INTRODUCTION

In 1973, the United States Supreme Court, in *Miller v. California* 1 developed a three-part test to aid in defining obscenity. 2 The Court held that in determining whether or not the material in question was obscene, the trier of fact must use the following guidelines:

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

Recently, in *Pope v. Illinois*, 4 the Court clarified the appropriate standard of review applicable to the third part of the *Miller* test. 5 The Court held that in assessing the value of the material in question, the trier of fact was required to apply a “reasonable person” standard as opposed to a “contemporary community” standard. 6 Moreover, the Court pointed out that *Miller* never required the application of a contemporary community standard in analyzing the value of obscene material. 7

The Note addresses four issues pertaining to the law of obscenity. First, the Note reviews whether or not the Court correctly assessed the proper standard of review applicable to the “value” prong of the *Miller* test. Second, the Note discusses whether or not the use of an objective standard under the value prong makes constitutional sense. Third, the Note reviews the present and future utility of the *Miller* tripartite test in light of past and present criticisms, as well as its effect on first amendment freedom of speech. Finally, the Note

2. *Id.* at 24.
3. *Id.*
5. *Id.* at 1921.
6. *Id.* In *Miller*, the Court had held that in applying the first two parts of the tripartite test, the trier of fact was required to use contemporary community standards. *Miller*, 413 U.S. at 30-34.
addresses the availability and appropriateness of alternatives in regulating obscene materials.

BACKGROUND

Obscenity as Unprotected Speech

The First Amendment of the United States Constitution reads in relevant part: “Congress shall make no law . . . abridging the freedom of speech . . . .” The prohibition applies equally to the states pursuant to the fourteenth amendment. Although the first amendment appears to forbid any regulation of speech, the Court has held that rights to free speech are not absolute. In Chaplin v. New Hampshire, the Court first indicated that the regulation of obscene material did not raise any constitutional issue. Thus commenced the battle over what material was obscene.

Fifteen years later, in Roth v. United States, the Court expressly stated that prohibiting the dissemination or exhibition of obscene material was not repugnant to the first amendment. It found that “implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance.” The Court defined obscenity as “material which deals with sex in a manner appealing to prurient interest.” However, the Court made clear that not every utterance which portrayed sexuality was unprotected under the first amendment. It concluded that the test for obscenity was “whether to the average person, applying contemporary community standards, the dominate theme of the material taken as a whole

8. U.S. CONST. amend. I.
9. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (holding that the fourteenth amendment makes constitutional prohibitions to the abridgement of freedoms of speech and of the press applicable to State governmental bodies).
10. Gitlow v. New York, 268 U.S. 652, 666-67 (1925) (holding that a State may punish those who abuse constitutional freedoms by language that is detrimental to the public welfare). See also Konigsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961) (stating that free speech does not constitute an unlimited license to speak since certain forms of speech could be prohibited and incidental regulation of speech was permissible).
12. Id. at 571-72.
14. Id. at 484-85. The Court supported the conclusion as expressed in Chaplin v. New Hampshire.
15. Id. at 484.
16. Id. at 487.
17. Id.
appeals to prurient interest."\(^{18}\)

**DEVELOPMENT OF AN OBSCENITY TEST**

The Court expounded upon the obscenity standard in *Manual Enterprises v. Day*.\(^{19}\) Justice Harlan, announcing the judgment of the Court, held that proof of obscenity required that the material be “patently offensive” and appeal to “prurient interests.”\(^{20}\) He noted that certain authorities had interpreted the *Roth* test as applying only to “hard-core” pornography.\(^{21}\) However, Justice Harlan concluded, in opposition to Roth, that the proper test for obscenity, given the diverse ethnic and cultural backgrounds of citizens, should be based on a “national standard of decency.”\(^{22}\)

Two years later, a plurality in *Jacobellis v. Ohio*\(^{23}\) expanded upon Justice Harlan’s position stated in *Manual Enterprises*.\(^{24}\) Justice Brennan, announcing the judgment of the Court, noted that the barrier which divided protected and unprotected speech was a “dim and uncertain line.”\(^{25}\) He also stated that the determination of whether material was obscene was an issue of constitutional law which ultimately had to be decided by the Court.\(^{26}\)

With the above concerns in mind, Justice Brennan recognized that the *Roth* test was not a perfect formulation.\(^{27}\) However, he conceded that any other alternative raised similarly difficult problems.\(^{28}\) Yet, Justice Brennan emphasized that obscenity was unprotected only because it was “utterly without redeeming social importance.”\(^{29}\) Furthermore, he stated that material which has literary, scientific or

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18. *Id.* at 489.
20. *Id.* at 486.
22. *Manual Enters.*, 370 U.S. at 488. Justice Harlan, without making any specific reference to any part of the obscenity test, concluded that denying some sections of the country access to material that other sections find offensive would be an “intolerable consequence.” *Id.*
26. *Id.* at 188.
27. *Id.* at 191. This statement raises interesting questions since Justice Brennan wrote the opinion for the Court in *Roth*. See *Roth*, 354 U.S. at 479.
29. *Id.* Justice Brennan also repeated the concern which had been stated in *Roth* that “[t]he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and
artistic value constituted protected speech and could not be labeled obscene. Nevertheless, despite Justice Brennan's concerns, he agreed that the standard of review for obscenity determination was national in nature. He reasoned that, after all, it is a national Constitution that the Court was expounding. After reaffirming the standard, he reversed the trial court's decision and held that the material in question was protected speech.

Up through *Jacobellis*, “value” was not thought to be a part of the expressed obscenity test. The Court had reasoned that obscenity was unprotected because it had no value at all. However, the Court had been indicating that the nature of the material, whether it be artistic, literary or scientific, was an important issue to address in analyzing the material in question. Not until *A Book Named “John Cleland's Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts* did the Court expressly incorporate a value component into the obscenity test.

In *Memoirs*, a plurality of the Court held that in order for material to be judged obscene, it must be shown that “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sex.”

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30. *Jacobellis*, 378 U.S. at 191. Justice Brennan also emphasized that the value of the material could not be offset by balancing it against the level of “prurient appeal” present in the material. *Id.*


33. *Id.* at 196. Justice Brennan noted that a number of national publications had given the film in question a favorable review, including two critics who rated it among the best films. *Id.*

Justices Black and Douglas, joining in a separate opinion, concluded that the Court was embarking upon censorship of speech. *Id.* at 196. They stated that any criminal conviction for exhibiting a motion picture violated the first and fourteenth amendments. *Id. But see id.* at 200 (Warren, C.J., dissenting). Chief Justice Warren recognized that the *Roth* test had created a great deal of fury but concluded that the Court should live with the test until a more satisfactory definition was developed. However, he rejected a national standard as being unprovable and questioned whether one even existed. He reasoned that if the Court could not enunciate a national standard, it could not expect the local courts to accomplish such a task. *Id.*


36. *Id.* (quoting *Roth*, 354 U.S. at 487).


