3-1-1990

Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards

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EMASCULATING THE DEFENSE IN OBSCENITY CASES: THE EXCLUSION OF EXPERT TESTIMONY AND SURVEY EVIDENCE ON COMMUNITY STANDARDS

I. INTRODUCTION

If defining obscenity was a thorny task for the United States Supreme Court in *Miller v. California,* [1] the aftermath of that decision has become an even deeper thicket. The Supreme Court thought it had solved the obscenity quandary in 1973 with the *Miller* test,[2] which established that obscenity would be measured by local, rather than national, standards.[3] But the Court failed to envision that the "community" could become an unwieldy unit of measure in decades to come, and that the test's "standards" may be elusive—or even illusory.

Miller provided a false sense of security for the courts: what appeared to be a neat and tidy test created more problems than it solved. The test did not define the relevant community, nor did it provide guidelines for proving the standards of that community. *Miller's* legacy has been seventeen years of confusion for state and federal courts struggling with the evidentiary issues that lay lurking in the community standards test.

Such a dilemma arose recently in *United States v. Pryba,*[4] a federal racketeering prosecution for the interstate sale of allegedly obscene videos and magazines. The district court defined the community as its jurisdictional area.[5] The defendants intended to prove the standards of that community through expert testimony, comparable materials and an opinion poll.[6] Although these are arguably the most effective and commonly used tools in obscenity cases, the court refused to allow the defendants to use them.

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1. 413 U.S. 15 (1973).

2. Material is obscene and loses first amendment protection when the factfinder concludes that: the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; the work describes, in a patently offensive way, sexual conduct specifically defined; and the work, taken as a whole, lacks serious literary, political or scientific value. *Id.* at 24.

3. *Id.* at 33-34.

4. 678 F. Supp. 1225 (E.D. Va. 1988).

5. *Id.* at 1232. The court defined the relevant community as the "adult community" in the Alexandria Division of the Eastern District of Virginia. *Id.*

6. *Id.* at 1226.

The *Pryba* case brings to light the Pandora's box opened by the *Miller* test: if one can pass the somewhat difficult threshold issue of determining the relevant community, what evidence is necessary to prove the standards of that community?

II. STATEMENT OF FACTS

On August 13, 1987, Virginia bookstore/videostore owners Dennis and Barbara Pryba, along with their employee, Jennifer Williams, were indicted on ten RICO violations.[7] These were based on the interstate rental or sale of allegedly obscene materials contained in four videotapes and nine magazines. An additional RICO charge against the Prybas' corporation, Educational Books, Inc., rested on fifteen obscenity pleas or convictions of the corporation under Virginia law from 1981 to 1984.[8] On the basis of these "patterns of racketeering activity,"[9] the Government sought forfeiture of nearly all the Prybas' assets.[10]

The Prybas' troubles had been a long time coming. Dennis Pryba had first been convicted for selling obscene material nineteen years earlier.[11] After a tour in the Navy, he moved from his native Midwest to the Washington, D.C. area, where he began to build a pornography business in the 1960s.[12]

Pryba's enterprise gradually expanded. In 1973, Dennis Pryba opened Educational Books in a shopping center on the Richmond Highway in Fort Belvoir, Virginia.[13] Soon afterward, local authorities began targeting Pryba with obscenity charges in an effort to close down his enterprise. Unsuccessful because of jurisdictional problems,[14] the county eventually sought help from the federal government—which was more than happy to oblige.

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7. Hayes, *A Jury Wrestles With Pornography,* AM. LAW. 98 (March 1988) [hereinafter *"A Jury Wrestles"*].

8. *Id.* at 98-99.

9. Under 18 U.S.C. § 1961(1)(B), "racketeering activity" includes "any act which is indictable" under the obscenity prohibitions of 18 U.S.C. § 1461-1465. The Prybas were convicted under 18 U.S.C. § 1465, which prohibits the transportation of obscene matters for sale or distribution. *Pryba,* 678 F. Supp. at 1228, n.4. A "pattern of racketeering activity" requires two or more acts of racketeering. 18 U.S.C. § 1961(5).

10. *A Jury Wrestles* at 98-99. *See also,* Appellants' Opening Brief at 3, *United States v. Pryba,* 678 F. Supp. 1225 (E.D. Va. 1988) (Nos. 88-5001(L), 88-5002, 88-5003, 88-5004).

11. *A Jury Wrestles* at 98.

12. *Id.* Pryba once described himself as "just a businessman selling smut"; "Everybody is renting it . . . every mom and pop has opened a video store and has this stuff." *Id.*

13. *Id.*

14. *A Jury Wrestles* at 98. The Prybas did not reside in the jurisdiction. A prosecutor on the case once lamented: "[W]e could never get them on the premises [to arrest them] when the material was sold." *Id.*

The United States Attorney's Office agreed to look into Pryba's activities, and was bolstered with help from the United States Department of Justice's recently formed National Obscenity Enforcement Unit. Undercover FBI agents were dispatched on a number of "shopping sprees" to Educational Books.[15]

On October 9, 1986, FBI agents raided Dennis Pryba's warehouse in Upper Marlboro, Virginia, and Barbara Pryba's 20-acre estate in Lorton, Virginia.[16] An inventory was prepared by agents, which indicated that the number of general-interest videos found in the search far outnumbered the amount of sexually explicit videos on the warehouse premises.[17]

A. Maneuverings at Trial Level

At trial, investigator Daniel B. Garrett III testified that as part of the obscenity investigation he had rented three sexually explicit videotapes from one of Pryba's eight Video Rental Centers and that he purchased an adult videotape from Educational Books.[18] Postal inspector Joseph Lee Edwards testified that on August 10, 1987, he purchased packages containing nine sexually explicit magazines from Educational Books.[19]

In his scathing opinion, Federal District Judge T. S. Ellis III expressed a clear revulsion toward these materials.[20] He noted that the content of most of the magazines and some of the videos was sado-masochistic in nature.[21] His opinion described each film in excruciating—and arguably unnecessary—detail.[22]

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15. *Id.* FBI agents bought about 20 magazines and 40 videotapes from Educational Books before charges were brought. *Id.*

16. *Id.*

17. Appellants' Opening Brief at 4, *Pryba.*

18. *Id.*

19. *Id.*

20. *See infra* note 22 and accompanying text. The judge pointedly observed: "Not surprisingly, defendants did not argue at trial that the materials possessed serious literary, artistic, political or scientific value." *Pryba,* 678 F. Supp. at 1228 n. 4.

A writer who interviewed six of the *Pryba* jurors after the verdict noted that Judge Ellis was a Reagan appointee who had recently been elevated to the federal bench. Therefore, it was anticipated that Judge Ellis was "likely to share the administration's position [against] pornography." *See A Jury Wrestles* at 98. Moreover, the writer observed that the "odds were against the Prybas before they stepped through the courthouse doors"—the Eastern District of Virginia is nicknamed the "Rocket Docket" because of its reputation for "dispensing speedy justice and decisions favorable to the government." *Id.*

21. *Pryba,* 678 F. Supp. at 1227.

22. *Id.* at 1227-28. The court's description includes, among other acts: "she-males" (with female breasts and male genitalia) engaged in fellatio and anal intercourse; group sex; the

The jury examined the materials and found that the four videotapes and six of the magazines were obscene.[23] On that basis, the jury convicted the Prybas and Jennifer Williams—who was their bookkeeper and an officer of the corporation—of three counts of racketeering and seven counts of distributing obscene materials.[24] Based on those convictions and on Educational Books' RICO conviction, the jury voted to allow the Government to seize nearly all the Prybas' assets (excluding Barbara Pryba's home and automobile).[25] The Government immediately padlocked the doors of the three bookstores and the nine video rental shops. Ironically, the conviction was for distributing only $105.30 worth of obscene materials.[26]

On December 18, 1987, Judge Ellis sentenced Dennis Pryba to three years in prison, a fine of $75,000, five years' probation and 300 hours of community service.[27] The judge said he considered the sentence "lenient for a life of selling pornography" and alluded to Pryba's "23-year history of selling smut."[28] Dennis' estranged wife, Barbara Pryba, received a three-year suspended sentence and a $200,000 fine.[29]

B. Contentions on Appeal

On appeal to the United States Fourth Circuit Court of Appeals,[30] the Prybas challenged the forfeiture as an unconstitutional confiscation and restraint of a large inventory of presumptively protected expressive material, most of which was not even sexually explicit. The conviction was appealed on several grounds, two of which present major evidentiary issues that go to the heart of the *Miller* community standards test: the exclusion of expert testimony and opinion survey evidence.

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drinking of male ejaculate from a glass; urination; painful positions of forced bondage for long periods of time; sticking pins into female breasts; inserting vegetables into the vagina; flagellation; mousetraps and tourniquet devices on female breasts; closeups of young women masturbating; inserting a large pipe into a woman's anus; and pregnant women in lascivious poses. *Id.*

23. Appellants' Opening Brief at 5, *Pryba.*

24. *A Jury Wrestles* at 100.

25. *Id.* at 101.

26. *Id.* at 97. When jurors read local newspaper accounts of the conviction the next day, they were shocked to learn that their verdict exposed the Prybas to possible prison terms of 95 years and dire financial consequences. *Id.* As a result of the seizure of his $1-million business, Dennis Pryba is reportedly penniless. *Id.* at 101.

27. *Id.*

28. *Id.*

29. *A Jury Wrestles* at 101.

30. United States v. Pryba, Record Nos. 88-5001(L), 88-5002, 88-5003, 88-5004. Oral arguments were held October 4, 1989. The Fourth Circuit had not rendered its decision as of the date this publication went to press. (LEXIS, Genfed library, U.S.App. file).

