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[1] 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 first[3] and fourteenth[4] 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] The court

1. Exterior signs at both stores identified them as adult book stores. A large sign outside the store where Morrison was employed claimed that the store contained "The Largest Selection of Adult Merchandise in Northern Illinois." Pope v. Illinois, 107 S. Ct. 1918, 1929, 95 L. Ed. 2d 439, 455 (1987) (Stevens, J., dissenting). The two stores were open only to patrons who were at least 18 years of age. Brief for Petitioners, Pope v. Illinois, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987) (No. 85-1973) (LEXIS, Genfed library, Briefs file) [hereinafter Brief]. Owners of the stores required all patrons to pay a fifty-cent browsing fee upon entering the stores. People v. Morrison, 138 Ill. App. 3d 595, 597, 486 N.E.2d 345, 347 (1985); People v. Pope, 138 Ill. App. 3d 726, 732, 486 N.E.2d 350, 353 (1985).

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.

3. U.S. CONST. amend. I.

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.

sentenced Morrison to twelve months conditional discharge and assessed a fine of $1,500 plus court costs.[6] In a subsequent trial, a jury also convicted Pope on three counts of obscenity.[7] The court then sentenced Pope to three concurrent sentences of 120 days imprisonment and three consecutive fines of $1,000.[8]

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[9] for obscenity.[10] Both Pope and Morrison submitted post-trial motions for judgment notwithstanding the verdict.[11] 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.[12]

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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.

ILL. PATTERN JURY INSTRUCTION, CRIMINAL, No. 9.57 (2d ed. 1981).

11. People v. Pope, 138 Ill. App. 3d at 731, 486 N.E.2d at 354; People v. Morrison, 138 Ill. App. 3d at 597, 486 N.E.2d at 347; *see* ILL. ANN. STAT. ch. 38, para. 116-2 (Smith-Hurd 1977).

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[13] 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[14] and combined the two cases.[15] *Held, vacated and remanded*: The first amendment value component of the *Miller* test[16] 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.[17] 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.

ILL. ANN. STAT. ch. 38, para. 11-20(b) (Smith-Hurd 1979) (current version at ILL. ANN. STAT. ch. 38, para. 11-20(b) (Smith-Hurd Supp. 1987)). In People v. Ridens, 59 Ill. 2d 362, 321 N.E.2d 264, 268-69 (1974), the court construed the statute to also incorporate the third part of the obscenity test proposed in Memoirs v. Massachusetts, 383 U.S. 413 (1966). For a discussion of *Memoirs*, see *infra* notes 72-87 and accompanying text.

The recent amendments to the Illinois statute eliminated the application of community standards to the third part of the obscenity test. The current Illinois statute provides:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

ILL. ANN. STAT. ch. 38, para. 11-20(b) (Smith-Hurd Supp. 1987).

13. People v. Morrison, 138 Ill. App. 3d 595, 486 N.E.2d 345 (1985); People v. Pope, 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985). While affirming Pope's conviction, the court vacated his sentence and remanded the case for resentencing. People v. Pope, 138 Ill. App. 3d at 745, 486 N.E.2d at 362. The court consolidated the cases for oral argument.

14. The Supreme Court has jurisdiction to review final judgments of the states' highest courts "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1257(3) (1982).

15. *See* SUP. CT. R. 19-4 (authorizes consolidation of cases involving identical questions).

16. Miller v. California, 413 U.S. 15, 24 (1973).

17. A. CRAIG, THE BANNED BOOKS OF ENGLAND AND OTHER COUNTRIES, A STUDY OF THE CONCEPTION OF LITERARY OBSCENITY 18 (1962). For a complete history of obscenity regulation and censorship, see H. CLOR, OBSCENITY AND PUBLIC MORALITY, CENSORSHIP IN A LIBERAL SOCIETY 14-43 (1969); M. ERNST & A. SCHWARTZ, CENSORSHIP, THE SEARCH FOR THE OBSCENE 3-132 (1964); F. LEWIS, LITERATURE, OBSCENITY & LAW 1-72 (1976); T. MURPHY, CENSORSHIP, GOVERNMENT AND OBSCENITY 41-51 (1963); N. ST. JOHN-STEVAS, OBSCENITY AND THE LAW 1-176 (1956); Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 41-70 (1938). The text of many of the most prominent

Church targeted blasphemy and heresy.[18] Religious leaders were relatively tolerant of sexual explicitness in drama and literature because such entertainment was limited to elite classes.[19] 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.[20] Nevertheless, the church continued to tolerate bawdy literature[21] as long as the literature did not cast religion in an unfavorable light.[22]

