

Defining Obscenity: The Criterion of Value

R. George Wright*

I. INTRODUCTION

The states, and the federal government, are constitutionally permitted to restrict or prohibit the sale of sexually explicit materials, at least within limits. The most significant limitation on the government's restrictive power is that material cannot be condemned as obscene if the material is found by the trier of fact to possess "value" of a certain kind. It is the purpose of this Article to sort out and seek to resolve the outstanding problems associated with value standards. If such problems can be satisfactorily resolved, this would provide a reason not to decriminalize all otherwise obscene materials out of sheer jurisprudential frustration, rather than conviction. The standards advocated below would not constitutionally protect some materials, but would remain faithful to the underlying value logic of the free speech and free press clauses.

The Supreme Court majority in *Miller v. California*¹ imposed as a constitutional requirement that if a state is to convict a criminal defendant in an obscenity case, it must show that the allegedly obscene work "taken as a whole, lacks serious literary, artistic, political, or scientific value."² The Court explicitly superseded the prior test of *Memoirs v. Massachusetts*³ which required a showing that the work be "utterly without redeeming social value."⁴ The Court's revised formulation of this requirement in *Miller* was undeniably well-considered. This Article examines whether the formulation was constitutionally or otherwise optimal. Indisputably, virtually every word of the *Miller* test regarding the work's value raises litigable issues of interpretation, some of a profound sort.⁵

* Associate Professor of Law, Cumberland School of Law, Samford University.

1. 413 U.S. 15 (1973).

2. *Id.* at 24. The Supreme Court's latest, and less than entirely felicitous, essay into value determinations in obscenity cases is *Pope v. Illinois*, 107 S. Ct. 1918 (1987), discussed below.

3. 383 U.S. 413 (1966).

4. 413 U.S. at 24 (quoting *Memoirs*, 383 U.S. at 419) (emphasis in *Miller*).

5. The Court referred to its overall obscenity standard as one of "basic guidelines" to orient the finder of fact. *Miller*, 413 U.S. at 24. It has continued, however,

II. TAKING THE VALUE OF THE WORK AS A WHOLE

Working through the test, the first requirement is that the value inquiry consider the work "as a whole."⁶ The Court's intent in focusing on the work as a whole is evidently to discourage excesses of both suppression and permissiveness. However, the test for value is otherwise formulated, a work of acknowledged value should not be condemned on the basis of isolated, incidental, meretricious passages.⁷ Neither, though, should an otherwise obscene work be protected merely because it is modestly adorned with an intellectually invigorating quotation from Voltaire on the flyleaf, or in the introductory credits.⁸

Just as the whole may be greater than the sum of the parts, so the value of a work, taken as a whole, may be greater or less than the value of the sum of its parts. The value of a work as a whole cannot reliably be said to reflect the value, or lack thereof, of even a clear majority of its pages, sections, chapters, or frames. This is for two major reasons. First, a theme or aspect of a work may be recognizably the primary or predominant theme of the work even though a page count reveals that most pages are not directly linked to that theme. By way of analogy, a ring may be mostly setting in a physical sense, but if it has a gemstone, the ring's value will more crucially reflect that of the gem. Second, and by way of contrast, it is plausible to argue that a work may be subject to prohibition even though it is "mostly" or preeminently constituted by valuable, or at least unobjectionable, material. This possibility reflects the recognition that parts of a whole may do more than lie in proximity to one another. They may be detectably organically related to one another. Alternatively, they may be only arbitrarily or gratuitously placed together.

Therefore, a reasonable trier of fact in a given case may conclude that the bulk of a work is of the requisite value, but that some remaining portion, say twenty percent, is utterly devoid of any value of any sort and is therefore itself obscene. If there is no traceable organic relationship between these two portions of the work, it is not unreasonable under the *Miller* standard to put the author or publisher to the choice between suppression of the whole work as presented, or the severance of the offending from the larger, unoffending segments. By hypothesis, the severance would not impair the work's organic unity. In brief, if a short work is obscene under *Miller*, it does not become pro-

to adhere to this precise formulation with unswerving fidelity. See, e.g., *Smith v. United States*, 431 U.S. 291, 300 (1977); *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2798-99 (1985). Of course, there is some not-fully-determined scope within which state statutory or jury instruction formulations may depart from the *Miller* formulation, yet remain within constitutionally permissible bounds.