38. *Id.* at 418.
sentation of sexual matters; and (c) the material is utterly without redeeming social value.\textsuperscript{39} The plurality concluded that each part of this three-part test was to be applied independently.\textsuperscript{40} Thus, the value element could not be balanced against or negated by the prurient appeal or patently offensiveness elements.\textsuperscript{41}

However, the Memoirs formulation did not fully settle the debate surrounding the obscenity standard of review.\textsuperscript{42} State courts continually struggled with whether obscenity regulation required the application of a local, national or some other standard.\textsuperscript{43} The Roth court had defined "obscenity" by contemporary community standards.\textsuperscript{44} The Jacobellis Court, though agreeing on the ultimate judgment, was split on whether the proper standard of review was local or national.\textsuperscript{45} Thus, the Court, recognizing the overwhelming confusion, attempted to finally solidify the obscenity test and standard of review in Miller v. California.\textsuperscript{46}

In Miller, a majority of the Court held that the proper standard of review was local not national.\textsuperscript{47} The Court held that any attempted application of a national standard would be an "exercise in futility."\textsuperscript{48} It reasoned that the nation was "too big and too diverse" to expect a jury to pronounce a standard applicable to all fifty states.\textsuperscript{49} Furthermore, the Court noted that our adversarial system of justice was premised upon lay jurors drawing from the standards of their community.\textsuperscript{50} Moreover, the Court concluded that it would be unrealistic to require the people of one community to accept the

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 419.
\textsuperscript{41} Id. Justice Brennan, speaking for the plurality, noted that if evidence was presented which supported that the material was exploited solely for its prurient appeal, such exploitation might justify a conclusion that the material was utterly without redeeming social importance. Id. at 420.
\textsuperscript{43} Id. at 166-73.
\textsuperscript{44} See supra notes 14-17 and accompanying text.
\textsuperscript{45} See, e.g., supra notes 31-33 and accompanying text.
\textsuperscript{46} 413 U.S. 15 (1973). Prior to Miller, the Court had issued signed opinions in thirteen obscenity cases subsequent to Roth. See Shugrue, 7 CREIGHTON L. REV. at 157-58 & n.5 (listing the cases). However, included in these thirteen cases were seventy-five different judicial opinions expounded by the members of the Court. Id.

Additionally, the Court, subsequent to Roth, issued a number of per curiam decisions, which only added to the confusion. Jacobellis, 378 U.S. at 200 (Warren, C.J., dissenting).
\textsuperscript{47} Miller, 413 U.S. at 33-34.
\textsuperscript{48} Id. at 30. The Court also cited Chief Justice Warren's position expressed in Jacobellis regarding the unprovable national standard. Id. at 32 (Warren, C.J., dissenting) (citing Jacobellis, 378 U.S. at 200). See also supra note 33.
\textsuperscript{49} Miller, 413 U.S. at 30.
\textsuperscript{50} Id.
public depiction of conduct held acceptable in another community.\(^5\)1

Additionally, the *Miller* Court revised the value element of the *Memoirs* test.\(^5\)2 Instead of determining whether the material was "utterly without redeeming social value," the Court held that the proper analysis was "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."\(^5\)3 The Court reasoned that the *Memoirs* value test placed a burden upon the State which was virtually impossible to discharge as it required the State to prove a negative.\(^5\)4 Moreover, it argued that the *Memoirs* value test had never commanded majority approval.\(^5\)5

Although the *Miller* Court stated that the prurient interest and patently offensive elements of the test were to be judged based on local community standards, the Court never actually said that local standards also applied to the analysis of the value element.\(^5\)6 Thus, it was not clear whether a local, national or some other standard applied when reviewing the serious-value element of the *Miller* test.\(^5\)7

In *Smith v. United States*,\(^5\)8 the last major pronouncement, the Court failed to directly express the proper standard of review for the *Miller* value element.\(^5\)9 In *Smith*, the Court reiterated that whether certain material appealed to prurient interests or was patently offensive was essentially a question of fact.\(^5\)0 However, the Court noted that the *Miller* decision never discussed literary, artistic, political or

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51. *Id.* at 32. See also *Jacobellis*, 378 U.S. at 193 (holding that what one state does not like should not prohibit another state from viewing it). *But see supra* notes 31-32 and accompanying text (stating that a national standard is the proper standard of review under the Constitution).

52. *Miller*, 413 U.S. at 18-23.

53. *Id.* at 24-25.

54. *Id.* at 22. The Court held that *Memoirs* was a severe alteration of the obscenity test expressed in *Roth*. *Id.* at 21. The Court attempted to distinguish between stating that obscenity was presumed to be "utterly without redeeming social importance" and stating that in order for material to be judged obscene, it must be "utterly without redeeming social value." *Id.* at 21-22.

55. *Id.* at 24-25.


57. Clor, *Obscenity and the First Amendment: Round Three*, 7 LOY. L.A.L. REV. 207, 218 (1974). The author stated that he thought a national standard should be applied to the value element. *Id.* at 218. He iterated that the value of material should not vary from community to community. *Id.* However, he emphasized that the Court should place the elaboration of the proper standard of review with respect to the value element high on its agenda. *Id.*


60. *Smith*, 431 U.S. at 300-01. The Court made clear that this conclusion followed from the application of contemporary community standards. *Id.* at 300.
scientific value in terms of a contemporary community standard.\textsuperscript{61} Yet, the Court did not expand upon this statement.\textsuperscript{62} Thus, the proper standard of review for the value prong remained in doubt.\textsuperscript{63}

**NATIONAL VS. LOCAL STANDARD**

Since Roth, the standard of review the trier of fact should apply to the obscenity test has been under constant debate.\textsuperscript{64} Even after the Court’s pronouncement in Miller regarding the application of contemporary community standards to the first two parts of the tripartite test, there still continued to be intense rejection of a local standard among Justices and commentators.\textsuperscript{65} Thus, after Miller there still existed some confusion about whether a local standard of review applied.\textsuperscript{66}

The central element in the debate over what standard of review applied to the third part of the obscenity test appeared to be whether “value” was a question of law or fact.\textsuperscript{67} In Jacobellis, the plurality stated that obscenity was a question of constitutional law which was to be ultimately decided by the court.\textsuperscript{68} Yet, when the Court estab-

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61. \textit{Id.} at 301.
63. \textit{Id.}
64. See supra notes 19-33 and accompanying text. One commentator had concluded that the value element could not possibly vary from community to community. F. Schauer, supra note 56, at 124. Professor Schauer stated that community standards only applied to factual determinations. \textit{Id.} Although prurient interest and patent offensiveness were essentially questions of fact, he concluded that the determination of the value prong was essentially a matter of constitutional law. \textit{Id.} He felt the value element represented the first amendment theory that expressions which communicated ideas were protected speech. \textit{Id.} Professor Schauer also concluded that the literary value standard, being a question of fundamental constitutional rights and not a question of fact, required a more stringent standard of review. \textit{Id.} at 125. He reasoned that if constitutional values were subject to variations of a local community standard, the Court’s fears that first amendment values would vary with time and place would materialize. \textit{Id.} at 124.

Note that the Court has consistently held that the determination of the first two parts of the \textit{Miller} test are essentially questions of fact. See, e.g., \textit{Smith}, 431 U.S. at 292-93; Jenkins v. Georgia, 418 U.S. 153, 159 (1974) (holding that occasional scenes of nudity is not enough to classify material as legally obscene); \textit{Miller}, 413 U.S. at 30.
66. Shugrue, 7 CREIGHTON L. REV. at 176.
67. See infra notes 68-72 and accompanying text.
68. Jacobellis, 378 U.S. at 188 (citing Roth, 354 U.S. 497-98). Remember that the
lished the test in *Miller*, it expressly stated that the first two parts were essentially questions of fact.⁶⁹

Finally, in *Smith*, the Court noted that it had never discussed the value prong with reference to contemporary community standards.⁷⁰ Furthermore, the Court reiterated that prurient interest and patent offensiveness were questions of fact.⁷¹ However, the Court did not state the standard of review applicable to the value prong.⁷²

The Supreme Court of Wisconsin addressed the standard of review applicable to the value element in *State v. Princess Cinema of Milwaukee, Inc.*⁷³ The court stated that subsequent to *Miller*, it was believed that contemporary community standards also applied to the determination of whether the material lacked serious literary, artistic, political or scientific value.⁷⁴ However, after *Smith*, the court noted that an objective test was the proper standard of review under the value prong.⁷⁵

A number of federal circuit courts of appeals also agreed that the value element was not analyzed under contemporary community standards.⁷⁶ In *United States v. Heyman*,⁷⁷ the Fourth Circuit re-

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⁷⁰. *Smith*, 431 U.S. at 301.
⁷¹. *Id.* at 300-01.

