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Obscenity and the Reasonable Person: Will He "Know It When He Sees It"?

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NOTES

OBSCENITY AND THE REASONABLE PERSON: WILL HE "KNOW IT WHEN HE SEES IT?"[1]

Society's appetite for sexually oriented works, from Sports Illustrated's swimsuit issue[2] to the burgeoning market in pornographic home videos,[3] continues unabated. So too does the battle over whether such works have a legitimate place in a civilized society. This battle pits religious, feminist, and other organizations, as well as state and federal governments, against those who create, distribute and view sexually oriented works.[4] Private organizations have exerted pressure publicly, in the form of boycotts and publicity campaigns,[5] and have lobbied state and federal governments to take action to halt the dissemination of works that portray nudity or

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[1] Referring to hard-core pornography, Justice Stewart once stated: "I shall not . . . attempt . . . to define [it]. . . . But I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[2] *See Evening Magazine: Sports Illustrated's Swimsuit Issue* (NBC television broadcast, Feb. 6, 1989). Evening Magazine reports that over two million copies of Sports Illustrated's swimsuit issue will be distributed. *Id.*

[3] *See* Coakley & Graham, *Burden of the '80s: policing videos*, Boston Globe, Sept. 1, 1988, at 31, col. 2 (parents and communities are concerned with the availability of pornographic videotapes).

[4] *See* Wyman, *The trend in US: Is tolerance under siege?*, Boston Globe, Feb. 27, 1989, at 12, col. 2 ("attempts to ban textbooks . . . and campaigns to suppress pornography by groups, including feminist organizations, are picking up momentum").

[5] *See* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 450–52 (1986) [hereinafter MEESE COMMISSION REPORT] (The Commission's report contains several "recommendations" for action by private groups, including boycotts and publicity campaigns.); Casenote, *Taking Serious Value Seriously: Obscenity*, Pope v. Illinois, *and an Objective Standard*, 41 U. MIAMI L. REV. 855, 858 & n.27 (1987). For example, *Playboy* magazine reports that public pressure caused Iowa state-fair officials to remove two pieces of art work that contained nudity from the art exhibit. Porn Huskers, PLAYBOY, March 1988, at 40. In response to the inclusion of a photograph of a woman nude from the waist up in an article in the June, 1987 issue of *Elle* magazine, a wholesale distributor of the magazine wrote a letter to the publisher threatening to cease distributing *Elle* if it continued to include nudity. Naked Threats, PLAYBOY, March 1988, at 40.

sexual acts.[6] In response, state and federal administrations have focused increased attention and resources on the control of pornography,[7] legislatures have enacted tougher statutes regulating obscenity[8] and pornography,[9] law enforcement agencies have in-

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[6] For example, feminist organizations have successfully sponsored legislation that bans pornography. *See, e.g.*, INDIANAPOLIS, IND., CODE § 16 (1984). The Court of Appeals for the Seventh Circuit held this provision unconstitutional in American Booksellers v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986).

[7] *See, e.g.*, MEESE COMMISSION REPORT, *supra* note 5; Playboy Enters. v. Meese, 639 F. Supp. 581, 583–88 (D.D.C. 1986), *discussed in* Casenote, *supra* note 5, at 857–58; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 59–63 (1963). The Meese Commission's charter directed it to "make specific recommendations concerning more effective ways in which the spread of pornography could be contained." MEESE COMMISSION REPORT, *supra* note 5, at 215. The Meese Commission's report contains 92 recommendations for combating pornography. *Id.* at 433–764. Recommendations are provided for both legislative and police action, at both the federal and state levels; for example, "Recommendation 7: State legislatures should amend, if necessary, obscenity statutes containing the definitional requirement that material be 'utterly without redeeming social value' in order to be obscene to conform with the current standard enunciated by the United States Supreme Court in Miller v. California[, 413 U.S. 15, 24 (1973)]." *Id.* at 491. "Recommendation 8: State legislatures should amend, if necessary, obscenity statutes to eliminate misdemeanor statutes for second offenses and make any second offense punishable as a felony." *Id.* at 495. In *Playboy*, the court permanently enjoined the Meese Commission from disseminating a "blacklist" of corporations engaged in the sale or distribution of pornography. 639 F. Supp. at 582; Casenote, *supra* note 5, at 858 & nn.28–29 (citing *Playboy*, 639 F. Supp. at 588). One such corporation, after the receipt of a letter from the Meese Commission indicating it would be on a list of "identified distributors," halted sale of *Playboy* by its stores and implored the Meese Commission that "any reference to [the corporation] be deleted from [its] final report." *Playboy*, 639 F. Supp. at 583–84. The plaintiffs in *Playboy* further alleged that, in response to the letter and the threat of dissemination of the "blacklist," some stores "pulled magazines such as *American Photographer*, *Cosmopolitan* and *Texas Monthly* out of an abundance of caution." *Id.* at 584. *Bantam Books* involved the activities of the "Rhode Island Commission to Encourage Morality in Youth," created by the Rhode Island legislature to inform the public about publications containing "obscene, indecent, or impure language." 372 U.S. at 59. The Commission carried out its mandate by notifying distributors that it had reviewed certain books or magazines and concluded that they were objectionable for distribution to young readers. *Id.* at 61. The typical notification included a reminder of the Commission's duty to recommend for prosecution sellers of obscenity. *Id.* at 62. Distributors usually reacted by halting further distribution of the indicated publications. *Id.* at 63. Police officers "visited" distributors following delivery of the notices to determine what steps they had taken to comply with the Commission's "suggestions." *Id.*

[8] *See, e.g.*, ILL. REV. STAT., ch. 38, paras. 11–20(b) (1985), *discussed in* Pope v. Illinois, 107 S. Ct. 1918, 1920 n.1, 1921 & n.4 (1987). Prior to 1985, the Illinois obscenity statute had been construed to incorporate the formulation of the tripartite test for obscenity originally set forth in *Memoirs v. Massachusetts*, discussed *infra* notes 116–28 and accompanying text. The *Memoirs* test required that material be "utterly without redeeming social value." 383 U.S. 413, 418 (1966) (plurality opinion). As revised, the statute employs the less stringent requirement that the material merely "lack[] serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). For the text of the revised statute, see ILL. REV. STAT., ch. 38, paras. 11–20(b) (1985).

[9] *See, e.g.*, INDIANAPOLIS, IND., CODE § 16 (1984). This ordinance prohibited the production, sale, exhibition, or distribution of pornography. *Id.* Pornography was defined by the

creased enforcement activity,[10] and prosecutors have increased the number of actions brought against distributors and producers of sexually oriented works.[11] Those defending the right to disseminate and view sexually oriented works have characterized their opponent's efforts as invidious moral censorship, unacceptable in a free society, and have vigorously defended, both in the public forum and in the courts, the right to continue publishing and exhibiting these works.[12]

The legal aspects of the battle have focused primarily on the law of obscenity and the first amendment's guarantee of freedom of expression. Although the first amendment's prohibition against

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ordinance as "the graphic sexually explicit subordination of women." *Id.* § 16-3(q). For a discussion of pornography statutes, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-17, at 920–24 (2d ed. 1988).

The term "pornography" has a variety of meanings. In its most general sense, "pornography" refers to any material that is intended to arouse sexual desires. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY, UNABRIDGED 1402 (2d ed. 1979).

[10] Police agencies, because they are both the most visible branch of the government and the branch charged with actual enforcement of the laws, often play a role in any governmental action whose intention is to suppress speech. *See, e.g.*, Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1357–62 (5th Cir. 1980); *Bantam Books*, 372 U.S. at 63. In *Penthouse*, the court found that via "a calculated scheme of warrantless arrests and harassing visits to retailers," McAuliffe, the Solicitor General of Fulton County, Georgia, had caused a number of magazines, including *Playboy* and *Penthouse*, to be removed from the shelves of *every* retail outlet in the county. 610 F.2d at 1361. McAuliffe's enforcement activities constituted a system of prior restraint and the "constructive seizure" of every explicit magazine in Fulton County. *Id.* at 1361, 1362. For a discussion of *Bantam Books*, see *supra* note 7.

[11] The government may bring a civil action seeking to have a work found or declared obscene as a preface to a criminal prosecution, or in the course of obtaining an injunction against distribution of the work. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973). In *Paris*, respondents sought a declaration that two films were obscene, and an injunction against further exhibition of the films. *Id.* at 52. For a discussion of the regulation of obscenity through civil actions, see F. SCHAUER, THE LAW OF OBSCENITY 197–99, 228–46 (1976).

The government may also bring criminal charges directly against the distributors, producers, or sellers of an obscene work. *See, e.g.*, Illinois v. Pope, 138 Ill. App. 3d 726, 731, 486 N.E.2d 350, 352 (1985), *vacated and remanded*, 107 S. Ct. 1918, 1923 (1987) (defendant was convicted of selling obscene material in violation of ILL. REV. STAT., ch. 38, paras. 11–20(a)(1) (1985)); Illinois v. Morrison, 138 Ill. App. 3d 595, 597, 486 N.E.2d 345, 346 (1985), *vacated and remanded sub nom.* Pope v. Illinois, 107 S. Ct. 1918, 1923 (1987) (defendant was convicted of selling obscene material in violation of ILL. REV. STAT., ch. 38, paras. 11–20(a)(1) (1985)). The Meese Commission has compiled several noncomprehensive lists of obscenity prosecutions that have occurred since 1973. MEESE COMMISSION REPORT 1291 & n.1518, 1294–95 & n.1528 (1986). One such list purports to include those prosecutions involving "hard-core" sexual conduct. *Id.* at 1291 n.1518. Another purports to include those involving nudity, but not sexual acts. *Id.* at 1295 n.1528.

[12] *See, e.g.*, American Booksellers Ass'n v. Virginia, 802 F.2d 691, 694 (4th Cir. 1986) (booksellers association challenged an amendment to a Virginia statute that prohibited the display of material considered harmful to juveniles in a manner whereby they could examine and peruse it); *see also Penthouse*, 610 F.2d at 1357; *Playboy*, 639 F. Supp. at 588.

laws "abridging the freedom of speech, or of the press"[13] appears to foreclose *any* government activity aimed at suppressing expression, the United States Supreme Court has held that "obscene" expression[14] is excluded from the first amendment's guarantee of protection.[15] Whereas works protected by the first amendment are presumptively immune from legal restraint, obscene works, and those who produce and distribute them, are exposed to a wide range of legal sanctions.[16]

The vast difference in treatment accorded obscene works makes the legal test for determining whether a work is obscene critically important.[17] Under the current tripartite test, set forth by the Supreme Court in *Miller v. California* in 1973, a work is obscene

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[13] U.S. CONST. amend. I. The first amendment of the United States Constitution is applicable to the states via the due process clause of the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[14] Obscenity is a legal term of art meaning speech that is *sexually* obscene, independent of whether the speech is also religiously, politically or otherwise contentious. *See* Miller v. California, 413 U.S. 15, 18–19 n.2 (1973); Roth v. United States, 354 U.S. 476, 487–88 & n.20 (1957); F. SCHAUER, *supra* note 11, at 96. The Court in *Miller* stated that "material which is [legally] obscene forms a sub-group of all 'obscene' expression. . . . [T]he words 'obscene material' . . . have a specific judicial meaning . . . , i.e., obscene material 'which deals with sex.'" *Miller*, 413 U.S. at 18–19 n.2 (quoting *Roth*, 354 U.S. at 487). The *second* definition of "obscene" given in the COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1966 (1933 ed.) [hereinafter OED] is: "offensive to modesty or decency; expressing or suggesting unchaste or lustful ideas; impure, indecent, lewd." Examples given of usage illustrating this meaning include: "Be not obsceane though wanton in thy rimes," (quoting JOHN MARSTON, THE METAMORPHOSIS OF PIGMALIONS IMAGE; AND CERTAINE SATRYES, xxxviii. 133 (1598)), "Chemos, th' obscene dread of Moabs Sons," (quoting JOHN MILTON, PARADISE LOST, 405 (1667)), "On the Walls . . . were obscene images," (quoting JOHN A. FRYER, A NEW ACCOUNT OF EAST INDIA AND PERSIA, 39 (1698)), "Words that were once chaste, by frequent use grow obscene and uncleanly," (quoting ISAAC WATTS, LOGICK: OR THE RIGHT USE OF REASON IN THE ENQUIRY AFTER TRUTH, bk. I., ch. iv., § 3 (1725)), "Her (Scylla's) parts obscene the raging billows hide," (quoting ALEXANDER POPE, HOMER'S ODYSSY, bk. XII., 115 (1725)). OED, *supra*, at 1966. Curiously, Justice Burger, in *Miller*, 413 U.S. at 18–19 n.2, quotes only the first, less relevant definition: "'[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome.'" (quoting OED, *supra*, at 1966). This definition seems much less relevant than the second.

