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A Call for Obscenity Law Reform

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I. THE NEED FOR OBSCENITY LAW REFORM

As one scholar has noted, the beauty of our Constitution is the document's capacity for growth that American society nourishes through faith in tolerance.[1] However, certain changes in constitutional law, including the law of obscenity, cannot occur unless the Supreme Court acts to advance the individual's interest in liberty despite the political, religious, or moral convictions of the majority.[2] The need for obscenity law reform is underscored by recent cases that involve rap group "2 Live Crew" and retailers who sold the group's allegedly obscene work "As Nasty As They Wanna Be";[3] Dennis Barrie and

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[1] *See* RODNEY A. SMOLLA, JERRY FALWELL v. LARRY FLYNT 302-03 (1988) (discussing capacity for growth in the United States Constitution).

[2] *See* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 973 (6th ed. 1983) (noting that obscenity reflects shifting social, ethical, and religious values of complex pluralistic society); Stephen Daniels, *The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making*, 17 SAN DIEGO L. REV. 757, 757 (1980) (arguing that freedom of expression is paramount liberty and as such, exceptions must be clearly defined); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography As Act and Idea*, 86 MICH. L. REV. 1564, 1633 (1988) (noting that advocates of censorship of sexually explicit materials generally have religious mindset, and engage in protecting established verities, cultivating influence, and eliminating heresy); Robert E. Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 B.Y.U. L. REV. 247, 268 (noting that vocalness of individuals and political pressures can affect prosecutors' decisions to prosecute obscenity cases).

[3] In February 1990, the Sheriff's Office for Broward County, Florida began an investigation of rap group 2 Live Crew's "As Nasty As They Wanna Be" recording, in response to complaints by South Florida residents. As part of the investigation, an undercover officer purchased a cassette tape copy of the recording from a retailer. The tape was transcribed in part and submitted to a local judge. In March 1990, the judge found probable cause that the recording was obscene and issued an order to that effect. The Broward County Sheriff's Office then copied the order and distributed it county-wide to retail establishments as a "courtesy," warning that the recording was obscene and that sale of the recording constituted a crime. Within days, all retail stores in Broward County withdrew the 2 Live Crew recording, even though the recording itself contained the disclaimer "WARNING: EXPLICIT LANGUAGE CONTAINED." The four members of 2 Live Crew — Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon — and the group's record company brought a civil rights suit against the Sheriff in federal court. *See* Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990). The court in *Skyywalker* determined that the recording was obscene. *Id.* at 596. However, the court also determined that the actions of the Broward County Sheriff's Office, by presenting retailers with a copy of the local judge's probable cause order and threatening retailers with arrest for selling the recording, were unconstitutional as an improper prior restraint of free speech. *Id.* at 603. Accordingly, the court in *Skyywalker* permanently enjoined the Sheriff's Office from such activity. *Id.* at 603-04. The court's application of federal obscenity law to the 2 Live Crew recording is highly recommended reading for anyone with an interest in obscenity law and the issues discussed in this article. *See id.* at 587-96.

the Cincinnati Art Center who exhibited 175 photographs taken by the late Robert Mapplethorpe, seven of which allegedly were obscene;[4] and a Georgia man who exhibited a sticker with the phrase "Shit Happens" on the bumper of his van.[5]

The decision of MTV and other cable networks to ban singer Madonna's video for her song "Justify My Love" illustrates the controversy that sexually oriented expression can generate.[6] Indeed, Bret Ellis' recently published *American Psycho*, a

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In October 1990, a jury convicted the owner of a record store in Fort Lauderdale, Florida of obscenity charges for selling the recording that the *Skyywalker* court had declared obscene. *See* Jon Pareles, *Store Owner Convicted of Obscenity in Album Sale*, N.Y. TIMES, Oct. 4, 1990, at A18. Later that month, however, a jury acquitted 2 Live Crew of charges that the group staged an obscene performance at a Hollywood, Florida night club in June 1990. The performance was a 45-minute adults-only show that included selections from "As Nasty As They Wanna Be." *See* Laura Parker, *Rap Group Acquitted in Florida*, WASHINGTON POST, Oct. 21, 1990, at A1. In December 1990, the court spared the retailer a possible one-year prison term pursuant to his October conviction, but fined him $1,000 plus court costs. Ironically, the court recommended that the fine be donated to a school for the performing arts. *See A Fine for Selling Obscene Music*, N.Y. TIMES, Dec. 13, 1990, at B16.

[4] In April 1990, the Cincinnati Contemporary Arts Center and its director, Dennis Barrie, were indicted on two misdemeanor charges: pandering obscenity, and illegal use of a minor in nudity-oriented material. Barrie faced a maximum penalty of six months in jail and a $1,000 fine for each count; the gallery faced a maximum $5,000 fine for each count. The charges were filed on the day the gallery's six-week exhibition "Robert Mapplethorpe: The Perfect Moment" opened to the public. At issue were seven of the 175 photographs in the exhibition. The charges were based upon five photographs which depicted men in sado-masochistic or homoerotic poses and two photographs which showed children in the nude. In October 1990, a Cincinnati jury acquitted both the gallery and Barrie of all charges. Robert Mapplethorpe, the artist who took the photographs, died in 1989 of complications from AIDS. *See generally Cincinnati Arts Center Denies Obscenity Charges*, N.Y. TIMES, Apr. 17, 1990, at B8; Kim Masters, *Gallery Must Face Obscenity Trial*, WASHINGTON POST, Sept. 7, 1990, at B1; *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, sec. 1, at 1. Barrie and the gallery incurred more than $300,000 in court-related costs. *See* Chuck Philips, *A War on Many Fronts*, L.A. TIMES, Dec. 26, 1990, at F1 (first installment of series "Issues in the Arts 1991").

[5] *See* Mark Curridan, *But Is It Art?*, 17 BARRISTER 13, 35-36 (Winter 1990-91) (discussing case in which Cobb County, Georgia jury found defendant guilty of violating Georgia's law against obscene bumper stickers, resulting in $100 fine). The Cobb County prosecutor successfully used a "captive audience" argument that no motorist should have to endure such a "lewd and profane expression." *Id.* at 36. By contrast, the defendant argued that the phrase had little to do with sexual or bodily functions, but meant "strange, unexpected and usually unwelcome events." *Id.* at 35. *But see* Cunningham v. State, 400 S.E. 2d 916 (Ga. 1991) (reversing the Cobb County trial court decision referred to above, ruling that the Georgia statute was unconstitutionally vague and overbroad).

[6] Singer Madonna's video to her song "Justify My Love" was banned by cable network MTV in November 1990. In December 1990, Canada's MuchMusic video-music channel joined MTV in rejecting Madonna's video. However, the video, which has been described as including "steamy scenes of bisexuality and mild sado-masochism," was aired on late-night British television. *See Madonna Suited for Late Night in Britain*, L.A. TIMES, Nov. 30, 1990, at 10; *see also Morning Report: TV & Video*, L.A. TIMES, Dec. 5, 1990, at F2. In the United States, ABC News' *Nightline* showed the video in its entirety on December 3, 1990. In an interview during that installment, Madonna explained that her video was the "filmic expression of the song . . . It's about a woman who's talking to her lover, and she's saying, 'Tell me your dreams, am I in them? Tell me your fears, are you scared? Tell me your stories, I'm not afraid of who you are.' And so, you know, we're dealing with sexual fantasies, and being truthful and honest with our partner, you know. And these feelings exist." *Nightline: Madonna Interview*, at 3 (ABC television broadcast, Dec. 3, 1990) (transcript available on NEXIS). Before airing the video, host Forrest Sawyer cautioned the audience that "[W]e expect that only adults are watching. You should know this video includes graphic portrayals of sexuality and nudity." *Id.* at 2. When asked essentially where she "draws the line," Madonna responded, "I draw the line in terms of what I think is viewable on television. I draw the line . . . with violence and humiliation and degradation, . . . [a]nd I don't think any of these issues are evident in my video." *Id.* at 4.

At the end of the "Justify My Love" video, displayed on the screen is the sentence "Poor is the man whose pleasure depends on the permission of another." Madonna, *Justify My Love* (retail video viewed

fictional literary work that contains descriptions of graphic violence in a sexual context, was cancelled by his original publisher after excerpts of the book were leaked to the press.[7] Nevertheless, sexually explicit materials *can* convey ideas worthy of constitutional protection.[8] Any coherent model of obscenity law, therefore, should focus not on controlling sexually explicit materials, but on fostering the trade of such materials in the marketplace of ideas without the barriers of local censorship.[9]

Section II sets forth the history of obscenity law in the United States, paying special attention to the roles of "community standards" and "serious value" in determining whether material is obscene.[10] Section III critically analyzes the Supreme Court's current test for obscenity.[11] Section IV discusses the importance of appellate review in obscenity cases, and how the Supreme Court's current body of obscenity law frustrates appellate courts' independent review of a jury's obscenity determinations.[12] In addition, Section

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by author Dec. 27, 1990). Author Camille Paglia described the video as "an eerie, sultry tableau of jaded androgynous creatures, trapped in a decadent sexual underground. Its hypnotic images are drawn from such sado-masochistic films as Lililana Cazani's 'The Night Porter' and Luchino Visconti's 'The Damned.' It's the perverse and knowing world of the photographers Helmut Newton and Robert Mapplethorpe." *See* Camille Paglia, *Madonna — Finally, A Real Feminist*, N.Y. TIMES, Dec. 14, 1990, at A39. Paglia noted that Madonna "exposes the puritanism and suffocating ideology of American feminism, which is stuck in an adolescent, whining mode." *Id.*

[7] BRET E. ELLIS, AMERICAN PSYCHO (1991). In January 1990, Simon & Schuster bought the rights to Bret Easton Ellis' novel *American Psycho*, with release scheduled for winter, 1990-91. On October 29, 1990, *Time* magazine published an "excerpt" describing a woman being skinned alive and on November 14, 1990, Simon & Schuster abruptly canceled Ellis' novel one month before its scheduled release. Ellis kept his $300,000 advance from Simon & Schuster. On November 15, 1990, Vintage Books, a trade paperback division of Random House, agreed to publish the novel. *See An "American Psycho" Drama*, L.A. TIMES, Dec. 11, 1990, at E1. The controversy over Ellis' novel began after passages of the book — about a young, successful, Wall Street businessman — were leaked to the press. According to one account, Patrick Bateman, the book's aptly-named protagonist, in "[w]hat might be the book's single most disturbing passage," engages in sexual torture of one of his former girlfriends: "In the scene, Bateman nails her hands to the floor, cuts out her tongue and then forces her to perform an act of oral sex, before killing her." *See* Richard Bernstein, *"American Psycho," Going So Far That Many Say It's Too Far*, N.Y. TIMES, Dec. 10, 1990, at C13. Ellis has responded that "[t]he book is 400 pages long, and there are less than 40 pages with the type of mayhem they quote. . . . The articles make it seem like they're a disproportionate amount of the book." The 26-year-old Ellis wrote the best-selling and critically acclaimed LESS THAN ZERO, published by Simon & Schuster. *See* David Streitfeld, *Publisher Cancels Lurid Novel*, WASHINGTON POST, Nov. 5, 1990, at C1.

[8] *See* DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 205-06 (1986) (arguing that pornography "certainly is communicative expression" whose aim and effect is to cultivate and stimulate sexual imagination); Gey, *supra* note 2, at 1631 (noting that sexual speech often serves as vehicle for anti-authoritarianism ideas that the First Amendment arguably must protect). Professor David A.J. Richards notes that "hard-core pornographic" material is the "natural communicative vehicle" for the "erotic imaginative life" that free speech principles must protect so that free persons can exercise their powers of imagination over "issues central to finding value in life." *See* David A. J. Richards, *A New Paradigm for Free Speech Scholarship*, 139 U. PA. L. REV. 271, 283 (1990).

[9] *See* Gey, *supra* note 2, at 1633 (noting that proponents of censorship never will achieve a world that will satisfy proponents of censorship); *see also* Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963) (arguing that obscenity basically is not crime, but is sin). One scholar questions the integrity of permitting states to regulate in areas of the law such as abortion that profoundly affect personal constitutional freedom. *See* RONALD DWORKIN, LAW'S EMPIRE 184-86 (1986) (discussing "Integrity and the Constitution"). Professor Dworkin questions whether a state legislature that dictates the extent to which persons may exercise abortion rights acts consistently with an American constitutional scheme that makes important rights national in scope and enforcement. *Id.* at 186. Arguably, Professor Dworkin's analysis of abortion rights equally applies to obscenity law, which implicates the First Amendment rights of both distributors and consumers.

[10] *See infra* notes 15-66 and accompanying text.

[11] *See infra* notes 67-94 and accompanying text.

[12] *See infra* notes 96-105 and accompanying text.

IV suggests procedural safeguards that would help juries reach more informed decisions in such cases, and would help appellate judges engage in meaningful independent review.[13] Section V proposes a three-stage test that protects all materials that have serious intellectual value, and incorporates a constitutionally required standard of tolerance that addresses the "explicit harm" of allegedly obscene material.[14]

II. A HISTORY OF OBSCENITY LAW: THE INFLUENCE OF *MILLER* AND *POPE*

A. *Preserving Social Order and Morality: The Emergence of "Community Standards"*

English and American courts, in establishing the earliest tests for "obscenity," expressed concern for social order and morality by taking into account different community standards.[15] In 1868, Lord Chief Justice Cockburn, an English jurist, formulated a test for obscenity.[16] Under Justice Cockburn's test, material was obscene if the material tended to deprave and corrupt particularly susceptible individuals who might gain access to the material.[17] In 1913, Federal District Judge Learned Hand suggested that government should regulate obscenity only by reference to a community standard that changes with the times, not by the Victorian moral standard that the deprave and corrupt test required.[18] In addition, Judge Hand expressed that an obscenity test should not focus on the weakest or most corruptible persons in society, as the deprave and corrupt test did, but instead should focus on persons of average conscience.[19]

In 1957, the United States Supreme Court formulated the Court's initial test for obscenity in *Roth v. United States*.[20] The Court in *Roth* held that the First Amendment does not protect obscene expression.[21] In determining that the law can punish obscenity, the Court reasoned that society's interest in order and morality outweighs the minimal social value of obscene expression.[22] The Court in *Roth* determined that material is obscene if an average person, applying contemporary community standards, would find that the dominant theme of the material as a whole appeals to the prurient interest in

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[13] *See infra* notes 95, 106-135 and accompanying text.