Professor Lockhart justified the distinction by stating that the value element represented the Court's duty to face up to constitutional judgment problems through the exercise of independent judicial review. Lockhart, 9 GA. L. REV. at 554. Otherwise, he reasoned that local jurors and State courts would have the final determination on what constituted first amendment values. *Id.*

⁷³. 96 Wis. 2d 646, —, 292 N.W.2d 807, 810 (1980).
⁷⁴. *Id.* 96 Wis. 2d at —, 292 N.W.2d at 810.
⁷⁵. *Id.* See also Moses v. County of Kenosha, 649 F. Supp. 451, 454-55 (E.D. Wis. 1986) (concluding that an objective standard applied to the value test and compared it to a "national" type standard); Castle News Co. v. Cahill, 461 F. Supp. 174, 179 (E.D. Wis. 1978) (agreeing that *Miller* required an objective test be applied under the value prong).

⁷⁶. Brief For the Petitioners at 19, *Pope v. Illinois*, 107 S. Ct. 1918 (1987). The cases listed by the petitioners were: United States v. Merrill, 746 F.2d 458, 463 (9th Cir. 1984), cert. denied, 469 U.S. 1165 (1985) (holding that review of the "value" prong of *Miller* requires greater scrutiny than other prongs); United States v. Bagnell, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983) (concluding that community standards are to be applied only in determining "prurient interest" and "patent offensiveness" and not "value"); Penthouse Int'l Ltd. v. McAuliffe, 610 F.2d 1353, 1353 (5th Cir. 1980) (holding that appellate courts can review trial court determinations concerning any prong of the *Miller* test); United States v. Heyman, 562 F.2d 316, 318-19 (4th Cir. 1977) (vacating trial court's decision because of error in instructing jury to apply "contemporary community standards" in determining scientific value of contested material). See infra notes 77-82 and accompanying text.

⁷⁷. 562 F.2d 316 (4th Cir. 1977).
versed a lower court decision applying contemporary community standards to all three parts of the *Miller* test. The court clarified that contemporary community standards only applied to parts one and two of the tripartite test. Likewise, in *United States v. Bag nell*, the Eleventh Circuit held that in assessing the serious value of the material, the trier of fact was not to rely on community standards. However, neither court stated what the proper standard of review was under the value prong.

**DETERMINATION OF SERIOUS VALUE**

After *Miller*, one scholar had concluded that not only did the Court fail to properly define the standard of review, it also failed to give guidance on how to apply the standard. Commentators had openly criticized the Court's apparent inability to provide the trier of fact with any guidance in how to apply contemporary community standards. These concerns also extended to the question of serious value. Furthermore, commentators had criticized the Court's definition of serious value as being too narrow.

The *Miller* Court noted that the first amendment was intended to protect the interchange of ideas which bring about desired political and social changes. However, it held that the display of hard-core sexual material for commercial gain was a different matter. Nonetheless, it was suggested that these broad generalities did not provide sufficient guidance for determining what materials achieved the level

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78. *Id.* at 318-19.
79. *Id.* at 318.
80. 679 F.2d 826 (11th Cir. 1982).
81. *Id.* at 835.
82. Brief for the Respondent at 20, *Pope*.
83. Shugrue, *7 CREIGHTON L. REV.* at 159.
84. See supra note 65. The Court's justification for adopting contemporary community standards under the prurient interest and patent offensiveness elements was that determining a national standard would place an impossible burden upon the trier of fact. See supra notes 47-51 and accompanying text.
85. *See infra* notes 90-93 and accompanying text.
86. *See infra* notes 91-96 and accompanying text. Note that in *Miller*, the Court only gave one example of what constitutes serious literary, artistic, political and scientific value. *Miller*, 413 U.S. at 26 (noting that display of sexual material in medical textbooks was protected activity).
of “serious.”

Professor William Lockhart, Dean Emeritus of the University of Minnesota Law School and a noted scholar in the area of obscenity, reasoned that what constituted “serious” was essentially a “subjective, judgmental decision” which could only be measured on a case-by-case basis. This analysis was necessary because the “value” determination required the evaluation of the material as a whole. Even the Court voiced concerns regarding the jury determination of the obscenity of certain material. The Court was concerned that many jurors might view themselves as reasonable persons and allow their own perceptions to influence their conclusions.

Many people felt that *Miller* went too far in limiting protected material to that which has serious literary, artistic, political and scientific values. Professor Lockhart stated that the Court had excluded other important first amendment values from the list. First, he stated that the *Miller* test had made no reference to educational value which represented one of the more important values that sexual material promotes. Second, he thought that the Court had ign-
nored entertainment value, which has been recognized in other areas under the first amendment.97 Finally, Professor Lockhart reasoned that there should have been an "other serious value" category which included other material that did not neatly fall into one of the categories but warranted constitutional protection.98 Another commentator suggested that to include many of these values within the four categories would require extending the plain meaning of the words beyond the point of "elasticity."99

Members of the Court were also very critical of the limited categorization of material representing serious values.100 Justice Brennan, in a strong dissent in Paris Adult Theatre I v. Slaton,101 took the position that there was a right to receive information, and, regardless of the social worth of the material, this right was fundamental to our free society.102 He proclaimed that the Court's definition of obscenity in Roth as an expression utterly lacking social value had been the key conceptual basis to ruling that obscenity was unprotected speech.103 Yet, Justice Brennan reasoned that the Miller court had disregarded the entire substantive basis for the Roth decision.104 He noted that

include such things as sexual techniques and certain categories of pornography. F. Schauer, supra note 65, at 142. See also Hunsaker, 11 SAN DIEGO L. REV. at 915-16.

97. Lockhart, 9 GA. L. REV. at 555. See also Winters v. New York, 333 U.S. 507, 510 (1948) (stating that material which appears to have no value to society deserves as much first amendment protection as the best of literature).

98. See Lockhart, 9 GA. L. REV. at 555. Schauer suggested that "humor" should be an acceptable value category. F. Schauer, supra note 65, at 142. However, he noted that good humor might reach the level of serious literary value. Id. He also included legitimate sex and marriage manuals in this category. Id.

It has been argued that pornography has a beneficial effect on some because it encourages openness and diminishes "archaic taboos and strictures about sex." Id. at 141. Professor Hunsaker suggested that the Court should recognize the therapeutic value of material in psychiatric treatment and marriage counseling. Hunsaker, 11 SAN DIEGO L. REV. at 916.


100. See infra notes 101-05 and accompanying text.


Justice Stevens once stated that no matter how distasteful material might be, it must have formed an acceptable medium of communication and entertainment to a segment of society; otherwise, the material would have had no value in the marketplace. Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part). See also Smith, 431 U.S. at 319-20 (Stevens, J., dissenting) (stating that the fact that there was a large demand supported that some value exists whether it be for amusement or information).

