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First Amendment--The Objective Standard for Social Value in Obscenity Cases

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CASENOTES

FIRST AMENDMENT—THE OBJECTIVE STANDARD FOR SOCIAL VALUE IN OBSCENITY CASES

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

I. INTRODUCTION

In *Miller v. California*,¹ the United States Supreme Court crafted a three-part test for judging whether material is obscene and therefore unprotected by the first amendment.² According to the *Miller* test, the fact finder must ask:

(a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³

In *Pope v. Illinois*,⁴ the Supreme Court clarified the meaning of the third prong of the *Miller* test, namely, the value element. Consolidating two unrelated obscenity prosecutions, the Court considered whether an adjudicator must apply national or local community standards to decide whether allegedly obscene material has redeeming social value. Both trial courts had instructed the juries to use a local standard to determine the value issue.

The *Pope* Court held that a fact finder must decide the value question using an objective, reasonable person standard and not that of the local community.⁵ Only a reasonable person standard, the Court reasoned, could effectively protect material under the first

¹ 413 U.S. 15 (1973).

² *Id.* at 24. The first amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech or of the press" U.S. CONST. amend. I.

³ *Miller*, 413 U.S. at 24 (citations omitted)(quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

⁴ 107 S. Ct. 1918 (1987).

⁵ *Id.* at 1921 (plurality opinion).

amendment. Because the trial courts had applied a state, not a reasonable person, standard to the value question, the Supreme Court declared the jury instructions given at the trials unconstitutional.⁶

The Court did not, however, automatically reverse the defendants' convictions. Instead, it determined that the constitutional errors in the jury instructions were subject to harmless error scrutiny.⁷ Therefore, the Court remanded the cases to the Illinois Court of Appeals to determine whether the evidence in the trial records established guilt beyond a reasonable doubt.⁸

The issue of community obscenity standards is not new to the Supreme Court. Since 1957, when the Court articulated its first obscenity test in *Roth v. United States*,⁹ it has considered the question of community standards. However, until *Pope v. Illinois*, the standards question had been largely a peripheral issue.¹⁰ Moreover, until *Pope*, the Court had never focused squarely on the value element of the *Miller* test, but only on the first two prongs.¹¹ Thus, *Pope* is significant in the evolution of obscenity law because the decision addressed the value prong and the appropriate standards for determining value for the first time.

This Note discusses the formation of the *Miller* test and its subsequent refinement. It examines the facts, procedural history, and Supreme Court opinions of *Pope v. Illinois*. Finally, this Note explores the impact of *Pope* on future obscenity cases, ultimately concluding that the decision will not significantly affect or clarify the law of obscenity.

II. CRAFTING THE OBSCENITY STANDARD

A. FROM *ROTH* TO *REDRUP*

In *Roth v. United States*,¹² the Supreme Court crafted its first ob-

⁶ *Id.* (plurality opinion).

⁷ *Id.* at 1922 (plurality opinion). According to the Court, if the trial records show on remand that the magazines at issue were obscene beyond a reasonable doubt, the error was harmless and the convictions should stand. *Id.* (plurality opinion).

⁸ *Id.* (plurality opinion).

⁹ 354 U.S. 476 (1957).

¹⁰ See, e.g., *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962) (the Court focused on defining "patent offensiveness" as hard-core pornography, but also stated that to determine whether material is patently offensive, a national standard should be used); *Miller v. California*, 413 U.S. at 37 (the Court's holding established the three-pronged test for obscenity, but, in dicta, the Court noted that the first two prongs of the test refer to local standards).

¹¹ See *infra*, notes 25, 28, 41 and accompanying text for a discussion of the Court's interpretation of the first two prongs.

¹² 354 U.S. 476 (1957).

scenity test. In *Roth*, which involved a defendant who was convicted for mailing allegedly obscene material, the Court held that obscenity is not speech at all.¹³ Therefore, the Court reasoned, the first amendment does not protect obscene material. In so holding, Justice Brennan, writing for a plurality of the Court, explicitly distinguished "obscenity" from material that is merely sexually-oriented and which does enjoy constitutional protection.¹⁴ Justice Brennan reasoned that "speech" does not include all utterances, and, therefore, all utterances are not constitutionally protected by the first amendment.¹⁵ For example, he pointed to statutes that prohibited libel and blasphemy, two offenses not protected by the first amendment.¹⁶ By excluding obscenity from the definition of constitutionally protected speech, the Court established the theoretical framework for obscenity law.

According to the *Roth* Court, to test whether sexually-oriented material is legally obscene, the fact finder must ask "[w]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest."¹⁷ If the material does so appeal, it would be considered legally obscene. The Court defined "prurient" as "a shameful or morbid interest in nudity, sex, or excretion, [which] goes substantially beyond customary limits of candor in description or representation of such matters."¹⁸ Whether the material appeals to prurient interests, according to the *Roth* Court, must be determined according to the values of an objective, reasonable person.¹⁹ The Court thus rejected the then-prevailing standard of *Regina v. Hicklin*,²⁰ which allowed courts to judge material by testing the effect of an isolated excerpt on particularly sensitive individuals.²¹

Although the *Roth* Court clearly specified that fact finders

¹³ *Id.* at 485 (plurality opinion) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

¹⁴ *Id.* (plurality opinion).

¹⁵ *Id.* at 486-87 (plurality opinion) (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)). See also F. SCHAUER, *THE LAW OF OBSCENITY* 35-36 (1976).

¹⁶ *Roth*, 354 U.S. at 486-87 (plurality opinion) (quoting *Beauharnais*, 343 U.S. at 266).

¹⁷ *Id.* at 489 (plurality opinion).

¹⁸ *Id.* at 487 n.20 (plurality opinion) (quoting MODEL PENAL CODE § 207.10 (2) (Tent. Draft No. 6, 1957)). An alternative definition of "prurient" offered by the Court was "material having a tendency to excite lustful thoughts." *Id.* See also *Brockett v. Spokane*, 472 U.S. 491, 498 (1985) (material that provokes "only normal, healthy desires" is not obscene under the *Roth* standard).

¹⁹ *Roth*, 354 U.S. at 489 (plurality opinion).

²⁰ L.R. 3 Q.B. 360 (1868).

²¹ *Roth*, 354 U.S. at 489 (plurality opinion).

should use the values of the average community member,²² the Court failed to state explicitly whether it was referring to the local or national community. However, it can be inferred that the Supreme Court intended to use the standards of the local community. The trial court required jurors to evaluate the impact of allegedly obscene material "upon the average person in the community" using "present-day standards of the community."²³ Because jurors have a local conception of their community and because the Supreme Court approved the jury instructions verbatim, it follows that the Supreme Court intended to use the standards of the local community in determining whether material is obscene.

Although the *Roth* Court did not explicitly specify that a lack of value must be an element in determining obscenity, the Court indicated in dicta that such a requirement exists. Justice Brennan wrote that "implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance."²⁴ However, the lack of social value of allegedly obscene material was not part of the *Roth* test itself. Instead, it was a justification to exclude obscenity from first amendment protection.²⁵

Five years later, in *Manual Enterprises v. Day*,²⁶ the Court clarified the question of community standards, stating that a "national standard of decency" should govern obscenity cases in order to prevent "the intolerable consequence of denying some sections of the country access to materials, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency."²⁷ This patchwork of community standards would result, according to Justice Harlan, if each local community enacted its own obscenity laws.²⁸

In *Manual Enterprises*, the Court introduced the concept of "patent offensiveness," which the Court defined as material which "af-front[s] community standards."²⁹ The *Manual Enterprise* Court overturned the Post Office Department's declaration that three homosexual magazines were obscene. The Court derived the patent-offensiveness standard from the requirements of the Comstock

²² *Id.* See also *Smith v. United States*, 431 U.S. 291, 304 (1977); *Miller v. California*, 413 U.S. 15, 20 (1973).