Obscenity is legally distinguishable from other types of offensive or indecent speech. For example, obscene speech differs in a constitutionally significant way from simple profanity, e.g. "Fuck the Draft," which, although perhaps subject to greater regulation than other types of protected speech, is not outside the first amendment's protection. *See* Cohen v. California, 403 U.S. 15, 20 (1971); *see also* FCC v. Pacifica, 438 U.S. 726, 730 (1978).

[15] Roth v. United States, 354 U.S. 476, 485 (1957). Other classes of speech that the first amendment does not protect include libelous statements, fighting words, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), and speech "directed to inciting or producing imminent lawless action, . . . [and] likely to incite or produce such action," Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[16] *Roth*, 354 U.S. at 484–85.

[17] *Id.* at 488, 491; G. GUNTHER, CONSTITUTIONAL LAW 1065 (11th ed. 1985).

if it appeals to the *prurient interest*, describes sexual conduct in a *patently offensive* way, and *lacks serious literary, artistic, political, or scientific value*.[18] Each component of the test must be independently evaluated by a jury applying the appropriate standards.[19] The prurient interest and patently offensive components of the test incorporate a "community" standard that is intended to embody the values and attitudes of the local community.[20] Under a community standard, jurors decide whether an *average person in the community, applying contemporary community standards*, would find that the work appeals to the prurient interest and is patently offensive.[21] The serious value component of the test incorporates a "reasonable person" standard; under this standard, a work is not obscene if a jury concludes that a *reasonable person* would find that the work possesses serious value.[22]

This note analyzes the application of a reasonable person standard to the value component of the tripartite test. Section I traces the development of obscenity law.[23] Subsection A briefly outlines the history of early obscenity law, focusing on early tests and standards for judging whether a work is obscene. Subsection B examines the constitutional basis of obscenity regulation, and the emergence and subsequent evolution of the modern tripartite obscenity test. Subsection C describes the Supreme Court's adoption of a reasonable person standard for the serious value component. Section II analyzes the the application of the reasonable person standard to the value component.[24] Subsection A describes the functions of each of the three components of the tripartite test, focusing on the value component as a fundamental constitutional threshold for determining whether a work is obscene. Subsection B analyzes the application of the reasonable person standard to the value component in terms of its constitutional function. First, the potential application of the community standard to the serious value component is examined. This subsection concludes that the community standard is inconsistent with the value component's constitutional function. This sub-

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[18] 413 U.S. 15, 24 (1973) (citations omitted).

[19] *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion).

For the standards applicable to the first two components of the tripartite test, see *Miller*, 413 U.S. at 37. For the standard applicable to the third, or value component, see *Pope*, 107 S. Ct. at 1921.

[20] *Smith*, 431 U.S. at 300, 301; *Miller*, 413 U.S. at 26, 30.

[21] *Smith*, 431 U.S. at 302; *Miller*, 413 U.S. at 33.

[22] *Pope*, 107 S. Ct. at 1921.

[23] *See infra* notes 26–171 and accompanying text.

[24] *See infra* notes 173–242 and accompanying text.

section next compares the reasonable person standard to the local community standard, concluding that the two standards do not differ in a constitutionally significant way, and that the reasonable person standard is therefore constitutionally deficient. Section III proposes the application of a "some rational persons" standard, rather than the reasonable person standard, to the serious value determination.[25] This section concludes that although no standard would be wholly consistent with the value component's constitutional function, the rational persons standard comports more closely with this function than does the reasonable person standard.

I. The Development of Obscenity Law

A. *The Historical Background of Modern Obscenity Law*

1. Early Obscenity-Related Law

Obscenity law first began to develop during the late 17th century as an outgrowth of earlier restraints on political and religious expression.[26] Prior to that time, sexually obscene expression constituted an actionable offense only where the expression was also politically or religiously libelous.[27] In 1663, the King's Bench in Great Britain decided *King v. Sedley*, in which the defendant, Sir Sedley, reportedly stood naked on a balcony, spraying bottles of urine on a crowd below.[28] Courts in both Great Britain and the United States subsequently relied on *Sedley* as establishing sexual obscenity as a crime at common law.[29] Despite this precedent, during

[25] *See infra* notes 244–52 and accompanying text.

[26] L. Tribe, *supra* note 9, § 12-16, at 905.

[27] *Id.*

[28] 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663), and 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1663). Sir Charles Sedley became intoxicated and made his way to a tavern balcony. *See* Meese Commission Report, *supra* note 5, at 1240. After having removed his clothes, he delivered to the growing crowd a series of antireligious epithets, while spraying the crowd with what is reported to be bottles of urine. *See* L. Tribe, *supra* note 9, § 12-16, at 905; Meese Commission Report, *supra* note 5, at 1240.

[29] *See, e.g.*, R. v. Curl, 2 Strange 788, 790, 93 Eng. Rep. 849, 850 (K.B. 1727), *cited in* L. Tribe, *supra* note 9, § 12-16, at 905; Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 101 (Pa. 1815). See Meese Commission Report, *supra* note 5, at 1241, for further discussion of *Curl*. Reliance on *Sedley* for the proposition that sexual obscenity is an independent offense indictable at common law is based on the fact that it was the first such case not also including an affront to either religion or government. *See* Meese Commission Report, *supra* note 5, at 1240.

Others have suggested, however, that reliance on *Sedley* for the proposition that obscenity alone (Sir Sedley's nudity) constituted a breach of the peace may be inappropriate, in that

the next century and a half only a few cases involving obscenity arose in Great Britain, and none at all in the United States.[30]

Significantly, as of the date of the first amendment's ratification, restrictions on obscenity virtually did not exist in the United States.[31] No prosecutions for obscenity had occurred.[32] Nor did any statutes of the time proscribe sexually lewd or obscene speech, except to the extent that it constituted political or religious libel.[33] A Massachusetts statute, for example, proscribed "obscenity,"[34] but the prohibition extended only to obscene expression that denigrated religion, rather than to sexual obscenity standing alone.[35]

Sedley's gratuitous shower, which apparently caused the crowd to riot, was an indictable breach of the peace regardless of his contemporaneous nudity. L. TRIBE, *supra* note 9, § 12-16, at 905; *Sharpless*, 2 Serg. & Rawle at 93 (counsel for the defendant).

[30] *See supra* note 29; *see, e.g.*, Reg. v. Reed, 11 Mod. Rep. 142, 142, 88 Eng. Rep. 953, 953 (K.B. 1708) and Fotescu's Reports 98, 98, 91 Eng. Rep. 777, 777 (K.B. 1708) (The Queen's Bench dismissed Read's indictment, rejecting the characterization of obscenity as libel absent its use to attack, for example, the government or the church.).

[31] L. TRIBE, *supra* note 9, § 12-16, at 906; *see* MEESE COMMISSION REPORT, *supra* note 5, at 242.

The first amendment of the United States Constitution was ratified in 1791. G. GUNTHER, *supra* note 17, app. at A-8.

For a discussion of the history of obscenity law indicating that sexual obscenity was criminal under both statutory and common law in the United States at the time of the first amendment's ratification, see *Roth v. United States*, 354 U.S. 476, 482–83 (1957); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 104–05 (1973) (Brennan, J., dissenting). For a discussion of the history of obscenity law indicating that sexual obscenity, independent of religious or political considerations, was not criminal in the United States at the time of the first amendment's ratification, see Memoirs v. Massachusetts, 383 U.S. at 428–31 (Douglas, J., concurring); *Paris*, 413 U.S. at 70 (Douglas, J., dissenting); MEESE COMMISSION REPORT, *supra* note 5, at 242, 1244; *see generally* L. TRIBE, *supra* note 9, § 12-16, at 906. Dissenting in *Paris*, Justice Douglas asserted that "prior to the adoption of our Constitution and Bill of Rights the Colonies had no law excluding 'obscenity' from the regime of freedom of expression and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none." *Paris*, 413 U.S. at 70 (citing J. GOEBEL, DEVELOPMENT OF LEGAL INSTITUTIONS (1946); J. GOEBEL, FELONY AND MISDEMEANOR (1937)).

[32] *See supra* note 31.

[33] *See* MEESE COMMISSION REPORT, *supra* note 5, at 242.

[34] Acts and Laws of Massachusetts Bay Colony (1726), Acts of 1711–1712, ch. 1, p. 218, *cited in Paris*, 413 U.S. at 104 (Brennan, J., dissenting). The statute prohibited the "Composing, Writing, Printing or Publishing of any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship." *Id.* Lawrence Tribe also states that Massachusetts had statutory law concerning obscenity, but, apparently by mistake, he cites the statute's preamble, rather than its active clause (quoted above): "In 1711, Massachusetts had extended its rigid censorship system to include the 'wicked, profane, impure, filthy and obscene . . . .' Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay, 1814." L. TRIBE, *supra* note 9, § 12-16, at 906 n.10.

[35] *See* MEESE COMMISSION REPORT, *supra* note 5, at 242, 1242.

Prosecutions and statutes concerned with obscenity as a distinct offense began to emerge during the early 1800s, but remained sparse until the later part of the century.[36] The first conviction for obscenity, *Commonwealth v. Sharpless*, occurred in Pennsylvania in 1815.[37] The *Sharpless* court held that a picture of a nude couple was obscene and that its exhibition was indictable at common law.[38] The next reported prosecution for obscenity took place in Massachusetts in 1821.[39] In *Commonwealth v. Holmes* the Massachusetts Supreme Judicial Court affirmed the defendant's conviction, under common law,[40] for publishing the book *Memoirs of a Woman of Pleasure* accompanied by a lewd illustration.[41] Statutes proscribing obscenity also began to emerge during this period. In 1821, Vermont enacted the first statute in the United States that prohibited sexual obscenity as an offense distinct from religious and political libel.[42] Other states followed Vermont's lead, so that by the beginning of the 20th century approximately thirty other states had enacted statutes regulating obscenity.[43] Congress enacted the first federal obscenity statute in 1842.[44] Neither the federal nor the state statutes were, however, strictly enforced during the first few decades following their enactment.[45]

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[36] *See Paris*, 413 U.S. at 104–05 (Brennan, J., dissenting); *id.* at 70 (Douglas, J., dissenting); *Memoirs*, 383 U.S. at 30–31 (Douglas, J., dissenting); *Roth*, 354 U.S. at 514 (Douglas, J., dissenting).

[37] 2 Serg. & Rawle at 105; *see Paris*, 413 U.S. at 104 (Brennan, J., dissenting); *Roth*, 354 U.S. at 514 (Douglas, J., dissenting).

[38] 2 Serg. & Rawle at 102. In concluding that the exhibition of obscene pictures constituted an indictable offense, the *Sharpless* court relied on R. v. Sedley, 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663), and 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1663). 2 Serg. & Rawle at 101.