103. Paris, 413 U.S. at 97. In Roth, the Court held that all ideas, whether they be unorthodox, controversial or against prevailing opinion, having even the slightest redeeming social importance, are protected unless they encroach upon a countervailing interest. Roth, 354 U.S. at 484.

no other area of first amendment constitutional law was limited to speech that had serious value.\textsuperscript{105}

Professor Lockhart reasoned that the Court's approach had created uncertainty concerning the scope of constitutional protection given to sexual material.\textsuperscript{106} He concluded that \textit{Miller} must have intended first amendment protection to extend to any material which reflected serious social value.\textsuperscript{107} Alternatively, he reasoned that the Court might have decided that other material reflecting serious values could be neatly placed under the four stated categories.\textsuperscript{108} Nevertheless, he urged the Court to clarify this ambiguity.\textsuperscript{109}

ATTACKS ON THE OBSCENITY TEST

Since \textit{Miller}, there has been a loud outcry that the tripartite test fails as a constitutional doctrine.\textsuperscript{110} Moreover, this outcry has extended to a call for the total abolition of the law of obscenity, at least with respect to consenting adults.\textsuperscript{111}

In discussing the first two parts of the \textit{Miller} test, Justice Stevens has stated that regardless of whether a local or national standard applied, the average juror could not be expected to answer the

\begin{itemize}
\item\textsuperscript{105} \textit{Id.} See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 563 (1980) (holding that commercial speech was protected speech if it concerned lawful activity which was not misleading); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (holding that no discussion of value was needed when distinguishing protected expression from unprotected conduct); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965) (holding that the regulation of symbolic speech was only permissible when it furthered substantial governmental interests and was unrelated to the suppression of "free expression").
\item\textsuperscript{106} Lockhart, 9 GA. L. REV. at 556.
\item\textsuperscript{107} \textit{Id.} at 556. However, Professor Lockhart noted that the "serious" categories were repeated continually in the \textit{Miller} opinion. \textit{Id.} Professor Schauer believed that the list was probably exclusive. \textit{See also F. SCHAUER, supra note 65, at 142.}
\item\textsuperscript{108} Lockhart, 9 GA. L. REV. at 556.
\item\textsuperscript{109} \textit{Id.}
\item\textsuperscript{110} \textit{See supra} note 65. Dr. Richard Shugrue attacked the Court's failure to require the State to present evidence, other than the material itself, in discharging its burden of proof. He concluded that such procedure violated due process because it placed the burden on the defendant to prove innocence as opposed to the State proving guilt. Shugrue, 7 CREIGHTON L. REV. at 170. \textit{But see} Note, \textit{Community Standards, Class Actions and Obscenity Under Miller v. California}, 88 HARV. L. REV. 1838, 1854 n.77(1975) (suggesting that the procedure only shifts the burden of bringing forth evidence to the defendant but leaves the burden of persuasion on the State).
\item\textsuperscript{111} F. LEWIS, \textit{LITERATURE, OBSCENITY, AND LAW} 225-26 (1976) (citing the Commission Report at 25, 27, 51).}


question evenhandedly. In his opinion, jurors might be influenced by their peers and feel that their own views were at odds with those of the community. He has further stated that the fact that a national standard was incapable of definition did not support the application of a community standard. Consistent with Justice Stevens' position, Justice Brennan has concluded that a jury could no more ascertain a community standard than a hypothetical national standard.

There has also been criticism that the reformulation of the obscenity test under Miller failed because it required the Court to determine in each case whether the material in question represented protected speech. Justice Brennan has noted that the current approach only resolved the dispute between the present adversaries. As such, he concluded that the Court has provided no guidance to legislators, adjudicators or private citizens regarding acceptable conduct. He stated that each case had become marginal, thus support-

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112. Smith, 431 U.S. at 315 (Stevens, J., dissenting). The Court has continually held that whether material was obscene could be determined from viewing it. Pinkus, 436 U.S. at 302; see also Paris, 413 U.S. at 56. As such, the jurors can totally disregard expert testimony regarding the nature of the material. United States v. Bagnell, 679 F.2d at 833 (holding that obscene materials are not so far removed from the realm of recognizable sexuality as to render jury evaluations inappropriate and replace it with expert testimony).

113. Smith, 431 U.S. at 315.

114. Id. at 313.

115. Id. at 314. Professor Schoen, in noting the Court's failure to properly define the relevant community more precisely, stated that the relevant community could be a village of 100, a town of 10,000, or a city of 100,000. Schoen, 50 N.D.L. Rev. at 580-81. He also concluded that even the use of expert testimony would not provide much help with that problem. Id. at 581. See supra notes 47-51 and accompanying text.

116. Jenkins, 418 U.S. at 162-63 (Brennan, J., dissenting). Justice Black, in Smith v. California, raised the following questions concerning the Court's role in obscenity cases:

What are the "more important" interests for the protection of which constitutional freedom of speech and press must be given second place? What is the standard by which one can determine when abridgement of speech and press goes "too far" and when it is slight enough to be constitutionally allowable? Is this momentus decision to be left to a majority of this Court on a case-by-case basis? What express provision or provisions of the Constitution put freedom of speech and press in this precarious position of subordination and insecurity?

Smith v. California, 361 U.S. at 157.

117. Paris, 413 U.S. at 83 (Brennan, J., dissenting).

118. Id. Justice Brennan noted that the voluminous number of summary reversals and denials of certiorari had only added to the problems which existed prior to Miller.
ing the sufficiency of notice concerns expressed in Roth.\textsuperscript{119} In his view, the result was that the Court had rendered superfluous State court decisions.\textsuperscript{120}

**CURRENT STATE OF OBSCENITY IN FREE SPEECH**

The Court stated in Roth that “[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.”\textsuperscript{121} The Roth Court emphasized that free speech should be tampered with only to “prevent encroachment upon more important interests.”\textsuperscript{122} In Miller, the Court recognized that it could not deprive the State of the police power reserved to it under the Constitution, a power enjoyed and exercised before the first amendment was passed.\textsuperscript{123} However, the Court has been criticized for not striking an appropriate balance between the competing interests.\textsuperscript{124}

The Court has recognized that the regulation of any form of ex-
pression created potential dangers.\textsuperscript{125} It once stated that the promulgation of strict standards which were vague in nature had the potential for inhibiting speech.\textsuperscript{126} Yet, the Court has held that lack of precision in the application of the obscenity test did not offend constitutional rights.\textsuperscript{127} However, the Court has also noted that the test must "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice."\textsuperscript{128} Nevertheless, some critics have expressed that the Court has failed in accomplishing these objectives.\textsuperscript{129}

The Court has held that no person shall be held criminally responsible for acts the person had no reason to know were criminal because a statute was vague.\textsuperscript{130} The requirement protects one's constitutional due process rights.\textsuperscript{131} Critics have stated that the \textit{Miller} test failed to provide guidance concerning what conduct was prohibited.\textsuperscript{132} They have concluded that the present uncertainty has had a chilling effect on distributors of sexual material.\textsuperscript{133}

\textsuperscript{125} \textit{Miller}, 413 U.S. at 23. The Court stated that state statutes must be carefully limited and specifically defined. \textit{Id.} at 23-24.

\textsuperscript{126} Smith v. California, 361 U.S. at 151.

\textsuperscript{127} \textit{Miller}, 413 U.S. at 27 n.10. The Court also noted that the fact that juries might reach different conclusions as to the same material did not mean constitutional rights were abridged. \textit{Id.} at 26 n.9. It reasoned that such results were an inherent consequence of our jury system. \textit{Id.}

\textsuperscript{128} \textit{Miller}, 413 U.S. at 27-28 n.10.

\textsuperscript{129} \textit{See e.g.,} Shugrue, \textit{7 CREIGHTON L. REV.} at 157 (concluding that the law of obscenity "produces as many views as there are legal minds at work") (quoting Olsen v. Doefler, 14 Mich. App. 428, \textendash, 165 N.W.2d 648, 650 (1968) (holding that prosecution under obscenity statute was premature as allegedly obscene magazines had not yet been distributed to the public)). Professor Schoen noted that free speech has been given a favored position in constitutional law. He found it questionable that the Court would bend constitutional standards to accommodate local attitudes and judgments. He concluded that first amendment rights should be enjoyed nationally. Schoen, \textit{50 N.D.L. REV.} at 584.

