3-1-1987


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CASENOTE

Taking Serious Value Seriously: Obscenity, Pope v. Illinois, and an Objective Standard

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I. INTRODUCTION

The case of Pope v. Illinois\(^1\) raises the issue of the workability of an objective, or national, standard for the determination of the third prong of the tripartite Miller\(^2\) obscenity test: whether allegedly obscene material lacks serious literary, artistic, political, or scientific value.\(^3\) A jury convicted Richard Pope, a clerk at an adult book store, of violating an Illinois state criminal statute\(^4\) prohibiting the sale of

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3. For a description of the Miller test, see infra text accompanying note 48. For a description of the third prong before Miller as “utterly without redeeming social value,” see infra notes 46, 50 & 52.
4. The Illinois obscenity statute reads:
   (b) Obscene Defined.
       A thing 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.


The legislature amended this section, effective January 1, 1986, to read:

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it
obscene magazines. A detective from the local police department had entered the store in July 1983, and purchased three magazines entitled *Anal Animal*, *Full Throttle*, and *Fuck Around.* Upon the court's entering the jury verdict of guilty, Pope filed timely post-trial motions seeking a judgment notwithstanding the verdict, or in the alternative, a new trial. The court denied these motions, and sentenced Pope to 360 days in prison and fined him three thousand dollars. On appeal, Pope asserted that the Illinois obscenity statute violates the first amendment because, among other things, "it fails to require the application of an objective standard as opposed to a contemporary community standard in finding that allegedly obscene material is 'utterly without redeeming social value.'" The Appellate Court for the Second District of Illinois held: The first amendment does not require the trier of fact to apply an objective national standard in determining whether materials are "utterly without

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 exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

ILL. REV. STAT. ch. 38, para. 11-20(b) (1986). The section as it now reads is an adoption of the tripartite *Miller* test.

6. *Id.* at 732, 486 N.E.2d at 353.
7. *Id.* at 734, 486 N.E.2d at 354.
8. *Id.* The court fined the defendant, Pope, $1000 on each of three counts of obscenity.

10. Pope asserted that the statute was "constitutionally weak," evidently referring to the first amendment. *Pope*, 138 Ill. App. 3d at 734, 486 N.E.2d at 354.
11. *Id.* at 735, 486 N.E.2d at 355. Morrison similarly argued that *People's Instruction No. 12*, the charge given at trial, improperly defined obscenity by permitting jurors to apply a community standard rather than an objective one in determining whether the magazines were "utterly without redeeming social value." *Morrison*, 138 Ill. App. 3d at 600, 486 N.E.2d at 349. *People's Instruction No. 12* provides:

A thing is obscene if considered as a whole, its predominant appeal is to a prurient interest . . . and, it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description . . . and, it is utterly without redeeming social value.

In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois . . . .

*Morrison*, 138 Ill. App. 3d at 599, 486 N.E.2d at 348 (quoting *PEOPLE'S INSTRUCTION NO. 12, ILLINOIS PATTERN JURY INSTRUCTION, CRIMINAL, NO. 9.57* (2d ed. 1981)).
POPE v. ILLINOIS

redeeming social value.


The application of an objective, or national, standard to the question of serious value is essential for the protection of first amendment freedoms. Through expert testimony and evidence of literary commentary, the trier of fact is given a tangible tool by which to analyze this mixed question of law and fact. A national standard in this context provides the utmost protection at the trial level, and also enables an appellate court to exercise de novo review. Although there are some practical problems in using a national standard for the question of serious value, these difficulties are tolerable in comparison to the unsatisfactory alternative of using a community standard.

While obscenity remains outside the scope of first amendment protection, requiring a fact finder to use a national standard for assessing serious value is the only way to assure a sensitive determination. Although an objective standard might not have prompted the jury to exonerate Richard Pope in the instant case because of the explicit sexual nature of the magazines in question, the Court must nonetheless overturn the jury's verdict.

II. THE PROBLEM IN CONTEXT

Recent events have contributed to an increased awareness of the obscenity issue on both national and community levels. In the summer of 1986, Attorney General Edwin Meese's Commission on Pornography released a report suggesting that pornography leads to violence. Before releasing the final draft, the Commission sent letters to corporations involved in the sale or distribution of pornogra-

12. See Morrison, 138 Ill. App. 3d at 600, 486 N.E.2d at 349.
13. See infra text accompanying notes 83-90.
14. For a discussion of the constitutional nature of the third prong, see infra text accompanying notes 124-33.
15. See infra notes 172-76 and accompanying text.
17. For a discussion of de novo review, see infra notes 144-62 and accompanying text.
18. See infra text accompanying notes 177-81.
19. For a discussion of "community standard," see infra notes 94-100, 163 and accompanying text.
21. For a discussion about the potential for overlap between value and prurience, see infra notes 117-23 and accompanying text.
22. For a discussion of harmless error, see infra notes 61-66 and accompanying text.
The Commission described the letter as an attempt to allow corporations to respond to these allegations, before drafting its section on identified distributors. As a result, several corporations have stopped selling certain magazines in fear of being "blacklisted." After the Commission contacted Southland Corporation, the owners of 7-Eleven Stores, the company pulled Playboy from its shelves and urged the Commission "that any reference to Southland or 7-Eleven be deleted from [its] final report." The District Court for the District of Columbia in Playboy Enterprises v. Meese, however, granted a permanent injunction against the Meese Commission's dissemination of a "blacklist."