In seventeenth century England sexually explicit works began to be subjected to judicial and legislative censorship.[23] The common law courts, the Court of Star Chamber,[24] and Acts of Parliament, including the Licensing Act,[25] provided the principal mechanisms for English censorship. In 1663 an English court heard the first case involving obscenity unrelated to religion or government.[26] The defendant was convicted of breaching the peace and was assessed a fine and sentenced to a jail term.[27] Obscenity remained largely unregulated by governmental entities and beyond the scope of the

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obscenity cases from 1663 until 1966 are collected in E. DE GRAZIA, CENSORSHIP LANDMARKS (1969).

18. *See* St. John-Stevas, *The Church and Censorship* in 'TO DEPRAVE AND CORRUPT. . .': ORIGINAL STUDIES IN THE NATURE AND DEFINITION OF 'OBSCENITY' 89 (J. Chandos ed. 1962) (traces history of church censorship).

19. F. SCHAUER, THE LAW OF OBSCENITY 1 (1976) (examples of Aristophanes, Plautus, Terence, and Juvenal in ancient times).

20. *Id.* at 2-3.

21. N. ST. JOHN-STEVAS, *supra* note 17, at 5; *see* "The Miller's Tale" and "The Wife of Bath" in Chaucer's *Canterbury Tales.*

22. A. CRAIG, *supra* note 17, at 18-19. The Roman Catholic Church banned certain books on religious grounds. The church, however, permitted Boccaccio's *Decameron* to be published when the author rewrote it by replacing sinning priests and nuns with sinning laymen. *Id.* at 19.

23. *See id.* at 19-22.

24. The Court of Star Chamber supplemented the common law courts and had authority to take action when other courts could not or would not. G. ELTON, STAR CHAMBER STORIES 12 (1958). The Star Chamber was not bound by common law so it provided remedies not available in other courts. *Id.* Henry VIII entrusted the control of books to the Star Chamber in the early 16th century. A. CRAIG, *supra* note 17, at 19. As late as 1637, the Star Chamber decreed that no books be imported into England without first being submitted to the Archbishop of Canterbury or the Bishop of London. *Id.* at 20-21. The Star Chamber was abolished in 1641. *Id.* at 13. For a further discussion of the Court of Star Chamber, see G. ELTON, *supra*; J. GUY, THE CARDINAL'S COURT, THE IMPACT OF THOMAS WOLSEY IN STAR CHAMBER (1977); J. GUY, THE COURT OF STAR CHAMBER AND ITS RECORDS TO THE REIGN OF ELIZABETH I (1985); N. ST. JOHN-STEVAS, *supra* note 17, at 6-13.

25. The English Parliament introduced licensing in 1643 after the demise of the Star Chamber. A. CRAIG, *supra* note 17, at 21. Censorship, however, became more severe under the Licensing Act of 1662, enacted to censor " 'heretical, seditious, schismatical or offensive books or pamphlets'." *Id.* The Act forbade all printing without a license, granted censors the power to search for and seize any unlicensed books, and limited to 20 the number of licensed master printers. N. ST. JOHN-STEVAS, *supra* note 17, at 15-16.

26. King v. Sedley, 83 Eng. Rep. 1146 (1663); also reported at 82 Eng. Rep. 1036 (1663). Sedley, sometimes spelled Sidley or Sydlyes, became drunk, removed his clothes at a London tavern, gave a profane speech, and poured bottles of urine on the audience. Although *Sedley* involved indecent behavior, the case is regarded as the precursor to modern obscenity regulation since it marks the first instance of government involvement in issues of public morality. 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 238 (1986); *see also* Reynolds, *Our Misplaced Reliance on Early Obscenity Cases*, 61 A.B.A.J. 220, 220-21 (1975).

27. *Sedley*, 83 Eng. Rep. at 1146-47.

courts[28] until 1727, however, when the Queen's Bench Court ruled that obscenity constituted an independent crime.[29]

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.[30] 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."[31]

The first American conviction for obscenity was affirmed by the Pennsylvania Supreme Court in 1815.[32] Seven years later Vermont passed the first obscenity statute exclusive of religious purposes.[33] Other states enacted similar statutes.[34] The federal government enacted its first obscenity law in 1842.[35] Despite the proliferation of obscenity laws, few prosecutions ensued.[36]

Anti-obscenity regulation gained impetus under the leadership of Anthony Comstock,[37] 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.*