\textsuperscript{130} United States v. Harriss, 347 U.S. 612, 617-18 (1954) (holding that although a criminal statute is invalid if it is so vague as to prevent persons from determining if their actions are illegal, the statute in which defendant was accused of violating was sufficiently definite to pass constitutional muster). \textit{Cf.} New York v. Ferber, 458 U.S. 747, 765 (1982) (holding that prosecution under obscenity laws may not occur unless defendant had some element of scienter).

\textsuperscript{131} \textit{Harriss}, 347 U.S. at 617. \textit{Cf.} \textit{Miller}, 413 U.S. at 41-42 (Douglas, J., dissenting) (comparing obscenity to racial discrimination cases where "fair warning" is a requisite to a criminal conviction).

\textsuperscript{132} \textit{Paris}, 413 U.S. at 83 (Brennan, J., dissenting). \textit{See also} Shugrue, \textit{7 CREIGHTON L. REV.} at 176 (the failure to provide guidance of what conduct was obscene prior to criminal conviction has a chilling effect on speech).

\textsuperscript{133} \textit{Paris}, 413 U.S. at 87 (Brennan, J., dissenting). Professor Lockhart stated that attitudes vary greatly among jurors as well as experts. Lockhart, \textit{9 GA. L. REV.} at 540. He reasoned that such a variation promotes uncertainty and has a chilling effect on the distribution of protected materials. \textit{Id.}

The doctrine of vagueness is a settled principle in constitutional law. Smith v. Goquen, 415 U.S. 566, 572, 574 (1974) (holding that a Massachusetts statute prohibiting
In 1968, President Lyndon Johnson formed a Commission on Obscenity and Pornography which issued a report concerning the present state of obscenity and pornography. The Commission reached several conclusions. First, the federal and state lawmakers had been unable to legislate successfully in the area of obscenity. Second, the obscenity test was a vague and highly subjective aesthetic, psychological and moral pronouncement which provided no guidance. Third, the law of obscenity had been inconsistently applied. Finally, the law of obscenity was overbroad and thus interfered with protected speech.

The law of obscenity has been based on the unprovable assumption that obscene material has an adverse effect on society. Nevertheless, the Commission on Obscenity and Pornography, after a two-year investigation, found no evidence that exposure to explicit sexual material caused delinquent or criminal behavior among youths and adults. The Commission concluded that established patterns of sexual behavior remained stable despite exposure to erotic material. Consequently, the Commission recommended that obscenity

contemptuous treatment of the flag of the United States was void for vagueness as it did not specify what constituted "contemptuous treatment"). The doctrine requires lawmakers to provide reasonably clear guidance to both law enforcement personnel and the court system in order to prevent arbitrary enforcement of the law. Id. at 572-73. It also requires that fair warning and notice be given concerning forbidden acts. Id. at 572. Furthermore, where the statute threatens protected speech, more specificity is required. Id. at 573.

Professor Schoen stated that the Court had permitted subjective and mischievous standards to exist which might destroy the first amendment. Schoen, 50 N.D.L. REV. at 577. Professor Clor concluded that the Miller test has made matters hard on publishers. Clor, 7 Loy. L.A.L. REV. at 216.


136. Id.

137. Id.

138. Id.

139. Paris, 413 U.S. at 61-62. Note that the Court has tried to compare obscenity to other areas, such as antitrust laws, securities laws and other business regulations, which were also based upon unprovable assumptions. Id. The Court also iterated that some laws were passed to protect the weak, the uninformed, the unsuspecting and the gullible from themselves. Id. at 64.

Dr. Shugrue criticized the analogy to business regulations as misleading. Shugrue, 7 CREIGHTON L. REV. at 177. He stated that the court must distinguish between pure expression and derivative expression. He noted that pure expression should be granted more latitude than market-oriented decisions which might affect speech. Id.

140. Commission Report at 27. This conclusion was reached despite expert statements that erotic stimulus frequently motivated criminal sexual behavior and other antisocial behavior. Id.

141. See supra note 134 and accompanying text.

142. Id. at 25.
laws be amended to apply only to minors and unconsenting adults.\(^{143}\)

Justice Brennan conceded that formulating a test for regulating obscenity was a difficult task.\(^{144}\) He had also stated that any substitute would create equally difficult problems.\(^{145}\) Thus, Justice Brennan has also suggested that regulation be limited to the distribution of obscene material to minors and unconsenting adults.\(^{146}\)

A few other alternatives have been suggested. Justice Douglas suggested that the proper solution would be a constitutional amendment redefining the scope of the first amendment.\(^{147}\) Justice Stevens has recommended that no criminal regulation with respect to obscenity laws should ban the mere possession of obscene material.\(^{148}\)

143. Commission Report at 51. In Stanley v. Georgia, 394 U.S. 557, 565 (1969), the Court upheld the right of an individual to read and view whatever material he chooses in the privacy of his own home. Cf. Memoirs, 383 U.S. at 431 n.10 (Douglas, J., concurring) (stating that if people were appalled by a certain book, they could close it after reading page one). But see United States v. 12 200-ft, Reels of Super 8mm, Film, 413 U.S. 123, 128 (1973) (rejecting distribution of material for private use and analogizing such allowance to that of importing and distributing drugs).

Note, however, the Court's statements in United States v. Reidel. The Court recognized that Stanley did not require the extension of such rights outside the privacy of the home. United States v. Reidel, 402 U.S. 351, 356 (1971). However, it recognized the concerns surrounding the law of obscenity. Id. at 357. The Court suggested that limiting the regulation of obscenity to preventing imposition of such material on children and unwilling recipients might prove to be a desirable and eventual alternative. However, it noted that such authority belonged to the legislature, and nothing the Court had said or done has prevented such an action. Id.

The Attorney General's Office recently issued a report on pornography. REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (July 1986). The Report recognized that many scholars have concluded that the Supreme Court has incorrectly interpreted the first amendment. Id. at 260-61. It went on to give credence to the idea that the Supreme Court has erred in its approach to obscenity regulation. Id. at 261. However, after reviewing the criticisms and challenges, the Attorney General's Office stated that it was unpersuaded that the Supreme Court was misguided. Id. at 261-64. Yet it qualified this statement by reasoning that it was not concluding that obscenity regulation created no first amendment concerns, nor that the Supreme Court was correct in its approach. Id. at 268. But, the Attorney General's Office concluded that the Supreme Court's approach was likely correct. It saw no reason that the approach should be altered at the present time. Id.

144. Paris, 413 U.S. at 79. The Court has consistently recognized protection of minors from obscene material. See e.g., Ferber, 458 U.S. at 756-57; F.C.C. v. Pacifica Found., 438 U.S. 726, 749-50, reh'g denied, 439 U.S. 883 (1978) (holding that the F.C.C.'s prohibition against broadcasting objectionable language on radio programs did not constitute censorship and was not repugnant to the first amendment's protection of free speech); Ginsberg v. New York, 390 U.S. 629, 637-39, reh'g denied, 391 U.S. 971 (1968) (holding that statute prohibiting sale of obscene materials to minors was not unconstitutional and was rationally based on the State's interest in safeguarding minors).