The trial court had excluded crucial defense evidence, including a public opinion survey and the testimony of an expert under whose direction the poll was conducted. Dr. John McConahay, who has a Ph.D. in social psychology and is an associate professor of policy sciences at Duke University,[31] was called by the defense to testify about the poll's results.[32]

Judge Ellis barred his testimony, although Dr. McConahay had previously been qualified as an expert on public opinion poll research more than 30 times in various state and federal courts.[33] The judge ruled that the survey was inadmissible because it was irrelevant and potentially prejudicial, confusing and misleading to the jury.[34]

The judge took particular exception to the specific questions posed and held that they were irrelevant.[35] Interviewees were asked the following questions:[36]

> —whether he/she thought that the portrayal of "nudity and sex" and materials available to adults only had become more or less acceptable in recent years;
>
> —whether he/she agreed or disagreed with the statement that adults who want to should be able to obtain and view materials depicting "nudity and sex";
>
> —whether he/she believed that he should be able to buy or rent materials depicting "nudity and sex"; and
>
> —whether he/she agreed or disagreed with the statement that adults who want to should not be able to buy or rent materials depicting "nudity and sex."

Before asking these questions, the pollster informed each interviewee that the phrase "nudity and sex" meant "nude bodies and closeup, graphic depictions of a variety of sexual activities, including sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers."[37]

The judge found that these questions were not designed to elicit

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31. *Pryba*, 678 F. Supp. at 1228 n.5.

32. Appellants' Opening Brief at 31-32, *Pryba*.

33. *Id.*

34. *Pryba*, 678 F. Supp. at 1231. Yet based upon comments by six jurors in an interview after the verdict, the *exclusion* of this evidence may have created far more confusion: "The jurors understood that strict adherence to the *Miller* test required them to put aside their personal opinions. . . . Since they had no expert opinion or community surveys to guide them, they judged the magazines and videotapes through the eyes of their parents, relatives and neighbors." *A Jury Wrestles* at 99.

35. *Pryba*, 678 F. Supp. at 1228-30.

36. Appellants' Opening Brief at 33, *Pryba*.

37. *Id.*

whether there was *community* acceptance of the materials in question.[38] Rather, he ruled, the questions inquired about the interviewees' individual acceptance of sexually explicit materials, which is irrelevant.[39] Further, Judge Ellis held that the questions were not comparable to the materials in question because "descriptive language fails to convey the impact of the visual image."[40]

The trial court also excluded an "ethnography"[41] study and the testimony of another expert who conducted the study. Dr. Joseph Scott is a sociologist, criminologist and associate professor at Ohio State University with a background in statistical methodology.[42] He conducted an ethnographic study of the attitudes of the adult community of the Alexandria Division toward sexually explicit material.[43] Dr. Scott conducted the study by visiting adult bookstores, drugstores, newsstands, grocery stores, candy and gift shops, and general bookstores. At each location, he found sexually explicit magazines and/or videotapes which he determined were comparable to those in question. He also spoke with clerks at each store and with newspaper editors regarding letters to the editor on the topic of pornography.[44]

Judge Ellis, however, was patently unimpressed with this undertaking. He branded Dr. Scott's study as "nothing more than a one-man, eight-day unscientific poll of purveyors and purchasers of smut. To permit this so-called 'study' to masquerade as expert testimony on Northern Virginia's contemporary community standards of obscenity is ludicrous."[45]

The particular wording of the judge's instructions to the jury delivered the death blow to the defense. Judge Ellis told the jury to determine whether the average person in the community would find that the materi-

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38. *Pryba,* 678 F. Supp. at 1228-29.

39. *Id.* at 1230-31. *See also,* People v. Nelson, 88 Ill. App.3d 196, 43 Ill. Dec. 476, 410 N.E.2d 476 (1980).

40. *Pryba,* 678 F. Supp. at 1229.

41. Ethnography is defined as a branch of anthropology that deals descriptively with specific cultures. Webster's New World Dictionary 481 (2d ed. 1980).

42. *Pryba,* 678 F. Supp. at 1232.

43. *Id.* Dr. Scott explained that an ethnographic study of community standards is a "recognized methodology for making a qualitative assessment of community standards in a given area." Appellants' Opening Brief at 41, *Pryba.*

44. Appellants' Opening Brief at 41-42, *Pryba.*

45. *Pryba,* 678 F. Supp. at 1234. The Government exhibited a similar attitude, arguing in its appellate brief that "asking the clientele of an adult bookstore if they like pornography is like asking the clientele of McDonald's if they like hamburgers." Appellee's Opening Brief at 41, *Pryba.* Curiously, Dr. Scott testified that the United States Department of Justice had once requested him to prepare a proposal to do an ethnographic study for the department. Appellants' Opening Brief at 41, *Pryba.*

als in question had prurient appeal and were patently offensive.[46] He defined prurient as a "shameful or morbid interest in nudity, sex or excretion" that "substantially" exceeds "customary limits of candor."[47] The jury was told that depicting sexual acts in a degrading manner is patently offensive.[48]

Further, the judge refused to instruct the jury to disregard any effect the material may have on sexual deviates.[49] Additionally, he instructed the jury that it was to determine whether the materials in question violated contemporary community standards based upon "what is, in fact, *accepted* in the adult community as a whole, and *not* by what the community merely *tolerates*."[50] Citing conflicting case law regarding whether the correct test is "tolerance" or "acceptance," the appellants argued on appeal that the trial court had improperly instructed the jury. They maintained that this "war of words"[51] regarding the community standards test was improperly interpreted against them.

III. BACKGROUND OF THE COMMUNITY STANDARDS TEST

The term "community standards" was coined more than 30 years ago in the landmark case of *Roth v. United States*,[52] which held that obscenity is not protected under the first amendment.[53] However, *Roth* did not define "community," nor did it indicate that such a definition was constitutionally required.[54]

With no guidelines, the courts struggled to define this enigma called the "community." There was no consensus among lower courts as to whether the standard should be local, national, or somewhere in be-

46. *A Jury Wrestles* at 99.

47. *Id.* The wording was a defeat for defense lawyers, who had argued that community tolerance—not unusual candor—was the proper standard. *Id.*

48. *Id.*

49. *Id.* This social concern about the possible effects of obscenity on crime reportedly inclined two of the jurors to vote for conviction. *Id.*

50. Appellants' Opening Brief at 55, *Pryba* (emphasis added).

51. *Id.* at 57.

52. 354 U.S. 476 (1954).

53. *Id.* at 485.

54. *See generally,* Roth v. United States, 354 U.S. 476 (1954). Jurors in the *Pryba* case were instructed: "You [are to] determine [the materials'] impact upon the average person in the community . . . . You judge the [materials] by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards . . . . In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children." *Pryba,* 678 F. Supp. at 490.

tween.[55] During the years between *Roth* in 1957, and *Miller* in 1973, state courts applied a panoply of "community" standards: the standards of the state;[56] of the venire;[57] and of the locality.[58]

Texas rejected a national standard but held the community was "not smaller than the state."[59] Louisiana courts equated community standards with national ones, "unless it is shown . . . that the community standard is not in accord with the national standard."[60] Nebraska sensed the inherent problem in such a test and questioned how jurors in a local prosecution could be expected to know what the "national standard of morality" is.[61]

Nonetheless, the Fifth Circuit[62] managed to apply a national standard. The United States Supreme Court impliedly legitimized a national standard for obscenity in two early cases, *Manual Enterprises Inc. v. Day*[63] and *Jacobellis v. Ohio.*[64]

However, this jurisdictional patchwork of standards prompted the United States Supreme Court to settle the issue—or so it thought—in *Miller v. California.*[65] The Court rejected national standards and ruled that obscenity must be judged by "contemporary community standards."[66]

However, *Miller* failed to take the next logical step and define "community." All that was known after *Miller*—and to this day—is that community standards do not necessarily equate with national standards. By ruling in the negative ("A does not equal B"), the Court did not tell us what the community *does* equal.

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55. *An Atlas for Obscenity: Exploring Community Standards,* 7 CREIGHTON L. REV. 157, 167 nn.41-45 (1974) [hereinafter *"Atlas"*].

56. People v. Butler, 49 Ill.2d 435, 436, 275 N.E.2d 400, 401 (1971).

57. Jones v. City of Birmingham, 45 Ala. App. 86, 87, 224 So.2d 922, 923 (1969).

58. *See Atlas* at 169 n.56 (citing Price v. Commonwealth, 213 Va. 113, 116, 189 S.E.2d 324, 327 (1972), *vacated,* 413 U.S. 912).

59. Carter v. State, 388 S.W.2d 191 (Tex. Crim. App. 1965).

60. *See Atlas* at 168 n.51 (citing State v. Gulf States Theatres, Inc., 264 La. 44, 47, 270 So.2d 547, 560 (1972), *vacated,* 287 So.2d 496).

61. *Id.* at 168 n.52 (citing State v. Little Art. Corp., 189 Neb. 681, 686, 204 N.W.2d 574, 578 (1973)).

62. *See* McGrew v. City of Jackson, 307 F. Supp. 754, 760 (S.D. Miss. 1969), *vacated,* 401 U.S. 987; Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 726 (5th Cir. 1966).

63. 370 U.S. 478 (1962).

64. 378 U.S. 184 (1964).

65. 413 U.S. 15 (1973).

66. *Id.* at 33-34.

