Balancing Community Standards against Constitutional Freedoms of Speech and Press: Pope v. Illinois

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NOTES

BALANCING COMMUNITY STANDARDS AGAINST CONSTITUTIONAL FREEDOMS OF SPEECH AND PRESS:

POPE V. ILLINOIS

Richard Pope and Charles G. Morrison worked as sales attendants in different adult bookstores in Rockford, Illinois. On July 21, 1983, Rockford Police Department detectives purchased magazines from Pope and Morrison, the on-duty attendants at the two stores. The police later arrested the two men and charged each with violating the Illinois obscenity statute.2

Prior to their separate trials in an Illinois circuit court, Pope and Morrison filed motions to dismiss the charges, claiming the obscenity statute violated the first3 and fourteenth4 amendments to the United States Constitution. The trial court denied each of the motions. After a two-day trial, a jury convicted Morrison on three counts of obscenity.5


2. The Illinois obscenity statute provides:

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he: (1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene . . . .

ILL. ANN. STAT. ch. 38, para. 11-20(a) (Smith-Hurd Supp. 1987); see infra note 12.


4. Id. amend. XIV, § 1.

5. The State called only two witnesses for the prosecution, the arresting detective and another officer. The witnesses identified photographs of the book store. People v. Morrison, 138 Ill. App. 3d at 597, 486 N.E.2d at 347. For his defense, Morrison responded with two witnesses, a college student and an expert in public opinion polls. Providing an indication of the availability of the sexually oriented adult magazines, the college student testified that he purchased comparable magazines in stores throughout Illinois. Id. An expert on public opinion polling testified that a survey he conducted showed the general level of acceptance of sexually explicit material among Illinois adults. Id. at 597-98, 486 N.E.2d at 347.

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sentenced Morrison to twelve months conditional discharge and assessed a fine of $1,500 plus court costs. In a subsequent trial, a jury also convicted Pope on three counts of obscenity. The court then sentenced Pope to three concurrent sentences of 120 days imprisonment and three consecutive fines of $1,000.

Over the defendant's objection in each trial, the Illinois court instructed both juries to apply contemporary community standards to all three elements of the test for obscenity. Both Pope and Morrison submitted post-trial motions for judgment notwithstanding the verdict. The defendants specifically objected to the application of a subjective contemporary community standard, rather than an objective standard, to the third prong of the obscenity test.

6. The initial violation of the obscenity statute is a Class A misdemeanor; second and subsequent offenses are Class 4 felonies. ILL. ANN. STAT. ch. 38, para. 11-20(d) (Smith-Hurd 1979 & Supp. 1987). The penalty for a Class A misdemeanor includes a fine of up to $1,000. ILL. ANN. STAT. ch. 38, para. 1005-9-1 (Smith-Hurd 1982). In addition, a court may impose a sentence of "any term less than one year." Id., para. 1005-8-3(a)(1).

7. As in the Morrison trial, the State called only two witnesses: the arresting detective and an officer to identify photographs of the book store. People v. Pope, 138 Ill. App. 3d at 732-33, 486 N.E.2d at 353. Pope responded with the same two defense witnesses called in the Morrison case. Id. at 733-34, 486 N.E.2d at 354; see supra note 5. Two character witnesses, Pope's mother and a long-time friend, testified during the sentencing hearing following conviction. People v. Pope, 138 Ill. App. 3d at 734, 486 N.E.2d at 354.

8. See supra note 6. Pope apparently received a harsher sentence because he continued to work at the book store. Prior to imposing Pope's sentence, the trial court commented: "I believe there is a difference between Mr. Morrison and this gentleman. Mr. Morrison, if I remember the testimony and sentencing, had left the employment and, I think, removed himself from the jurisdiction." People v. Pope, 138 Ill. App. 3d at 744, 486 N.E.2d at 361.

9. Miller v. California, 413 U.S. 15, 24 (1973). The Supreme Court set forth the three elements of the test as follows:

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. Id. (citations omitted).

10. The jury instruction defining obscenity read:

A thing is obscene if considered as a whole, its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and, it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals, and, it is utterly without redeeming social value.

In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State.