[39] *See Paris*, 413 U.S. at 104 (Brennan, J., dissenting).

[40] 17 Mass. 336, 340 (1821). In his dissenting opinion in *Paris*, Justice Brennan stated that the conviction in *Holmes* was under both common and statutory law, 413 U.S. at 104 (Brennan, J., dissenting); the opinion in *Holmes* indicates, however, that the offense was "[not] created by statute." 17 Mass. at 340.

[41] *Holmes*, 17 Mass. at 336. The book for whose publication the defendant was convicted — MEMOIRS OF A WOMAN OF PLEASURE — is the same book at issue in Memoirs v. Massachusetts, 383 U.S. 413, 414 (1966).

[42] 1824 Vt. Laws ch. XXXII, no. 1, § 23; *see Paris*, 413 U.S. at 104 (Brennan, J., dissenting).

[43] *Paris*, 413 U.S. at 104–05 (Brennan, J., dissenting); L. TRIBE, *supra* note 9, § 12-16, at 906.

[44] The Comstock Act, ch. 270, § 28, 5 Stat. 566 (1842) (prohibiting the importation into the United States of "all indecent and obscene prints, lithographs, engravings and transparencies").

[45] *See* L. TRIBE, *supra* note 9, § 12-16, at 906.

Strong public sentiment against sexually oriented works arose during the early 1870s.[46] Private organizations alleging a concern for society's moral character were the most virulent proponents of this sentiment.[47] These organizations worked to suppress any and all material that they deemed to be indecent or obscene.[48] One such organization, the Committee for the Suppression of Vice, was formed by a store clerk named Anthony Comstock.[49] Comstock's organization intensively lobbied Congress to enact stronger laws, and eventually succeeded in obtaining passage of a comprehensive statute[50] that prohibited the mailing of any obscene or lewd works.[51] Other, similar organizations successfully brought about the enactment and active enforcement of additional federal and state obscenity statutes.[52]

2. The Rise and Fall of the *Hicklin* Rule and the Emergence of a Community Standard

As legislatures enacted new statutes, and as enforcement of the available statutes increased, the need arose for a legal definition of

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[46] *See id.*; MEESE COMMISSION REPORT, *supra* note 5, at 243.

[47] *See* L. TRIBE, *supra* note 9, § 12-16, at 906; MEESE COMMISSION REPORT, *supra* note 5, at 243.

[48] *See* L. TRIBE, *supra* note 9, § 12-16, at 906; MEESE COMMISSION REPORT, *supra* note 5, at 243.

[49] *See* L. TRIBE, *supra* note 9, § 12-16, at 906; MEESE COMMISSION REPORT, *supra* note 5, at 1245.

Comstock, who was eventually appointed a federal agent, *see* MEESE COMMISSION REPORT, *supra* note 5, at 244, 1246, claims to have eventually destroyed "something over fifty tons of vile books [and] 3,984,063 obscene pictures." C.G. TRUMBULL, ANTHONY COMSTOCK, FIGHTER 239 (1913), *quoted in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 668 (1st ed. 1978). As Professor Tribe writes in *American Constitutional Law*, "most of [these books and pictures] today would be likely to shock no one." L. TRIBE, *supra*, at 668; *see* MEESE COMMISSION REPORT, *supra* note 5, at 244.

[50] *See* L. TRIBE, *supra* note 9, § 12-16, at 906; MEESE COMMISSION REPORT, *supra* note 5, at 1245.

[51] Act approved Mar. 3, 1873, Ch. 258, 17 Stat. 599 (1873) (current version at 18 U.S.C. § 1461 (1982)). The statute prohibited the mailing of any "obscene, lewd, or lascivious book, pamphlet, picture, [etc.] . . ., or any article . . . intended for the prevention of conception . . . or any article . . . adapted for any indecent or immoral use . . . ." *Id.*

[52] *See* MEESE COMMISSION REPORT, *supra* note 5, at 243–44. Another organization whose activities contributed significantly to the suppression of works that portrayed nudity or sexual acts was the Watch and Ward Society, located in Boston, Massachusetts. *Id.* For example, an agent of the Watch and Ward Society brought about the successful prosecution of the defendant bookstore manager in *Commonwealth v. Delacey* by posing as an ordinary customer of the bookstore interested in purchasing the book that the defendant was later convicted of selling. 271 Mass. 327, 333, 171 N.E. 455, 456 (1930); *see also* L. TRIBE, *supra* note 9, § 12-16, at 907.

obscenity.[53] An early definition, first articulated by the Queen's Bench in *Regina v. Hicklin* in 1868, was adopted and refined by British courts during the late 19th century.[54] Under this definition a court determined whether a work was obscene by judging the effect that isolated passages of the work (for example, a single illustration contained within a larger text) might have on the most sensitive persons who could potentially have contact with the work (for example, children).[55]

A majority of courts in the United States eventually adopted the *Hicklin* rule.[56] The ease with which prosecutors could satisfy the *Hicklin* rule rendered it a significant weapon in the war against obscenity that was waged by organizations such as Comstock's.[57] Obscenity prosecutions during the late 19th and early 20th centuries were profligate.[58] The prosecutions were not limited to sexually explicit works, but extended to numerous works of contemporary literature, many of which were declared obscene.[59]

Courts eventually began to challenge the validity of the *Hicklin* rule, questioning both the rule's "isolated passages" and "most sensitive persons" provisions.[60] Early criticism of the test came in 1913

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[53] L. TRIBE, *supra* note 9, § 12-16, at 906; MEESE COMMISSION REPORT, *supra* note 5, at 1246.

[54] 3 L.R. Q.B. 360 (1868). In *Hicklin* the trial judge, Hicklin, ordered the destruction of an antireligious pamphlet called "The Confessional Unmasked" because of references to intercourse and fellatio. *Id.* at 362. Chief Justice Cockburn, of the Queen's Bench, fashioned the test as: "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.* at 368.

[55] *Id. See* L. TRIBE, *supra* note 9, § 12-16, at 907; MEESE COMMISSION REPORT, *supra* note 5, at 1246–47.

[56] *See* Roth v. United States, 354 U.S. 476, 489 (1957); United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913); L. TRIBE, *supra* note 9, § 12-16, at 906–07 (Tribe describes the *Hicklin* rule's influence on United States courts as a "stranglehold."); MEESE COMMISSION REPORT, *supra* note 5, at 1247; *see, e.g.*, United States v. Bennett, 24 F. Cas. 1093, 1102–05 (C.C.S.D.N.Y. 1879); Commonwealth v. Friede, 271 Mass. 318, 322–23, 171 N.E. 472, 474 (1930); *Delacey*, 271 Mass. at 329, 171 N.E. at 456; People v. Friede, 133 Misc. 611, 613, 233 N.Y.S. 565, 568 (1929).

[57] *See* MEESE COMMISSION REPORT, *supra* note 5, at 1246–47.

[58] *See id.*; L. TRIBE, *supra* note 9, § 12-16, at 906–07.

[59] L. TRIBE, *supra* note 9, § 12-16, at 906–07. The works of contemporary literature that were declared obscene included Theodore Dreiser's *An American Tragedy*, Commonwealth v. Friede, 271 Mass. at 319, 323, 171 N.E. at 472, 473 (1930), and D.H. Lawrence's *Lady Chatterly's Lover*. Commonwealth v. Delacey, 271 Mass. at 333, 171 N.E. at 457. James Joyce's *Ulysses* was also challenged, but was ultimately found nonobscene. United States v. One Book Called "Ulysses," 5 F. Supp. 182, 185 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705, 709 (2d Cir. 1934).

[60] *See* MEESE COMMISSION REPORT, *supra* note 5, at 1247–48; L. TRIBE, *supra* note 9, § 12-16, at 907; *see, e.g.*, *Ulysses*, 72 F.2d at 707 (excerpted portions of a work cannot be used in determining its obscenity); *Ulysses*, 5 F. Supp. at 184 (whether a work is obscene must be

from then United States district court Judge Learned Hand in *United States v. Kennerley*.[61] Although Judge Hand felt bound by precedent to follow the *Hicklin* rule,[62] he questioned the notion that a work should be judged by its effect on the persons most susceptible to its corrupting influence, and admonished that "to fetter [thought] by the necessities of the lowest and least capable seems a fatal policy."[63] In place of this lowest common denominator analysis, Judge Hand suggested that obscenity be measured against the "average conscience of the time," as indicating "the present critical point in the compromise between candor and shame at which the community may be arrived here and now."[64]

Judge Learned Hand's opinion in *Kennerley* had little practical effect at the time it was issued.[65] The concepts it espoused were, however, revived and given greater force by Judge Augustus Hand writing for the Second Circuit in 1934 in *United States v. One Book Called Ulysses*.[66] Judge Augustus Hand observed that although the *Hicklin* rule had until then been the prevailing test for obscenity, courts had granted numerous exceptions for the classics and works concerning "medicine, science, and sex instruction."[67] Reasoning that a strict application of the rule would condemn these works, as well as numerous contemporary works of literature, Judge Hand rejected the *Hicklin* rule as unnecessarily harsh.[68] He held that when a jury is judging a work, it must make its decision based on the effect of the work *as a whole*, not isolated passages.[69] Judge Woolsey, in the district court below, had reached a similar conclusion concerning the *Hicklin* rule, and had thus ruled that a jury must con-

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determined by analyzing its effect on a person having average sex instincts); Commonwealth v. Gordon, 66 Pa. D. & C. 101, 136 (Phila. 1949) (a work's obscenity must be determined with regard to an "average person"), *aff'd sub nom.* Commonwealth v. Feigenbaum, 166 Pa. Super. 120, 70 A.2d 389 (1950).

[61] 209 F. at 120–21.

[62] *Id.* at 120.

[63] *Id.* at 121.

[64] *Id.*

[65] *See* L. TRIBE, *supra* note 9, § 12-16, at 907 & n.22. Judge Hand, in *Kennerley*, while criticizing the *Hicklin* rule, acknowledged that it had been accepted almost universally and concluded that he was compelled to apply it. 209 F. at 120 . It was not until after the Second Circuit's decision in *Ulysses* 21 years later that a test for obscenity other than the *Hicklin* rule began to be applied in a significant number of courts. 72 F.2d at 708. *See infra* notes 66–74 and accompanying text.

[66] 72 F.2d 705, 708 (2d Cir. 1934), *aff'g* 5 F. Supp. 182 (S.D.N.Y. 1933).

[67] *Ulysses*, 72 F.2d at 707.

[68] *Id.* at 707–08.

[69] *Id.*

sider the effect that a work has on an average, or normal, person, rather than on the persons most susceptible to the work's appeal.[70] Together, the opinions in *Ulysses* represent the first articulation of a new test that, in the two decades following, displaced the *Hicklin* rule in a majority of United States courts.[71]

In 1957 in *Butler v. Michigan* the United States Supreme Court struck down a state statute that incorporated a principle directly analogous to the *Hicklin* rule's "most susceptible persons" standard.[72] In *Butler*, a unanimous Court invalidated as overbroad a Michigan statute that, in the name of protecting children, prohibited the sale *to anyone* of any books, magazines or newspapers that were determined to be harmful to juveniles.[73] Justice Frankfurter, writing for the Court, held that a statute that reduced adults to reading and viewing only those works that are suitable for children contravened the first amendment's guarantee of freedom of expression.[74] Although not explicitly deciding the constitutionality of either the *Hicklin* rule or obscenity laws generally, *Butler* set the stage for the Court's resolution of both questions that same year in *Roth v. United States*.[75]

B. *Modern Obscenity Law:* Roth *and Its Progeny*

Modern obscenity law originated with the United States Supreme Court's landmark ruling in *Roth v. United States* in 1957 that the first amendment does not protect obscene speech.[76] Under *Roth*, a work was obscene if the dominant theme of the work taken as a whole appealed to the prurient interest.[77] In *Manual Enterprises v. Day*, the Court added a second component to the test, under which a work must also be patently offensive before a jury may find the work obscene.[78] In *Memoirs v. Massachusetts*, Justice Brennan added a third component, holding that a work is not obscene unless, in addition to satisfying the patently offensive and prurient interest components, it is also "utterly without redeeming social value."[79] In

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[70] *Ulysses*, 5 F. Supp. at 185.
[71] L. TRIBE, *supra* note 9, § 12-16, at 907.
[72] 352 U.S. 380, 383 (1957).
[73] *Id.* at 383–84.
[74] *Id.*
[75] 354 U.S. 476 (1957).
[76] *Id.* at 483.
[77] *Id.* at 489.
[78] 370 U.S. 478, 482, 486 (1962) (plurality opinion).
[79] 383 U.S. 413, 418 (1966) (plurality opinion).