6. 413 U.S. at 24.

7. See *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (11th Cir. 1980), cert. dismissed, 447 U.S. 931 (1980).

8. See *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

tected merely because a distributor sells it glued to the last page of *The Brothers Karamazov*. Nor does the cause of freedom of speech and press suffer cognizably if the entire glued-together melange is duly suppressed, despite the classic status of the greater component of this compound work.

III. "LACK" AND THE VALUE DETERMINATION

Assuming, then, a focus on the work as a whole, the task becomes that of interpreting how the state is to show a "lack" of some sort of value. The nature of this showing is only partially elucidated by the recognition that it is "serious" value of some sort, a lack of which the state is to show. The language following "lacks" cannot, by its nature, solve all interpretive problems. A work might utterly lack serious value of a given sort, or it might only substantially lack serious value of such a sort while demonstrating "some" serious value or at least a "scintilla" of serious value.

The literal meaning of "lack" is probably closer to "utterly lacks," or an absolute lack. This literal interpretation of "lacks" would seem inconsistent, however, with the logic of the *Miller* court in rejecting the *Memoirs* requirement of showing that the material at issue is "utterly without redeeming social value,"⁹ on the theory that such a burden on the state was "virtually impossible to discharge under our criminal standards of proof."¹⁰

In an effort to determine whether the *Miller* formulation is a significant improvement in light of the Court's own purposes, this Article considers the relationship between the *Memoirs* and *Miller* tests in great detail below. In the meantime, just as we cannot fully clarify "lacks" by looking ahead to "serious value," we cannot fully clarify the term "lacks" by looking backward to the requirement of taking the work as a whole. The courts can and must look everywhere in the work, or to its preeminent theme, in context, in the light of the relationship of the parts of the work to one another, or the absence of such relationships, when looking for value, or showing lack of value. This does not tell us whether finding, say, a scintilla of (serious) value of the proper sort will bar an otherwise valid obscenity conviction, considering the work as a whole.

The notion of serious value itself raises problems both of interpretation and of normative appropriateness. Is there such a thing, for example, as "mere" value of the relevant sort, as opposed to "serious" value of the relevant sort? It is often supposed that there is such a thing as "mere" value, as, for example, in one reviewing court's determination,

9. 413 U.S. at 22 (citing *Memoirs v. Massachusetts*, 383 U.S. at 418) (emphasis in *Miller*).

10. *Id.*

in evaluating the films at issue, that "each film is devoid of any value, let alone any serious value, aside from its intended commercial purpose to cater to a prurient interest in sex."¹¹

IV. "SERIOUS" VALUE AND "IMPORTANT" VALUE

Pursuing the nature of the distinction between value and serious value, as a matter of the magnitude or character of the value, courts have sometimes suggested that serious value implies, if it is not synonymous with, "important value."¹² At least as a rough approximation, though, serious value would seem easier to show, or less restrictive, than important value. Certainly a work could be "serious" without rising to the level of being "important." This may be partly because of the greater selectivity implied by the notion of "important" value, and partly because "seriousness," even of value, seems to partake more of the author's intent than does the intent-independent concept of a work's "importance". "Important" implies "successful," at least more than does "serious."

One distinguished commentator has maintained in this connection that the Court's message is:

If you plan to write a novel that contains explicitly sexual scenes that an average person in a remote community would judge to be titillating or shocking, you had better make sure that it has important literary value; if it turns out to be merely mediocre on literary grounds, your publisher may end up in jail.¹³

This is doubtless too demanding a formulation of the Court's intent. The Court's requirements need hardly be read as so rigorous. A book may still be a work that has at least some "serious" literary value even though it is not in any sense "important" because it is universally recognized as of only average or ordinary quality in all respects and is incontestably "merely mediocre on literary grounds."¹⁴ Such a work may even possess not merely "some" serious value, but a substantial amount of serious value, if the latter standard is thought to be both higher and constitutionally required.

