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Susan Royston Turner

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# Recent Developments

## *Pope v. Illinois*: SUPREME COURT REDEFINES VALUE TEST FOR DETERMINING OBSCENITY

In *Pope v. Illinois*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 1918 (1987), the United States Supreme Court refined one prong of the tripartite test for determining obscenity. A split Court held that the value prong, "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value," *Miller v. California*, 413 U.S. 15, 24 (1973) should not be determined according to contemporary community standards, but rather the trier of fact should determine "whether a reasonable person would find such value in the material, taken as a whole." *Pope*, 107 S. Ct. at 1921.

In July, 1983, the petitioners Pope and Morrison, both attendants at adult book stores, were arrested during separate incidents for selling allegedly obscene magazines to police detectives in Rockford, Illinois. During separate trials, both petitioners were convicted for the sale of obscene materials. The respective juries were instructed "to judge whether the material was obscene by determining how it would be viewed by ordinary adults in the whole State of Illinois." *Id.* at 1920. On appeal, the Illinois Court of Appeals affirmed Pope's conviction in part and Morrison's entirely. The Illinois Supreme Court denied review of both convictions while the United States Supreme Court granted certiorari and consolidated the appeals.

At both the circuit court and appellate court levels the petitioners argued that the value prong of the obscenity determination must be made according to an objective standard rather than the contemporary community standard. The Supreme Court framed the issue narrowly as "whether, in a prosecution for the sale of allegedly obscene materials, the jury may be instructed to apply community standards in deciding the value question." *Id.*

The tripartite test for obscenity has been set forth by the Court as:

(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.

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

The Court relied heavily upon *Miller* as establishing that the first two prongs of the obscenity test are questions of fact to be determined according to contemporary community standards, and that the value prong "does not vary from community to community based upon the degree of local acceptance it has won." *Pope*, 107 S. Ct. at 1919. The *Miller* decision, however, is silent about whether the last prong, the value prong, is to be decided according to contemporary community standards. In *Miller*, the Court clouds the value prong issue by stating "we... hold that the obscenity issue is to be determined by applying contemporary community standards." *Miller*, 413 U.S. at 37. The *Miller* Court provides little guidance as it does not differentiate the standards for the prurient interest, patently offensive and value prongs of the obscenity test. The reasonable man standard for the value prong was not mentioned in *Miller*.

The Court cites *Smith v. United States*, 431 U.S. 291 (1977) for the proposition that the value prong is not to be evaluated according to contemporary community standards. *Smith* states that "[l]iterary, artistic, political or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards." *Smith*, 431 U.S. at 301. The *Pope* Court interprets this phrase not as pointing out an oversight in *Miller*, but rather as showing that the purpose of the comment was "to call attention to and approve a deliberate choice." *Pope*, 107 S. Ct. at 1921.

If indeed the *Miller* Court expressly

chose to exclude the value prong from the contemporary community standard, it failed to announce the standard for the value prong. The *Smith* Court also did not articulate the standard for the value prong. The *Smith* Court did state, however, that "[t]he work must also lack serious literary, artistic, political or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review." *Smith*, 431 U.S. at 305. The Court in the instant case then filled in the gap left by *Smith* and *Miller* as a matter of law, susceptible to appellate review, as to the value prong standard—setting forth the reasonable person standard to be applied to the value prong.

As the jury instruction from the trial court expressly declared that the value prong standard would be that of the ordinary adult in the State of Illinois, the remaining issue to be decided in *Pope* was "whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error." *Pope*, 107 S. Ct. at 1921. The Court determined that a retrial was not necessary "if it can be said beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction." *Id.* at 1922. The Court reserved the authority, but declined to decide the harmless error issue as it had not been considered by the Illinois Court of Appeals. *Id.* at 1922-23.

In *Pope*, the Supreme Court has declined to apply the contemporary community standard to the value prong of the obscenity test and has injected a new standard to fill the gap left by the *Miller* and *Smith* decisions. The trier of fact must now determine whether a reasonable person would find serious literary, artistic, political or scientific value in allegedly obscene material, taken as a whole, in order to fulfill the value prong of the obscenity test. The contemporary community standards, however, still apply for the patently offensive and prurient interest prongs of the obscenity test.

—Susan Royston Turner