The increased interest in regulating pornography is further exemplified through recent legislation at the local level. Municipalities have drafted ordinances banning the pornographic depiction of women in sexually subordinate roles. The Indianapolis legislature passed one such ordinance through the joint lobbying efforts of anti-pornography feminists and fundamentalists. A court struck down this ordinance, however, as unconstitutional. On an even smaller scale, municipalities recently presented an unofficial ballot on obscenity in a local election. Voters in three Florida cities in November

25. Id. at 585.
26. Id.
27. Id. at 583-84.
29. Id.
1986, responded affirmatively to a straw ballot question of whether they found it "offensive, annoying and obscene" for material to "degrade basic religious beliefs by use of nudity, sexual acts or profan-ity." This sampling reflects some communities' strong interest in regulating pornography.

These efforts, and numerous others, have triggered a response from anti-censorship organizations. The National Coalition Against Censorship held a public information briefing on the Meese Commission prior to the release of the Commission's final report. This briefing featured speakers in the areas of literature, publishing, law, medicine, and sex education. It is apparent that the future direction of obscenity law is of intense concern to national and local groups on both sides of the debate—and to distributors, publishers, and citizens as a whole. The timeliness of this issue is perhaps the main reason why the Supreme Court of the United States has agreed to hear Pope v. Illinois, a case dealing with an uncertain aspect of obscenity law.

A. The History of Obscenity Law: From Roth to Miller

The Supreme Court of the United States expressly held for the first time in Roth v. United States that "obscenity is not within the area of constitutionally protected speech or press." In order to determine whether material deserved first amendment protection, the Court defined obscenity in terms of contemporary community standards to be applied by a jury: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Although the Court measured obscenity on the basis of prurient interest, it recognized that ideas having even the slightest social importance have full protection under the first amendment. A few years later, Justices in two separate plurality opinions interpreted the phrase "con-
temporary community standard” to be a national standard.44

The Court in yet another plurality opinion, Memoirs v. Massachusetts,45 refined Roth into a three-prong test incorporating prurient interest, patent offensiveness, and the requirement that the material be “utterly without redeeming social value.”46 It was not until the landmark decision of Miller v. California47 in 1973 that the Supreme Court came to a consensus on the test to be used in finding a work obscene, as well as the standards to be applied to the first two prongs. Redefining the tripartite Roth-Memoirs test, the Court set out guidelines for the trier of fact:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.48

The Court expressly declined to adopt the social value test of Memoirs,49 and instead articulated a “serious value” requirement that the prosecution might be able to prove more easily.50 Regarding the phrase “contemporary community standards,” the Court rejected a

44. In Manuel Enterprises, Justices Harlan and Stewart signified that the proper standard to apply under a federal obscenity statute was a national one. 370 U.S. at 488. Two years later in Jacobellis, involving an Ohio state obscenity statute, Justices Brennan and Goldberg wrote: “We . . . reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard.” 378 U.S. at 195. Justices Douglas and Black stated that obscenity should be constitutionally protected under the first amendment. Id. at 196. But commentators have suggested that, if forced to choose, Justices Douglas and Black would have preferred a national standard over a local one. See Waples & White, Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law, 64 Va. L. Rev. 399 (1978). This suggestion indicates a belief that a national standard would provide greater first amendment protection.

45. 383 U.S. 413 (1966) (plurality opinion).

46. Id. at 418. Under the Memoirs test, in order for a work to be found obscene, the prosecution must satisfy three elements: (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.

47. 413 U.S. 15 (1973).

48. Id. at 24 (citations omitted).

49. Id.

50. According to the Miller Court, the Memoirs “utterly without redeeming social value” test was “a burden virtually impossible to discharge under our criminal standards of proof,” requiring “the prosecution to prove a negative.” Miller, 413 U.S. at 22. The Miller standard is more favorable to the prosecution’s case because it provides less first amendment protection than the Memoirs standard. Justice Brennan, however, in his dissenting opinion in Paris Adult Theatre I v. Slaton, asserted that “[w]hether it will be easier to prove that material lacks
uniform national interpretation for what appeals to the prurient interest as well as for what is patently offensive, discerning these first two prongs as questions of fact, and relying on a history of permitting triers of fact to apply community standards in other areas of the law.\textsuperscript{51} The Miller Court, however, failed to clarify the appropriate standard for the third prong.\textsuperscript{52}

\textbf{B. Post-Miller: Failure to Clarify the Standard for the Third Prong}

Considering the lack of consensus among the Justices in obscenity cases prior to 1973,\textsuperscript{53} it is not surprising that since that time the Supreme Court has failed to clarify the third prong of the Miller test and its applicable standard. Rather than hold that the trier of fact must determine “serious value” through an objective, national standard, the Court merely has alluded to this distinction without explanation.\textsuperscript{54} In \textit{Smith v. United States},\textsuperscript{55} the Court strongly emphasized

'serious' value than to prove that it lacks any value at all remains, of course, to be seen.” 413 U.S. 49, 98 (1973).

\textsuperscript{51} Miller, 413 U.S. at 30. The Court, in rejecting a national standard, stated that “[t]o require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.” \textit{Id}. The Miller Court also referred to Chief Justice Warren's dissent in \textit{Jacobellis}: “It is my belief that when the Court said in \textit{Roth} that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . .” \textit{Id}. at 32 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting)).