1973 in *Miller v. California*, the Court reformulated the value component to require merely that a work "lack serious" value before a jury may find it obscene.[80]

The development of the standards applicable to the components paralleled the development of the components themselves. Prior to the addition of the value component in *Memoirs*, the Court had held that jurors should apply contemporary community standards when determining whether a work appeals to the prurient interest and is patently offensive.[81] The *Memoirs* Court, when it added the value component, failed to indicate the standard that jurors should apply when determining whether a work possesses the requisite value.[82] In *Miller*, the Court reaffirmed that community standards were applicable to the patently offensive and prurient interest components,[83] but once again failed to set forth the standard to be applied to the value component.[84] In 1976, in *Smith v. United States*, the Court briefly considered, but failed to resolve, whether a community standard is applicable to the value determination.[85] Finally, in *Pope v. Illinois*, the Court explicitly rejected a community standard for the value component,[86] and held instead that jurors must apply a *reasonable person* standard.[87]

1. The Emergence of the Tripartite Obscenity Test

In 1957, in *Roth v. United States*, the Supreme Court for the first time expressly held that obscenity is not protected by the first amendment.[88] The defendant in *Roth* had been convicted of depositing sexually obscene materials in the mails in violation of the federal mail obscenity statute.[89] Challenging the constitutionality of the statute, the defendant contended that obscenity was protected

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[80] 413 U.S. 15 (1973).

[81] *See Memoirs*, 383 U.S. at 418. See text accompanying notes 95–113 for a discussion of the cases preceding *Memoirs*, which set forth the standard applicable to the patently offensive and prurient interest components.

[82] 383 U.S. at 418.

[83] 413 U.S. at 33–34.

[84] *See id.* at 30–34; *see also* Pope v. Illinois, 107 S. Ct. 1918, 1920–21 (1987); Smith v. United States, 431 U.S. 291, 301 (1977).

[85] 431 U.S. at 300 (construing *Miller*, 413 U.S. at 30–34, and citing F. SCHAUER, *supra* note 11, at 123–24).

[86] 107 S. Ct. at 1920–21.

[87] *Id.* at 1921.

[88] 354 U.S. 476, 485 (1957).

[89] *Id.* at 479. A companion case, *Alberts v. California*, concerned the constitutionality of California's obscenity statute. *Id.* at 479–80.

under the first amendment's prohibition against laws abridging the freedom of expression.[90]

The Supreme Court rejected the defendant's contention based on its conclusion that the history of the first amendment evinced a rejection of obscenity as constitutionally protected expression.[91] In reaching this conclusion, the *Roth* Court relied heavily on an historical analysis of early obscenity-related law and prior Supreme Court cases.[92] The Court asserted that dicta in various Supreme Court opinions prior to *Roth* indicated that the Court had always assumed that obscenity was outside the protection provided by the first amendment.[93] One of the principle cases on which the *Roth* Court relied was *Chaplinsky v. New Hampshire*.[94] In *Chaplinsky*, the Court stated that obscenity, profanity, libelous speech, and "fighting words" were classes of speech whose regulation had never been assumed to raise any constitutional concerns.[95] In explaining the exclusion of these categories of speech from the freedom of expression, the *Chaplinsky* Court observed that such speech tends to cause injury or incite a breach of the peace merely by being spoken.[96] Such speech, reasoned the *Chaplinsky* Court, is not essential to the exposition of ideas, and is of only slight social value.[97] The *Roth* Court, echoing the *Chaplinsky* Court, based the failure of ob-

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[90] *Id.* at 479.

[91] *Id.* at 484.

[92] *Id.*

[93] Roth v. United States, 354 U.S. 476, 481 (1957); *see Chaplinsky*, 315 U.S. 586 (1942); *Beauharnais*, 343 U.S. 250 (1952); Winters v. New York, 333 U.S. 507, 510 (1948) (citing *Chaplinsky*); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946) (assuming the validity of the existing obscenity laws); Near v. Minnesota, 283 U.S. 697, 716 (1931); Hoke v. United States, 227 U.S. 308, 322 (1913) (assuming that obscene literature may be banned from interstate commerce); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904) (stating that the constitutionality of laws prohibiting the use of the mails for the distribution of obscene material and criminalizing the act of depositing obscene material in the mails has never been challenged); Roberston v. Baldwin, 165 U.S. 275, 281 (1897) (the first amendment is not offended by the prohibition of "indecent" publications); United States v. Chase, 135 U.S. 255, 261 (1890) (assuming the constitutionality of a law intended "to purge the mails of obscene and indecent matter as far as [is] consistent with the rights reserved to the people"); *ex parte* Jackson, 96 U.S. 727, 736–37 (1877) (distinguishing material that is "injurious to the public morals," i.e., obscene, from that which is protected by the first amendment). For a review of these cases, see Judge Frank's concurring opinion in United States v. Roth, 237 F.2d 796, 803–04 (2d Cir. 1956) (Frank, J., concurring).

[94] 315 U.S. 568 (1942).

[95] *Id.* at 572.

[96] *Id.*

[97] *Id.*

scenity to achieve constitutional stature on its utter lack of redeeming social importance.[98]

The *Roth* Court's exclusion of obscene speech from the domain of constitutionally protected expression rendered the test for determining whether a work is obscene critically important.[99] If a work is obscene, a state may constitutionally proscribe its dissemination, and may impose criminal sanctions upon those distributing or exhibiting it.[100] Conversely, if a work is not obscene, it is entitled to the first amendment's weighty protection, and any restrictions on its exhibition or publication are presumptively unconstitutional.[101] Thus, if the boundary between obscene and nonobscene speech is improperly drawn, expression entitled to the protection of the first amendment will be impermissibly exposed to the chilling effect of legal sanctions.[102]

Under the test articulated by the *Roth* Court, a jury had to decide "whether to the average person, applying contemporary community standards, the dominant theme of the work as a whole appeals to the prurient interest."[103] Historically, this test is significant for its express rejection of the *Hicklin* rule as constitutionally unpalatable. Rather than deciding whether a work is obscene by analyzing the effect of "isolated passages" on the "most susceptible" persons, the *Roth* test called upon the factfinder to judge the effect of a work *taken as a whole* on the *average person*.[104]

The patently offensive component was added to the evolving test by Justice Harlan writing for a plurality in *Manual Enterprises v. Day*.[105] Under the test as revised by Justice Harlan, in addition to manifesting an appeal to the prurient interest, a work also had to be "so [patently] offensive on [its] face as to affront current community standards of decency."[106] The petitioners in *Manual* challenged an administrative ruling by the Judicial Officer of the Post

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[98] Roth v. United States, 354 U.S. 476, 484 (1957).

[99] *Id.* at 488, 491; G. GUNTHER, *supra* note 17, at 1065.

[100] *See Roth*, 354 U.S. at 492–93. "[T]he federal obscenity statute punishing the use of the mails for obscene material is a [constitutional] exercise of . . . power." *Id.* at 493.

[101] *Id.* at 484.

[102] *Id.* at 488, 491. In *Roth*, the Court held that it was "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material [that is not obscene]." 354 U.S. at 488.

[103] *Id.* at 489.

[104] *Id.*

[105] 370 U.S. 478, 486 (1962) (plurality opinion).

[106] *Id.* at 482.

Office Department that barred a shipment of the petitioners' magazines from the mails on the ground that they were obscene.[107] In upholding the petitioners' challenge, Justice Harlan found that the Judicial Officer had based his determination that the magazines were obscene on the mistaken assumption that the existence of prurient appeal alone was sufficient to sustain a finding of obscenity.[108] To be considered obscene, Justice Harlan held, a work must also depict sexual conduct in a patently offensive manner.[109] Justice Harlan also held that the relevant community for determining whether a work is patently offensive is a national one.[110] The *Manual* plurality based its decision to mandate a national standard on the fear that use of a lesser geographical unit would foreclose access by some regions of the country to works simply because others found them intolerably offensive.[111]

In *Manual*, Justice Harlan focused solely on the patently offensive component when he held that the relevant community is a national one. In 1964 in *Jacobellis v. Ohio*, however, Justice Brennan expanded Justice Harlan's analysis to apply to obscenity generally.[112] Interpreting prior Supreme Court opinions as explicitly refusing to accept an interpretation of the Constitution that allowed first amendment protections to vary with state lines,[113] the plurality in *Jacobellis* rejected a "local" definition of community.[114] Rather, Justice Brennan wrote, whether a work is obscene must be determined on the basis of a national standard.[115]

The third and final component of the evolving obscenity test was added by Justice Brennan writing for a plurality in 1966 in *Memoirs v. Massachusetts*.[116] Although earlier incarnations of the test had implicitly subsumed the *Roth* Court's characterization of obscenity as utterly without redeeming social value,[117] the *Memoirs*

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[107] *Id.* at 479.

[108] *Id.* at 482.

[109] *Id.*

[110] *Id.* at 488.

[111] *Id.*

[112] 378 U.S. 184, 193 (1964) (plurality opinion) ("Judge Hand[, in *United States v. Kennerley*,] was referring not to state and local 'communities,' but rather to the 'community' in the sense of 'society at large; . . . the public, or people in general.'") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 542 (2d ed. 1949)).

[113] *Id.* at 194–95 (citing Pennakamp v. Florida, 328 U.S. 331, 335 (1946)).

[114] *Id.* at 193.

[115] *Id.* at 195. *But see infra* notes 142–49 and accompanying text.

[116] 383 U.S. at 418 (plurality opinion).

[117] *Roth*, 354 U.S. at 484.

Court's formulation was the first to incorporate it as an independent requirement.[118] *Memoirs* was a civil suit brought by the Attorney General of Massachusetts in which the commonwealth sought to have a book, *Memoirs of a Woman of Pleasure* (also known as *Fanny Hill*), declared obscene.[119] On appeal below, the Supreme Judicial Court of Massachusetts had held that a work need not be unqualifiedly worthless before a jury may find it obscene.[120] Finding that *Fanny Hill* possessed only a small amount of social value, the Supreme Judicial Court had declared the book obscene.[121]

Justice Brennan flatly rejected this analysis, declaring that a book cannot be banned unless a jury finds it to be *utterly* without redeeming social value.[122] With regard to *Fanny Hill*, Justice Brennan held that the testimony of several English professors from prominent universities that the book possessed literary and historical value[123] had established the minimum social value required to escape a finding of obscenity.[124] Justice Brennan also stressed that a jury must independently evaluate each component of the tripartite test;[125] a work's social value may not be weighed against nor canceled by its prurient appeal or patent offensiveness.[126]

A majority of the Supreme Court never endorsed the *Memoirs* plurality's formulation of the test.[127] During the seven years following *Memoirs*, the Justices were unable to agree on a precise formulation of a test for obscenity.[128] In a series of cases beginning with *Redrup v. New York* in 1967,[129] the Court instead summarily reversed, via per curiam decisions, any conviction that at least five Justices, applying their separate tests, found to be unconstitutional.[130] Be-

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[118] 383 U.S. at 418.

