UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 56 | Number 1 Article 6

1-1-1978

Reflections on Contemporary Community Standards: The Perpetuation of an Irrelevant Concept in the Law of Obscenity

Frederick F. Schauer

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Frederick F. Schauer, *Reflections on Contemporary Community Standards: The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. Rev. 1 (1978).
Available at: http://scholarship.law.unc.edu/nclr/vol56/iss1/6

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

REFLECTIONS ON "CONTEMPORARY COMMUNITY STANDARDS": THE PERPETUATION OF AN IRRELEVANT CONCEPT IN THE LAW OF OBSCENITY

FREDERICK F. SCHAUER†

Several recent obscenity prosecutions involving multi-state shipment by national distributors of sexually explicit magazines and motion pictures[1] have brought heightened attention to the "contemporary community standards" aspect of *Miller v. California*.[2] *Miller* rejected the concept of national community standards in favor of the more localized determination of the relevant community. This rejection resulted in a large amount of commentary and controversy about, and popular and judicial misconception of, the concept of local community standards.[3] The debate over whether national or local standards should be employed continues undiminished.

---

† Visiting Scholar, Member of the Faculty of Law and Senior Member of Wolfson College, Cambridge University; Associate Professor of Law (on leave), West Virginia University College of Law; A.B., 1967, M.B.A., 1968, Dartmouth College; J.D., 1972, Harvard Law School.

1. None of these cases has generated a reported opinion. For factual accounts and commentary, see, *e.g.*, *A Bad Case Makes Worse Law*, 109 TIME, Feb. 21, 1977, at 51; *A Dirty Book Goes to Jail*, 89 NEWSWEEK, Feb. 21, 1977, at 34; *First Amendment Hustle; Trial of Hustler Magazine Publishers*, 224 NATION, Jan. 29, 1977, at 99; Kretchmer, *Justice for 'Hustler,'* 89 NEWSWEEK, Feb. 28, 1977, at 13; Lapham, *Confusion Worse Confounded*, 254 HARPERS, Apr. 1977, at 12; Marro, *Prurient Interest in Memphis*, 174 NEW REPUBLIC, Apr. 24, 1976, at 6; Morgan, *United States versus the Princes of Porn*, N.Y. Times, Mar. 6, 1977, § 6, pt. 1 (Magazine), at 16; Neville, *Has the First Amendment Met its Match?*, *id.* at 18; Rembar, *Obscenity—Forget It*, 239 ATLANTIC, May 1977, at 37.

2. 413 U.S. 15 (1973). This article does not attempt to deal with all of the issues raised by the *Miller* opinion. For more comprehensive treatments, see, *e.g.*, F. SCHAUER, THE LAW OF OBSCENITY 44-48, 96-113, 116-35, 139-53, 164-68, 192-200 (1976); Gellhorn, *Dirty Books, Disgusting Pictures, and Dreadful Laws*, 8 GA. L. REV. 291 (1974); Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906 (1974); Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533 (1975); Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223, 234-41 (1973); *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 160-75 (1973); Comment, *In Quest of a "Decent Society": Obscenity and the Burger Court*, 49 WASH. L. REV. 89 (1973); Recent Decisions, *Constitutional Law—Obscenity*, 40 BROOKLYN L. REV. 442 (1973); Note, *Obscenity '73: Something Old, A Little Bit New, Quite a Bit Borrowed, But Nothing Blue*, 33 MD. L. REV. 421 (1973); Note, *Miller v. California: A Cold Shower for the First Amendment*, 48 ST. JOHN'S L. REV. 568 (1974); Recent Developments, *Constitutional Law—Obscenity—United States Supreme Court Adopts a New Test*, 18 ST. LOUIS U.L.J. 297 (1973).

3. On the community standards aspect of *Miller*, see F. SCHAUER, *supra* note 2, at 116-35; Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to*

Implicit in these continuing controversies is the belief that the basic notion of "contemporary community standards" is a viable component of the test for obscenity. This acquiescence in the relevance of "contemporary community standards" is by no means surprising. Few would deny that obscenity judgments are both variable and more subjective than are judgments applying most other legal concepts.[4] Thus, it appears natural to incorporate recognition of this variability into a test for obscenity.

But the subjectivity and variability of determinations of obscenity do not require the inclusion of the concept of contemporary community standards as part of a constitutional obscenity test. Deeper analysis shows that the "contemporary community standards" component of the constitutional test does not flow from the recognition that other eras and other cultures would suppress as obscene that which our culture now believes to be clearly within the protection of the first amendment. And although determinations of obscenity should not vary according to the personal tastes or whims of individual jurors (or judges),[5] the need for some general standard is no more persuasive as an argument for the use of contemporary community standards. It is entirely possible to prevent subjective and repressive obscenity judgments without encumbering the constitutional test with a factor that is both conceptually unsound and practically unworkable.

This article will argue that the concept of contemporary community standards appears in the *Miller* test for obscenity as a result of flawed analysis of the earlier cases and a misunderstanding of the original purpose of the community standards idea. The concept not only lacks historical and precedential justification, but it also fails to relate to the theoretical foundations of the Supreme Court's current definitional approach to obscenity. Finally, the concept serves no independent purpose in the application of the *Miller* test, merely duplicating other factors while making the *Miller* test

---

Prior Restraints, Community Standards, and Judgment Preclusion, 7 SETON HALL L. REV. 543 (1976); Schauer, *Obscenity and the Conflict of Laws*, 77 W. VA. L. REV. 377 (1975); Shugrue, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974); Comment, *Pornography, The Local Option*, 26 BAYLOR L. REV. 97 (1974); Comment, *Obscenity: Determined By Whose Standards?*, 26 U. FLA. L. REV. 324 (1974). *See also* Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838 (1975).

4. Hence the Supreme Court's particular concern with vagueness in the area of obscenity. Miller v. California, 413 U.S. at 24, 27-28. *See generally* F. SCHAUER, *supra* note 2, at 154-68. There is, however, some recent indication that the Court's concern for precisely drawn statutes is waning. *See* Ward v. Illinois, 97 S. Ct. 2085 (1977).

5. Smith v. California, 361 U.S. 147, 172 n.3 (1959) (Harlan, J., concurring in part and dissenting in part); United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

substantially more confused. The result is an anachronistic and useless element in modern obscenity law serving only to bewilder and not to clarify.

I. An Historical Account of the Conception and Perpetuation of "Contemporary Community Standards"

This article will accept, for analytical purposes, the doctrine that obscenity is a class of utterance that is not speech and thus is not entitled to first amendment protection.[6] This doctrine is labelled the definitional theory of obscenity. While persuasive arguments have attacked the conceptual justification for this method of dealing with obscenity,[7] the theory behind

6. The Court first explicitly treated certain utterances as non-speech in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("fighting words"), and thereafter applied the concept in Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (commercial speech), Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libel), and Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity). The exceptions for libel and commercial speech have since been undercut by New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech). The exception for fighting words has been vitiated by recent cases that have narrowed the definition so as to allow their regulation even if they are classed as speech. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972). Thus, obscenity remains the last bastion of a strict definitional approach to first amendment protection.

7. The most significant analysis of the definitional approach and the one in which the phrase "two-level theory" of speech was introduced is Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1. The late Professor Kalven has been credited with having "destroyed the intellectual foundations of the two-level theory." Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 30 (1975).

Kalven's masterful piece can, however, be read somewhat differently. It is important to bear in mind that it was written in 1960. Professor Kalven was most concerned that the two-level theory might be a vehicle for the suppression of serious literature, Kalven, *supra* at 12, and suggested that a limitation to hard-core pornography would be the only application of the two-level theory that could save it. *Id.* at 13. This has, of course, happened. Miller v. California, 413 U.S. at 29. Professor Kalven was also concerned that the two-level theory might be used as a general vehicle for first amendment adjudication. Kalven, *supra* at 17. This has not happened; if anything, the trend is in the opposite direction. *See* note 6 *supra*. There may very well be a principled distinction between obscenity methodology and all other areas of first amendment analysis, however.

