POPE V. ILLINOIS: THE REASONABLE PERSON AS THE SUPREME COURT'S LATEST ARBITER OF OBSCENITY

I. INTRODUCTION

When the United States Supreme Court decided *Pope v. Illinois*[1] in May of 1987, it was attempting to settle years of controversy by articulating a clear and definitive test by which to judge obscenity. *Pope* represents the most recent effort on the part of the Court to arrive at a constitutional balance between two powerful and competing forces: on the one side, first amendment interests in protecting the individual's freedom of speech and expression; and on the other, state and federal government interests in protecting their citizens from the detrimental effects of pornography. Before the *Pope* decision, the Supreme Court's definitive test for judging obscenity had been set forth in *Miller v. California*.[2] Under *Miller*, the trier of fact had to determine "whether 'the average person, applying contemporary community standards would find that the work' in question (1) appeal[ed to a] prurient interest;" (2) whether it depicted sex in a "patently offensive way;" and (3) whether it lacked "serious literary, artistic, political, or scientific value."[3]

Pope's plurality opinion[4] addressed the issue of "community standards." Its holding affirmed the application of that standard to the questions of (1) prurience, and (2) offensiveness, but said that "community standards" were not appropriate when determining (3) "serious literary, artistic, political, or scientific value" (hereinafter, the LAPS test).[5] Instead, the proper standard to be applied to the third prong of the *Miller* test was "whether a reasonable person would find such value in the material, taken as a whole."[6]

This Note will examine the Court's most recent attempt to better articulate its obscenity standard. For over twenty years the

---

[1] 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed.2d 439 (1987).

[2] 413 U.S. 15 (1973).

[3] *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

[4] Justice White wrote the majority opinion; he was joined by Justices O'Connor, Rehnquist and Powell. Justice Scalia wrote a concurrence; Justice Blackmun concurred in part and dissented in part. Dissents were filed by Justice Brennan and by Justice Stevens (joined by Justice Marshall).

[5] *See generally*, Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 913-17 (1974).

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

Supreme Court has tried to give guidance to both the fact finder at the trial level and to the judiciary at the appellate level, but it has vascillated in its determination of the standard appropriate for arriving at and reviewing findings of obscenity.

Part One will briefly describe the history of the Court's struggle with this dilemma. It will analyze the various tests that have been proposed and their respective drawbacks, which necessitated the further clarification attempted in *Pope*. Part Two will analyze the language of the *Pope* opinion itself. It will examine how the majority chose to address the issues raised in the petitioners' and *amici curiae* briefs, where the concurring opinions diverge from that of the majority, and why Justice Stevens (joined by Justices Marshall, Brennan, and Blackmun in part) felt compelled to file such an emphatic dissent. Part Three will discuss the importance of the *Pope* decision in terms of its effect upon the Court's scope of review of obscenity findings. Part Four will explore two basic problems with the *Pope* holding raised by Justice Stevens: the amorphous nature of the "reasonable person," and the due process ramifications of promulgating a standard with such potentially subjective and nebulous boundaries.

Part Five will discuss the practical importance of a clear standard in obscenity cases. Part Six will proffer the thesis that the new standard espoused by *Pope v. Illinois*, instead of clarifying this issue, presents so minimal an improvement that its effect may in fact be negligible. It will also present recommendations for an alternative approach to the problem that may provide more protection to the constitutional interests at stake.

II. Part One: A Brief History of the Court's Attempt to Create a Viable Test for Obscenity

A. Roth v. United States[7]

Roth represents the Supreme Court's "first journey into the obscenity thicket."[8] It unequivocally held that "obscenity is not within the area of constitutionally protected speech or press."[9] *Roth* also planted the seeds for the standards later elaborated upon in *Miller* and *Pope*. It described obscenity as material "ut-

---

[7] 354 U.S. 476 (1957).

[8] Brief for Petitioners at 11, *Pope*, 107 S. Ct. 1918 (1987). Actually, in 1948 an equally divided Court affirmed without opinion the conviction of a publishing house under a New York obscenity statute for its publication of Edmund Wilson's *Memoirs of Hecate County*. Doubleday & Co. v. New York, 335 U.S. 848 (1948). Because it was a *per curiam* affirmance, it lacked precedential value.

[9] *Roth*, 354 U.S. at 485.

terly without redeeming social importance,"[10] which "deals with sex in a manner appealing to prurient interest."[11] Justice Brennan, the frequent dissenter in later obscenity opinions, here delivered the majority opinion. As shown by the language quoted below, he was careful to delineate the salient first amendment interests at stake.

> [S]ex and obscenity are not synonymous. . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.
>
> . . . .
>
> . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.[12]

Notwithstanding *Roth*'s attention to the vital first amendment issue, Justice Brennan may have, inadvertently, created the standard upon which all other standards have been built, a standard which he later found to be unworkable and which he has consistently opposed.

Roth presented a constitutional challenge to the federal obscenity statute which made it a criminal offense to disseminate obscene material through the mail;[13] it was argued and decided in conjunc-

---

[10] *Id.* at 484.

[11] *Id.* at 487.

[12] *Id.* at 487-88. *See also* Mishkin v. New York, 383 U.S. 502, 508-09 (1966). The *Roth* decision rejected an earlier standard, borrowed from English law, which allowed the alleged obscene material in question to be judged by its effect upon particularly susceptible persons. Regina v. Hicklin, 1868 L.R. 3, Q.B. 360.

[13] 18 U.S.C. § 1461 (1979) (amended 1984) provides that:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> Every article or thing designed, adapted, or intended for . . . indecent or immoral use . . . .
>
> . . . .
>
> . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not

tion with *Alberts v. California*, which concerned similar provisions in the California Penal Code.[14]

In both *Roth* and *Alberts* the Supreme Court found that the trial courts had followed the proper obscenity standard by giving instructions to the juries which advocated the application of community standards. The language used to describe this standard was reminiscent of words often used to describe the "reasonable man" standard in tort law.[15]

> [T]he trial judge [in *Alberts*] indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person, and in *Roth*, the trial judge instructed the jury as follows:
>
> . . . .
>
> . . . In other words, you determine its impact upon *the average person* in the *community*. . . . You judge the circulars, pictures and publications which have been put in evidence *by present-day standards of the community*. You may ask yourselves does it offend the common conscience of the *community by present-day standards*.[16]

Justice Douglas' dissent in *Roth* is a harbinger of much of the criticism that has been directed toward the Court's tests for judging obscenity. He assailed the "prurient interest" aspect of the test as lacking any relevant connection to the sort of material and behavior the test was meant to proscribe.[17] He also asserted that the application of community standards was directly opposed to the intentions of the framers of the first amendment, and that the Court's role in considering this factor was constitutionally suspect: "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be

---

more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

14 CAL. PENAL CODE § 311.2(a)(West 1955) provided that "[e]very person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

15 For a discussion of the reasonable man, *see infra* notes 114-124 and accompanying text.

16 Roth v. United States, 354 U.S. 476, 489-90 (1957) (emphasis added). The interchangeable use of the terms "average person," "normal person," and "community standards" will prove to be problematic in light of *Pope* where the "reasonable person" standard is distinguished from the "community standard." *See infra* notes 75-82 and accompanying text.

17 *Roth*, 354 U.S. at 513 (Douglas, J., dissenting): "[t]hat standard does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit."

squared with the First Amendment."[18]

B. *Pre*-Miller

After the *Roth* decision, the Court struggled unsuccessfully to come up with a consistent and universally accepted test for determining what constitutes obscenity.[19] In 1962, in *Manual Enterprises v. Day*,[20] the Court added "patent offensiveness" as another criterion by which to measure obscenity. The purpose of this addition was to protect material that was sexual in nature and might appeal to the "prurient interest," but which otherwise contained some literary or social value,[21] thus constituting protected speech under *Roth*.[22]

In 1964, in *Jacobellis v. Ohio*,[23] a divided Court found that a foreign film entitled "Les Amants" (or "The Lovers") was not obscene, yet still reaffirmed *Roth*'s holding that obscenity was not entitled to constitutional protection.[24] The material in question was found to be protected because of its artistic value, which was supported by the commendation it received from several national film critics.[25] Hence, a third and final criterion was introduced to the Court's standard on obscenity; to be found obscene, the material had to be "utterly without redeeming social importance."[26]

---

[18] *Id.* at 512 (Douglas, J., dissenting).