[119] 383 U.S. at 415 (plurality opinion). *Fanny Hill* was written by John Cleland in about 1750.

[120] *Memoirs*, 349 Mass. 69, 73, 206 N.E.2d 403, 406 (1965); *see Memoirs*, 383 U.S. at 420 (plurality opinion).

[121] *Memoirs*, 349 Mass. 69, 73, 206 N.E.2d 403, 406 (1965); *see Memoirs*, 383 U.S. at 420 (plurality opinion).

[122] 383 U.S. at 419.

[123] *Id.* at 415–16 n.2 (quoting Justice Whittemore's dissenting opinion in the proceeding below in the Massachusetts Supreme Judicial Court. 349 Mass. 69, 74–75, 206 N.E.2d 403, 406–07 (1965) (Whittemore, J., dissenting)).

[124] *Id.* at 421.

[125] *Id.* at 419.

[126] *Id.*

[127] *Id. Miller*, 413 U.S. at 24–25.

[128] *See infra* notes 129–31 and accompanying text.

[129] 386 U.S. 767.

[130] *Miller*, 413 U.S. 15, 22 n.3 (citing *Redrup*, 386 U.S. 767).

tween 1966 and 1973, the Court disposed of thirty-one cases in this manner.[131]

2. The *Miller* Obscenity Test

Finally, in 1973 in *Miller v. California*, five members of the Court agreed on a single test to be used in determining whether a work is obscene.[132] In *Miller*, the Court reviewed the appellant's conviction for the unsolicited mailing of several sexually explicit brochures, in violation of a California statute prohibiting the knowing distribution of obscene works.[133] Justice Burger, writing for the Court, set forth the current formulation of the tripartite test.[134] Under this test, in determining whether a work is obscene, a jury must decide:

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts, in a patently offensive way, sexual conduct defined by the applicable state law; (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[135]

Miller is particularly significant for its treatment of three issues. First, the Court's reformulation of the value component to require that a prosecutor prove not that a work is *utterly* without redeeming value, but merely that it is lacking in *serious* literary, artistic, political, or scientific value.[136] Second, its conclusion that a local, rather than national, community standard applies to the prurient interest and patently offensive components of the tripartite test.[137] And, finally, its silence concerning the standard to be applied by jurors in determining whether a work contains serious intellectual or cultural value.[138]

Turning first to the value component, the *Miller* Court criticized as a severe departure from precedent Justice Brennan's holding in *Memoirs* that a work must be utterly without value before it may be considered obscene.[139] Moreover, the Court insisted that the ex-

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[131] *Id.*
[132] *Id.* at 24.
[133] *Id.* at 16.
[134] *Id.* at 24.
[135] *Id.*
[136] *Id.* F. SCHAUER, *supra* note 11, at 140–41.
[137] *Miller*, 413 U.S. at 33–34.
[138] *Pope*, 107 S. Ct. at 1920–21; *Smith*, 431 U.S. at 301.
[139] *Miller*, 413 U.S. at 22.

treme wording of the *Memoirs*' formulation an evidentiary burden that was impossible for prosecutors to satisfy.[140] The Court therefore replaced the strict requirement that a work be utterly without redeeming social value with the lesser requirement that the work merely lack serious value.[141]

Turning to the standards that jurors must use in evaluating the test's components, the *Miller* Court considered but rejected the argument that a national standard must be applied to the prurient interest and patently offensive components.[142] The Court held instead that a state-wide standard is constitutionally sufficient.[143] Although acknowledging that first amendment protections do not vary from one region to the next, the Court maintained that the Constitution does not mandate the imposition of uniform national standards.[144] The *Miller* Court did not definitively indicate, however, whether its rejection of a national standard was based on constitutional concerns, or was merely a recognition of the practical difficulties involved in establishing a national standard.[145] The Court's analysis seems to proceed from the assumption that because the first amendment does not explicitly mandate a national standard, the Court will not impose one upon the states unless a strong rationale exists for doing so.[146] The Court's primary objection appeared to be that a national standard would be difficult to establish and maintain.[147] The Court also stated that a national standard would be unfair in that it would force people from different regions of the country to conform their selection of reading materials to those deemed suitable by the entire country.[148] The Court thus concluded that with regard to the prurient interest and patently

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[140] *Id.*

[141] *Id.* at 26. Variously, the opinion sets forth the "value" component as requiring that "[a] state offense must be limited to works which . . . do not have serious . . . value," and that the "trier of fact . . . [determine] whether the work . . . lacks serious . . . value." *Id.* at 24.

[142] *Id.* at 30–33.

[143] *Id.* at 30–34.

[144] *Id.* at 30.

[145] *See id.* at 30–34.

[146] *Id.* at 31. "Nothing in the First Amendment requires that a jury must consider . . . 'national standards.'" *Id.*

[147] *Id.* at 30. "To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' standard would be an exercise in futility." *Id.* "'[T]his Court has not been able to enunciate [a national standard], and it would be unreasonable to expect local courts to divine one.'" *Id.* at 32 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (plurality opinion)).

[148] *Id.* at 33.

offensive components of the tripartite test, a state-wide standard is all that the first amendment requires.[149]

In 1977 in *Smith v. United States*, the Court reaffirmed that a jury must apply contemporary local community standards to the prurient interest and patently offensive components, but rejected the suggestion that a jury also use community standards when deciding whether a work lacks serious value.[150] The petitioner in *Smith* had been convicted of violating the federal mail obscenity statute. In challenging his conviction, he argued that the Iowa state legislature had established a state-wide standard and that the district court had erred in refusing to instruct the jury that it was bound to apply this standard.[151]

The *Smith* Court began its analysis by restating the *Miller* Court's holding that in deciding whether a work appeals to the prurient interest, or is patently offensive, jurors must decide how the average person, applying local community standards, would react to the work.[152] Turning to the sources to which jurors should look in determining the content of local community standards, the *Smith* Court held that jurors are not bound to follow legislative definitions,[153] but are entitled to draw on their own views, and on the views of their friends and associates in the surrounding community, in deciding how the average person in the local community would react to an allegedly obscene work.[154]

C. Pope v. Illinois: *A Reasonable Person Standard for the Value Component*

In the series of opinions beginning with *Roth* and extending through *Smith*, the United States Supreme Court painstakingly constructed a comprehensive, though complex, definition of obscenity. Under this definition, a work is obscene if it appeals to a prurient interest in sex, depicts sexual conduct in a patently offensive manner, and lacks serious literary, artistic, political, or scientific value. When evaluating whether a work appeals to a prurient interest, or is patently offensive, jurors must decide how the average person in the community, applying local community standards, would react

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[149] *Id.* at 33–34.
[150] 431 U.S. at 300–01.
[151] *Id.* at 297–99.
[152] *Id.* at 300–01.
[153] *Id.* at 302–03.
[154] *Id.*

to the work. Finally, although jurors may consider legislatively defined standards in determining what constitutes local community standards, they are free to look to their own views, and the views of the people in the community around them.

After *Smith*, the only question left unanswered was the standard applicable to the value component. Given the Supreme Court's vigorous endorsement of the community standard in *Miller*, legislators, judges and attorneys might have assumed, with some justification, that a local community standard was applicable to all three of the test's components. But the Court foreclosed this possiblity when it noted in dicta in *Smith* that *Miller* had not sanctioned the use of a community standard when deciding whether a work has serious value.[155] *Smith* did not, however, provide any further guidance concerning the appropriate standard.

The Supreme Court finally answered this question in 1987 in *Pope v. Illinois* by holding that a reasonable person standard applies to the determination of whether a work lacks serious literary, artistic, political, or scientific value.[156] The petitioners in *Pope* had been charged with selling obscene magazines in violation of Illinois' obscenity statute.[157] In accordance with the statute's provisions, the trial court had instructed the jury to decide whether ordinary adults in the State of Illinois would find that the magazines were obscene.[158] This instruction in effect directed the jury to apply a community standard to the serious value question. The petitioners challenged the application of community standards to the value component, arguing that the first amendment prohibited judging the value of a work based on the tastes and mores of the *average* person in the *local* community.[159]

The Supreme Court agreed.[160] Writing for the majority in *Pope*, Justice White reviewed the *Smith* and *Miller* Court's discussions of the value component, from which he concluded that neither decision had held, or even suggested, that community standards are applicable to the value component.[161] Citing *Miller*, the *Pope* Court stressed that a work that possesses literary, artistic, political or scientific value is protected by the first amendment, regardless of

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[155] *Smith*, 431 U.S. at 301.
[156] *Pope*, 107 S. Ct. at 1921.
[157] *Id.* at 1920.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 1921.
[161] *Id.* at 1920–21.

whether the ideas that the work espouses have come to be accepted by a majority of the people in the community.[162] Similarly, the *Pope* Court held, the first amendment would not countenance a standard that permitted the perceived value of a work to vary from one community to the next.[163] Thus, the Court concluded, the use of a community standard, which is *intended* to yield varying results, would be inconceivable.[164] The proper standard, the Court held, is whether a *reasonable person* would find that the work, taken as whole, lacks serious literary, artistic, political, or scientific value.[165]

Dissenting, Justice Stevens first echoed the majority's holding that the first amendment protects works even if they are valued by only a small number of the people in the community.[166] But he rejected the majority's assertion that a reasonable person standard would protect these works.[167] The purpose of the value component, Justice Stevens explained, is to prevent obscenity laws from being used to suppress works that have won acceptance with only a minority of the population.[168] Unfortunately, jurors drawn from a community that rejects a work as valueless, Justice Stevens reasoned, are likely to find that a reasonable person would reach the same conclusion.[169] The problem, Justice Stevens noted, is that in the real world some reasonable people might find that a work possesses serious value, whereas other reasonable people could find no such value.[170] Consequently, Justice Stevens concluded, the first amendment protects a work so long as *some* reasonable people believe that the work had serious value.[171]

II. The Reasonable Person Standard and the Constitutional Function of the Value Component

A. *Introduction*

The purpose of the value component of the tripartite obscenity test is to give substance to the first amendment guarantee of pro-

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[162] *Id.* at 1921 (quoting *Miller*, 413 U.S. at 34).
[163] *Pope*, 107 S. Ct. at 1921.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 1926 (Stevens, J., dissenting).
[167] *Id.*
[168] *Id.* at 1927 (Stevens, J., dissenting).
[169] *Id.*
[170] *Id.* at 1926–27 (Stevens, J., dissenting).
[171] *Id.* at 1927 (Stevens, J., dissenting).

tection for speech that expresses ideas. It is intended to protect from legal condemnation sexually explicit works that, in the eyes of at least some individuals, possess serious intellectual or societal value. The value component performs its function by operating as a constitutional threshold. If a work contains the requisite literary, artistic, political, or scientific value, the value component prohibits a finding that the work is obscene, regardless of the degree to which the work appeals to the prurient interest or is patently offensive.

The standard that jurors apply to the serious value question controls the level of protection that the value component provides to a work. At a minimum, to remain consonant with the constitutional purpose of the value component, the standard chosen must ensure that a work is protected even where its value is perceived by only a minority and must discourage juries in different areas of the country from adopting widely variant views of a work's perceived value. Thus, in *Pope v. Illinois,* the Supreme Court held that a community standard is inapplicable to the value component, and that, instead, jurors must apply a reasonable person standard.[172] This note concludes, however, that, rather than providing the protection mandated by the Constitution, application of a reasonable person standard will not differ significantly from that of a community standard, and will thus thwart the purpose of the value component.

