“I know it when I see it.”
Justice Stewart, on how he might never intelligently describe obscenity.

_Jacobellis v. Ohio_
In *Jenkins v. Georgia*, Billy Jenkins, manager of a movie theater, was unanimously convicted by a district-court jury of violating a Georgia obscenity statute by distributing obscene material, namely, the popular movie, "Carnal Knowledge." This conviction was later defended by a split Georgia Supreme Court and then reversed by the U.S. Supreme Court. In reversing the ruling, the high court claimed that although juries could apply "contemporary community standards" in obscenity decisions, and "even though questions of appeal to the prurient interest or of patent offensiveness were essentially fact questions," juries did not have "unbridled discretion," and their decisions "did not preclude all further appellate review." This is important because although it meant the *Jenkins* case could be tried under the conservative Miller Test, which permitted juries to use local standards to decide obscenity, it also asserted that these jury decisions, which would normally be presented to an appellate court as fact, could actually be reevaluated by the appellate court. Finally, "based on the Supreme Court's viewing of the film, 'Carnal Knowledge' was not obscene but was protected by the First and Fourteenth Amendments." This majority opinion was backed by a description of why exactly the movie was not judged to be obscene, which I will discuss later.

Although I agree with the high court's decision in *Jenkins*, I find the majority opinion's reasoning to be flawed and contradictory. The high court has historically treated obscenity as a categorically unprotected form of speech (something like hate speech directed, as many controversial First Amendment scholars including Catherine MacKinnon would argue, against women”), meanwhile violating principles of free speech—namely causation/harm, emotion, precision and neutrality—which should be used to defend such a decision, without giving reasonable justification for abridging the First Amendment so alarmingly.” Yet when the *Jenkins* jury followed ambiguous high-court standards of judgment, particularly those set out in the Roth-Memoirs Test (later superseded by the more conservative Miller...
Test\textsuperscript{vii}, and the high court disagreed with the ruling, the majority justices transcended even the slight standards they created.\textsuperscript{viii} The court cannot have it both ways; it cannot restrict obscenity using its own rules, then reverse lower-court decisions when it does not agree with the legal outcome and implications of those rules.

Some background on where obscenity law stands constitutionally is in order. In \textit{Roth v. U.S.}, the Supreme Court ruled that obscene material was not protected by the First Amendment.\textsuperscript{ix} Obscenity is grouped with fighting words, libel and other unprotected speech, despite the fact that much obscene pornography depicts action that is not illegal.\textsuperscript{x} This decision was made\textsuperscript{xi} despite rules defined in \textit{Brandenburg v. Ohio} (and its more conservative predecessors), which essentially stated that speech (obscenity apparently excluded) “cannot be regulated because of the harm it produces unless it is shown that the speech is directed to produce harm that is both imminent and extremely likely to occur.”\textsuperscript{xii} Although some (including, again, MacKinnon) argue that a general and pervasive harm is done to women by the very existence of pornography, which is by nature subversive,\textsuperscript{xii} such a harm argument would not stand in court in any other form of hate speech. Under the causation principle, an author of a white-supremacist text could hardly be prosecuted for the killing of a black man, even if the killer read the text before the murder, unless the text condoned killing black people. It would be similarly difficult to demonstrate that harms from obscenity were imminent or likely to occur, based on a direct, causal link. In the \textit{Jenkins} case, the idea of causal harm was not even presented by the prosecuting state of Georgia. That’s because no tangible harm occurred to the community, aside from emotional offense, perhaps. But injuries to communal sensibilities are reactive, and such harms are difficult, if not impossible, to prove in court.