²³ *Roth*, 354 U.S. at 490.

²⁴ *Roth*, 354 U.S. at 484 (plurality opinion).

²⁵ F. SCHAUER, *supra* note 15, at 137.

²⁶ 370 U.S. 478 (1962)(plurality opinion).

²⁷ *Id.* at 488 (plurality opinion).

²⁸ See *id.* (plurality opinion).

²⁹ *Id.* at 482 (plurality opinion).

Act.³⁰ That statute prohibited the mailing of "obscene, lewd, lascivious, indecent, filthy or vile" material.³¹ In effect, according to the Court, this language limited obscenity to hard-core pornography,³² a standard which was adopted by the Supreme Court in subsequent obscenity cases.³³

The *Manual Enterprises* test, like that of *Roth*, did not contain an explicit value element. However, the *Manual Enterprises* Court held that the "patent offensiveness" prong should act as a value check on the "prurient appeal" element.³⁴ The Court recognized that material could appeal to the prurient interest without being patently offensive. The Court sought to protect material which appealed to the prurient interest but which, at the same time, had literary, scientific or artistic value.³⁵ Such material, therefore, must both appeal to the prurient interest and be patently offensive in order to be obscene.³⁶

The Court reconfirmed this point two years later in *Jacobellis v. Ohio*,³⁷ in which it reversed the conviction of the manager of a movie theater for showing allegedly obscene films. Justice Brennan, for the plurality, stated that the first amendment absolutely protects work that appeals to prurient interests if the work has social value.³⁸ According to Justice Brennan, the two elements could not be weighed against each other. Only material that "utterly" lacks social importance could be restricted regardless of the material's prurient appeal.³⁹ The Court confirmed that an obscenity analysis should be based on national, not local, standards.⁴⁰

The new "utterly without value" standard became the basis of the Court's first explicit value test. In *Memoirs v. Massachusetts*,⁴¹ the Court reversed the condemnation of a book popularly known as *Fanny Hill*. The Court stated that material is obscene only if "(a) the dominant theme taken as a whole appeals to a prurient interest in

³⁰ 18 U.S.C. § 1461 (1955).

³¹ *Id.*

³² See also *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973) (patent offensiveness is limited to hard-core pornography). Accord *Smith v. United States*, 431 U.S. 291, 303 (1977).

³³ See, e.g., *Miller v. California*, 413 U.S. 15, 27 (1973).

³⁴ *Manual*, 370 U.S. at 487.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 378 U.S. 184, 196 (1964) (plurality opinion). Justice Brennan and Justice Goldberg constituted the plurality in *Jacobellis*. That only two Justices joined the Court's opinion illustrates the sharp division among the Justices on how to define obscenity.

³⁸ *Id.* at 191 (plurality opinion).

³⁹ *Id.* (plurality opinion).

⁴⁰ *Id.* at 195 (plurality opinion).

⁴¹ 383 U.S. 413 (1966) (plurality opinion).

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.⁴² The *Memoirs* Court stated that allegedly obscene material must satisfy *each* prong of the test and, again, that the value of a work may not "be weighed against nor cancelled by its prurient appeal or patent offensiveness."⁴³ If a work has any redeeming social value at all, the first amendment protects it. In effect, the *Memoirs* test barred only hard-core pornography.⁴⁴ By setting the value prong against the first two prongs of the test and by using the value prong as a check on the other prongs, the *Memoirs* Court set forth a fundamental tenet of first amendment jurisprudence: only valuable speech will be protected. The Court left open, however, the issue of geographically-based standards, thus setting the stage for the debate in *Pope v. Illinois*.

At the time of *Memoirs*, the Court was divided on how to define obscenity; this division sharpened after the decision in *Memoirs*. One year after *Memoirs*, in *Redrup v. New York*,⁴⁵ the Court began a six-year practice of reversing obscenity convictions *per curiam* if at least five members of the Court, applying their separate tests, thought the material in question was not obscene.⁴⁶ *Redrup* consolidated three unrelated obscenity cases in which the defendants were convicted for violating New York, Kentucky, and Arkansas obscenity laws, respectively.⁴⁷ The Court, in a cursory opinion, explained its reason for reversing the convictions:

Two members of the Court have consistently adhered to the view that a State is utterly without power to suppress, control, or punish the distribution of any writings or pictures upon the ground of their "obscenity." A third has held to the opinion that a State's power in this area is narrowly limited to a distinct and clearly identifiable class of material. Others have subscribed to a not dissimilar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless [it meets the *Memoirs* test]. . . . Another Justice has not viewed the "social value" element as an independent factor in the judgment of obscenity.

Whichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand. Accord-

⁴² *Id.* at 418 (plurality opinion).

⁴³ *Id.* at 419 (plurality opinion).

⁴⁴ See sources cited *supra* note 32.

⁴⁵ 386 U.S. 767 (1967)(*per curiam*).

⁴⁶ See, e.g., *Carlos v. New York*, 396 U.S. 119 (1969)(*per curiam*); *Henry v. Louisiana*, 392 U.S. 655 (1968)(*per curiam*).

⁴⁷ *Redrup*, 386 U.S. at 768-69.

ingly, the judgment in each case is reversed.⁴⁸

As the above excerpt suggests, the *Redrup* Court was sharply divided on the definition of obscenity. This division and uncertainty would not be resolved until six years later, in *Miller v. California*.⁴⁹

B. MILLER AND ITS REFINEMENT

Seven years after *Memoirs*, the Supreme Court refined the tripartite test in *Miller v. California*⁵⁰ and vacated the defendant's conviction for mailing unsolicited, sexually-explicit advertising brochures.⁵¹ The *Miller* case was the first time a majority of the Supreme Court agreed on a definition of obscenity since the *Roth*⁵² decision sixteen years earlier. The Court crafted the tripartite test, each element of which must be met, by synthesizing the obscenity tests it had designed in previous cases. For example, the Court reaffirmed the rule of *Roth* that, to be considered obscene, a work must appeal, as a whole, to the prurient interest of the average person, using contemporary community standards.⁵³ The *Roth* standard became the first prong of the *Miller* test.⁵⁴

The second prong, which requires that obscene material be patently offensive, was derived from the Court's decision in *Manual Enterprises* and prohibits only hard-core pornography.⁵⁵ The Court in *Miller* stated that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard-core' sexual conduct specifically defined by the regulating state law, as written or construed."⁵⁶ By requiring a state statute to prohibit specifically the type of portrayal that would be deemed obscene, the Court also added a due process standard to the second prong.

The third prong of the *Miller* test, the value element, represented the most significant departure from the Court's previous tests.⁵⁷ The *Miller* Court specifically rejected the *Memoirs* standard

⁴⁸ *Id.* at 770-71 (citations omitted).

⁴⁹ 413 U.S. 15 (1973).

⁵⁰ *Id.*

⁵¹ *Id.* at 37.

⁵² *Roth v. United States*, 354 U.S. 476 (1957).

⁵³ *Miller*, 413 U.S. at 24 (citing *Roth*, 354 U.S. at 489).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 27.