> Under that test [using community standards], juries can censor, suppress, and punish what they don't like, provided the matter relates to "sexual impurity" or has a tendency to "excite lustful thoughts." This is community censorship in one of its worst forms.
>
> . . . .
>
> . . . The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence.

Id. at 512-14 (Douglas, J., dissenting).

[19] "No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting). *See also infra* note 29 and accompanying text.

[20] 370 U.S. 478 (1962).

[21] Brief for Petitioners at 12, Pope v. Illinois, 107 S. Ct. 1918 (1987).

[22] *See supra* note 12 and accompanying text.

[23] 378 U.S. 184 (1964). *Jacobellis'* most memorable legacy is Justice Stewart's concurrence. *Id.* at 197. In asserting that "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography," Justice Stewart did "not . . . attempt further to define the kinds of material . . . embraced within that shorthand description." *Id.* He concluded with the now famous line that epitomizes the subjectivity involved in this area: "I know it when I see it . . . ." *Id.*

[24] *Id.* at 195-96.

[25] *Id.* at 196. The film was shown in approximately one hundred cities throughout the United States and was favorably reviewed in several national publications. At least two national critics rated the film among the best of the year in which it was produced.

[26] *Id.* at 191. "Nor may the constitutional status of the material be made to turn on a

This criterion was codified in the case of *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts*,[27] where it became the third prong of that court's tripartite test for what constituted obscenity.[28]

During the years before *Miller*, there proliferated "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication."[29] As Justice Brennan noted in his dissent to *Paris Adult Theatre I v. Slaton*[30] (*Miller*'s companion case):

> In the face of this divergence of opinion the Court began the practice in *Redrup v. New York*[31] of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene[32] . . .
>
> . . . .
>
> . . . The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.[33]

C. Miller v. California

In 1973, in *Miller v. California*, the Supreme Court finally set down a tripartite test governing the regulation of obscenity that five of its members deemed to be consistent with the first and fourteenth amendments.[34] The most significant portion of the opinion was the Court's rejection of the *Memoirs* "utterly lacking" test for determining the social value of a work as overbroad.[35]

'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Id.*

27 383 U.S. 413 (1966) Justice Brennan wrote the majority opinion, in which Chief Justice Warren and Justice Fortas joined; Justices Black, Stewart and Douglas concurred.

28 The *Memoirs* test required that the prosecution satisfy three criteria:

> (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418.

29 Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (Harlan, J., concurring and dissenting); *see also Miller*, 413 U.S. at 22.

30 413 U.S. 49, 82 (1973).

31 386 U.S. 767 (1967) (citation omitted).

32 *Paris Adult Theatre*, 413 U.S. at 82; *see* Brief for Petitioners at 13, Pope v. Illinois, 107 S. Ct. 1918 (1987).

33 *Paris Adult Theatre*, 413 U.S. at 92.

34 *See supra* notes 2-3 and accompanying text.

35 A judicial test or a statute is described as being overbroad if, in addition to proscribing activities which may be constitutionally impermissible, it reaches speech and

Such a requirement, said the Court, imposed a burden upon the prosecutor that was "virtually impossible to discharge under our criminal standards of proof" since it required "the prosecution to prove a negative."[36] The Court thus replaced the "utterly without redeeming social importance"[37] language of the test with the words "seriously without redeeming social importance."[38] This deceptively simple change was intended to have great impact, since it was far easier to convince a jury or a judge that certain materials seriously lacked value.[39]

The Court also held that the issues of prurience and patent offensiveness were questions of fact for a jury to decide through the application of "contemporary community standards."[40] However, the Court failed to clarify whether the third prong—the LAPS test—should also be determined by a jury's perception

---

conduct which is protected by the guarantees of free speech or free association. *See* Thornhill v. Alabama, 310 U.S. 88 (1940) (statute prohibiting *all* picketing found facially void). A law is void on its face if it "does not aim specifically at evils within the allowable area of [administrative] control," and when it encompasses other activities within the realm of protected rights. *Id.* at 97.

Since *Miller*, courts have been reluctant to strike down anti-pornography laws as overbroad. *See* New York v. Ferber, 458 U.S. 747 (1982) (although some protected expression like medical textbooks and National Geographic pictorials could be affected, statutes prohibiting depictions of sexual performances by children upheld); *cf.* Brockett v. Spokane, 472 U.S. 747 (1982)(word "lust" in statute found to be too broadly defined as encompassing materials which excite normal lust, not just shameful or morbid lust; statute's general ban on obscene matter upheld). Lawrence Tribe has criticized the *Ferber* decision for its lack of explanation for how it weighed the "expressive interests" and the "evil to be restricted"; he claimed the court "provided no indication as to how it calculated those values, beyond mere intuition" and displayed a "'troubling disregard of the gravity of any departure from scrupulous first amendment protection.'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 942 (2d ed. 1988), citing *New York v. Ferber*, 458 U.S. 747, 763-764 (1982), and *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 145 (1982).

36 Miller v. California, 413 U.S. 15, 22 (1973); *see also* Hamling v. United States, 418 U.S. 87, 107 (1974).

37 *Jacobellis*, 378 U.S. at 191.

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

39 *See* Hunsaker, *supra* note 5, at 914.

> Presumably, the Majority believed that its "serious [LAPS] value test" will ease the burden on the prosecution, so that "hard core" pornography may properly be proscribed. It is doubtful whether this will be the case. Proof of "seriousness" or the lack thereof is just as nebulous, if not more so, than the "social value" test discarded. The term, "serious" implies a judgment as to quality, a much more difficult determination than the one implied by the term, "utterly without," which is a judgment as to quantity or degree.

Id.

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

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation.

Id.

of community standards.[41]

Generally, subsequent interpretations of *Miller* have established that its definition of the community standards governing the first and second prongs of the test was an explicit rejection of a national standard.[42] However, prior to the *Pope* decision, there arose much controversy over whether a national standard, a community standard, or something altogether different should be applied to the value question in the LAPS test.[43]

The language of *Miller* seemed to set this final criterion apart from the other two. The first two questions are considered ones of fact; the last one, on the other hand, has been referred to as one of "constitutional fact." This status made the LAPS test especially "amenable to appellate review."[44] The majority opinion[45] and the supporters of *Miller*[46] found this availability of judicial review of the value of the work the pertinent feature of the test which ultimately saved its constitutionality.

The *Miller* test still did not succeed in creating a standard that would withstand further modification. Justice Douglas' dissent highlighted concerns now familiar in the obscenity debate: the first amendment issue, the Court's scope of review, the danger of majoritarian rule and of censorship, and the lack of fair notice.[47] Justice Douglas thought that the Court had no place in judging the "tastes and standards of literature."[48] In reaffirming

---

41 *See, e.g.*, Kois v. Wisconsin, 408 U.S. 229 (1972). An explanation by the Supreme Court of the LAPS test is "notable for its absence." Main, *The Neglected Prong of the* Miller *Test for Obscenity: Serious Literary, Artistic, Political or Scientific Value*, 11 S. ILL. U. L.J. 1154, 1163 (1987). *See also, supra* note 5, for explanation of LAPS.

42 Smith v. United States, 431 U.S. 291 (1977). "In *Miller* . . . this Court rejected a plea for a uniform national standard as to what appeals to the prurient interest and as to what is patently offensive . . . ." *Id.* at 292-93.

43 *See generally* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1961) [hereinafter Lockhart & McClure].

44 Smith v. United States, 431 U.S. 291, 305 (1977); *see infra* Part Four, notes 131-147 and accompanying text.

45 Chief Justice Burger wrote the majority opinion, joined by Justices Powell, Blackmun, Rehnquist and White.

46 Justice Rehnquist remains one of the Court's most consistent advocates of the *Miller* test. In his majority opinions to Jenkins v. Georgia, 418 U.S. 153 (1974), and Hamling v. United States, 418 U.S. 87 (1974), he praised the test for enabling jurors to draw on their own knowledge of the community and ensuring, in his view, that "the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling*, 418 U.S. at 107.

47 Miller v. California, 413 U.S. 15, 41-42 (1973)(Douglas, J., dissenting):

> Under the present regime . . . the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That . . . has all the evils of an *ex post facto* law.
>
> . . . .
>
> . . .[W]e should not allow men to go to prison or be fined when they had no "fair warning" that what they did was criminal conduct.