29. Dominus Rex v. Curl, 93 Eng. Rep. 849 (1727). Edmond Curl, sometimes spelled Edmund Curll, was convicted of publishing the book *Venus in the Cloister, or The Nun in Her Smock*. *Curl*, 93 Eng. Rep. at 849. The book concerned lesbian love in a convent. F. SCHAUER, *supra* note 19, at 5. The conviction was not based on religious grounds since the anti-Catholic theme of the book increased its acceptance in England. Reynolds, *supra* note 26, at 221. One judge in *Curl* argued that the book was acceptable specifically because of its anti-Catholic nature. *Id.*

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

31. Acts and Laws of the Province of Mass. Bay, ch. CV, § 8 (1712), *cited in* Roth v. United States, 354 U.S. 476, 483 (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).

33. 1824 Vt. Laws ch. XXIII, No. 1, § 23, *cited in* F. SCHAUER, *supra* note 19, at 10.

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,[38] Comstock secured the passage of a federal law prohibiting the mailing of obscene publications. The legislation became commonly known as the Comstock Act.[39] As special agent to the Post Office Department, Comstock personally supervised the enforcement of the law.[40]

In response to the passage of the Comstock Act and its fervent enforcement,[41] courts were compelled to formulate a definition of obscenity. In *United States v. Bennett*[42] a federal court of appeals adopted a standard initially presented in the English case of *Regina v. Hicklin*.[43] 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.[44] Several federal district courts also elected to adopt the *Hicklin* obscenity standard.[45]

Not all jurisdictions, however, favorably received the *Hicklin* standard.[46] The New York Court of Appeals rejected the standard in *Halsey v. New York Society for Suppression of Vice*.[47] Three separate cases decided by the

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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. BROUN & 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.

39. 17 Stat. 598 (1873) (current version at 18 U.S.C. § 1461 (1982)).

40. M. ERNST & A. SCHWARTZ, *supra* note 17, at 33. A portion of the fines collected went to Comstock or his New York Society. *Id.*

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 20 (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).

45. *See, e.g.*, United States v. Males, 51 F. 41, 42 (D. Ind. 1892); United States v. Smith, 45 F. 476, 477 (E.D. Wis. 1891); United States v. Harmon, 45 F. 414, 417 (D. Kan. 1891); United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889); United States v. Wightman, 29 F. 636, 637 (W.D. Penn. 1886); United States v. Bebout, 28 F. 522, 524 (N.D. Ohio 1886); United States v. Britton, 17 F. 731, 733 (S.D. Ohio 1883). The Supreme Court also seemed to favor the *Hicklin* rule. *See* Dunlop v. United States, 165 U.S. 486, 500-01 (1897); Rosen v. United States, 161 U.S. 29, 42-43 (1896).

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.[48] 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.[49]

In response to the position taken by the Second Circuit,[50] most courts accepted the dominant effect standard.[51] A significant number of jurisdictions, however, retained the traditional *Hicklin* rule.[52] The discrepancy between the standards for determining obscenity persisted until the Supreme Court resolved the issue.[53]

B. Roth v. United States

In 1957 the Supreme Court began its long struggle with the regulation of obscenity in *Roth v. United States*.[54] Writing for the majority, Justice Brennan reasoned that constitutional guarantees of freedom of speech and press

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> statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole.

136 N.E. at 220.

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)).

52. *See* Barstein v. United States, 178 F.2d 665, 667 (9th Cir. 1949); United States v. Two Obscene Books, 99 F. Supp. 760, 762 (N.D. Cal. 1951), *aff'd sub nom.* Besig v. United States, 208 F.2d 142 (9th Cir. 1953) (books were *Tropic of Cancer* and *Tropic of Capricorn*, both by Henry Miller); United States v. Goldstein, 73 F. Supp. 875, 877 (D.N.J. 1947); United States v. Barlow, 56 F. Supp. 795, 796-97 (C.D. Utah), *appeal dismissed*, 323 U.S. 805 (1944); King v. Commonwealth, 313 Ky. 741, 233 S.W.2d 522, 524 (1950); State v. Becker, 272 S.W.2d 283, 285 (Mo. 1954). For a discussion of later attempts to censor Henry Miller's work, see E. HUTCHISON, TROPIC OF CANCER ON TRIAL, A CASE HISTORY OF CENSORSHIP (1968).

53. *See* Roth v. United States, 354 U.S. 476 (1957). For a discussion of *Roth*, see *infra* notes 54-71 and accompanying text. The Court failed to reconcile the conflicting lower court obscenity standards in Doubleday & Co. v. New York, 335 U.S. 848 (1948) (Frankfurter J., not participating) (court evenly split on proper standard for obscenity), *aff'g per curiam*, 297 N.Y. 687, 77 N.E.2d 6 (1947).