146. Paris, 413 U.S. at 113.

147. Miller, 413 U.S. at 46 (Douglas, J., dissenting). Professor Schauer had similarly suggested that the Court make the determination of "obscenity" a legislative decision. He was of the opinion that this would prevent the definition from varying from community to community and provide better notice to those involved. Schauer, supra note 56, at 126.
He stated that the best solution was to let the marketplace decide what material was acceptable and worthwhile.\textsuperscript{149}

**FACTS AND HOLDING**

The petitioners, Richard Pope and Charles Morrison, were both attendants at different Rockford, Illinois adult bookstores.\textsuperscript{150} On July 21, 1983, local police detectives entered the respective stores and purchased several allegedly obscene magazines from the petitioners.\textsuperscript{151} Subsequently, the petitioners were arrested and separately charged with selling obscene materials pursuant to an Illinois statute.\textsuperscript{152}

At their trials, the petitioners argued, among other things, that the Illinois statute was repugnant to the First and Fourteenth Amendments of the United States Constitution.\textsuperscript{153} They contended that the failure of the Illinois statute to require that the value portion of the obscenity test be judged under an objective standard was

\begin{itemize}
\item \textsuperscript{148} Smith, 431 U.S. at 311-12 (Stevens, J., dissenting).
\item \textsuperscript{149} Id. at 321.
\item \textsuperscript{150} Pope, 107 S. Ct. at 1920. The exterior of both stores contained signs identifying them as adult bookstores. Brief for the Petitioners at 5, Pope.
\item \textsuperscript{151} Pope, 107 S. Ct. at 1920.
\item \textsuperscript{152} Id. The defendants were prosecuted under a statute which defined obscenity as:
\end{itemize}

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

ILL. ANN. STAT. ch. 38, § 11-20(b) (Smith-Hurd 1979).

Subsequent to their conviction, the statute was revised to define obscenity as:

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

ILL. ANN. STAT. ch. 38, § 11-20(b) (Smith-Hurd 1987).

\begin{itemize}
\item \textsuperscript{153} Pope, 107 S. Ct. at 1920. At the time of the petitioners' trial, the Illinois obscenity statute had been construed to adopt the value prong as stated in \textit{A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts}, in which the plurality held that material must be shown to be "utterly without redeeming social value" before it would be found obscene. Pope, 107 S. Ct. at 1920, n.1 (citing A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966)). However, the Court held that use of the higher burden of proof had no effect on the outcome of the case. Id. at 1920 n.1. See supra notes 52-55 and accompanying text (discussing the decreased burden placed upon the State under the value prong as stated in \textit{Miller}).
\end{itemize}
contrary to Miller. However, both trial courts rejected the petitioners' argument. After deliberation, a jury found both petitioners guilty of selling obscene material in violation of the Illinois statute.

On appeal, the Appellate Court of Illinois combined the two cases for review. The court, likewise, rejected the petitioners' argument concerning the standard of review under the value prong and upheld the lower court's decision. The Illinois Supreme Court denied the petitioners' request for further review; however, the United States Supreme Court granted certiorari.

The Court held that the proper inquiry under the third prong of the Miller test was whether a reasonable person would find "serious literary, artistic, political or scientific value" in the material viewed as a whole. The Court pointed out that it had never suggested that the question of serious value required reference to contemporary community standards. It further reasoned that the failure of the Miller Court to discuss the value prong with reference to a community standard had not been an oversight, but a deliberate choice. Thus, the Court concluded that the Miller test only required that the trier of fact apply contemporary community standards in assessing the prurient interest and patent offensiveness prongs.

155. Id.
156. Id.
157. People v. Morrison, 138 Ill. App. 3d 595, 486 N.E.2d 345, 346 (1985); id. at 348 N.E.2d at 349 (allowing jury to apply a community standard instead of an objective standard in judging material as obscene).
158. Id. at 347-48.

The Court remanded the case to the Appellate Court of Illinois (referred to as the Illinois Court of Appeals by the Supreme Court) for determination of whether the improper jury instructions prejudiced the petitioners. Id. at 1920, 1922-23. Justice Blackmun disagreed with this treatment, asserting that the harmless error rule was not applicable to this case. Id. at 1923.

The State had contended that unless a contemporary community standard applied, the jurors would not be able to properly decide the value issue. Brief for the Respondent at 21, Pope. The State stated that Miller essentially had discussed all three parts as questions of fact. Id. at 13. Thus, the State reasoned that in order for the jury to consistently evaluate obscenity cases, a uniform standard of review should apply to all three elements. Id. at 12.

162. Pope, 107 S. Ct. at 1921.
163. Id. at 1920-21.
Speaking for the majority, Justice White further discussed the role of the value element in obscenity cases. He stated that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." He reasoned that since majority acceptance of the ideas that certain materials represent was not a necessary prerequisite to the material being protected speech, it also followed that the value of such material did not depend upon local acceptance in each community.

The majority opinion was greeted by a strong dissent from Justice Stevens. Justice Stevens reasoned that the majority had given no guidance to a jury on how to apply a "reasonable person" standard. He concluded that under the Court's present formulation, the jury would ultimately apply contemporary community values instead of objective values. Justice Stevens argued that unless a juror would conclude that the ordinary person in the relevant community was less than reasonable, then the majority view of the community would prevail. He reasoned that such a result would conflict with the Court's recognition of the importance of the minority view in obscenity cases.

Justice Stevens then stated that the above confusion supported his position that criminalizing the sale of obscene material to con-
senting adults was unconstitutional.\textsuperscript{172} He stated that the average juror would likely react differently toward sexual material in a private setting as opposed to a social setting.\textsuperscript{173} He further reasoned that in obscenity cases the precise standard of review the jury used was never disclosed, which made the cases not reviewable.\textsuperscript{174} Consequently, Justice Stevens concluded that the outcome of obscenity cases depended solely on the subjective views of the individual jurors rather than the predictable application of a rule of law.\textsuperscript{175}

Justice Scalia joined the Court’s opinion but quickly pointed out that he did so only because the Court had correctly interpreted Miller,\textsuperscript{176} as it applied to the instant case. However, he noted that had the Court been asked to reexamine Miller, his position would have been different.\textsuperscript{177}

Justice Scalia reasoned that it was impossible for a jury to objectively assess the value of material given the diverse opinions which exist among people.\textsuperscript{178} However, Justice Scalia noted that Justice Stevens’ proposal that first amendment protection be afforded to material that reasonable people find to have serious value would not eliminate this problem.\textsuperscript{179} Yet, Justice Scalia emphasized that since taste was incapable of an ascertainable standard, there was no use litigating it.\textsuperscript{180}

\textsuperscript{172} Id. at 1927 (Stevens, J., dissenting). Justice Stevens also reasoned that the demand for such materials indicated that they must have some value, whether it be for amusement or information. \textit{Id.} at 1930 (Stevens, J., dissenting) (citing Smith, 431 U.S. at 319) (Stevens, J., dissenting). Furthermore, many of the materials once thought to be baneful are now considered works of art. Pope, 107 S. Ct. at 1930. Thus, he felt the proper course of action was to allow the free marketplace of ideas to determine the value of a piece of work. \textit{Id.}

\textsuperscript{173} Id. at 1928. Justice Stevens cited studies which showed that a large majority of a group could significantly distort the perceptions of the minority members regarding neutral and objective subjects. He further reasoned that with regard to obscenity, “by no means a neutral subject,” the majority’s subjective views and sentiments would inevitably influence the views of those in the minority. \textit{Id.}

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Id. at 1923 (Scalia, J., concurring).

\textsuperscript{177} Id.

\textsuperscript{178} Id. Justice Stevens had noted that the Court’s formulation allowed the jury to ignore expert testimony regarding the value of the material. \textit{Id.} at 1927 n.5 (Stevens, J., dissenting). Justice Stevens stated it was conceivable that a jury could conclude that an expert’s opinion could be ignored because it may not reflect the view of the ordinary “reasonable person.” \textit{Id.}

\textsuperscript{179} Id. at 1923 (Scalia, J., concurring).

\textsuperscript{180} Id.
ANALYSIS

In *Pope v. Illinois*, the Court attempted to clarify the confusion which existed concerning the standard of review applicable to the value prong of the *Miller* test. The Court held that, unlike the prurient interest and patent offensiveness prongs, the "serious value" prong was to be judged under a reasonable person or objective standard. Thus, the Court settled at least part of the debate which has surrounded the controversial *Miller* test. However, since *Miller* was decided, the tripartite obscenity test has been criticized and its utility questioned. The criticisms have centered around the Court's failure to provide sufficient guidance to the trier of fact and producers of sexual material on how to precisely determine what material is "obscene." Thus, in *Pope*, the Court continued to stand by a test which may well be unworkable.