\textsuperscript{52} Although the Illinois Supreme Court has adopted the Roth-Memoirs “utterly without redeeming social value” standard as the third prong rather than the Miller “lacking serious literary, artistic, political, or scientific value” standard, it is of no consequence which test is used when addressing the question of whether an objective standard should be applied. Petition for Writ of Certiorari at 10, Pope v. Illinois, No. 85-1973 (U.S. cert. granted Oct. 6, 1986); see also Michigan v. Long, 463 U.S. 1032 (1983) (holding that the Court will not review a state court decision expressly based on independent and adequate state grounds, which provide more protection than the federal Constitution).


\textsuperscript{54} Smith v. United States, 431 U.S. 291 (1977); Miller v. California, 413 U.S. 15 (1973). Some federal decisions have interpreted Miller as a rejection of a national standard for only the first two prongs. See United States v. Bagnell, 679 F.2d 826, 835 (11th Cir. 1982) (trier of fact should not rely on contemporary community standards in determining whether films lack
Miller's reference to prurient appeal and patent offensiveness as questions of fact to be measured by contemporary community standards, and described the Miller Court's rejection of a uniform national standard as applicable only to those prongs. The Smith Court, however, did not expressly state that a national standard be applied to the third prong.

Courts generally have distinguished the third prong of the Miller test as the one to be carefully considered. Opinions after the Miller decision have referred to "serious value" as the prong necessitating a higher standard of review. Others have referred to the first two prongs as questions of fact, and to the third as one of "constitutional" fact. These allusions seem significant in determining whether serious value should be measured on the basis of a national standard. Perhaps these references are an indication that the third

serious value); United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977) (holding that the third prong requires an objective standard, that Miller confines the application of contemporary community standards to the first two prongs, and that Miller does not suggest that "scientific value... be judged on such a parochial basis"); Castle News Co. v. Cahill, 461 F. Supp. 174, 179 (E.D. Wis. 1978) (Miller requires an objective standard in applying the third prong); cf. United States v. Merrill, 746 F.2d 458, 463 (9th Cir. 1984), cert. denied, 469 U.S. 1165 (1985) (greater scrutiny of third prong on appellate review).

56. Id. at 292-93.
57. The Smith Court stated:

The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact... [A]ppeal to the prurient interest is one such question of fact for the jury to resolve. The Miller opinion indicates that patent offensiveness is to be treated in the same way.

431 U.S. at 300-01. As for the third prong, the Court stated that it "is not discussed in Miller in terms of contemporary community standards." Id. at 301.

60. In Kois v. Wisconsin, 408 U.S. 229 (1972), the Court addressed the question of whether an article and a poem printed in an underground newspaper were serious art under the Roth-Memoirs test by determining whether the "dominant" theme appealed to the prurient interest. The Court reasoned that "while there is an undeniably subjective element in the test as a whole, the 'dominance' of the theme is a question of constitutional fact." Id. at 232. This approach represents the view that the first and third prongs are mutually exclusive. For a discussion of overlap between prurience and serious value, see infra notes 117-23 and accompanying text. Although the Court still referred to the first two prongs of Miller as questions of fact twelve years later in Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984), it recognized the power of appellate courts to conduct an independent review of constitutional claims when necessary. The Court specifically referred to de novo review of the first two prongs. Id. at 506. Perhaps the Court was suggesting that all three prongs were mixed questions of fact and law, yet somehow the third always necessitated independent review. For a discussion of de novo review, see infra notes 144-62 and accompanying text.
prong's significance is self-evident. Nevertheless, the reasons for such disparate treatment need to be articulated.

The lack of clarity and consistency in the application of obscenity standards places an unfair burden on the victims of obscenity laws—movie producers, theater owners, publishers, store owners and clerks, and patrons of pornography—who may be unknowingly in violation of the law. In addition, the differing approaches courts take in determining whether an admittedly incorrect jury instruction is harmless error further complicate obscenity law. In *Hamling v. United States*, the trial judge instructed the jury to apply the “community standards of the ‘nation as a whole’” to determine whether the brochure in question was obscene. The Supreme Court held that, although the jury charge delineated a wider area than warranted by *Miller*, it was harmless error because the prosecution did not convince the jury that a national sampling provided less protection than a community standard.

On the other hand, the court in *United States v. Heyman* held that a jury charge to apply contemporary community standards for the third prong was constitutionally erroneous and therefore must be “harmless beyond a reasonable doubt.” The *Heyman* court thereby avoided the uncertain inquiry of prejudicial error on the basis of jury persuasion or understanding. Because of the ambiguity found not only in opinions, but in jury instructions themselves, these sources provide the public with little guidance.

62. Id. at 107.
63. Id.
64. Because the prosecution's witness stated that “essentially the same kinds of material are found throughout the United States,” among other dialogue between the witness and counsel, the Court concluded that the erroneous jury charge did not require reversal. *Hamling v. United States*, 418 U.S. 87, 110 (1974). The Court reasoned that “the excision of the references to the ‘nation as a whole’ . . . would [not] have materially affected the deliberations of the jury.” Id. at 108. *Compare United States v. Cutting*, 38 F.2d 835 (9th Cir. 1976), cert. denied, 429 U.S. 1052 (1977) (It was harmless error to instruct the jury to use a national standard to determine obscenity as a whole because the record contained no evidence of a national standard that would have tended to persuade the jury that the national standard was stricter than the local standard.) *with United States v. Henson*, 513 F.2d 156 (9th Cir. 1975) (It was prejudicial error for the judge to instruct the jury to decide the question of obscenity using a national standard because the government may have succeeded in its attempt to convince the jury that Californians would permit more sexual candor than Americans as a whole.).
65. 562 F.2d 316 (4th Cir. 1977).
66. Id. at 318.
67. Obscenity is defined in the Pattern Jury Instructions of both the Fifth and Eleventh Circuits as follows:

For something to be “obscene” it must be shown that the average person, applying contemporary community standards and viewing the material as a whole, would find (1) that the work appeals predominantly to “prurient”
Against a background of controversy and uncertainty in the law, the Supreme Court of the United States is faced with an opportunity to alleviate the confusion. 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 is unlikely; and therefore, such a focus in this Note would be futile. "[A]s long as government chooses to remain in the distasteful business of censorship,"68 the Supreme Court in Pope v. Illinois69 should incorporate the allusions of Miller and Smith as its holding in order to maintain the highest possible protection for literary, artistic, political, and scientific works.

III. AN OBJECTIVE STANDARD FOR THE THIRD PRONG

The Illinois appellate court in People v. Pope70 upheld the constitutionality of the Illinois obscenity statute,71 and stated: "[T]he United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value.'"72 This court's reasoning was cursory and misguided: although the Supreme Court has not directly decided this issue,73 strong implications within

68. United States v. 35 MM. Motion Picture Film "Language of Love," 432 F.2d 705, 712 (2d Cir. 1970), cert. dismissed, 403 U.S. 925 (1971).
71. See supra note 4.
72. Pope, 138 Ill. App. 3d at 735, 486 N.E.2d at 355.
73. One commentator stated that the Supreme Court in Smith v. United States, 431 U.S. 291 (1977), explicitly held that the third prong cannot vary regionally. Schauer, Reflections on
Smith and Miller, and their interpretations by lower courts, lend credence to the position that the first amendment mandates an objective standard. The Supreme Court of the United States in Smith distinguished the serious value prong on five occasions within its decision. The court in United States v. Bagnell relied on Smith, stating that the trier of fact is not to rely on contemporary community standards in determining whether the materials in question possess serious value. Similarly, in United States v. Heyman, the appellate court reversed a conviction because the trial court instructed the jury to apply community standards in determining the third prong. In addition, the Attorney General’s Commission on Pornography stated in its final report that the Miller Court “clearly found [the first two prongs] subject to local community standards, leaving the question of serious literary, artistic, political, or scientific value to be determined by a national standard.” Yet it is apparent from the Pope decision that courts need an explicit guideline to follow. For this reason, it is time to re-evaluate the standards used in this constitutional issue.

A. A Theoretical Framework

Before analyzing the application of an objective standard to the third prong of the Miller test, it is necessary to examine why the Supreme Court dispensed with this standard as applied to the first two

76. First, the Court explained that in Miller it had rejected a uniform national standard for the first two prongs, holding that these were questions of fact to be measured by contemporary community standards. Smith v. United States, 431 U.S. 291, 292-93 (1977) (citing Miller v. California, 413 U.S. 15, 30-34 (1973)). Second, the Court stated that appeal to the prurient interest and patent offensiveness are questions of fact for the jury. Id. at 301. Third, the Court emphasized that it did not discuss literary, artistic, political, or scientific value in Miller in terms of contemporary community standards. Id. Fourth, the Court held that the first two prongs are to be considered in light of jurors' understanding of contemporary community standards. Id. at 309. Last, the Court stated that the third prong is “particularly amenable to appellate review.” Id. at 305.
77. 679 F.2d 826 (11th Cir. 1982).
78. Id. at 835.
79. 562 F.2d 316 (4th Cir. 1977).
81. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 1290 (1986) (citing Miller, 413 U.S. at 31). In addition, the Commission stated that "[t]he third facet of the Miller test . . . is never in any event to be determined by reference to local standards. Here the frame of reference must in all cases be national.” Id. at 259 n.36 (citing Smith v. United States, 431 U.S. 291 (1977)).
prongs in *Miller v. California*. The Supreme Court has defined an objective standard as a national standard—one varying in meaning from time to time, not place to place. Before *Miller*, the Court relied on this standard in determining whether a work was obscene because of the sensitive, constitutional nature of such a determination. With a community standard, "constitutional limits of free expression . . . would vary with state lines." In *Jacobellis v. Ohio*, Justices Brennan and Goldberg were concerned that a local standard would deter the dissemination of works that were held obscene in one locality in other localities where they might not be held obscene. According to these Justices, a community standard would result in the restriction of public access to works that the state could not have constitutionally suppressed directly. Another reason why they considered a national standard appropriate was that it effectuates independent review as a means of preserving freedom of expression. Unfortunately, courts have neglected to provide examples of a national standard, or the means of deriving this standard. Interestingly, the Supreme Court, in *Hamling v. United States,* suggested that there may be no difference between local and national standards as applied.
Nevertheless, the Supreme Court in *Miller* switched from a national to a community standard. The idea of a contemporary community standard is based on the proposition that neither personal opinions nor the “effect on a particularly sensitive or insensitive person” form the basis of a determination of obscenity. In several cases, the Court has attempted to describe the meaning of “contemporary community standards.” In *Hamling*, it likened the standard to the concept of “reasonableness” in other areas of the law. According to the Court in *Kois v. Wisconsin*, a contemporary community standard is subjective rather than objective, leaving room for personal judgment. In *Smith*, Justice Blackmun, writing for the majority, stated that the jury must consider the community along with its own understanding of the average person in that community.