54. 354 U.S. 476 (1957). Roth was convicted in a federal district court in New York for mailing obscene material in violation of a federal obscenity statute. *Id.* at 476. In a combined case, another man was convicted under the California obscenity statute. *Id. See generally* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960) (calling *Roth* test inadequate and misleading); Note, *The Supreme Court and Obscenity*, 11 VAND. L. REV. 585 (1958) (analyzing *Roth* and obscenity cases immediately following *Roth*).

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

In a decision that essentially labeled obscenity a lower form of speech,[58] the *Roth* Court also attempted to provide an obscenity standard for literature.[59] The Court recognized the division among the lower courts concerning the proper definition of obscenity.[60] The Court ruled that the *Hicklin* standard was too restrictive in light of the constitutional guarantees of freedom in speech and press.[61] Accordingly, the Court adopted a variation of the dominant effect standard.[62] The *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."[63]

In formulating its definition of obscenity, the Court hastened to identify the distinction between obscenity and sex.[64] Sex, according to the Court, is not only a subject of human interest, but a matter of vital public concern.[65] Because of its significant public interest, the *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.[66]

In *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.[67] Second, the material must be judged on the basis of its dominant

55. *Roth*, 354 U.S. at 485.

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, *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. *Id.* at 538. The Court in *Roth* decided that the first amendment was not designed to protect every utterance; therefore no weighing of rights was necessary. *Roth*, 354 U.S. at 483.

57. *Roth*, 354 U.S. at 484.

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, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08.

59. *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." *Id.*

60. *Id.* at 489.

61. *Id.* The Court noted that the *Hicklin* test might exclude legitimate sexual material. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 487.

65. *Id.*

66. *Id.* at 488.

67. For a discussion of who is the "average person," see Bell, *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. *Id.* at 1204. One could define average as the mean average of various statistical data. *Id.* Alternatively, average could indicate a median average, with an individual representing the midpoint in a range of statistical

theme.[68] Finally, the material must be found to "appeal to the prurient interest."[69] 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.[70] The Court refused to directly address these issues for nearly a decade.[71]

C. Memoirs v. Massachusetts

In *Memoirs v. Massachusetts*[72] the Supreme Court modified the *Roth* standard in two significant respects.[73] *Memoirs* concerned a conviction for distributing the book *John Cleland's Memoirs of a Woman of Pleasure*, more popularly known as *Fanny Hill*.[74] Justice Brennan's opinion divided the *Roth* standard into three independent tests that must be satisfied to find ma-

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data with half the people having the characteristic below and half above the average person. *Id.* 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. *Id.* If there is not 75 percent agreement, then there is no single average person. *Id.* at 1205.

68. Several courts rejected the *Hicklin* practice of judging a work by isolated passages. *See* Walker v. Popenoe, 149 F.2d 511, 512 (D.C. Cir. 1945); People v. Wepplo, 78 Cal. App. 2d Supp. 959, 178 P.2d 853, 855 (Cal. App. Dep't Super. Ct. 1947); Attorney General v. Book Named "Forever Amber," 323 Mass. 302, 81 N.E.2d 663, 666 (1948); *see also* cases cited *supra* notes 46-48. The *Roth* court, in contrast, rejected the *Hicklin* standard on constitutional grounds. *Roth*, 354 U.S. at 488-89; *see* Lockhart & McClure, *supra* note 54, at 88-89.

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* Lockhart, *supra* note 56, at 541.

71. In Jacobellis v. Ohio, 378 U.S. 184 (1964), four Justices divided equally on whether local or national standards should determine community standards. Nudist magazines, however, did receive recognition as deserving constitutional protection. Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958) (per curiam) (conviction reversed); Mounce v. United States, 355 U.S. 180 (1957) (per curiam) (judgment vacated and case remanded). In addition, the court also afforded protection for a magazine for homosexuals. One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam) (conviction reversed).

72. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) (popularly known as *Memoirs v. Massachusetts*).

73. *See infra* notes 77-80 and accompanying text.