12. Effective January 1, 1986, the Illinois Legislature amended the obscenity statute to change the definition of obscene material. The former Illinois statute provided:

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion,
Upon denial of their motions, both defendants appealed to the Illinois appellate court, which affirmed the convictions in written opinions filed on November 26, 1985. The appeals court thereafter denied the appellants' motions for rehearing. The two men attempted to appeal their cases to the Illinois Supreme Court, but the court denied both Pope and Morrison leave to appeal. Upon application, the United States Supreme Court granted certiorari and combined the two cases. Held, vacated and remanded: The first amendment value component of the Miller test for obscenity must employ a national objective standard, not derived from the preferences of any given community, to determine whether literature lacks serious literary, artistic, political, or scientific value. Pope v. Illinois, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

I. THE DEVELOPMENT OF OBSCENITY STANDARDS

A. Early Censorship Efforts

Religious intolerance provided the historical basis for the regulation of obscenity. Early censorship efforts spearheaded by the Roman Catholic

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and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.
Church targeted blasphemy and heresy. Religious leaders were relatively tolerant of sexual explicitness in drama and literature because such entertainment was limited to elite classes. The invention of the printing press in the mid-fifteenth century, however, permitted persons of every social class ready access to various types of literature. Nevertheless, the church continued to tolerate bawdy literature as long as the literature did not cast religion in an unfavorable light.

In seventeenth century England sexually explicit works began to be subjected to judicial and legislative censorship. The common law courts, the Court of Star Chamber, and Acts of Parliament, including the Licensing Act, provided the principal mechanisms for English censorship. In 1663 an English court heard the first case involving obscenity unrelated to religion or government. The defendant was convicted of breaching the peace and was assessed a fine and sentenced to a jail term. Obscenity remained largely unregulated by governmental entities and beyond the scope of the
courts until 1727, however, when the Queen’s Bench Court ruled that obscenity constituted an independent crime.

Censorship efforts in the American colonies paralleled those of England. Accordingly, colonial activists initially focused on banning literature deemed blasphemous or heretical, but allowed the publication and distribution of secular sexual materials. In response to an increase in bawdy literature, however, a Massachusetts statute promulgated in 1711 prohibited the “composing, writing, printing or publishing of any filthy, obscene or profane song, pamphlet, libel or mock-sermon.”

The first American conviction for obscenity was affirmed by the Pennsylvania Supreme Court in 1815. Seven years later Vermont passed the first obscenity statute exclusive of religious purposes. Other states enacted similar statutes. The federal government enacted its first obscenity law in 1842. Despite the proliferation of obscenity laws, few prosecutions ensued.

Anti-obscenity regulation gained impetus under the leadership of Anthony Comstock, organizer of the New York Society for the Suppres-

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28. See Queen v. Read, 88 Eng. Rep. 953 (1708). In Read James Read was indicted for publishing the book The Fifteen Plagues of a Maidenhead, but the Queen’s Bench Court dismissed the indictment since the book did not “shak[e] religion.” Id. at 953. The Court held that obscenity itself was “punishable only in the Spiritual Court.” Id.


30. For a compilation of early obscenity statutes, see Roth v. United States, 354 U.S. 476, 482-83 n.12 (1957).


32. Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815), cited in F. SCHAUER, supra note 19, at 9. Jesse Sharpless was convicted of exhibiting a painting depicting a man and woman in “an obscene, impudent, and indecent posture.” Id. at 92 (emphasis omitted).


34. See, e.g., CONN. STAT. § 182-184 (1830), cited in F. SCHAUER, supra note 19, at 10; MASS. REV. STAT. ch. 130 § 10 (1835), cited in Roth, 354 U.S. at 483 n.13; N.H. REV. STAT. 221 (1843), cited in Roth, 354 U.S. at 483 n.13. For citations to early state laws concerning profanity and obscenity, see Roth, 354 U.S. at 483 n.13.

35. 5 Stat. 566, § 28 (1842) (allowing the confiscation and destruction by customs authorities of obscene pictures) (current version at 19 U.S.C. § 1305 (1982)). The primary purpose of the statute was to eliminate the importation of French postcards. F. SCHAUER, supra note 19, at 10.

36. Some of the cases that did make it to the courts include: McJunkins v. State, 10 Ind. 140 (1858) (indecent and vulgar songs); Commonwealth v. Tarbox, 55 Mass. (1 Cush.) 66 (1848) (advertisement of contraception preventative); People v. Girardin, 1 Mich. 90 (1848) (obscene newspaper); Britain v. State, 22 Tenn. (3 Hum.) 203 (1842) (slave owner convicted for allowing slave in public without clothes).