Perhaps the main reason for the switch to community standards was the inherent difficulty in defining a national standard for obscenity. When the *Miller* Court rejected a national standard, it cited Chief Justice Warren’s dissenting opinion in *Jacobellis v. Ohio* that “there is no provable ‘national standard,'” further describing it as “hypothetical and unascertainable.” Ironically, both sides of the debate based their respective arguments—for and against a community standard—on the benefits, or lack thereof, of differing community mores. Those in favor of a national standard asserted that free expression cannot be determined by local standards for fear of preventing dissemination of material by those unwilling to risk criminal conviction. Those perpetuating a local community standard—be it town,
county, city, or state—expressed the importance of diversity over the absolutism of uniformity. Apparently because a local community standard was more workable and more easily defined, the Supreme Court expressly chose it over its national counterpart.

This switch, however, did not necessarily include the third prong of the Miller test. As previously discussed, the Court distinguished this prong without explanation. This is the precise issue that the Supreme Court is forced to address in Pope v. Illinois. An express holding mandating the application of an objective standard to the third prong might solve the uncertainty in the courts, and result in greater protection of first amendment freedoms for literary, artistic, political, and scientific works, while maintaining diversity for the determination of prurient interest and patent offensiveness. The issue to address at this stage of the analysis is whether the first and third prongs differ to the extent that they necessitate the use of separate standards.

The Supreme Court has defined "prurient" as "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

105. The Court in Hamling v. United States stressed the insignificance of geographic boundaries for determining contemporary community standards:

Our holding in Miller that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law.


106. Miller, 413 U.S. at 33.

107. But see Smith v. United States, 431 U.S. 291, 314 (1973) (Brennan, Stewart & Marshall, JJ., dissenting) ( intimating that a standard for such a culturally diverse state as California is no more ascertainable than a national standard).

108. Miller, 413 U.S. at 30, 32.

109. See Smith, 431 U.S. at 292, 301, 309; Miller, 413 U.S. at 30.

110. See supra notes 54-60 and accompanying text.

111. In Miller, the Court ruled that the fact finder must judge both patent offensiveness and prurient appeal by contemporary community standards. 413 U.S. at 30; see Smith, 431 U.S. at 292-93.

112. The second prong of "patent offensiveness" is not compared in this analysis. The Miller Court offered examples of what a state statute could define under this part of the test:

- Patent offensiveness representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- Patent offensiveness representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25. The delineation of specific acts which constitute patent offensiveness behavior obviates the need to compare this prong with the requirement of serious value. (This is not to say that patent offensiveness material is not or cannot be of serious value.) On the other hand, serious value and works appealing to prurient interest seem to be natural comparisons because there are no definite guidelines. See Schauer, supra note 73, at 17-21 (stating that the patent offensiveness prong of the Miller test is unnecessary).
such matters.” The Court stressed that “prurient” was not synonymous with sex, or “normal” sexual desire, but merely described the manner in which sex was portrayed. In other words, if the manner appeals to the prurient interest, the film, book, or magazine is obscene. The juxtaposition of value within this definitional framework is important in order to determine whether the third prong mandates the use of a separate standard. Before Miller, the Court in Kois v. Wisconsin supported the proposition that the trier of fact need only use one standard to measure the first and third prongs. The Court determined serious value on the basis of whether the “dominant theme” appeals to the prurient interest, thus treating the two prongs—prurience and value—as mutually exclusive. Such a proposition, however, not only obviates the need for a separate measure, but also the need for a third prong; once a jury determines that a work appeals to prurient interests, it necessarily follows that the work lacks serious value. Yet this proposition is erroneous because it does not recognize the existence of overlap between value and prurience. The Supreme Court’s articulation of a three-prong test only one year later in Miller v. California, based on the separate concepts of prurient appeal and value stressed in the Roth and Memoirs decisions, demonstrates that there must be potential for overlap between prurience and serious value. The film Carnal Knowledge is a prime exam-
ple of material that may appeal to the prurient interest of a community, yet which has serious artistic value.\(^\text{123}\) The presence of this area of overlap calls for the use of a separate test for the determination of value. Such a test would be useful because it provides an additional check in the process of labeling work obscene—a process threatening to literary, artistic, scientific, and political achievement.

It is not difficult to find support for the proposition that the third prong of the *Miller* test deserves more protection than the other two prongs: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."\(^\text{124}\) The third prong has been described as the instrument for removing speech from obscenity—the protector of the "transmission of thoughts, information and ideas"\(^\text{125}\)—and is not to be "judged on such a parochial basis" as contemporary community standards.\(^\text{126}\) This constitutional aura is also found in jury instructions describing the third prong as one with "roots in the First Amendment."\(^\text{127}\)