More basically, Professor Kalven's analysis assumes that obscenity is in fact speech, Kalven, *supra* at 3-4, which is assuming away the issue. While the two-level theory of *speech* is conceptually weak, a two-level theory of utterances, only one level of which is speech, is discussed by the Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), and Roth v. United States, 354 U.S. 476, 482-85 (1957). Of course there can be no federal judicial deference to a state definition of non-speech; the determination of whether an utterance is speech or non-speech is a constitutional question.

The real issue is whether all words are in fact speech. A reason all words should fall into this category is the key to an attack on the two-level theory, but this reason is not to be found in Professor Kalven's article or elsewhere. The Court's theoretical foundation—that some word use is not speech—does not seem completely frivolous. *See* Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967). There is, after all, "nothing intrinsically sacred about wagging the tongue or wielding a pen." Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968).

The definitional approach to obscenity may be intellectually justifiable, but such an analysis is beyond the scope of this article. It can also be defended on strictly pragmatic

the Supreme Court opinion in *Paris Adult Theatre I v. Slaton*[8] once again demonstrates that this approach continues to justify criminal prosecutions for dealing in obscene materials. A properly precise analysis of the contemporary community standards concept must then assume this definitional, or "two-level," theory of constitutional protection in which the use of "contemporary community standards" finds expression.

If, following the theory, one acknowledges that obscene utterances are outside the scope of the first amendment, it becomes necessary to have a carefully drawn definition of obscenity. Non-obscene utterances are speech and generally remain protected by the Constitution.[9] The determination of whether material is obscene, therefore, will be dispositive of the issue of regulation. The definition of obscenity thus becomes a question of constitutional law. To say otherwise would render the notion of first amendment protection a nullity.[10]

Further, the purpose of the definition of obscenity can now be seen most clearly—it performs the essential *separating* function of allocating one type of utterance (the obscene) to relatively free legislative control and another (speech) to constitutional protection from control. It is this need to separate speech from non-speech that entitles and requires the Supreme Court to define obscenity. While this definitional process may take place conceptually, pragmatically or somewhere in between, the purpose will remain the same. Thus, there is no need to evaluate whether the present obscenity test is a correct exercise in first amendment analysis. Any

---

grounds, however. *See* Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275 (1977).

8. 413 U.S. 49 (1973). *Paris* dramatically points up the effects of the definitional approach by discussing at length the types of justifications for regulation that are sufficient if that which is being regulated is not speech. *Id.* at 60-64.

9. Some strong justifications will support the regulation of speech, but the determination of the necessary level of justification is an issue that embraces the entire range of first amendment theory. One of the best contemporary analyses is Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

10. On the definitional approach to the first amendment, *see generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Black, *Mr. Justice Black, the Supreme Court and the Bill of Rights*, 222 HARPERS, Feb. 1961, at 63, *reprinted in* C. BLACK, THE OCCASIONS OF JUSTICE 89 (1963); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 915-18 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Kauper, Book Review, 58 MICH. L. REV. 619 (1960) (reviewing A. MEIKLEJOHN, POLITICAL FREEDOM (1960)).

Of course it is clear that there is some balancing of interests in the definitional process. That does not mean, however, that this balancing may not be more or less particularistic. *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963). The real objection to the Supreme Court's treatment of obscenity may not be that it is a definitional approach, but that it is an overly conceptualistic definitional approach, focusing only on the abstract meaning of the word "speech."

categorization involves a definition, and any definition thus used must inevitably perform this separating function.[11]

That the purpose of the constitutional obscenity test was primarily to separate protected from unprotected utterances was apparent in *Roth v. United States*[12] and remains equally apparent today. The *Roth* majority used the following language:

> The door barring federal and state intrusions into [the area of speech] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.[13]

This is not appreciably different in focus from the language used sixteen years later in *Miller*: "But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."[14] Therefore, it is appropriate to evaluate the concept of contemporary community standards by focusing on the separating function that provides the *raison d'être* of a constitutional definition of obscenity.

Roth marked the Supreme Court's first major encounter with the definition of obscenity and thus with the idea of contemporary community standards. It is therefore instructive to look first at the use of the contemporary community standards concept in *Roth* itself. In that case, the Court defined obscenity while rejecting the English definition established in *Regina v. Hicklin*.[15] "Some American courts adopted [the *Hicklin*] standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[16]

The Court did not purport to create a new test for obscenity, but rather to restate the definition prevailing in the state and federal courts of the United States. A reading of the cases cited by the Court shows that it went

---

11. *See* notes 9 & 10 *supra*.
12. 354 U.S. 476 (1957).
13. *Id*. at 488.
14. 413 U.S. at 29.
15. L.R. 3 Q.B. 360 (1868). "[T]he test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id*. at 371. The law of obscenity in England is still based on the "deprave and corrupt" formula. *See generally* Davidow & O'Boyle, *Obscenity Laws in England and the United States: A Comparative Analysis*, 56 NEB. L. REV. 249 (1977).
16. 354 U.S. at 489 (footnotes omitted).

beyond mere transcription of the existing law.[17] The test stated by Mr. Justice Brennan for the *Roth* majority cannot be found in any of the cited lower court opinions. Instead, it seems to have been gleaned from incomplete and often inconsistent principles contained in those cases.[18] The greater significance of the reference to the earlier cases is its indication that it is in those cases, if anywhere, that one will find the origin of the community standards concept. In fact, each of the cited cases that discusses the notion of community norms[19] (the actual words "contemporary community standards" appear to have been first used by the *Roth* court[20]), directly or indirectly relies on *United States v. Kennerley*.[21] In that case, Learned Hand, then a federal district judge, protested against the *Hicklin* test that he was reluctantly compelled to follow.

> I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time, as conveyed by the words, "obscene, lewd, or lascivious." I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature . . . .
>
> . . . 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?* If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. *To put thought*

17. A thorough analysis of the relationship between the cases cited by the *Roth* court and the *Roth* test itself is contained in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 50-53 (1960).

18. *See id.* at 50-55.

19. Parmelee v. United States, 113 F.2d 729, 731 (D.C. Cir. 1940); United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936) (L. Hand, J.); Commonwealth v. Isenstadt, 318 Mass. 543, 551, 62 N.E.2d 840, 845 (1945); State v. Becker, 364 Mo. 1079, 1085, 272 S.W.2d 283, 286 (1954); Adams Theatre Co. v. Keenan, 12 N.J. 267, 271-72, 96 A.2d 519, 521 (1953); Commonwealth v. Gordon, 66 Pa. D. & C. 101, 136 (Philadelphia County Ct. 1949), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. Ct. 120, 70 A.2d 389 (1950) (per curiam).

20. Smith v. United States, 97 S. Ct. 1756, 1763 n.6 (1977).

21. 209 F. 119 (S.D.N.Y. 1913) (L. Hand, J.).

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.[22]

What then were the meaning and purpose of community standards when the concept was suggested by Learned Hand? It seems clear that Hand, although not writing specifically in the context of constitutional considerations of obscenity regulation,[23] was aware of the dangers that the *Hicklin* test could present to the free expression of ideas. In response, therefore, he suggested that it was inappropriate to suppress anything inoffensive to current community standards in the name of controlling obscenity.[24] In other words, Hand appreciated the separating function of a definition of obscenity and suggested the community standards test as a means of performing that function. It was to define and exclude a subset of constitutionally protected materials that could not be suppressed from the entire set of communications that would "deprave and corrupt" under the *Hicklin* definition. The *Hicklin* test defined what was "bad" and should be controlled; the community standards test was to define (and thus exclude from regulation) what was "good." The two factors properly operated at cross purposes,[25] together ensuring that only material that was corrupting *and* worthless according to current standards would be subject to suppression.

In addition, the community standards concept appears to have been a reaction against the *Hicklin* "most susceptible person" test. Hand seems to have been saying that the focus of the obscenity determination should not be on the weakest people in the community, but on the community at large, here and now. It is this view that is embodied in the origin of the community standards idea.