According to the emotion principle, speech cannot be stifled simply because it causes offense or goes beyond the bounds of civility. But the opposite of that principle seems to be the U.S. Supreme Court’s basis for its decisions about obscenity. In fact, the very language of the \textit{Miller Test} suggests a jury should deem as obscene sexual conduct which is
"patently offensive" and "appeal[s] to the prurient interest." The high court asks a jury to decide based on what offends its members which, unfortunately, is exactly what the Jenkins jury did. Albany, Ga., was a notoriously conservative town in 1972\textsuperscript{xiii}, and many citizens no doubt believed the film "Carnal Knowledge" to be offensive. The court itself allowed in the Jenkins decision that "community standards" specified in the Miller Test could mean any community the jury wanted it to.\textsuperscript{xiv} The assumption in the Miller Test was that no one knows a community better than those who live in it. In fact, three years before, in Cohen v. California, Justice Harlan said, "The constitutional right of free expression" is designed "to remove governmental restraints from the arena of public discussion, putting the decisions as to what views shall be voiced largely in the hands of each of us." Matters of taste and style, he said, are left up to the individual "largely because government officials cannot make principled distinctions in this area." Yet that is exactly what the Supreme Court did in Jenkins—make a principled decision—thus overriding an Albany jury, about what classifies as obscene in the Albany community.

And it's not as though the Albany jury made up qualifications by which to decide obscenity. In Jenkins, the high court ruled "even though the subject matter of the picture was, in a broad sense, sex, and there were scenes in which sexual conduct including 'ultimate sexual acts' was to be understood to be taking place, nevertheless the camera did not focus on the bodies of the actors at such times, and there was no exhibition whatever of the actors' genitals during such scenes." However, the only applicable guidelines for deciding what was obscene that the U.S. Supreme Court provided in Miller v. California were "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," which, in its majority opinion, the Supreme Court admitted were present in the film.\textsuperscript{xvi} So the jury's decision process actually passed the test, in a sense. But the Supreme Court made its limitations vague enough—going against the precision principle which governs other law dealing with free speech—that it could sidestep nearly any interpretation by a jury. And to make matters more obvious, the Jenkins jury made its decision based on
the more liberal Roth-Memoirs Test, which stated: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value [my emphasis] and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."\textsuperscript{xxvii} The Albany jury came to a hyper-conservative opinion from a hyper-liberal test.\textsuperscript{xxviii} And the Supreme Court disagreed. But the disagreement occurred generally in the area of quality, the very thing which the Supreme Court said it was not qualified to critique,\textsuperscript{xxix} and in fact shouldn't matter in obscenity cases. Perhaps this difficulty explains why it took so long for the court to write an opinion.\textsuperscript{xxx}

The strongest argument against the Supreme Court’s policy on obscenity comes from the lack of a neutrality principle. Speech cannot be abridged simply because it is unpopular. Similarly, speech that would normally be abridged, according to conservative tests, cannot be tolerated simply because it is popular. “Carnal Knowledge” was a popular film, with a national audience of more than 20 million viewers. It was a contender for the Academy Award for best film, among other nominations, and its actors were popular and well-reputed. Critics acclaimed the film nationwide, and the Supreme Court majority opinion even quoted a piece of a review and noted that the film made numerous “Ten Best” lists in the movie industry that year.\textsuperscript{xxxi} In the Supreme Court case, eight different amici curiae were filed by Hollywood-friendly organizations. And Louis Nizer, Jenkins’ lawyer, claimed “to confuse [the result of the film] with pornographic imbecility is cultural illiteracy."\textsuperscript{xxxii} Many would agree that such a film could not, indeed should not, be confused with obscenity. I agree, and the Supreme Court obviously did. But that's not the point. In deciding to abridge obscenity in the first place on the basis of the emotional principle of offense, then in agreeing to allow local communities to judge trials on the basis of what they deemed “contemporary community standards,” the high court effectively signed away its right to complain afterwards when the determination of “quality” turned out to be even more conservative than the court itself would vote. A film’s national audience and critical acclaim could not
serve as a ground for reversing the jury’s decision, for “evidence of such matters did not have to be presented to the jury, and in any event the jury was free to apply [its own standards growing out of its own community.”