[14] *See infra* notes 136-42 and accompanying text (proposing "explicit harm" standard); *infra* notes 143-62 and accompanying text (discussing proposed three-stage test for obscenity); *infra* notes 163-71 and accompanying text (discussing benefits of proposed three-stage test).

[15] *See generally* United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913); Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868).

[16] *Hicklin*, 3 L.R.-Q.B. at 371.

[17] *Id.*

[18] *Kennerley*, 209 F. at 120-21.

[19] *Id.*

[20] 354 U.S. 476 (1957), *overruled by* Miller v. California, 413 U.S. 15 (1973).

[21] *Roth*, 354 U.S. at 484-85.

[22] *Id.* at 485 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). *But see* Pamela J. Stevens, Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 703 (1982) (contending that social interest in order and morality should be constitutionally impermissible purpose for government regulation of speech because that purpose regulates speech solely on the basis of some persons' distaste for content of speech).

sex.[23] The Court's "contemporary community standards" test, however, did not describe the geographic scope of the term "community."[24]

Nevertheless, the obscenity test formulated in *Roth* resolved three flaws that the Court perceived in the English test for obscenity.[25] First, the *Roth* test required the jury to evaluate allegedly obscene material according to the material's effect on average persons, rather than on unusually sensitive persons.[26] Second, the *Roth* test required that the jury evaluate allegedly obscene material according to present-day community standards rather than obsolete moral standards.[27] Third, the *Roth* test did not focus on the effect of isolated portions of a work, but on the effect of the entire work.[28]

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[23] *Roth*, 354 U.S. at 489. The Supreme Court has noted that the *Roth* test equated obscenity with "prurience" — material that appeals to a "shameful or morbid" interest in sex rather than to a "good, old fashioned, healthy" interest in sex. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 497-99, 504 (1985).

[24] *See Roth*, 354 U.S. at 488-90 (discussing community standards test); *see also* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 117 (1976) [hereinafter SCHAUER, THE LAW OF OBSCENITY] (noting Court's failure in *Roth* to define explicitly the term "community" in contemporary community standards test); Gregory L. Waples & Mary Jo White, *Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law*, 64 VA. L. REV. 399, 400 (1978) (noting Court's failure to explain the scope of contemporary community standards in *Roth*); Lorri Staal, Note, *The Objective Standard for Social Value in Obscenity Cases*, 78 J. CRIM. L. & CRIMINOLOGY 735, 738 (1988) (same).

Some commentators have reasoned that because the Court in *Roth* upheld the trial judge's jury instructions that deemed the jurors exclusive judges of the common conscience of the community, the Court intended that jurors, in making obscenity determinations, apply standards of the local community. *See* SCHAUER, THE LAW OF OBSCENITY, *supra*, at 117 (discussing Court's concept of "community"); Staal, *supra*, at 738 (same). Further, some commentators have presumed that, because of the judge's instruction that deemed the jurors exclusive judges of the community's "conscience," the jury in *Roth* applied localized standards in determining what the common conscience of the community was. *See* SCHAUER, THE LAW OF OBSCENITY, *supra*, at 117 (discussing standards that the jury in *Roth* applied); Staal, *supra*, at 738 (same). Another scholar, however, has argued that the Supreme Court in *Roth* intended that the contemporary community standard represent the society's current prevailing opinion, without reference to any specific community. *See* HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 38 (1969) (discussing Court's "contemporary community standards" requirement in obscenity cases). Similarly, some commentators have noted that the broad tone of the Court's opinion in *Roth* indicated that the standard would change through time, rather than differ geographically at any given time. *See* William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 110 (1960) (noting that Court used phrase "contemporary community standards" to disapprove of jurors' application of Victorian standards in obscenity cases); Frederick F. Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 8 (1978) (noting Court's temporal rather than geographical emphasis on contemporary community standards).

[25] *See* 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 172-73 (1985) (discussing three flaws in the *Hicklin* test for obscenity).

[26] *Roth*, 354 U.S. at 488-89; *see* FEINBERG, *supra* note 25, at 173 (discussing *Hicklin* test's focus on especially susceptible persons).

[27] *Roth*, 354 U.S. at 488 (citing Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940)); *see* FEINBERG, *supra* note 25, at 173 (discussing *Hicklin* test's application of eternally fixed Victorian upper class standards to works).

[28] *Roth*, 354 U.S. at 489; *see* FEINBERG, *supra* note 25, at 173 (discussing *Hicklin* test in which jurors evaluated isolated passages of works). *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 906 n.17 (2d ed. 1988) (suggesting that *Hicklin* does not advocate obscenity test based on "isolated passages" of given work). Scholars generally view the *Roth* standard as making obscenity law more liberal than the obscenity law prior to *Roth*. *See* FEINBERG, *supra*, at 173 (noting that *Roth* test for obscenity was a distinct improvement over *Hicklin* test); Gey, *supra* note 2, at 1571 (analyzing liberal effect of *Roth* decision on obscenity law); Riggs, *supra* note 2, at 249 (noting that *Roth* decision effectively stimulated publishers' production and distribution of sexually explicit materials).

After the Supreme Court established a test for obscenity, Congress and most state legislatures enacted criminal statutes that punish obscene expression.[29] Accordingly, the question of whether the First Amendment protects sexually explicit materials can turn on a jury's often complicated determination, under a legislature's statute, of whether the materials are obscene.[30] In obscenity cases, community standards have emerged as the primary criteria for determining whether certain sexually explicit materials are obscene and thus are denied constitutional protection from criminal sanctions.[31]

B. "National" Community Standards for Obscenity: A Good Idea that Commanded Only a Plurality of the Court

During the early 1960's, in an effort to clarify the decision in *Roth*, a plurality of the Supreme Court endorsed a uniform, national standard for obscenity determinations in several opinions. In 1962, a plurality of the Supreme Court in *Manual Enterprises v. Day*[32] clarified the scope of the term "community" in the phrase "contemporary community standards" that the Court introduced in *Roth*.[33] The plurality in *Manual Enterprises* determined that national standards of decency governed federal obscenity cases.[34] The Court reasoned that if an obscenity standard denied certain areas of the country access to material that is acceptable in other areas, the standard would intolerably affect the public's right of access to sexually explicit material.[35] The Court, therefore, determined that in federal obscenity cases, the relevant community was the United States rather than any state, county, or city.[36]

Two years after the *Manual Enterprises* decision, a plurality of the Court in *Jacobellis v. Ohio*[37] further clarified the scope of the term "community" in the phrase "contemporary community standards."[38] In *Jacobellis* the plurality stated that jurors must evaluate the obscenity of materials by reference to societal standards rather than local or

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[29] *See, e.g.*, 18 U.S.C. § 1461 (1988) (punishing persons who mail obscene matter); ALA. CODE § 13A-12-151 (1987) (prohibiting distribution and manufacture of obscene works); ARK. CODE ANN. § 5-68-405 (Michie 1987) (punishing possession, sale, or distribution of obscene material); FLA. STAT. ch. 847.06 (1987) (punishing transportation of obscene materials into state); IDAHO CODE § 18-4103 (1988) (punishing sale or distribution of obscene matter); KY. REV. STAT. ANN. § 531.020 (Baldwin 1988) (punishing distribution of obscene matter); MD. ANN. CODE art. 27, § 418 (1987) (punishing sale, distribution, or publication of obscene matter); MINN. STAT. § 617.241 (1987) (punishing distribution of obscene materials); NEV. REV. STAT. ANN. § 201.249 (Michie 1987) (punishing production, sale, distribution, exhibition, and possession of obscene materials); R.I. GEN. LAWS § 11-31-1 (1987) (punishing circulation of obscene publications and shows); VA. CODE ANN. § 18.2-374 (Michie 1988) (punishing production, publication, sale, and possession of obscene items).

[30] *See generally* Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159, 1162-75 (1986) (discussing jury's role in obscenity determinations and advocating plain-language jury instructions). One scholar considers obscenity one of the most intractable speech problems that the Supreme Court has faced. *See* SMOLLA, *supra* note 1, at 189 (discussing obscenity law).

[31] *See* Marguerite M. Lentz, *Comparison Evidence in Obscenity Trials*, 15 U. MICH. J.L. REF. 45, 47-48 (1981) (describing community standards as the "heart" of obscenity test).

[32] 370 U.S. 478 (1962).

[33] *Id.* at 488.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 488 & n.10.

[37] 378 U.S. 184 (1964).

[38] *Id.* at 192-93.

state community standards.[39] Moreover, the plurality determined that *Roth* indeed had required a national standard for all obscenity cases,[40] reasoning that the First Amendment does not vary with state, county, or municipal lines, but is national in application.[41] The *Jacobellis* decision thus reaffirmed that the Constitution required a national standard for obscenity determinations.[42]

C. Miller v. California: *The Tension Between "Community Standards" of Tolerance and "Serious Value" of Material*

The Supreme Court set forth the current three-part obscenity test in *Miller v. California*.[43] In *Miller*, the State of California, under a California statute, convicted the, defendant for knowingly distributing obscene materials.[44] The Superior Court of California summarily affirmed the conviction, rejecting the defendant's claim that the jury violated the First Amendment by applying state rather than national standards.[45] After the appeal to the United States Supreme Court, the Court formulated a test in which material, to be obscene, must satisfy three prongs.[46] The first prong requires that an average person, applying contemporary community standards, would find that the work, as a whole, appeals to the prurient interest in sex ("prurient interest prong").[47] The second prong requires that, according to contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct as defined by state law ("patent offensiveness prong").[48] The third prong requires that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value ("serious value prong").[49]

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[39] *Id.*

[40] *Id.* at 195.

[41] *Id.* at 194-95.

[42] *Id.* Chief Justice Earl Warren, however, expressed in his *Jacobellis* dissent that no national standard for obscenity existed. *Id.* at 200 (Warren, C.J., dissenting). Moreover, the Chief Justice proposed that state and lower federal courts evaluate allegedly obscene material with reference to local community standards. *Id.*

[43] 413 U.S. 15 (1973).

[44] *Id.* at 16. In *Miller*, the obscene matter consisted of five brochures that advertised a film, "Marital Intercourse," and four books: "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography." *Id.* at 18. The brochures depicted, through pictures and drawings, men and women in groups of two or more engaged in various sexual activities. *Id.* The brochures often prominently displayed the genitals of the men and women. *Id.*

[45] *Id.* at 17.

[46] *Id.* at 24; *see infra* notes 47-53 and accompanying text (describing three-prong *Miller* test).

[47] *Miller*, 413 U.S. at 24.

[48] *Id.*; *see* Smith v. United States, 431 U.S. 291, 300-01 (1977) (noting that juries must apply contemporary community standards to the patent offensiveness prong of the *Miller* test).

[49] *Miller*, 413 U.S. at 24. The third prong in *Miller*, which inquired whether allegedly obscene material lacked serious intellectual value, was a distinct change from the third prong in the obscenity test that the Court endorsed in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion). The third *Memoirs* prong required that, to declare material obscene, a jury find the material "utterly without redeeming social value." *Id.* Further, the third *Memoirs* prong had made the Court's obscenity standard significantly more permissive, because the "utterly without" prong required the prosecution in an obscenity case to prove a negative. *See Miller*, 413 U.S. at 22 (discussing third prong of *Memoirs* obscenity test). Indeed, the Court in *Miller* explicitly disapproved of the permissive effect of the third *Memoirs* prong. *Id.* Accordingly, one scholar views the *Miller* standard as an effort by the Supreme Court to restrict the use of sexually explicit materials as a vehicle for free expression. *See* FEINBERG, *supra* note 25, at 186 (noting that intended consequence of the *Miller* decision was to permit more aggressive prosecutions of pornographers).

The Supreme Court explained that the jury could measure the prurient appeal and patent offensiveness prongs by community standards rather than national standards.[50] The Court reasoned that the issues of prurient appeal and patent offensiveness essentially are questions of fact and, because of the diversity and size of the United States, the Court could not formulate a single, national standard to determine whether a work appeals to prurient interest or is patently offensive.[51] Accordingly, the Court rejected a requirement that juries apply a national standard to the first two prongs of the obscenity test.[52] The Court, however, did not state what geographic standard a jury must apply in assessing the obscenity test's serious value prong.[53]

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[50] *Miller*, 413 U.S. at 30. The Court upheld the trial court's instruction that the jury, in evaluating the allegedly obscene material, apply a statewide community standard. *Id.* at 33-34. The Court in *Miller* noted that the primary purpose of the contemporary community standards requirement in *Roth* was to avoid the dangers of the *Hicklin* "deprave and corrupt" obscenity test that focused on particularly susceptible individuals. *Id.*; *see supra* notes 20-28 and accompanying text (discussing *Roth* decision); *supra* notes 16-17 and accompanying text (discussing *Hicklin* test for obscenity). The Court in *Miller* determined that the jury instruction adequately ensured that the jury would judge the allegedly obscene material by the material's impact on an average person, rather than the material's effect on a particularly susceptible, particularly sensitive, or totally insensitive person. *Miller*, 413 U.S. at 33.

[51] *Miller*, 413 U.S. at 30. Four years after the Supreme Court's decision in *Miller*, Justice Stevens discussed at length the illogic of the Court's geographic premise in *Miller* that a national standard for obscenity cases would be futile for juries to apply. *See* Smith v. United States, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting) (noting that jury could not ascertain contemporary community standards in California, a large and culturally diverse state, more accurately than jury could ascertain national standards); *see also* SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 125 (noting that in states such as New York, California, and Texas, statewide standards are not more ascertainable than national standards); Harry M. Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L.A. L. REV. 207, 215 (1974) (discussing diversity in standards between New York City and upstate New York). Justice Stevens argued further that the standard for some metropolitan areas would be no more ascertainable than a national standard. *Smith*, 431 U.S. at 314 n.10 (Stevens, J., dissenting). Because state and local community standards are no more ascertainable than national standards for obscenity, the logic of the Court in *Miller* would dictate that a jury's attempt to apply any particular community standard is futile. *See id.* at 312-15 (discussing Justice Stevens' view of *Miller* "community standards" test).