The appropriate standards for the three components follow from the functions they are intended to perform. The function of the patently offensive and prurient interest components is to determine whether the government has a legitimate interest in proscribing a work's dissemination. The patently offensive and prurient interest components are concerned with the *effect* that a sexually explicit work has on society; if the work is patently offensive and appeals to the prurient interest, the government is justified in attempting to protect society from exposure to the work. Thus, a community standard, which asks the jury to determine how an average person in the community would react to the work, is appropriate. No constitutional difficulties are raised by the fact that under a community standard determinations of whether a work is patently offensive and appeals to a prurient interest vary from community to community.

In contrast, the function of the value component is to provide first amendment protection to those works that possess serious

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[172] *Id.* at 1921.

value, even where the value is perceived by only a few. Under the value component, a finding of obscenity is constitutionally prohibited if at least some rational persons would find that the work has intellectual or artistic merit. A community standard is thus inappropriate, as is any standard that would permit the determination of whether a work possesses serious value to vary depending on the locality in which the determination is made.

The reasonable person standard defined by the *Pope* Court may provide slightly greater protection than would a community standard. Ultimately, however, jurors will not be able to meaningfully distinguish between how a reasonable person and an average person in the community would react to a sexually explicit work. The reasonable person standard is thus as unacceptable as a community standard. Accordingly, this note proposes that the Supreme Court abandon the reasonable person standard and adopt instead a "rational persons" standard. Under a rational persons standard, a work is not obscene if a jury concludes that at least *some rational persons* could find that the work possesses serious literary, artistic, scientific, or political value.

B. The Value Component as the Embodiment of Constitutional Limitations on Obscenity Determinations

The government does not have an a priori interst in regulating every work that portrays nudity or sexually explicit conduct. Before it may proscribe such a work, the government must demonstrate a legitimate interest in doing so. In the obscenity cases that have come before the Supreme Court, from *Roth* through *Pope*, the government has successfully argued that the harmful effect of obscene materials on individuals who view them justifies the proscription of such materials.[173] Although the Supreme Court has accepted the general proposition that obscene works are harmful, it has continued to require the government to prove that allegedly obscene works are harmful on a case-by-case basis.[174] This requirement is

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[173] *See* New York v. Ferber, 458 U.S. 747, 756 (1982); *Miller*, 413 U.S. at 18–19, 35 n.15; *Manual*, 370 U.S. at 484–85 (plurality opinion).

An exploration of the various rationales said to underlie the state's interest in proscribing the dissemination of obscene material is beyond the scope of this note. For discussion of these rationales, see *Paris*, 413 U.S. at 57–63; *id.* at 106–12 (Brennan, J., dissenting); *Miller*, 413 U.S. at 18–19.

[174] *Memoirs*, 383 U.S. at 419.

implemented as the patently offensive and prurient interest components of the tripartite obscenity test.[175] The function of these components is thus to determine whether the effect that an allegedly obscene work has on persons is sufficiently adverse to justify outlawing the work.

The patently offensive component, which requires the prosecution to prove that a work depicts sexual conduct in a patently offensive manner, derives from the government's interest in "prohibiting [the] dissemination of works [that carry] a significant danger of offending the sensibilities of unwilling recipients . . . ."[176] If a work patently offends persons in the community, the government has, according to the Supreme Court, a legitimate interest in banning distribution or exhibition of the work.[177] Similarly, the prurient interest component, which requires the prosecution to prove that a work appeals to the prurient interest, corresponds to the government's interest in preventing crime and preserving order and morality.[178] If a work appeals to an abnormal interest in sex, the state has a valid interest in proscribing the work, the Court has held, to prevent potentially unstable or violent viewers from being provoked by the work to commit sexual crimes.[179]

Regardless of whether the government has a legitimate interest in prohibiting a work's distribution, it may not do so if the work is protected by the first amendment's guarantee of freedom of expression.[180] Although various theories of the first amendment disagree concerning the ultimate breadth of the protection provided by the freedom of speech, they concur that it encompasses expression that espouses ideas.[181] As the Supreme Court held in *Roth*,

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[175] *Miller*, 413 U.S. at 18–19.

[176] *Id.*

[177] *See* cases cited *supra* notes 173, 176.

[178] *See Paris*, 413 U.S. at 58–59.

[179] *See id.* at 58–61.

[180] *Memoirs*, 383 U.S. at 419.

[181] The Court's holding in *Roth* that all speech that expresses ideas, i.e. that has intellectual value, is protected by the first amendment was based on the "public issues" or "necessary for intelligent self-government" theory of the first amendment. *Id.* at 488; *see* L. TRIBE, *supra* note 9, § 12-1, at 786–88. Another major first amendment theory is the "marketplace of ideas" doctrine. This theory holds that "the ultimate good is better reached by free trade in ideas." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see* L. TRIBE, *supra* note 9, § 12-1, at 785–88.

All of the theories that have gained significant acceptance embrace the concept that speech that expresses ideas is protected. *See* L. TRIBE, *supra* note 9, § 12-1, at 790. "[I]f the constitutional guarantee means anything, it means that . . . 'government has no power to

works that possess even the slightest intellectual value[182] are entitled to the full protection of the first amendment.[183] Although the Supreme Court has not always embraced an expansive view of the guarantee, it has steadfastly maintained that the first amendment protects the expression of ideas having cultural or intellectual value.[184]

If the freedom of expression protects works that possess intellectual or cultural merit, then the exclusion of a category of expression from the first amendment must be based on the assumption that such expression is devoid of redeeming value.[185] In *Roth*, the Supreme Court applied this analysis to the question of whether obscenity was outside the area of constitutionally protected speech.[186] Only after concluding that obscene speech is "utterly without" redeeming social value did the *Roth* Court hold that it was unprotected by the first amendment and could be freely regulated.[187]

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restrict expression because of its . . . ideas . . . .'" *Id.* (quoting Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972)); *see* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959) ("[T]he First Amendment's basic guarantee is the freedom to advocate ideas. The State, quite simply, [by preventing the exhibition of a movie that implicitly advocated the idea that adultery may be proper behavior,] has struck at the very heart of constitutionally protected liberty."); *Memoirs*, 383 U.S. at 433 (Douglas, J., concurring); *see also Memoirs*, 354 U.S. at 419 n.7; *Jacobellis*, 378 U.S. at 191 (plurality opinion); *Roth*, 354 U.S. at 484.

[182] The Court has variously formulated the concept of "value" under the third component as "redeeming social value," *Memoirs*, 383 U.S. at 418 (plurality opinion), and "literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. The term "intellectual value" is intended merely as a generic short hand for both formulations, rather than an attempt to define a new phrasing.

[183] *Roth*, 354 U.S. at 484. "All ideas having even the slightest . . . importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the [first amendment] guaranties [sic]." *Id.*

[184] *See supra* note 181.

[185] *See Miller*, 413 U.S. at 20–21; *Memoirs*, 383 U.S. at 419 (plurality opinion); *Jacobellis*, 378 U.S. at 191 (plurality opinion); *Roth*, 354 U.S. at 484. The *Jacobellis* plurality stressed that "obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance.'" *Jacobellis*, 378 U.S. at 191 (quoting *Roth*, 354 U.S. at 484). *But see* New York v. Ferber, 458 U.S. 747, 773 (1982). In *Ferber*, the Court held that child pornography constitutes a category of speech outside the protection of the first amendment, *id.* at 764, despite the Court's recognition that a statute banning child pornography might encompass material that possesses serious value. *See id.* at 773. The Court's recognition does not imply, however, that the application of such a statute to a work that possesses serious value would be constitutionally permissible. The Court concluded only that because such arguably impermissible applications could represent at most a tiny fraction of the materials covered by the statute, they would not render the statute substantially overbroad. *Id.*

[186] *Roth*, 354 U.S. at 484.

[187] *Id.*

If obscenity's exclusion from the first amendment is predicated on its lack of value, then by definition only those sexually oriented works that are without such value are obscene and may be constitutionally proscribed.[188] All other works are presumptively protected. A constitutionally valid obscenity test must attempt to distinguish between valueless speech, which may be proscribed, and speech that espouses meaningful ideas, which is protected. In its first attempt at defining a test for obscenity, however, the *Roth* Court failed to require an independent determination of whether a work possesses serious value.[189] Apparently recognizing the *Roth* Court's omission, the *Memoirs* plurality amended the test to explicitly require that a work be "utterly without redeeming social value" before a court may hold the work obscene.[190] Although the *Miller* Court reformulated the value component, it did not alter the underlying inquiry — whether the work lacks material intellectual or social value.[191] In sum, by preventing a finding that a work is obscene if it expresses ideas that have literary, artistic, political or scientific merit,[192] the value component provides substance to the limitations that the first amendment imposes on obscenity determinations.[193]

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[188] *See Pope*, 107 S. Ct. at 1921; *Memoirs*, 383 U.S. at 418–19 & n.7 (plurality opinion); *Jacobellis*, 378 U.S. at 191 (plurality opinion); F. SCHAUER, *supra* note 11, at 137–38 ("If obscenity . . . is utterly without redeeming social importance, then something that is not utterly without redeeming social importance cannot be obscenity.").

[189] *See supra* notes 112–16 and accompanying text.

[190] *Memoirs*, 383 U.S. at 418. For the complete text of the test as articulated by the *Memoirs* plurality, see *supra* notes 122–26 and accompanying text. Although *Memoirs* was only a plurality opinion, Justices Black and Douglas both concurred in the judgment based on their belief that the first amendment prohibits the government altogether from criminalizing obscenity. *See Memoirs*, 383 U.S. at 431–33 (Douglas, J., concurring); *id.* at 421 (Black, J., concurring). Thus, Justice Brennan's formulation of the test in *Memoirs* represented the minimal level of protection that a majority of the Court thought the first amendment provided allegedly obscene works. *See* F. SCHAUER, *supra* note 11, at 138–39.

[191] *See Miller*, 413 U.S. at 21–24; *Paris*, 413 U.S. at 83 (Brennan, J., dissenting); F. SCHAUER, *supra* note 11, at 143. Some commentators have argued that the *Miller* Court's reformulation of the value component to require merely that the work "lack serious" value gutted the essence of the value component as an independent requirement and represents a substantive change from the "utterly without" test found in *Memoirs*. Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 602 (1979). Clearly some substantive difference exists between the two formulations of the requirement. *See* F. SCHAUER, *supra* note 11, at 140–41 & n.24, 143. *But see* Rembar, *Obscenity and the Constitution: A Different Opinion*, PUBLISHERS' WEEKLY, 79 (Jan. 14, 1974), *quoted in* F. LEWIS, LITERATURE, OBSCENITY, AND THE LAW 241 (1976). The practical effect of the reformulation, however, is for the most part limited to preventing publishers that have merely inserted a quote from Shakespeare on the flyleaf of their publication from claiming that the work possesses the requisite value. *See* Kois v. Wisconsin, 408 U.S. 229, 231 (1972); F. SCHAUER, *supra* note 11, at 143.

[192] *Pope*, 107 S. Ct. at 1920; *Miller*, 413 U.S. at 24.

[193] *See Pope*, 107 S. Ct. at 1921; *Miller*, 413 U.S. at 34; *Pope*, 107 S. Ct. at 1927 (Stevens,

A comprehensive test for whether an allegedly obscene work is protected by the first amendment, however, must comprise more than the recognition that the Constitution protects expression that possesses material intellectual or societal value; this assertion does not indicate how one determines whether a work possesses such value. A basic tenet of the freedom of speech guarantee is that the first amendment protects any work that expresses ideas, even where the ideas have been accepted by only a minority of the people.[194] It follows that neither a legislature nor a jury, in its capacity as a representative of the majority, may impose its tastes or values on the few.[195] The value component necessarily subsumes the first amendment's rejection of majoritarian rule.[196] The value component, the Supreme Court has stated, incorporates the first amendment principle that works that advocate ideas are protected "regardless of whether the government or a majority of the people approve of the ideas these works represent."[197] Even where only a small segment of the population believes that a work contains intellectually or artistically valuable ideas, the first amendment, via the value component, prohibits the state from removing the work from our bookshelves or theaters.[198]

J., dissenting); F. SCHAUER, *supra* note 11, at 125, 144, 151. Schauer states that of the three components, "only the literary-value standard is really a question of fundamental constitutional rights." *Id.* at 125.