⁵⁷ F. SCHAUER, *supra* note 15, at 47.

of "utterly without redeeming social value."⁵⁸ Instead, it defined obscene material as work, which, "taken as a whole, lacks serious literary, artistic, political, or scientific value."⁵⁹

Chief Justice Burger, writing for the Court in *Miller*, rejected the "utterly without value" standard of *Memoirs* because this standard created a "burden virtually impossible to discharge under our criminal standards of proof."⁶⁰ Instead, Chief Justice Burger adopted a value standard that was novel in at least three ways. First, requiring the material "taken as a whole" to have "serious" value allowed the fact finder to consider the intent behind the material's dissemination. According to the Court's standard, the first amendment protects material with literary, artistic, political, or scientific content only if that content is included for a legitimate reason.⁶¹ The standard ensured that the sham inclusion of valuable material within an otherwise obscene work will not be sufficient to obtain first amendment protection. Thus, no longer would "[a] quotation from Voltaire in the fly-leaf of a book . . . redeem an otherwise obscene publication."⁶²

Second, the *Miller* test restricted the meaning of "social importance" to include works with only literary, artistic, political, or scientific value. Although "value" should be broadly construed under the test, the list defining social value was exhaustive.⁶³ The list, however, did not include entertainment value. If it had, very little material would fall beyond the protection of the first amendment, because even worthless material can be a source of entertainment for some people.

Finally, the *Miller* test was novel because it addressed the issue of which standard, national or local, the fact finder should apply in obscenity cases. The Court stated explicitly that "prurient interest" and "patent offensiveness" are questions of fact which should be judged according to local community standards.⁶⁴

⁵⁸ *Miller*, 413 U.S. at 24. See *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)(plurality opinion).

⁵⁹ *Memoirs*, 383 U.S. at 418 (plurality opinion).

⁶⁰ *Id.* at 22 (plurality opinion).

⁶¹ *Id.* at 24 (plurality opinion).

⁶² *Id.* at 25 n.7 (plurality opinion)(quoting *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)).

⁶³ F. SCHAUER, *supra* note 15, at 142.

⁶⁴ 413 U.S. at 37. See also *Smith v. United States*, 431 U.S. 291, 300-01 (1977)(Prurient interest and patent offensiveness are questions of fact which the jury must resolve using the standards of "the community as a whole." *Id.* at n.6). But see *United States v. Hamling*, 418 U.S. 87, 105-06 (1974)("community" should be defined as the trial court's judicial district).

By contrast, the *Miller* Court did not specify which standard, national or local, applies to the value element; in fact, it failed to mention any standard at all in its discussion of value. Instead, the Court said 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."⁶⁵

By addressing the value element separately from the prurient interest and patent offensiveness elements to which local standards are to apply, the *Miller* Court implied that a community standard other than a local standard should be used.⁶⁶ However, the Court declined to articulate a specific value standard. Thus, the *Miller* Court set the stage for the Court's consideration in *Pope* of the appropriate standards to use in the evaluation of the value element.

In *Pope*, the Court addressed only the issue of whether to apply local or national community standards to the question of whether a work has redeeming social value. It did not evaluate the meaning of the term "value." In fact, the exact definition of "value," unlike the definitions of "prurient interest" and "patent offensiveness," has never been determined by the Supreme Court.⁶⁷ Thus, the exact scope of what may be considered redeeming social value remains uncertain. Such uncertainty, in turn, endangers the due process right of notice of criminality of those who deal with sexually-explicit material.⁶⁸

III. POPE V. ILLINOIS

A. FACTS AND PROCEDURAL HISTORY

In *Pope v. Illinois*,⁶⁹ the Supreme Court considered two unrelated but factually similar obscenity cases, *People v. Morrison*⁷⁰ and

⁶⁵ *Miller*, 413 U.S. at 34; accord *Smith v. United States*, 431 U.S. 291, 301 (1977).

⁶⁶ See *Pope*, 107 S. Ct. at 1920-21 (first two prongs of the *Miller* test apply a local community standard).

⁶⁷ On its face, "value" does not seem to be more self-defining than "prurient interest" and "patent offensiveness." Arguably, the *Miller* language does provide some guidance in the analysis of "value," for it specifies types of value—literary, artistic, political, or scientific. Nonetheless, different people interpret "value" differently, just as they interpret "offensiveness" or "prurience" differently. See ATT'Y GEN. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 155 (1970).

⁶⁸ The fourteenth amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

⁶⁹ 107 S. Ct. 1918 (1987).

⁷⁰ 138 Ill. App. 3d 595, 486 N.E.2d 345 (1985).

People v. Pope.⁷¹ In both cases, the defendants sold sexually-explicit magazines to Illinois undercover police detectives while working as attendants in adult book stores.⁷² The defendants were charged with the offense of "obscenity" for selling the magazines.⁷³

At trial, both defendants argued that the then-current version of the Illinois obscenity statute violated the first and fourteenth amendments because it ordered fact finders to use a local, not a national, community standard to determine the value of allegedly obscene material.⁷⁴ Each trial court rejected the defendants' assertions, instead instructing the jury to refer to the values of ordinary citizens in the State of Illinois.⁷⁵

The juries found both defendants guilty and both subsequently appealed.⁷⁶ The Illinois Court of Appeals, Second District, affirmed the convictions, again rejecting the defendants' assertions that the issue of whether the works have value must be determined using national, not local, community standards.⁷⁷ The Illinois Supreme Court denied *certiorari*.⁷⁸ The United States Supreme Court, however, granted *certiorari* to determine the appropriate standard by which to analyze the value element of the *Miller* test.⁷⁹

B. THE PLURALITY OPINION

1. *Establishing an Objective Standard of Value*

Justice White, joined by Chief Justice Rehnquist and Justices Powell and O'Connor, held that the fact finder must apply the standards of a reasonable person in the United States to determine the

⁷¹ 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985).

⁷² *Pope*, 107 S. Ct. at 1920 (plurality opinion).

⁷³ *Id.* (plurality opinion). The then-current version of the Illinois obscenity statute forbade selling, publishing, and participating in obscene works. According to that statute, material is obscene.

if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

ILL. REV. STAT. ch. 38, para. 11-20(b)(1983)(amended 1986). The statute incorporated the *Roth* test. See *supra* notes 17-19 and accompanying text for an explanation of the *Roth* test.

⁷⁴ *Pope*, 107 S. Ct. at 1920 (plurality opinion).

⁷⁵ *Id.* (plurality opinion). The instructions stated that the jury should determine obscenity using a state-wide standard instead of the "standard of any single city, town, or region" within Illinois. *Id.* at 1920 n.2 (plurality opinion).

⁷⁶ *Id.* at 1920 (plurality opinion).

⁷⁷ *Id.* (plurality opinion).

⁷⁸ *Id.* (plurality opinion).

⁷⁹ 107 S. Ct. 61 (1986).

value of allegedly obscene material.⁸⁰ The Court maintained that local community values applied only to the first two prongs of the *Miller* test—prurient interest and patent offensiveness.⁸¹ The Court noted that *Miller* did not discuss value in terms of local standards, an omission which the Court deemed a deliberate choice and not a mere oversight.⁸² The *Miller* Court applied a different standard to the value element, according to the Court, because, unlike prurient interest or patent offensiveness, the literary, artistic, political, and scientific value of material does not vary from community to community.⁸³ To the Court, a local community's evaluation of allegedly obscene material is irrelevant, because as long as material has "serious value" the first amendment protects it.⁸⁴

To determine whether material has "serious value," the fact finder must refer to the standards of a reasonable person. The Court held that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."⁸⁵

The rationale underlying the Court's test is that a reasonable person standard is the most effective way to protect a minority group's views.⁸⁶ Even if only a small minority of the population finds value in a work, the Court reasoned, a "reasonable person" may still conclude that the work has value.⁸⁷ Thus, a work which suffers from unpopularity could still receive first amendment protection. With a local standard, however, a juror would have to apply the local community's standards, regardless of whether a reasonable person would agree with her.⁸⁸ The application of a local standard could ban the same unpopular work which a minority of the community found appealing. If, by objective standards, that work is valuable, banning the work would violate the first amendment rights of the minority.⁸⁹

Because both trial courts had applied a state-wide standard to the value element and rejected a national standard, the Supreme

⁸⁰ *Pope*, 107 S. Ct. at 1921 (plurality opinion).