The Supreme Court has recognized the special significance of political, literary, and artistic value. Historically, the want of free political expression provided the impetus for the framing of the first amendment. The Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders*\(^\text{128}\) stated that "speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection."\(^\text{129}\) In *New York Times Co. v. United States*,\(^\text{130}\) Justice Black articulately stressed that freedom of the press serves as an essential means towards a just political end.\(^\text{131}\) The Court afforded similar status to artistic expression and scientific achievement in *Abood v. Detroit Board of Education*:\(^\text{132}\) "[O]ur cases have

\begin{itemize}
\item \(^\text{123}\) A jury found the film *Carnal Knowledge* to be obscene: appealing to the prurient interest, patently offensive, and lacking serious value. The Supreme Court reversed this jury finding on the ground that the film was not patently offensive, also implying that the film did not lack serious value. *Jenkins v. Georgia*, 418 U.S. 153 (1974).
\item \(^\text{124}\) *Roth*, 354 U.S. at 484.
\item \(^\text{125}\) Schauer, *supra* note 73, at 21.
\item \(^\text{126}\) United States v. Heyman, 562 F.2d 316, 318 (4th Cir. 1977). See *Kois v. Wisconsin*, 408 U.S. 229, 231-32 (1972) (suggesting that serious value is a question of constitutional fact and therefore should not be measured against a contemporary community standard, which is subjective).
\item \(^\text{127}\) M. BENDER, *supra* note 67, at 14.
\item \(^\text{128}\) 472 U.S. 749 (1985).
\item \(^\text{129}\) *Id.* at 759 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).
\item \(^\text{130}\) 403 U.S. 713 (1971).
\item \(^\text{131}\) Justice Black stated: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black & Douglas, JJ., concurring).
\item \(^\text{132}\) 431 U.S. 209 (1977).
\end{itemize}
never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.”

While this demonstrates the special constitutional protection afforded literary, scientific, artistic, social, and political works, the question remains whether an objective standard is the proper vehicle to provide such protection.

Before Miller, the national standard attempted to provide “fair warning,” a necessity in connection with constitutional rights. For reasons previously discussed, however, the Court later rejected this standard in Miller. Justices in earlier decisions voiced their concern that a uniform standard fosters censorship, and decisions since Miller have regarded neither standard—objective nor local—as more tolerant than the other. Thus, why would the Supreme Court now choose to apply a national standard to the third prong? The answer is that the application of a national standard to the serious value prong provides first amendment protection, and does not undermine the Court’s concerns in switching to a community standard for the first two prongs. The inability to prove a national standard prior to Miller was understandable because the trier of fact was expected to apply it to obscenity as a whole rather than solely to the third prong. One could not expect the attainment nor the existence of a uniform standard for offensiveness or sexual appeal. This is not the case, however, with regard to serious value. As will be discussed, a national standard for the third prong is ascertainable through evi-
dence;142 and, unlike the first two prongs, the requirement of evidence for the third prong provides a safeguard in the form of consistency. In addition, fear of national censorship, while arguably a legitimate concern, is already checked by the first two prongs. Because all three prongs need to be satisfied in order for the trier of fact to find a work obscene,143 the use of a community standard for the first two prongs is sufficient to protect against any threat of absolute national uniformity. In fact, the application of a national standard solely to the serious value prong forces the fact finder to consider both community and national values, albeit for different criteria, striking a balance between diversity and uniformity. Thus, the fact that the Miller Court rejected a national standard for the first two prongs has no bearing on its application to the third, this standard serving a protective function for works of serious value.

The serious value prong is not only protected at trial through the use of a national standard, but also at the appellate level through de novo review. As early as Jacobellis,144 the Supreme Court recognized independent review as a device for the preservation of individual freedoms.145 Thirteen years later, the Court in Smith described the third prong as one "particularly amenable to appellate review."146 But the Court contrasted this with appellate review of the first two prongs, noting that "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."147 An appellate court would be able to review a determination that the work lacked serious value, however, if the fact finder must apply a national standard to the third prong.148 Yet, the Supreme Court in Bose Corp. v.

142. See infra text accompanying notes 172-76.
143. Miller, 413 U.S. at 24.
144. 378 U.S. 184 (1964) (plurality opinion).
145. Jacobellis v. Ohio, 378 U.S. 184, 188 n.3 (1964) (Brennan & Goldberg, JJ., plurality) (quoting Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 MINN. L. REV. 5, 119 (1960)) ("If freedom is to be preserved," the decisions of juries or government censorship experts "must be subject to effective, independent review.").
147. Id. at 315-16. The Court apparently did not intend to propose, however, that an appellate court independently review the first two prongs because there is no evidentiary record to review. This is evidenced by the Court's statement that "a reviewing court could not use [similar materials as evidence] to overturn a jury verdict." Id. at 316 n.14. According to the Seventh Circuit, a trial judge must articulate standards to make appellate review possible. United States v. Various Articles of Merchandise, Seizure No. 170, 750 F.2d 596, 601 (7th Cir. 1984).
Consumers Union of United States apparently rejected differing standards of appellate review by stating that it could independently review the first two prongs of the Miller test as well as the last. In Bose, the plaintiff sued Consumers Union for libel in a federal bench trial. The Supreme Court waived Rule 52(a)'s clearly erroneous standard of review and held that the appellate judge must exercise de novo review of the trial judge's finding that the defendant acted with actual malice. The Court noted in dicta that previously it had "rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings," apparently referring to Jenkins v. Georgia. In Jenkins, the Court similarly waived any deference to factual findings, and independently examined and reversed a state jury finding that the film Carnal Knowledge was patently offensive, "even though a properly charged jury unanimously agreed on a verdict of guilty." It is questionable, however, whether the patent offensiveness prong formed the basis of the Court's opinion in Jenkins. The Court seemed to be primarily motivated by the question of serious value, spending much of its opinion analyzing critiques and reviews of the film to determine whether it lacked serious value.