[52] *Miller*, 413 U.S. at 37.

[53] *See id.* at 30 (failing to describe geographic standard that juries must apply to serious value prong); Staal, *supra* note 24, at 743 (noting that the Court, in discussing "serious value" prong, failed to mention geographic standards). In 1974, the Supreme Court clarified the *Miller* holding to mean that the Constitution did not require any specific geographic standard in either federal or state obscenity cases. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (holding that states can define the phrase "contemporary community standards" without further geographic specification); Hamling v. United States, 418 U.S. 87, 106 (1974) (holding that courts in federal obscenity cases could define the phrase "contemporary community standards" without further geographic specification). One scholar noted that the Court, by failing to require that juries utilize any specific geographic community standard in evaluating allegedly obscene materials, confirmed the fears of persons who oppose censorship. *See* FELICE F. LEWIS, LITERATURE, OBSCENITY, AND LAW 242 (1976) (discussing Supreme Court's failure to require any specific geographic standard in obscenity cases) (quoting *Jenkins*, 418 U.S. at 157). After *Jenkins* and *Hamling*, prosecutors could subject publishers to innumerable lawsuits unless the most restrictive communities in the United States would find the publishers' materials acceptable. *Id.*

D. Pope v. Illinois*: "Serious Value" Revisited: Enter the "Reasonable Person"*

In 1987, the United States Supreme Court determined in *Pope v. Illinois*[54] the standard a jury must apply in judging the obscenity test's serious value prong.[55] In *Pope*, the State of Illinois separately charged the defendants, both of whom were attendants at an adult bookstore, with violating Illinois obscenity law by selling adult magazines.[56] The defendants in *Pope* moved to dismiss the obscenity charges on the ground that the Illinois obscenity statute was unconstitutional because the statute failed to require that the jury judge the materials' value solely on an objective basis rather than by contemporary community standards.[57] The juries convicted both defendants,[58] and the Illinois Appellate Court affirmed the judgment.[59] The defendants subsequently appealed to the United States Supreme Court and renewed their claim that the Illinois obscenity statute was unconstitutional.[60] Reversing in part the lower court's decision, the Supreme Court held that the jury, when determining the value of allegedly obscene materials, must apply an objective reasonable person standard.[61]

The Supreme Court in *Pope* reasoned that because the value of sexually explicit material does not vary from community to community based on the degree of local acceptance that the material has won, the serious value of a work, as a matter of

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[54] 481 U.S. 497 (1987).

[55] *Id.* at 500; *see infra* notes 61-66 and accompanying text (discussing Court's determination of the standards that juries must apply to serious value prong). In *Pope*, the Court noted that the Court in *Miller* intentionally did not discuss the third prong of the *Miller* test in terms of contemporary community standards. *Pope*, 481 U.S. at 500.

[56] *Pope*, 481 U.S. at 499.

[57] *Id.*

[58] *Id.* at 499-500. In *Pope*, both trial courts rejected the defendants' contention that the Illinois obscenity statute was unconstitutional. *Id.* at 500. Further, the trial courts instructed the respective juries to determine the "value" prong with reference to how ordinary adults in the entire state of Illinois would view the materials' value. *Id.* at 499 n.1. The United States Supreme Court granted certiorari after the Illinois Supreme Court denied review. *Id.*

[59] *Id.* at 500.

[60] *Id.*

[61] *Id.* at 500-01; *see id.* at 504 (characterizing Court's "reasonable person" standard as an "objective standard") (Scalia, J., concurring); Staal, *supra* note 24, at 735 (interpreting reasonable person standard, which is the Court's requirement in *Pope* for serious value prong, as an objective standard). The Court noted that jurors can apply contemporary community standards only to the first two prongs of the *Miller* test. *Pope*, 481 U.S. at 500. The Court determined that the trial courts' jury instruction was unconstitutional; the proper inquiry for a jury in determining serious value is whether a reasonable person, rather than an ordinary member of a given community, would find certain types of intellectual value in allegedly obscene material taken as a whole. *Id.* at 500-01; *see infra* notes 62-66 and accompanying text (discussing Court's rationale in *Pope*). Notably, while the defendants pursued their appeals in the United States Supreme Court, the Illinois legislature repealed the obscenity statute under which the jury convicted the defendants in *Pope*, and enacted a new statute that did not require juries to apply contemporary community standards to the third *Miller* prong. *See* ILL. ANN. STAT. ch. 38, para. 11-20(b) (Smith-Hurd 1985) (effective Jan. 1, 1986) (Illinois obscenity statute).

constitutional law, must be constant throughout the United States.[62] The Court further reasoned that if a judge instructed jurors assessing the serious value of allegedly obscene material to apply community standards, jurors might feel bound to apply prevailing local values without considering whether local values were reasonable.[63] The Court determined, therefore, that under the *Pope* standard a jury cannot find material obscene if a reasonable person would find serious value in the material, even though only a minority of persons in a given community might find serious value in the material.[64] Comparing the reasonable person requirement for the serious value prong to the "reasonable man" instructions that apply in other contexts, such as tort suits, the Supreme Court determined that the reasonable person standard would not unduly confuse the trier of fact.[65] The Court, therefore, established a standard that juries, in assessing serious value of allegedly obscene material, must apply without reference to contemporary community standards.[66]

III. ANALYSIS OF THE SUPREME COURT'S *MILLER-POPE* OBSCENITY TEST

A. "Community Standards" of Tolerance — The Court Injects Taste Into the First Amendment

The Supreme Court in *Miller* approved a contemporary community standard for sexually explicit expression that could vary depending on a state's or town's distaste for the material.[67] Because the *Miller* standard permitted juries to utilize a statewide or local community standard for the prurient appeal and patent offensiveness prongs, local courts could convict persons for distributing sexually explicit material that more permissive jurisdictions might not find obscene.[68] For national publishers who distributed materials that lacked serious value, the *Miller* test created a risk of criminal liability unless materials met the most austere standards in the country.[69]

In rejecting a requirement of a national standard for the prurient appeal and patent offensiveness prongs, the Supreme Court's opinion in *Miller* indicated that an

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[62] *Pope*, 481 U.S. at 500; *see* Gey, *supra* note 2, at 1580 (noting that third prong of *Pope* test requires a national standard for jury's determination of the intellectual value of allegedly obscene materials). Professor Gey noted, however, that the Court in *Pope*, in determining that "serious value" of a work is a matter of constitutional law that is consistent nationwide, merely reiterated the common understanding that the serious value question required a uniform constitutional standard. *Id.*

[63] *Pope*, 481 U.S. at 501 n.3.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 500-01 & n.3.

[67] *See* Miller v. California, 413 U.S. 15, 30-34 (1974) (discussing contemporary community standards test); *infra* notes 68-73 and accompanying text (discussing standard for sexually explicit expression that the Court established in *Miller*).

[68] *See Miller*, 413 U.S. at 30-34 (discussing propriety of state and local community standards of tolerance for sexually explicit materials in the *Miller* test); FEINBERG, *supra* note 25, at 186 (noting that *Miller* effectively permitted local courts to convict distributors of sexually explicit materials that "more sophisticated" jurisdictions might not find obscene).

[69] *See* FEINBERG, *supra* note 25, at 186 (discussing adverse effects of *Miller* decision on free expression); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 295 (Avon ed. 1981) (noting that lower court judges repeatedly would abuse or misread obscenity law); *see also* CLOR, *supra* note 24, at 74 (noting that jurors' application of local community standards likely would result in censorship of genuinely valuable materials); Richard E. Shugrue, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157, 159 (1974) (noting that righteous prosecutors conceivably may seek to impose personal morality on society).

obscenity standard should not require that persons in certain parts of the nation accept sexually explicit material that persons in other parts of the nation tolerate.[70] The Court thus rejected a national standard of tolerance for sexually explicit materials that the Court had recognized in obscenity cases prior to *Miller*.[71] One commentator has suggested that

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[70] *Miller*, 413 U.S. at 32. Professor Gey has noted that the Court's approach was internally contradictory. Gey, *supra* note 2, at 1579. Professor Gey reasoned that the Court intended that the standards of "corrupt" urbanites of Manhattan no longer would define the constitutional obscenity standard for the rest of the country. *Id.* Professor Gey concluded, accordingly, that because intellectual merit would "salvage" material from an obscenity determination even if most Americans considered the material sexually debasing, the *Miller* serious value prong did not express the Court's intent. *Id.*

[71] *Miller*, 413 U.S. at 37; *see* FEINBERG, *supra* note 25, at 186 (noting that *Miller* decision "tightened the screws" on obscenity); Gey, *supra* note 2, at 1578 (noting that the Court, in defining a new obscenity test, relied primarily upon Justices' visceral valuations of obscene expression); Waples & White, *supra* note 24, at 446 (noting that the Court's rejection in *Miller* of a national standard weakened First Amendment protection of sexually explicit materials); *supra* notes 32-42 and accompanying text (discussing national standards that the Court endorsed prior to *Miller*).

Courts disagree whether the Court's community standards requirement from *Miller* measures a community's affirmative acceptance of allegedly obscene material, versus a community's tolerance for (but not necessarily acceptance of) the material. *Compare* United States v. Pryba, 900 F.2d 748, 759 (4th Cir. 1990) (noting that a "tolerance" test for community standards would "affront . . . the notion of 'standards,' because tolerance embodies the permissible *deviations* from standards") (quoting Hoover v. Byrd, 801 F.2d 740, 741-42 (5th Cir. 1986)) (emphasis in original), *cert. denied*, 111 S. Ct. 305 (1990) *with* Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1029 (5th Cir. Unit A June 1981) ("[T]he line between protected expression and punishable obscenity must be drawn at the limits of a community's tolerance rather than in accordance with the dangerous standards of propriety and taste"), *cert. denied*, 455 U.S. 913 (1982). The Court's decision in *Miller* does not mention "acceptance" or "toleration" in discussing contemporary community standards. *Pryba*, 900 F.2d at 759. However, the Court's decision in Smith v. United States, 431 U.S. 291 (1977), suggests that the *Miller* test might indeed require that the jury determine the tolerance of the community for allegedly obscene material. *See id.* at 305 ("[C]ommunity standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community") (emphasis added).

Prior to the Supreme Court's decision in *Miller*, the Court indicated that contemporary community standards embodied society's tolerance for allegedly obscene materials. *See* Manual Enters. v. Day, 370 U.S. 478, 489 (1962) (finding material which did not violate contemporary notions of fundamental decency to be non-obscene); *id.* at 490 (finding sexually explicit portrayals, which did not exceed portrayals that "society tolerates," to be non-obscene); CLOR, *supra* note 24, at 62 (analyzing *Manual Enterprises* standard as "outer limits of tolerance" standard). The Supreme Court in *Manual Enterprises* sought to ensure that no nationwide "patchwork" of divergent ethnic and cultural standards would result in unequal nationwide access to sexually explicit materials. *See Manual Enterprises*, 370 U.S. at 488 (noting "intolerable consequence" that occurs if some sections of the United States do not have access to material that those sections find acceptable, simply because other sections of the United States might find same materials offensive to prevailing community standards of decency); Staal, *supra* note 24, at 738 (noting "patchwork" of community standards that would result if local communities enacted obscenity laws). Indeed, some commentators have supported the national standard of tolerance for sexually explicit materials that the Court advocated in *Manual Enterprises*, rather than an obscenity standard that requires community acceptance to gain First Amendment protection for material. *See* Michael K. Curtis, *Obscenity: The Justices' (Not So) New Robes*, 8 CAMPBELL L. REV. 387, 410 (1986) (advocating standard of tolerance for obscenity determinations); *see also* CLOR, *supra*, at 56 (suggesting interpretation of "contemporary community standards" as community's outer limits of tolerance rather than community's present moral standards). Professor Clor implies that a community could tolerate sexually explicit materials while at the same time disapproving of the materials. *See id.* (noting that community may tolerate many things of which the community disapproves).

The American Law Institute's Model Penal Code obscenity standard encompasses society's tolerance for sexually explicit materials. *See* MODEL PENAL CODE § 251.4(4)(d) (Official Draft 1962) (declaring, as admissible evidence, degree of public acceptance of allegedly obscene material in the United States). Similarly, both Canada's and West Germany's current obscenity law espouse a national or societal standard of tolerance toward sexually explicit communication. *See* Cynthia A. MacDougall, *The Community Standards Test of Obscenity*, 42 U. TORONTO FAC. L. REV. 79, 83 (1984) (noting that Canada's obscenity standard, which is national in scope, involves factfinder's determination of whether allegedly obscene

in *Miller*, the Court intended to allow freedom of expression in various regions of the country to flourish according to differing community standards.[72] The Court, however, by revising the permissible geographic scope of contemporary community standards to include statewide or local community standards, effectively fostered local censorship.[73]

After the Court in *Miller* rejected a national standard of tolerance for sexually explicit materials, the Court subsequently clarified which community members' views comprise the community standard.[74] In clarifying the breadth of the community that jurors must consider, the Court determined that jurors must not take account of children when analyzing the relevant community.[75] Furthermore, it held that jurors, in determining community standards, must take into consideration the views of sensitive persons and members of atypical "deviant" groups.[76] The Court reasoned that a jury's inclusion of both atypical group members and sensitive adults would broaden the community standard,

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material exceeds community's tolerance); Kathleen E. Mahoney, *Obscenity, Morals and the Law: A Feminist Critique*, 17 OTTAWA L. REV. 33, 64 (1984) (discussing Canada's obscenity standard that establishes tolerance for sexually explicit materials); Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REF. 201, 212-18 (1987-88) (discussing West German criminal law that establishes tolerance toward sexually explicit materials); *id.* at 225 (noting that West Germany's obscenity test takes into account "general social value judgments").