⁸¹ *Id.* at 1920 (plurality opinion).

⁸² *Id.* at 1921 (plurality opinion).

⁸³ *Id.* (plurality opinion).

⁸⁴ *Id.* (plurality opinion).

⁸⁵ *Id.* (plurality opinion).

⁸⁶ *Id.* at n.3 (plurality opinion).

⁸⁷ *Id.* (plurality opinion).

⁸⁸ *Id.* (plurality opinion).

⁸⁹ *See id.* (plurality opinion).

Court held that the jury instructions were unconstitutional.⁹⁰ The Court therefore vacated the opinion of the court of appeals.⁹¹

2. Harmless Error Analysis

Having found the jury instructions unconstitutional, the Court then considered whether to reverse the defendants' convictions outright or preserve the verdicts if the erroneous instructions were found to be harmless error.⁹² According to the plurality, a constitutional error is harmless and will not require automatic reversal of the verdict "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines"⁹³

The Court decided not to reverse the convictions. Instead, it remanded the case to the Illinois Court of Appeals because the unconstitutional jury instruction did not preclude the jury from considering the value question.⁹⁴ On remand, the court of appeals was instructed to determine whether any rational juror, if properly instructed, could find value in the magazines.⁹⁵

The Court also declined to invalidate the repealed state statute because even if it did so, the defendants would still be vulnerable to another prosecution under the new statute.⁹⁶ Even if they were acquitted under the former statute, a second prosecution could occur because the repealed statute had been interpreted as incorporating the third prong of the *Memoirs* "utterly without redeeming social value" test,⁹⁷ a standard which required a higher burden of proof than the one articulated in *Miller*.⁹⁸ Thus, the state could prosecute obscenity more easily under the new constitutional standards and

⁹⁰ *Id.* at 1921 (plurality opinion).

⁹¹ *Id.* at 1923 (plurality opinion).

⁹² *Id.* at 1921 (plurality opinion).

⁹³ *Id.* at 1923 (plurality opinion).

⁹⁴ *Id.* at 1921 (plurality opinion).

⁹⁵ *Id.* (plurality opinion).

⁹⁶ *Id.* (plurality opinion). The new statute provides, in relevant part:

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

ILL. REV. STAT. ch. 38, paras. 11-20 (b)(1985). The new statute became effective on January 1, 1986.

⁹⁷ *Pope*, 107 S. Ct. at 1921 (plurality opinion).

⁹⁸ *Id.* at 1920 n.1 (plurality opinion); *People v. Ridens*, 59 Ill.2d 362, 373, 321 N.E.2d 264, 269-70. (1974).

the defendants could not reasonably claim that they had inadequate notice that the state would prosecute the sale of obscene material.⁹⁹

Moreover, the Court noted that simply invalidating the repealed statute would not prevent the Illinois courts from applying unconstitutional value standards in the future.¹⁰⁰ The Court wanted to determine the proper value standard to prevent constitutional errors in future obscenity cases. For these reasons, the Court maintained that invalidating the repealed obscenity statute would be ineffective to protect the defendants' rights.¹⁰¹

The plurality stated that the convictions did not require automatic reversal because the unconstitutional jury instructions did not necessarily constitute substantial errors.¹⁰² The Court compared the situation in *Pope* to that in *Rose v. Clark*,¹⁰³ a recent murder case in which a judge's erroneous instructions on the issue of malice improperly shifted the burden of proving malice to the defendant.¹⁰⁴ The Court applied a harmless error inquiry in *Rose* because it determined that the shift in the burden of proof was not fundamentally unfair.¹⁰⁵ That is, absent substantial errors, such as the denial of counsel or bias of the adjudicator, a conviction should be affirmed "where a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt" ¹⁰⁶

In *Rose*, the Court decided the error in the instructions lacked fundamental unfairness and refused to reverse the verdict automatically for two reasons. First, despite the error, the Court reasoned that the jury might have considered whether the defendant had malice and, therefore, would have reached the correct verdict.¹⁰⁷ Second, the Court reasoned that "[w]hen a jury is instructed to presume malice from predicate facts, it still must find those facts beyond a reasonable doubt."¹⁰⁸ The Court noted that in many cases the predicate facts establish intent, "so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury."¹⁰⁹ According to the Court in *Rose*, harmless error inquiry is to be applied as long as the trial rec-

⁹⁹ See *Miller*, 413 U.S. at 24.

¹⁰⁰ *Pope*, 107 S. Ct. at 1921 (plurality opinion).

¹⁰¹ *Id.* (plurality opinion).

¹⁰² *Id.* (plurality opinion).

¹⁰³ *Id.* at 1922 (plurality opinion).

¹⁰⁴ *Rose*, 106 S. Ct. 3101 (1986).

¹⁰⁵ *Id.* at 3107 (plurality opinion).

¹⁰⁶ *Id.* (plurality opinion).

¹⁰⁷ *Id.* at 3107 (plurality opinion).

¹⁰⁸ *Id.* at 3108 (plurality opinion).

¹⁰⁹ *Id.* at 3107-08 (plurality opinion).

ord contains facts which establish guilt beyond a reasonable doubt, because a jury's possible reliance on an unconstitutional presumption is not a sufficient reason to vacate a conviction.¹¹⁰

Applying the reasoning of *Rose*, the Supreme Court in *Pope v. Illinois* noted that the jurors did consider facts relating to the value issue. They had to find, among other things, that the magazines were "utterly without redeeming social value."¹¹¹ Thus, although the jury instructions were unconstitutional, the Court stated, "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."¹¹² In articulating this standard, the Court specifically overruled cases decided prior to *Rose* which required an automatic reversal if the instructions did not require the jury to consider each element of the crime under the proper standard of proof.¹¹³

After deciding to apply the harmless error standard, the Court indicated that it had the authority to decide whether, based on the trial record, the constitutional error was harmless.¹¹⁴ However, the Court declined to decide that question in *Pope*, noting that it must decide harmless error questions sparingly.¹¹⁵ The Court therefore vacated the judgments and remanded the case to the Illinois Court of Appeals to decide whether, by applying the reasonable person standard, a rational juror could have found value in the material.¹¹⁶

C. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia agreed with the Court's decision to remand *Pope v. Illinois* for harmless error inquiry.¹¹⁷ He maintained that the error was probably harmless because he doubted that a jury which was instructed to use a state-wide community standard would convict the defendants but, under a reasonable person standard, would not do so.¹¹⁸ Further, if a reviewing court determines that no rational juror could find value in the magazines, according to Justice Scalia, allowing the convictions to stand would not offend the defendants' constitutional rights.¹¹⁹

¹¹⁰ *Id.* at 3108 (plurality opinion)(emphasis in original).

¹¹¹ *Id.* at 3107 (plurality opinion).

¹¹² *Pope*, 107 S. Ct. at 1922 (plurality opinion).

¹¹³ *Id.* (plurality opinion).

¹¹⁴ *Id.* at 1923 n.7 (plurality opinion). Herein, the Court overruled *Cabana v. Bullock*, 474 U.S. 376, 384 (1986).

¹¹⁵ *Pope*, 107 S. Ct. at 1922-23 (plurality opinion).

¹¹⁶ *Id.* at 1923 (plurality opinion)(citing *Rose*, 106 S. Ct. at 3109).

¹¹⁷ *Id.* (plurality opinion).

¹¹⁸ *Id.* (Scalia, J., concurring).

¹¹⁹ *Id.* (Scalia, J., concurring).