This historical excursus would be largely irrelevant but for the fact that the majority opinion in *Roth* used the phrase "contemporary community standards" in substantially the same way that it was intended and used by Judge Hand in *Kennerley*. The *Roth* test as originally stated—"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"[26]—is noteworthy for the simplicity that is hidden in its juxtaposition of adjectives and qualifiers. Beneath it all there is one and only one test—does the

22. *Id.* at 120-21 (emphasis added).

23. Pre-*Roth* cases tended to talk about what is or is not obscene in terms of whether the applicable statutes proscribing obscenity had been violated. *See, e.g.*, Walker v. Popenoe, 149 F.2d 511 (D.C. Cir. 1945); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

24. 209 F. at 121.

25. This is analogous to current English law applying *Hicklin* for there is a defense of "public good" even if the material is such as to "deprave and corrupt." *See* Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66, § 4.—(1); Davidow & O'Boyle, *supra* note 15, at 260.

26. 354 U.S. at 489.

material appeal to the prurient interest? Everything else, including contemporary community standards, is there only to define how prurient interest will be determined. The Court intended to emphasize two significant departures from the *Hicklin* test—first, that the work must be evaluated in its entirety and not by reference to isolated passages and, second, that the work must be evaluated in light of its effect on the average reader, and not on the most susceptible person "into whose hands a publication of this sort may fall."[27] That these were the only changes in the definition of obscenity intended by the Court is the generally accepted reading of *Roth*.[28]

What, then, of the separating function of the definition? What is to prevent the suppression of works of serious literary merit that also appeal to the prurient interest of the average person? The answer is the same one that occurred to Judge Hand. The check is the requirement that the average person apply the present standards of the community as a whole. The materials must offend contemporary notions of decency in the community if they are to be suppressed. In other words, the contemporary community standards factor in *Roth* merges into and affects the average person's view of the material to exclude from the "obscene" category those materials that the community recognizes as valuable or worthwhile. The use of "contemporary community standards" was intended, then, to emphasize the average person concept, not to set up a separate test. The factor also highlights that it is not the jurors' own personal reactions that are relevant, but some external standard.[29] What matters is not how the juror feels, but how the juror thinks the average person feels.

It seems unlikely that the Court was thinking of either local *or* national standards when it used the phrase "contemporary community standards." Historically the use of the concept had been in reference to the temporal, not the geographical, aspects of the words.[30] It was a warning to judges and jurors to apply the standards of today's society,[31] not the standards of the mid-Victorian era.[32] Thus, the use of "contemporary community standards" by the *Roth* court was intended to emphasize a contrast to the *Hicklin* test.[33] It was a check on the prurient interest concept designed to

---

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

28. Lockhart & McClure, *supra* note 17, at 53; *see* Memoirs v. Massachusetts, 383 U.S. 413, 441-42 (1966) (Clark, J., dissenting).

29. On the average person concept and the idea of an external standard, see F. SCHAUER, *supra* note 2, at 72-76.

30. Hence Judge Hand's reference to "mid-Victorian morals." 209 F. at 120.

31. Jacobellis v. Ohio, 378 U.S. 184, 193 (1964) (plurality opinion by Brennan, J.). For a discussion of the appropriateness of Mr. Justice Brennan's inference that this view suggests a national community, see text accompanying note 49 *infra*.

32. 209 F. at 120.

33. *See* note 15 *supra*.

ensure that nothing of value to today's society was denied first amendment protection in the name of obscenity regulation.

This view of the purpose of the contemporary community standards language is confirmed by the judgment in *Alberts v. California*,[34] the companion case to *Roth*. There, the Court affirmed a conviction although the test applied by the lower court made no mention whatsoever of communities or standards.[35] Since the trial court had incorporated the need to have the average person judge the material as a whole, the conviction was held constitutionally sufficient.[36] This demonstrates the use of the *Roth* test to perform a separating function. As long as the proceedings below were generally designed to perform this function and thereby to prevent serious literature from being designated obscene, the Constitution and the first amendment were satisfied.

A form of contemporary community standards first became a necessary component of the constitutional test for obscenity as a result of Mr. Justice Harlan's opinion in *Manual Enterprises v. Day*.[37] There he determined that prurient interest alone could not adequately identify the legally obscene. Therefore an additional test, that of patent offensiveness, was necessary to place on the protected side of the obscenity line that speech which was worth protecting.

> To consider that the "obscenity" exception in "the area of constitutionally protected speech or press," . . . does not require any determination as to the patent offensiveness *vel non* of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. For one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works whose "dominant theme" might, not beyond reason, be claimed to appeal to the "prurient interest" of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of § 1461 would doubtless encounter constitutional barriers.[38]

34. 354 U.S. 476 (1957). *Alberts* and *Roth* were decided in one opinion.

35. The actual standard is not contained in the lower court opinion. People v. Alberts, 138 Cal. App. 2d 909, 292 P.2d 90 (1955). But neither the record nor the then controlling case of People v. Wepplo, 78 Cal. App. 2d 959, 178 P.2d 853 (1947), refers to community standards as part of a definition of obscenity. *See* Lockhart & McClure, *supra* note 17, at 24 n.105, 54-55.

36. 354 U.S. at 489-90.

37. 370 U.S. 478 (1962). Mr. Justice Harlan's opinion was joined only by Mr. Justice Stewart.

38. *Id.* at 487 (citations omitted). Although Mr. Justice Harlan suggested that patent offensiveness was thus a constitutional requirement, he introduced the concept as a matter of statutory interpretation. *Id.* at 482-87.

Thus, Mr. Justice Harlan conceived of the patent offensiveness test as performing the same basic "checking" function as Hand's community standards. This part of the test definitively separates what is protected by the first amendment from what is not speech by "putting back" within first amendment protection true speech that was pulled out by the prurient interest test. The prurient interest test alone provides an overinclusive definition of obscenity; it is narrowed to proper scope by the additional requirement that the material also be "patently offensive."

It is obvious, however, that material cannot be patently offensive in the abstract. The very nature of the word "offensive" demands that something or someone be offended. A frame of reference is needed, and the standards of the contemporary community provide such a frame for the patent offensiveness concept. As a result, the second part of the two part obscenity test required that the material be patently offensive to contemporary community standards.[39]

To Mr. Justice Harlan, patent offensiveness and contemporary community standards were inseparable. In *Manual Enterprises* he stated, "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.' "[40] Mr. Justice Harlan advocated a national standard for application of the federal statute at issue in *Manual Enterprises*;[41] more importantly, he used contemporary community standards not as an independent factor, but as the measure by which patent offensiveness was to be judged. The patent offensiveness of the material, as judged by contemporary community standards, was to serve as the primary tool for ensuring that accepted literature, art, science or political commentary was not suppressed as obscenity.[42] This role of contemporary community standards is underscored by the fact that Harlan saw the determination as ultimately a matter of constitutional law for final resolution by the Supreme Court.[43]

Jacobellis v. Ohio,[44] decided two years later, marked the Court's first acknowledgment of the "utterly without redeeming social importance"

---

39. *See* text accompanying note 38 *supra*.
40. 370 U.S. at 482.
41. *Id.* at 488.
42. *Id.* at 487.
43. *Id.* at 488-90. The necessity of the "independent examination" referred to in *Manual Enterprises* was explained in detail in *Roth*. 354 U.S. at 496-98 (Harlan, J., concurring in part and dissenting in part). On the obligation of independent review, *see also* Miller v. California, 413 U.S. at 29-30; Jacobellis v. Ohio, 378 U.S. 184, 188 (1964) (plurality opinion by Brennan, J.).
44. 378 U.S. 184 (1964) (the Court's plurality opinion was written by Mr. Justice Brennan and joined by Mr. Justice Goldberg).

test.[45] The incorporation of this factor led directly to the current confusion regarding the patent offensiveness concept and the idea of contemporary community standards. In his plurality opinion, Mr. Justice Brennan reaffirmed the prurient interest test of *Roth*[46] and acknowledged the need for the patent offensiveness test set forth in *Manual Enterprises*.[47] He also added the observation that, if obscenity is utterly without redeeming social value (*Roth*), then only expressions that are determined to be socially worthless are in fact obscene.[48] While one might differ over wording, the concept is sound. Since the two-level theory is based on obscenity not being speech at all, then utterances having the characteristics of speech (value) must not be obscene. And if social value is a defining characteristic of speech, only that which is without that value can be removed from the speech category and treated as obscene. The entire *Roth* analysis hinges on this point. Thus, whatever tests are employed must guarantee that socially valuable communications are not denominated obscene. This point is recognized in *Roth* by the rejection of the *Hicklin* test and in *Manual Enterprises* by the use of the patent offensiveness test. Both of these cases tried to choose a definition that would separate valuable communications and keep them within first amendment protection. The "utterly without redeeming social importance" test and the "patently offensive to contemporary community standards" test perform one and the same function—that of ensuring that the prurient interest test does not inadvertently catch some speech.