37. See P. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 2 (1968). Comstock was a New England Congregationalist who moved to New York after the Civil War. Alarmed by the nature of the books he saw, he helped to arrest a seller of bawdy books in 1872. Id. Comstock soon formed his own vice commission, finding support among such prominent persons as J.P. Morgan. M. ERNST & A. SCHWARTZ, supra note 17, at 30. Comstock did not limit his scorn to obscenity; he also opposed gambling,
sion of Vice. Consolidating the support of various judicial, executive, and legislative leaders, Comstock secured the passage of a federal law prohibiting the mailing of obscene publications. The legislation became commonly known as the Comstock Act. As special agent to the Post Office Department, Comstock personally supervised the enforcement of the law.

In response to the passage of the Comstock Act and its fervent enforcement, courts were compelled to formulate a definition of obscenity. In United States v. Bennett a federal court of appeals adopted a standard initially presented in the English case of Regina v. Hicklin. Specifically, the court held that under the Hicklin standard, a jury could determine suspect material obscene based on the effect selected passages would have on especially susceptible members of the population, such as the immature or mentally weak. Several federal district courts also elected to adopt the Hicklin obscenity standard.

Not all jurisdictions, however, favorably received the Hicklin standard. The New York Court of Appeals rejected the standard in Halsey v. New York Society for Suppression of Vice. Three separate cases decided by the

lotteries, light literature, popular magazines, and weekly newspapers. F. Schauer, supra note 19, at 12 n.51. His slogan was “Morals, not Art or Literature.” T. Murphy, supra note 17, at 9. For a discussion of the life and work of Comstock, see P. Boyer, supra; H. Brown & M. Leech, Anthony Comstock, Roundsman of the Lord (1927); M. Ernst & A. Schwartz, supra note 17, at 29-35. For a criticism of Comstock, see H.L. Mencken, Comstockery, in The First Freedom 276 (R. Downs ed. 1960).

38. Justice Strong of the United States Supreme Court drafted the bill for Comstock to present to Congress. F. Schauer, supra note 19, at 13.
41. In the first year, Comstock claimed to have seized: 194,000 pictures; 134,000 pounds of books; 5,500 decks of cards; 14,200 stereo plates; 60,300 rubber articles (mostly contraceptives); and 31,150 boxes of pills and powders (“aphrodisiacs”). Id. Before his death in 1915, Comstock claimed to have convicted more than 3,600 persons and destroyed 160 tons of obscene literature. F. Schauer, supra note 19, at 13. Comstock also took credit for at least 15 suicides. R. Haney, Comstockery in America, Patterns of Censorship and Control (1960).
42. 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No. 14,571) (affirming conviction under 19 Stat. 90 (1876) for use of mail to distribute obscene book entitled Cupids Yokes or The Binding Forces of Conjugal Life).
43. [1868] 3 L.R.-Q.B. 360.
44. Bennett, 24 F. Cas. at 1104 (quoting Regina v. Hicklin, [1868] 3 L.R.-Q.B. 360).
46. See Konda v. United States, 166 F. 91 (7th Cir. 1908). “[W]hen [excerpts were] taken from their settings and deprived of the support of their full context, it may be that they did not fairly represent the character of the work.” Id. at 92; see also United States v. Kennerly, 209 F. 119, 120-21 (S.D.N.Y. 1913) (Hand, J. Learned) (applying, but disapproving of, Hicklin standard).
47. 234 N.Y. 1, 136 N.E. 219 (1922).

No work may be judged from a selection of... paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the
Second Circuit Court of Appeals in the 1930s also rejected the Hicklin standard. In its place, the Second Circuit adopted a standard that judged obscenity by the dominant effect of the suspect work on the average person in the community.

In response to the position taken by the Second Circuit, most courts accepted the dominant effect standard. A significant number of jurisdictions, however, retained the traditional Hicklin rule. The discrepancy between the standards for determining obscenity persisted until the Supreme Court resolved the issue.