Justice Scalia agreed with the plurality that an objective, reasonable person standard was consistent with the *Miller* test, but he asserted that the *Miller* test itself was flawed and should be reevaluated.¹²⁰ He stated that it is futile to try to assess objectively the value of material because people's tastes vary so widely. Logic, Justice Scalia said, has very little to do with aesthetics, implying that obscenity cannot be defined at all.¹²¹ He noted, for example, that there are "many accomplished people who have found literature in Dada and art in the replica of a soup can."¹²²

Because of this wide range of taste, Justice Scalia also criticized the test which Justice Stevens set out in his dissent. That test requires the trier of fact to ask whether a reasonable person could find value in allegedly obscene material.¹²³ The answer to that inquiry, according to Justice Scalia, will always be affirmative because there will always be someone who finds some value in a work.¹²⁴ Justice Scalia thus criticized Justice Stevens' test, although he agreed with Justice Stevens' objectives.

D. JUSTICE BLACKMUN'S PARTIAL CONCURRENCE AND PARTIAL DISSENT

Justice Blackmun concurred with the plurality's reasonable person test, stating that it stands for "the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population"¹²⁵ He stated that the reasonable person test will effectively safeguard material deserving first amendment protection because "even a minority view among reasonable people that work has value may protect that work from being judged 'obscene.'"¹²⁶ Without explaining why, however, Justice Blackmun agreed with Justice Stevens' dissent that harmless error inquiry was inappropriate in this case.¹²⁷

¹²⁰ *Id.* (Scalia, J., concurring).

¹²¹ *Id.* (Scalia, J., concurring).

¹²² *Id.* (Scalia, J., concurring).

¹²³ *Id.* (Scalia, J., concurring)(citing *id.* at 1927 (Stevens, J., dissenting)). Justice Stevens maintained that the first amendment protects material "if *some reasonable persons* could consider it as having serious . . . value." *Id.* (Stevens, J., dissenting)(emphasis in original).

¹²⁴ *Id.* (Scalia, J., concurring).

¹²⁵ *Id.* at 1924 (Blackmun, J., concurring in part and dissenting in part).

¹²⁶ *Id.* (Blackmun, J., concurring in part and dissenting in part).

¹²⁷ *Id.* (Blackmun, J., concurring in part and dissenting in part)(citing *id.* (Stevens, J., dissenting)).

E. JUSTICE STEVENS' DISSENT

Justice Stevens agreed with the plurality that the trial courts' jury instructions were unconstitutional, but he dissented from the Court's disposition of the case for several reasons.¹²⁸ First, Justice Stevens stated that the harmless error inquiry was inappropriate and, therefore, that the convictions should have been reversed.¹²⁹ According to Justice Stevens, a harmless error analysis is available only if a jury properly finds each element of the crime.¹³⁰ He stated that "[t]he harmless error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings."¹³¹

Thus, Justice Stevens asserted that in obscenity cases, the prosecution must prove the existence of each of the three elements of the *Miller* test beyond a reasonable doubt.¹³² In this case, however, because of the erroneous instructions regarding value, the jury had failed to use the correct standard of proof in considering the third element of the test.¹³³ He compared this situation to a case which held that "the constitutional right to trial by jury forbids a judge from directing a verdict for the prosecution."¹³⁴ A jury's failure to find one or all of the essential elements of the crime "can never constitute harmless error," Justice Stevens concluded.¹³⁵

Justice Stevens then rejected the reasonable person standard because it incorrectly assumes that the "reasonable person" is an absolute standard and that all reasonable people will agree as to which material is obscene.¹³⁶ Justice Stevens argued that reasonable people will differ on the value question, with some reasonable people finding value in material which other reasonable people conclude is worthless, and, therefore, the Court's standard offered no real guidance to the jury.¹³⁷ Without effective jury instructions, according to Justice Stevens, valuable work may be banned in viola-

¹²⁸ *Id.* (Stevens, J., dissenting).

¹²⁹ *Id.* at 1925 (Stevens, J., dissenting).

¹³⁰ *Id.* (Stevens, J., dissenting).

¹³¹ *Id.* (Stevens, J., dissenting) (emphasis in original).

¹³² *Id.* (Stevens, J., dissenting).

¹³³ *Id.* (Stevens, J., dissenting).

¹³⁴ *Id.* (Stevens, J., dissenting) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)).

¹³⁵ *Id.* (Stevens, J., dissenting) (citing *Henderson v. Morgan*, 426 U.S. 637, 650 (1976); *Cabana v. Bullock*, 474 U.S. 376, 384 (1986)). The *Pope* plurality specifically overruled *Cabana v. Pope*, 107 S. Ct. at 1922 n.7 (plurality opinion).

¹³⁶ *Id.* at 1926 (Stevens, J., dissenting).

¹³⁷ *Id.* (Stevens, J., dissenting).

tion of the first amendment.¹³⁸

Justice Stevens offered an alternative standard, asserting that the first amendment protects material "if *some reasonable persons* could [find] serious literary[,] artistic, political, or scientific value" in it.¹³⁹ According to this standard, if *anyone* finds serious value in allegedly obscene material, it should be protected. Justice Stevens argued that this standard would prevent obscenity laws from censoring or severely limiting the availability of material to the public.¹⁴⁰

Justice Stevens also disagreed with the plurality because of "insurmountable problems involved in [the] criminalization" of obscenity.¹⁴¹ No definition of obscenity, he stated, can adequately notify the public about which material is legally obscene and which is merely sexually-explicit.¹⁴² Justice Stevens noted that "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.'"¹⁴³ Arbitrary and selective prosecutions, which result from a vague definition of obscenity, decrease the effectiveness of notice that certain conduct is illegal.¹⁴⁴

Justice Stevens argued that criminalizing obscene material effectively controls people's thoughts in violation of the first amendment.¹⁴⁵ Although he conceded that a state may regulate obscenity for the narrow purposes of protecting minors and unconsenting adults, he maintained that such interests do not justify the broad criminalization of obscene material.¹⁴⁶ Instead of the state deciding for its citizens what material has value and what does not, Justice Stevens asserted that the population as a whole should determine the value of material.¹⁴⁷ He noted that there is a high demand for sexually-explicit material and that many well-intentioned people believe it serves a worthwhile purpose. Such a high demand indicates that many people do in fact find value in a wide range of sexually-

¹³⁸ *Id.* at 1927 (Stevens, J., dissenting).

¹³⁹ *Id.* (Stevens, J., dissenting)(emphasis in original).

¹⁴⁰ *Id.* (Stevens, J., dissenting).

¹⁴¹ *See id.* at 1929 n.11 (Stevens, J., dissenting)(defining obscenity involves "insurmountable vagueness problems").

¹⁴² *Id.* (Stevens, J., dissenting).

¹⁴³ *Id.* at 1928 (Stevens, J., dissenting)(quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

¹⁴⁴ *Id.* (Stevens, J., dissenting).

¹⁴⁵ *Id.* at 1930 (Stevens, J., dissenting).

¹⁴⁶ *Id.* (Stevens, J., dissenting)(citing *Stanley v. Georgia*, 394 U.S. 557, 567 (1969)).