Mr. Justice Brennan correctly noted in *Jacobellis* that Judge Hand referred in *Kennerley* not to state and local communities, "but rather to 'the community' in the sense of society at large; . . . the public, or people in general."[49] But although "community" refers to society at large, it need not be defined as a national community. What actually follows from the use of this word, and what Hand seems to have intended, is that "community" should not be defined at all, except perhaps as the generally accepted values of modern society. In other words, that which is offensive to contemporary community standards is the same as that which is utterly without redeeming social importance. The concepts are substantially identical and were designed to serve the same purpose. The real error of Mr. Justice Brennan's opinion in *Jacobellis* is in assuming that two wholly different concepts were involved. Although wording may suggest some differences in breadth of

45. *Id.* at 191.
46. *Id.; see* text accompanying note 26 *supra*.
47. 378 U.S. at 191-92.
48. *Id.* at 191.
49. *Id.* at 193.

coverage, they are both directed to the same end and are different statements of the same idea.

From here the development of the community standards concept follows a natural course. The three separate standards to which Mr. Justice Brennan referred in *Jacobellis* "coalesced" into a three part test in *Memoirs v. Massachusetts*.[50]

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[51]

The *Memoirs* test did properly take community standards *out* of (a). The "contemporary community standards" language was a part of the prurient interest test in *Roth* because the combined standard was the entirety of the *Roth* test. Thus, in *Roth*, one test served the purposes of (a) and (b). With (a), (b) and (c) as separate parts of the test, there remained no need to refer to prurient interest in the context of community standards, and the *Memoirs* court properly did not do so.

But *Memoirs* did perpetuate the error of *Jacobellis* by not recognizing that (b) and (c) were directed at the same end, the withdrawal of communications of social value from the overinclusive reach of the prurient interest test. The concept of patent offensiveness in (b), incorporating contemporary community standards, served no purpose not served by part (c) of the *Memoirs* test.

This duplication continued in *Miller*,[52] despite that opinion's criticism of the wording of the *Memoirs* test.[53] By preserving the three part structure

---

50. 383 U.S. 413 (1966). Although Mr. Justice Brennan's opinion was joined only by Chief Justice Warren and Mr. Justice Fortas, the concurrences of Justices Black, Stewart and Douglas gave the *Memoirs* opinion the effect of a majority opinion. *See* F. SCHAUER, *supra* note 2, at 138-39. Although the Court suggested in *Miller* that the *Memoirs* opinion was weak precedent ("that concept has never commanded the adherence of more than three Justices at one time," 413 U.S. at 25), it has since acknowledged that the *Memoirs* opinion of Mr. Justice Brennan had the effect of a majority holding. Marks v. United States, 430 U.S. 188, 193-94 (1977).

51. 383 U.S. at 418.

52. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24.

53. *Id.* at 22 (noting that the "*utterly* without redeeming social value" standard created "a burden virtually impossible to discharge under our criminal standards of proof" (emphasis in original)).

of the *Memoirs* formula, *Miller* also preserves the separateness of the "patently offensive" and "serious literary, artistic, political, or scientific value" factors, thereby sustaining the error established in *Jacobellis*. The *Miller* Court's desire to repudiate the precedential effect of *Memoirs* and demonstrate the fundamental continuity of approach from *Roth* to *Miller*,[54] however, led to the verbatim use of the *Roth* prurient interest formulation including the reference to contemporary community standards.[55] This served only to compound the error, since the community standards part of the *Roth* definition was intended to embody the values now separately expressed in the patent offensiveness and social value standards. The Court has since made clear in *Smith v. United States*[56] that community standards apply to the second, or patent offensiveness, part as well as the prurient interest part of the *Miller* test.[57]

To recapitulate, the concept of contemporary community standards was conceived by Judge Hand and used by the *Roth* court to ensure that protected speech, defined loosely as the transmission of ideas, did not fall on the wrong side of the line dividing obscenity from protected expression. This function has since been taken over by the patent offensiveness standard of Mr. Justice Harlan and then in turn by "utterly without redeeming social value" and "without serious literary, artistic, political, or scientific value." Thus, the concept of contemporary community standards has been replaced in function by other tests and exists in the current test only as excess baggage, carried on solely by an uncritical lifting of language from one case to another without regard for the purpose the language was intended to serve.

II. THE ROLE OF "CONTEMPORARY COMMUNITY STANDARDS" IN A DEFINITIONAL APPROACH TO OBSCENITY

Showing that history does not support the present use of the contemporary community standards concept does not by itself warrant discarding the concept as irrelevant. It does, however, present a clean slate on which to examine the purpose of the obscenity definition's various parts and the role that the "contemporary community standards" concept plays in each part. This section of the article, then, will evaluate the role of each portion of the

54. *Id.* at 21-23. *See also* Paris Adult Theatre I v. Slaton, 413 U.S. at 54.

55. *See* note 52 and accompanying text *supra*.

56. 97 S. Ct. 1756 (1977).

57. *Id.* at 1763. This application had previously been implied in Jenkins v. Georgia, 418 U.S. 153, 159 (1974), and Hamling v. United States, 418 U.S. 87, 104-06 (1974). A close reading of *Miller* yields the same conclusion. *See* F. SCHAUER, *supra* note 2, at 122-23. *See also* United States v. B & H Dist. Corp., 375 F. Supp. 136, 141 (W.D. Wis. 1974); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 149, 121 N.W.2d 545, 553 (1963).

obscenity test and consider what, if anything, the contemporary community standards concept can add to that portion. It is especially important here for the reader to bear in mind the essential *separating* function that the definition of obscenity performs in the two-level theory.[58]

A. *Appeal to the Prurient Interest*

The concept of appeal to the prurient interest provides the strongest conceptual justification for the two-level theory. If there are utterances that are not speech (and their existence is by no means as absurd a proposition as is often suggested[59]) then, according to the rationale of *Chaplinsky v. New Hampshire,*[60] what prevents them from being speech is that they do not deal in ideas.[61] But what is an idea? Certainly any conception of ideas in terms of beliefs[62] would exclude most entertainment, art, science and the like from the protection of the first amendment—clearly an unacceptable proposition. Rather, the notion of an idea suggests something that engenders a response in the *mind* of the reader or hearer as a result of at least some thinking, reason or reflection and that operates primarily as a cognitive stimulus.[63] Assuming this, the prurient interest requirement must be designed to exclude those utterances from the first amendment that are not speech because they do not deal in ideas and do not appeal to one's cognitive processes.

It is futile to try to ascertain the legal concept of prurient interest by resort to dictionary definitions of the words "prurient" or "pruriency."[64]

---

58. *See* text accompanying notes 9-14 *supra*.

59. The very nature of the special concern for content regulation suggests that it is not the words themselves but what the words express or do that is protected by the first amendment. Thus, it follows that there is some property that words must have in order for them to be speech. From a purely philosophical approach, it is thus possible to imagine words without that property, and therefore for there to be words that are not speech. *Cf.* Finnis, *supra* note 7 (suggesting that speech is that which appeals to the "reason"). On content discrimination and regulation, *see generally* Ely, *supra* note 9; Karst, *supra* note 7; Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29 (1973); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

60. 315 U.S. 568 (1942).

61. *Id.* at 572. There is some question whether the *Chaplinsky* rationale was properly applied in *Chaplinsky* itself.

62. *See, e.g.*, 5 OXFORD ENGLISH DICTIONARY I-15 (1933) (defining an idea as "a conception of what is desirable or ought to be").