[72] *See* FEINBERG, *supra* note 25, at 187 (quoting Willard Gaylin). Willard Gaylin noted that the Court in *Miller* intended to permit local communities to set their own standards for obscenity cases, and thus allow diversity to flourish as people of each area wished. *Id.* (quoting Gaylin, "Obscenity," WASHINGTON POST, Feb. 20, 1977). Gaylin maintained, however, that *Miller* effectively set limits for national distribution for literature and television at the level of the "bluest-nosed small town critic." *Id.*; *see supra* notes 67-71 and *infra* note 73 and accompanying text (discussing how Supreme Court's decision in *Miller* encouraged local censorship).

[73] *See Miller*, 413 U.S. at 30-34 (rejecting "national" community standard of tolerance for sexually explicit materials and advocating statewide or local community standards for jury's obscenity determinations); FEINBERG, *supra* note 24, at 186 (noting that intended consequence of the *Miller* decision was to permit more aggressive prosecutions of pornographers); WOODWARD & ARMSTRONG, *supra* note 69, at 295 (noting that *Miller* obscenity test effectively would create "at least fifty separate First Amendments"); Riggs, *supra* note 2, at 267 (noting that *Miller* decision broadened the range of unprotected sexually explicit materials); *see also* ALAN M. DERSHOWITZ, THE BEST DEFENSE 192 (Vintage ed. 1983) (noting that "[t]o advocate censorship is to choose not to be able to choose at all"); Curtis, *supra* note 71, at 387 (noting that censorship is more dangerous than expression, even though much speech advocates repugnant values). The *Miller* decision permitted effective local censorship not only in theory, but in practice as well. *See* WOODWARD & ARMSTRONG, *supra*, at 300 (noting prosecution in Charlottesville, Virginia, of the seller of *Playboy* magazine, and Chief Justice Burger's view that the *Miller* decision never intended to ban *Playboy*).

[74] *See* Pinkus v. United States, 436 U.S. 293, 297-304 (1978) (clarifying demographic composition of "community" in contemporary community standards test); *infra* notes 75-79 and accompanying text (discussing Supreme Court's clarification of composition of "community" that reinforced local community censorship of sexually explicit materials); *supra* notes 67-73 and accompanying text (discussing less permissive standard of tolerance for sexually explicit materials that the Court established in *Miller*).

[75] *Pinkus*, 436 U.S. at 298. In holding that jurors should not consider children when determining the demographic composition of "community," the Court reasoned in *Pinkus* that if children were included, the "average person" by whose standards jurors judge obscenity would be much more susceptible or sensitive than if jurors restricted the composition of the "community" to adult viewers. *Id.* The Court in *Pinkus* suggested that if jurors permissibly could include children in the community when determining community standards, obscenity law might "reduce the adult population . . . to reading only what is fit for children." *Id.* (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[76] *Id.* at 300-03. The Court, in determining that jurors may include sensitive persons in comprising the "community," noted that jurors in obscenity cases must not focus only on the most sensitive or insensitive persons, but must include both sensitive and insensitive persons together with all other adults in the community. *Id.* at 300-01. Similarly, the Court, in ruling that jurors may include deviant persons in the "community" when ascertaining the prurient appeal of material, reasoned that although certain materials might appeal more to the prurient interest of "deviants," the same materials equally could appeal to the prurient interest of any adult observer. *Id.* at 302.

so that the jury more accurately could determine the views of a hypothetical "average person."[77] Unlike the inclusion of sensitive adults, however, the inclusion of deviant group members cannot significantly impact the jury's formulation of the community standard because the concept of a deviant group implies that the group contains a very small number of individuals.[78] As a result of permitting the jury to include sensitive adults in formulating the community standard, the Supreme Court's definition of "community" thus reinforced the less tolerant community standards that the Court approved in *Miller* for a jury's determinations of patent offensiveness and prurient appeal of sexually explicit materials.[79]

B. "Serious Value" — The Court's National Standard for Free Expression

The Supreme Court in *Pope* clarified the standards that jurors must apply to the serious value prong of the *Miller* test. In the *Pope* test, jurors must apply an objective, "reasonable person" standard when they judge the value of allegedly obscene materials.[80] In contrast to the serious value question, a jury can apply a local or state "contemporary community" standard when evaluating the patent offensiveness and prurient appeal of the same material.[81] Accordingly, for the serious value prong, the Supreme Court assumed a generic, arguably national, community of "reasonable persons" who have objective standards.[82] Legislatures and judges, therefore, cannot dictate the scope of the relevant community for the serious value prong.[83] As a matter of constitutional law, the contemporary community standard for the value of a specific work must be the same throughout the United States.[84]

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[77] *Id.* at 300-02.

[78] *See* Kai Erikson, *Introduction to Wayward Puritans*, *in* BEFORE THE LAW 423 (4th ed. 1989) (noting that deviant individuals violate rules of conduct that the rest of the community holds in high esteem).

[79] *See Pinkus*, 436 U.S. at 300 (noting that jurors in obscenity cases can include most susceptible or sensitive members in the community along with all other community members); *supra* notes 67-73 and accompanying text (discussing Court's less tolerant standard for sexually explicit expression in *Miller*).

[80] *See* Pope v. Illinois, 481 U.S. 497, 500-01 (1983) (requiring "reasonable person" standard for serious value prong of obscenity test); *id.* at 504 (classifying Court's reasonable person test for third *Miller* prong as "objective" test) (Scalia, J., concurring); Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 267 (1987-88) (interpreting *Pope* decision to require an objective standard for serious value prong).

[81] *Pope*, 481 U.S. at 500. By requiring that jurors utilize an objective, reasonable person standard when they assess the constitutional value of materials, the Supreme Court in *Pope* retreated from the *Miller* determination that a uniform, national standard is nonexistent. *See* Miller v. California, 413 U.S. 15, 30 (1973) (expressing that no community standard could encompass all fifty states in single formulation). *Pope* specifically referred only to the first two prongs of the *Miller* standard in the Court's discussion of the impropriety of national standards. *See Pope*, 481 U.S. at 500 (discussing prurient interest and patent offensiveness prongs of obscenity standard). Other language in *Miller*, however, indicates that the Court felt that no national standard should exist for the serious value prong. *See Miller*, 413 U.S. at 33 (acknowledging that because people in different states vary in their tastes and attitudes, uniform standards for obscenity impermissibly would disturb states' diversity).

[82] *Pope*, 481 U.S. at 500-01; *see supra* note 81 (discussing objective nature of serious value prong); Gey, *supra* note 2, at 1580 (characterizing serious value prong of *Pope* standard as a national standard); Staal, *supra* note 24, at 755 (interpreting *Pope* to require that jurors assess the value of allegedly obscene material based on how the "average American" would evaluate material).

[83] *See Pope*, 481 U.S. at 499-501 (holding, as unconstitutional, judge's instruction that the jury assess the value of allegedly obscene material by determining how ordinary adults in the entire state would view material); *id.* at 501-02 (suggesting that obscenity statute, which required jury to apply community standards to value question, was invalid).

[84] *Id.*, 481 U.S. at 500-01.

In *Pope*, the Supreme Court explained its reasoning that a "reasonable person" standard was the appropriate way for juries to determine whether material has constitutionally protected value. The Court distinguished between the concept of a reasonable person who evaluates allegedly obscene material and an ordinary member of any specific community who judges the same material.[85] The Court in *Pope* noted that even though only a small minority of persons might find serious value in certain sexually explicit materials, those persons might indeed be reasonable.[86] Therefore, by endeavoring to protect minority views regarding serious value of sexually explicit material, the Court approved a national standard for serious value in *Pope* that it had rejected in *Miller* regarding the prurient appeal and patent offensiveness of material.[87]

In distinguishing the serious value prong from the prurient interest and patent offensiveness prongs, and requiring an objective "reasonable person" standard for serious value, the Court in *Pope* stated that the constitutional value of a work cannot change from community to community.[88] However, for the Court's reasonable person standard to bring about a truly uniform standard for serious value, a "reasonable person" by definition always would recognize whether allegedly obscene material has serious literary, artistic, political, or scientific value.[89] The Court ignores the possibility that the term "reasonable person" will confuse the jury,[90] convinced that the jury can distinguish between its use here and in other legal contexts, such as tort suits.[91] Jurors can more easily agree on

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[85] *Id. But see* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 90-91 (1965) (explaining role of "reasonable man" concept in law). Notably, Lord Patrick Devlin considered an "ordinary person" and a "reasonable man" to be the same entity. *Id.* at 90. The Supreme Court's distinction in *Pope* between an ordinary member of any given community and a reasonable person, therefore, is inconsistent with Devlin's position that an "ordinary" person who ascertains moral principles after lawyers' arguments, a judge's instructions, and jury deliberations *is* a "reasonable" person. *See Pope*, 481 U.S. at 500-01 (distinguishing between "ordinary person" and "reasonable person" who evaluates allegedly obscene material). Accordingly, Devlin's explanation of the "reasonable man" would suggest that the Court, in justifying a "reasonable person" standard for the serious value prong, relies upon a meaningless distinction.

[86] *Pope*, 481 U.S. at 501 n.3. *But see* Donald E. Montgomery, Note, *Obscenity: 30 Years of Confusion and Still Counting*, 21 CREIGHTON L. REV. 379, 402 (1987) (noting that reasonable person standard, as "mean" of population, contradicts theory that minority views can prevail regarding serious value of sexually explicit material) (citing *Pope*, 481 U.S. at 511-12 n.4).

[87] *See Pope*, 481 U.S. at 500-01 (requiring national constitutional standard for serious value); *Miller*, 413 U.S. at 30 (rejecting national standard of tolerance for prurient appeal and patent offensiveness prongs of obscenity standard). *Compare supra* notes 80-86 and accompanying text (discussing Supreme Court's *Pope* decision, which established an objective standard for serious value of sexually explicit materials) *with supra* notes 68-71 and accompanying text (analyzing Supreme Court's *Miller* decision, which rejected national standards of tolerance for prurient appeal and patent offensiveness of sexually explicit materials).

[88] *Pope*, 481 U.S. at 500. *But see* William B. Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 555-56 (1975) (interpreting serious value prong of *Miller* standard as merely representative of First Amendment values, requiring jury's subjective judgment).

[89] *See Pope*, 481 U.S. at 500-01 (discussing reasonable person standard for serious value prong of obscenity test); *supra* notes 85-86 and accompanying text (discussing the Court's distinction between ordinary member of community and "reasonable person" who determines whether material has serious value).

[90] *See Pope*, 481 U.S. at 501 n.3 (noting that reasonable person standard for serious value prong will not confuse jurors); MacDougall, *supra* note 71, at 84 (noting differences between "reasonable man" of negligence law and community standards tests generally); Taylor, *supra* note 80, at 281 (noting that current obscenity standard results in "undeniable confusion" for jurors).

[91] *See Pope*, 481 U.S. at 501 n.3 (stating that reasonable person standard for serious value prong will not confuse jurors). *But see* Lentz, *supra* note 31, at 56 (noting that although community standards depend on actual views that specific persons hold, "reasonable man" principles do not depend on what persons actually think).

whether a reasonable person would have driven a car more safely in a tort case, than whether a reasonable person would react a certain way to allegedly obscene material.[92] Furthermore, although the Court's reasonable person standard requires a uniform standard for serious value, jurors might believe that reasonable persons can disagree about the serious value of a sexually explicit work.[93] Faced with such a reasonable person test, juries would be more likely to resolve obscenity cases according to their personal tastes and biases.[94]

IV. MAKING "COMMUNITY STANDARDS" TESTS RELIABLE

A. Helping Juries and Judges Fulfill Their Roles

To improve obscenity law, the Supreme Court should improve the ability of juries to ascertain community standards of tolerance that juries must apply in determining whether material is patently offensive. Because community standards are a determinative factor for a jury in deciding whether sexually explicit materials are obscene, the jury should receive as much information as possible to help clarify the scope of community standards.[95] Otherwise, a jury's determination under the current obscenity standard frustrates the ability of appellate courts and the Supreme Court to discern community standards in deciding obscenity cases on appeal.

In 1984, the Supreme Court in *Bose Corporation v. Consumers Union of United States, Inc.*,[96] a product defamation case, discussed the nature and importance of appellate review in obscenity cases.[97] The Court recognized that every obscenity case raises an individual constitutional problem in which appellate courts must make sensitive,

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[92] *See* Gey, *supra* note 2, at 1580 (noting that *Pope*'s "reasonable person" formulation erroneously assumed that all reasonable persons consistently would resolve "serious value" question). MacDougall notes that in a negligence action the jury determines, according to a "reasonable man" standard, what the defendant ought to have done. MacDougall, *supra* note 71, at 84. In contrast, the jury in an obscenity case determines what the community actually thinks of the allegedly obscene material. *Id.* Arguably, therefore, the Court's analogy of the "reasonable person" standard in the obscenity context to tort cases was inappropriate. *See Pope*, 481 U.S. at 501 n.3 (discussing "reasonable man" instructions that judges often give jurors in tort suits).

[93] *See Pope*, 481 U.S. at 500 (noting that "serious value" of work cannot vary from community to community); *id.* at 506 (noting that reasonable persons certainly may differ regarding what constitutes literary or artistic merit) (Blackmun, J., concurring in part); Gey, *supra* note 2, at 1580 (noting that Court's reasonable person analysis might reduce First Amendment protection of "fringe" or "avant-garde" materials that might not appear to most persons to have value).

[94] *See* Curtis, *supra* note 71, at 405 (quoting juror, in obscenity trial, who felt that jury should represent community and establish community standard); Taylor, *supra* note 80, at 281 (noting current obscenity standard's "inherent weakness" that results because jurors subjectively apply obscenity test in various local communities); Staal, *supra* note 24, at 761 (noting that jurors' ability successfully to apply "reasonable person" standard to serious value prong in obscenity cases is unlikely).