[194] *See supra* note 181.

[195] *Pope*, 107 S. Ct. at 1921; *Miller*, 413 U.S. at 34; *Roth*, 354 U.S. at 484; *Pope*, 107 S. Ct. at 1924–25 & n.1 (Stevens, J., dissenting). In *Pope*, the Court stated:

> In *Miller* itself, the Court was careful to point out that '[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.' 413 U.S. at 34.

107 S. Ct. at 1921.

Although a juror or judge does not represent the majority in the same manner in which a legislature does, a determination as to how an "average person in the community" would view a work is certainly intended to seek out the views of the majority.

[196] *See Pope*, 107 S. Ct. at 1921; F. SCHAUER, *supra* note 11, at 143–44, 151; *cf.* Butler v. Michigan, 352 U.S. 380, 383–84 (1957). Schauer writes that "[u]nlike the prurient-interest or patent-offensive [components], the literary-value [component] embodies implicitly the concept that . . . the obscenity laws [should not] 'level' the available reading matter to the majority or lowest common denominator of the population." F. SCHAUER, *supra* note 11, at 143–44, 151 (citing *Kennerley*, 209 F. 119). "Determinations of literary, artistic, political, or scientific value seem less majoritarian in purpose, in that . . . they [embody] those aspects of the First Amendment designed to protect minority or unpopular views." *Id.* at 151. For a discussion of *Butler*, see *infra* notes 213–14 and accompanying text.

[197] *Pope*, 107 S. Ct. at 1921 & n.3; *Miller*, 413 U.S. at 34; *see also supra* notes 195–96.

[198] *See supra* notes 195–97.

C. *Designing Appropriate Standards: Form Must Follow Function*

1. The Average Person in the Community: One Standard Fits All?

The use of a community standard to evaluate the prurient interest and patently offensive components is consistent with their purpose — to determine whether the state has a legitimate interest in regulating the sexually oriented work at issue. Under a community standard, jurors are asked to evaluate the hypothetical reactions of the average person in the community.[199] Generally, the relevant community is state-wide;[200] thus, jurors must determine whether the average person in their state would, for example, be patently offended by an allegedly obscene work.[201] This correlates well with the task of determining whether the state has a legitimate interest in proscribing dissemination of a work. If a work adversely affects ordinary people of the state, then the state has demonstrated the necessary interest in controlling the work's dissemination.[202]

The intrinsic geographic variability of a community standard accommodates the inherent subjectivity of the prurient interest and patently offensive components.[203] Both of these components require jurors to assess the reactions of people exposed to sexually explicit works.[204] Given the polarized views concerning sexually explicit works that exist in our society, and the strong emotive response that sexually explicit works evoke, the reactions of persons viewing such works will necessarily be subjective. They will perforce vary from region to region.[205] A community standard recognizes and permits expression of these differences.[206]

The fact that under a community standard a particular publication or film might be found to be patently offense in one state,

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[199] *Miller*, 413 U.S. at 33–34; *Smith*, 431 U.S. at 305.

[200] *See* F. SCHAUER, *supra* note 11, at 126 n.43; *see, e.g.*, *Miller*, 413 U.S. at 33–34 (State of California is "constitutionally adequate" as the relevant community for purposes of the community standard).

[201] *See Miller*, 413 U.S. at 33–34.

[202] *See* F. SCHAUER, *supra* note 11, at 104. "[Patent offensiveness] is a standard susceptible to, and perhaps designed for, subjectivity, on the theory that the jury represents society's interests. . . . [T]he concept of patent offensiveness is inevitably intertwined with the concept of contemporary community standards." *Id.*

[203] *Miller*, 413 U.S. at 32–33.

[204] F. SCHAUER, *supra* note 11, at 102, 104.

[205] *See Miller*, 413 U.S. at 32–33.

[206] *Id.*

but not in another, does not raise constitutional concerns.[207] That a work is patently offensive does not of necessity imply that the work is not entitled to first amendment protection; it merely indicates that the government has a legitimate interest in restraining the work's distribution.[208] Obversely, the absence of patent offensiveness does not by itself qualify a work for first amendment protection. Consequently, inconsistent assessments by different juries under the prurient interest or patently offensive components do not offend the Constitution.[209]

In contrast to the correlation between the operation of the community standard and the purpose of the prurient interest and patently offensive components, the use of a community standard in evaluating whether a work possesses serious value would frustrate the very purpose of the value component.[210] First amendment protection is not limited to works that have been accepted by the average or ordinary people in society.[211] Rather, so long as *some rational persons* believe that the work possesses value, it is entitled to the protection of the first amendment.[212] The Supreme Court has rejected the suggestion that a state may "level," or reduce to some lowest common denominator, the reading material available to its citizens.[213] In *Butler v. Michigan*, the Court struck down an early obscenity statute that prohibited the sale of publications that were potentially harmful to children. A state, the Court held, may not

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[207] *See* Hamling v. United States, 418 U.S. 87, 106 (1974); *Miller*, 413 U.S. at 30.

[208] F. SCHAUER, *supra* note 11, at 125. Schauer states that although all three of the components of the tripartite test have a constitutional basis, only the value component represents a substantive constitutional interest. *Id.*

[209] *See supra* note 207 and accompanying text.

[210] *See Pope*, 107 S. Ct. at 1921; *Smith*, 431 U.S. at 301; F. SCHAUER, *supra* note 11, at 151. The *Pope* Court concluded that, "[t]he proper inquiry is not whether an ordinary member of the community would find serious literary, artistic, political, or scientific value." 107 S. Ct. at 1921.

[211] *See supra* notes 195–98 and accompanying text.

[212] *See Pope*, 107 S. Ct. at 1927 (Stevens, J., dissenting); F. SCHAUER, *supra* note 11, at 144, 151. Justice Stevens, in *Pope*, argued that "[sexually oriented] material . . . is entitled to the protection of the First Amendment if *some reasonable persons* could consider it as having serious . . . value." 107 S. Ct. at 1927 (Stevens, J., dissenting). Schauer similarly states:

> a finding of serious literary value should be made . . . [even if] that serious value is only perceived by a sophisticated (or perhaps unsophisticated) segment of the population. . . . [I]f material has serious literary value for a significant portion of the population, then the fact that this portion is neither average nor in the minority is irrelevant, [and the material is entitled to the full protection of the first amendment.]

F. SCHAUER, *supra* note 11, at 144.

[213] *See supra* notes 196, 212 and accompanying text.

"reduce the adult population . . . to reading only what is fit for children."[214] By the same principle, a state may not limit its entire population to reading only those sexually oriented works that the average person, in his or her mediocrity, finds to contain ideas of serious value.[215]

The Constitution also forbids the use of any standard that would permit the value of a work to vary from state to state.[216] Any standard under which persons in one state are subject to criminal sanctions for purchasing the same book that is *constitutionally protected* in another state contravenes the first amendment right of persons in the minority to read or view works that they find worthwhile, regardless of whether some other portion of the population finds them lacking.[217]

The rejection of a geographically variable standard for gauging the value of a work is not inconsistent with the earlier conclusion that variability is constitutional with respect to the patently offensive and prurient interest components.[218] This is not because the requirements found in the first two components lack constitutional significance: if they are not satisfied, a work may not be judged obscene.[219] Rather, it is the close relationship between the value component and the first amendment — their shared fundamental concern with ideas — that explains the first amendment's abhorrence for any standard that would permit the perceived value of a work to vary based upon the degree of acceptance it has won in the local community.[220]

2. The Reasonable Person Standard Versus the Community Standard

Jurors applying a community standard provide substance to the views and reactions of the "average person in the community" primarily by resort to their own views, and the views of the people

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[214] *Butler*, 352 U.S. at 383.

[215] *See supra* notes 210–12 and accompanying text.

[216] *Pope*, 107 S. Ct. at 1921; *Jacobellis*, 378 U.S. at 193–95 (plurality opinion); *Manual*, 370 U.S. at 488 (plurality opinion).

[217] *See supra* note 216 and accompanying text.

[218] *See Pope*, 107 S. Ct. at 1920–21. F. SCHAUER, *supra* note 11, at 125, 144, 151 (the value component differs from the patently offensive and prurient interest component in that it is more closely related to the first amendment guarantees).

[219] *Smith*, 431 U.S. at 311–12 n.3 (Stevens, J., dissenting); F. SCHAUER, *supra* note 11, at 125 ("[A]ll of the [components] of the . . . test[] have a constitutional basis.").

[220] *See supra* notes 193–198 and accompanying text.

in their community.[221] In *Smith v. United States* the Supreme Court, in the context of rejecting the concept of legislatively defined community standards, held that "contemporary community standards must be applied by juries in accordance with their own understanding of . . . the average person in their community."[222] Even without the Court's express endorsement, one would expect that jurors asked to assess the reactions of the "average person" would resort to their own emotions and experiences, and the emotions and experiences of their friends and associates in the surrounding vicinage.[223]

Application of a reasonable person standard to the value component may afford somewhat greater protection to expressive works that portray nudity or sexual conduct than would application of a community standard. Under a reasonable person standard, jurors are not constrained to follow their own views, or the views of their friends and associates in the surrounding community.[224] As the Court in *Pope* stated, jurors instructed to decide whether a reasonable person would find that a work has serious value would not necessarily feel "*bound* to follow prevailing local views on value . . . ,"[225] as they would if instructed instead to decide whether an average person in their community would find such value. Thus, the use of a reasonable person standard at least suggests to jurors that they should try to reason objectively.[226]

Just as with the community standard, however, jurors confronted with the necessity of providing their hypothetical reasonable persons with experiences and values on which to draw in evaluating whether a work possesses serious literary, artistic, political, or scientific value will most likely resort to their own experiences and emotions.[227] In an obscenity trial, the prosecution is not required

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[221] *Smith*, 431 U.S. at 302, 305; *id.* at 316 (Stevens, J., dissenting); *Hamling*, 418 U.S. at 104–05; F. SCHAUER, *supra* note 11, at 73–74; Rembar, *Obscenity and the Constitution: A Different Opinion*, PUBLISHERS' WEEKLY 79 (Jan. 14, 1974), *quoted in* F. LEWIS, LITERATURE, OBSCENITY, AND THE LAW 240–41 (1976).

[222] *Smith*, 431 U.S. at 305.

[223] *See supra* note 221.

[224] *Pope*, 107 S. Ct. at 1921 n.3; *id.* at 1926–27 n.4 (Stevens, J., dissenting).

[225] *Id.* at 1921 n.3.

[226] *See* KEETON, PROSSER AND KEETON ON TORTS 173–74 & n.2 (5th ed. 1984).