63. "By *ideas* I mean the faint images of [sensations, passions and emotions] in thinking and reasoning; such as, for instance, are all the perceptions excited by the present discourse, excepting only, those which arise from the sight and touch, and excepting the immediate pleasure or uneasiness it may occasion." D. HUME, A TREATISE OF HUMAN NATURE 1 (1st ed. L. Shelby-Bigge 1888, reprint 1960). Hume's basic distinction was between *impressions* and *ideas*, but he recognized that the line between them could often blur. *Id.* at 1-2. *See also* 1 J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, ch. I, § 8, at 47 (4th ed. 1700, reprint P. Nidditch 1975) (referring to ideas in terms of thinking and understanding). Locke also uses the word "idea" in a somewhat broader sense to include perception. 2 *id.* ch. VIII, § 8, at 134.

64. *See* F. SCHAUER, *supra* note 2, at 98-99.

Some of these definitions tell us why a society might want to regulate obscene publications,[65] but that is not an issue under a definitional approach. The dictionary definitions do not tell us why materials appealing to the prurient interest are not speech, and this is the question that must be answered if the *Roth* analysis is followed. In the context of a definitional theory of obscenity and speech, the concept of prurient interest seems to imply some immediate, non-cognitive, non-reasoning stimulation.[66] Most often, it seems, this stimulus is plainly physical, or something close to it (no one who writes about obscenity law will admit to knowing exactly what the stimulus is). It may also be what Mr. Justice Harlan referred to as "psychic stimulation."[67]

The significance of the immediate non-cognitive stimulation is such that it is then relatively easy to class such utterances as conduct rather than speech.[68] In other words, this conception of prurient interest requires that obscenity, by definition, be "mainly conduct and little speech."[69] Seen in this light, obscenity, defined so as to equate it with hard-core pornography,

65. *See* the collected definitions in Roth, 354 U.S. at 487 n.20. Some of the definitions there presented show remarkably little similarity. In particular, that which excites lustful thoughts has a very different connotation from that which is shameful or morbid. For a philosophical analysis that is "taken in" by the Court's reference to morbid and shameful, see Crawford, *Can Disputes Over Censorship be Resolved?*, 78 ETHICS 93, 104 (1968). For discussions of pornography in which aesthetic philosophers and others focus on the prurient interest idea, see P. MICHELSON, THE AESTHETICS OF PORNOGRAPHY (1971); M. PECKHAM, ART AND PORNOGRAPHY (1969); PERSPECTIVES ON PORNOGRAPHY (D. Hughes ed. 1970). *See also* D.H. LAWRENCE, PORNOGRAPHY AND OBSCENITY (1929); D.H. LAWRENCE, SEX, LITERATURE, AND CENSORSHIP (1953).

66. This has been called an appeal to passion as opposed to an appeal to reason. Finnis, *supra* note 7, at 227-30.

67. Harlan was making the point that this does not occur when one sees a jacket with the words "FUCK THE DRAFT" on it. Cohen v. California, 403 U.S. 15 (1971). "It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* at 20. Professor Ely's characterization is too good not to be repeated. "[A]nyone who finds Cohen's jacket 'obscene' or erotic had better have his valves checked." Ely, *supra* note 9, at 1493.

68. The chief proponent of this distinction would put obscenity in the speech category, however. Emerson, *Toward a General Theory of the First Amendment*, *supra* note 10, at 937-39. While Professor Emerson's expression/action distinction does not seem to serve as an effective doctrinal tool for free speech adjudication in general, it does add some support to the *Chaplinsky-Roth* thesis by acknowledging that some words may not be speech. But in many constitutional contexts the distinction is conclusory and merely provides doctrinal labels for what has been decided on other, unexpressed grounds to be worthy or unworthy of first amendment protection. Professor Emerson's placing of obscenity on the expression side does not seem supported by the distinction itself. For a philosophical elaboration of the Emerson thesis, see Fuchs, *Further Steps Toward a General Theory of Freedom of Expression*, 18 WM. & MARY L. REV. 347 (1976).

69. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting). It is important to bear in mind the distinction between speech *as* action (shouting "Fire!" in a crowded theater and perhaps hard-core pornography and purely private libel) and speech *with* action (picketing, sound trucks, some forms of symoblic speech). One of the problems with the expression/action dichotomy is that it does not adequately explore or accommodate this distinction.

can be viewed primarily as a physical experience, albeit with some aspects of a type of mental activity. This does not seem wholly unlike what presumably occurs to the patron of a massage parlor, and a first amendment challenge to massage parlor regulation would properly be deemed frivolous.[70] If this analogy to the massage parlor is apt, then the only distinction is whether the effect is produced by words or pictures on the one hand or direct physical stimulus on the other; this distinction appears somewhat trivial.[71] This illustration highlights the proper conception of appeal to the prurient interest, which envisions an immediate non-cognitive response approaching actual physical stimulation. If this is the case, the distinction between obscenity (not speech) and all other uses of language and pictures (speech) does not seem at all ridiculous.

A defense of the two-level theory as applied to hard-core pornography is best left for another time. For present purposes it is sufficient to say that if prurient interest is conceived as implying physical or quasi-physical stimulation, then a finding of appeal to the prurient interest is primarily an evaluation that is either intuitive ("I know it when I see it"[72]), or behavioral. The concept of contemporary community standards does not seem particularly applicable in either case. Neither an intuitive evaluation nor a psychological or physiological response is likely to vary appreciably from place to place. More importantly, the concept of appeal to the prurient interest does not necessarily demand a geographic reference point, as does the notion of patent offensiveness. Determinations of prurient interest are primarily questions of fact for the jury.[73] Even recognizing, however, that juries in different places may see things differently, it does not follow that contemporary community standards must become part of this aspect of the obscenity definition, any more than they are part of any other factual determination with constitutional implications. The observation in *Miller* that standards differ from place to place[74] proves too much, since there is no reason to believe that the same things could not be said about "clear and present

70. Most challenges to massage parlor regulation have been on vagueness or equal protection grounds. *See, e.g.*, Colorado Springs Amusements, Ltd. v. Rizzo, 387 F. Supp. 690 (E.D. Pa. 1974), *rev'd*, 524 F.2d 571 (3d Cir. 1975); Lancaster v. Municipal Ct., 6 Cal. 3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972).

71. This is an area of rather difficult line drawing, as the cases involving live performances and topless and bottomless bars demonstrate. A line drawn at the point at which the performer physically touches the viewer is easily applied but theoretically weak. *See generally* F. SCHAUER, *supra* note 2, at 200-05; Comment, *The First Amendment Onstage*, 53 B.U.L. REV. 1121 (1973). More attention to the actual and intended effect on the viewer and less attention to the amount of clothing worn by the performers would clarify most cases. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

72. Jacobellis v. Ohio, 378 U.S. at 197 (Stewart, J., concurring).

73. Jenkins v. Georgia, 418 U.S. 153, 159 (1974); Miller v. California, 413 U.S. at 30.

74. 413 U.S. at 30-34.

danger"[75] or "reckless disregard for the truth"[76] or any other constitutional test to be applied by a jury. Others have noted that the community standards idea does not appear suited to determinations of appeal to the prurient interest,[77] and the *Miller* court's view to the contrary seems, as discussed previously,[78] to be based solely on the fact that the original *Roth* test attempted to integrate too many different factors into one phrase.

B. Patent Offensiveness

The concept of patent offensiveness presents difficulties of a different order. These words necessitate a reference point. Although community standards were not mentioned in *Miller* in regard to this part of the test, the Court has now properly recognized the relationship of the community standards concept to the determination of patent offensiveness.[79] As Mr. Justice Harlan suggested in *Manual Enterprises*, community standards and patent offensiveness are inseparable.[80] But a closer look at the concept of patent offensiveness itself is required because, as previously stated, its original purpose has been supplanted by the test of "serious literary, artistic, political, or scientific value." Putting history aside, the basic question is simple: Is the requirement that material be patently offensive to the community necessary or helpful to a constitutional obscenity test? A negative answer seems compelled.