[95] *See* Lentz, *supra* note 31, at 57 (noting that jury's determinations of community standards "borders on the impossible" unless jury receives specific evidence that reflects community standards); Waples & White, *supra* note 24, at 411 (noting that jurors' selection of relevant community standard may determine obscenity issue in particular cases); Wilcox, *supra* note 30, at 1170 (noting unnecessary complexity and misleading connotations that result if a court does not define "community" in obscenity cases); Glenn B. Hotchkiss, Note, *Is Expert Testimony Necessary to Obscenity Litigation? The Arizona Supreme Court Answers — NO!*, 19 ARIZ. ST. L.J. 821, 842 (1987) (noting that whenever jurors draw standard from the community, they must determine scope of community before jury can recognize standard).

[96] 466 U.S. 485 (1984).

[97] *Id.* at 504-08.

particularized judgments to determine whether material is obscene.[98] The Court noted that in child pornography cases, it independently may examine allegedly unprotected material to assure that the judgment below does not unduly intrude on the field of free expression.[99] The Court in *Bose* recognized, therefore, that appellate courts can exercise *de novo* review in obscenity cases,[100] even though the prurient appeal and patent offensiveness prongs of the *Miller* test are essentially questions of fact.[101] Indeed, the Court suggested that the *Miller* test's first two prongs are of such constitutional significance that appellate courts *must* exercise independent, *de novo* review in obscenity cases to preserve free expression.[102]

When courts exercise appellate review, however, the trial record does not reflect the actual subjective standards that the jury applied, because jurors may draw on their own experience in determining the relevant community standard.[103] Because the trial record does not reflect the subjective standards applied by the jury, the Supreme Court arguably cannot apply the appropriate local or statewide community standard when exercising *de novo* review.[104] Similarly, although state or federal appellate courts might have

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[98] *Id.* at 506 & n.25; *see also* Rodric B. Schoen, *Billy Jenkins and Eternal Verities: The 1973 Obscenity Cases*, 50 N.D. L. REV. 567, 584 (1974) (noting that each obscenity case raises constitutional problem of whether the First Amendment protects allegedly obscene material).

[99] *Bose*, 466 U.S. at 504-05.

[100] *Id.*

[101] *Id.* at 506 (quoting Miller v. California, 413 U.S. 15, 25 & 30 (1973)).

[102] *Id.* at 506 & n.25 (quoting Roth v. United States, 354 U.S. 476, 497-98 (1957) (opinion of Harlan, J.) *overruled by* Miller v. California, 413 U.S. 15 (1973)); *see also* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 18 (Rutledge Hill Press ed. 1986) [hereinafter ATTORNEY GENERAL'S COMMISSION REPORT] (noting that close judicial scrutiny of materials that juries find obscene ensures First Amendment protections for truly non-obscene material); David J. Paulin, Note, *Obscenity Test Requires Trier of Fact to Determine Whether "Reasonable Person" Would Find Material Lacks Serious Value*, 18 SETON HALL L. REV. 478, 502 (1988) (observing that *Pope* decision grants appellate courts authority to constitutionally supplement jury findings). Some commentators interpreted the *Bose* decision to mean that all three prongs of the *Miller* standard are mixed questions of law and fact, subject to independent appellate review. *See* J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 508 (1985) (stating that community standard is mixed question of law and fact); Susan Elkin, Note, *Taking Serious Value Seriously: Obscenity,* Pope v. Illinois, *and an Objective Standard*, 41 U. MIAMI L. REV. 855, 862 n.60 (1987) (interpreting *Bose* to suggest that all three prongs of obscenity standard are mixed questions of law and fact).

[103] *See* Smith v. United States, 431 U.S. 291, 315-16 (1977) (noting that because trial record never discloses jurors' obscenity standards, appellate courts cannot effectively review jury decisions) (Stevens, J., dissenting); Lentz, *supra* note 31, at 62 (noting that if judges at trial admit no evidence of community standards, trial record, upon appeal, will contain no indication of community norms) (citing United States v. Cutting, 538 F.2d 835 (9th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); United States v. Groner, 479 F.2d 577 (5th Cir. 1973), *vacated and remanded on other grounds*, 414 U.S. 969 (1973); United States v. Wild, 422 F.2d 34 (2d Cir. 1969), *cert. denied*, 402 U.S. 986 (1971)).

[104] *See* Schoen, *supra* note 98, at 588-89 & n.77 (questioning the Supreme Court's ability to properly assert a better understanding of state or local community standards than citizens and judges of that state); *see also* Parker, *supra* note 102, at 503 (noting Supreme Court's authority to review de novo jury decisions that restrict free expression). In 1974, the Supreme Court independently examined *Carnal Knowledge* and reversed a state jury's determination that the film was obscene because the Court found that the film was not patently offensive. Jenkins v. Georgia, 418 U.S. 153, 161 (1974). The Court reversed the jury's determination that the film was obscene despite the jury's general verdict of guilty. *Id.* at 156; *see also* Parker, *supra* note 102 at 506 (noting that *Jenkins* stands for proposition that appellate courts should disturb jury verdicts to vindicate First Amendment rights). When the Court reviewed the jury's decision on the patent offensiveness prong of the *Miller* test, which the Court stated essentially is a question of fact, the Court exercised de novo review. *See Jenkins*, 418 U.S. at 163 (noting that *Jenkins* decision leaves no doubt that *Miller* requires reviewing courts independently to review obscenity determinations) (Brennan, J., concurring).

knowledge of a statewide standard in making *de novo* evaluations, appellate courts arguably cannot apply local standards, because the trial record does not preserve for appellate review the jury's subjective standards.[105] If the Supreme Court continues to require that juries apply contemporary community standards of tolerance for the first two *Miller* prongs, the Court also should require that trial courts admit and preserve in the trial record evidence of the community standards for the patent offensiveness and prurient appeal prongs of the *Miller* test.[106] The Court, therefore, no longer would require juries to apply standards that appellate courts cannot discern upon independent, *de novo* review.

B. Requiring Prosecution's Affirmative Evidence of Community Standards and Requiring Admission of Defense's Expert Testimony

One procedure that would make the *Pope* standard more accurate is a requirement that the prosecution present evidence of community standards as part of its prima facie case. The Supreme Court has held that the prosecution need not present any evidence of community standards because the allegedly obscene material speaks for itself.[107] In stating that obscene material speaks for itself, the Court reasoned that the material itself is the best evidence of what the material represents.[108] The Court further explained that the prosecution need not introduce expert testimony of community standards because jurors presumably know the views of average members of the community.[109]

The Court's reasoning, however, contains three flaws. First, to claim that allegedly obscene materials speak for themselves merely begs the question of whether the materials actually violate community standards because the allegedly obscene materials

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In *Jenkins*, the Court actually viewed the film and reviewed critical commentary that the trial record contained. *Id.* at 158-59, 161. Several Justices and clerks, on "movie day," would view feature films that were exhibits in obscenity cases that defendants appealed to the Court. *See* WOODWARD & ARMSTRONG, *supra* note 69, at 233-34 (discussing "movie day" at Supreme Court). A few Justices, however, refused to attend, not because of the possibility of being offended, but because those Justices maintained that the first amendment absolutely protected obscenity. *See id.* at 229, 234 (discussing decision of Justices Black and Douglas never to attend "movie day"). Of several Justices who attended a screening of *Carnal Knowledge*, Justice Thurgood Marshall complained that he thought the Court was "going to see a dirty movie"; Justice White declared that the film was "obscenely boring"; Justice Rehnquist liked the film's music; and Chief Justice Burger, who left early, thought the camera work and lighting were well done. *Id.* at 331.

[105] *See* Lentz, *supra* note 31, at 62 (noting that an appellate court faces an "insuperable burden" when engaging in independent review if the record does not reflect community norms).

[106] *See* Schoen, *supra* note 98, at 580 (noting that main problem in obscenity law is not determining the community standard that applies, but process by which parties in adversary proceeding illuminate standard); *infra* notes 107-135 and accompanying text (discussing procedures that Supreme Court should adopt to ensure reliability of community standards tests).

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

[108] *Id.* at 56 & n.6; *see* Ginzburg v. United States, 383 U.S. 463, 465 (1966) (noting that the Court has regarded allegedly obscene materials as sufficient in themselves for determination of obscenity). *But see* LEWIS, *supra* note 53, at 240 (noting that Supreme Court's position that materials speak for themselves is dangerous because courts and juries might ignore critical opinion in making "serious value" decisions); Shugrue, *supra* note 69, at 165 (questioning jury's knowledge of what materials their community will tolerate).

[109] *See* Smith v. United States, 431 U.S. 291, 305 (1977) (holding that juries must apply contemporary community standards in accordance with jury's understanding of the tolerance of an average person in community); Hamling v. United States, 418 U.S. 87, 104-05 (1974) (noting that jurors permissibly may draw on their own knowledge of community in making obscenity determinations); *Paris Adult Theatre*, 413 U.S. at 56 n.6 (noting that courts usually admit expert testimony for purpose of explaining to jurors that which jurors cannot understand) (citing 2 JOHN H. WIGMORE, EVIDENCE §§ 556, 559 (3d ed. 1940)).

indicate the standards of the publisher, rather than the standards of the community where the defendant distributed the materials.[110] Second, juries probably cannot know the standards of the geographic community that their legislature defined without hearing extrinsic evidence for different types of sexually explicit materials.[111] Third, the opinion of a twelve-member jury is arguably an insufficient sample of the community to identify accurately the standards of an entire community or state.[112] Consequently, even though the jury might comprehend what certain allegedly obscene material depicts, the jury probably cannot determine, without hearing external evidence of community standards, whether the depiction violates those community standards.[113]

To make any community standards test more accurate, courts should require that the prosecution establish through expert testimony that the allegedly obscene materials actually transgress the relevant community standard.[114] Rather than instructing jurors to draw upon their own experience in determining the community standards, a judge would instruct the jury to ascertain community standards according to the evidence admitted at trial.[115] The expert testimony could take the form of scientifically conducted public opinion polls regarding the types of sexual activity portrayed in the allegedly obscene

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[110] *See* United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 135 (2d Cir. 1983) (noting that even though allegedly obscene material provides best evidence of substantive content, material fails to supply information about community standards by which jury must judge it); Lentz, *supra* note 31, at 59 (noting that sexually explicit materials themselves communicate nothing about community's views).

[111] *See* Curtis, *supra* note 71, at 406-07 (noting that Court, by reasoning in *Paris Adult Theatre* that jurors already know views of average members of community, improperly solved the problem of determining what community finds offensive); Lentz, *supra* note 31, at 59 (noting that because prevailing community standards necessarily are external to allegedly obscene materials, juries must discover prevailing community standards through other evidence) (citing United States v. 2,200 Paperback Books, 565 F.2d 566 (9th Cir. 1977)); Shugrue, *supra* note 69, at 169 (noting that without expert testimony, jury can only make "stab in the dark" in ascertaining community standards); Hotchkiss, *supra* note 95, at 842-43 (noting that expert testimony may be necessary to properly identify community standard for trier of fact); *see also* MacDougall, *supra* note 71, at 88 (noting "little doubt" that experts strongly can influence trier of fact in obscenity cases).

[112] *See* United States v. Roth, 237 F.2d 796, 822 (2d Cir. 1956) (noting that no statistician conceivably would accept views of twelve-person jury as a fair sample of community attitudes on obscenity) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957), *overruled by* Miller v. California, 413 U.S. 15 (1973); Stevens, *supra* note 22, at 710 (noting that twelve juror sample of community is too small to accurately reflect the attitude of a community) (citing Roderick A. Bell, *Determining Community Standards*, 63 A.B.A. J. 1202, 1207 (1977)).

[113] *See* Lentz, *supra* note 31, at 56 (noting that Supreme Court, by assuming that jury is competent to gauge the content of prevailing community standards, entrusts jury with "Herculean" responsibility).

[114] *See* Curtis, *supra* note 71, at 408 (noting that instructing the jury that allegedly obscene materials speak for themselves and government need not prove elements of obscenity, seriously aggravates the jurors' ability to accurately apply the obscenity standards); Lentz, *supra* note 31, at 59 (noting that without evidence of prevailing standards of community tolerance for obscenity, prosecution cannot prove beyond reasonable doubt that allegedly obscene material violates community standards of prurience and offensiveness); Mahoney, *supra* note 71, at 67-68 (advocating that the Crown in Canadian obscenity cases adduce evidence of community standards, so long as the evidence represents entire community); Shugrue, *supra* note 69, at 167 (advocating expert testimony requirement for all three prongs of obscenity standard); Hotchkiss, *supra* note 95, at 843 (advocating expert testimony requirement to give trier of fact information necessary to make obscenity determination). *But see* Schoen, *supra* note 98, at 581 (contending that the use of expert testimony does not solve the problem of imprecise definitions of relevant community standards).

[115] *See* Erikson, *supra* note 78, at 425 (noting geographical and cultural dimensions that set community apart and provide important reference points for community members); Hotchkiss, *supra* note 95, at 841 (noting that if jury must apply a statewide standard in determining whether materials are obscene, courts should require expert testimony because no individual juror reasonably can know a statewide standard).

materials.[116] In addition, qualified experts could give testimony concerning the standards of the geographically relevant community.[117] Accordingly, by requiring that the prosecution present expert testimony of community standards, the Supreme Court would ensure that juries have an objective reference point to determine whether the allegedly obscene material violates the community standard and, therefore, is obscene.

A requirement that trial courts admit relevant defense expert testimony would also make the *Pope* standard more accurate. The Supreme Court has determined that the Constitution does not require that courts admit defendant's expert testimony regarding community standards.[118] The Court reasoned that a jury does not need expert testimony to understand whether certain material is obscene.[119] A jury might, however, require the assistance of expert testimony to comprehend what the allegedly obscene material depicts, especially in the case of materials that appeal to unusual sexual preferences.[120] Many courts, accordingly, do permit the defense to present expert testimony to shed light on community standards.[121] If the Supreme Court changed its current stance on expert testimony and adopted the proposed requirements, the jury could determine more objectively whether material is obscene.[122] In addition, appellate courts could more

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[116] *See* Regina v. Pink Triangle Press, 45 C.C.C.2d 385, (Prov. Ct. J.D. York, Ont. 1979), *in* D. COPP & S. WENDELL, PORNOGRAPHY AND CENSORSHIP 399 (1983) (advocating that courts admit competently conducted public opinion surveys to determine the limits of community tolerance); Roderick A. Bell, *Determining Community Standards*, 63 A.B.A. J. 1202, 1203 (1977) (proposing that public opinion polls ascertain community standards); Curtis, *supra* note 71, at 411 (advocating that courts admit scientifically conducted surveys of public opinion as evidence of community standards); Mahoney, *supra* note 71, at 64 (noting that Canadian courts encourage parties to offer evidence of public opinion surveys in obscenity cases) (citing R. v. Prairie Schooner News Ltd., 75 W.W.R. 585, 599 (Man. C.A. 1970)).