48 *Id.* at 40 (Douglas, J., dissenting).

his *Paris Adult Theatre* dissent,[49] he said that no test for obscenity would survive constitutional attack. "[S]hort of that extreme [of deeming obscene any depiction of human sexual organs,] it is hard to see how any choice of words could reduce the vagueness problem . . . ."[50] Justice Douglas thought that promulgation of a constitutionally adequate obscenity standard could only be achieved by "constitutional amendment after full debate by the people."[51]

Justice Douglas' concerns continue to resound in today's Court. For example, Justice Stevens' dissent in *Pope* reiterated these same concerns about whether a judicially created obscenity standard constituted censorship and deprived writers and publishers of fair notice. Justice Stevens also exhorted the alternative solution of legislative action as opposed to judicial reaction.[52]

D. *Post*-Miller

With only a few modifications, the *Miller* test controlled the regulation of obscenity until *Pope*. In 1974, in *Jenkins v. Georgia*,[53] innovative attempts by the defense to prove the requisite literary

---

[49] Paris Adult Theatres I v. Slaton, 413 U.S. 49 (1973).

[50] *Id.* at 94 (Douglas, J., dissenting).

> Art and Literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncracies of individuals. They are too personal to define and too emotional and vague to apply. . . .

Id. at 70 (Douglas, J., dissenting).

A law will be held void for vagueness as a matter of due process if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *See also* Kolender v. Lawson, 461 U.S. 352 (1983)(law requiring persons to produce on demand "credible and reliable" identification invalidated on vagueness grounds). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). One of the main functions of the vagueness doctrine is to curb the discretion afforded to law enforcement officers or administrative officials and to limit the dangers of arbitrary and discriminatory enforcement through explicit legislative standards. Papachristou v. Jacksonville, 405 U.S. 156, 170 (1972).

[51] *Miller*, 413 U.S. at 41. Douglas believed that the regulation of obscenity would provide fair notice to potential defendants only if undertaken by a branch of government other than the judiciary, whose basic administration of law is retrospective:

> Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground.

Id.

[52] *See infra* notes 125-126 and accompanying text.

[53] 418 U.S. 153 (1974).

value of a film in order to meet the LAPS test proved fatal to the state's case. Expert testimony proffered by way of film criticism, plus an Academy Award nomination for Ann-Margret, "established" the literary and artistic value of the movie "Carnal Knowledge," therefore precluding a finding of obscenity. This case also established that the community whose standards should be applied to the first two prongs of the test could be statewide, citywide, or of unspecified boundaries. But the Court again avoided clarifying the appropriate standard of review to be applied to the test's third prong.

During the years after *Miller*, many legal scholars proffered their own interpretations and criticisms of the case. Frederick Schauer's 1976 treatise, *The Law of Obscenity*,[54] proved very influential, and subsequently has been cited in several Supreme Court obscenity opinions.[55] Lockhart and McClure,[56] the authors of several post-*Miller* articles on pornography, hypothesized that while the national community might be in agreement that hardcore pornography should be suppressed, all materials falling short of that "hardcore" (in itself a relative concept) characterization might be vulnerable to censorship. According to Lockhart and McClure, it was for the protection of these "experimental 'works of literary and' artistic distinction"[57] that appellate review dictated by the LAPS test gained its true relevance.

In 1977, in *Smith v. United States*[58] the Court emphatically reaffirmed its holding in *Miller*. The decision further clarified the application of community standards to the offensiveness and prurient appeal requirements, but, once again, the Court left open the value question. *Smith* also held that state legislatures could not set community standards. Its language on this issue is

---

54 F. SCHAUER, THE LAW OF OBSCENITY 123-24 (1976). Schauer is a prominent advocate of the position that pornography should not, nor was ever meant to, be protected by the first amendment because it is more akin to sexual activity than other forms of expression. Pornography is stripped of first amendment protection not because of its 'offensiveness,' but rather because "the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process." Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979). Or, as Professor Lynn puts it: "Pornography, says Schauer, is quite indistinguishable from using a dildo or watching two prosititutes engage in sexual activity." See *infra* note 63, at 58-59. Schauer was also one of the "experts" who participated in the Attorney General's Commission on Pornography. *See supra* notes 151-54 and accompanying text.

55 *E.g.*, Pope v. Illinois, 107 S. Ct. 1918, 1920-21 (1987).

56 Lockhart & McClure, *supra* note 43, at 116-17.

57 *Id.* at 112.

58 431 U.S. 291 (1977).

an interesting precursor to the "reasonable person" standard proposed in *Pope*:

> [T]he Court [has] recognized the close analogy between the function of "contemporary community standards" in obscenity cases and "reasonableness" in other cases . . . . It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.[59]

Smith was also notable for its dissent by Justice Stevens, which he later cited extensively in his dissent to *Pope*. Justice Stevens' differences with the majority opinion echoed those of Justice Douglas in *Miller*.[60] Both Justices indicated that there were entities other than the Court better equipped to deal with this problem. Justice Douglas urged constitutional amendment while Justice Stevens advocated a market approach: "In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless."[61]

Justice Stevens also introduced interesting arguments which he would later raise in regard to the new *Pope* standard. He considered the potentially capricious dynamics of juries applying ambiguous standards in a case whose facts revolved around the emotionally volatile issue of pornography,[62] and he admitted to the existence of a large audience for the materials the Court sought to prohibit.[63]

---

[59] *Id.* at 302 (quoting Hamling v. United States, 418 U.S. 87, 104-05 (1974)).

[60] *Smith*, 431 U.S. at 319 (Stevens, J., dissenting): "I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means." *See also* notes 47-50 and accompanying text.

[61] *Smith*, 431 U.S. at 321. *See also* Pope v. Illinois, 107 S. Ct. 1918, 1930 (1987).

[62] The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social context. . . . Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the minority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

Smith, 431 U.S. at 315-16 (citations omitted). *See Pope*, 107 S. Ct. at 1928.

[63] Justice Stevens wrote: "The fact that there is a large demand [for pornography]

III. PART TWO: *POPE V. ILLINOIS*

A. *Facts of the Case*

By the time the petitioners in *Pope v. Illinois* applied for a writ of *certiorari* to the Supreme Court in 1986, the need to reassess the *Miller* test to provide further clarification and guidance on the issue of obscenity was clear. A series of appellate courts had affirmed decisions that community standards were not applicable to the third prong of the *Miller* test.[64] State and local legislatures had been passing statutes of varying degrees of rigidity since the *Miller* decision.[65] The factual setting of *Pope* created an appropriate forum to determine the proper standard by which to judge whether a work has literary, artistic, political or scientific value.

Pope v. Illinois was actually a decision rendered upon two separate cases;[66] the identical nature of their scenarios, however, made them suitable for joint adjudication. The defendants were Charles G. Morrison of Winnebago County, Illinois, and Richard Pope, of Rockford, Illinois. Both were clerks in "adult" bookstores that displayed signs stating no one under eighteen would be admitted;[67] additionally, both stores charged "browsing

---

indicates that [these materials] do provide amusement or information, or at least satisfy the curiosity of interested persons." *Smith*, 431 U.S. at 319 (citation omitted). Several contemporary critics have cited the overwhelming statistics of sales and rentals of pornographic materials as evidence of the Court's archaic sense of morality. *See* Main, *supra* note 41, at 1164 (the *Miller* opinion described as smacking of "cultural elitism"); Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 32-37 (1986).

64 United States v. Heyman, 562 F.2d 316 (4th Cir. 1977); Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980); United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); United States v. Merrill, 746 F.2d 458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985).

65 Though not typical, the most extreme example of such legislation was Indianapolis, Ind. City-County General Code 35, § 16-3(a)(7), which prohibited the production, use, display, and commercial transfer of sexually oriented material labeled pornography which advocated "sex discrimination" by depicting the "graphic sexually explicit subordination" of women in various detailed statutory specifications. The ordinance was found to be unconstitutionally restrictive in American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331-32 (7th Cir. 1985).

66 *Pope*, 107 S. Ct. at 1920. The two cases are People v. Pope, 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985) and People v. Morrison, 138 Ill. App. 3d 595, 486 N.E.2d 345 (1985).