74. John Cleland wrote *Fanny Hill* in 1748. Although no one attempted to suppress the book when first published in England, periodic efforts at censorship were made after its initial publication. One of the earliest American obscenity cases concerned *Fanny Hill*. *See* Commonwealth v. Holmes, 17 Mass. 336 (1821). Shortly before the Supreme Judicial Court of Massachusetts found *Fanny Hill* obscene in Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403, 406 (1965), courts in two other states also considered the book. New York found *Fanny Hill* not obscene. Larkin v. G.P. Putnam's Sons, 14 N.Y.2d 399, 403-04, 200 N.E.2d 760, 762-63, 252 N.Y.S.2d 71, 74-75 (1964). New Jersey, however, found *Fanny Hill* obscene. G.P. Putnam's Sons v. Calissi, 86 N.J. Super. 82, 205 A.2d 913, 923 (N.J. Super. Ct. Ch. Div. 1964), *rev'd*, 50 N.J. 397, 235 A.2d 893 (1967).

terial obscene and beyond constitutional protection.[75]

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

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75. *Memoirs*, 383 U.S. at 418-19.

76. *Id.* at 418.

77. *See* Manual Enters. Inc. v. Day, 370 U.S. 478, 486 (1962) (Harlan, J., joined by Stewart, J.) (reverses Post Office Department's ban of shipment of magazines under Comstock Act). Justices Harlan and Stewart proposed a "patent offensiveness" test to rescue literature appealing to prurient interest, but still considered of value. *Id.* at 487.

78. *Memoirs*, 383 U.S. at 418.

79. *Id.*

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

81. *Memoirs*, 383 U.S. at 420. The state court indicated that testimony showed "this book has some minimal literary value . . . ." Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 73, 206 N.E. 2d 403, 406 (1965).

82. *Memoirs*, 383 U.S. at 421. Chief Justice Warren and Justice Fortas joined Justice Brennan's opinion. *Id.* at 414. Justices Black, Douglas, and Stewart concurred in the result, but not the opinion. *Id.* at 421, 424. For Justice Black's reasoning, see Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting); Mishkin v. New York, 383 U.S. 502, 515 (1966) (Black, J., dissenting). Justice Black believed the first amendment forbade all governmental censorship or regulation of speech and press. *Ginzburg*, 383 U.S. at 481 (Black, J., dissenting). According to Justice Black, however, government could regulate conduct. *Mishkin*, 383 U.S. at 518 (Black, J., dissenting). For Justice Douglas's reasoning, see *Memoirs*, 383 U.S. at 424 (Douglas, J., concurring). "[T]he first amendment leaves no power in government over *expression of ideas*." *Id.* at 433 (emphasis in original). For Justice Stewart's reasoning, see *Ginzburg*, 383 U.S. at 497 (Stewart, J., dissenting); *Mishkin*, 303 U.S. at 518 (Stewart, J., dissenting). Justice Stewart believed government could not suppress anything short of hard-core pornography. *Ginzburg*, 383 U.S. at 499 (Stewart, J., dissenting). Justices Clark, Harlan, and White dissented. *Memoirs*, 383 U.S. at 441, 455, 460 (dissenting opinions). Justice Clark rejected the "utterly without redeeming social importance" test. *Id.* at 443 (Clark, J., dissenting). Justice Harlan asserted that the federal government could only regulate hard-core pornography, but that the states were free to be more restrictive. *Id.* at 457-58 (Harlan, J., dissenting). Justice White also claimed that the states were not bound by the first amendment. *Id.* at 462 (White, J., dissenting). Justice White, however, criticized the "social importance" test as failing to consider the dominant theme of the book. *Id.* at 461 (White, J., dissenting).

83. Chief Justice Warren and Justices Brennan and Fortas followed the *Memoirs* test. Justices Black and Douglas consistently voted against any restrictions on first amendment freedoms. *See, e.g.*, Ginzberg v. New York, 390 U.S. 629, 650 (1968) (Douglas, J., dissenting); Jacobs v. New York, 388 U.S. 431, 436 (1967) (Douglas, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374, 398 (1967) (Black, J., concurring). Justice Stewart limited obscenity to what he

component of the obscenity analysis. The *Memoirs* standard remained the relevant obscenity standard for the next seven years.[84] During the several years following *Memoirs*, the Court reversed per curiam[85] all of the obscenity convictions it reviewed involving the distribution of sexual material to adults,[86] except certain pictorial depictions of explicit sexual activity.[87]

D. Miller v. California

A restructuring of the Court[88] finally enabled a five-Justice majority[89] to agree on a modified standard separating obscenity from constitutionally protected sexual matter in *Miller v. California*.[90] Chief Justice Burger's majority opinion in *Miller*[91] retained a three-prong test for obscenity.[92] The

called "hard core pornography." For Justice Stewart's definition of hard core pornography, see *Ginzburg*, 383 U.S. at 499 n.3 (Stewart, J., dissenting). For an alternative definition of hard core pornography, see THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 18 (1970). Justice Harlan concurred with Justice Stewart in matters of federal law. For Justice Harlan's view, see his dissent in *Roth*, 354 U.S. at 503-08 (Harlan, J., dissenting).