B. Roth v. United States

In 1957 the Supreme Court began its long struggle with the regulation of obscenity in Roth v. United States. Writing for the majority, Justice Brennan reasoned that constitutional guarantees of freedom of speech and press

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48. United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936) (Hand, J., Learned); United States v. One Book Called "Ulysses," 72 F.2d 705, 708 (2d Cir. 1934) (Hand, J., Augustus) (affirming trial court decision that James Joyce's book was serious literary effort); United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930) (Hand, J., Augustus).

49. Levine, 83 F.2d at 157. "[W]hat counts is its effect, not upon any particular class, but upon all those whom it is likely to reach." Id. "[T]he book must be taken as a whole . . . ." Id. at 158. "The standard must be the likelihood that the work will so arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have . . . ." Id. Learned Hand's opinions in Kennerly and Levine set out essentially the same tests adopted by the Supreme Court many years later. For an analysis of the decisions and their effect on later Supreme Court rulings, see THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND 29-37 (H. Shanks ed. 1968).

50. See supra notes 48-49 and accompanying text.

51. See American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954) (appeal from injunction against city's enforcement of ordinance preventing exhibition of film remanded to trial court to determine whether motion picture obscene (citing series of cases in which courts adopted dominant effect standard)).


do not protect obscenity.\textsuperscript{55} The Court based its determination on the premise that the first amendment does not defend obscenity\textsuperscript{56} because obscenity lacks redeeming social importance.\textsuperscript{57}

In a decision that essentially labeled obscenity a lower form of speech,\textsuperscript{58} the \textit{Roth} Court also attempted to provide an obscenity standard for literature.\textsuperscript{59} The Court recognized the division among the lower courts concerning the proper definition of obscenity.\textsuperscript{60} The Court ruled that the \textit{Hicklin} standard was too restrictive in light of the constitutional guarantees of freedom in speech and press.\textsuperscript{61} Accordingly, the Court adopted a variation of the dominant effect standard.\textsuperscript{62} The \textit{Roth} standard asks “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”\textsuperscript{63}

In formulating its definition of obscenity, the Court hastened to identify the distinction between obscenity and sex.\textsuperscript{64} Sex, according to the Court, is not only a subject of human interest, but a matter of vital public concern.\textsuperscript{65} Because of its significant public interest, the \textit{Roth} Court ruled that the first amendment protects sex portrayed in works of art, literature, and science so long as the sex depicted is not obscene.\textsuperscript{66}

In \textit{Roth} the Court specified several criteria for judging whether literature is obscene. First, the material must be judged by its impact on the average person.\textsuperscript{67} Second, the material must be judged on the basis of its dominant

\begin{itemize}
\item \textsuperscript{55} \textit{Roth}, 354 U.S. at 485.
\item \textsuperscript{56} In previous first amendment decisions, the Court used a balancing approach that weighed the government’s interest in restricting expression against the constitutional guarantees of free speech and press. Lockhart, \textit{Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment}, 9 GA. L. REV. 533, 537-38 (1975). The Court attempted to discern whether the harm threatened by the expression under scrutiny outweighed the interest in free expression of that type. \textit{Id.} at 538. The Court in \textit{Roth} decided that the first amendment was not designed to protect every utterance; therefore no weighing of rights was necessary. \textit{Roth}, 354 U.S. at 483.
\item \textsuperscript{57} \textit{Roth}, 354 U.S. at 484.
\item \textsuperscript{58} The Court addressed the obscenity issue in dicta in previous cases involving other speech-related issues. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (prevention and punishment of lewd and obscene speech never raised constitutional problem); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (obscene speech not protected by clear and present danger standard). For a further discussion of unprotected speech, see Sunstein, \textit{Pornography and the First Amendment}, 1986 DUKE L.J. 589, 602-08.
\item \textsuperscript{59} \textit{Roth}, 354 U.S. at 488. “It is . . . 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.” \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 489.
\item \textsuperscript{61} \textit{Id.} The Court noted that the \textit{Hicklin} test might exclude legitimate sexual material. \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 487.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 488.
\item \textsuperscript{67} For a discussion of who is the “average person,” see Bell, \textit{Determining Community Standards}, 63 A.B.A.J. 1202, 1204-06 (1977). Bell argues that the average person might have a variety of meanings beyond just the normal or typical individual. \textit{Id.} at 1204. One could define average as the mean average of various statistical data. \textit{Id.} Alternatively, average could indicate a median average, with an individual representing the midpoint in a range of statistical
\end{itemize}
Finally, the material must be found to “appeal to the prurient interest.” The Court ruled that the obscenity inquiry should be conducted with reference to contemporary community standards. Unfortunately, the Court failed to specify the boundaries of the community to be used in applying contemporary community standards. In fact, the Court appeared to ignore first amendment values in its test. The Court refused to directly address these issues for nearly a decade.