[227] *See* KEETON, *supra* note 226, at 175 n.11; *Pope*, 107 S. Ct. at 1926–27 n.4 (Stevens, J., dissenting). With regard to jurors applying the reasonable person standard in tort law, Keeton warns that "jurors will no doubt invariably consider their own personal standards of conduct, at least to some exten . . . .'It is inevitable that judge and jurors will . . . be influenced by their own life patterns and roles in deciding what a reasonable man would do.'" KEETON, *supra* note 226, at 175 n.11 (quoting Reynolds, *The Reasonable Man and Negligence Law: A*

to produce any evidence, other than the work itself, regarding a work's offensiveness, its prurient appeal, or its intellectual or artistic value.[228] Absent such external references on which to draw, jurors will have little recourse but to turn inward to their personal understandings of what constitutes serious artistic, literary, or political value.[229] At the very least, it stretches credibility to suggest that jurors who themselves find no literary or artistic merit in a work might endow their hypothetical reasonable persons with more liberal views and conclude that the work nonetheless possesses the requisite value.[230]

The difficulties inherent in the reasonable person standard are intensified by the fact that courts and commentators have often analogized the average person in the community to the reasonable person of tort law.[231] Although the existence of such analogies does not establish the identity of these standards, it does indicate a close correspondence between them.[232] In his analysis of the average person in *Smith*, Justice Blackmun relied on what he termed a close analogy between contemporary community standards in the area of obscenity law and reasonableness in other areas of the law.[233] He drew on this analogy to conclude that jurors evaluating the reactions of the average person in the community in obscenity cases, like jurors determining the reactions of the reasonable person in tort cases, may resort to their own knowledge and views.[234] Similarly, one commentator justified the Supreme Court's decision to permit jurors to consider their own biases and opinions when evaluating the average person by noting that "[f]aced with a 'reasonable [person]' instruction in a tort case, . . . many jurors would say 'What

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Health Report on the "Odious Creature," 23 OKLA. L. REV. 410, 416 (1970)). *But see Pope*, 107 S. Ct. at 1921 n.3.

[228] *See Paris*, 413 U.S. at 56.

[229] Even where the defense provides expert testimony to the effect that a portion of the community would find value in the work, jurors might disregard it, reasoning that, though some discrete group might find serious value, a reasonable person would not. 107 S. Ct. at 1926–27 n.5 (Stevens, J., dissenting).

[230] *Cf. Smith*, 431 U.S. at 302, 305; *id.* at 316 (Stevens, J., dissenting); *Hamling*, 418 U.S. at 104–05; F. SCHAUER, *supra* note 11, at 73–74; Rembar, *Obscenity and the Constitution: A Different Opinion*, PUBLISHERS' WEEKLY 79 (Jan. 14, 1974), *quoted in* F. LEWIS, LITERATURE, OBSCENITY, AND THE LAW 240–41 (1976). Each of these authorities has concluded that jurors will resort to their own views when making a determination as to the average person.

[231] *See Smith*, 431 U.S. at 302; *Hamling*, 418 U.S. at 104–05; *Ulysses*, 5 F. Supp. at 184; *Kennerley*, 209 F. 121; *Gordon*, 66 Pa. D. & C. at 131.

[232] *See* cases cited *supra* note 231.

[233] *Smith*, 431 U.S. at 302.

[234] *Id.*

would I have done?'"[235] Even the Restatement of Torts (Second) proposes that in applying the reasonably prudent person standard, the "trier[] of fact . . . [should] look to a community standard."[236]

The strong tendency of jurors to rely on their own views in applying a reasonable person standard, together with the pre-existing analytical entanglement of the reasonable person and community standards, suggests that determinations made under a reasonable person standard will not differ in a constitutionally significant way from those made under a community standard. For the purpose of determining whether a work possesses serious literary, artistic, political, or scientific value, the reasonable person and the average person in the community are functionally equivalent.[237]

As a consequence, the reasonable person standard shares in full measure the constitutional deficiencies of the community standard.[238] The reasonable person standard would fail to protect those works whose intellectual or artistic value is recognized by that segment of the population whose literary tastes fall between those of the "reasonable or average person" and those of "some rational persons," a result that the first amendment cannot tolerate.[239] Nor will application of the reasonable person standard prevent juries in different regions from reaching different conclusions as to the value of a work.[240] Any standard that permits jurors to refer primarily to their own views in assessing the value of a sexually explicit work, such as the reasonable person standard does, is bound to yield subjective assessments of the work's value.[241] Tort law's reasonable person standard may perhaps be accurately characterized as objective. Jurors in different parts of the country can be expected to reach substantially similar conclusions regarding the degree of due care that is required, for example, when driving an automobile along a crowded street. Personal views as to what has artistic value, however, do vary widely from region to region; thus, jurors making a determination as to whether a work possesses such value, if permitted to draw heavily on their own views, could not be expected

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[235] F. SCHAUER, *supra* note 11, at 74.

[236] § 283, comment c. (1965).

[237] *See supra* notes 227–36 and accompanying text.

[238] *See generally Pope*, 107 S. Ct. at 1926–27 (Stevens, J., dissenting).

[239] *See supra* note 212 and accompanying text.

[240] *See Pope*, 107 S. Ct. at 1926–27 (Stevens, J., dissenting). "[T]he Court announces an obscenity standard that fails to accomplish the goal that the Court ascribes to it:" preventing the value of a work from varying from community to community. *Id.* at 1926 (Stevens, J., dissenting).

[241] *See supra* notes 204–206 and accompanying text.

to be objective in the same manner in which their tort compatriots are.[242] Just as the average person in the community varies from one community to the next, his close cousin, the reasonable person, will do little to prevent the perceived value of a work from varying from community to community.[243]

In sum, the value component of the obscenity test incorporates the restraints that the first amendment imposes on obscenity adjudications. Both the community standard and the reasonable person standard are at odds with these fundamental restraints. The application of a community standard to the value component would effectively reduce the entire population to viewing only those sexually oriented works that the average person in the community, and hence the majority, found palatable. Works that represent ideas whose significance only a small number of individuals are able to discern, and which are presumptively protected by the first amendment, would be abandoned. Moreover, a community standard would encourage jurors in different communities to measure the value of a work based solely on their own local standards, thus impermissibly permitting the perceived value of the work to vary from one community to the next. As a result of the close analytical entanglement between the community standard and tort's reasonable person standard and the likelihood that jurors will resort to their own views, and the views of the local community, when asked to assess the reactions of a hypothetical reasonable person, the reasonable person standard shares the community standard's constitutional difficulties. Thus, rather than enhancing the level of protection provided by the value component, as the *Pope* Court intended, the application of the reasonable person standard to the value component will frustrate the component's purpose and will fail to prevent a work's value varying geographically.

III. The "Rational Persons" Standard

The proper standard to apply to the value component is a "rational persons" standard; under a rational persons standard, a work is not obscene if a jury determines that at least "some rational persons" could find that the work possesses serious literary, artistic, political, or scientific value.[244] That a "rational persons" standard is

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[242] *See Miller*, 413 U.S. at 30, 33 ("People in different States vary in their tastes and attitudes.").

[243] *See supra* note 240 and accompanying text.

[244] *See Pope*, 107 S. Ct. at 1927 (Stevens, J., dissenting).

the appropriate standard follows directly from the purpose of the value component.[245] Further, a "rational persons" standard comports with the first amendment's refusal to allow a majority, whether in the form of a jury, a court, or a legislature, to dictate to a minority what they may and may not read.[246] Finally, although no standard can entirely prevent juries in different states from reaching different conclusions as to the value of a work, a "rational persons" standard will at least tend to promote, rather than defeat, uniformity.

The value component is designed to protect works that have serious value,[247] even where only a minority of the people can discern their merit.[248] While the community standard and the reasonable person standard operate acceptably where the works under scrutiny have been accepted by the general public, they fail to protect works of which only a minority approve. In contrast, a "rational persons" standard is designed to protect the very works that the reasonable person and community standards forsake.[249]

The use of a "rational persons" standard would not permit publishers of sexually obscene materials to escape a finding of legal obscenity merely by, for example, including a quote by Shakespeare on the flyleaf, as the Supreme Court contended was possible under the "utterly without" formulation of the value component. Admittedly, a defendant in an obscenity prosecution presumably will always be able to produce a few experts who are willing to proclaim that they find value even in the most objectively worthless works. Jurors applying a "rational persons" standard, however, are not stripped of their ability to judge critically the credibility of the evidence presented.[250] Nor would a defendant's presentation of an arbitrary number of witnesses proclaiming that they perceive value in a work force jurors to the conclusion that "some rational persons" would find that a work possesses serious value. The use of the term "some" is not intended to connote any particular minimum number. Rather, the term "some rational persons" is intended to free jurors

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[245] *See supra* notes 211, 212 and accompanying text.

[246] *See supra* notes 195–98 and accompanying text.

[247] *See supra* note 193 and accompanying text.

[248] *See supra* note 197 and accompanying text.

[249] *Cf. Pope*, 107 S. Ct. at 1927 (Stevens, J., dissenting).

[250] *Cf. Pope*, 107 S. Ct. at 1921 n.3. Referring to the reasonable person standard it had just defined for the value component, the *Pope* Court stated that: "[s]uch an instruction would be no more likely to confuse a jury than the 'reasonable man' instructions that have been given for generations in other contexts." *Id.*

entirely from any suggestion in the language of the standard itself that they are bound to conclude that a work lacks serious value simply because the work has not come to be accepted by the general public.[251] Admittedly, regardless of the standard they are instructed to apply, jurors will ultimately rely on their own emotional reaction to a work, rather than on any dispassionate analysis of the reactions of either "some rational persons," or a "reasonable person," in deciding whether a work is obscene. The two standards, however, do differ in this respect: whereas the latter implicitly commands jurors to consult their own views and the views of the local community, the former encourages jurors to actively look outward and consider whether rational people could find that the work at issue contains material value.[252]

Similarly, although application of a "rational persons" standard may not prevent juries in different regions of the country from reaching different conclusions with regard to whether a work contains value, the standard will at least promote uniformity. Whereas a community standard, and by analogy a reasonable person standard, encourages geographic variation, the variations that may occur under a "rational persons" standard are likely to be small.

Conclusion

The test for determining whether or not a work is obscene continues to stand at the center of the judicial battle between those attempting to suppress sexually oriented works, contending that they appeal only to humankind's basest instincts, and those seeking to protect sexually oriented works, contending that they are socially valuable works of at least some literary and artistic merit. This battle raises constitutional issues because the test for obscenity delineates speech that may be constitutionally proscribed from speech entitled to the first amendment's full protection. First amendment protection extends to all works that express ideas having intellectual or cultural merit, regardless of whether only a minority of persons perceive this merit. Conversely, only those works having no intellectual or societal value lie outside the area of constitutionally protected speech. The value component gives practical effect to the principles of the first amendment in the context of obscenity adju-

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[251] The *Pope* Court states that "under a 'community standards' instruction a jury member could consider himself bound to follow prevailing local views." 107 S. Ct. at 1921 n.3. This is the same danger implicated by the "reasonable person" standard.

[252] *Pope*, 107 S. Ct. at 1926 (Stevens, J., dissenting).

dications. It prevents a finding of obscenity if the allegedly obscene work possesses serious literary, artistic, political or scientific value.

The standard to be applied to determinations under the value component must be consistent with its purpose. Although a standard that permits jurors to draw upon their own views and emotions may constitutionally be applied to the prurient interest and patently offensive components, the application of such a standard to the value component would be inconsistent with its constitutional function. Under such a standard, jurors' conclusions are likely to represent the judgment of the majority, and to thus reject as valueless those works that have yet to gain community acceptance. The reasonable person standard, though perhaps not as indentured to majoritarian views as the community standard, will nonetheless produce conclusions that reflect the personal views of the jurors. The reasonable person standard is thus also constitutionally unacceptable.

In contrast, a rational persons standard is consistent with the value component's function. Under a rational persons standard a work is not obscene if the factfinder concludes that at least some rational persons could find that an allegedly obscene work possesses serious literary, artistic, scientific, or political value. Consequently, this standard embodies the first amendment's command that even those ideas and beliefs accepted only by a relatively few individuals are protected. Although no standard can ensure that jurors will consider the views of the minority when deciding whether a work possesses value, the rational persons standard at least provokes them to look outward to consider whether rational people exist who could find value in the work.

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