A. *Why Do Courts Care About "Protecting" the Community From Obscenity?*

The Supreme Court has been intent on protecting this nebulous enclave called the "community" from the perceived evils of obscenity and pornography.[67] Why? From our Puritan roots to today's naysayers,[68] obscenity has been blamed for a myriad of social evils.[69] The U.S. Department of Justice undertook an exhaustive study of pornography and concluded that such materials were harmful to society.[70] To bolster its support for a national anti-pornography campaign, the government formed a specialized National Obscenity Enforcement Unit to target obscenity prosecutions.[71]

In a curious fellowship, the government and God appear to be on the same side when it comes to obscenity. Not surprisingly, religious organizations have consistently fueled the anti-obscenity fire. One article in a religious journal authored by a federal prosecutor purports to debunk ten popular myths about obscenity.[72] It lists children and women as particular targets of serial murderers and rapists[73] who are purportedly driven to act out the scenes of violent pornography they view.[74] Among obscenity's "silent victims" are said to be marriages and families (damaged by "pornography-inflamed sexual abuse"),[75] as well as communities (damaged by street violence around pornographic outlets).[76] Some say obscenity "promotes, dramatizes, glorifies, and many believe, causes horrors" such as: rape, torture, incest, child molestation, mutila-

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67. *See infra* notes 91-92 and accompanying text. A distinction should be made between pornography and obscenity. Pornography is a generic term for sexually explicit materials. Obscenity is a legal term of art for illegal pornography, sometimes called hard-core pornography. *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?,* 56 FORDHAM L. REV. 1101 n.2 (1988). *See also,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-17, at 920-24 (2d ed. 1988).

68. During his 1988 campaign for the presidency, George Bush denounced the American Civil Liberties Union for its position on pornography. *U.S. Civil Liberties Group Defends Itself From Bush Attack,* The Reuter Library Report, Oct. 2, 1988 (LEXIS, Nexis library, News file).

69. In one of his final statements before his January, 1989 execution in Florida, serial killer Ted Bundy blamed his exposure to hard-core pornography for fueling his fantasies and having a "crystallizing effect" on his violent tendencies. *Ted Bundy Shows Us The Crystallizing Effect of Pornography,* L.A. Times, Feb. 8, 1989, pt. 2, at 7, col. 1.

70. *See generally,* Final Report of the Attorney General's Commission on Pornography (1986).

71. *See* United States Department of Justice Legal Activities, 1989-90, at 32.

72. *See, e.g.,* H. Showers, *Myths and Misconceptions of Pornography: What You Don't Know Can Hurt You,* 9 CHRISTIAN LEGAL SOC'Y Q. 8 (Fall 1988).

73. *Id.* at 9.

74. *Id.*

75. *Id.*

76. *Id.*

tion and murder.[77] Sexual immorality, it is decreed in the Bible, ranks among the negative traits that "make a man 'unclean.' "[78]

Clean or unclean, there are those who take strong exception to such fire-and-brimstone views of pornography. Some professionals maintain that obscenity may actually be *helpful* to certain segments of society.[79] One court, in holding the movie "Deep Throat" not obscene, observed that there may be a socially "beneficial utility of pornography."[80]

However, the debate over whether obscenity is good or bad for society is irrelevant[81] when viewed in the context of the first amendment.[82] The issue is simply whether obscenity is constitutionally protected speech. Rather than asking whether we should protect society from obscenity, the question becomes: should we protect sexually explicit materials from the dictates of society?

B. Will Obscenity Remain Unprotected?

The Supreme Court has never solidly lined up against obscenity. The Court in *Roth v. United States*[83] was not unanimous in holding obscenity outside the protective cloak of the first amendment. In fact, in all its 1973 obscenity rulings[84] the Court was sharply divided[85] on the issue. Of course, the Court has changed considerably in composition since the 1973 panel[86] that held against obscenity as protected speech.

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77. H. Showers, *Myths and Misconceptions of Pornography: What You Don't Know Can Hurt You,* 9 CHRISTIAN LEGAL SOC'Y Q. 9 (Fall 1988).

78. *Id.* at 10 (quoting Matthew 15:18-20a).

79. United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 565 F. Supp. 7, 8-9 (S.D.N.Y. 1982) (quoting Meyer, *B.F. Skinner on Behaving His Age,* Washington Post, Aug. 24, 1982, at B1). Behavioral psychologist B.F. Skinner, in a speech to the American Psychological Association, supported the view of theologian Paul Tillick that pornography may be advantageously used to "extend sexuality into old age." *Id.*

80. *Various Articles of Obscene Merchandise, Schedule No. 2102,* 565 F. Supp. at 9.

81. F. SCHAUER, THE LAW OF OBSCENITY 281 (1976). This raises admissibility issues in obscenity prosecutions. Evidence which is not relevant is not admissible. FED. R. EVID. 402. Therefore, defense testimony that exposure to sexually explicit materials is not harmful, as well as prosecution evidence that obscenity causes "moral decay or criminal activity," are both immaterial to a particular defendant or to the materials in issue and should be excluded. F. SCHAUER, THE LAW OF OBSCENITY 281 (1976).

82. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . ." U.S. CONST. amend. I, § 1.

83. 354 U.S. 476 (1957).

84. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

85. In each case, the vote was 5-4.

86. The Court in 1973 consisted of Justices Burger, Powell, Blackmun, Brennan, Douglas,

Four of the current Justices have made it clear that they find the *Miller* test unacceptable.[87] Justices Brennan, Stevens and Marshall have consistently pointed to problems in applying the *Miller* test.[88] Justice Scalia, concurring in *Pope v. Illinois,* [89] dropped a strong hint that had he been asked to reexamine the *Miller* test, he would have opted to do so.[90]

However, the Court has recently sent strong signals that it intends to preserve *Miller.* In *Fort Wayne Books, Inc. v. Indiana,* [91] the Court flatly rejected an invitation to overturn *Miller.* [92]

Moreover, the mood of the public appears to have been gathering an anti-pornography momentum. On September 29, 1989, House and Senate negotiators voted to ban federal funds for "obscene" art.[93] When the United States invaded Panama in December, 1989, American newspapers trumpeted that "lewd pornographic photographs" were found in General Manuel Noriega's bunker.[94] Many states have current obscenity laws in force,[95] and prosecutors are constantly looking for new weapons such as pandering statutes[96] and RICO laws[97] to use in the fight against obscenity. Since the *Miller* test is central to that arsenal, it is doubtful that the current Court will abandon it altogether. The question is whether the Court will fine-tune the vague community standards prong of *Miller*—and define the type of evidence required to prove those standards—to make *Miller* a viable test.

IV. COMMUNITY STANDARDS PRONG OF THE *MILLER* TEST

The *Miller* test requires that the standards of the community be

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Marshall, White, Stewart and Rehnquist. Burger, Douglas and Stewart have been replaced by Stevens, O'Connor and Scalia.

87. The four are Justices Stevens, Brennan, Marshall, and Scalia. *Obscenity: 30 Years of Confusion and Still Counting—Pope v. Illinois,* 21 CREIGHTON L. REV. 379, 405 n. 250 (1987).

88. Smith v. United States, 431 U.S. 291 (1977).

89. 481 U.S. 497 (1987).

90. *Id.* at 502.

91. — U.S. —, 109 S. Ct. 916 (1989).

92. *Id.* at 924.

93. *Obscenity Measure Approved,* Washington Post, Sept. 30, 1989, at A1.

94. *Pornography, Drugs Found in Noriega's Lair,* Boston Globe, Dec. 23, 1989, at 10.

95. These states include: Alabama, Arkansas, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Wyoming.

96. *See People v. Freeman—No End Runs on the Obscenity Field or You Can't Catch Me From Behind,* 9 LOY. L.A. ENT. L.J. 69 (1989).

97. *See RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment,* 56 FORDHAM L. REV. 1101 (1988).

used to determine whether sexually explicit materials are obscene.[98] However, *Miller* did not define the size of the community. It indicated that the community was smaller than the nation, but it did not say whether the community could be smaller, for example, than the state.[99]

A. Various Interpretations of "Community"

In *Miller,* jurors were instructed that the community was the state of California.[100] The Court held that the "[First Amendment does not require] that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[101] Curiously, the Court mentioned both state and municipal standards in the same breath. Was this an inadvertent mixed metaphor, or was the Court implying that the community could be as small as a city? Could it be even smaller?[102]

But determining what "the entire community believes" may be impossible when the community is a large, diverse city such as Los Angeles. An experienced pollster has observed that "attitudes regarding the depiction of sexual matters vary markedly from one location in a city to another."[103] He concludes that the lack of consensus within the city may mean that there are no community standards. A further danger, he suggests, is that of the "pseudocommunity," the neighborhood or portion of the city where a juror may live and work. The homogeneous values of the pseudocommunity may obscure for such a juror the actual variations in standards that exist in the larger community.[104]

The city of Chicago was deemed the relevant community in *United States v. Various Articles of Merchandise, Seizure No. 170.* [105] While the Seventh Circuit did not find this error, on remand it suggested that the district court should consider whether "a larger community, such as the

98. *See supra* note 66 and accompanying text.

99. F. SCHAUER, THE LAW OF OBSCENITY 124 (1976).

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

101. *Id.* at 32.

102. In extremely large cities, such as Los Angeles or New York, a case could be made for a quasi "community" that lies within a portion of the city limits. In *United States v. Gottesman,* CR 88-295-KN (1989), the community was the city of Los Angeles. Federal District Judge David Kenyon dismissed the RICO and obscenity charges because he could not determine whether the films violated community standards in an area as diverse as Los Angeles. "The great majority of people in this town would be incensed by this [material]. I just do not believe that unless you have positive evidence of what the entire community believes in this area, that any judge could say . . . whether it's obscene or [just] pornographic," said the judge. *Porno Case Is Dismissed; L.A. Diversity Cited,* L.A. Times, May 4, 1989, pt. I at 1, col. 4.

103. Bell, *Determining Community Standards,* 63 A.B.A. J. 1203, 1206 (Sept. 1977).

104. *Id.*

105. 750 F.2d 596 (7th Cir. 1984).