¹⁴⁷ *Id.* (Stevens, J., dissenting)(citing *Smith v. United States*, 431 U.S. 291, 319 (1977)).

explicit material. Justice Stevens maintained that only "the marketplace of ideas" should determine whether material is obscene.¹⁴⁸ That is, the public, if exposed to all available types of material, will choose that which it decides has value. Justice Stevens implied that all regulation of worthless material should be left to the people themselves and not to the legislatures or the courts.¹⁴⁹

E. JUSTICE BRENNAN'S DISSENT

Justice Brennan wrote separately to reiterate his long-standing view that *any* regulation of "obscene" material, with respect to consenting adults, does not provide sufficiently clear notice to the public as to which material is legally obscene.¹⁵⁰ Lack of clear and specific notice, he asserted, will result in a "substantial erosion" of first amendment rights to freedom of speech.¹⁵¹

Justice Brennan agreed with all of Justice Stevens' dissent, except footnote eleven, in which Justice Stevens maintained that the state may constitutionally regulate the sale and exhibition, in contrast to the legality, of both obscene and nonobscene material.¹⁵²

IV. DISCUSSION AND ANALYSIS

A. THE DEBATE OVER STANDARDS

The debate over whether to use a national or local standard in defining obscenity dates back to *Manual Enterprises*,¹⁵³ in which Justice Harlan provided the first rationale for using a national standard to evaluate obscenity cases. He argued that "a national standard of decency" is appropriate, particularly if a federal statute is involved, because obscenity issues affect the entire country.¹⁵⁴ Absent specific legislation requiring that local standards be applied, according to Justice Harlan, the relevant community should be the entire country.¹⁵⁵

This argument was echoed by Justice Brennan eleven years

¹⁴⁸ *Id.* (Stevens, J., dissenting).

¹⁴⁹ *Id.* (Stevens, J., dissenting).

¹⁵⁰ *Id.* at 1924 (Brennan, J., dissenting).

¹⁵¹ *Id.* (Brennan, J., dissenting)(quoting *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1978)).

¹⁵² *Id.* at 1931 (Stevens, J., dissenting)(citing *Pope*, 107 S. Ct. 1929 n.11).

¹⁵³ 370 U.S. 478.

¹⁵⁴ *Id.* at 488. In *Manual*, the Court held that the magazines at issue were not legally obscene because they were not "patently offensive." See *supra* notes 31-32 and accompanying text for a description of how the *Manual* Court defined patent offensiveness.

¹⁵⁵ 370 U.S. at 488.

later in his powerful dissent in *Paris Adult Theater I v. Slaton*,¹⁵⁶ in which he stressed the importance of a clear definition of obscenity. Only with a clear standard could the government adequately notify people who deal with sexually-oriented material as to which material is considered legally obscene.¹⁵⁷ He maintained that one uniform national law would be easier to understand than hundreds of local laws and would provide more effective notice of the law as required by the due process clause of the fourteenth amendment.¹⁵⁸

In *Jacobellis v. Ohio*,¹⁵⁹ Justice Brennan articulated perhaps the strongest argument that has been made to support a national standard.¹⁶⁰ Stating that "it is, after all, a national constitution we are expounding,"¹⁶¹ he maintained that laws applying local standards would threaten all citizens' first amendment rights of free expression. Obscenity statutes in one locale, he argued, would have a chilling effect on communities elsewhere.¹⁶² If members of one community knew that people had been prosecuted in a nearby community for dealing with certain sexually-explicit material, they might decide not to deal with that material in their own town for fear of prosecution.¹⁶³ Distributors of sexually-oriented material, said Justice Brennan, would not risk a criminal conviction simply to test the different obscenity laws in the two communities.¹⁶⁴ For that reason, he noted, the Supreme Court has repeatedly refused to "tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines.'"¹⁶⁵

Justice Brennan's argument assumes that a national standard will be generally more permissive than local standards.¹⁶⁶ If the national standard were stricter than local ones, the national standard would effectively restrict rather than promote the availability of sexual material and would thereby frustrate Justice Brennan's goal of relatively free expression. Similarly, Justice Brennan considered the effect only of a community with strict standards relative to its neighbors; he failed to analyze the converse situation, namely, the poten-

¹⁵⁶ 413 U.S. 49, 78 (1973)(Brennan, J., dissenting).

¹⁵⁷ *Id.* at 86 (Brennan, J., dissenting).

¹⁵⁸ *Id.* (Brennan, J., dissenting)(citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

¹⁵⁹ 378 U.S. 184 (1964).

¹⁶⁰ *Id.* at 195.

¹⁶¹ *Id.*

¹⁶² *Id.* at 194.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 194-95 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

¹⁶⁶ *Id.* at 193.

tially expansive effect of a community's permissive standards on its neighbors.¹⁶⁷ As one commentator noted, however, this latter danger is probably illusory because a community whose citizens have generally permissive values regarding sexual material would be unlikely to prosecute its distribution, even if the material were legally obscene.¹⁶⁸ It would not be worthwhile for that community to prosecute material if it were not in reality considered offensive or harmful. A lack of local prosecution would not affect local inhabitants' behavior; therefore, there would be no risk of an expansive effect.

In *Miller v. California*,¹⁶⁹ Chief Justice Burger, writing for the majority, rejected the national standard for the first two prongs of the *Miller* test and instead held that fact finders must apply a statewide community standard.¹⁷⁰ He maintained that there is no ascertainable national obscenity standard because values regarding obscenity vary widely from locale to locale.¹⁷¹ Chief Justice Burger admitted that the scope of first amendment protection must be uniform in the nation, but he maintained that the factual determination of contemporary community standards could be based on local standards.¹⁷² He stated that

[u]nder 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 To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.¹⁷³

Chief Justice Burger noted that even if a uniform standard were formulated, jurors would not necessarily apply it.¹⁷⁴ Traditionally, he said, jurors use their local community's standards, qualified by the judge's limiting instructions and would be unable to apply an "abstract [national] formulation."¹⁷⁵

Further, Chief Justice Burger rejected a national standard because he believed it would stifle the local diversity of the nation. He stated:

It is neither realistic nor constitutionally sound to read the First

¹⁶⁷ *Id.* at 194. See also *Miller v. California*, 413 U.S. 15, 32 n.13 (1973).

¹⁶⁸ F. SCHAUER, *supra* note 15, at 121.

¹⁶⁹ 413 U.S. at 24.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 30. This view was first articulated by Chief Justice Warren in his dissent in *Jacobellis*, 378 U.S. 184, 199-203 (1964) (Warren, C.J., dissenting).

¹⁷² 413 U.S. at 30.

¹⁷³ *Id.* (emphasis in original).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City People in different States vary in their tastes and attitudes and this diversity is not to be strangled by the absolutism of imposed uniformity.¹⁷⁶

Chief Justice Burger's argument in *Miller* favoring a local standard explicitly addressed only the prurient interest and patent offensiveness elements of the tripartite test, not the value element. However, the arguments he uses are the same ones that other Justices have used to support local standards with regard to obscenity in general.¹⁷⁷ Therefore, Chief Justice Burger's statements are useful because they articulate the point of view of those who favor local community standards for determining value.

Ultimately, of course, the Supreme Court in *Pope v. Illinois* held that the fact finder must use an objective national standard—that of the reasonable person—to decide the value question.¹⁷⁸ After *Pope*, the fact finder in obscenity cases must judge the value of material based on how the average American would evaluate it, not on the basis of her own personal opinion.¹⁷⁹

Exactly what values the reasonable person embodies may be difficult to determine, however, because the reasonable person in obscenity cases may not be the same reasonable person in other cases, such as tort actions. In tort cases, the reasonable person is not average.¹⁸⁰ She has superior judgment and personifies "a community ideal of reasonable behavior"¹⁸¹ In obscenity cases, however, the standard is used to gauge what might be termed a person's *weaknesses* for sexually-explicit material,¹⁸² as many people consider an affinity for sexual material to be a weakness.¹⁸³

Because the reasonable person in obscenity cases has both the strengths and the weaknesses of an average person, she may provide a relatively realistic standard of behavior. Given the realistic quality of the standard, then, the outcome of an obscenity case using a reasonable person test should be predictable, especially in comparison

¹⁷⁶ *Id.* at 32-33.