67 The existence of signs advertising the type of materials sold or exhibited within provides the essential warning needed to protect those who do not wish to observe pornography. Both Justices Brennan and Douglas in their dissents to *Paris Adult Theatre* reiterated the importance of these signs as permitting unconsenting adults to avert their eyes from what might offend them. *See also* Splawn v. California, 431 U.S. 595, 604 (1977)(Stevens, J., dissenting). "[The signs] provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter . . . ought to be encouraged, not punished." *Id.*

fees."[68] There was no evidence that either store had ever been raided before, nor had either one been subject to prosecution of any type.[69]

Detectives entered the respective stores of defendants' employ and purchased three magazines each.[70] Morrison and Pope were then arrested for violating Illinois' obscenity statute.[71]

At the trial, both defendants provided testimony describing community standards in their areas; a college student and an expert on public opinion polling testified about their surveys on attitudes toward pornography throughout Illinois. The trial judge instructed the jury on the *Miller* test for obscenity and on its local counterpart, the Illinois obscenity statute.[72] He asked the jury to apply contemporary community standards to all three elements of the tripartite test. The defendants were found guilty, sentenced to prison, and required to pay fines.

On appeal, the Illinois Appellate Court rejected the defendants' argument that the Illinois statute was unconstitutional because it applied an objective standard to determine the value of the material in question.[73] The Supreme Court granted a writ of *certiorari* to determine whether the instruction to apply community standards to the third prong of the test for obscenity was erroneous, and, had it been correctly instructed, whether a reasonable jury could have reached an opposite conclusion, thereby mandating either a reversal of petitioners' convictions or a new

---

68 A browsing fee is an entry fee charged by the "adult" book stores. The fee is nonreturnable, but is deductable from the purchase price of any items bought. The fees are designed to prevent loitering and to ensure that those who enter have an intent to buy. In *Pope*, a patron paid $.50 to enter the store.

69 People v. Pope, 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985); People v. Morrison, 138 Ill. App. 3d 595, 486 N.E.2d 345 (1985). *See also* Briefs for Respondent and Petitioners, Pope v. Illinois, 107 S.Ct. 1908 (1987).

70 The magazines purchased where Pope worked were entitled *Full Throttle*, *Anal Animal* and *Fuck Around*. Those purchased at Morrison's store were of a similar nature. However, there was no evidence in the record that the materials were any more or less obscene than other material for sale at these stores, nor was there evidence suggesting that the detectives picked these magazines at random.

71 ILL. REV. STAT. ch. 38, paras. 11-20 (1973).

72 *Id.*

73 At the time of the defendants' prosecution, the State of Illinois elected to impose the *Roth-Memoirs* higher burden of proof with regard to the LAPS test: whether the material was "utterly without redeeming social value." The majority opinion in *Pope* decreed the state was free to do this, and that it made no difference in their disposition of the case. *See* Pope v. Illinois, 107 S. Ct. 1918, 1920 n.1 (1987). Subsequent to the defendants' conviction in 1986, a new obscenity statute took effect in Illinois, substituting the *Miller* test: whether the material "lack[ed] serious literary, artistic, political or scientific value" and mandating application of community standards only to the first two prongs.

trial.[74]

B. *The Majority Opinion*

Writing for the majority, Justice White held that the proper inquiry was not whether an ordinary member of a given community would find serious value in the allegedly obscene material, but whether a reasonable person would find such value in the material taken as a whole.[75] The majority remanded the case, setting forth the following guidelines: "[P]etitioners' convictions should stand despite the erroneous 'community standards' instruction if the appellate court concludes that no rational juror, if properly instructed, could find 'value' in the magazines petitioners sold."[76]

The majority's failure to apply "community standards" to the "value" prong of the *Miller* test was predictable in light of both the *Smith* decision[77] and the movement of the lower courts in this direction.[78] The adoption of the "reasonable person" standard, however, lacked clear precedent. The *Smith* opinion, citing *United States v. Hamling*, recognized the analogy between "community standards" in obscenity proceedings and the "reasonable person" standard in other areas of law,[79] but never had the Court directly applied the "reasonable man" standard in the former type of trial.

The briefs submitted by the parties in *Pope* and by *amici curiae* offer little insight into how the Court arrived at this particular standard. The petitioners' brief urged the "independence" of

---

74 *See* Petitioners' Brief for, and Grant of, Writ of Certiorari, Pope v. Illinois, 107 S. Ct. 1918 (1987).

75 *Pope*, 107 S. Ct. at 1921.

76 *Id.* at 1919.

77 Smith v. United States, 431 U.S. 291, 292-93 (1977)(state law cannot define contemporary standards for what constitutes appeal to the prurient interest and patent offensiveness).

78 *See supra* note 64.

79 *Smith*, 431 U.S. at 302 (citing Hamling v. United States, 418 U.S. 87, 104-05 (1974)). *Hamling* relied heavily upon *Miller*, and even counseled using the "reasonable person" concept as a guide to assessing community standards. Authority for this equation was derived from the *Restatement of Torts* itself, which states: "[T]he 'reasonable man' standard . . . enables the triers of fact . . . to look to a community standard." RESTATEMENT (SECOND) OF TORTS, § 283 (1985). *See infra* notes 114-124 and accompanying text. *Hamling*'s dicta states that jurors, instead of being guided by expert witnesses, should utilize their knowledge of the community to determine what the average person might deem obscene:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Hamling, 418 U.S. at 104.

the LAPS test, and emphasized the importance that it remain separate from community or majoritarian determinations of value; it instead espoused an "objective" test.[80] Nowhere did it suggest an objective test in the form of a "reasonable person" standard. On the other hand, the Court did not follow the admonitions of the respondent to apply community standards to the entire *Miller* test both to ensure uniformity and to diminish jury confusion.[81] Justice White explicitly rejected this argument in a footnote to his *Pope* opinion.[82]

Justice White, however, did adopt much of respondent's terminology. Respondent argued that under the reasoning of *Jenkins v. Georgia*,[83] which allowed the state to decide the size of the community whose standard was to be applied, a state could "make the standard of review [that of] a national community."[84] Respondent also argued that this national community standard was essentially identical to an "average person" standard.[85] Respondent reasoned that since the reasonable man was the same as an average man, it followed that the "use of [the] 'community standards' instruction on the value question, . . . [was] the functional equivalent of a 'reasonable man' instruction."[86] Since the purpose behind instructions using either standard was to focus the LAPS test away from the reaction of overly-sensitive persons, respondent argued that the standards were basically the same.[87]

This interchange of standards indicates that the terms may have more of a distinction in form than in substance. Respondent's most convincing argument was that "[t]hese standards of

---

80 Brief for Petitioners at 18-19, Pope v. Illinois, 107 S. Ct. 1918 (1987): "[a]n independent value element enhances First Amendment rights . . . . It allows a jury . . . to give protection to material which the community may subjectively consider valueless, but which, objectively viewed, meets the appropriate value standard."

81 Brief for Respondent at 18-22, Pope v. Illinois, 107 S. Ct. 1918 (1987).

82 In an obscenity prosecution the trial court, in its discretion, could instruct the jury to decide the value question by considering whether a reasonable person would find . . . value in the work, taken as a whole. Such 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, such as tort suits . . . .

Pope, 107 S. Ct. at 1921 n.3.

Justice White presumed that the "reasonable man" had never before presented a confusing concept for juries and should not do so now. The discussion below in Part Three will examine how this "reasonable man" standard has historically been found to be a bit more problematic. *Id. See infra* notes 114-24 and accompanying text.

83 418 U.S. 153 (1974).

84 Brief for Respondent at 16, Pope v. Illinois, 107 S. Ct. 1918 (1987).

85 *Id.* at 17.

86 *Pope*, 107 S. Ct. at 1921 n.3.

87 Brief for Respondent at 15, Pope v. Illinois, 107 S. Ct. 1918 (1987) (citing Mishkin v. New York, 383 U.S. 502, 508-9 (1966)).

'the reasonable man' and 'the community' are very similar in that neither lends itself to precise definition."[88] In his opinion, Justice White adopted a phrase—reasonable man—used extensively by the respondent; however, by ignoring respondent's arguments that the "reasonable man" standard and "community" standards were, in fact, functional equivalents, he rejected respondent's reasoning for introducing the term in the first place.