Chicago metropolitan area or the Northern District of Illinois, may be more suitable."[106]

The jurisdictions have made various interpretations of their own. Some state courts have defined the relevant community as the state.[107] Others have specified local communities or municipalities as the standard.[108]

In *United States v. Pryba*[109] the district court instructed jurors to apply the standards of "the adult community in the Alexandria Division of the Eastern District of Virginia."[110] Some scholars believe that this venire-based approach is the correct one and that "the size of the community is theoretically the area from which the jury is drawn."[111] Some courts have even *required* that the community be defined as that of the venire.[112]

The Supreme Court has tended to employ a more relaxed standard, allowing jurors to use their own perceptions to define the community. In *Hamling v. United States*[113] the Court held that jurors could rely upon their personal experience and knowledge to assess the standards of the community. No definition of community was given.[114] Moreover, the Court saw fit to explain that its "holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law."[115] While implying that the community would logically be that of the venire, the Court commented that it may, however, be proper under certain circumstances to "admit evidence of standards existing in some place outside of this particular district."[116] Unfortunately, the Court offered no clues as to what those circumstances might be.

B. Evidentiary Problems When "Community" Is Undefined

Based on *Hamling,* courts have consistently, albeit mysteriously, al-

106. *Id.* at 600 n.4.

107. *See, e.g.,* Commonwealth v. United Books, 389 Mass. 888, 453 N.E.2d 406 (1983); Pierce v. State, 292 Ala. 473, 296 So.2d 218 (1974); State v. Cimino, 33 Conn. Sup. 681, 366 A.2d 1168 (1976).

108. *See, e.g.,* United States v. Marks, 520 F.2d 913 (6th Cir. 1975); State v. Pierren, 583 P.2d 69 (Utah 1978); People v. Austin, 76 Mich. App. 455, 257 N.W.2d 120 (1977).

109. 678 F. Supp. 1225 (E.D. Va. 1988).

110. *Id.* at 1232.

111. F. SCHAUER, THE LAW OF OBSCENITY 126 (1976).

112. United States v. Friedman, 488 F.2d 1141, 1142 (10th Cir. 1973).

113. 418 U.S. 87 (1974).

114. *Id.* at 103-10.

115. *Id.* at 105.

116. *Id.* at 106.

lowed juries to apply community standards without a specified geographic boundary.[117] But when the community remains undefined, evidentiary problems may arise. How can the defense determine the extent and scope of evidence to put forward on community standards when he or she does not know what "community" the jury has in mind? The prosecution faces a similar dilemma. It has therefore been suggested that upon the motion of either party, a trial judge should define "community" so that both parties will have notice as to how wide or how narrow the scope of their evidence should be.[118]

Another inherent danger in using an undefined "community" is that the jury may see *itself* as a mirror of the community. With no extrinsic standards to rely upon, jurors may have no choice but to rely on their own. Therefore, current obscenity standards may "create a community of the twelve seated in the [jury] box and permit their standards to largely determine *ex post facto* whether material is obscene."[119]

Some state obscenity statutes eliminate the guesswork by defining "community" as the entire state. Congress could similarly define the community for federal prosecutions, although it is unlikely to do so.[120] Moreover, a single standard for any large geographic area is likely to be elusive. In expansive states such as California, New York and Texas, "a statewide standard is little more ascertainable than a national standard."[121] Even if it is ascertainable, it may not be logical. Why would the standards of two bordering communities be different "just because a state line intervenes?"[122]

One scholar points out that "the Supreme Court had in mind a geographically limited community"[123] when it developed the community standards test for obscenity. He suggests that in most cases, it is best to define the community as a narrow area. However, if the area is too small there may be a chilling effect upon distributors of sexually explicit materials because they may have to deal with too many different community

117. Lentz, *Comparison Evidence in Obscenity Trials,* 15 J.L. REFORM 45, 57 n.47 (1981).

118. F. SCHAUER, THE LAW OF OBSCENITY 131 (1976).

119. Ford v. State, 71 Ind. Dec. 580, 588, 394 N.E.2d 250, 258 (1979) (Garrard, P.J., dissenting).

120. F. SCHAUER, THE LAW OF OBSCENITY 127 (1976).

121. *Id.* at 125.

122. *Id.* at 125 n. 41. Consider, for example, Schauer's example of the two bordering communities of Fairfield, Connecticut and Westchester, New York. Generally referred to as the "Westchester-Fairfield" area, the two upscale communities are virtually indistinguishable socio-economically. They share the same country clubs, polo grounds—and in all probability, the same community standards on obscenity.

123. F. SCHAUER, THE LAW OF OBSCENITY 117 (1976).

standards that make up their local distribution area.[124] The question then becomes, *how* limited should the community be?

V. PROVING COMMUNITY STANDARDS

If a court can pass the threshold question of which "community" is at issue, the next step is to determine what the term "standards" means in the context of obscenity. Does it mean the lowest common denominator in the community, or does it mean sexually explicit materials that are relatively mainstream?

Curiously, the Supreme Court in *Miller* seemed to have thrown a curve ball when it commented that residents of one region of the country need not "accept" sexually explicit materials which are found "tolerable" elsewhere.[125] That raised the question of whether tolerance or acceptance was the key to a community's "standards."

Through a series of decisions in the federal courts,[126] the answer clearly became "acceptance." The district court in *Pryba* correctly observed, "[c]ommunity acceptance is the touchstone of admissibility. It is axiomatic that community tolerance or availability does not equate with acceptability."[127] That was the easy part; the difficulty for the court lay in deciding which evidence to admit as probative of what the community found acceptable or not acceptable.[128]

Courts may also have to address an unusual but distinct possibility: that a community may in fact have *no* standards or that such standards may be unascertainable. Therefore, it would be impossible to determine what is acceptable in the community. In *State v. Kam,* [129] jurors had been instructed that they "must, as an average person, determine and apply the contemporary community standards of the State of Hawaii."[130] The judge refused the appellant's requested instruction, which read: "If you are unable to identify the statewide community standard, Defendant is entitled to a finding in her favor."[131]

The appellate court in *Kam* found that the jurors may have construed the court's instruction as "mandating them to decide that there are contemporary community standards. The problem with such a man-

124. *Id.* at 125.
125. *Miller,* 413 U.S. at 32.
126. *See Pryba,* 678 F. Supp. at 1230 n.9.
127. *Id.* at 1230.
128. *Id.* at 1229-31.
129. 66 Haw. 528, 726 P.2d 263 (1986).
130. *Id.* at 530, 726 P.2d at 265.
131. *Id.*, 726 P.2d at 265.

date is that such standards may, or may not, exist."[132] The court found persuasive a Massachusetts Supreme Judicial Court[133] case, which stated: "A defendant is entitled to rulings or instructions that, if the trier of fact cannot determine Commonwealth norms, the defendant is entitled to a finding in his favor . . . ."[134] Therefore, in order to convict a defendant in an obscenity case, the trier of fact must find that a contemporary community standard in fact exists before it can determine whether the defendant violated it.[135]

A. Expert Testimony

1. The Role of the Expert

An expert is one who possesses "scientific, technical or other specialized knowledge"[136] that is "beyond the ken of laymen."[137] The role of the expert is to impart such knowledge to the judge or jury, who will use it to decide the factual issues of the case.

Unlike a lay witness, an expert may draw inferences from the facts and may offer an opinion based upon the facts (or a hypothetical set of facts).[138] The jury is free to accept or reject the expert's opinion.

An expert in an obscenity case may, for example, explain the relationship of various portions of a film or book to help the jury understand the "work as a whole." If he has expertise in community standards, the expert's testimony may help dissuade jurors from a tendency to equate the standards of the community with their own.[139] The expert may not, however, offer a legal conclusion that the work is "obscene."[140]

2. Admissibility Issues

The role of an expert in an obscenity case is the same as his or her role in any other case: to assist the trier of fact in its search for the truth. Generally, expert testimony must address a subject that is beyond the understanding of the average layman.[141] However, the testimony may

132. *Id.*, 726 P.2d at 265.

133. The Supreme Judicial Court is the highest state court in the Commonwealth of Massachusetts.

134. Commonwealth v. Trainor, 374 Mass. 796, 799, 374 N.E.2d 1216, 1219 (1978).

135. *Kam*, 66 Haw. at 530, 726 P.2d at 265.

136. FED. R. EVID. 702.

137. C. MCCORMICK, EVIDENCE, § 13 (3d ed. 1984).

138. FED. R. EVID. 703.

139. F. SCHAUER, THE LAW OF OBSCENITY 286 (1976).

140. FED. R. EVID. 702 would preclude such testimony because the witness is not an "expert" in the law of obscenity. Therefore, his opinion would lack the necessary foundation.

141. C. MCCORMICK, EVIDENCE, § 13 (3d ed. 1984).

still be admissible if it would be "helpful" to jurors who have a general knowledge of the subject.[142]

Secondly, the testimony must come from one who is qualified[143] as an expert. The witness must have sufficient skill or expertise to assist the trier of fact in making its determination.[144] Unlike personal injury cases which logically call for medical testimony from physicians, there is no obvious "obscenity expert" to call in an obscenity prosecution. Because there is no defined area of "expertise," for example, in the area of community standards,[145] there is no clear demarcation as to who is or is not an expert. However, *Miller* did suggest that such expertise is possible.[146]

This latter question is precisely the one the court struggled with in *Pryba*—and unfortunately, decided incorrectly. The exclusion of the defense experts in *Pryba* had a profound effect upon the jurors, and ultimately on their verdict.[147]

3. Application to Obscenity Cases

The utility of expert testimony in obscenity cases has been best described as follows:

> If the expert testimony is focused upon a particular aspect of the test for obscenity, and if in that context it helps the jury to understand that part of the test, or apply that part of the test, or understand some aspect of the material at issue, then it becomes a very desirable addition to an obscenity case.[148]

Clearly the most valuable use of expert testimony in obscenity cases is to help jurors grasp what tends to be the most elusive part of the *Miller* test: contemporary community standards. An expert can help define the standards of the community[149] for the jurors and give them a frame of reference upon which to decide whether the materials in question violate those standards.

