of the relevant community, whatever that community might be, and are finally compelled to apply individual and subjective standards, the "average person-contemporary community standards" test at least requires that triers of fact *attempt* to decide the issue by standards other than their own. Of course the test also permits the adversary parties to present evidence, probably contradictory, on community standards. *Miller* plainly discloses that the issue of obscenity is considered primarily a question of fact during the trial stage,[62] but *Miller* also discloses that each obscenity case reviewed by the Supreme Court presents "tough individual problems of constitutional judgment."[63] How may rejection of "national community standards" in deciding questions of obscenity affect the scope of the Court's "tough constitutional judgments" in future obscenity cases? And what are the possible first amendment consequences, immediate and remote, of the Court's rejection of national community standards? Until the Court decides *Jenkins v. Georgia*[64] (and the fate of the film *Carnal Knowledge*), which may convert speculation to relative certainty, the preceding questions raised by *Miller* are, as the Court declared, pure speculation.

Speculation on the *Miller* rejection of national community standards suggests these possible consequences. After *Miller*, all state trial courts may exclude, on grounds of irrelevancy, any evidence offered by either side concerning the prurient interest and patent offensiveness of the challenged material when the evidence pertains to the community standards of any place other than the jurisdiction in which the trial court sits. For example, were the film *Carnal*

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ally, the first amendment does not *require* that any state enact obscenity laws; a state *may* enact obscenity laws. A definition of obscenity formulated by the Supreme Court as an exception to the first amendment could logically include national community standards as the constitutionally permissible minimum. Any locality or state might then accord *greater* protection for expression than the minimum established by imaginary national standards. While localities or state could never provide less protection for expression than national standards allow, they may always provide more.

61. 413 U.S. at 29 n.11.
62. *Id.* at 24.
63. *Id.* at 29.
64. 94 S.Ct. 719 (1973), noting probable jurisdiction.
65. No language in *Miller* precludes this possibility.

Knowledge to be prosecuted in Albany, Georgia, after *Miller*, any evidence based on community standards in states other than Georgia or cities outside Georgia is wholly irrelevant to the issues of prurient interest and patent offensiveness of challenged material in Georgia. Indeed, after *Miller*, a trial court in Albany, Georgia, might declare that Albany alone is the relevant community and exclude evidence of the community standards of Atlanta or the whole of Georgia.[65] A particularly zealous trial court might even seek to exclude evidence offered on Georgia community standards if offered by a non-resident of Georgia.[66] Because a companion case to *Miller*, *Paris Theatre*,[67] holds that the prosecution need not present *any* evidence on the issue of obscenity if the challenged material is presented in court for examination and judgment by the trier of fact,[68] obviously the evidentiary consequences of rejecting national community standards will fall most heavily upon the defense when a strict interpretation of *Miller* is adopted by state trial courts.

Specific rejection of national community standards by *Miller* may also liberate prosecutors in the states from whatever restraints the Court's prior uncertainty on the relevant community standards imposed. A Georgia prosecutor, for example, may now challenge material that before *Miller* was judged by the prosecutor more likely than not protected by the first amendment under national community standards. The same material judged solely by the prosecutor's sense of state or local community standards may now seem more likely than not obscene. Some prosecutors, after *Miller*, may find themselves compelled, for political reasons, among others, to challenge material that before *Miller* they ignored or tolerated by explaining that the Supreme Court prevented judging objectionable material by state or local community standards. The lay public may read the Court's rejection of national community standards and solicitude for state and local diversity as an indirect invitation to embark on crusades to vindicate *their* community standards by suppressing smut.

If the public and prosecutors react to *Miller* in this fashion, creators, distributors, exhibitors, and vendors of controversial sex material may be unwilling to enter certain state or local markets for fear of offending what are imagined to be the prevailing community standards and thus encountering expensive litigation and the risk of criminal punishment. Films and publications, and perhaps even theatrical productions, concerned in large part with sex in one form or another may then be disseminated to the public only

66. Under certain circumstances, the non-resident might be held incompetent to testify on these relevant but local standards.
67. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
68. *Id.* at 56.

in those states or communities whose standards are judged able to withstand or tolerate the material. From what has been said and written concerning the film *Deep Throat,*[69] those responsible for its production and distribution probably anticipated obscenity prosecutions anywhere in the nation the film was shown, regardless of decisions of the Supreme Court. Conversely, it seems unlikely that the producers and distributors of the films *Last Tango in Paris*[70] and *Carnal Knowledge*[71] anticipated obscenity prosecutions of those films before *Miller* was decided. Presumably sex material will continue to be disseminated in "safe" but restricted market areas within the United States if it is economically feasible to do so, but will not be introduced into doubtful market areas within the United States where civil or criminal litigation is likely. Conceding that many citizens of Albany, Georgia,[72] and Lubbock, Texas,[73] might be relieved to know that *Carnal Knowledge* and *Last Tango in Paris* would not be exhibited in their cities, it nevertheless seems tragic under the first amendment that other citizens in those cities would be denied the opportunity, if they choose, to see and judge these films.