Even slight departures from language recommended broadly by the Supreme Court may be argued to constitute deviations prejudicial to the free speech rights of obscenity defendants. For example, it may seem inconsequential to formulate the issue as whether the allegedly obscene materials "are presented in a sufficiently 'serious' manner to

11. *United States v. Bagnell*, 679 F.2d 826, 837 (11th Cir. 1982).

12. *See, e.g., Andrews v. State*, 652 S.W.2d 370, 389 (Tex. Crim. App. 1983) (en banc).

13. *Feinberg, Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 602 (1979).

14. *Id.*

warrant invocation of the first amendment.”¹⁵ Error can credibly be predicated upon a jury instruction taking this form, though, because the Supreme Court has more precisely indicated that what counts is not the seriousness of the *manner* of presentation, or even the seriousness of the work’s content or message, but the seriousness of the work’s *value*.¹⁶

V. SERIOUS IDEAS AND SERIOUS VALUE

An even more subtle, but readily litigable, departure from a plain reading of the Supreme Court’s formulation is exemplified by the language from the Texas case of *Andrews v. State*.¹⁷ The court in *Andrews* characterized the relevant test as “whether the material advocates or communicates any ideas or opinions concerning serious literary, artistic, political, or scientific values.”¹⁸ Setting aside any concern for the categories of values themselves, courts must decide whether there must be ideas *concerning serious values*, or whether the ideas themselves must be serious, or themselves have serious value. Clearly, there is a potential difference. One might seek to communicate a not-particularly-serious idea, or a frivolous idea or opinion, about a serious value or subject.

It is arguable that the *Andrews* formulation is in fact a superior formulation. This is because it may well be that there is a broader, more nearly objectively-based consensus as to what sorts of values or subjects are serious than there is about whether a given particular idea itself is “serious.” Government monetary policy is by consensus a serious subject or “value.” Statements about such policy, or that communicate or convey some rudimentary idea or message relating to such policy, could be securely protected under the *Andrews* formulation. If the test is instead a matter of the “seriousness” of the particular idea — e.g., that monetary policy is in fact dictated by some nefarious international cabal based in Zurich — courts may have to decide cases not only on more of a case-by-case basis, but on a basis giving broad scope to the expression of mere jury prejudice against unpopular ideas. The *Andrews* formulation, perhaps inadvertently, enhances predictability and fairness in free speech adjudication, while still faithfully serving the acknowledged broad purposes of the free speech clause.¹⁹

15. Leventhal, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U.L. REV. 810, 930 (1977).

16. See the literal formulation of the authoritative language of *Miller*, 413 U.S. at 24.

17. 652 S.W.2d 370 (Tex. Crim. App. 1983) (en banc).

18. *Id.* at 384.

19. See generally Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149 (P. Kurland, G. Casper & D. Hutchinson eds. 1986).

VI. VALUE AND USE

The question then arises whether, in making the serious value determination, courts are to consider the work "in itself," on its own merits, or, instead, in some particular context. That courts are to consider the work as a whole means that they must consider the "internal context" of an allegedly obscene passage or illustration. For example, this may be helpful in rescuing explicit illustrations in medical school anatomy texts. There are "external" contexts as well. The Washington statute at issue in *Brockett v. Spokane Arcades*²⁰ spoke, for example, of considering the value of the work "in the context in which it is used. . . ."²¹

It seems realistic and fair to allow the defendant to place the allegedly obscene work in context. There may be some difference, though, between the context in which the work is ordinarily used, the context in which it was actually "used" in a given case, and the context in which the author genuinely intended the work to be used. Control over the use of a work, even by those with the legal right to control, may be imperfect.²² A work intended for use by one sort of audience may be foreseeably or unforeseeably "intercepted" in another context, such as retail display, by another audience, perhaps of juveniles.²³ *Miller* is best interpreted to protect the author of an otherwise serious work that is unforeseeably used in some depraved, frivolous context, while permitting the suppression of a work that might be of value in some conceivable context, but which is, to the author's knowledge, uniformly used in circumstances that render the use of the work without the constitutionally requisite value.