Particularly for jurors who have had little exposure to sexually explicit materials—or little exposure to outlying regions of an expansive "community" such as a large state—expert testimony may be essential. Without it some jurors may have difficulty determining what the rest of

142. *Id.*
143. FED. R. EVID. 702.
144. C. MCCORMICK, EVIDENCE, § 13 (3d ed. 1984).
145. F. SCHAUER, THE LAW OF OBSCENITY 286 (1976).
146. 413 U.S. at 31 n.12.
147. *See infra* notes 156-58 and accompanying text.
148. F. SCHAUER, THE LAW OF OBSCENITY 281 (1976).
149. Of course, such testimony is appropriate only in cases in which there *are* determinable community standards. *See supra* notes 129-35 and accompanying text.

the community, except for their immediate neighborhood or social circle, finds acceptable.[150] This is particularly true in jurisdictions which define the relevant community as the entire state.[151]

Arizona is one such state. In a bizarre reversal of its longstanding position on obscenity, the Arizona Supreme Court recently decided that expert testimony was not required on statewide community standards.[152] However, Justice Feldman's dissent points out that "[i]t defies common sense to expect that a local jury will consistently intuit a statewide standard."[153] He argued that expert testimony should be required when the community encompasses the entire state.[154]

Even when the community is more narrowly defined as that of the venire, expert testimony on community standards may help prevent the "natural inclination of many jurors . . . to equate the community's standards with their own."[155] In fact, that is precisely what the jurors did in *Pryba.* In an interview after the decision, six of the *Pryba* jurors stated that the exclusion of expert testimony had left them uncertain as to community standards.[156] The jurors perceived themselves as more conservative than the "average" member of the community, so they felt compelled to judge the materials "through the eyes of their parents, relatives and neighbors."[157] Some blamed the constraints and vagueness of

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150. A juror's perception of community standards is likely to be affected by the location of his home within the community. "For example, a person living in an outlying suburb might very well have a profoundly different opinion on what is permitted in the metropolitan area than would a person living in the inner city. This difference of opinion points out the need for expert testimony on contemporary community standards." *Is Expert Testimony Necessary to Obscenity Litigation? The Arizona Supreme Court Answers—NO!,* 19 ARIZ. ST. L.J. 821, 843 (1987) [hereinafter *"Arizona"*].

151. F. SCHAUER, THE LAW OF OBSCENITY 285-86 (1976). Professor Schauer further notes that a juror's familiarity with state standards depends on:

> the size and diversity of the state, and on the experiences of the particular juror. Thus, expert testimony as to the statewide standards may be of considerable assistance. Furthermore, community standards as to sexual materials may not necessarily be something that jurors have noticed or thought about, and it is conceivable that a juror's impressions about contemporary community standards can be modified by the appropriate use of expert testimony.

Id. at 286.

152. *See Arizona* at 821.

153. Three consolidated cases of State v. Superior Court, State v. Shih Ching Lin, and State v. Coulter (Ariz. S. Ct. July 2, 1986) (Feldman, J., dissenting), referred to collectively as Superior Court, slip op. at 19.

154. *Id.*

155. F. SCHAUER, THE LAW OF OBSCENITY 286 (1976).

156. *A Jury Wrestles* at 99.

157. *Id.* As one satirist noted, "the genius of the local jury is that it does *not* apply the local community standard as reflected in the actual behavior of the people. Rather, the local jury applies the *expected* or *anticipated moral standard.* This anticipated moral standard is that which each member of the jury thinks other members of the jury expect him to possess" (em-

the *Miller* test for what they later felt had resulted in an unfair outcome to the Prybas.[158]

4. How Courts Have Reacted to Obscenity Experts

Courts are split as to whether expert testimony is appropriate in obscenity cases. Modern courts tend to allow expert testimony.[159] However, the Supreme Court in *Paris Adult Theatre I v. Slaton*[160] indicated that the field of obscenity did not lend itself to the traditional use of expert testimony.[161] The Court stated:

> [Expert] testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand [citation omitted]. No such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.[162]

It is important to note, however, that the Court based this reasoning on its belief that the materials in question are themselves the "best evidence of what they represent."[163] Even if the books or films are the best evidence of whether they are pornographic or obscene, they are not the best evidence of whether such materials are or are not acceptable in the community. Evidence of community standards should come from an expert who has conducted a reliable and relevant study of the community and its attitudes toward sexually explicit materials.

The Supreme Court held that the prosecution is not required to provide expert testimony in federal obscenity cases.[164] Likewise, states generally do not require expert testimony in state obscenity prosecutions.[165] However, the defendant does have a right to present expert testimony,[166]

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phasis in original). Brigman, *The Controversial Role of The Expert In Obscenity Litigation,* 7 CAP. U.L. REV. 519, 542 (1978) (quoting The Obscenity Report, 110-11 (1970)).

158. *A Jury Wrestles* at 99. This is a fascinating article that examines the dynamics of the jury's deliberations—and its dilemmas in dealing with the evidence and the *Miller* test—in the *Pryba* case. One juror commented in an interview after the verdict: "Why [was the Government] going after the Prybas? . . . These people sell dildos to adults. They were going to take someone's house away for *that*?" (emphasis in original). After the vote the juror asked herself, "Have we trampled all over the [f]irst [a]mendment?" *Id.*

159. *See generally,* Miller v. California, 413 U.S. 15 (1973).

160. 413 U.S. 49 (1973).

161. *Id.* at 56 n.6.

162. *Id.* (citations omitted).

163. *Id.* at 56.

164. *Id.*

165. *See supra* note 153 and accompanying text.

166. Kaplan v. California, 413 U.S. 115, 121 (1973).

as long as it is relevant and not misleading to the jury.[167] The Supreme Court recognized that one charged with an obscenity violation has a right to "enlighten" the trier of fact as to community standards "through qualified experts."[168] The Court further recognized that community standards "can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process."[169]

5. Who Is Qualified as an "Obscenity" Expert?

The study of pornography and obscenity is not exclusive to any one field or profession. The effect of sexually explicit materials upon individuals or groups in society has been studied by professionals in any number of fields, including medicine, psychology and sociology. Therefore, there is no unanimity on which type of expert would be the most qualified to testify in an obscenity case.

The courts have taken note of this ambiguity but have not reacted to it in any uniform manner. Some courts have rejected the testimony of sex therapists[170] and homosexuals[171] as experts on community standards; other courts have allowed sociologists,[172] art professors,[173] psychiatrists,[174] and vice squad police officers[175] to offer such testimony.

In most cases, this confusion as to who is a proper obscenity expert has worked to the advantage of the prosecution. The prosecution rarely presents expert testimony on community standards because it is not required to do so.[176] More often the defense will offer an expert, and the prosecution will challenge the witness' credentials to testify as an expert on community standards. Because it has never been established who is a proper obscenity expert, judges tend to side with the prosecution and exclude defense expert witnesses. This effectively "emasculates the defense,"[177] which is thus barred from presenting opinion testimony as well

167. *See* FED. R. EVID. 403, 702.

168. Smith v. California, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring) (cited with approval in Kaplan v. California, 413 U.S. 115, 121 (1973)).

169. *Id.*

170. *See* Albright v. State, 501 N.E.2d 488 (Ind. App. 4 Dist. 1986); Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 3 Dist. 1983).

171. *Id.*

172. *See* State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264 (1987).

173. *See* Commonwealth v. United Books, 389 Mass. 888, 453 N.E.2d 406 (1983).

174. *See* State v. Hull, 86 Wash. 2d 527, 546 P.2d 912 (1976).

175. *See* Kaplan v. California, 413 U.S. 115, 121 (1973).

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

177. Appellants' Opening Brief at 32, *Pryba.*

as introducing any studies or surveys its expert may have conducted for the particular case.

This is precisely what happened in *Pryba.* The Prybas' expert was a sociologist with a background in statistical methodology, who had conducted an attitudinal survey in the community.[178] The trial judge excluded him as an expert in community standards because he had never lived in the community and had spent only eight days there conducting his survey.[179] Some scholars feel that "if the issue is contemporary community standards, then a local witness is a necessity in order that the testimony relate particularly to the community whose standards are at issue."[180] But this would seem unduly harsh on the defendant, who would be burdened with having to seek out a local expert for each individual case. How can it fairly be assumed that every jurisdiction, no matter how small, isolated or unsophisticated, will have within its bounds someone qualified to testify as an expert on the standards of that community?

Even when the expert is drawn from the community, there is still no guarantee the court will allow him or her to testify. In *Albright v. State,* [181] the court prohibited testimony from a certified sex therapist who lived and practiced in the community.[182] The expert had examined 200 patients in three years, 60 of whom had sexual dysfunctions. This experience was held irrelevant as to the general community's attitude toward sexually explicit material.[183]

If such specialized expertise precludes one from being an expert on the standards of the community at large, perhaps courts would accept an expert with more generalized contacts in the community. One scholar suggests that proper experts may include: statisticians, public opinion analysts, police officers, journalists, ministers, or "others who are especially knowledgeable and experienced as to community views and beliefs."[184] However, it may be argued that police officers tend to have contact with a narrow segment of society—those who run afoul of the law—and that ministers deal with an equally insular, if opposite, group of the populace. Neither the criminal element nor religious devotees can be said to represent the views of the general public on sexually explicit materials.

178. United States v. Pryba, 678 F. Supp. at 1232.
179. *Id.*
180. F. SCHAUER, THE LAW OF OBSCENITY 289-90 (1976).
181. 501 N.E.2d 488 (Ind. App. 1986).
182. *Id.*
183. *Id.* at 493.
184. F. SCHAUER, THE LAW OF OBSCENITY 289 (1976).