C. Memoirs v. Massachusetts

In Memoirs v. Massachusetts the Supreme Court modified the Roth standard in two significant respects. Memoirs concerned a conviction for distributing the book John Cleland's Memoirs of a Woman of Pleasure, more popularly known as Fanny Hill. Justice Brennan's opinion divided the Roth standard into three independent tests that must be satisfied to find ma-

data with half the people having the characteristic below and half above the average person. Finally, average could indicate a modal average, like “most people.” Bell reasons that a modal individual would be that person who shares the views of at least 75 percent of the population. If there is not 75 percent agreement, then there is no single average person.


69. The Court defined “prurient” as “having a tendency to excite lustful thoughts.” Roth, 354 U.S. at 487 n.20. A few months earlier, the American Law Institute proposed to define the same term as “a shameful or morbid interest in nudity, sex, or excretion . . . .” MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957), cited in Roth, 354 U.S. at 487 n.20. Justice Brennan stated for the majority, “We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code . . . .” Roth, 354 U.S. at 487 n.20. Contra id. at 498-500 (Harlan, J., dissenting).

70. See infra notes 77-80 and accompanying text.


terial obscene and beyond constitutional protection.\textsuperscript{75}

The Court retained the central criterion for obscenity in \textit{Roth} as its first test for obscenity in \textit{Memoirs}. Specifically, the Court required that the dominant theme of the material taken as a whole appeal to prurient interests.\textsuperscript{76} Proposed in an earlier opinion determining the obscenity of material under a modern version of the Comstock Act,\textsuperscript{77} the second test for obscenity advocated by the \textit{Memoirs} Court required an evaluation of the patent offensiveness of suspect material.\textsuperscript{78} According to Justice Brennan, obscene material is patently offensive because it insults contemporary community standards relating to the depiction of sexual matters.\textsuperscript{79} The third test in \textit{Memoirs} provided that to be obscene the material must be "utterly without redeeming social value."\textsuperscript{80} Since the Massachusetts state court determined \textit{Fanny Hill} contained a minimum amount of social value,\textsuperscript{81} the Supreme Court reversed the trial court's determination that the book was obscene.\textsuperscript{82} Although only three Justices regarded the social value element as conclusive, the ideological composition of the Court\textsuperscript{83} effectively solidified the social value test as a

\textsuperscript{75} \textit{Memoirs}, 383 U.S. at 418-19.

\textsuperscript{76} \textit{Id.} at 418.


\textsuperscript{78} \textit{Memoirs}, 383 U.S. at 418.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} The test came from Brennan's \textit{Roth} opinion, holding that the first amendment did not protect literature "utterly without redeeming social importance." \textit{Roth} v. United States, 354 U.S. 476, 484 (1957).


component of the obscenity analysis. The Memoirs standard remained the relevant obscenity standard for the next seven years. During the several years following Memoirs, the Court reversed per curiam all of the obscenity convictions it reviewed involving the distribution of sexual material to adults, except certain pictorial depictions of explicit sexual activity.

D. Miller v. California


86. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 n.8 (1973) (Brennan, J., dissenting) (citing thirty-one cases decided between 1967 and 1971). For an analysis of the cases by the type of suspect material, see Huffman v. United States, 470 F.2d 386, 397-401 (D.C. Cir. 1972).


89. The majority consisted of the four Nixon appointees and Justice White.


Court, however, significantly changed the third component of the *Memoirs* standard.93

The *Miller* obscenity analysis continued to inquire whether the material under scrutiny contained the requisite prurient appeal94 and whether the work depicted sexual conduct in a patently offensive manner.95 The *Miller* Court, however, specifically rejected the "utterly without redeeming social value" test used in *Memoirs*.96 In place of the *Memoirs* value test, the *Miller* Court required the trier of fact to determine if a suspect work as a whole lacked the value deserving of constitutional protection.97 According to the Court, the first amendment protects the exchange of ideas relating to political and social change, but not the depiction of sex for mere titillation or for profit.98 Thus, the Court added a first amendment test for obscenity.