Yet, even if one were to accept the contention that the Jenkins Court independently reviewed the second prong, such a determination represents a limited circumstance. Although the Bose decision emphasized the Court's obligation to consider all three prongs through de novo review, the Court still distinguished the first and second prongs from the third by recognizing that the former two require more deference to the fact finder. The Court, relying on Miller,
emphasized the "'ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,'” explicitly referring to prurient appeal and patent offensiveness. Such a qualified expression of review of the first two prongs is reminiscent of the Miller Court’s unexplained distinction of the serious value prong. In addition, the Ninth Circuit in United States v. Merrill, relied on Bose to review all of the Miller prongs, and indicated that the third is subject to full de novo review, whereas the others are given more of an evidentiary or intermediate review. Thus, we are left with a theoretical framework whereby serious value is determined through the use of an objective standard at the trial level, subject to de novo review.

B. Will it Work?

Evidence provides the tool for turning theory into reality, playing a role in both the application of a standard and in the review process. In applying a contemporary community standard to the first two prongs of Miller, the trier of fact is permitted to rely on his or her own notions of the standard of that community. The allegedly obscene materials alone constitute sufficient evidence for the determination of obscenity, judged in the eyes of the average person in the community. The problem with not providing extraneous evidence in that instance, however, is that the judge's or jury's findings are virtually

159. Id. at 506 (quoting Miller, 413 U.S. at 25) (emphasis added).
160. 746 F.2d 458 (9th Cir. 1984), cert. denied, 469 U.S. 1165 (1985).
161. Id. at 463-64. The court, in applying the Bose-Smith standard of review, did not disturb the district judge's determinations of the first two prongs, but rather reviewed findings of the third prong "more extensively." See Schauer, supra note 73, at 23.
162. It is quite possible that a community standard might be more amenable to a defendant in certain locations, i.e., in New York City or San Francisco. In these situations, applying a community standard to the third prong would not be unconstitutional because states are free to provide more protection than does the federal Constitution, but never less. Brown v. Mississippi, 297 U.S. 278 (1936). See Waples & White, supra note 44, at 428 n.124 (stating that the "wrong" community declaring "obscene" materials nonobscene "would not be inconsistent with the first amendment"); cf. Michigan v. Long, 463 U.S. 1032 (1983) (holding that the Supreme Court of the United States will not review a state court decision expressly based on independent and adequate state grounds that provide more protection than the federal Constitution).
164. Paris, 413 U.S. at 56 (citing Ginzburg v. United States, 383 U.S. 463, 465 (1966)). But see United States v. 2,200 Paper Back Books, 565 F.2d 566, 569 (9th Cir. 1977) (The judge at a bench trial could not find books to be obscene because the government did not produce evidence of contemporary community standards and the judge's limited experience prevented him from deriving the applicable standard on his own).
Unlike a contemporary community standard, a national standard requires the use of evidence of that standard. While it may be reasonable to expect jurors in detecting prurient appeal or patent offensiveness to determine local standards on their own, it is unrealistic to expect them to do so in deriving a national standard for serious scientific, political, literary, or artistic value. If left to assess serious value on its own, a trier of fact—jury or judge—would effectively apply a local standard. As a result, “value” would differ among communities.

Was Chief Justice Burger correct, however, in saying that the formulation of a national standard is “an exercise in futility?”

165. United States v. Various Articles of Merchandise, Seizure No. 170, 750 F.2d 596, 599 (7th Cir. 1984); see supra note 147 and accompanying text.


167. Professor Daniels points out that these phenomena vary individually. What is sexually arousing to one may be repulsive to another. Also, cues for sexual arousal vary between the sexes. According to one of Alfred Kinsey’s studies, men generally become sexually aroused from more direct, unambiguous cues, whereas women tend to respond to indirect, romantic cues. Daniels, The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making, 17 SAN DIEGO L. REV. 757, 772 (1980). In addition, people tend to judge obscenity on the basis of what evokes negative feelings, a varying criterion. Id. at 779. Sociological and psychological studies conclude that conservatism, defined as a type of overall cognitive style, is a major factor in predicting assessments of pornography. Brown, Anderson, Burggraf & Thompson, Community Standards, Conservatism, and Judgments of Pornography, 14 J. SEX RES. 81, 82, 94 (1978).

168. The view that one standard is not necessarily more strict than the other, so that prejudicial effect depends upon the understanding of the jury, makes sense in this context. See supra note 64. In Hamling v. United States, 418 U.S. 87 (1974), and United States v. Cutting, 538 F.2d 835 (9th Cir. 1976), cert. denied, 429 U.S. 1052 (1977), the courts focused upon the first two prongs in defending this view. In fact, in Cutting, before determining that a nationwide jury instruction for obscenity as a whole was not prejudicial error, the court held that the photographs did not fall within the description of artistic material used in Jenkins, signifying the use of a national standard for the third prong. Cutting, 538 F.2d at 840. In Jenkins, the Court examined literary commentary to determine that the film in question was not obscene. 418 U.S. at 158-59.

169. The Court’s reversal of the jury’s censorship of Carnal Knowledge in Jenkins exemplifies the objectionable outcome of applying a contemporary community standard to the third prong. 418 U.S. at 161.