In its *amicus curiae* brief, the American Civil Liberties Union ("ACLU") persuasively presented a strong case for not using "community standards" to judge the value of allegedly obscene material.[89] While Justice White espoused the theory enunciated in the ACLU's brief, he paid little attention to the logic behind it. The ACLU contended that community standards promoted a leveling effect, which in essence imposed a standard of the "average person" but in effect allowed material to be judged by the lowest common denominator of society.[90]

The majority opinion did not address these substantive arguments. Instead, it perpetuated the semantic distinctions between the "reasonable person," "average person," and "community" standards.

C. *The Concurrences*

Justice Scalia dealt with the semantic problem of the "reasonable man" in his concurrence. He equated the proposed test to an objective standard,[91] yet he explained that in the realm of

---

88 *Id.* at 16 (citing Smith v. United States, 431 U.S. 291, 308 (1977)).

89 The ACLU *amicus curiae* brief even hinted at the inappropriateness of applying community standards to any of the three prongs; presumably so as not to detract from the main argument, this contention was relegated to a footnote. *See* ACLU Amicus Curiae Brief at 12 n.15, Pope v. Illinois, 107 S. Ct. 1918 (1987). As authority, the brief cited Schauer's treatise, *see supra* note 54, which was also relied upon by the Court in their majority decision. *See Pope*, 107 S. Ct. at 1920-21.

90 The ACLU cited Note, *Community Standards, Class Actions, and Obscenity under* Miller v. California, 88 HARV. L. REV. 1838, 1859 n.91 (1975): "[T]aken to extremes, least common denominator distributions create a uniform national standard—the standard defined by the attitudes of the least tolerant jurisdiction." This argument had been put forth twenty years earlier by Lockhart and McClure:

> In our judgment contemporary community standards have little place in obscenity censorship. . . . [T]heir application would emasculate independent judicial review based on federal constitutional standards governing obscenity censorship, Balkanize art and literature in the United States, and reduce art and literature to the levels of the most Philistine communities in the country.

Lockhart & McClure, *infra* note 43, at 112-13.

91 Pope v. Illinois, 107 S. Ct. 1918, 1923 (1987)(Scalia, J., concurring): "I joined the Court's opinion with regard to an 'objective' or 'reasonable person' test. . . . " J. White, on the other hand, never explicitly labeled the "reasonable man" test an objective one. As the dissent pointed out, they are not necessarily one and the same. *Id.* at 1926-27 (Stevens, J. and Marshall, J., dissenting).

taste, an objective standard might simply not be feasible.

> I must note, however, that in my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste"—a description that betrays the lack of an ascertainable standard.[92]

Justice Scalia even subtly hinted that while he joined in the Court's decision, his proposal for a solution to this problem might be more closely aligned with the radical proposition of Justice Stevens.[93] He closed his opinion with a deceptively simple statement: "All of today's opinions, I suggest, display the need for reexamination of *Miller*."[94] Thus, if the purpose of the new *Pope* test was to clarify and elucidate *Miller*, at least one of the Justices was convinced that the new test had not achieved that goal satisfactorily.

Justice Blackmun concurred with the majority on all but its holding that the erroneous instructions should be subjected to a harmless-error analysis on remand.[95] In rebutting the concerns of the dissent, Justice Blackmun cited neither cases, surveys, nor any other authorities on juries to support his argument. Instead he relied primarily upon the language of Justice White: "Justice White points out . . . . Justice White further emphasizes."[96] He quoted the majority opinion extensively. Justice Blackmun also relied heavily

---

92 *Id.* at 1923 (Scalia, J., concurring).

93 Justice Scalia continued:

> Just as there is no use arguing about taste, there is no use litigating about it . . . . It is a refined enough judgment to estimate whether a reasonable person *would* find literary or artistic value in a particular publication; it carries refinement to the point of meaninglessness to ask whether he *could* do so. Taste being . . . unpredictable, the answer to the question must always be "yes"—so that there is little practical difference between that proposal and Part III of Justice STEVENS' dissent . . . .

Id. (emphasis in original).

94 *Id.*

95 *Id.* at 1923-25 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun agreed with Justice Stevens that letting the jury determine the LAPS test by community standards would deny petitioners a jury determination on a critical element of the offense charged. The majority decided to remand on the following question: Would the petitioners have been convicted despite the erroneous instruction? If so, the instruction constituted merely a "harmless error." This appears to undermine the strength of the Court's holding requiring instructions pertaining to the "reasonable person" standard. If petitioners would have been convicted under either instruction, there may actually be no discernible difference between the two standards that the Court sought to differentiate.

96 *Id.*

upon the strength of his own convictions: "I believe the standard enunciated . . . meets the other concerns . . ." and "I do not think that [a] juror asked to create a 'reasonable person' . . . might well believe that the majority . . . who find no value in such a book are more reasonable than the minority who do . . . ."[97] Justice Blackmun overlooked the practical issues of scope of review and the unpredictability of juries raised by Justice Stevens in his dissent.[98] He also chose not to address the issue — raised by both the respondent and the dissent — that juries may be confounded by these overlapping and indistinct tests and therefore may be unable to apply them correctly.[99]

D. *The Dissenters*

Justice Brennan's dissent again expressed the concern he raised in his dissent in *Paris Adult Theatre*.[100] He focused on the ephemeral, constantly changing definition of obscenity that would give rise to statutes of insufficient specificity and clarity, thereby denying fair notice to individuals involved in the dissemination or creation of pornographic and/or sexually explicit materials.[101] In *Paris Adult Theatre*, Justice Brennan had written of the deeper problems he believed would inevitably accompany these unclear laws: "[I]nstitutional stress . . . inevitably results where the line separating protected from unprotected speech is excessively vague."[102] Justice Brennan felt that where laws and standards appear to be arbitrary or unclear, citizens lose a degree of faith in and respect for the judiciary, resulting in stress upon the integrity of that institution.

Justice Brennan expressly withheld his direct endorsement of Justice Stevens' footnote eleven which declared that the vagueness problem inherent in criminal obscenity statutes may not necessarily arise in the area of civil regulation.[103] Justice Stevens claimed that "'[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.'"[104] He would thus not require equal specificity for penal and civil statutes regulating forms of expression. Justice Stevens has been known to differ with Justice

---

97 *Id.* at 1923-24.
98 *See infra* notes 106-110 and accompanying text.
99 Brief for Respondent at 18-22, Pope v. Illinois, 107 S. Ct. 1918 (1987).
100 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 103 (1973).
101 *Pope*, 107 S. Ct. at 1924 (Brennan, J., dissenting).
102 *Paris Adult Theatre*, 413 U.S. at 91.
103 *Pope*, 107 S. Ct. at 1929 n.11 (Stevens, J., dissenting).
104 *Id.* (quoting Winters v. New York, 333 U.S. 507, 515 (1948)).

Brennan on this matter: "Indeed, [Justice Stevens] has led the way in justifying civil sanctions restraining not only obscene but also nonobscene offensive or indecent displays . . . . It is only with respect to criminal prosecutions for obscenity that he has voiced strong objections."[105] Justice Brennan, on the other hand, has never voiced his support for the differential treatment of criminal and civil obscenity prosecutions.