The *Miller* Court also clarified the definition of community standards.99 Chief Justice Burger specifically stated that, in order to avoid hypothetical determinations, the relevant community should not attempt to encompass the nation as a whole.100 On the contrary, the *Miller* Court expressly upheld the use of a state-wide standard.101 In subsequent decisions, the Court further clarified its definition of community. Specifically, the Court ruled that the relevant community may be less than statewide,102 and that a state may elect not to specify a particular geographic community.103

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93. See supra notes 75-80 and accompanying text.
95. *Id.*
96. *Id.* at 24-25. "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ." *Id.* at 25 n.7 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)).
97. *Id.* at 26.
98. *Id.* at 34-36.
101. *Id.* at 33-34.
103. *Jenkins*, 418 U.S. at 157 (states may choose whether or not to specify community).
After the *Miller* decision, a question remained as to which of the three prongs of the obscenity test were subject to the community standards determination. The contemporary community standard undoubtedly applied to the first prong, which specifically mentioned that standard. Furthermore, while the *Miller* court implied that the same community standard may apply to the second prong, in *Smith v. United States* the Court clearly stated that courts must judge both prurient interest and patent offensiveness according to community standards. Until recently, however, the applicability of the community standards determination related to the first amendment value prong of the *Miller* test remained in dispute.

II. *POPE v. ILLINOIS*

A. Defining the Issue

Following the development of the three-prong *Miller* test for obscenity, the Supreme Court emphasized that the first two prongs of the test depended on community standards. The Court, however, failed to rule on the standard applicable to the third prong of the test. Several federal circuit courts held that community standards were not applicable to the first amendment value test. Obscenity legislation in several states has followed the same reasoning. On the other hand, obscenity legislation in certain states applies community standards to all three components of the obscenity test.

The remaining states have avoided a legislative resolution of the issue by enacting statutes that substantially reproduce the *Miller* test.

105. Id. at 33.
107. Id. at 301-02.
108. See supra note 9.
109. See supra notes 105-107 and accompanying text.
The Illinois appellate court that considered the convictions of Pope and Morrison held that courts may apply community standards to the first amendment value test since the Supreme Court had not issued a ruling to the contrary.\textsuperscript{114} \textit{Pope v. Illinois}\textsuperscript{115} presented the Court with the opportunity to clarify the applicability of contemporary community standards to the third element of the \textit{Miller} obscenity test. Justice White, writing for the majority, based the opinion on two premises. First, prior cases provided clear guidance for the resolution of the issue.\textsuperscript{116} Second, the existence of serious literary, artistic, political, or scientific value does not vary from community to community.\textsuperscript{117} In a concurring opinion Justice Scalia agreed with the interpretation of \textit{Miller} offered by the majority.\textsuperscript{118} In a dissent joined by Justices Brennan and Marshall, Justice Stevens criticized the majority opinion for failing to follow the guidelines of the first amendment.\textsuperscript{119}

\textbf{B. Adding Reasonableness to Obscenity}

The majority began its analysis in \textit{Pope} by asserting that the Court had never previously suggested that community standards should be applied to the first amendment value test.\textsuperscript{120} The Court conceded that the lower courts may have misinterpreted \textit{Smith},\textsuperscript{121} in which the Court pointed out that, unlike the first two prongs of the obscenity test, \textit{Miller} did not discuss value in terms of contemporary community standards.\textsuperscript{122} The Court held that \textit{Smith} did not indicate an oversight in the \textit{Miller} test, but constituted a clear and deliberate decision to exclude the application of community standards in the value test.\textsuperscript{123}

In delineating the boundaries of the relevant community, the majority further reasoned that the standards of a single community could not be used to

