bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.[1332] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[1333] By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[1334]

The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment, and the Court's idea of the content of "hard core" pornography was revealed in its examples: "(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."[1335] Subsequently, the Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[1336] The Court has also indi-

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[1332] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[1333] 413 U.S. at 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, id. at 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the state within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[1334] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

[1335] Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller's* language in Hamling v. United States, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[1336] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984).