If controversial sex material cannot survive commercially with either restricted markets or the threat of excessive litigation under state or local community standards, then controversial sex material will no longer be produced for general public acceptance. If this occurs, each citizen of the United States is denied access to a class of material which for each citizen may have value, as that individual citizen defines or perceives his or her values. It is not now possible to know the effects of *Miller* on the diversity of material each citizen may see and read. Depending on where in the United States the citizen resides, films like *Last Tango in Paris* and *Carnal Knowledge,* and even *Deep Throat,* may or may not be exhibited to the public. Or perhaps no citizen anywhere in the United States will be able to see films like these because the cumulative legal and commercial burdens and uncertain state and local community standards outweigh the incentives for producing controverisal sex material. As films go, *The Sound of Music* is very nice, but surely the first amendment should not be construed to deny adult citizens of any state or all adult citizens in the United States the opportunity

69. *E.g.*, People v. Mature Enterprises, Inc., 41 U.S.L.W. 2498 (Crim. Ct. New York City, Mar. 1, 1973).

70. The film *Last Tango in Paris* was prosecuted as obscene in Lubbock, Texas, in November, 1973, and the jury acquitted the exhibitor of showing an obscene film. State v. Boyd, No. 56982 (County Court-at-Law, Lubbock County, Texas, Nov. 12, 1973).

71. The film *Carnal Knowledge* was found obscene in Albany, Georgia, and the exhibitor's obscenity conviction was upheld by the Supreme Court of Georgia. Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973), *prob. juris. noted,* 94 S.Ct. 719 (1973).

72. See note 71 *supra.*

73. See note 70 *supra.*

to see the films *Last Tango in Paris* and *Carnal Knowledge*, and perhaps even the film *Deep Throat*. Of course *Miller* does confine the constitutional definition of obscenity to material concerned with sex, so producers and distributors of controversial sex material may divert their creative efforts toward new levels of violence and gore.

Whether the preceding "speculations" are never, only partially, or fully realized depends in large measure upon the future role of the Supreme Court in reviewing obscenity cases, like *Jenkins v. Georgia*,[74] in which the Court may elaborate upon its ambiguous language in *Miller*. If obscenity cases reviewed by the Supreme Court present "tough individual problems of constitutional judgment," as *Miller* declares they do, will not these problems of constitutional judgment be much tougher or impossible in state obscenity cases after *Miller*? The value of deciding the question of obscenity by reference to any community standard is debatable, but the use of national community standards (society at large)[75] for deciding obscenity at least facilitated an independent constitutional judgment by the Justices of the Supreme Court, whether the question of obscenity in a case before the Court is characterized as one of constitutional judgment, constitutional fact, ultimate fact, or constitutional law.[76] The Justices are perceptive men capable of applying their subjective constitutional definition of obscenity to material found obscene in the state courts. Moreover, their judgment on largely imaginary national community standards is scarcely less valid than any other that might be made. Because they are the Justices of the Supreme Court charged with interpreting the Constitution, at least five can decide whether challenged material is obscene under the first amendment.

Outright rejection of the national community standards as the constitutional test for obscenity in state proceedings certainly creates serious barriers for the continued exercise of the Court's independent constitutional judgment on the obscene nature of material condemned in state courts. The Court's majority opinion in *Miller* invites state trial courts to exclude evidence pertaining to national community standards. When material is found obscene in state proceedings governed by state or local community standards, and that finding is sustained by the state appellate courts using state or local community standards, how may the Supreme Court explain a contrary finding under the Constitution when the Court's inter-

74. 94 S.Ct. 719 (1973), noting probable jurisdiction.

75. To Mr. Justice Brennan, "contemporary community standards" means the standards of society at large. Jacobellis v. Ohio, 378 U.S. 184, 192-93 (1964).

76. The Court has yet to fully characterize its role in reviewing obscenity decisions of lower courts.

pretation of the first amendment holds that state obscenity is essentially a question of fact governed by state or lesser community standards? Are the Justices competent to apply or even determine the contemporary community standards of Albany, Georgia, or for that matter, the community standards of the entire state of Georgia?

If the trier of fact was instructed to determine the question of obscenity by applying the *Miller* three-element definition, and the resulting judgment of obscenity has survived appellate review in the state courts, reversal by the Supreme Court is indefensible after *Miller*. *Miller* allows the states to apply state and possibly local community standards, but it seems unlikely that the Supreme Court would in a later case rule that the state courts, trial and appellate, did not understand their own community standards. If the Court did reverse a state judgment of obscenity, determined under proper *Miller* guidelines, by explaining that findings of obscenity present ultimate questions of constitutional law for the Supreme Court, the result after *Miller* is even more anomalous. Characterizing the question of obscenity as a question of constitutional law is not helpful because the Court's interpretation of the Constitution in *Miller* holds that this particular question of constitutional law is one that may be decided by state or local community standards, of which only the citizens and trial and appellate judges of each state have knowledge.[77]

Under this interpretation of *Miller*, the majority should not and could not reverse Billy Jenkins' obscenity conviction for exhibiting the film *Carnal Knowledge* in Albany, Georgia, if the trier of fact had been instructed to decide Billy's guilt or innocence by the using the *Miller* three--element definition of obscenity. In future obscenity cases, a record presented to the Supreme Court showing that the *Miller* instructions were given to the trier of fact will excuse the Court from viewing the challenged material and will preclude an independent constitutional judgement by the Court because *Miller* makes the final judgment of the state courts conclusive on the question of obscenity if the *Miller* guidelines were used.