NATIONAL V. LOCAL STANDARD

Since the *Roth* decision held that obscenity was unprotected, the Court has battled to clarify the constitutional test applicable to the obscenity analysis. The initial confrontation dealt with whether the test was subject to a national or local standard of review. After years of debate, the *Miller* decision clarified some of the confusion by concluding that a contemporary community standard of review applied to the first two parts of the obscenity test. Nevertheless, the confusion and criticisms continued to persist even subsequent to *Miller*.

The Court, in *Pope*, stated that it had never held that the value prong was subject to contemporary community standards. It further held that such decision was not accidental, but constituted a deliberate choice. Yet, the Court, until *Pope*, had failed to expressly state what the applicable standard was with respect to the "serious

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182. Id. at 1920-21.
183. Id.
184. Brief for the Respondent at 20, *Pope* (noting that the applicable value standard previously had not been addressed).
185. See supra notes 116-33 and accompanying text.
186. See supra notes 114-16 and accompanying text.
187. See supra notes 167-80 and accompanying text.
188. See supra notes 19-66 and accompanying text.
190. *Miller*, 413 U.S. at 33-34. See supra notes 46-51 and accompanying text.
191. See supra note 65 and accompanying text.
value” component of the tripartite test. Thus, the Court’s conclusion concerning the use of an objective standard under the value prong is not as justified as the Court suggests.

Nevertheless, it would appear that the Court reasonably interpreted the standard of review applicable to the value prong. When the obscenity test was first developed in Roth and Manuel Enterprises the analysis only included reference to prurient interest and patent offensiveness. The Court has emphasized that the determination of these two parts are questions of fact and thus subject to review under contemporary community standards. However, the Court has specifically noted that the “serious value” element was particularly subject to judicial review. Moreover, since the Court has only referred to prurient interest and patent offensiveness as questions of fact, it is reasonable that the “serious value” test must ultimately be a question of law. Consequently, since a question of law should not vary from community to community, it follows that a national or objective standard should apply to the “serious value” prong. This conclusion is also consistent with the analysis of the state and lower federal courts. Yet, as with the first two parts, the Court, in Pope, failed to provide any helpful guidance on how to apply an objective standard in a first amendment context.

The Miller test has been continually criticized for its failure to provide sufficient guidance to the trier of fact or publishers and producers concerning what material should be classified as obscene. Many of these criticisms extend equally to the Court’s attempted clarification of the value analysis in Pope.

The Determination and Analysis of the Serious Value Prong

In Pope, the Court reasoned that neither the majority view nor the view of the government should prevail in an obscenity case. The Court stated that the determination of the value test and the re-

195. See supra notes 67-82 and accompanying text.
196. See supra notes 13-22 and accompanying text.
197. Smith, 431 U.S. at 300-01. See supra note 60 and accompanying text.
198. Smith, 431 U.S. at 305.
199. See supra notes 68-72 and accompanying text.
200. See supra note 64 and accompanying text.
201. See supra notes 73-82 and accompanying text.
203. See supra notes 83-86 and accompanying text.
204. See, e.g., Lockhart, 9 GA. L. REV. at 556-57. See also supra notes 90-93 and accompanying text.
205. Pope, 107 S. Ct. at 1921. See also supra note 165 (Miller, 413 U.S. at 34, quoted in, Pope, 107 S. Ct. at 1921).
lated "objective standard" was consistent with the above state-
ment. Yet, the Court proceeded to compare the "objective
standard" to the "reasonable person" standard in a tort context. Under a "reasonable person" approach, the jury is supposed to deter-
mine what the average person would do or think if presented with a certain set of circumstances. Thus, a "reasonable person" standard represents the "mean" of the population, and such standard contra-
dicts the theory that a minority view can prevail in an obscenity con-
text. As such, the Court has provided no real basis for determining or applying an objective standard when reviewing al-
leged obscene material.

The end result continues to be that "serious value" remains a subjective and personal judgment on the part of the trier of fact. This conclusion is only solidified by the Court's limitation on what categories satisfy the requisite level of "serious value."

When the Court first promulgated the obscenity test under the first amendment, the test was predicated on the assumption that obscene material was "utterly without redeeming social importance." This statement remained the continuing basis for excluding obscene material from first amendment protection. The categories of "artistic," "literary" and "scientific" had only been considered as justifi-
cations for not finding material obscene and were not viewed as exclusive limitations. Even in Memoirs, when "value" became an expressed part of the obscenity test, material was not obscene unless it was "utterly without redeeming social value." The range of ac-
ceptable categories of "value" was not limited until the Miller
decision.

The Court's change in the value prong analysis was predicated partly on two factors. First, the Court reasoned that the Memoirs test placed an impossible burden on the State to prove a negative.

207. See supra note 170.
208. Id.
211. See supra notes 90-93 and accompanying text.
213. Roth, 354 U.S. at 484. See supra note 29 and accompanying text.
215. Id.
217. Miller, 413 U.S. at 22. See also supra note 54 and accompanying text. The Court also had concluded that the Memoirs test never achieved majority support. Miller, 413 U.S. at 24-25. However, it is interesting to note that the Roth decision, which made the statement under which the Memoirs "value" test was predicated, did receive majority approval. Roth, 354 U.S. at 479.
Second, it stated that the “utterly without redeeming social importance” language, as contained in Roth, was only a justification for concluding that obscene material was unprotected speech and was not meant to be included in the obscenity test analysis. Yet, it would appear that the Court ignored these concerns in the end.

The Court replaced the “utterly without redeeming social value” language with “lacks serious value.” Under such a reformulation, the State still has to discharge its burden by proving a negative. Furthermore, the Court, despite its previous indication that “value” was not an expressed part of the obscenity test, included a “value” prong as part of the Miller test. Moreover, the Court, by limiting the categories of “serious value,” ignored the entire basis for the Roth decision that obscene material be “utterly without redeeming social importance.”

**Obscenity and First Amendment Protection**

The underlying thesis of the first amendment is that free speech encourages the expression of ideas. Speech is protected when it stirs political debate; it is protected when used for commercial profit; and it is protected even when it is unpopular. This thesis is a fundamental right and an underpinning of our free democratic society. Although it is generally accepted that first amendment values are not absolute, they only succumb to countervailing state and federal interests. No fundamental right deserves any less protection.

The Court has held that “serious value” includes material which is artistic, political, literary and scientific in nature. Yet, “value” should not be so strictly limited. Many materials have educational, entertainment or therapeutic value to those who view it. However, the Court has chosen to dictate to the minority what “value” is

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219. Miller, 413 U.S. at 21-22.
220. Id. at 24-25.
221. Schoen, 50 N.D.L. REV. at 575-76.
222. Miller, 413 U.S. at 24.
223. Paris, 413 U.S. at 97 (Brennan, J., dissenting). See supra notes 103-05 and accompanying text.
224. See supra note 121 and accompanying text.
226. See supra note 102 and accompanying text.
227. Roth, 354 U.S. at 484.
228. Id.
229. Miller, 413 U.S. at 24.
230. See supra notes 95-109 and accompanying text.
231. See supra notes 95-97 and accompanying text.
acceptable in our society. On the one hand, it has been suggested that the Court might not have intended for the categories to be totally inclusive. On the other hand, it also has been suggested that all things of "serious value" can probably be fitted into one of the categories. However, if either suggestion be the case, the Court should state as much.

Consequently, the determination of what satisfies the Miller value prong remains virtually impossible. Prior to Pope, the Court had been urged to clarify the ambiguity surrounding the "serious value" element of the tripartite test. Subsequent to Pope, the echo of the urging remains unanswered.