¹⁷⁷ See, e.g., *Smith*, 431 U.S. at 317 (Stevens, J., dissenting); *Roth v. United States*, 354 U.S. 476, 506-07 (1957) (Harlan, J., dissenting). Although Justice Harlan advocated a local standard in *Roth*, he later changed his position in *Manual Enters. v. Day*, 370 U.S. 478, 488 (1962).

¹⁷⁸ 107 S. Ct. at 1921.

¹⁷⁹ *Id.*

¹⁸⁰ F. SCHAUER, *supra* note 15, at 73.

¹⁸¹ W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 32 (5th ed. 1984).

¹⁸² See *Smith*, 361 U.S. at 172 n.3 (Harlan, J., concurring in part and dissenting in part).

¹⁸³ See F. SCHAUER, *supra* note 15, at 73.

to cases which use a local standard. This predictable outcome is not, however, necessarily the case. A national standard may not produce an outcome that differs at all from the use of another standard.

In theory, the use of a national reasonable person standard would produce an outcome which differs from the use of a local standard to determine whether material is obscene. For example, jurors in Berkeley, California would probably judge sexually-explicit material differently from jurors in Birmingham, Alabama.¹⁸⁴ Using local standards, juries from the two communities would therefore resolve the value issue differently. Under a national standard, however, the juries would have to apply the same value standard and would therefore resolve their cases identically.

In practice, however, it is doubtful that the choice of tests would have a significant impact. Jurors are likely to find it difficult to apply an abstract national standard because the issues in obscenity cases differ significantly from those in other cases.¹⁸⁵ Obscenity is uniquely linked to strongly held, emotionally-charged *local* values, such as religion,¹⁸⁶ which is perhaps the strongest determinant of people's attitudes toward all issues, including obscenity.¹⁸⁷ Other local factors which affect people's attitudes towards obscenity include education, economic status, and occupation.¹⁸⁸

Lessons about sex and morality begin at an impressionable early age from parents and from religious and secular schools.¹⁸⁹ Because exposure to these concepts starts at such a young age and because the concepts are internalized over a long period of time, people's opinions on pornography and obscenity are deeply engrained.¹⁹⁰ Thus, it seems unlikely that a juror could immediately transcend local community norms and values which have been internalized over several decades, merely because of a judge's instruction

¹⁸⁴ See *Miller v. California*, 413 U.S. at 32-33.

¹⁸⁵ F. SCHAUER, *supra* note 15, at 73-75.

¹⁸⁶ ATT'Y GEN., COMM'N ON PORNOGRAPHY: FINAL REPORT 237-244 (1986)[hereinafter COMM'N ON PORNOGRAPHY].

¹⁸⁷ Fago & Bonora, *Conducting the Voir Dire*, in THE CARE AND FEEDING OF JURORS, Tab 4, 174 (1980)(citing G. LENSKI, THE RELIGIOUS FACTOR 45 (1977)). See also H. FEILD & L. BIENIEN, JURORS AND RAPE 95-99 (1980).

¹⁸⁸ ATT'Y GEN., REPORT OF THE COMM'N ON OBSCENITY 356 (1970).

¹⁸⁹ Berger, Gagnon & Simon, *Urban Working-Class Adolescents and Sexually Explicit Media*, in 9 ATT'Y GEN. TECHNICAL REPORTS OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, 209, 247-48 (1970) [hereinafter TECHNICAL REPORTS]. See also COMM'N ON PORNOGRAPHY, *supra* note 187, at 339-40.

¹⁹⁰ See Zurcher & Kirkpatrick, *Collective Dynamics of Ad Hoc Anti-Pornography Organizations*, in 5 TECHNICAL REPORTS, *supra* note 190, at 91-106.

to use a national value standard.¹⁹¹ Even if the juror tried to do so, morality is too deeply entrenched to be put aside during a trial. As Justice Stevens stated in *Smith v. United States*, "[i]n 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."¹⁹²

The tendency of jurors to apply their local standards is consistent with the fact that juries are local institutions. The only trait that all jurors in a particular case will have in common is where they live. In fact, lawyers will often choose whether to have a jury trial based on the location of the trial.¹⁹³ Defense attorneys might, for example, waive the right to a jury in an obscenity case if they perceive the community to be conservative. This tactic indicates that many trial lawyers believe jurors generally vote consistently with the values of their local community.¹⁹⁴

The personal nature of obscenity issues, coupled with peer pressure among jurors, may also affect the jury's deliberative process.¹⁹⁵ Because obscenity is such a sensitive subject, a juror may react differently to the same material, depending on whether she is in a private or public setting.¹⁹⁶ As Justice Stevens stated, one juror's opinion "will inevitably influence the perceptions of other jurors," particularly those who find the material appealing but perceive that they are in the minority and are hesitant to articulate their view.¹⁹⁷

Moreover, at least one study has shown that most people believe that they are more permissive than others with regard to sexually-oriented material.¹⁹⁸ A juror's perception that she is more permissive than her peers might make her hesitant to speak favorably about the sexually-explicit material.

In sum, jurors will probably not apply a national value standard

¹⁹¹ But see CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, FINAL REPORT 99 (June 1977)(prejudices about legal issues are "minimized or equalized" when questions are submitted to jurors because juries encompass a cross-section of the community).

¹⁹² *Smith v. United States*, 431 U.S. 291, 316 (1977)(Stevens, J., dissenting).

¹⁹³ See *Smith & Locke, Problems in Arrests and Prosecutions for Obscenity and Pornography*, in 5 TECHNICAL REPORTS, *supra* note 190, at 54.

¹⁹⁴ *Id.*

¹⁹⁵ See *Hamling v. United States*, 418 U.S. 87, 164 (1974)(Brennan, J., concurring); accord *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

¹⁹⁶ *Smith*, 431 U.S. at 315 (Stevens, J., dissenting).

¹⁹⁷ *Id.* (Stevens, J., dissenting).

¹⁹⁸ Abelson, Cohen, Heaton & Suder, *National Survey of Public Attitudes Toward and Experience With Erotic Materials*, in 5 TECHNICAL REPORTS, *supra* note 190, at 84.

that differs from their own local one. Moreover, the standard they do apply is likely to be linked to the standards that they perceive their fellow jurors will apply. It is difficult, if not impossible, to predict exactly which standards a juror will use in obscenity cases. As a result, judicial insistence on a national standard may well be futile.

The impact of *Pope v. Illinois* on the law of obscenity, therefore, is questionable, particularly in light of the Court's decision to subject the case to harmless error inquiry.¹⁹⁹ In so doing, the Supreme Court in effect instructed the appeals court to determine whether the choice of a reasonable person standard over the local standard, which the trial courts used, leads to a finding that the works had value and were therefore not obscene.²⁰⁰ If, under a reasonable person standard the lower court determines that the works are not obscene, it must set aside the defendants' convictions. If, however, the court finds that the application of the local standard had no substantial effect on the value determination, the convictions must stand.²⁰¹ Because of the practical reality of the jury deliberation process,²⁰² the convictions will probably survive the harmless error inquiry.

B. HARMLESS ERROR

The Supreme Court first articulated the harmless error rule in *Chapman v. California*,²⁰³ holding that not all constitutional errors require an automatic reversal of the trial verdict if the errors are so insignificant that they may be deemed harmless.²⁰⁴ In criminal cases, if a reviewing court holds that a constitutional error was committed at trial, it may not set aside the conviction if it determines, after considering the whole record, that the error was "harmless beyond a reasonable doubt."²⁰⁵ The *Chapman* Court stated, however, that an error is harmless only if it did not contribute to the final verdict.²⁰⁶ If there is even "a reasonable possibility" that the mistake contributed to the conviction, the error is not harmless and the

¹⁹⁹ 107 S. Ct. at 1921 (plurality opinion).

²⁰⁰ *Id.* at 1922 (plurality opinion).