Justice Stevens' dissent presented a three-part discourse on (1) the harmless error issue; (2) the first amendment issue; and (3) the propriety of regulating the distribution of pornography at all.[106] He initially attacked the majority's finding that "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."[107] He contended that the improper instructions prevented an essential element of the crime from being presented to a jury, thereby depriving the defendants of their right to a fair trial. He cited Justice White's concurrence to *Henderson v. Morgan*:[108] "It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged."[109] By allowing the jury to judge "value" by the wrong standard, the actual "literary, artistic, political, or scientific value" of the magazines in question was never determined; therefore, the tripartite *Miller* test was never completely met.[110]

IV. Part Three: The Reasonable Man Approach — How This Traditionally Amorphous Concept May Potentially Confuse Juries and Otherwise Affect Defendants' Due Process Rights

Part II of Justice Stevens' dissent addressed the theoretical and constitutional implications of *Pope*'s "reasonable man" standard, in addition to addressing its effects upon the practical aspects of obscenity trials. Justice Stevens subscribed to the ACLU's contention that the new standard would impose a leveling effect in jurors' eyes and would therefore provide little pro-

105 G. Gunther, Constitutional Law 1087 (11th ed. 1985).
106 The second and third parts of his argument will be discussed in Parts Three and Five below.
107 *Pope*, 107 S. Ct. at 1922.
108 426 U.S. 637 (1976).
109 *Pope*, 107 S. Ct. at 1920.
110 Hamling v. United States, 418 U.S. 87, 108 (1974).

tection for minority views on what constituted literary, artistic, political or scientific value.[111]

Justice Stevens reasoned that juries could become perplexed when trying to determine how the "reasonable person" might find value differently from how the community might perceive it. A juror tends to base an "objective" standard upon his or her own personal views, upon his or her perception of the average or representative stance on the subject, or by arriving at a compromise.[112] Consequently, asking a jury to apply a "reasonable person" standard consequently becomes a problematic and unpredictable scenario. Justice Stevens also noted that the content of obscenity hearings might also affect how a juror decides to formulate his or her standard.[113]

Traditionally, the "reasonable man" has eluded a concrete definition; rather, he is more often described in illustrative metaphors drawn from the context of the case at hand. Some examples have been: "the man in the street" or "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[114] He is often evoked in negligence cases; anything the reasonable man would do is considered non-negligent conduct.[115] He has also been used as a "human

---

111 The problem with this formulation is that it assumes that all reasonable persons would resolve the value inquiry in the same way. In fact, there are many cases in which *some* reasonable people would find that specific sexually oriented materials have serious artistic, political, literary, or scientific value, while *other* reasonable people would conclude that they have no such value.

. . . .

. . . A juror asked to create "a reasonable person" in order to apply the standard that the Court announces today, might well believe that the majority of the population who find no value in such a book are more reasonable than the minority who do find value.

Id. at 1926-27 (emphasis in original) (citation omitted) (*Cf.* Blackmun, J., concurring in part, dissenting in part), *supra* note 95.

112 See V. HANS & N. VIDMAR, JUDGING THE JURY 121-55 (1986). The authors cite many experiments that have attempted to track the vagaries of jury deliberation. One study by Kalven and Zeisel tried to discover where juries most often deviated from the law; this usually occurred where "the laws were unpopular in the community," such as gambling or liquor violations. The jury was observed to heed its own ideas of right and wrong. "[I]n most cases, the jury bends the law to comport with its own standards of justice and fairness . . . ."

Hans and Vidmar also noted certain instructions which tended to especially confound juries. Their primary examples were negligence standards, which use such terms as "a person of ordinary prudence" or a "reasonably careful person." It seems likely that a jury faced with a confusing instruction is more likely to rely upon its own opinions of what it is being asked to judge than upon the standard given in the instruction.

113 *See supra* note 62 and accompanying text.

114 Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933).

115 Reynolds, *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature"*, 23 OKLA. L. REV. 410, 411 (1970).

guide"[116] to determine what behavior must justify recovery and where defenses of mistake or consent ought to be available in cases of battery, assault, intentional infliction of emotional harm, nuisance, defamation, invasion of privacy, and malicious prosecution.[117]

As his title implies, the "reasonable man" is considered rational and enlightened. His advocates urge that he injects both a human element and some stability into the flux of the law.

> [H]e has been thought to introduce, despite his fictional nature, an element of realism; he focuses attention on our dealing with conduct of some actual person; he emphasizes that we must judge a human being with human failings . . . . The reasonable man's development by the courts is generally thought to have been necessitated by the difficulty of applying a constantly changing standard based on individual capabilities and limitations, and the need of those who live in society to expect and require that all others behave, to some minimal extent, in a prescribed way.[118]

Prescribed behavior, while it may have its place in the area of negligence and tort law, may not necessarily be an appropriate consideration when a jury must determine the artistic value of a book or film.

The critics of the "reasonable person" have claimed that he requires others to live up to impossibly high standards.

> Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious creature stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example.[119]

Critics have also claimed that this standard, when submitted to a jury, greatly favors the plaintiff, and that it is not in fact humanitarian because it requires "rational but not necessarily ethical or good Samaritan conduct."[120] In obscenity cases, where the jury is often predisposed against the defendant,[121] *Pope*'s standard may further push them in that direction.[122]

Writing for the majority in *Pope*, Justice White claimed that a

---

116 *Id.* at 410.
117 *Id.* at 411-13.
118 *Id.* at 414 (citing O.W. HOLMES, THE COMMON LAW 107-09 (1881)).
119 *Id.* at 417 (citing F. HERBERT, UNCOMMON LAW 1-6 (7th ed. 1952)).
120 *Id.* at 418-19.
121 *See infra* note 150 and accompanying text.
122 *See supra* note 62 and accompanying text.

jury would have no more difficulty applying the "reasonable man" standard to the LAPS test than juries have had when applying it to areas of tort law. However, a study of the application to tort law shows that the "reasonable man" standard is closely linked to the standards of the community.[123] If these two standards are so similar in effect, then the holding of *Pope* appears superfluous. As Justice Stevens declared in his dissent, there are pertinent first amendment interests at stake that cannot be circumscribed by the "reasonable man," whose standards are amorphous and may even be overly demanding.[124]

Finally, Justice Stevens argued that the new *Pope* standard posed a danger to defendants' due process interests under the fourteenth amendment. In light of the history of the Court's unsuccessful attempts to satisfactorily define obscenity,[125] and in light of potential difficulties in implementing the new test, Justice Stevens vigorously proposed that all such judicial guidelines, tests and standards were inevitably vague and would necessarily infringe upon individuals' rights of free speech, due process and fair notice.[126]

The Constitution "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[127] Since the Court has vascillated so drastically on the subject of obscenity, state legislatures have been obliged to pass equally nebulous laws.[128] Obtuse laws give no notice to potential defendants of the potential illegality of their conduct. "If a legislature cannot define the crime, Richard Pope and Michael [sic] Morrison should not be expected to."[129]

---

123 *See supra* note 79.

> In foresight, caution, courage, judgment, self-control, altruism and the like he represents, and does not excel, the general average of the community . . . . Indeed, we use a jury, given the reasonable man instruction, so that we may obtain the community's judgment of what is proper . . . . Thus, the reasonable man may necessarily become somewhat a community composite. If we broaden the meaning of community to take in a wide area or the whole nation, we are back to our average man.

Reynolds, *supra* note 115, at 423, 424 (citing James, *Nature of Negligence*, 3 UTAH L. REV. 275, 280-81 (1953); A. HARPER, TORTS § 69 (1938)). *See also supra* note 77.

124 Reynolds, *supra* note 115, at 417.

125 Pope v. Illinois, 107 S. Ct. 1918, 1927 (1987).

126 *Pope*, 107 S. Ct. at 1928-29 (Stevens, J., dissenting).

127 *Id.* at 1928 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

128 *See supra* note 65 and accompanying text.

129 *Pope*, 107 S. Ct. at 1930. Justice Stevens has apparently forgotten that the other defendant's name is Charles, not Michael.

One purpose behind requiring penal statutes to provide clear descriptions of the prohibited activity is to prevent selective and arbitrary prosecution. *See infra* notes 148-51 and accompanying text. This goal is considered necessary because inconsistent en-

It is very possible that Pope and Morrison had no idea they were breaking the law. Their respective stores were not clandestine; they advertised themselves as "adult" bookstores, and neither had previously been subject to similar prosecution or investigation.[130] Furthermore, the confusion surrounding the obscenity definition and the resulting legislation gave rise to lax enforcement. This created an illusion that selling pornography was not a criminal activity. Such a presumption does not exist where a lucid statute effectively warns the pornography industry that specific activities are illegal, even if officials in that jurisdiction choose not to enforce the laws. A lack of enforcement, coupled with an ambiguous statute will, however, deprive individuals of fair notice.

V. PART FOUR: THE EFFECT OF *POPE* UPON THE SUPREME COURT'S ABILITY TO REVIEW FINDINGS OF OBSCENITY

Pope's modification of *Miller* affected not only the role of the jury at the trial level in obscenity proceedings, but also that of the appellate courts in reviewing findings of obscenity. The third prong of *Miller* had always been considered "particularly amenable to appellate review."[131] The LAPS test's classification as a question of constitutional fact[132] was meant to leave this final determination of value to the judges.[133] While a full explanation of the constitutional fact doctrine is beyond the scope of this Note, it will be examined briefly in order to articulate its relevance to the scope of review applied to findings of obscenity.