171. In United States v. Various Articles of Merchandise, Seizure No. 170, the court did not accept surveys of national or large geographic areas, describing them as “canned” surveys. 750 F.2d 596, 599 (7th Cir. 1984). The court claimed that “[i]f surveys are to be used, they must be taken in the relevant area; they must address material clearly akin to the material in dispute, and they must be good studies by the usual standards.” Id. Bender’s Modern Jury Instructions cited this case for the proposition that the Seventh Circuit is critical of any
standard is ascertainable for the third. Both before and after \textit{Miller}, the Supreme Court demonstrated that the fact finder can determine a national standard for serious value through the use of expert testimony\textsuperscript{172} and written analyses of works.\textsuperscript{173} In \textit{Memoirs}, the trial court heard expert testimony from professors of English and accepted book reviews as evidence in assessing the "literary, cultural, or educational character of the book."\textsuperscript{174} Similarly, the Supreme Court itself in \textit{Jenkins} examined both favorable and nonfavorable reviews and critiques which the appellant supplied\textsuperscript{175} in determining that the film \textit{Carnal Knowledge} was of serious literary value.\textsuperscript{176}

Several problems, however, arise from relying on witnesses and reviews for the determination of a national standard. First, as in any area of the law, witnesses' testimony may—and probably will—conflict.\textsuperscript{177} In that event, the judge or jury will need to determine which expert is more credible. This might result in a subjective outcome.\textsuperscript{178} Second, commentaries may conflict; but courts have considered the mere existence of reviews as evidence of a work's literary or artistic appeal.\textsuperscript{179} Third, the question remains as to which magazines or newspapers are appropriate publications by which to measure a

\textsuperscript{172} One commentator considered expert testimony an important part of the determination of serious value. Note, supra note 16, at 1857 n.87. An expert, however, is likely to base his or her opinion on community rather than national values.


\textsuperscript{174} \textit{Memoirs}, 383 U.S. at 415-16.

\textsuperscript{175} The state did not refute the authenticity of the information supplied. \textit{Jenkins}, 418 U.S. at 158.

\textsuperscript{176} For a discussion of the Court's analysis of serious value in \textit{Jenkins} and its relation to de novo review, see supra text accompanying notes 155-57. In addition, the appellant offered evidence that the film appeared on "Ten Best" lists and that Ann Margret received an Academy Award nomination. He also offered evidence of the film's popularity by showing the number of towns and theaters in which it played. \textit{Jenkins}, 418 U.S. at 158 & n.5. The Court reprinted a section of a review from the \textit{Saturday Evening Post} in its opinion. \textit{Id.} at 158-59.

\textsuperscript{177} See \textit{Memoirs}, 383 U.S. at 15 n.2; United States v. Heyman, 562 F.2d 316, 317 (4th Cir. 1977); \textit{McCauley v. Tropic of Cancer}, 20 Wis. 2d 134, 146, 121 N.W.2d 545, 552 (1963).

\textsuperscript{178} The defendants in \textit{McCauley} offered academicians to testify as to the book's qualifications, while plaintiff's witnesses consisted of clergy and a probation officer. 20 Wis. 2d at 146, 121 N.W.2d at 551.

\textsuperscript{179} Experts' disagreement regarding the success of the film \textit{Last Tango in Paris} was immaterial. United Artists v. Gladwell, 373 F. Supp. 247, 249 (N.D. Ohio 1974), cited in Note, supra note 16, at 1857 ("[I]t was their agreement—that the film should be judged as art—that was decisive."); see also \textit{Jacobellis v. Ohio}, 378 U.S. 184, 195 (1964) (Brennan & Goldberg, JJ., plurality) (recognizing that the film in question was favorably reviewed in a number of national journals, disparaged in others).
national standard.\textsuperscript{180} In \textit{Jenkins}, the Court considered a review published in the \textit{Saturday Evening Post}.\textsuperscript{181} Had the review been printed in \textit{The Village Voice}, however, it is questionable whether the Court would have considered it. Ironically, newspapers such as this would probably need to be assessed for \textit{their} literary value. Would the plaintiff need to show a critique of the newspaper itself? Finally, how would a national standard be determined if the matter in dispute has not been reviewed? Is lack of commentary equivalent to lack of serious value? These are questions that the trier of fact will be left to answer. In comparison with the alternative of community assessment, however, the problems surrounding evidence of a national standard for \textit{Miller}'s third prong are tolerable.

\textbf{IV. CONCLUSION}

The protection of first amendment freedoms of speech, press, and expression lies at the core of labeling material “obscene.” The sensitivity of such a determination mandates the articulation of standards providing this protection. Because the question of whether a work lacks serious scientific, literary, artistic, or political value—or whether a work is utterly without redeeming social value—is the focal point of the \textit{Miller} test as far as the protection of first amendment freedoms, it requires great scrutiny at both the trial and appellate levels. The application of an objective standard by the trier of fact through the use of expert witnesses and literary commentary provides protection up front, and makes it possible for the appellate judge to independently review the jury’s determination. The Supreme Court of the United States has only alluded to this scheme. It now needs to articulate it, and \textit{Pope v. Illinois} provides the opportunity. Of course, the use of such a scheme could never be foolproof; but while the Court chooses to refuse obscenity first amendment protection, this is the best it can do.

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\textsuperscript{180} In \textit{McCawley}, the court considered the proffered periodicals to be “responsible,” and the critics to be “of recognized stature.” 20 Wis. 2d at 146, 121 N.W.2d at 552. In \textit{Jenkins}, the opposition did not dispute the authenticity of the reviews. 418 U.S. at 158.

\textsuperscript{181} \textit{Jenkins}, 418 U.S. at 158-59.

* This Note is dedicated to Ronald Moglia, Ed.D., for his inspiration, and to my family for their continuous support. I would like to express my sincere appreciation to Kevin Dorse for his expertise, guidance, and humor.