²⁰¹ *Id.* (plurality opinion).

²⁰² See *supra* notes 186-99 and accompanying text.

²⁰³ 386 U.S. 18 (1967).

²⁰⁴ *Id.* at 22. Although Congress codified the harmless error rule in 1919, see Act of Feb. 26, 1919, ch. 48, 40 stat. 1181 (currently codified at 28 U.S.C. § 2111 (1982)), not until *Chapman* did the Court decide whether a constitutional error could ever be considered "harmless." See *The Supreme Court, 1985 Term—Leading Cases* [hereinafter *Leading Cases*], 100 Harv. L. Rev. 100, 107 (1986).

²⁰⁵ *Chapman*, 386 U.S. at 24.

²⁰⁶ *Id.*

conviction must be set aside.²⁰⁷

In *Hamling v. United States*,²⁰⁸ a case closely analogous to *Pope*, the Supreme Court significantly modified the standard set forth in *Chapman*. The *Hamling* defendants were convicted of mailing and conspiring to mail an obscene brochure. The trial judge, applying the *Miller* test, erroneously instructed the jury to refer to a national standard instead of a local one to determine whether the material was patently offensive.²⁰⁹

The Supreme Court held that the trial judge should have used a local standard, but it concluded that "reversal is required only where there is a probability that the excision of the references to the 'nation as a whole' . . . would have materially affected the deliberations of the jury."²¹⁰ The Court upheld the convictions, reasoning that the erroneous instructions had not "materially affected" the jury's deliberations because of the "confusing and often gossamer distinctions between 'national' standards and other types of standards."²¹¹

Recently, the Court broadened further the application of the harmless error analysis. In *Delaware v. Van Arsdall*,²¹² for example, the Court extended the harmless error analysis to violations of a defendant's right to cross-examine an adverse witness.²¹³ In *Van Arsdall*, the trial judge prohibited the defense counsel from cross-examining a testifying witness in the presence of the jury, which ultimately convicted the defendant of first-degree murder.²¹⁴ The Court determined that the trial judge had violated the defendant's right to cross-examine an adverse witness but concluded that the denial of the opportunity to cross-examine is not prejudicial in every case.²¹⁵ The Court therefore remanded the case for a harmless error analysis.²¹⁶

In *Rose v. Clark*,²¹⁷ the Court further expanded the application of the harmless error analysis to include erroneous jury instructions

²⁰⁷ *Id.* at 23.

²⁰⁸ 418 U.S. 87, 108 (1974).

²⁰⁹ *Id.* In *Miller*, the Supreme Court ruled that patent offensiveness must be judged according to local standards. *Miller*, 413 U.S. 15, 24 (1973).

²¹⁰ *Hamling*, 418 U.S. at 108.

²¹¹ *Id.* at 109.

²¹² 106 S. Ct. 1431 (1986).

²¹³ According to the sixth amendment of the United States Constitution, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. CONST. amend. VI.

²¹⁴ *Van Arsdall*, 106 S. Ct. at 1434.

²¹⁵ *Id.* at 1437.

²¹⁶ *Id.* at 1438.

²¹⁷ 106 S. Ct. 3101 (1986).

on the alleged malicious intent of the defendant, who was convicted of murder. In *Rose*, the trial judge erroneously instructed the jury that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption."²¹⁸ Justice Powell, writing for the majority, declined to classify erroneous jury instructions as errors which require automatic reversal because they do not "necessarily render a trial unfair."²¹⁹ Such reversible errors are "the exception and not the rule."²²⁰ Justice Powell wrote that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis."²²¹

The Court in *Rose* held that an error is harmless if the trial record establishes guilt beyond a reasonable doubt.²²² It reasoned that if the record remains intact, a reviewing court will be able to determine whether the erroneous instruction harmed the defendant's case.²²³ An erroneous jury instruction, the Court said, does not disturb the "composition of the record."²²⁴

In effect, the standard that the *Rose* Court articulated establishes that as long as the trial record reveals sufficient evidence of guilt, a reviewing court does not have to consider the constitutional fairness of the trial proceedings. If the reviewing court believes that the record supports a conviction, despite procedural errors, the conviction must stand. Such an outcome-oriented perspective could violate the defendant's constitutional rights to a jury trial and the tenets of procedural due process.²²⁵ In harmless error analysis, the appellate court reviews the record and uses its own discretion to determine whether the state established guilt beyond a reasonable doubt. Essentially, the court must engage in factual review of the evidence in the record, which is a task properly delegated to the jury.²²⁶

If the reviewing court affirms the conviction, despite a constitutional error at trial, the defendant potentially suffers two constitutional violations. The first occurs at trial when the judge gives

²¹⁸ *Id.* at 3104.

²¹⁹ *Id.* at 3106.

²²⁰ *Id.*

²²¹ *Id.* at 3107.

²²² *Id.*

²²³ *Id.* at n.7.

²²⁴ *Id.*

²²⁵ The sixth amendment guarantees the "right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. The fourteenth amendment guarantees all citizens' due process. See *supra* note 69 for the text of the fourteenth amendment.

²²⁶ See *Leading Cases*, *supra* note 205, at 116.

erroneous jury instructions, as in *Pope*;²²⁷ the second violation occurs on appeal, when the appellate court reviews facts which are properly in the realm of the jury.²²⁸ As Justice Blackmun stated:

[T]he question a reviewing court must ask is not whether guilt may be spelt out on a record, but whether guilt has been found by a jury according to the procedures and standards required by the Constitution When a jury has not been properly instructed concerning an essential element of the offense that has been charged, the danger exists that the defendant has been deprived of his Sixth and Fourteenth Amendment rights to have a jury determine whether the State has proved each element of the offense beyond a reasonable doubt.²²⁹

In *Pope*, however, the Supreme Court specifically overruled previous cases which held that a conviction can never stand if the jury instructions do not require the jury to find each element of the crime under the proper standard of proof.²³⁰ Therefore, although the value element of the obscenity test was not found under the proper standard of proof, the convictions, according to *Pope* and *Rose*, may stand. Furthermore, in light of *Hamling*,²³¹ which allowed a guilty verdict to stand despite an erroneous instruction on obscenity standards it is extremely unlikely that the Illinois Court of Appeals will reverse the convictions in *Pope*.

V. CONCLUSION

After *Pope*, fact finders must apply a reasonable person standard to determine whether allegedly obscene material has redeeming social value. Successful application of the reasonable person standard is unlikely, however, given the local orientation of both the jury process and obscenity issues. Opinions on obscenity are closely linked to religion, education, and economic status, which, in turn, produce strongly engrained values with bonds to the social fabric of the local community. Moreover, because obscenity is a sensitive, personal issue, jurors may choose to disregard a reasonable person standard if they believe it is wrong or immoral. Thus, the Court's choice of a national instead of a local standard will not have a significant impact on future obscenity prosecutions.

Further, the Court's decision in *Pope* to remand the case for a harmless error inquiry means that the verdicts will probably stand, despite the trial court's unconstitutional value instructions. It is un-

²²⁷ See, e.g., *Pope*, 107 S. Ct. at 1921.

²²⁸ *Leading Cases*, *supra* note 205, at 116.

²²⁹ *Rose v. Clark*, 106 S. Ct. 3101, 3115-16 (1986) (Blackmun, J., dissenting).

²³⁰ 107 S. Ct. at 1922 n.7.

²³¹ 418 U.S. 87 (1974).

likely that the lower court will rule that the error materially affected the trial record. For all the reasons discussed above, using a reasonable person standard instead of a local community standard, in practice, does not have a substantial impact on an obscenity case. In sum, the Supreme Court's decision in *Pope v. Illinois* will substantially impact neither the evolution of obscenity law nor the outcome of this particular case.

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