Historically, the doctrine of constitutional fact was developed by a series of cases which did not concern the first amendment, but which dealt with the ability of the judiciary to review

---

forcement of the law "lessens the degree to which an actor is on notice that his or her conduct is illegal." *Pope*, 107 S. Ct. at 1929. Unpredictable behavior on the part of courts and administrative officials is against public policy. As Justice Brennan emphasized in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973), it is conducive to institutional stress. Little confidence is engendered in our system of government by its promulgation of uncertain laws, unequal degrees of law enforcement, and conflict and division amongst Supreme Court Justices.

130 *See supra* note 67 and accompanying text.

131 Brief for Petitioners at 16, Pope v. Illinois, 107 S. Ct. 1918 (1987). *See also* Justice Brennan's concurrence in Jenkins v. Georgia, 418 U.S. 153, 163-64 (1974) " '[T]here can be no doubt that *Miller* requires appellate courts . . . to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of [the LAPS test] of *Miller* . . . .' "; Smith v. United States, 431 U.S. 291, 305 (1977) (the LAPS test was described as "particularly amenable to appellate review").

132 Kois v. Wisconsin, 408 U.S. 229, 232 (1972); *see also* Comment, *Taking Serious Value Seriously: Obscenity*, Pope v. Illinois *and an Objective Standard*, 41 U. MIAMI L. REV. 855, 862 n.60 (1987).

133 Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232 n.21 (1985).

administrative findings of fact. *Crowell v. Benson*,[134] *Ng Fung Ho v. White*,[135] and *Ohio Valley Co. v. Ben Avon Borough*[136] dealt with disparate factual situations but were similar in that nearly "all [were] cases in which the presence or absence of certain facts may be regarded as having *peculiar constitutional significance*."[137] Together, these cases stood for "[t]he primary holding . . . that the court will make an independent determination of the constitutional fact."[138]

The classification of an issue as one of "constitutional fact" therefore changed the effect of judicial review on a case. For cases dealing with facts not deemed constitutional, "judicial review is designed . . . to provide minimum assurance that there is record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence."[139] With constitutional fact, and especially with the issue of obscenity, the fact to be decided is so intertwined with the constitutional standard involved that judicial review could not simply stop at determining that the facts uphold the verdict.

In *St. Joseph's Stock Yards v. United States*,[140] another of the early constitutional fact cases, the Court reviewed a federal rate order on the issue of alleged confiscation. Chief Justice Hughes pointed out that "[t]he validity of a rate depends . . . on no precise facts. The 'facts' themselves — the value of the investment, costs of service, value of service, rate of return — are abstract."[141]

The doctrine of constitutional fact has often been utilized to mandate heightened appellate review in cases dealing with the first amendment. The area of free speech, for example, is often given heightened scrutiny on appeal, since the findings of fact are

---

134 285 U.S. 22, 54 (1932)(Court rejects challenge to constitutionality of Federal Longshoremen's and Harbor Workers' Compensation Act; Congress is allowed to set up special tribunals, but access must remain open to courts for questions of law or questions of fundamental fact).

135 259 U.S. 276 (1922)(judicial determination of citizenship upheld).

136 253 U.S. 287 (1920)(Court free to make independent findings of constitutional validity of state public utility rate order).

137 L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 641 (1965) [hereinafter JAFFE] (emphasis in original).

138 *Id.* at 652.

139 *Id.* at 641.

140 298 U.S. 38 (1936).

141 JAFFE *supra* note 137, at 646. Obscenity presents the same problem. The factors to be ascertained: prurience, offensiveness, and literary or social value, are themselves abstract. The appellate courts reviewing a jury's finding of these three factors are ultimately faced with the same subjective decision each juror was obliged to make: what he or she believes constitutes prurience, offensiveness, or value.

frequently the same legal standards that determine whether speech is protected. "[T]he first amendment imposes a special duty with respect to law application: both trial and appellate judges must examine the evidence, marshal the relevant adjudicative facts, and then apply the controlling first amendment norms . . . ."[142] In first amendment cases dealing with libel, for example, the judge must decide certain historical facts based upon the jury's assessment of the credibility of witnesses' testimony.[143] On the other hand, "where the crucial issues do not turn on credibility . . . the judge may function like a thirteenth juror . . . . This occurs where, as in obscenity cases, the elements of the statutory offense are identical with the factors that determine whether speech is protected."[144]

The reason for deeming certain issues, such as those touching on the first amendment, as subject to stricter judicial review is to ensure that "[s]uch things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents."[145] In the area of obscenity, it is arguable that the judiciary has established itself as "the best-instructed tribunal" to decide these issues. It is certainly not guaranteed to be the "most likely to adhere to precedent," because the precedents themselves, as evidenced by a survey of the Court's obscenity decisions,[146] are so nebulous.

Therefore, the availability of extensive judicial review for findings of obscenity only gives the appearance of providing more protection to sexually oriented materials, and the interjection of a "reasonable person" standard into the equation still does little to elucidate that standard. The test for obscenity, whether being applied by a juror or by an experienced Justice, still turns on a subjective and personal concept of prurience, offensiveness and value. Now both trial and appellate courts must additionally consider the reasonable person's concept of value within the context of pornography. What the *Pope* decision ignored was the fact that reasonableness still does not assist in defining what Justice Scalia referred to as matters of taste.

---

142 *Id.* at 646 n.8.

143 *Id.* at 232.

144 *Id.* (citing Jenkins v. Georgia, 418 U.S. 153 (1973)).

145 Monaghan, *supra* note 133, at n.21.

146 *See* Part One of this Note.

"[R]atiocination has little to do with esthetics." [147]

VI. Part Five: How Practical Application of Obscenity Tests has Shown Them to Be Ineffective

In *United States v. Bagnell*,[148] a significant post-*Miller* case, the defendant presented an argument that, while rejected by the circuit court, did introduce a significant new wrinkle to the obscenity problem: varying and inconsistent standards of obscenity may encourage law enforcement officials to forum-shop.[149] Certain communities have less tolerant attitudes toward pornography, and obscenity trials in those districts are more likely to result in convictions.[150] With *Pope*'s new test, the problem may not be alleviated, since, as explained earlier, the "reasonable man" standard is in effect very similar to the "community standard." The "reasonable man" in Indianapolis may have significantly different ideas on what has artistic value than may the "reasonable person" in New York or Los Angeles,[151] making the former the preferable place to institute prosecution.

The Attorney General's Presidential Commission on Pornography was formed in 1985 to hear testimony describing the

---

147 Pope v. Illinois, 107 S. Ct. 1918, 1923 (1987).

148 679 F.2d 826, 832 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983).

149 This danger had been recognized after the *Roth* decision by scholars Lockhart and McClure:

> [T]he Post Office and Justice Departments secured federal legislation authorizing obscenity prosecutions at any place through which mail passes or at the place of its receipt, in the hope that convictions could be more easily obtained in the hinterlands than in some of the more sophisticated metropolitan communities where material is mailed. At trials in more strait-laced communities, the government could make particularly effective use of such trial tactics as refusing to consent to waivers of jury trials.

Lockhart & McClure, *supra* note 43, at 109. *See Bagnell*, 679 F.2d at 830 (defendant's venue challenge on the grounds of prosecuters' forum shopping rejected). *See also* United States v. Blucher, 581 F.2d 244, 245-46 (10th Cir. 1978) (venue in pornography cases found to be "subject to the creative zeal of the federal enforcement officers").

150 The ACLU *Amicus Curiae* brief for Petitioners in *Pope* also cited this concern as part of its argument that applying community standards to the third prong would have a leveling effect on freedom of speech. "[I]t creates a strong incentive for prosecutors to 'forum-shop' by commencing prosecutions in those areas with the least tolerant 'community standards.' Consequently, unless an objective standard is used speakers must assume that the value of their speech will be judged by the most parochial standards." ACLU Amicus Curiae Brief at 21 n.31, Pope v. Illinois, 107 S. Ct. 1918 (1987). It is not clear that even an objective standard, at least one in the guise of the "reasonable person," would counteract this leveling effect.