To summarize the speculative effects of *Miller* on the Court's future role in reviewing state obscenity cases, it seems the Court has made its bed but does not want to lie in it.[78] Concededly, the majority's language in *Miller* is unclear, but rejection of national community standards appears to lead to these speculative results and to the substantial dilution of first amendment rights of individual citizens throughout the United States by the vagaries of imaginary state and local community standards.

77. It would be difficult for the Justices of the Supreme Court to assert that they have a better understanding of state standards than the citizens and judges of that state.
78. This judgment, phrased inelegantly, is premature, but it does seem unavoidable.

Perhaps the majority in *Miller* will escape these speculative consequences by declaring that only questions of prurient interest and patent offensiveness are to be decided by essentially unreviewable appraisals of state and local community standards, but that the third element of the *Miller* definition of obscenity, the "serious value" test, is either a question of constitutional judgment for the Court or is to be decided by national community standards. Although the Court indicates at one place in *Miller* that the "serious value" of the challenged material is a proper question for the trier of fact,[79] the majority strangely omits the issues of "serious value" from its later discussion rejecting national community standards for deciding the issues of prurient interest and patent offensiveness.[80] It is conceivable that the Court intends to reserve for its ultimate review and final "constitutional judgment" only the question of the "serious value" of challenged material, which is certainly a position consistent with the Court's *Roth* and *Miller* rulings that the first amendment protects only expression possessing value or importance. If the *Miller* majority decides in the future to reserve the question of "serious value" for its independent judgment, perhaps films like *Last Tango in Paris* and *Carnal Knowledge* will be found within the protection of the first amendment despite contrary judgments on their "serious value" by triers of fact applying state or local community standards, or by state trial and appellate judges applying even national standards of "serious value."

If this is the device chosen to avoid *Miller*, and is used in the future, perhaps in *Jenkins v. Georgia*,[81] the Court's decision in *Miller* means only that the Justices of the Supreme Court are better judges of "serious value" under the first amendment than other citizens.[82] Perhaps they are and perhaps they are not, but nothing changes the fact that judgments on the "serious value" of any form of expression remain personal and subjective. Once freedom to speak, to publish, to read, to view is limited to freedom to speak, to publish, to read, to view something of value, the freedom enjoyed depends on the subjective definition of value, a judgment made by others, be they jurors in Georgia, state appellate judges, or Justices of the United States Supreme Court.

IV. EPILOGUE

For the sake of Billy Jenkins, the people of Georgia, and the

79. Miller v. California, 413 U.S. 15, 24 (1973).
80. *Id.* at 30-34.
81. 94 S.Ct. 719 (1973), noting probable jurisdiction.
82. That the Justices are more sensitive to the societal values protected by the first amendment is readily conceded, but their superior capacity to judge the serious value of a particular book or film is surely less apparent.

first amendment, the Supreme Court should reverse Billy's obscenity conviction for showing the film *Carnal Knowledge*. The Court should reverse for the sole reason that *Carnal Knowledge* is not and could not be found beyond the protection of the first amendment anywhere in the United States. The Court should decide this question by exercising its constitutional judgment, avoiding any device to defer or obscure this plain judgment. This conclusion is subjective, but obscenity, by constitutional definition, is subjective. Those who believe that American *adults* should have "complete freedom to produce, deal in, possess and consume"[83] all communicative materials under the first amendment should seek restoration of this freedom in the legislatures.

The Supreme Court dislikes the commercial exploitation of obscene material, but the exercise of first amendment rights is frequently undertaken for profit. Mere commercialization of first amendment rights is not per se objectionable, so the objection is directed toward the obscene material. Why is obscene material objectionable? Because to some or many obscenity is disgusting. Criticism of *Roth*, and now *Miller*, for denying first amendment protection to obscene material might be taken as a position favoring the obscene, but the principle of freedom of expression must protect the bad if it is to protect the good. Absent substantial evidence that exposure to obscene material causes crimes,[85] suppression of obscene material for adults is justified by societal interests in protecting and perpetuating prevailing standards of morality and decency.[86] But if the prevailing morality is worthy of perpetuation, will it not survive what are imagined to be the corrosive effects of free access for adults to sex material now deemed obscene?

83. Mr. Justice Brennan dissenting in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973), and quoting from the Court's opinion in United States v. Reidel, 402 U.S. 351, 357 (1971).

84. Miller v. California, 413 U.S. 15, 25, 34, 36 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57, 63, 68 (1973).

85. See note 47 *supra; cf.* Stanley v. Georgia, 394 U.S. 557 (1969).

86. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).