Another writer mentions the problems of clergymen as experts[185] and offers the following laundry list of other potential experts[186] in obscenity cases: sociologists, social workers, students of American culture, distributors of similar (sexually explicit) materials, librarians, those knowledgeable in the arts—such as critics, professors,[187] or publishers—as well as movie craftsmen, producers and film reviewers. Among the more likely experts may be psychiatrists and psychologists.[188]

Whatever field the witness comes from, it has been observed that "the only expert likely to aid the trier of fact is the expert who has gathered significant data through opinion-attitude survey methods."[189] That, of course, would require a witness qualified to conduct a survey, such as a sociologist or a statistician. Curiously, that was exactly the background of the Prybas' expert, who did in fact conduct such a survey. However, this gives a court one more element to use in excluding a defense expert: if he passes the threshold issue of expertise in community standards, the witness may still be excluded if the results of his survey are considered unreliable or more prejudicial than probative.[190] This was the "hook" the district court used in *Pryba* to get itself "off the hook" for excluding the defense's experts.

B. Public Opinion Polls and Surveys as Evidence of Community Standards

1. Polls as Foundation for Expert Testimony

If an expert is allowed to testify, he may be required to state the basis on which he formed his opinion.[191] The most persuasive basis for an opinion as to community standards is likely to come from a public opinion poll or survey that the expert conducted within the relevant community. One court, in allowing survey evidence in an obscenity case, observed:

> Expert testimony based on a public opinion poll is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise: 'A properly

185. Comment, *Expert Testimony in Obscenity Cases,* 18 HASTINGS L. J. 161, 176 n.89 (1966).

186. *Id.* at 176.

187. *See supra* note 173 (art professor accepted as obscenity expert).

188. Note, *The Use of Expert Testimony in Obscenity Litigation,* 1965 WIS. L. REV. 113, 116 (1965).

189. Shugrue, *An Atlas For Obscenity: Exploring Community Standards,* 7 CREIGHTON L. REV. 157, 170 (1974).

190. *See* FED. R. EVID. 403.

191. FED. R. EVID. 705.

> conducted public opinion survey itself adequately ensures a good measure of trustworthiness, and its admission may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter.'[192]

In fact, some authorities feel that a properly conducted opinion poll affords "[t]he only basis upon which one could arguably claim expertise in the matter of community standards."[193] Therefore, expert testimony and survey results will often form a crucial link for an obscenity defense. As the Prybas learned, the exclusion of such evidence may effectively cripple the defense.

Even the court which ruled against the Prybas on this issue acknowledged that a properly conducted public opinion survey may be admissible to prove community standards.[194] The message from the Supreme Court is that expert statistical or sampling testimony about what a sample of the community actually believes "may" be admissible in obscenity cases.[195]

The choice of the word "may" creates an inherent stumbling block: admissibility often turns on whether the poll does in fact reflect the standards of the community. This offers fertile ground for an extenuated evidentiary battle. The prosecution, as it did in *Pryba,* is likely to argue that the poll—or the person who conducted it—is somehow flawed, thereby rendering the poll incompetent evidence which must be excluded. The burden may shift to the defense to show that the poll is an accurate reflection of the community's attitude toward obscenity.

However, as the Prybas' attorneys argued, the defense should not have to shoulder this burden.[196] Rather, the issue should go to the weight of the survey rather than to its admissibility.[197] Some state courts

192. Saliba v. State, 475 N.E.2d 1181, 1186 (Ind. App. 2 Dist. 1985) (quoting Commonwealth v. Trainor, 374 Mass. 796, 801, 374 N.E.2d 1216, 1221 (1978)).

193. Stern, *Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation,* 20 CASE W. RES. L. REV. 527, 553 (1969).

194. *Pryba,* 678 F. Supp. at 1229.

195. *See* Miller v. California, 413 U.S. 15 (1973) *reh'g denied,* 414 U.S. 881 (1973); *see also* Hamling v. United States, 418 U.S. 87 (1974).

196. Appellants' Opening Brief at 36, *Pryba,* 678 F. Supp. 1225 (Nos. 88-5001 (L), 88-5002, 88-5003, 88-5004) (1988).

197. Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation: II,* 40 RUTGERS L. REV. 467, 486 (1988). In analogizing survey evidence in obscenity cases to similar issues in trademark cases, Miller suggests that "the cases generally agree that defects in survey methodology go to the weight of the survey rather than its admissibility." *Id.*

have adopted the same view.[198]

2. Evidentiary Standards for Admissibility: Relevance and Reliability

Present standards for admissibility require an extremely fact-specific inquiry as to precisely how a poll in an obscenity case was conducted. As a threshold issue, the survey must be relevant and reliable evidence.[199] Therefore, questions asked in such a survey must be carefully framed to meet this criteria.[200] The court in *Pryba* offered a two-prong test[201] to determine whether the survey questions were relevant as to community standards: (1) the questions must focus on the allegedly obscene materials in the case, or materials that are "clearly akin"[202] to them; and (2) the questions must address whether the interviewee believes that the materials "depict nudity and sex in an acceptable manner."[203]

The district court in *Pryba* found the specific questions[204] posed by the expert flawed because it felt they focused on whether adults "should" be able to obtain such sexually explicit materials, rather than whether the community finds such materials "acceptable."[205] It found that the questions were too broad because they addressed attitudes about "nudity and sex" in general, rather than inquiring about whether the depictions in the materials at issue were actually accepted in the community.[206] On that basis, the court found the questions irrelevant and ruled the survey inadmissible on the grounds that it was not probative of community standards.[207]

Curiously, the court in *Pryba* seemed to require an almost impossible standard of specificity for such a poll to meet. Having viewed the films at issue, the court noted that "descriptive language fails to convey the impact of the visual image."[208] For example, the court noted that the term "bondage" as used in the poll did not adequately describe some of the violent acts in the films.[209] Therefore, it reasoned that while the vis-

198. *See* Carlock v. State, 609 S.W.2d 787, 789 (Tex. Crim. App. 1980); Saliba v. State, 475 N.E.2d 1181, 1188, *transfer denied,* 484 N.E.2d 1295 (Ind. Ct. App. 1985).

199. *See* FED. R. EVID. 402.

200. *Pryba,* 678 F. Supp. at 1228-29.

201. *Id.* at 1229.

202. *Id.*

203. *Id.*

204. *See supra* notes 36-37 and accompanying text for specific questions that were posed in the *Pryba* poll.

205. *Pryba,* 678 F. Supp. at 1228-29.

206. *Id.* at 1229 (citing Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, 672 (1980)).

207. *Pryba,* 678 F. Supp. at 1229.

208. *Id.*

209. *Id.*

ual image itself may be patently offensive, a written or verbal description may not be.[210] If that is so, how can *any* question in an obscenity poll meet such an admissibility standard? The court's bizarre implication seems to be that the pollster must cart around with him a video cassette recorder and a box full of films in order to pose questions to interviewees.[211]

Due to its perceived inadequacy of the written word in capturing the "flavor" of the visual image, the court in *Pryba* feared that the survey results would be unfairly prejudicial to the jury.[212] Therefore, the court held that the probative value of the survey did not outweigh its potential for prejudicial impact.[213] In a strongly worded—and rather revealing—portion of the opinion, the court declared that Dr. Scott's ethnography[214] study was "nothing more than a one-man, eight-day, unscientific poll of purveyors and purchasers of smut."[215]

3. Proper Methodology for Conducting a Survey on Community Standards

The *Pryba* court's difficulty with Dr. Scott's study calls into question how a proper opinion poll should be conducted in an obscenity case. Based upon the court's reaction in *Pryba,* the following issues appear to be paramount: (1) what type of questions should be asked; (2) who should be polled; (3) where should the poll be conducted, and (4) how extensive or of what duration must the survey be?

Some of these questions have been addressed in piecemeal fashion by the courts, but considered as a whole they are yet to be resolved. Together these questions encompass the underlying issue: what is the proper method of conducting a survey on community standards? The court in *Pryba* outright rejected Dr. Scott's "ethnography" method and held it was not competent evidence.[216]

Curiously, other courts have accepted ethnography evidence in obscenity cases. The North Carolina Court of Appeals, in fact, found it

210. *Id.* at 1227 n.3.

211. As the Prybas' attorneys pointed out, such a requirement could open up the pollster to criminal liability if the visual materials he displayed were later deemed to be legally obscene. Appellants' Opening Brief at 34, *Pryba;* Appellants' Reply Brief at 13, *Pryba.*

212. *Pryba,* 678 F. Supp. at 1231.

213. *Id.* (citing FED. R. EVID. 403).

214. Ethnography is a branch of anthropology that deals with cultural differences. Dr. Scott testified that ethnography "looks at what is going on in the community." State v. Anderson, 85 N.C. App. 104, 107, 354 S.E.2d 264, 267 (1987). *See also supra* notes 41-44 and accompanying text.

215. *Pryba,* 678 F. Supp. at 1234.