First, the offensiveness of language has never been thought to be relevant to whether speech is constitutionally protected.[81] The very fact of regulation generally indicates that someone is offended by the words spoken, and one of the foundations of the first amendment seems to be the principle that society cannot regulate all use of language that its members find objectionable.[82] In fact, many forms of protected speech are probably considerably more offensive to the majority of the community than hardcore pornography.[83]

The exclusion of the patent offensiveness concept, in the same way that offense to the community is excluded from all other determinations of the

---

75. Schenck v. United States, 249 U.S. 47, 52 (1919).
76. New York Times Co. v. Sullivan, 376 U.S. 254, 280-81 (1964).
77. *See* McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 149, 121 N.W.2d 545, 553 (1963).
78. *See* text accompanying notes 22-57 *supra*.
79. Smith v. United States, 97 S. Ct. at 1763; Jenkins v. Georgia, 418 U.S. 153, 159 (1974).
80. *See* text accompanying note 40 *supra*.
81. *See* Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969). In fact, offensiveness alone clearly does not justify singling out sexually explicit material for special regulation. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).
82. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).
83. For example, showing contempt for the flag. *See* Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969).

scope of the first amendment, does not make any substantive difference in the application of the definitional theory of obscenity regulation. If certain words or pictures do not convey any ideas or thoughts, lack any serious literary, artistic, political or scientific value, and are intended to and do in fact have a predominantly physical and immediate effect (prurient appeal), then under any rational interpretation of the two-level theory they are not speech, regardless of whether anyone is offended or not. Conversely, if ideas are conveyed, the material has some value or the words or pictures have a cognitive effect, then again, by any reasonable construction of the two-level theory, no amount of offense to any community can take them out of the category of speech. This latter concept is acknowledged by the Court insofar as an affirmative finding on each aspect of the *Miller* test is a necessary condition for a finding of obscenity.[84] Thus, since patent offensiveness is neither a necessary nor a sufficient condition for a determination of obscenity, it is not logically part of the definition of obscenity. It is mere surplusage.

A second and related point is that patent offensiveness implies community rejection. But community acceptance or rejection seems to be a peculiarly legislative matter, especially unsuited as part of a definition of speech. What makes something speech under the *Chaplinsky-Roth* hypothesis is the fact that ideas are conveyed, that thoughts are involved, that a response requires some use of the mental faculties.[85] None of these factors varies in any way according to the degree of community acceptance or rejection.

What may vary is the community's willingness to allow the dissemination of prurient material. If a community wishes to accept what is solely prurient and wholly valueless, however, the most apt recourse would seem to be decriminalization, not a definition of obscenity that sweeps into the speech category everything the community will tolerate.[86] The result of such a definition is that the first amendment casts in constitutional terms the majority's legislative preferences. This is an inappropriate use of constitutional power. If a community operating under this definition wishes to reject what is not prurient or does contain some value, then the first amendment will properly stop them.

---

84. 413 U.S. at 24.

85. *See* text accompanying notes 60-61 *supra*.

86. In *Miller*, Chief Justice Burger suggests that national standards may have a "chilling effect" since they might result in materials being "unavailable where they are acceptable." 413 U.S. at 32 n.13. This could not occur if community enforcement practices or legislation accurately reflected community standards, which will most often be the case. *See* Schauer, *Obscenity and the Conflict of Laws*, *supra* note 3, at 380 n.18.

Imagine, for example, a motion picture that appeals to the prurient interest and lacks serious literary, artistic, political or scientific value, but does not offend the relevant community. Can the community suppress the movie? The answer under the present obscenity test is no. The movie is protected as speech because the community accepts it. Why, then, would they want to suppress it? If one assumes that community legislation reflects community standards, this is an exercise in circularity. But, as *Smith v. United States*[87] points out, this assumption is not always correct.[88] When legislation fails to reflect community standards, then, the patent offensiveness test will use the first amendment to invalidate that legislation. This has nothing to do with what is or is not speech, unless speech is defined as that which the community accepts.[89]

What is wrong with saying that those materials that are not offensive are speech, because utterances that do not repulse the community are entitled to retain this protected status? In other words, should there not be a presumption (rebuttable under a definitional theory) that all utterances are speech? If so, the patent offensiveness concept is merely a device to make it more difficult to rebut this presumption and thereby to protect first amendment values. But those values are already protected by the requirement that material be without redeeming social value before it may be suppressed as obscene. The sole dimension added by the patent offensiveness test is the constitutional protection of socially valueless communications because a community wants them.

The concept of patent offensiveness, then, cannot sensibly be related to the determination of what is or is not speech. It can be related to the community's justification for regulation, but under a strict definitional theory of obscenity those justifications are not a matter of concern. The concept of patent offensiveness is thus fundamentally at odds with the theoretical underpinnings of the two-level theory.

There are real dangers inherent in too broad a definition of obscenity. The patent offensiveness test has the pragmatic goal of ensuring that real speech is not mistakenly defined as obscenity.[90] This is an admirable goal,

---

87. 97 S. Ct. 1756 (1977).

88. *Id.* at 1766.

89. The converse situation occurs when the community is offended but no legislative action is taken. This is surely not a constitutional matter. There may be many reasons the community chooses not to regulate offensive matter, and since patent offensiveness without legislation cannot result in prosecution, this is not a practical problem.

90. In other words, the erroneous designation of obscenity as speech is a less serious error than the erroneous designation of speech as obscenity. A substantial hurdle to a finding of obscenity must be erected to make certain that the latter error will be much less frequent than the former. This is analogous to the purpose of the "beyond a reasonable doubt" standard in criminal law. This process of identifying and attempting to minimize the more serious error

but are the words "patently offensive" suited to perform this function? It seems likely that reference to community standards would work the other way and condemn that which ought to be protected. If the goal is to strengthen the test, the addition of inappropriate concepts does not seem the way to do it.

Moreover, a definition of obscenity, under present theory, is designed to separate speech from valueless words. It is primarily and ultimately a judgment of constitutional fact, as to which the views of the community are remarkably inappropriate. This becomes apparent in *Jenkins v. Georgia*.[91] In that case the Supreme Court, speaking through Mr. Justice Rehnquist, did not reverse the Supreme Court of Georgia because *Carnal Knowledge* had serious literary, artistic, political or scientific value, although this would have been the easiest course.[92] The decision was reversed because the movie was not patently offensive.[93] How did Mr. Justice Rehnquist know that? He did not purport to know the community standards of Georgia. Rather, he said that certain things are simply not patently offensive, referring primarily to the "hard-core" concept and the examples given in *Miller*.[94] This determination is actually and ultimately a finding that the movie was a mild (non-prurient) and critically respected[95] effort (of serious literary value).

Would it not have been more straightforward to reverse on these grounds rather than to say that the Georgians did not know the standards of their own community? The very fact that community standards are subject to judicial review undermines their claim to theoretical legitimacy. This, of course, is no less true of national community standards. The Court in *Miller* was clearly right in saying that national standards are "hypothetical and unascertainable."[96] The Court's error was in assuming that the only logical alternative was the local community standard. This alternative was more realistic, but it was also logically inconsistent with the very purpose of a constitutional definition of obscenity. Unfortunately, the Court did not

---

(erroneous conviction in the criminal process) was most clearly explained by Mr. Justice Harlan in *In re* Winship, 397 U.S. 358, 369-74 (1970) (Harlan, J., concurring). *See generally* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

Since it is likely that determinations of obscenity are more prone to error than the factual determinations in most criminal trials, this analysis would seem especially applicable to obscenity law. For an application of this method of analysis to the first amendment (where erroneous infringement of expression and belief can be equated with erroneous deprivations of personal liberty), see Speiser v. Randall, 357 U.S. 513 (1958).

91. 418 U.S. 153 (1974).

92. This factor "is particularly amenable to appellate review." Smith v. United States, 97 S. Ct. at 1766.

93. 418 U.S. at 161.

94. *Id.* at 160-61.

95. *Id.* at 158.