84. For further analysis of *Memoirs*, see Note, *Constitutional Law—Freedom of Press—Obscenity Standards*, 31 ALB. L. REV. 143 (1967); Note, *Ginzburg et al.—An Attack on Freedom of Expression*, 17 W. RESERVE L. REV. 1325 (1966); Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966). For a discussion and analysis of *Memoirs* by the defendant's attorney, see C. REMBAR, THE END OF OBSCENITY (1968). The oral arguments of *Memoirs*, *Ginzburg*, and *Mishkin* plus other cases are collected in OBSCENITY, THE COMPLETE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN THE MAJOR OBSCENITY CASES (L. Friedman ed. 1970).

85. *See* Redrup v. New York, 386 U.S. 767, 770-71 (1967) (summarizes different approaches used by Justices to evaluate whether or not suspect material was obscene). The divergence of opinions among the Justices made it impossible to render a majority opinion. Later cases merely cited *Redrup* as controlling. *See* Wiener v. California, 404 U.S. 988 (1971); Bloss v. Dykema, 398 U.S. 278 (1969); Friedman v. New York, 388 U.S. 441 (1967).

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).

87. *See, e.g.*, Levin v. Maryland, 389 U.S. 1048 (1968) (denying certiorari to conviction for illegal sale of obscene photographs); G.I. Distributors, Inc. v. New York, 389 U.S. 905 (1967) (denying certiorari to appeals court determination that seventy-page pamphlet containing photos of males engaging in sex was obscene under New York obscenity statute); Landau v. Fording, 388 U.S. 456 (1967) (holding film "Chant D'Amour" obscene), *aff'g per curiam*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966); Phelper v. Texas, 382 U.S. 943 (1965) (denying certiorari to conviction for possession of obscene photographs).

88. *See* A. MASON, THE SUPREME COURT FROM TAFT TO BURGER 283-93 (1979). In 1969 President Nixon appointed Chief Justice Burger to replace Chief Justice Warren. *Id.* at 287. By 1973 Nixon had made three more appointments to the Court. Justice Blackmun replaced Justice Fortas in 1970, and Justices Powell and Rehnquist replaced Justices Black and Harlan in 1972. *Id.* at 288-93.

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

90. 413 U.S. 15 (1973).

91. The Court issued five related obscenity opinions on June 21, 1973. In addition to *Miller*, *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68-69 (1973) (addressing question of consenting adults); Kaplan v. California, 413 U.S. 115, 118 (1973) (verbal descriptions of sexual activity without pictures); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 128 (1973) (importation of obscene materials for private use); United States v. Orito, 413 U.S. 139, 142 (1973) (interstate transportation of films). *See generally* Fahringer & Brown, *The Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions*, 62 KY. L.J. 731 (1974) (criticizing *Miller* as restriction on first amendment rights); Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 22 SAN DIEGO L. REV. 906 (1974) (criticizing *Miller* test as experiment in "New Federalism"); Note, *Com-*

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 appeal[94] 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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munity Standards, Class Actions and Obscenity Under Miller v. California, 88 HARV. L. REV. 1838 (1975) (criticizing *Miller* as deterrence to distribution of serious works); Note, Miller v. California: *A Cold Shower for the First Amendment*, 48 ST. JOHN'S L. REV. 568 (1974) (identifying *Miller* test as effort to give police power to deter dissemination of obscenity).

92. *Miller*, 413 U.S. at 24.

93. *See supra* notes 75-80 and accompanying text.

94. *Miller*, 413 U.S. at 24.

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.

99. Judge Learned Hand offered the first definition of contemporary community standards. Judge Hand characterized the standard as "the average conscience of the time." United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913). For a further discussion of the concept of contemporary community standards, see Bell, *supra* note 67, at 1202 (1977) (proposing public opinion polling determine community standards); Schauer, *Reflections on "Contemporary Community Standards: The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C.L. REV. 1 (1978) (tracing community standards to flawed analysis of early case law); Shugrue & Zieg, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157 (1974) (criticizing community standards as leading to inconsistency in law); Note, *Community Standards in Obscenity Adjudication*, 66 CAL. L. REV. 1277 (1978) (identifying community standards as limit on judicial control of obscenity); Note, *Community Standards, Class Actions, and Obscenity under* Miller v. California, 88 HARV. L. REV. 1838 (1975) (criticizing community standards as threat to first amendment); Comment, *The Geography of Obscenity's "Contemporary Community Standards,"* 8 WAKE FOREST L. REV. 81 (1971) (analyzing community standards as defined by various courts).