216. *Id.* at 1232.

reversible error when a public opinion poll and expert testimony based on an ethnographical study were excluded in an obscenity case.[217] The defense expert in that case was none other than Dr. Scott—the witness whom the *Pryba* court excluded. The North Carolina court found Dr. Scott and his ethnography study perfectly acceptable evidence of community standards, stating:

> [I]f Dr. Scott, based on his specialized knowledge of contemporary community standards, formed an opinion about whether the challenged materials would be patently offensive to the average person in the community, then we can see no reason, based on a relevancy objection, to prevent the jury from having the benefit of that opinion testimony.[218]

Arriving at the exact opposite conclusion from the district court in *Pryba,* the North Carolina court ruled that the probative value of Dr. Scott's testimony "outweighs any potential for prejudice, confusion or undue delay."[219] Accordingly, it ordered a new trial for the defendant.[220]

Similarly, an Illinois court found reversible error when a public opinion poll on community standards was excluded in an obscenity case.[221] The court viewed the survey results as "strong evidence"[222] of community standards, stating:

> In fact, survey evidence may be the only way to prove degrees of acceptability of a product or material, as distinct from its availability. The State does not have the burden of introducing any evidence as to what the . . . community standard is. But that cannot justify a court in denying the defendant the right to introduce the best evidence he can gather on this issue. Essentially the result of refusing the proffered evidence left the jurors with no way of knowing what the . . . [community] standard might be.[223]

Unfortunately, few other courts have been so enlightened. The Georgia Court of Appeals rejected a public opinion poll in an obscenity case[224] largely on the same grounds that the district court did in *Pryba:*

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217. State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264 (1987).
218. *Id.* at 109, 354 S.E.2d at 269.
219. *Id.*, 354 S.E.2d at 269.
220. *Id.*, 354 S.E.2d at 269.
221. People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980).
222. *Id.* at 199, 410 N.E.2d at 479.
223. *Id.* at 199, 410 N.E.2d at 479 (citations omitted).
224. Flynt v. State, 153 Ga. App. 232, 235, 264 S.E.2d 669, 672 (1980) *cert. denied,* 449 U.S. 888 (1980).

the questions were not specific enough to be probative of community standards. Similarly, other courts[225] have excluded surveys which do not address community acceptance of conduct specifically as depicted in the materials at issue.

Based on these cases—and on the *Pryba* ruling—the prevailing attitude of the courts toward survey evidence in obscenity cases seems to be "when in doubt, throw it out." Courts have been more comfortable excluding such evidence than admitting it. Judges have given few insights as to what would make a poll admissible, other than basic standards of relevancy and reliability. However, if a survey passes muster under the rules of evidence, a party must consider whether commissioning that survey is worth the inherent risks.

4. Strategic Considerations

There may be a calculated risk in basing a large part of a case on a public opinion survey, particularly for prosecutors. The prosecution is not required to provide evidence of community standards.[226] However, "[i]f the government does choose to introduce evidence of community standards, it should be prepared to do its homework,"[227] chided the Seventh Circuit in branding a prosecution survey as "canned" and "barely relevant" to the obscenity inquiry.[228]

Moreover, if the prosecutor does commission a survey, the results could backfire on him. If the responses indicate that residents of the community *accept* this type of material, the survey may become exculpatory evidence which must be disclosed to the defense.[229]

The risks are considerably less for the defense. If the poll results are favorable, this may become powerful evidence in front of a jury. One commentator considers survey evidence to be the best evidence the defense can offer in an obscenity case.[230] In addition, "[s]uch empirical data will tend to reduce the otherwise inevitable battle of the experts."[231]

However, since courts have provided no clear guidelines as to how a

225. *See* Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d 1216 (1978); People v. Thomas, 37 Ill. App. 3d 320, 346 N.E.2d 190 (1976).

226. Hamling v. United States, 418 U.S. 87, 194 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

227. United States v. Various Articles of Merchandise, Seizure No. 170, 750 F.2d 596, 599-600 (7th Cir. 1984).

228. *Id.* at 599.

229. F. SCHAUER, THE LAW OF OBSCENITY 135 (1976).

230. Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation: II,* 40 RUTGERS L. REV. 467, 485 (1988).

231. *Id.* at 485-86.

proper survey in an obscenity case should be conducted, a distinct possibility exists that such a survey may be ruled inadmissible. Thus the defense risks an investment of both time and money in a piece of evidence that may be inadmissible at trial. Further, the defense may find itself having to regroup and formulate a new strategy at the eleventh hour if its key piece of evidence—and its expert—are excluded by the trial court. Such was the disadvantaged situation the Prybas found themselves trapped in by the district court.

C. Comparison Evidence

Another way that courts reject survey evidence in obscenity cases is to hold that the materials used in the survey are not "comparable" to the materials in question. Such was the approach of the district court in *Pryba.* [232] This poses a curious dilemma for the defense and its pollster: How "comparable" must the survey be to the "real thing?" If they are not comparable, the poll's results may be inadmissible; if they are too comparable, the pollster may open himself up to prosecution for distributing what may be ruled legally obscene material.[233]

A safer use of comparison evidence may be by inference: widespread availability of materials similar to those in question may be evidence of what is acceptable in the community.[234] The theory is that if the community allows similar materials to circulate within its bounds, then the materials at issue cannot be obscene because the community impliedly accepts them.

However, courts have held that "mere availability" standing alone is not enough.[235] The Supreme Court observed that availability of similar materials does not necessarily equate with community acceptance.[236] For availability to be probative of community standards, there must also be evidence that the material has a "reasonable degree of acceptance" in the community.[237] Otherwise, availability of similar materials means "nothing more than that other persons are engaged in similar activi-

232. 678 F. Supp. at 1233.

233. *See supra* note 211 and accompanying text.

234. *See* United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132, 137 (2d Cir. 1983). For an in-depth analysis of the impact of *Schedule 2102* and other cases on this proposition, *see also In Determining Whether Materials Are Obscene, The Trier of Fact May Rely Upon the Widespread Availability of Comparable Materials to Indicate That the Materials Are Accepted by the Community and Hence Not Obscene Under the Miller Test,* 52 CINCINNATI L. REV. 1131 (1983).

235. United States v. Manarite, 448 F.2d 583, 593 (2d Cir. 1971).

236. Hamling v. United States, 418 U.S. 87, 126 (1974).

237. *Manarite,* 448 F.2d at 593. *See also* Lentz, *Comparison Evidence in Obscenity Trials,* 15 J. L. REFORM 45, 67-69 (1981).

ties."[238] From an evidentiary stance, mere availability alone is irrelevant and thus inadmissible.[239]

Basic foundational elements for comparison evidence to meet relevancy standards require that the comparison material be: (1) similar[240] to the material in question; and (2) acceptable to the community.[241] The Second Circuit in *United States v. Manarite*[242] suggested that proof of community acceptance "would normally be supplied by expert witnesses."[243] Apparently that court did not envision the precarious situation that defendants such as the Prybas would be placed in nearly 20 years later, with courts not hesitating to exclude expert testimony on community standards.

Some defendants have attempted to introduce sales figures of similar materials as a means to show both availability and acceptance.[244] In *Flynt v. State,*[245] a widely publicized case in the 1970s, publisher Larry Flynt was prohibited from presenting sales records of *Hustler* magazine, as well as comparison materials which had sold 1.3 million copies in the county during the six-month period which encompassed his alleged obscenity violations.[246] The Georgia Court of Appeals ruled that the evidence had been properly excluded because the comparison exhibits were not the best evidence and because they demonstrated availability rather than community acceptance.[247]

Over the years, courts have varied widely in the admission and exclusion of comparison evidence in obscenity cases.[248] "Some have admitted [comparison evidence]; some have excluded it; some have reversed lower courts for refusing to admit it; some have suggested it is never

238. *Manarite,* 448 F.2d at 593.

239. *See* FED. R. EVID. 402.

240. The content (sexual acts) and the explicitness of their presentation must be similar to the materials that are the subject matter of the obscenity case. F. SCHAUER, THE LAW OF OBSCENITY 134 (1976).

241. Lentz, *Comparison Evidence in Obscenity Trials,* 15 J. L. REFORM 63-64 (citing United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974)).

242. 448 F.2d 583 (2d Cir. 1971).

243. *Manarite,* 448 F.2d at 593.

244. The court in *Pryba* took defense expert Dr. Scott to task for offering "no *quantitative* analysis for much of his male sophisticate material, such as sale or distribution figures, which might have been probative of community acceptance." *Pryba,* 678 F. Supp. at 1234 (emphasis in original). However, since the court found many of the materials Dr. Scott used in his survey not comparable to the materials in question, one must wonder whether the court was merely dangling a carrot in front of the defense regarding sales figures. Sales figures are admissible only for comparable materials. F. SCHAUER, THE LAW OF OBSCENITY 133-34 (1976).

245. 153 Ga. App. 232, 264 S.E.2d 669 (1980).

246. *Id.*

247. *Id.*

248. Lentz, *Comparison Evidence in Obscenity Trials,* 15 J. L. REFORM 45, 50 (1981).

admissible. Moreover, the courts' reasoning has been as disparate as their conclusions."[249] In ruling on the *Flynt* case, the Georgia Court of Appeals aptly observed that comparison evidence is "one of the most often attempted and rarely successful methods of presenting evidence of contemporary community standards."[250]

This maxim is underscored by the Supreme Court's ruling in *Hamling v. United States,* [251] which held that it was permissible to exclude comparison evidence because a defendant was free to offer expert testimony on community standards. However, comparison evidence may in fact be "essential to an adequate defense against obscenity charges."[252] This is particularly crucial to cases such as *Pryba,* in which expert testimony and comparison evidence were excluded. When a court permits no expert testimony, no opinion poll, and no comparison evidence, how is a jury of laymen to determine what the community does or does not find acceptable?

VI. ALTERNATIVE WAYS TO PROVE COMMUNITY STANDARDS

When courts handcuff defendants in obscenity cases from presenting expert testimony or comparison evidence, there may be other ways the trier of fact can draw inferences about community standards. These alternative methods tend to be less objectionable, but they are usually less effective. They simply lack the communicative effect that live expert testimony can have before a jury.

One scholar suggested that relatively "safe" alternative methods in a federal prosecution under local standards include: state statutes, legislative history and municipal ordinances.[253] The theory is that if the relevant local community does not make a certain type of activity a crime, then that activity is acceptable and does not violate the community's standards.[254] Legislative history may be used to explain the relationship between the statute and the community's standards.[255] Municipal ordinances may likewise be probative of the community's standards.[256] Even if there are local statutes, evidence of a policy of nonenforcement may be

249. *Id.* at 50-51.