VII. VALUE, COMMUNITY, AND EXPERTISE

Of course, a local community within which a work is disseminated may also be said to be a context within which the work is used. The Court has loosely approved the application of divergent community standards in obscenity cases, despite constitutional objections.²⁴ It is easy to argue, though, that if a work is of value for the nation as a whole, or in a national "context," it is unjustifiable, if not incoherent, to claim that it is not of value within the particular community in which the obscenity trial is being held. Certainly, a work may be of broad or "na-

20. See 105 S. Ct. 2794 (1985).

21. *Id.* at 2797.

22. See, e.g., *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 129 (1973); *United States v. Orito*, 413 U.S. 139, 143 (1973).

23. See, e.g., *American Booksellers Ass'n v. Virginia*, 792 F.2d 1261 (4th Cir. 1986), *prob. juris. noted*, 55 U.S.L.W. 3569 (U.S. Feb. 24, 1987) (No. 86-1034); *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

24. See, e.g., *Hamling v. United States*, 418 U.S. 87, 106 (1974).

tional" interest, but not interest anyone in a local area. While lack of local interest may imply that the work is not locally *valued*, a work clearly can be valuable even if it is not subjectively valued by a given community. On the most common accounts, a local community can, subjectively, fail to perceive the value in a work that is by consensus detectable by recognized experts or those widely regarded as well-tutored in the subject matter.²⁵

This argument does not require as a premise that the serious literary value, for example, of a work be "objective" in the sense of some quality or property that is invariant or incontestable, or precisely measurable and independent of any observer. Value, whether recognized or not,²⁶ is unavoidably value *for* some person or group, or broader society, in the sense of bearing upon their recognized or unrecognized interests, aims, or desires. Value may also be interpreted as only value *according to*, or in the opinion of, or as recognized by at least one observer, based on a range of standards and kinds of evidence.

If the recognized literary critics, then, unanimously find serious literary value in a work, the *Miller* test is reasonably interpretable as permitting a judge, at trial or on appeal, to effectively overrule a local jury on the precise issue of serious literary value. There is no disputing Judge Posner's observation that "evaluation of a work of (purported) art [may be relatively] difficult and uncertain,"²⁷ and that "the values, experiences, and preconceptions of the adjudicator" may play a significant role.²⁸ The same is true, to at least some degree, of medical diagnosis. But courts would not be unduly reluctant to overrule a jury's untutored collective medical diagnosis, especially if no relevant evidence were presented to them, if the consensually recognized expert medical community were of another opinion, and for reasons that the jury would not necessarily be assumed to have considered or comprehended. The detection of literary merit in a work at least falls between the process of medical diagnosis and a purely arbitrary expression of

25. In *Jenkins v. Georgia*, for example, the Court might have rescued the film "Carnal Knowledge" not by announcing that the local jury was legally mistaken in finding the film patently offensive on community standards — a dubious rationale for reversal — but by noting the widespread critical acclaim of the merits of the film, and finding such to be, perhaps, sufficient "nationally-based consensus" or expert evidence of value to save the work. See *Jenkins*, 418 U.S. at 153-61 (1974). But cf. Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 240-41 (1967) (seeking to protect the "classics" as implicitly part of, rather than offenders against, current community standards).

26. See E.J. BOND, REASON AND VALUE 57-58, 84 (1983). Bond argues that "[i]t is neither a necessary nor a sufficient condition of the end's being worthwhile that it is in fact desired, even when the relevant beliefs are true." *Id.* at 58.

27. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 25 (1986).

28. *Id.*

equal-status personal tastes and preferences, where evidence, reason, and insight play no role.

It is true as well, as Justice Douglas argued, that "what may be trash to me may be prized by others."²⁹ It is more pertinent to observe that we do not distribute art professorships, or museum curatorships, on a random basis, even if we are a bit nervous about the objectivity of our precise rankings of the artistic merits of the great masters. The connoisseur's studied determination that a Turner is of greater serious aesthetic value than a painting of the pool-playing dogs is not the same kind of determination as a preference for chocolate to vanilla, even if the ice-cream evaluator offers sensible reasons for her preference.