100. *Miller*, 413 U.S. at 30-31.

101. *Id.* at 33-34.

102. Hamling v. United States, 418 U.S. 87, 105 (1974) (national community standard not required in federal obscenity prosecutions); Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (Court sanctioned use of smaller than statewide community).

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.[104] Furthermore, while the *Miller* court implied that the same community standard may apply to the second prong,[105] in *Smith v. United States*[106] the Court clearly stated that courts must judge both prurient interest and patent offensiveness according to community standards.[107] 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,[108] the Supreme Court emphasized that the first two prongs of the test depended on community standards.[109] 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.[110] Obscenity legislation in several states has followed the same reasoning.[111] On the other hand, obscenity legislation in certain states applies community standards to all three components of the obscenity test.[112] The remaining states have avoided a legislative resolution of the issue by enacting statutes that substantially reproduce the *Miller* test.[113]

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104. *Miller*, 413 U.S. at 24.
105. *Id.* at 33.
106. 431 U.S. 291 (1977).
107. *Id.* at 301-02.
108. *See supra* note 9.
109. *See supra* notes 105-107 and accompanying text.
110. *See* United States v. Merrill, 746 F.2d 458, 464 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985); United States v. Bagnell, 679 F.2d 826, 835 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); Penthouse Int'l Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir. 1980); United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977).
111. *See* ARIZ. REV. STAT. ANN. § 13-3501 (Supp. 1986); COLO. REV. STAT § 18-7-101(2) (1986); ILL. ANN. STAT. ch. 11, para. 20(b) (Smith-Hurd Supp. 1987); IOWA CODE ANN. § 728.4 (West Supp. 1987); MISS. CODE ANN. § 97-29-103 (Supp. 1986); N.D. CENT. CODE § 12.1-27.1-01 (1985); S.C. CODE ANN. § 16-15-260 (Law Co-op. 1985); TEX. PENAL CODE ANN. § 43.21(a)(1) (Vernon Supp. 1987); WYO. STAT. § 6-4-301 (1983). *But see* Goldstein v. Allain, 568 F. Supp. 1377, 1387 (N.D. Miss. 1983) (preliminary injunction to prevent enforcement of statute). South Dakota applies community standards specifically to the "patently offensive" test, but does not refer to the standard in the "prurient interest" test. *See* S.D. CODIFIED LAWS ANN. § 22-24-27(10) (1979).
112. *See* CONN. GEN. STAT. ANN. § 53a-193(a) (West 1987); KAN. STAT. ANN. § 21-4301(3)(a) (Supp. 1986); MO. ANN. STAT. § 573.010(9) (Vernon Supp. 1987); W. VA. CODE 61-8A-1(7) (1984).
113. *See* ALA. CODE § 13A-12-150 (1982); ARK. STAT. ANN. § 41-3585.1(4) (Supp. 1985); DEL. CODE. ANN. tit. 10, § 7201 (Supp. 1986); FLA. STAT. ANN. § 847.001(7) (West Supp. 1987); GA. CODE ANN. § 26-2101(b) (Harrison 1988); HAW. REV. STAT. § 712-1210(6) (1985); IDAHO CODE § 18-4101(2) (1987); IND. CODE § 35-49-2-1 (1985); KY. REV. STAT. ANN. § 531.010(3) (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 14:106(3) (West 1986); ME. REV. STAT. ANN. tit. 17, § 2912(2)(B) (1983); MASS. GEN. LAWS ANN. ch. 272, § 31 (West Supp. 1987); MICH. COMP. LAWS ANN. § 752.362(5) (West Supp. 1987); MINN.