96. 413 U.S. at 31.

realize that there was another alternative, that of discarding the geographical reference entirely.[97]

The patent offensiveness test thus has one of two possible effects. Either the determination whether material is "patently offensive to contemporary community standards" is an independent test, in which case it is fundamentally inconsistent with a definitional approach to obscenity, or it duplicates functionally, as it does historically,[98] the notion of "valuelessness." It is therefore appropriate to turn to the question whether the concept of contemporary community standards has any place in the last part of the *Miller* test, which requires that material defined as obscene lack "serious literary, artistic, political, or scientific value."[99]

C. Serious Literary, Artistic, Political or Scientific Value

As previously suggested,[100] this last part of the *Miller* test, the current version of the old "utterly without redeeming social value" test, most clearly embodies what Judge Hand contemplated when he first suggested that community standards had a place in the determination of obscenity. Obviously the concept of "value," like the concept of "offensiveness," must have some external referent. But the referent here is not necessarily geographical.

This part of the test carries the main weight of removing anything that looks like speech from the definition of obscenity. As such, it embodies the basic principles of the first amendment—protecting the transmission of thoughts, information and ideas. Clearly this factor cannot vary regionally, a point that the Supreme Court has in the past implicitly recognized[101] and that it has recently explicitly held.[102] But a national geographic standard seems no more realistic here than for any other part of the test.

This problem can be solved if courts do not assume that "contemporary community standards" refers to some specific geographic locality. The intention here is that the inherently subjective determination of value must be made in light of society's current standards of value,[103] just as determina-

97. Deemphasis of the geographic component of contemporary community standards has been previously suggested. Lockhart & McClure, *supra* note 17, at 112-14.

98. *See* text accompanying and following notes 44-48 *supra*.

99. 413 U.S. at 24.

100. *See* text following note 57 *supra*.

101. In *Miller*, the Court talked about local community standards only in reference to prurient interest and patent offensiveness. 413 U.S. at 30. The omission of the third part of the *Miller* test from the discussion of local standards suggested that local standards were to be applied only to the first two parts of the test.

102. Smith v. United States, 97 S. Ct. at 1764.

103. *See* text accompanying notes 30-33 *supra*.

tions of "value" in other areas of constitutional law and the first amendment are made without use of any geographic referent.[104] The reference to society in general is all that is implied and is important primarily to remind the jury that they are not to consider whether a particular reader or viewer would find value in the material or whether they, the jurors, would find it to have some personal value.[105] That is, it reminds the jury to apply an external standard. Geographic references of any kind are neither necessary nor tolerable. Further, the approval of instructions that incorporate no geographic boundaries into the reference to community standards[106] has stripped the idea of community standards of most of its geographic meaning. Without a specific geographic reference, there is even less conceptual or pragmatic purpose for using "contemporary community standards" than before.

Perhaps part of the problem is that, although the "serious literary, artistic, political, or scientific value" factor is clearly a matter of basic constitutional law, the Court has referred to the prurient interest and patently offensive characteristics as being primarily questions of fact.[107] The Court, however, must not lose sight of the distinction between factual findings as an element of the offense and those same factual findings as delineating the line between constitutional protection and non-protection.[108] While it is true that the people of Maine or Mississippi need not "accept public depiction of conduct found tolerable in Las Vegas, or New York City,"[109] it is not true that the people of Maine or Mississippi have a right to legislatively reject what is in fact speech merely because they do not accept it. Thus, by defining speech in terms of varying geographic standards, the Court allows the permissible limits of state power to vary according to the desires of that state—certainly a radical departure from accepted notions in constitutional law. Of course tastes and desires vary, but this variation is normally expressed in terms of varying legislative solutions, not in varying degrees of constitutional protection.

---

104. For example, the balancing process now mandated for commercial speech, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), recognizes that the value of speech is now relevant, but makes no reference to geographic variability.

105. Smith v. California, 361 U.S. 147, 172 n.3 (1959) (Harlan, J., concurring in part and dissenting in part).

106. Jenkins v. Georgia, 418 U.S. at 157; Hamling v. United States, 418 U.S. 87, 104-06 (1974).

107. Jenkins v. Georgia, 418 U.S. at 159; Miller v. California, 413 U.S. at 30.

108. *See generally* Note, *Supreme Court Review of Fact Finding by State Courts*, 34 N.Y.U.L. Rev. 1118 (1959).

109. Miller v. California, 413 U.S. at 32.

D. The Effect of the Current Use of Contemporary Community Standards

If one incorporates into the Court's present definition and use of the concept of contemporary community standards what can be gleaned from this analysis and from the cases subsequent to *Miller*, the following principle emerges: since that which is not obscene is speech and is thus protected by the first amendment, the Supreme Court must review state determinations of obscenity to ensure that they do not include speech. The Court will review closely and independently all state determinations that material is lacking in serious literary, artistic, political or scientific value. Due to the added discretion given localities by the contemporary community standards test, the Court will review somewhat less closely determinations of prurient interest and patent offensiveness. Seen in this way, the concept of community standards becomes almost as irrelevant in practice as it is in theory. It is, at bottom, a minor grant of discretion to lower courts in close cases.[110] Although the discretionary component is small, however, there seems no principled way to say that the Court should review less carefully the contents of *Hustler* than it reviewed the contents of Brandenburg's speech[111] or the words on Cohen's jacket.[112]

It should be apparent that the concept of national community standards is as amorphous and unprovable as the Court surmised in *Miller*. On the other hand, the concept of local community standards is fundamentally inconsistent with other areas of first amendment theory. Neither formulation serves any purpose under the definitional approach to obscenity. The Court was right in *Miller* in rejecting the national standards concept of *Jacobellis*. It was wrong in thinking it had to be replaced with something else.

III. *Smith v. United States*—The Supreme Court Moves Towards Rejection of Community Standards

The foregoing argument was made necessary by the recent attention paid to the effect of local community standards. There is reason to believe that the Court is inclined towards abandoning the geographic aspects of

110. This view seems to form part of the basis for the Supreme Court's decision in Smith v. United States, 97 S. Ct. 1756 (1977). *See* text accompanying notes 119-26 *infra*. In the sense that the community standards concept becomes a factor only in the close cases, it is analagous to the "pandering" concept of Ginzburg v. United States, 383 U.S. 463 (1966). Pandering remains a factor in determinations of obscenity. Splawn v. California, 97 S. Ct. 1987 (1977).

111. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

112. Cohen v. California, 403 U.S. 15 (1971). Conversely, there seems no principled way to say that a magazine may not be made illegal and suppressed by a local community (assuming the two-level theory) if its sole claim to constitutional protection is its acceptance by a national audience. If the magazine appeals to the prurient interest and if it is in fact without serious literary, artistic, political or scientific value, the demands of the Constitution, given the two-level theory, have been satisfied.

contemporary community standards. The main source of that belief is the recent opinion in *Smith v. United States*.[113]

The issue presented in *Smith* was narrow and uncluttered by legal or factual complications. Smith was prosecuted and convicted under 18 U.S.C. § 1461[114] in the United States District Court for the Southern District of Iowa for mailing several sexually explicit magazines from Des Moines, Iowa to Mount Ayr, Iowa and Guthrie, Iowa. It was not a crime in Iowa at any relevant time to send or distribute obscene materials to adults. The trial court admitted into evidence the absence of Iowa law proscribing this activity, but refused to give it conclusive effect. This action was affirmed by the Court of Appeals for the Eighth Circuit[115] and then by the Supreme Court, Mr. Justice Blackmun writing the opinion for the five member majority.[116]

Given the legal precedents, the issue was relatively easy. If the local community standards concept is part of the definition of obscenity, it is equally applicable in state and federal prosecutions.[117] Furthermore, if obscenity is not in fact speech, the scope of federal power under the Constitution undoubtedly involves intrastate transactions involving obscenity and employing the mails.[118]

The Court first acknowledged that neither literary, artistic, political nor scientific value should be governed by the local community standards idea.[119] This too, although expressed clearly for the first time in *Smith*, was deducible from the earlier cases.[120] The Court then turned to the real issue in the case:

> [W]hether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as c. 725 of the Iowa Code. Put another way, we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state

113. 97 S. Ct. 1756 (1977).