[117] *See* Curtis, *supra* note 71, at 411 (noting that expert testimony on the issue of community standards "may be highly relevant" to obscenity determinations (quoting Saliba v. State, 475 N.E.2d 1181, 1185 (Ind. Ct. App. 1985)); Shugrue, *supra* note 69, at 166 n.37 (suggesting that sociologists, by using objective factors, can analyze social systems); Stevens, *supra* note 22, at 711 (noting that expert testimony may help jury more accurately discern community standards); *see also* SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 132 (discussing expert testimony in obscenity cases and suggesting that experts should be individuals, such as police officers, ministers, journalists, and public officials, whose occupation requires assessment of community standards).

[118] Hamling v. United States, 418 U.S. 87, 108 (1974).

[119] *Id.* at 100 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973); Kaplan v. California, 413 U.S. 115, 120-21 (1973); Ginzburg v. United States, 383 U.S. 463, 465 (1966)).

[120] *See* Shugrue, *supra* note 69, at 179 (noting that Supreme Court improperly assumes that members of jury have the requisite exposure to all written, performed, or spoken descriptions of sexual matters) (citing Terry D. Ross, Comment, *Expert Testimony in Obscenity Cases*, 18 HASTINGS L.J. 161, 175 (1966)); *see also* Pinkus v. United States, 436 U.S. 293, 302-03 (1978) (suggesting that in extreme cases involving materials that appeal to prurient interest of deviants, prosecution must present evidence to aid jury in obscenity determination). *Cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 n.6 (1973) (reserving judgment on jurors' ability to accurately determine, without expert testimony, whether materials appeal to prurient interest of bizarre deviant groups) (citing Mishkin v. New York, 383 U.S. 502, 508-10 (1966); United States v. Klaw, 350 F.2d 155, 167-68 (2d Cir. 1965)) *Id.*

[121] *See, e.g.*, People v. Hanserd, 483 N.E.2d 1321, 1324 (Ind. App. Ct. 1985) (holding admissible psychologist's testimony on an element of prurient appeal of allegedly obscene magazines); Saliba v. State, 475 N.E.2d 1181, 1185 (Ind. App. Ct. 1985) (holding that defense may present expert "community standards" evidence); Commonwealth v. Dane Entertainment Servs., 452 N.E.2d 1126, 1132-33 (Mass. 1983) (noting that defense may introduce expert testimony regarding patent offensiveness or prurient appeal of allegedly obscene materials). Canadian courts also encourage expert testimony in obscenity cases. *See* Mahoney, *supra* note 71, at 64 (discussing Canadian courts' use of expert testimony in obscenity cases).

[122] *See* Curtis, *supra* note 71, at 410-11 (noting that expert evidence offered by defendant has crucial bearing on whether jury makes obscenity determinations objectively); MacDougall, *supra* note 71, at 79 (noting that courts' admission of expert evidence may increase the credibility of community standards tests);

easily exercise independent, *de novo* review because the trial record would preserve expert testimony regarding the relevant community standards.[123]

C. Requiring Admission of Comparison Materials and Marketplace Data Into Evidence

In addition to requiring that the prosecution establish community standards through expert testimony, and requiring that courts admit a defendant's relevant expert testimony, the Supreme Court should require that trial courts admit into evidence comparison materials and marketplace data regarding purchase or patronage. If courts admit comparison materials that are similar to the allegedly obscene material and readily available for purchase throughout the community, the defense could rebut the prosecution's case by demonstrating that the allegedly obscene materials comport with the relevant community standard.[124] For example, if the jury knew that large quantities of a comparison exhibit were sold in a county during the period of the indictment, the jury might conclude that the allegedly obscene material did not violate community standards of that county.[125] Similarly, statistical evidence of community patronage of an allegedly obscene film would help the jury determine whether the film violated community standards.[126] Although the Supreme Court has held that courts can exclude comparison evidence,[127] many courts do admit into evidence the defendant's comparison evidence so that the jury can determine whether the allegedly obscene material violates the relevant community standard.[128]

The tangible nature of comparison evidence can provide the jury with a visual reference point for determining what the community standards are and, therefore, whether the materials at issue are obscene.[129] One commentator has suggested that because comparison evidence is tangible, it is even more effective than expert testimony[130] and thus more vital to the defendant's case.[131] Additionally, comparison evidence could be

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Shugrue, *supra* note 69, at 180 (contending that requiring courts in obscenity cases to admit into evidence expert testimony would reduce chances of arbitrary jury action).

[123] *See* Shugrue, *supra* note 69, at 180 (noting that extrinsic evidence of community standards is "indispensable to effective appellate review").

[124] *See* Lentz, *supra* note 31, at 49-50 (discussing role of comparison evidence in obscenity cases).

[125] *See id.* at 50 (discussing publisher's attempt to offer comparison evidence of sexually explicit materials that sold 1.3 million copies in county during six-month period that indictment covered).

[126] *See* Keller v. Texas, 606 S.W.2d 931, 933 (Tex. Crim. App. 1980) (holding evidence regarding community patronage of film *Deep Throat* admissible because "[w]idespread acceptance indicates community acceptance"). *Id.*

[127] *See* Hamling v. United States, 418 U.S. 87, 125-26 (1974) (upholding trial court's exclusion of comparison evidence).

[128] *See* United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 137 (2d Cir. 1983) (holding that trier of fact may rely on widespread availability of comparable materials to determine that materials are not obscene); Commonwealth v. Dane Entertainment Servs., Inc., 452 N.E.2d 1126, 1132-33 (Mass. 1983) (noting that comparison evidence of sexual activity similar to that portrayed in allegedly obscene material is relevant to show whether the material appeals to prurient interest or is patently offensive); Berg v. Texas, 599 S.W.2d 802, 808 (Tex. Crim. App. 1980) (reversing trial court's refusal to admit comparison evidence).

[129] *See* Lentz, *supra* note 31, at 60 (noting that jurors can examine comparison evidence in jury room).

[130] *See id.* (noting that comparison evidence may be much more effective than expert testimony in demonstrating prevailing community standards); *see also* Curtis, *supra* note 71, at 412-13 (advocating that courts admit into evidence comparable materials that the community widely accepts so that jury does not make obscenity determination in "factual vacuum").

[131] *See* Lentz, *supra* note 31, at 60 (noting that courts which do not admit comparison evidence unconstitutionally might infringe upon defendant's right to present defense).

an important aid to appellate courts that exercise independent, *de novo* review of an obscenity conviction because an appellate court could view the comparison evidence when the court reviews the jury's decision.[132] Because the marketplace basically reflects the community's tolerance for certain materials, requiring courts to admit comparison evidence would ensure that juries ascertain as objectively as possible whether the community tolerates allegedly obscene material.[133]

Absent a requirement that courts admit expert testimony of community standards and comparison evidence of materials that are readily available for purchase or patronage throughout the community, juries arguably cannot discern either local or national community standards.[134] Jurors, when applying an obscenity standard, probably would draw upon their own personal biases, absent evidence of community standards.[135] Courts, therefore, should receive into evidence valid public opinion surveys, expert testimony, and comparison evidence to aid a jury in discerning how a community member would evaluate the allegedly obscene materials.

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[132] *See id.* at 62 (noting that appellate courts cannot meaningfully and independently review jury findings without evidence of prevailing community standards).

[133] *See* Note, *Community Standards and Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1855 (1975) (noting that *Miller*'s "serious value" prong in making obscenity determinations conflicts with the Court's First Amendment "marketplace of ideas" metaphor that measures value by marketplace acceptance in other First Amendment cases); Montgomery, *supra* note 86, at 407 (advocating *inter alles* marketplace as indication of "worth and utility" of sexually explicit materials); *see also* Marks v. United States, 430 U.S. 188, 198 (1977) (noting that marketplace determines whether sexually explicit material, as a form of communication and entertainment, has value) (Stevens, J., concurring in part and dissenting in part); Smith v. United States, 431 U.S. 291, 321 (1977) (relying on capacity of the marketplace of ideas to distinguish useful or beautiful works from ugly or worthless works) (Stevens, J., dissenting). *But see* CLOR, *supra* note 24, at 60 (suggesting that circulation of obscenity that statutes prohibit, but public tolerates, should not enable material to lose obscene status); Mahoney, *supra* note 71, at 65-66 (noting that marketplace acceptance as evidence of community standards abdicates responsibility of trier of fact to apply community standards when distributors import comparison materials from abroad); Joan Schleef, *Recent Case*, 52 U. CIN. L. REV. 1131, 1141 (1983) (noting that admission into evidence of comparable materials might result in no materials being found obscene in areas that already tolerate sexually explicit materials).

[134] *See* United States v. Roth, 237 F.2d 796, 822 (2d Cir. 1956) (noting that no statistician conceivably would accept views of twelve-person jury as fair sample of a community attitude on obscenity) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957); Curtis, *supra* note 71, at 414 (advocating evidentiary procedures in obscenity trials that reduce rather than enhance subjective nature of jurors' obscenity determination, as a matter of North Carolina constitutional law); *id.* at 404 (noting that in most places in United States, no consensus regarding obscenity exists "because members of community have very different personal tastes and standards"); Stevens, *supra* note 22, at 710 (noting that jury cannot accurately reflect attitude of the community because twelve juror sample of community is too small). *But see* CLOR, *supra* note 24, at 189-90 (arguing that community beliefs are not susceptible of proof).

[135] *See* Curtis, *supra* note 71, at 405 (noting that juries in obscenity cases act as "tiny autonomous legislature[s]") (quoting *Roth*, 237 F.2d at 822); Stevens, *supra* note 22, at 711 (noting that without evidence of community standards, jurors would draw upon their own notions that would not accurately reflect community attitudes at large); Staal, *supra* note 24, at 756-58 (discussing roles of emotionally-charged local values such as jurors' religion, education, economic status, and occupation in jurors' obscenity determinations).

V. RECONCILING "COMMUNITY STANDARDS" OF TOLERANCE WITH THE FIRST AMENDMENT: A PROPOSAL FOR A NEW THREE-STAGE TEST

A. A Constitutional Standard of Tolerance: "Explicit Harm"

The *Pope* test permits juries, in determining prurient appeal or patent offensiveness of material, to consider statewide or local community standards of tolerance according to a state legislature's statute. The Supreme Court could improve on this by requiring a uniform national standard of tolerance for sexually explicit material, establishing an objective, "explicit harm" standard.[136] Under an explicit harm standard, the jury's inquiry would be (1) whether, as depicted by the material, one person inflicted serious bodily injury upon another person in the course of sexual activity, or (2) whether one participant most likely did not consent to the sexual activity before production of the material, or (3) whether, in fact or as depicted by the material, one participant in sexual activity most likely was a minor. The First Amendment should not unequivocally protect the circulation of *all* pornographic materials, (1) because of the possible harm to citizens inherent in graphically violent sexually explicit material, (2) because of the presumed harm to persons who do not consent to potentially harmful activities, and (3) because of the government's compelling interest in protecting children from sexual exploitation and abuse.[137]

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[136] *See* Urbana v. Downing, 539 N.E.2d 140, 152-53 (Ohio), *cert. denied*, 493 U.S. 934 (1989) ("[T]he law should be looking for the existence of 'harm,' not trying to define 'obscenity'") (Brown, J., dissenting); BLACK'S LAW DICTIONARY 579 (6th ed. 1990) (defining "explicit" as "[n]ot obscure or ambiguous," "having no disguised meaning or reservation," "[c]lear in understanding").

[137] *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) (noting that when government has "strong interest" in forbidding conduct that is subject of material, such as sexual acts involving minors, government may restrict or forbid dissemination of the film to reinforce prohibition of such conduct), *aff'd*, 475 U.S. 1001 (1986); *Urbana*, 539 N.E.2d at 152 & n.13 (1989) (noting two examples of sexually explicit material which cause harm: publications which utilize minors and publications whose production requires the commission of a crime) (Brown, J., dissenting); J. FEINBERG & H. GROSS, PHILOSOPHY OF LAW 195-96 (3d ed. 1986) (discussing "harm principle" argument that, to avoid direct personal injury to some persons, justifies government restrictions on other persons' liberty).

"Snuff films" — in which sexual characters and, in some cases, the actors themselves are killed as a necessary element of the sexual activity — always would transgress an explicit harm standard. *See* FEINBERG, *supra* note 25, at 146 (describing violent pornography and "snuff films"). No national standard of tolerance should condone actual killings, graphically portrayed killings, or graphically portrayed physical injury in sexually explicit materials. *See Urbana*, 539 N.E.2d 140 at 152 (noting that "extremely violent sexually oriented material" is a potential exception to the First Amendment) (Brown, J., dissenting); FEINBERG, *supra*, at 147, 149 (noting "harm principle" argument that permits suppression of violent pornography because violent pornography may incite physical sexual violence). Similarly, child pornography always would violate an explicit harm standard because minors legally cannot consent to the activity and because the potential, if not actual, personal harm to the child actor is extreme. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982) (noting government's "compelling" interest in safeguarding physical and psychological well-being of minors); *id.* at 759 (noting relationship between depictions of juvenile sex activity and sexual abuse of children). Moreover, some commentators note that not all *adult* participants in sexually explicit material consent to the sexual activity before production of the material. *See* Catherine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 339 (1984) (noting that participants "are known to be brutally coerced into pornographic performances"); *see also* Jeffry M. Gamso, Comment, *Sex Discrimination and the First Amendment: Pornography and Free Speech*, 17 TEX. TECH L. REV. 1577, 1597 n.116 (1986) (noting that Linda Marchiano, known as Linda Lovelace, was "unwilling star" of film *Deep Throat*).