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.[114] *Pope v. Illinois*[115] presented the Court with the opportunity to clarify the applicability of contemporary community standards to the third element of the *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.[116] Second, the existence of serious literary, artistic, political, or scientific value does not vary from community to community.[117] In a concurring opinion Justice Scalia agreed with the interpretation of *Miller* offered by the majority.[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.[119]

B. Adding Reasonableness to Obscenity

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

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STAT. ANN. § 617.241 (West 1987); MONT. CODE ANN. § 45-8-201 (1987); NEB. REV. STAT. § 28-807(9) (1985); NEV. REV. STAT. § 201.235(4) (1979); N.H. REV. STAT. ANN. § 650:1 (1986); N.J. STAT. ANN. § 2C:34-2 (West Supp. 1987); N.M. STAT. ANN. § 30-38-1(B) (1987); N.Y. PENAL LAW § 235.00(1) (McKinney 1980); N.C. GEN. STAT. § 14-190.1(b) (Supp. 1985); PA. STAT. ANN. tit. 18, § 5903(b) (Purdon 1983); R.I. GEN. LAWS § 11-31-1 (1981); TENN. CODE ANN. § 39-6-1101(5) (1982). Oklahoma applies contemporary community standards to the "prurient interest" test, but does not mention the remaining tests in its statute. *See* OKLA. STAT. ANN. tit. 21, § 1040.12 (West 1983). Four states, Alaska, Maryland, Oregon, and Wisconsin, provide no statutory definition of obscenity.

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).

115. 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

116. *Id.* at 1920, 95 L. Ed. 2d at 445.

117. *Id.* at 1921, 95 L. Ed. 2d at 445.

118. *Id.* at 1923, 95 L. Ed. 2d at 448.

119. *Id.* at 1924, 95 L. Ed. 2d at 449.

120. *Id.* at 1920, 95 L. Ed. 2d at 445.

121. *Id.* at 1921, 95 L. Ed. 2d at 445 (citing *Smith*, 431 U.S. 291 (1977)).

122. *Smith*, 431 U.S. at 301 (citing F. SCHAUER, *supra* note 19, at 123-24).

123. *Pope*, 107 S. Ct. at 1921, 95 L. Ed. 2d at 445; *see also* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 259 n.36 (1986) (*Smith* decision interprets third prong of *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.[124] The Court stated that the first amendment provides protection to any work of merit.[125] Justice White added that first amendment value neither results from majority approval nor varies from community to community based on local acceptance.[126]

The Court ruled that the "reasonable person" standard constituted an appropriate method for determining whether suspect material contains merit.[127] 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.[128] Based on precedent and pragmatic appraisal of the relevant community, the Supreme Court, therefore, ruled the jury instruction[129] given in the trials of Pope and Morrison unconstitutional.[130]

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,[131] but he confined his agreement to the limits of the issue presented to the Court.[132] 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.[133] 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.[134] Accordingly, Justice Scalia called for a reconsideration of the *Miller* test.[135] Justice Scalia failed to indicate, however, what test he would favor to replace *Miller*. Indeed, his approach to the *Miller* test appeared to

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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.[136]

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.[137] The dissent reasoned that reasonable persons could possibly disagree in their appraisal of the value of pornographic material.[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.[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.[140] Justice Stevens concluded that if any reasonable person could find value in the suspect material, then the first amendment must provide protection.[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.[142] Justice Stevens argued that the general public, not the courts or legislatures, should determine whether sexually oriented material contains value.[143] The dissent also specifically criticized the vagueness and enforcement of the Illinois statute.[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

136. *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." *Id.*

137. *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. *Id.* at 1924, 95 L. Ed. 2d at 449. Justice Blackmun joined only in the harmless error portion. *Id.* at 1923, 95 L. Ed. 2d at 448. Justices Brennan and Marshall joined also with the obscenity portions. *Id.* at 1924, 95 L. Ed. 2d at 449.

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

139. *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. *Id.* at 1926 n.4, 95 L. Ed. 2d at 452 n.4; *see also* RESTATEMENT (SECOND) OF TORTS § 283 comment c (1965) (reasonable man standard allows jury "to look to a community standard").

140. *Pope*, 107 S. Ct. at 1927, 95 L. Ed. 2d at 453.

141. *Id.* at 1927, 95 L. Ed. 2d at 452.

142. *Id.* at 1927, 95 L. Ed. 2d at 453; *see* Paris Adult Theatres I v. Slaton, 413 U.S. 49, 83-84 (1973) (Brennan, J., dissenting). In Ginsberg v. New York, 390 U.S. 629, 639-43 (1967), the Court recognized that a state may regulate obscenity to protect children and unwilling viewers. Four states set forth statutory definitions of obscenity only with respect to minors. *See* OHIO REV. CODE ANN. § 2907.01(F) (Anderson 1987); UTAH CODE ANN. § 76-10-1201(11) (1978); VT. STAT. ANN. tit. 13, § 2801(6) (Supp. 1987); WASH. REV. CODE ANN. § 9.68.050 (1977).

143. *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)).

144. *Id.* at 1928-30, 95 L. Ed. 2d at 454-55.

products.[145]

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.

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