114. 18 U.S.C. § 1461 (1970 & Supp. V 1975).

115. 97 S. Ct. at 1762. The Eighth Circuit's per curiam opinion was not reported.

116. *Id.* at 1759. Mr. Justice Stevens, although clearly on record as permitting some controls on obscenity, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), dissented in *Smith*, repeating his objections to *criminal* prosecutions for obscenity. 97 S. Ct. at 1769 (Stevens, J., dissenting); *see* Marks v. United States, 430 U.S. 188 (1977) (Stevens, J., concurring in part and dissenting in part).

117. *See* Hamling v. United States, 418 U.S. 87, 105 (1974); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 129-30 (1973).

118. The predecessor of 18 U.S.C. § 1461 (1970 & Supp. V 1975) was first upheld against commerce clause attacks in *Ex parte* Jackson, 96 U.S. 727 (1877) (lotteries), and *In re* Rapier, 143 U.S. 110 (1892) (lotteries). A similar challenge was rejected in *Roth*. 354 U.S. at 492-94.

119. 97 S. Ct. at 1763.

120. F. SCHAUER, *supra* note 2, at 123-24.

> legislature (or a smaller legislative body) may declare what the community standards shall be, and, if such a declaration has been made, whether it is binding in a federal prosecution under § 1461.[121]

The answer was clear. To acknowledge that the community could by legislation impose standards on everyone would make community standards and community legislation congruent. As explained previously, this would expose the nakedness of the whole community standards idea. The only recourse was to acknowledge that standards and legislation are different, declining to give the Iowa statute binding effect in the federal prosecution. This is an uncomfortable analysis of the real meaning of local community standards, however, as the Court's attempts to explain this variance show.[122]

The significance of *Smith* is that the Court seems to be backing further away from the geographic conception of contemporary community standards. This retreat started with *Hamling v. United States*[123] and *Jenkins v. Georgia*,[124] in which the Court held that instructions as to a specific geographic community were unnecessary and that each juror's own notion of the relevant community was quite sufficient. In *Smith*, the Court referred to juror discretion in the determination of those elements of the obscenity test to which community standards apply.[125] This underscores the point that the real significance of contemporary community standards is the scope of review of factual determinations and the permissible tolerance of variation in those determinations.[126] The *Smith* Court also referred to the use of "contemporary community standards" in *Roth*, pointing out that the concept serves primarily to ensure that the jury does not rely on an "atypical subset" of the community.[127] As support for this interpretation of the meaning of "contemporary community standards," the Court quoted Learned Hand in *Kennerley* for the original meaning of the idea.[128] The *Smith* opinion, then, shows a recognition that the reference is to "society at large" without any geographic conception. In other words, the key term is not "community" but "contemporary." If the Court follows the path set in *Smith* it may, and should, drop both the geographic construction of contem-

121. 97 S. Ct. at 1764.
122. *See id.* at 1764-65.
123. 418 U.S. 87, 104-06 (1974).
124. 418 U.S. at 157.
125. 97 S. Ct. at 1766.
126. *See* text accompanying notes 110-12 *supra*.
127. "[T]he Court has never varied from the *Roth* position that the community as a whole should be the judge of obscenity, and not a small, atypical subset of the community." 97 S. Ct. at 1763 n.6.
128. *Id.* at 1763 n.7.

porary community standards and the patent offensiveness test that is its natural corollary.

IV. Contemporary Community Standards and the State Interest in Obscenity Regulation

Thus far this article has urged the rejection of the twin anomalies of obscenity law, the patent offensiveness concept and contemporary community standards. This rejection should take place on the ground that these elements are fundamentally inconsistent with the definitional theory of obscenity regulation to which the Court continues to subscribe. In reality, the patent offensiveness idea is itself a rejection of the theory because it is, more than a definition, a *reason* for governmental control. If obscenity is not speech, such reasons are superfluous to the constitutional question. Therefore, the inclusion of this factor in the test exposes a possible weakness of the two-level theory by requiring a higher justification for the regulation of this type of non-speech than is necessary for other types of non-speech. The community must be offended before regulation is permitted.

If the definitional approach is abandoned, the contemporary community standards idea might be appropriate under an approach to obscenity that treated it as a class of speech and then required some degree of state justification for its regulation. That the Court may be heading away from the strict definitional approach and towards an evaluation of reasons is not inconceivable. In *Young v. American Mini Theatres, Inc.*,[129] the Court looked to the state's *reasons* for the regulation at issue and may have started a turn from the definitional approach and toward evaluation of the state's reasons in all obscenity cases.

If the Court should broaden the general approach of *Young* to all obscenity questions, the result would probably still be a categorizing, definitional approach. Any change from the present approach would in all likelihood be a form of definitional balancing in which the court evaluates the justifications for a particular type of regulation, such as licensing or distribution prohibitions for "consenting adults."

But this approach, while looking to the community's general interest in suppressing what offends it, will have little use for an evaluation of the

129. 427 U.S. 50 (1976). In *Young*, the Court permitted the regulation by zoning of adult theaters and adult bookstores, even though there was no requirement in the Detroit ordinance at issue that the materials available in adult establishments be legally obscene under the *Miller* definition. In allowing this type of regulation and in analyzing the reasons why it would be permitted, the Court seemed to approach a less definitional and more variable, or contextual, approach to obscenity. *See* Schauer, *supra* note 7.

offensiveness of each particular magazine or motion picture, or for a determination of whether a particular community is offended by a particular publication. While it is difficult to predict what, if anything, the Court will do, one can say with confidence that the concept of contemporary community standards will be no more relevant under an approach that treats obscenity as a class of speech than it is under the current approach, which treats obscenity as non-speech.

V. CONCLUSION

The concept of contemporary community standards exists in present day obscenity law only by historical accident. Its use in the *Miller* definition of obscenity cannot be traced to any prior, analogous use of the contemporary community standards formulation. Moreover, it is at once irrelevant to and fundamentally inconsistent with the definitional approach now used by the Court, and would be no more helpful under any other approach.

A rejection of the contemporary community standards concept and its partner in crime, patent offensiveness, would not decrease the protection that the first amendment now affords, nor would it change the treatment of obscenity in a way that would be unacceptable to the current Court. Rather, it would result in a two part test with an additional check. The two parts would be: First, the determination of appeal to the prurient interest that identifies the non-cognitive nature of the material; and second, the "serious value" test that ensures that those expressions worth protecting are in fact protected. Concentrated attention on these two factors should be coupled with the rigorous standard of review that the definition's separating function requires. This test should allow triers of fact to understand more easily what it is they are to do, enable courts to perceive more clearly their role in reviewing determinations of obscenity and generally add predictability and simplicity to obscenity law without decreasing the protection available to speech under the current test. The check would be the "hard core" concept of *Miller* and *Jenkins*, a concept that does not create an independent standard for determining what is obscene.[130] But if Mr. Justice Stewart's intuitive views about hard-core pornography are correct,[131] this check should ensure that the two primary tests are properly applied.

If the contemporary community standards factor is eliminated, the unpredictability of local standards and the concomitant problems raised in *Smith* and in cases in which federal conspiracy law is applied to a definition of the underlying crime that varies from community to community are

130. F. SCHAUER, *supra* note 2, at 109-13.
131. *Id.* at 113; *see* text accompanying note 72 *supra*.

removed. The need to evaluate the impossible that occurred under the national standards formulation would also disappear. Obscenity determinations would be narrowed to the determination of appeal to the prurient interest as a physiological and psychological factor and that of "serious literary, artistic, political, or scientific value."[132] These factors are not only more easily determinable than patent offensiveness and contemporary community standards, but they are more properly consistent with the definitional method of dealing with obscenity. Obscenity law is difficult and confused enough as it is without the burden of additional factors that unnecessarily complicate the problem.

---

132. This is not meant to approve the particular language used by the *Miller* court in expressing the general idea of value. While the concept of "social value" may in fact be too broad and amorphous, the qualification of "serious" in the *Miller* formulation may be underprotective of real speech, especially as applied by a jury.