PRESENT AND FUTURE UTILITY OF THE MILLER TEST

Both Justices and scholars have criticized the entire Miller test. This criticism continues with the same energy today. However, the Court continues to ignore these criticisms while simultaneously permitting a cloud to exist over the law of obscenity.

The Court has held that the law of obscenity, especially the value analysis, is subject to independent judicial review. However, given the present lack of clear guidance from the Court, this requirement makes it virtually impossible for one to know what is obscene until the Court has reviewed the material. Moreover, this lack of guidance makes it difficult for States to promulgate statutes which do not impede the exercise of protected speech. The presence of such vague guidelines only has the effect of inhibiting protected speech. Even more so, the present obscenity test ultimately results in either the majority of the population or a majority of the Court defining the parameters of a fundamental constitutional right.

The current "value" analysis perpetuates the problem. The Court has continually held that the jurors may ignore expert testimony when assessing the obscenity of the challenged material.

232. See supra notes 101-05 and accompanying text.
233. Lockhart, 9 GA. L. REV. at 556.
234. Id.
235. Id. at 557.
237. See supra notes 110-20 and accompanying text.
238. See supra notes 167-80 and accompanying text.
239. Smith, 431 U.S. at 305.
244. Paris, 413 U.S. at 56. But see supra note 112 and accompanying text.
Thus, how is a juror supposed to objectively decide what constitutes "serious?" The ultimate burden of proof is placed on the defendant to prove that the material is not obscene. Additionally, the word "serious" is an ambiguous term which can only be analyzed based upon subjective and personal judgments. Also, the Court's limitation on the acceptable categories only increases the subjectivity, and correspondingly, the state of confusion and lack of guidance.

Thirty years ago, Justice Brennan wrote the majority opinion in Roth which originally found obscenity to be unprotected speech. However, Justice Brennan has since determined that the obscenity test has failed as a constitutional doctrine. Moreover, Justice Scalia, who joined the majority in Pope, noted that had he been asked to reexamine the Miller test, he would have opted for that alternative. The Court should seriously consider adopting Justice Scalia's view and reexamine the Miller test.

The law of obscenity was developed based on the general, unprovable assumption that obscene material has adverse societal effects on adults and youths alike. Yet, in a 1970 study, a federal commission found no such adverse effects on adult behavior. Moreover, the Meese Commission provided no evidence that refuted this earlier finding. The Meese Commission chose to maintain the status quo because of insufficient evidence to warrant a change in the present approach. Nonetheless, the Court has compared the law of obscenity to other areas of the law which are based on unprovable assumptions. It is a constitutionally acceptable principle that the incidental regulation of speech is permitted under the first amendment. However, the direct prevention or regulation of the fundamental right to free speech has always been cautiously pursued. Pure speech deserves far more protection than derivative speech.

Also, the Court has held that obscenity laws apply to youths, un-
consenting adults and consenting adults.\textsuperscript{259} Yet, it has held that the private possession of obscene material is not subject to regulation.\textsuperscript{260} Thus, although the Court is willing to protect the buyer, the seller receives no similar protection.\textsuperscript{261} The Court analogizes this treatment to the regulation of drug trafficking.\textsuperscript{262} It holds that to make an exception for consenting adult activity would be comparable to allowing consenting adults to buy and sell drugs.\textsuperscript{263} However, drug laws pertain to the buyer and seller equally.\textsuperscript{264} This is also true with respect to other morality-type transactional laws such as prostitution.\textsuperscript{265} Thus, the Court's justification for regulating the sale of obscene material to consenting adults appears inconsistent.

The Court suggests that independent judicial review would prevent all inconsistencies.\textsuperscript{266} However, this suggestion fails as a constitutional procedure.\textsuperscript{267} One of the core values of due process is that one receives notice that certain behavior is criminally proscribed.\textsuperscript{268} Where such notice is not present, the criminal conviction of a person should be overturned.\textsuperscript{269} The present obscenity test offends these objectives.\textsuperscript{270} As it exists now, a seller or distributor of sexual material does not know whether the material is obscene until five members of the Court have ruled upon it.\textsuperscript{271} This uncertainty only deters the production of such material and, thus, continues to have a chilling effect upon protected areas of speech.\textsuperscript{272}

CONCLUSION

In \textit{Pope}, the Court made another futile attempt to clarify the obscenity test under the first amendment. The Court's expansion of the value prong is no less vague than its previous expansion of the patent offensiveness and prurient appeal prongs. Given the degree of confusion and lack of guidance surrounding the \textit{Miller} test, the Court should pursue alternative means of regulating obscenity. The most

\begin{itemize}
\item \textsuperscript{259} See supra note 143 and accompanying text.
\item \textsuperscript{260} Stanley v. Georgia, 394 U.S. at 565 (holding that private possession of pornographic material is not subject to State regulation).
\item \textsuperscript{261} \textit{12 200-ft. Reels of Super 8mm. Film}, 413 U.S. at 128.
\item \textsuperscript{262} Id.
\item \textsuperscript{263} Id.
\item \textsuperscript{264} See, e.g., 21 U.S.C. §§ 841-44 (1982); NEB. REV. STAT. § 28-452 (Reissue 1964).
\item \textsuperscript{265} See, e.g., ILL. ANN. STAT. ch. 38, ¶¶ 11-14 - 19.1 (Smith-Hurd Supp. 1987).
\item \textsuperscript{266} \textit{Smith}, 431 U.S. at 305-06.
\item \textsuperscript{267} \textit{Memoirs}, 383 U.S. at 426-27 (Douglas, J., concurring). See supra note 93 and accompanying text.
\item \textsuperscript{268} \textit{Harriss}, 347 U.S. at 617. See supra notes 130-31 and accompanying text.
\item \textsuperscript{269} \textit{Harriss}, 347 U.S. at 617.
\item \textsuperscript{270} Paris, 413 U.S. at 83-84 (Brennan, J., dissenting).
\item \textsuperscript{271} Jenkins, 418 U.S. at 164-65 (Brennan, J., dissenting).
\item \textsuperscript{272} See supra notes 133, 138 and accompanying text.
\end{itemize}
reasonable alternative would be to limit the range of regulation to minors and unconsenting adults.\textsuperscript{273} For 30 years, the Court and other experts have failed to adequately support the theory that obscene material has an adverse effect on adult behavior.\textsuperscript{274} Furthermore, the lack of guidance present in obscenity tests has continually encroached upon protected speech.\textsuperscript{275} By limiting regulation to minors and unconsenting adults, the Court would remedy the state of confusion and prevent future encroachment upon protected speech while protecting those who most need protection.

Alternatively, the Court should consider prohibiting any formal regulation of obscene material and allow the marketplace to determine the worth and utility of material.\textsuperscript{276} This would permit the law of economics to determine the societal worth of certain material. As long as an individual, especially an adult, is willing to bargain and pay for certain material, even if obscene, we should allow that individual such option. This right would be consistent with the idea that the majority of the population should not dictate the realm of acceptable material to the minority.

Nevertheless, the next step in the area of obscenity should be the dissolution or alteration of the \textit{Miller} test, a step that \textit{Pope} did not take. First Amendment freedom of speech has historically been an important and invaluable fundamental constitutional right. The continuing infringement upon this privileged right is uncomprehensible. The Court should remedy this exercise in futility as soon as the opportunity arises.

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\textsuperscript{273} \textit{Paris}, 413 U.S. at 113 (Brennan, J., dissenting). \textit{See also} Commission Report at 51-58 (recommending such a change in the scope of obscenity regulation).
\textsuperscript{274} Commission Report at 27.
\textsuperscript{275} \textit{Id.} at 53.
\textsuperscript{276} \textit{Pope}, 107 S. Ct. at 1930 (Stevens, J., dissenting).