250. *Flynt,* 264 S.E.2d at 681.

251. 418 U.S. 87 (1974).

252. Lentz, *Comparison Evidence in Obscenity Trials,* 15 J. L. REFORM, 45, 75 (1981).

253. F. SCHAUER, THE LAW OF OBSCENITY 134 (1976).

254. *Id.*

255. *Id.*

256. *Id. See also* United States v. Miscellaneous Pornographic Magazines, 400 F. Supp. 353 (N.D. Ill. 1975).

evidence of community standards.[257]

The fallback position of the courts has routinely been that it is permissible to exclude expert testimony and comparison evidence because the allegedly obscene materials themselves are the best evidence of what is acceptable in the community.[258] Courts in the 1980s upheld this position, ruling that whether materials are obscene can be determined by viewing them, so excluding expert testimony on community standards does not violate due process.[259] Therefore, the prevailing view seems to be that when the films or books themselves are admitted in evidence, there is no need for extrinsic evidence of community standards.

This, however, creates a dangerous standard. Showing films or magazines in a vacuum gives a jury no point of reference, no way to determine whether the materials in question exceed the bounds of what is acceptable to the community. Research has indicated that in some communities there is no consistency between one's personal standards and his or her perception of community standards.[260] In locales where sexual candor is limited, there is likely to be an ambiguity in articulation of community standards.[261] Therefore, when evidence of community standards is not presented, there is a marked possibility of jury bias in obscenity cases.[262]

VII. DO COURT TRIALS AND JURY TRIALS REQUIRE DIFFERENT EVIDENCE?

The court in *Pryba* excluded the defense's expert and opinion poll because of fears it "would have been unfairly prejudicial to the United States, would have confused the issues and would have misled the jury."[263] Clearly the emphasis was on the jury's perceived inability to properly assess and weigh such evidence. This raises an issue not addressed in *Pryba* nor in other cases: would the ruling have been different had this been a court trial instead of a jury trial? Are judges innately better equipped to assess community standards than are jurors?

The difficulties that jurors typically have in obscenity cases are well-documented. The Supreme Court moved from national standards to community standards because it recognized that jurors cannot be ex-

257. F. SCHAUER, THE LAW OF OBSCENITY 134 (1976).

258. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973).

259. *See* Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 1983).

260. Herrman and Bordner, *Attitudes Toward Pornography in a Southern Community,* 21 CRIMINOLOGY 349, Aug., 1983.

261. *Id.*

262. *Id.*

263. *Pryba,* 678 F. Supp. at 1231.

pected to know what the national standard of obscenity is.[264] Some would take that one step further, arguing that a jury is no more able to determine a community standard than a national standard.[265]

Expert testimony has been suggested as the best way to help a jury determine community standards, particularly when the relevant community is the entire state.[266] However, others maintain that unless the court defines the relevant community for the jury, expert testimony is of no help.[267]

Judges face similar problems when presiding at court trials on obscenity cases. In the recent federal obscenity prosecution of *United States v. Gottesman,* [268] United States District Court Judge David V. Kenyon dismissed the obscenity counts because he could not determine that the materials violated community standards in a city as large and diverse as Los Angeles.[269] Justice Stevens had anticipated this problem more than a decade ago in *Smith v. United States,* [270] when he wrote, in dissent: "For surely, the standard for a metropolitan area is just as 'hypothetical and unascertainable' as any national standard. For a juror, it would be almost as hard to determine the community standard for any large urban area as it would be to determine a national standard."[271]

Expert testimony was not presented in *Gottesman,* so one can only speculate as to whether Judge Kenyon would have found such evidence dispositive as to the community standards of Los Angeles. However, if a federal district judge has difficulty ascertaining community standards without the help of an expert, it appears axiomatic that a jury would necessarily require such evidence.

VIII. DISCUSSION AND PROPOSED SOLUTION

Pryba, like cases from many other jurisdictions, tells us what evidence is *not* admissible in obscenity cases. The problem, however, is the converse: no court has ruled definitively on what evidence must be presented—and in what *form* it must be presented—to prove community standards. With such scant guidance from the courts, both the prosecu-

264. Miller v. California, 413 U.S. 15, 33 (1973).

265. *See* Smith v. United States, 431 U.S. 291, 314 (Stevens, J., dissenting).

266. *Is Expert Testimony Necessary to Obscenity Litigation? The Arizona Supreme Court Answers—NO!,* 19 ARIZ. ST. L.J. 821, 841 n.143 (1987).

267. *Obscenity: 30 Years of Confusion and Still Counting—Pope v. Illinois,* 21 CREIGHTON L. REV. 379, 391 n.115 (1987).

268. L.A. Times, May 4, 1989, pt. 1, at 1, col. 4 (C.D.C. May 3, 1989).

269. *Id.*

270. 431 U.S. 291, 314 (1976).

271. *Id.* at 314 n.10.

tion and the defense are left in the dark. Both parties can only guess at what evidence should be presented. Therefore, if the *Miller* community standards test is to be viable, courts must provide evidentiary guidelines for litigants.

First, courts should define the relevant community on the motion of any party before trial so litigants will know the scope of the evidence they must produce. Before the jury begins deliberations, the court should instruct that it is conceivable a community may have *no* standards on obscenity (in which case the defendant must be acquitted).

Presently the rule is that the prosecution is not required to present evidence on community standards, but the defense can offer such evidence. Rather, the rule should be that the prosecution must prove community standards or the defense is entitled to a dismissal. The existence of community standards should be treated as an inherent element of an obscenity violation. Therefore, the government or state should be required to prove every element of its case, as is required in any criminal prosecution.[272]

Further, courts should provide clear-cut rulings on what type of evidence is admissible to prove community standards. If that evidence is to include an expert or an opinion poll, courts should indicate what qualifications an "expert" on community standards must possess and what questions will be deemed relevant. If the survey is to include comparable materials, courts should explain how "comparable" they must be. Certainly what appears to be the *Pryba* mandate—that the materials themselves must be shown because the written word does not convey the impact of graphic sexual works—is unwieldy. Someone conducting an opinion poll cannot be expected to cart around a box full of allegedly obscene videos, a VCR and a television just because a member of the community is likely to "know [obscenity] when he sees it."[273]

IX. CONCLUSION

In rejecting a national standard for obscenity, the Court in *Miller* explained that applying such a standard would be "an exercise in futil-

272. "[T]he prosecution has the burden of proving each of the various elements of the offense . . . it must, to secure a conviction, convince the trier of fact of the existence of each element beyond a reasonable doubt." R. LAFAVE AND A. SCOTT, JR., CRIMINAL LAW, § 1.8(b) at 49 (2d ed. 1986) (citing C. MCCORMICK, EVIDENCE, § 341 (3d ed. 1984). *See also* In re Winship, 397 U.S. 358 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

273. This was Justice Stewart's often-quoted and amusing comment in his concurrence in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

ity" because the nation was "too big and too diverse."[274] Therefore, it would be impossible for jurors to formulate and apply a uniform standard for obscenity to such an unwieldy and non-homogeneous geographic unit as the nation.[275]

That pronouncement came in 1973. The same reasoning applies today to our megalopolises, which have burgeoned in population in the past two decades and have been transformed in character. Just as jurors could not find a national standard for obscenity in 1973, neither can they be expected to find a uniform standard in cities as sprawling and diverse as the Los Angeles or New York of the 1990s. Logically, if this is an impossible task to apply to today's major cities, it is likewise impossible to determine a "community standard" for a larger and more diverse region, such as a state.

The only reliable way for the trier of fact to accurately determine community standards is for courts to require expert testimony on that issue. The burden should properly rest with the prosecution to establish community standards through expert testimony. The defense must be allowed to present its own expert testimony as well. The Supreme Court has recognized:

> [T]he right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. . . . [C]ommunity standards . . . can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process.[276]

Another right—the right to appellate review—is also burdened when expert testimony is excluded. Without expert testimony, the trial record does not disclose what standards the jury applied in deciding an obscenity case. Therefore, decisions in such cases are "effectively unreviewable by an appellate court."[277] The Fifth Circuit expressed its frustration over this dilemma: "We cannot take judicial notice, without even

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274. *Miller,* 413 U.S. at 30.

275. *Id.*

276. Smith v. California, 361 U.S. 147, 164-65 (Frankfurter, J., concurring) (cited with approval in Kaplan v. California, 413 U.S. 115, 121 (1973)).

277. Brigman, *The Controversial Role of the Expert in Obscenity Litigation,* 7 CAP. U.L. REV. 519, 526 (1978).

a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. . . . At best it would be a matter of pure chance as to whether we as a Court, or as individuals left to our own devices and without the aid of evidence, could determine the correct standard."[278]

That is precisely the situation the jurors in *Pryba* were left with: pure chance that they would reach the correct standard without expert testimony. Unfortunately for the defendants—and for the first amendment—the roll of the dice went to the prosecution.

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278. *Id.* at 529-30 (quoting United States v. Groner, 475 F.2d 550, 557-58 (1972) *vacated,* 414 U.S. 969 (1973), *reversed,* 494 F.2d 499 (1974)). In another obscenity prosecution, Federal District Court Judge David V. Kenyon alluded to the difficulty in determining community standards when there has been no expert testimony. *See supra* notes 268-69 and accompanying text. After Judge Kenyon dismissed the obscenity case, the Los Angeles Times observed: "Kenyon earlier in the trial expressed doubts about his ability to judge community standards without the testimony of experts." L.A. Times, May 4, 1989, pt. 1, at 1, col. 4 (C.D.C. May 3, 1989). The prosecutor commented that this may prompt the Government to present expert testimony in obscenity cases. *Id.*