In the realm of social policy, the point has been made in the following terms:

In supposing, for example, that the elimination of racism has intersubjective value, we suppose that racists do not simply differ with us in taste, but that they are *blinded* to the impersonally apprehensible evils of racism, either by a refusal to consider them impersonally or by an incapacity to appreciate what they apprehend. If, we think, the blinders of privilege, self-interest, and ignorance were to be stripped away in a situation that allowed full impersonal attention, they too would share our impersonal preference.³⁰

It goes without saying that the jury selection and judicial trial process generally, in the obscenity context and elsewhere, does not guarantee the latter transformation. Particularly if no evidence on the matter is introduced other than the allegedly obscene works themselves, the jury may conceivably be blind to value that may require assistance or expertise to discover. The court on appellate review may, with some degree of reliability, detect such blindness.³¹

VIII. VALUE AND THE NECESSARY PRESENCE OF AN IDEA

If there must be a direct response to the relativistic logjam feared by Justice Douglas — "what may be trash to me may be prized by others"³² — it should perhaps be that the others are right, and the material they champion should be protected under the *Miller* test if they can articulate or otherwise establish the presence and communication of, some sort of "idea" falling within the categories of value stipulated

29. *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 137 (Douglas, J., dissenting); cf. *Cohen v. California*, 403 U.S. 15, 25 (1971) ("it is . . . often true that one man's vulgarity is another man's lyric").

30. S. DARWALL, *IMPARTIAL REASON* 141 (1983) (emphasis in the original).

31. While it is conceivable that a local jury may purport to find serious literary value in a work where such value is undetectable to a fully-briefed appellate court, we may assume that in many such cases, the jury may more effectively insulate its verdict by also finding that the work is not patently offensive to community standards.

32. See *supra* note 29 and accompanying text.

by *Miller*, i.e., literary, artistic, political, and scientific.³³ While the "idea" intended to be conveyed need not be some crudely literal "message," so that, for example, we protect the Beethoven Fifth Symphony only if we determine that it is somehow about the nobility of struggling against fate, there must be an intent to communicate some rudimentary, not necessarily intellectualized, sort of idea falling within the *Miller* categories.³⁴

Interpreting the *Miller* serious value requirement to demand no more than some rudimentary idea of a sort falling within the *Miller* categories draws some of the sting of Justice Brennan's objection that "[t]he Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have *some* social³⁵ value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently serious' to warrant constitutional protection."³⁶ On our interpretation of *Miller*, the Court need not make the exceptionally subjective determination of the "seriousness" of the work or idea itself. The potential for judicial arbitrariness or abuse of such a nebulous standard, particularly during stressful or uneasy historical periods, is clear.³⁷ On our interpretation, the courts need make only the occasionally difficult, but at least minimally logic-bounded, inquiry into the intended presence of an idea of the proper sort, whether or not that intended idea was understood or "received" by its audience. An idea is of a constitutionally sufficient sort, under *Miller*, if it is a literary idea, or an artistic idea, or a political idea, or a scientific idea, independent of any judgment of the seriousness of the idea. There is no need to assume under *Miller* that the word "idea" functions precisely the same in each of these contexts. An idea in the realm of artistic communication may be utterly unlike an idea in the realm of scientific communication. But this need be of no constitutional consequence.

Of course, terms such as "artistic" and "political" can be employed in narrower or broader senses.³⁸ The *Miller* formulation itself suggests, however, that while the courts should be sensitive to important broadly

33. See *Miller*, 413 U.S. at 24.

34. For some of the relevant issues and complications, see Wright, *supra* note 19.

35. Actually, the Court in *Miller* had explicitly rejected the allegedly ambiguous concept of "social importance" as a value category. See *Miller*, 413 U.S. at 25 n.7. The categories of literary, artistic, political, and scientific value presumably replace the more readily abused notion of "social" value.

36. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting) (emphasis in original).