In fact, rather than hearing evidence about the film’s popularity nationally, the court should have been hearing evidence about the film’s popularity in Albany, Ga., and evidence about what locals might consider obscene in the movie. In essence, the high court denied the city of Albany the right given by Miller to make its own decisions governing obscenity in the community.

 Apparently, the Supreme Court thought it had escaped all possibility of having to rule on quality with the Miller Test. “By setting the threshold of ‘quality’ very low—only expression that, as a whole, lacks serious literary, artistic, political, or scientific value could be obscene—the factual findings of the jury could be made conclusively reliable, or at least nearly enough so that the Court would no longer have to review every jury decision and watch every dirty film...juries can surely be trusted to identify those works that ‘lack’ value, even ‘serious’ value. So the Court thought, at least.”

But the Albany jury did identify the negative, or lack of value, in Jenkins. In fact, the jury recognized the movie as valueless according to the more liberal Roth-Memoirs Test under which it made its decision that the film was “utterly without redeeming social value”—not just “literary, artistic, political, or scientific value,” but all social value.

So when the high court overturned an Albany, Ga., jury’s decision on what was ruled to be obscenity in Albany, Ga., it was making a decision between cultures. As Justice Brennan (with Stewart and Marshall concurring) noted in his dissent, “I do not understand how the court can resolve the Constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based.”

In its decision in Jenkins, the high court implied either it, or the critics, or the 20 million audience members, were better able to decide what was obscenity in Albany than was a group of the so-called “average person[s]” the Miller Test asks for. This is an obviously chilling thought, in the way of Constitutional law. But, shockingly, the high
court claims that “it is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where legislation plainly impinges upon rights protected by the Constitution itself.” But what could be a more basic infringement on the Constitution than an abridgment of First Amendment free-speech rights? The high court, in attempting to regulate and later define obscenity (even if it depicts legal actions), sets itself up for a judgment of value, whether artistic, literary, or otherwise. It also admits it is not best qualified to make such a judgment.

Although some high-court dissenters have suggested that no obscenity be regulated without an amendment to the Constitution, I think perhaps some regulation is in order. But before the Supreme Court adopts any policy when it comes to obscenity, it should be willing to also accept the consequences accompanying that policy. With Jenkins v. Georgia, the court was not willing to live with the consequences of its own Miller Test, and thus deflated much of the meaning of the test by utterly contradicting it when a jury did not decide as the court thought it should.

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i Miller v. California was decided before the U.S. Supreme Court heard Jenkins v. Georgia, but after the original case was heard before the Albany, Ga., jury. Miller v. California, 413 U.S. 15 (1973).
iv MacKinnon, Catherine. “The Roar on the Other Side of Silence.” In Harm’s Way. Ed. Catherine MacKinnon and Andrea Dowkin. Cambridge: Harvard University Press, 1997. 3-24. I tend to agree with much of Strossen’s view (a self-described anti-censorship feminist) here that feminism and women are injured by censorship of pornography. This seems contradictory at first glance. But MacKinnon’s philosophy on pornography says when women look at a pornographic image, they automatically adopt a submissive role for themselves. MacKinnon paints women as perpetual victims with little to no free will and suggests that in order to protect them (as they cannot protect themselves—which is true sometimes, physically, but certainly not to this extent), pornographic images should be banned. Any stigma of victimhood is by nature subversive to women, even if in the name of empowerment. Other feminist arguments against censorship exist: Feminism depends on free speech (historically and currently) to promote its cause, so any censorship is a bad thing for all free speech; women who consensually work in the pornography industry would be hurt by censorship; pornography provides a powerful educational tool for feminist scholars; censorship is paternalistic, perpetuating demeaning stereotypes about women, such as that sex is bad for them. These ideas deserve an essay of their own. Strossen, Nadine. “A Feminist Critique of ‘the’ Feminist Critique of Pornography.” 79 Virginia Law Review 1099 (1993).