\textsuperscript{114} In both cases the court stated that "the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value.'" People v. Morrison, 138 Ill. App. 3d 595, 600, 486 N.E.2d 345, 349 (1985); People v. Pope, 138 Ill. App. 3d 726, 735, 486 N.E.2d 350, 355 (1985).
\textsuperscript{115} 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).
\textsuperscript{116} Id. at 1920, 95 L. Ed. 2d at 445.
\textsuperscript{117} Id. at 1921, 95 L. Ed. 2d at 445.
\textsuperscript{118} Id. at 1923, 95 L. Ed. 2d at 448.
\textsuperscript{119} Id. at 1924, 95 L. Ed. 2d at 449.
\textsuperscript{120} Id. at 1920, 95 L. Ed. 2d at 445.
\textsuperscript{121} Id. at 1921, 95 L. Ed. 2d at 445 (citing \textit{Smith}, 431 U.S. 291 (1977)).
\textsuperscript{122} \textit{Smith}, 431 U.S. at 301 (citing F. SCHAUER, \textit{supra} note 19, at 123-24).
\textsuperscript{123} \textit{Pope}, 107 S. Ct. at 1921, 95 L. Ed. 2d at 445; see also 1 ATTORNEY GENERAL'S \textit{COMMISSION ON PORNOGRAPHY, FINAL REPORT} 259 n.36 (1986) (\textit{Smith} decision interprets third prong of \textit{Miller} test as requiring application of national, not local, community standards).
determine whether the literary, artistic, political, or scientific value of any material deserved first amendment protection. The Court stated that the first amendment provides protection to any work of merit. Justice White added that first amendment value neither results from majority approval nor varies from community to community based on local acceptance.

The Court ruled that the "reasonable person" standard constituted an appropriate method for determining whether suspect material contains merit. The majority dismissed the possibility that the objective standard might promote confusion by explaining that an objective obscenity standard should present no greater dilemma than the reasonable person tort standard. Based on precedent and pragmatic appraisal of the relevant community, the Supreme Court, therefore, ruled the jury instruction given in the trials of Pope and Morrison unconstitutional.

C. A Call for Reexamination of Miller

In his concurring opinion Justice Scalia agreed with the Court's determination that a court should determine value using a reasonable person standard, but he confined his agreement to the limits of the issue presented to the Court. Although the standard adopted by the Court for the value test remained consistent with Miller, Justice Scalia asserted that the Miller test is fundamentally flawed. Justice Scalia further asserted that the reasonable person standard provided an inappropriate method for determining the value of art or literature since beauty and taste have nothing to do with reason. Accordingly, Justice Scalia called for a reconsideration of the Miller test. Justice Scalia failed to indicate, however, what test he would favor to replace Miller. Indeed, his approach to the Miller test appeared to

124. Pope, 107 S. Ct. at 1921, 95 L. Ed. 2d at 445.
125. Id. (quoting Miller v. California, 413 U.S. 15, 34 (1973)).
126. Id.
127. Id.
128. Id. at 1921 n.3, 95 L. Ed. 2d at 445 n.3.
129. See supra note 10.
130. Pope, 107 S. Ct. at 1921, 95 L. Ed. 2d at 445. Instead of reversing the convictions, the Court remanded the cases to the Illinois appellate court to consider if the faulty jury instructions amounted to harmless error. See id. at 1921-23, 95 L. Ed. 2d at 445-47. Justice Blackmun concurred in the portion of the majority opinion concerning the reasonable person standard, but dissented on the harmless error issue. Id. at 1923-24, 95 L. Ed. at 448-49.
131. Id. at 1923, 95 L. Ed. 2d at 448.
132. Id. The issue was stated as follows: "Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in Miller v. California, 413 U.S. 15 (1973)." Brief, supra note 1.
133. Pope, 107 S. Ct. at 1923, 95 L. Ed. 2d at 448.
134. Id. Justice Scalia said the reasonable man would be better identified as a "man of tolerably good taste." Id. ("De gustibus non est disputandum" means taste cannot be disputed).
135. Id. The November 24, 1987, decision by the Federal Communications Commission to allow late night television broadcasting of indecent, but not obscene, programming illustrates the confusion caused by the Miller test. The Dallas Morning News, Nov. 26, 1987, § A, at 33, col. 2. The FCC defined indecent programming as "material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Id. at 33-35. Compare this definition with the first two prongs of the Miller obscenity test. See supra note 9.
question whether courts should properly determine the value of artistic works.\textsuperscript{136}