Allegedly obscene material might not violate an explicit harm standard even though the materials directly would offend most members of the community.[138] An explicit harm standard is distinguishable from the *Pope* community standards test, because the latter standard inquires whether the materials would, in fact, directly offend persons who normally would *not* choose to view allegedly obscene materials.[139] By shifting the focus of the first two prongs of the *Pope* test from the effect of allegedly obscene material on unwilling observers to the nature of the material itself, an explicit harm standard would afford due consideration for those persons who choose to view sexually explicit materials, while permitting suppression of some materials.[140]

An explicit harm standard, which would be uniform in application throughout the United States, would provide a guaranteed minimum level of protection to publishers who distribute sexually explicit materials nationwide.[141] Further, because an explicit harm standard would be constant throughout the United States as a matter of constitutional law, the standard would provide a safeguard against local censorship by enabling appellate courts to exercise independent, *de novo* review of the jury's findings.[142]

B. Proposed Three-Stage Test for Obscenity Trials

A federal constitutional standard based only on "serious value" and "explicit harm" would create problems in the areas of freedom of expression and public access to sexually explicit materials in sections of the United States that have more permissive standards than those at the federal level.[143] For example, New York City arguably has more permissive standards for sexually explicit materials than the national norm.[144] If a New York City jury faithfully applied a federal standard for obscenity, the jury might declare material obscene that most members of the New York City community would find

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[138] *See* SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 133 (discussing possible interpretation of Supreme Court's contemporary community standards test, which could find material non-obscene even though the material directly would offend unwilling observers of the material).

[139] *See id.* (distinguishing between personal offense as a result of directly viewing sexually explicit materials and personal offense because other persons have access to same materials). Professor Schauer has suggested that a standard like the proposed "explicit harm" standard, which addresses whether materials' mere *availability* to *willing observers* is offensive to other members of the community, might properly evaluate sexually explicit materials in obscenity. *Id.*

[140] *See* DERSHOWITZ, *supra* note 73, at 192 (noting that the critical choice in obscenity regulation is "between society in which everyone must tolerate some offensiveness at the price of diversity, or society that permits only expression that is offensive to no one").

[141] *See* SCHAUER,THE LAW OF OBSCENITY, *supra* note 24, at 125 (noting chilling effect on distribution of generally acceptable materials when distributor faces too many different community standards); MacDougall, *supra* note 71, at 87 (noting that distributors of material would face "draconian" law if one town accepted sexually explicit materials, but another town found distributor of the same material guilty of criminal offense).

[142] *See supra* notes 96-102 and accompanying text (discussing important role of independent review by appellate courts).

[143] SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 119 (noting that national obscenity standard effectively would prohibit the distribution of material in more permissive communities); Stevens, *supra* note 22, at 712-13 (noting that a national standard for sexually explicit communication, which precludes states from creating a more relaxed standard, is not the least restrictive means of protecting the community from offense) (citing Miller v. California, 413 U.S. 15, 32-33 (1973)); Staal, *supra* note 24, at 753 (noting that national standards effectively could restrict rather than promote availability of sexually explicit materials and therefore frustrate free expression).

[144] *See* Miller v. California, 413 U.S. 15, 32 (1973) (implying New York City's tolerance toward sexually explicit materials).

desirable, or at least tolerate.[145] It seems likely that local juries who have community standards that are more permissive than a national standard might disregard an instruction to evaluate allegedly obscene materials with reference to a national standard, and take into account the more permissive local standards.[146]

Accordingly, to preserve the cultural diversity of individual states and communities that are highly tolerant of sexually explicit materials, the Supreme Court should adopt an analysis that the First Amendment protects materials that do not transgress state or local community standards of tolerance even if the materials affront national standards.[147] Similarly, in the interests of freedom of expression and public access to sexually explicit materials, the Supreme Court should recognize that the First Amendment protects materials that do not transgress a national standard of tolerance even if the materials might transgress local or state standards.[148] The Supreme Court could achieve these First Amendment objectives by adopting a three-stage obscenity test.

The jury would apply the three-stage test in the context of a three-stage obscenity trial. To make the trial as efficient as possible, stage one would address the question of "serious value," because even as currently interpreted the First Amendment protects all materials that have serious intellectual value.[149] During this first stage, the prosecution

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[145] *See id.* (suggesting that New York City's tolerance for sexually explicit materials exceeds the tolerance of Maine or Mississippi for sexually explicit materials).

[146] *See* DEVLIN, *supra* note 85, at 90-91 (noting that jurors, by acquitting defendant, effectively can veto government's enforcement of morals); *see also* SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 121 (arguing that suppression of sexually explicit materials in permissive communities is an illusory danger under a national standard because prosecutors likely will not prosecute obscenity in truly permissive communities).

[147] *See* Parker, *supra* note 102, at 550 (stressing importance of giving citizens, rather than judges, the first opportunity to vindicate free expression); Waples & White, *supra* note 24, at 420-21 (noting that if community believes that government suppression of sexually explicit materials advances no local interest, the federal government should not interfere with community's judgment). Arguably, the federal government has no independent interest in denying certain communities access to materials that other communities may find repugnant. *See also* CLOR, *supra* note 24, at 35 (noting that choice of local community, state, or nation as "community" in contemporary community standards test affects ability of local, state, and federal governments to regulate obscene expression); Robert M. O'Neil, *Federalism and Obscenity*, 9 U. TOL. L. REV. 731, 737-39 (1978) (suggesting that federal punishment of the distribution of obscene materials implicates problems of federalism); Stevens, *supra* note 22, at 716 (contending that federal government must create obscenity regulation to allow states to pursue their own policies).

[148] *See* RICHARDS, *supra* note 8, at 206 (noting that current obscenity test expresses "extremely controversial moral judgments that no longer command either general or critical moral consensus"); Schoen, *supra* note 98, at 584 (advocating that persons should enjoy national First Amendment rights, undiminished by local diversity); Waples & White, *supra* note 24, at 428 n.124 (noting that if "wrong" community declares material non-obscene that would be obscene under standards of "proper" community, result does not contravene First Amendment principles). *But see* CLOR, *supra* note 24, at 184 (contending that government has a duty to protect community's common values).

[149] *See Miller*, 413 U.S. at 34 (noting that the First Amendment protects works that have serious literary, artistic, political, or scientific value). *But see* New York v. Ferber, 458 U.S. 747, 761 (1982) (noting that child pornography may have serious value and still be denied First Amendment protection).

Under the proposed obscenity test, material in which a minor participates in sexual activity is protected if it has any serious value. The Court in *Ferber* considered "unlikely" the possibility "that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-63. To solve the First Amendment dilemma for non-obscene child pornography having serious value, the Court in *Ferber* observed that young-looking non-minors could be "utilized" to convey the impression that children were engaging in such activities, without actually involving minors in the production of non-obscene sexually explicit material. *Id.* at 763 (citing People v. Ferber, 409 N.Y.S.2d 632, 637 (1978)). Ironically, this "solution" overlooks the possibility, implicit in the *Ferber* decision, that sexually explicit material depicting

would present evidence to show that the allegedly obscene material lacks serious value. If the prosecution establishes a prima facie case, the defense would present evidence to show that the material does have serious value. The court would admit into evidence all relevant expert testimony by persons who are qualified to judge whether the material has serious scientific, political, artistic, or literary value.[150] In addition to expert testimony, the court would also admit critical reviews of books and films.[151]

After the prosecution and defense present stage one evidence, the judge would instruct the jury to evaluate the allegedly obscene material by determining whether, in light of the evidence presented, the material, taken as a whole, has any serious literary, artistic, political, or scientific value.[152] The judge would employ a special verdict or

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youthful non-minors might nevertheless remain a tool in the sexual exploitation of children that *Ferber* sought to prevent. *See id.* at 759 (noting relationship between depictions of juvenile sex activity and sexual abuse of children); *see also* Osborne v. Ohio, 495 U.S. 103, 111 & n.7 (1990) (pointing to evidence that pedophiles use child pornography to seduce other children by showing that other children have "fun" participating in the activity) (quoting 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986)). Accordingly, material that portrays a minor participating in sexual activity meets the "explicit harm" standard which comprises stage two of the proposed obscenity test, and might be obscene in the absence of serious value. *See infra* notes 155-56 and accompanying text (discussing stage two of proposed obscenity test that addresses "explicit harm" of material); *supra* notes 136-42 and accompanying text (discussing proposed "explicit harm" standard).

Moreover, the *Ferber* decision is unsatisfactory to properly protect works that have serious intellectual value. "[C]linical pictures of adolescent sexuality," or depictions of "children engaged in rites widely approved by their cultures, such as those that might appear in issues of the *National Geographic*," might not implicate the government's compelling interest in preventing harm to minors. *Ferber*, 458 U.S. at 775 (O'Connor, J., concurring). A non-obscene, sexually explicit depiction of a child that makes a serious contribution to the world of art, literature, or science is just as worthy of First Amendment protection as a similar depiction of an adult. *Id.* at 776-77 (Brennan, J., concurring). Such examples might include exhibition of films before a state legislative committee studying a proposed state law, or before a group of research scientists studying human behavior; depictions of children as part of a "medical or psychiatric teaching device"; or a documentary on behavioral problems. *Id.* at 778 (Stevens, J., concurring). The most important consideration in determining whether the First Amendment protects allegedly obscene material, as the proposed test demonstrates, is the *context* rather than the content of the depiction. *Compare id.* (Stevens, J., concurring) (Justice Stevens comments that "whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context"). Accordingly, sexually explicit depictions of children that have serious value are protected under the proposed test for obscenity. Only when such depictions fail to have any serious value does the issue of potential or presumed harm to minors become a consideration. *See infra* notes 155-56 and accompanying text (discussing stage two of proposed obscenity test that addresses "explicit harm" of material); *supra* notes 136-42 and accompanying text (discussing proposed "explicit harm" standard).

[150] *See supra* notes 118-23 and accompanying text (advocating court's admission of expert testimony as evidence of community standards).

[151] *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 158-59 (1974) (referring to a review of film CARNAL KNOWLEDGE (Embassy Pictures 1971)).

[152] *Compare* Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (requiring that jury apply "reasonable person" standard to issue of serious value); *with Miller*, 413 U.S. at 24 (noting that in "serious value" prong, jury determines whether the material "*lacks* serious literary, artistic, political, or scientific value") (emphasis added). Lord Patrick Devlin suggests that the Supreme Court's use of a "reasonable person" in serious value determinations is inappropriate because moral principles become law according to what a jury finds acceptable. DEVLIN, *supra* note 85, at 90. Devlin stresses that for a jury to give a moral principle the force of law, a random jury of twelve persons unanimously must agree on a verdict. *Id.*

The serious value prong, however, arguably involves an objective determination of the intellectual value of allegedly obscene material, rather than subjective moral worth. *See Pope*, 481 U.S. at 504-05 (characterizing *Pope* obscenity test as requiring the jury to apply an objective test for literary or artistic value) (Scalia, J., concurring). Because the jury in making serious value determinations applies objective constitutional criteria to determine what the community must tolerate, rather than moral principles to determine what the community chooses not to tolerate, the Supreme Court's requirement that juries

interrogatory so that the record could preserve for appellate review the jury's findings regarding each of the four types of serious intellectual value that the First Amendment protects.[153] If the verdict indicates that the allegedly obscene material has any of the four types of intellectual value, the material is not obscene and is protected by the First Amendment.[154] If, however, the stage one verdict indicates that the materials do not have any serious value, the trial would continue to stage two.

Before stage two of the obscenity trial begins, the judge would instruct the jury to disregard all evidence that the jury heard in stage one of the trial, because stage two does not involve an assessment of the value of the allegedly obscene material. Stage two, rather than addressing the serious value of sexually explicit materials, addresses whether the material depicts "explicit harm." After the jury views the allegedly obscene material, the judge would instruct the jury to determine by special verdict or interrogatory (1) whether, as depicted by the material, one person inflicted serious bodily injury upon another person in the course of sexual activity, (2) whether one participant most likely did not consent to the sexual activity before production of the material, and (3) whether, in fact or as depicted by the material, one participant in sexual activity most likely was a

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determine the views of a reasonable person in making serious value determinations is inappropriate in light of Devlin's account of the "reasonable person."

A better standard to determine serious value of a work, therefore, would instruct the jury to directly address the question of serious value of allegedly obscene material without regard to what a hypothetical "reasonable person" might think. By eliminating the reference to a reasonable person in the *Pope* test for serious value, the Court would send to juries the message that material having serious value deserves protection regardless of whether a majority or a minority of a population thinks that the same material has serious value. *See Miller*, 413 U.S. at 34 (holding that the First Amendment protects works that have serious value, regardless of whether the government or majority of the population approves of ideas that works represent). If the test for serious value in the Court's obscenity standard asked "whether the work, taken as a whole, has any serious literary, artistic, political, or scientific value," the test more clearly would achieve the Court's intent in *Pope* that the First Amendment protects materials that have serious value. The proposed test differs slightly from the *Miller*'s serious value standard, which essentially requires the jury to determine the negative proposition: whether serious value is *absent* from the material. *Cf. Miller*, 413 U.S. at 24 (inquiring whether material "lacks" serious intellectual value).

[153] *Cf.* FED. R. CIV. P. 49(a) (authorizing judges to use special verdicts). Under Rule 49(a), the special verdict permits the jury to determine only the facts in controversy, so that the court can apply the law. Parker, *supra* note 102, at 550-51. Professors Wright and Miller argue that judges might prefer special verdicts because general verdicts hide jury error and prejudice. 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2503 (1971). Although no rule similar to Rule 49(a) is available in the criminal context, the Supreme Court could prescribe that judges use special verdicts in obscenity trials. *See* 28 U.S.C. §§ 2071-74 (1988) (describing Supreme Court's rule-making power generally).