v As we discussed these principles (causation/harm, emotion, precision, neutrality) in media law class (and as the research case brief description sheet cited we can base evidence on “class readings, lectures, discussions”) and they are common knowledge in the law world, I am not going to reference them in the rest of the paper.
"I will elaborate on this point later in the essay. Memoirs v. Massachusetts (the language of which was very similar to that of the pertinent Georgia obscenity statute) required that to prove obscenity, a plaintiff must affirmatively establish a work’s lack of value (a negative thing). Additionally, according to the Memoirs ruling: “Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.” Roth v. United States, 354 U.S. 476 (1957), Memoirs of a Woman of Pleasure V. Massachusetts, 383 U.S. 478 (1962)

The stricter Miller Test requires a juror to question, in reference to standards of social value:
“(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest, (b) whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or authoritatively construed, and (c) whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value” Miller v. California, 413 U.S. 15 (1973)

This decision essentially proved Justice Brennan right in his dissent in Paris Adult Theatre I v. Slaton: “one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.” Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973)

Roth v. United States, 354 U.S. 476 (1957)

Interestingly, selling murder/ rape mysteries is fine, but selling obscenity about legal, consensual activities is illegal.


To describe what we see as a political act with First Amendment consequences, when it is an epistemological one, is to confuse the act of refusing the forbidden fruit with the act of forcing others through pornography, to eat it. The political act, MacKinnon claims, is the pornographer’s, not ours.” Bezanson, Randall P. How Free Can Speech Be? New York: New York University Press, 1998. 115-119.

The case was tried before the Albany jury in 1972. It was tried in the U.S. Supreme Court in 1974.

Miller v. California, 413 U.S. 15 (1973)


Miller v. California, 413 U.S. 15 (1973). The earlier Roth-Memoirs Test is slightly different, on the liberal side. The only possible contention is that the high court ruled nudity (an offense and possible obscenity under Roth-Memoirs) was not enough to prove obscenity in Jenkins, but under the Roth-Memoirs test, sex itself (if the jury deemed it distasteful or prurient, which it did) was enough to justify an obscenity ruling. And, as the Supreme Court noted in the Jenkins opinion, there was decidedly sex in “Carnal Knowledge.”


Because the Roth-Memoirs Test put a substantial burden of proof on the prosecution, that the same Justice Harlan, in his dissent in Memoirs, questioned whether the “utterly without redeeming social values” test had any meaning at all because it was so difficult to prove obscenity. Memoirs of a Woman of Pleasure; v. Massachusetts, 383 U.S. 413 (1966)


Bezanson states affirmatively that “the Carnal Knowledge case had thus ‘cornered’ the Court. The qualitative judgment implicit in the Albany jury’s decision was essentially unreviewable. This is the reason Justice Rehnquist had such difficulty forming an opinion for the Court.” Bezanson, Randall P. How Free Can Speech Be? New York: New York University Press, 1998. 135

“Many but not all of the reviews were favorable,” Justice Rehnquist said in the majority opinion. This is a value judgment, and should not be considered in a Supreme Court ruling. It almost implies a critic’s
opinion is **more** valuable than an Albany juror's when it comes to what is valuable and what is obscene in Albany, Ga.


This statement was originally made by Justice Harlan in *Roth v. United States*, 354 U.S. 476 (1957).

Justice Brennan’s dissent in *Jenkins v. Georgia* asserts that such regulation has a chilling effect on the First Amendment.

*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973)

Regulation of obscenity such as, perhaps, that depicting illegal acts or violence towards women and children as acceptable, or regulation of obscenity near schools, is much more reasonable and precise than regulation of all obscenity, even that which depicts legal actions.
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Brandenburg v. Ohio, 395 U.S. 444 (1969),


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Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973)

Clear thesis/position statement.......................15 points  

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fully formulated, original-to-self (i.e., 
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