\textbf{D. The Dissenting Opinion}

Justice Stevens’s dissenting opinion also expressed concern about the effect of using a reasonable person standard to judge first amendment value.\textsuperscript{137} The dissent reasoned that reasonable persons could possibly disagree in their appraisal of the value of pornographic material.\textsuperscript{138} According to Justice Stevens, the majority’s standard would still allow a jury to use community standards to determine value, even though jury instructions could not specify such a standard.\textsuperscript{139} The dissent added that the reasonable person standard could result in a subjective, rather than an objective, determination of first amendment value as juries tend to base decisions on the perceived viewpoint of the majority of persons in the community.\textsuperscript{140} Justice Stevens concluded that if any reasonable person could find value in the suspect material, then the first amendment must provide protection.\textsuperscript{141}

In the second portion of their analysis of the Pope and Morrison obscenity convictions, the dissenting Justices reaffirmed their position that possession or sale of obscene materials should not be prohibited or criminalized among consenting adults.\textsuperscript{142} Justice Stevens argued that the general public, not the courts or legislatures, should determine whether sexually oriented material contains value.\textsuperscript{143} The dissent also specifically criticized the vagueness and enforcement of the Illinois statute.\textsuperscript{144} The dissent reasoned that even if the defendants knew the magazines they sold were pornographic, Pope and Morrison likely did not know that the publications were legally obscene since the state allowed their employers to operate and advertise the

\textsuperscript{136} \textit{Pope}, 107 S. Ct. at 1923, 95 L. Ed. 2d at 448. “Just as there is no use arguing about taste, there is no use litigating about it.”\textit{ Id.}

\textsuperscript{137} \textit{Id.} at 1927, 95 L. Ed. 2d at 452. Justice Stewart divided his opinion into three parts: the first dealing with harmless error and the remaining two dealing with the obscenity issue.\textit{ Id.} at 1924, 95 L. Ed. 2d at 449. Justice Blackmun joined only in the harmless error portion.\textit{ Id.} at 1923, 95 L. Ed. 2d at 448. Justices Brennan and Marshall joined also with the obscenity portions.\textit{ Id.} at 1924, 95 L. Ed. 2d at 449.

\textsuperscript{138} \textit{Id.} at 1926, 95 L. Ed. 2d at 452 (quoting Hannegan v. Esquire, Inc., 327 U.S. 146, 157 (1946)).

\textsuperscript{139} \textit{Id.} at 1926, 95 L. Ed. 2d at 452. Unless the juror finds an ordinary member of his or her community is not reasonable, community standards must apply.\textit{ Id.} at 1926 n.4, 95 L. Ed. 2d at 452 n.4;\textit{ see also Restatement (Second) of Torts \S 283 comment c (1965) (reasonable man standard allows jury “to look to a community standard”).}

\textsuperscript{140} \textit{Pope}, 107 S. Ct. at 1927, 95 L. Ed. 2d at 453.

\textsuperscript{141} \textit{Id.} at 1927, 95 L. Ed. 2d at 452.


\textsuperscript{143} \textit{Pope}, 107 S. Ct. at 1930, 95 L. Ed. 2d at 457 (quoting Smith v. United States, 431 U.S. 291, 321 (1977) (Stevens, J., dissenting)).

\textsuperscript{144} \textit{Id.} at 1928-30, 95 L. Ed. 2d at 454-55.
III. CONCLUSION

In Pope v. Illinois the Supreme Court asserted that courts must use a national, not local, standard to determine the first amendment value of sexually oriented material. Such value should not vary from community to community based on the local level of acceptance. The Court held that a jury must decide whether or not a reasonable person would find value in the material.

The concurring and dissenting opinions, especially the concurrence of Justice Scalia, however, signaled the need for a further modification of the Miller obscenity test. The majority of the Pope Court supported the three-prong Miller test. Justice Scalia's call for reconsideration of Miller, along with the three dissenting justices' opposition to the test, however, created a 5-4 split on the matter. The recent retirement of Justice Powell, a supporter of the test, vests the swing vote in his replacement, Justice Kennedy.

Even if the Court decides to completely reexamine Miller, no clear indication exists as to the direction the Court may pursue. A majority of the Court may adhere to the Miller test either in its present form or in a modified form. Alternatively, the Court may develop a new test. Finally, the Court may reach an impasse reminiscent of the period between Memoirs and Miller, when the Justices were unable to render majority decisions in either affirming or reversing obscenity convictions. Consequently, while Pope clarifies the first amendment value component of the Miller test, at the same time the decision obscures the future of obscenity law.

Ronald D. Gray

145. Id. at 1929, 95 L. Ed. 2d at 454-55.