151 Lynn, *supra* note 63, at 47 n.72. Indianapolis District Attorney Steven Goldsmith testified for President Reagan's Commission on Pornography that "'we are almost to the point where there are no community standards. I am a prosecutor in Indianapolis, Indiana, the values of people in my community are going to be set by people in Los Angeles and New York' who make movies and cable television programming seen in Indianapolis." *Id.*

variety of approaches that states and municipalities had chosen to combat their pornography problems. Thomas Bohling, from the Obscene Matter Unit of the Chicago Police Department, testified that "almost every case that has gone before a jury has been found guilty (sic)."[152] On the other hand, the Commission found that public reaction to pornography in New York City and Los Angeles was so apathetic that convictions in those cities were far more difficult to obtain.[153] Enforcement of obscenity laws in these cities was found to be generally lax, due to public indifference and lack of funds.[154] The potential for forum shopping thus presents due process problems for individuals involved in the creation of sexually explicit material, which is often disseminated through many communities.

Dissatisfaction with the lack of guidance provided by the Supreme Court has caused a surge in creativity on the part of the states in developing ways to curb the growth of the pornography business. Several Supreme Court decisions have acknowledged the salient state interest in protecting their citizens from the possible detrimental effects of pornography;[155] outside of *Pope* and *Miller* however, they have failed to give any concrete advice on how to regulate sexually explicit materials.

Despite the paucity of empirical evidence supporting a connection between pornography and juvenile delinquency or crime,[156] states have persisted in their efforts to control and sup-

---

152 *Transcript of Proceedings, U.S. Department of Justice, the Attorney General's Commission on Pornography, Public Hearing, Chicago, Illinois*, 67 (July 24, 1985), *quoted in* Lynn, *supra* note 63, at n.60.

153 *Id.* at 61 (testimony of Donald Smith, Supervisory Investigator of the Los Angeles County Pornography Unit).

154 Lynn, *supra* note 63, at 43.

155 Justice Harlan, in his partial concurrence, partial dissent to *Roth* wrote:

> The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. And the State has a legitimate interest in protecting the privacy of the home against the invasion of unsolicited obscenity.

Roth v. United States, 354 U.S. 476, 502 (1957).

The state in Stanley v. Georgia, 394 U.S. 557, 560 (1969), argued: "If the State can protect the body of a citizen, may it not protect, argues Geogia, his mind?" While the Supreme Court has been reluctant to allow state legislation which endeavors to protect or control thoughts, it has not satisfactorily answered the query of states on how to curb the ever-growing industry of pornography. But its silence on the subject cannot be presumed to advocate pornography, because it persists in defining and refining obscenity for the purpose of further pornography prosecution, and because it has consistently ignored Justice Stevens' suggestion to remove all criminal regulation on pornography involving consenting adults. Pope v. Illinois, 107 S. Ct. 1918, 1927 (1987) (Stevens, J., dissenting).

156 Lynn, *supra* note 63, at 27-32. Although no formal statistical study was performed, in San Francisco data suggested that a relaxation of the pornography laws corresponded

press this industry. Relevant dicta in *Smith* suggested that the states use their zoning laws to better circumscribe the boundaries of their "communities" in the hope that this might facilitate prosecution.[157] Several states have followed this advice and their statutes have been consistently, but not always successfully, challenged.[158] The fact that prosecutors are pursuing pornographers by means other than the traditional mail statutes indicates that there may exist more effective measures to curb the spread of pornography. At the very least it indicates that the guidance now given by the Supreme Court is ineffective. Furthermore, the latest manifestation set forth in *Pope* is more of a semantic change than one providing any useful clarification of *Miller*.

VII. Part Six: Possible Solutions

Justice Stevens' final solution, as espoused in Part III of his dissent to *Pope*, was to prevent the government from criminalizing the possession or sale of obscene materials "absent some connection to minors, or obtrusive display to unconsenting adults."[159] This would necessitate a reevaluation of the *Roth* holding that obscene material is not protected by the first amendment.[160] Under Justice Stevens' reasoning, *Roth* would no longer be widely applicable. Only material obtrusively displayed, for instance, at a drive-in movie or on television, or involving minors, could be deemed obscene and therefore unprotected.[161] Justice Stevens found authority in the first amendment for his proposal. He believed the Bill of Rights overpowered all attempts by state governments to utilize their police powers to regulate the morality of their communities. "'[O]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds' . . . . [A] 'desire to control the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment.'"[162]

The inability of courts, legislatures and agencies to imple-

---

with a reduction in the number of violent sex crimes. E. Kiester, Crimes with No Victims 52 (1972).

157 Smith v. United States, 431 U.S. 291, 303 (1977).

158 *See* Young v. American Mini-Theaters, 427 U.S. 50 (1976); Schad v. Mount Ephraim, 452 U.S. 61, 79 (1981); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

159 Pope v. Illinois, 107 S. Ct. 1918, 1927 (1987) (Stevens, J., dissenting).

160 Roth v. United States, 354 U.S. 476 (1952).

161 *Pope*, 107 S. Ct. at 1927.

162 *Id.* at 1930 (citing Stanley v. Georgia, 394 U.S. 557, 565-66 (1969)).

ment the approaches advanced by the Supreme Court in *Roth*, *Miller*, and now *Pope* support Justice Stevens' proposal. Perhaps his idea, arguably more consistent with constitutional values, would prove to be a more practical approach than the current formulation. Under the system envisioned by Justice Stevens, responsibility for pornography regulation would be taken away from the courts. It would be up to the public to decide whether to either institute a constitutional amendment,[163] as Justice Douglas had proposed, or to leave the issue up to the "free marketplace of ideas" as Justice Stevens advised in both *Smith* and *Pope*.[164]

As the Washington Post stated in an editorial directly following the *Pope* decision, "[t]here is no room for subjective standards in criminalizing behavior that is otherwise protected by the First Amendment."[165] The Court in *Pope* perpetuated a standard that is probably as subjective and as vulnerable to community and majoritarian influence as the tests preceding it. Instead of advocating increasingly subtle and formalistic distinctions, the Court might be better advised, as Justice Stevens suggested, to wipe the slate clean.[166] Except in very limited circumstances, criminal statutes outlawing pornographic materials and penalizing individuals for the sale, possession, or creation of such materials should be invalidated as violative of the first amendment.

One legal scholar has proposed that "although the ultimate solution would be to rid the nation of obscenity legislation directed at consenting adults and to revitalize obscenity's First Amendment protections, in light of our conservative times, such a solution . . . would be futile."[167] On the contrary, the constitutional concerns at stake demand that this solution not be dismissed as unattainable. While the Supreme Court persists in trying to find the definitive test for obscenity, some scholars have suggested throwing out the test completely. This school of thought has been advocated by strong dissents in each of the major obscenity cases of the past decades. The empirical evidence of widespread use and general acceptance by the population of sexually oriented materials also underline the need for a loosening of restrictions. This issue should be taken out of the ivory tower

---

163 Miller v. California, 413 U.S. 15, 41 (1973); *see supra* note 51 and accompanying text.

164 *Pope*, 107 S. Ct. at 1930; Smith v. United States, 431 U.S. 291, 320 (1977).

165 *Reprinted in* L.A. Daily L.J., June 1, 1987, at 3, col. 1.

166 *Pope*, 107 S. Ct. at 1927.

167 Comment, *supra* note 132, at 864.

and away from the analytical and Olympian scrutiny of the Court. Restrictions on freedom of expression should, if ever, "be done by constitutional amendment after full debate by the people."[168]

CONCLUSION

A review of the past several decades of Supreme Court decisions on obscenity betrays an inability on the part of the judiciary to create a test for obscenity which is both constitutionally sound and realistically practicable. *Pope v. Illinois* applied a "reasonable person" standard to *Miller v. California*'s value test in an effort to clarify the proper standard by which juries and appellate courts could identify obscenity. However, in practice, the "reasonable person" provides no real assistance to juries in this area; it only serves to cloud the issue and reduce the tests to mere semantics. The fact that the standard may be of some help to judges at the appellate level does not alleviate the problems such a nebulous standard inevitably generates: vague statutes, arbitrary enforcement, and a spreading apathy towards anti-pornography laws.

In order to preserve the constitutional interests at stake and to give courts at all levels a straightforward and viable standard by which to judge obscenity, the Court is best advised to stop building upon tests which have already proved unsatisfactory, and to reconsider Justice Stevens' proposal that "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults."[169]

Penny E. Paul

---

168 *Miller*, 413 U.S. at 41.
169 *Pope*, 107 S. Ct. at 1927.