Professor Parker advocates the use of special interrogatories in free expression cases. Parker, *supra* note 102, at 552; *see also* FED. R. CIV. P. 49(b) (authorizing judges to use special interrogatories). Special interrogatories, by enabling jurors to focus on the determinative facts of the case, assist the jury in reaching an intelligent verdict. Parker, *supra* note 102, at 553. Special interrogatories, which outline the steps that the jury should follow in reaching a general verdict, alleviate jurors' memory problems regarding the judge's instructions to the jury. *Id.* Moreover, the special interrogatories place psychological pressure on the jury to follow the law because the judge can determine by the jury's responses whether the jury properly applied the law. *Id.* In obscenity cases, where jurors' personal biases might discourage juries from following the law, special interrogatories would prove vital in the proposed "three-stage" obscenity test. *See* Staal, *supra* note 24, at 756 (noting that factors such as education, economic status, and religion affect jurors' attitudes toward obscenity). Although no rule similar to Rule 49(b) is available in the criminal context, the Supreme Court could prescribe that judges use special interrogatories in obscenity cases. *See* 28 U.S.C. §§ 2071-74 (1988) (describing Supreme Court's rule-making power generally).

[154] *Cf. Miller*, 413 U.S. at 34 (noting that the First Amendment protects works that have serious literary, artistic, political, or scientific value). *But cf.* New York v. Ferber, 458 U.S. 747, 761 (1982) (noting that the First Amendment does not protect child pornography even if such material is non-obscene).

minor.[155] If the verdict indicates that the allegedly obscene material does not depict any of the three types of "explicit harm," the material is not obscene and the First Amendment protects the material.[156] Otherwise, the trial would continue to stage three.

Before stage three of the obscenity trial begins, the judge again would instruct the jury to disregard all evidence that the jury heard in stages one and two of the trial, because stage three does not assess the serious value or explicit harm of material. During stage three, the prosecution would present evidence concerning standards of tolerance, within the geographic "community" that state law prescribes, for patent offensiveness of sexually explicit materials.[157] Then, assuming that the prosecution could establish a prima facie case for patent offensiveness under the state obscenity statute, the defense would present community standards evidence for patent offensiveness.[158] The court would admit all relevant expert testimony and comparison evidence of materials available within the geographic scope of the "community."[159] After the prosecution and defense present stage three evidence, the judge would instruct the jury to apply to the *Miller* patent offensiveness prong the geographic community standard that state law prescribes.[160]

In effect, stage three duplicates the patent offensiveness prong in the current *Pope* test.[161] If the allegedly obscene materials are not patently offensive, the material is not obscene and, therefore, the First Amendment protects the defendant's allegedly obscene materials. Hence, the government can subject the publisher to criminal penalties only if material fails stage one, stage two, and stage three of the proposed obscenity test.[162]

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[155] *See supra* notes 136-142 and accompanying text (discussing proposed "explicit harm" standard); *supra* note 153 and accompanying text (discussing value of special verdicts or interrogatories in proposed "three-stage" obscenity test).

[156] *See supra* notes 140-42 and accompanying text (advocating that First Amendment protects materials that do not transgress proposed "explicit harm" standard).

[157] *Cf. Miller*, 413 U.S. at 24 (requiring in obscenity cases that jurors apply "community standards" test for prurient appeal and patent offensiveness of sexually explicit materials). In Jenkins v. Georgia, 418 U.S. 153, 160 (1974), the Court noted different examples of what juries properly could declare patently offensive under the second *Miller* prong. The Court in *Jenkins* noted that state statutes could define as "patently offensive" representations or descriptions of actual or simulated "ultimate sex acts" that are normal or perverted, representations or descriptions of masturbation or excretory functions, and lewd exhibition of the genitals. *Id.* (quoting *Miller*, 413 U.S. at 25). The Court in *Jenkins* noted that although the list of "patently offensive" examples was not exhaustive, the list fixed substantive limitations on the types of materials that juries could find patently offensive and determined that juries do not have "unbridled discretion" to determine what is patently offensive. *Id.* at 160-61.

[158] *See* Lentz, *supra* note 31, at 48 (noting that defendant's demonstration that materials do not transgress contemporary community standards is vital to defense of obscenity charges).

[159] *See supra* notes 107-135 and accompanying text (advocating that Supreme Court require that trial courts admit into evidence relevant expert testimony and comparison evidence in obscenity cases).

[160] *Cf. Miller*, 413 U.S. at 24 (requiring that in obscenity cases jurors apply "community standards" test for prurient appeal and patent offensiveness of sexually explicit materials).

[161] *Cf. Pope*, 481 U.S. at 500 (requiring that in obscenity cases jurors apply contemporary community standards to first two *Miller* prongs). The proposed "three-stage" obscenity test would eliminate the prurient interest prong of the current *Pope* test, because if the material has serious value, the sexual effect of material on willing observers is irrelevant in determining whether the material deserves First Amendment protection. *See* Elkin, *supra* note 102, at 869 (noting that *Pope* standard, which requires non-objective standards for the first two prongs and objective standards for the third prong, is inconsistent because serious value prong and prurient interest prong overlap).

[162] *See* Curtis, *supra* note 71, at 414 (noting that government should use criminal sanction in limited fashion because government has tremendous power and might abuse criminal sanction powers).

C. Benefits of the Three-Stage Obscenity Test

Stage one of the proposed test is similar but not identical to the third *Pope* prong; the stage one test requires the jury to answer directly the question whether allegedly obscene materials have serious value, rather than requiring that juries apply a "reasonable person" standard as in *Pope*.[163] Moreover, by directly focusing on the issue of serious value, stage one alleviates the jury confusion in the *Pope* standard caused by the jury's application of a "reasonable person" standard that, as a matter of constitutional law, must yield uniform results throughout the United States.[164] Stage two, requiring that the jury evaluate "explicit harm," establishes a standard of constitutional tolerance for sexually explicit material. Stage two of the proposed three-stage test thus accomplishes what the *Pope* standard accomplishes for only the serious value prong: implementation of an objective standard that is uniform and national in application.[165] Stage two of the obscenity test, therefore, would provide increased First Amendment protection for publishers by requiring that obscene materials depict explicit harm.[166] Stage three of the three-stage obscenity test would give local communities who have more permissive standards access to sexually explicit materials that might nevertheless transgress a standard of constitutional tolerance.[167] Publishers, therefore, could distribute sexually explicit materials in specific regions of the United States that have expressed a higher tolerance for certain materials.[168]

Perhaps the most desirable result of the proposed obscenity test would be the elimination of the parochial censorship that certain local communities have exercised since

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[163] *See supra* note 152 and accompanying text (discussing *Pope* "reasonable person" standard for serious value and the proposed modification of obscenity standard to enable jurors directly to address issue of "serious value").

[164] *See Pope*, 481 U.S. at 500-01 (discussing "reasonable person" standard for serious value).

[165] *Cf. Pope*, 481 U.S. at 504 (classifying *Pope*'s reasonable person test for serious value prong as "objective" test) (Scalia, J., concurring); Gey, *supra* note 2, at 1580 (characterizing serious value prong of *Pope* standard as national standard); Taylor, *supra* note 80, at 267 (interpreting *Pope* decision to require objective standard for serious value prong). *See also* Elkin, *supra* note 102, at 866 & n.83 (noting that Supreme Court has defined objective standard as "national" and "uniform" standard).

[166] The proposed "three-stage" obscenity standard is consistent with one scholar's opinion that a definition of obscenity logically could include national standards as a constitutionally permissible minimum. *See* Schoen, *supra* note 98, at 584-85 n.60. Professor Schoen stated further that although localities or states never properly can provide less protection for expression than national standards allow, localities or states properly may provide more protection for expression. *Id.* The proposed "three-stage" standard in effect implements Professor Schoen's suggestion in the context of an obscenity trial.

[167] *See* Schoen, *supra* note 98, at 587 (noting that tragic results would occur if United States citizens who wish to have access to certain materials cannot have access to materials due to restrictive markets or threats of litigation against distributors). Should a state's courts determine that the state's constitution absolutely protects obscene expression, no federal prosecution could result under the "three-stage" standard because a distributor of sexually explicit materials would never violate state standards. *See id.* at 584-85 n.60 (noting that the First Amendment does not require states to enact obscenity laws). Similarly, some commentators doubt that the federal government has any interest in punishing obscene expression unless a certain state makes obscenity a criminal offense. *See* Roth v. United States, 354 U.S. 476, 505 (1957) (Harlan, J., concurring in part and dissenting in part) (doubting that federal government has any interest in punishing distribution of obscene materials), *overruled by* Miller v. California, 413 U.S. 15 (1973); O'Neil, *supra* note 147, at 737 (same); Stevens, *supra* note 22, at 716 (contending that federal government must let states regulate obscene materials).

[168] *See* Shugrue, *supra* note 69, at 178 (noting that cultural creativity cannot flourish when obscenity standard becomes "lowest common denominator" of community tolerance throughout United States); Waples & White, *supra* note 24, at 446 (noting that community standards of the forum should prevail in resolution of obscenity questions so that distributors of sexually explicit materials can send works into tolerant communities).

Miller.[169] A further value of the proposed test is that federal obscenity prosecutions would be more consistent with state obscenity prosecutions, because the three-stage test incorporates federal constitutional standards for value and harm. As some commentators have noted concerning federal obscenity prosecutions, interstate distributors of sexually explicit materials, to avoid criminal sanctions, must conform to the least permissive standard in the nation because the federal government can prosecute a distributor in any federal district in which the distributor circulated the material.[170] The Supreme Court's adoption of the three-stage test, therefore, would reduce forum shopping by federal prosecutors because sexually explicit materials would be protected unless the materials transgressed constitutional standards of tolerance, in addition to the standards of the state or local community where the defendant distributed the materials.[171]

VI. CONCLUSION

Although the Supreme Court's decision in *Pope* is a step toward a uniform obscenity standard that is national in application, the Court does not go far enough in requiring an objective standard only for the serious value prong. The proposed three-stage test provides a way for the Supreme Court to ensure a coherent, fair model of obscenity law. By establishing a three-stage obscenity test that finds obscene only that sexually explicit material which violates both federal constitutional and local community standards of tolerance, the Supreme Court would establish a standard that reconciles local community standards of tolerance and the First Amendment.

The Court necessarily would require various procedural safeguards such as special verdicts and admission into evidence of valid public opinion surveys, expert testimony, comparison materials, and marketplace data by the defense.[172] Further, the Court should require that the prosecution make a prima facie showing that the allegedly

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[169] *See* ATTORNEY GENERAL'S COMMISSION REPORT, *supra* note 102, at 23 (recognizing that excesses in censorship of sexually explicit materials have occurred since *Miller* in local communities, and that excesses continue to increase); LEWIS, *supra* note 53, at 247 (noting that although Supreme Court might recognize truly obscene materials, local authorities often are less discriminating); Schoen, *supra* note 98, at 586 (noting that localities might view Supreme Court's rejection of national standards as an invitation to vindicate local community standards by "suppressing smut"); Schleef, *supra* note 133, at 1140 n. 69 (noting that when singular members of community may initiate procedures to censor sexually explicit materials while majority remains silent or apathetic, local censorship of sexually explicit materials does not indicate that community has particularly high standards).

[170] *See* Sable Communications v. FCC, 492 U.S. 115, 125-26 (1989) ("There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others"); Waples & White, *supra* note 24, at 415 (noting government's wide-ranging choice of trial districts in federal criminal obscenity prosecutions); Stevens, *supra* note 22, at 709, 711-12 (discussing how nationwide venue in federal obscenity cases creates uniform standard of intolerance for sexually explicit materials); *see also* SCHAUER, THE LAW OF OBSCENITY, *supra* note 24, at 128 (discussing dangers of forum shopping and selective prosecution in federal obscenity cases). For a detailed account of forum shopping in federal obscenity cases, see DERSHOWITZ, *supra* note 73, at 155-63 (discussing obscenity prosecution in Memphis, Tennessee of actor Herbert Streiker, known as Harry Reems, for his performance in movie *Deep Throat*).

[171] *See* O'Neil, *supra* note 147, at 748 (noting forum shopping in which federal prosecutors have engaged since *Miller* decision)Waples & White, *supra* note 24, at 415 (noting danger of undesirable forum shopping by government in federal criminal obscenity cases).

[172] *See supra* notes 118-135, 153 and accompanying text (advocating that courts use special verdicts, and admit into evidence public opinion surveys, expert testimony, comparison evidence, and marketplace data).

obscene materials affront relevant community standards.[173] The proposed three-stage obscenity test would establish a minimum national standard of tolerance for sexually explicit expression and guard against local censorship. Moreover, the three-stage test would facilitate appellate review by admitting into evidence, and preserving in the trial record, testimony regarding community standards and serious value.[174]

In addition, the proposed three-stage test would provide better First Amendment protection for national distributors of sexually explicit materials.[175] Distributors could sell sexually explicit materials that society generally does not tolerate, in areas of the United States with more permissive standards than the nation at large, without fear of criminal sanction.[176] Thus, the three-stage obscenity test would enable local communities whose tolerance for sexually explicit materials exceeds a national standard of tolerance to have access to desired materials.[177]

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[173] *See supra* notes 107-117 and accompanying text (advocating that Supreme Court require prosecutors to present prima facie evidence of community standards).

[174] *See supra* notes 96-102 and accompanying text (discussing important role of independent review by appellate courts).

[175] *See supra* notes 166-171 and accompanying text (discussing increased First Amendment protection for distributors of sexually explicit materials under proposed "three-stage" obscenity test).

[176] *See* Waples & White, *supra* note 24, at 446 (noting that community standards of forum should prevail in resolution of obscenity questions so that distributors of sexually explicit materials can send works into tolerant communities); *supra* notes 143-47 and accompanying text (proposing that First Amendment should protect materials that do not violate state or local community standards even if materials violate national standards).

[177] By incorporating both federal and local standards in obscenity determinations, the proposed "three-stage" obscenity test recognizes that no single community standard for obscenity exists. *See* Schoen, *supra* note 98, at 581 (noting that diversity of American society destroys premise that single contemporary community standard exists).