37. See generally Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

38. For an example of the use of "political" in a particularly broad sense in the context of free speech debate, see Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 Nw. U.L. REV. 1137 (1983).

encompassing understandings of the realm of the political, for example, they are not to assume that every articulated interpersonal dispute is inevitably a matter of political expression in the sense intended in *Miller*. Perhaps every truly voluntary, non-compulsive, fully informed transaction in allegedly obscene goods between competent buyers and sellers in at least some sense enhances the subjective welfare of both, else it would not be agreed upon and undertaken. It is value-enhancing in this sense, but the value involved need not inevitably be described as including the communication of a political idea. A less disingenuous way of describing at least some such transactions would advert to a simple market exchange of money, or financial value, for erotic value of one sort or another. The value conferred by the supplier of such materials may be essentially private or personal to the buyer — “autobiographical” — in a way not intended by the *Miller* Court to be encompassed within the admittedly broad realm of the political, or of political ideas.

Such a line of demarcation would hardly be irrational. One can readily imagine a set of rational Framers seeking to constitutionally protect the political idea-communicative elements of market transactions, while countenancing the government’s regulating the financial, autobiographically erotic, or other transaction-motivating values that may be characterized as political only in an extended sense upon the showing merely that the regulation promotes some significant governmental interest. It is perfectly conceivable that to the Framers, unencumbered discussion and debate on broadly public issues was both fairly distinguishable and more worth fighting and dying on the battlefield for, than unencumbered consumer choice in an inconceivable variety of erotic stimulants.

There is as well an independent argument, grounded in the value of political stability, in favor of interpreting *Miller* to require a showing of not merely an absence of genuinely “serious” value, but an absence of any intended even rudimentary idea falling within one of the specified categories. The latter standard, which requires less judicial “grading” of the idea at issue, is more consonant with the valuable civic virtues of mutual political restraint and mutual political compromise. It avoids the greater suppression of a demanding “serious” value standard, while taking seriously the claim that some allegedly obscene materials are both deeply and widely offensive and do not even purport to significantly implicate any of the range of values or aims that distinctively underlie the doctrine of freedom of speech.³⁹ In order for “distaste for the content of the speech” to be an “impermissible” basis for govern-

39. For discussion of the mutual restraint value, see Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUDIES 1, 21 (1987).

ment regulation,⁴⁰ the "speech" at issue must first be speech for constitutional purposes. The literal or figurative speech attendant upon some allegedly obscene works may simply not be speech in the requisite sense if core values and attributes such as discussion, reflection, issues, information, and debate are only tangentially implicated.⁴¹

The judicial task, on the theory outlined above, in some cases admittedly may not be simple. Just as the court should not infer the absence of the requisite kind of idea from the racy promotion or advertising of the work, so the court need not take implausible post-hoc assertions of defense counsel as to the true nature of the work at face value. Applied as intended, though, the above interpretation minimizes the risk that works will be struck down because of government disapproval of the ideas expressed.⁴² If the defendant can show government disapproval, or any other attitude, toward the ideas expressed in the work, the work is presumably protected by the free speech clause. In sum, then, a professed desire to "rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless"⁴³ is not, by its terms, a purely libertarian standard; to qualify, there must be an idea of a cognizable sort.

IX. "REDEEMING" VALUE

Confusion is further reduced if courts set aside the idea that the work's value must be "redeeming" value. The language of "redeeming" value is a holdover from *Memoirs v. Massachusetts*,⁴⁴ in which the Court's plurality imposed the requirement that the allegedly obscene material be "utterly without redeeming social value."⁴⁵ While the Court in *Miller* repudiated the terminology of "social value"⁴⁶ and apparently objected to the "utterly" language as impossibly requiring the state to prove a negative,⁴⁷ it did not explicitly disavow the idea that value was to be "redeeming," even though such language does not appear in the *Miller* "serious value" formulation.

While other approaches are possible, it seems best to assume that

40. See Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. CAL. L. REV. 693, 703 (1982).

41. See *id.* for the implicit reliance on the concepts of "discussion," "issues," and "information."

42. See *id.* at 723.

43. See *Smith v. United States*, 431 U.S. 291, 321 (1977) (Stevens, J., dissenting) (citing Justice Holmes' "test of truth" of ideas rationale set forth in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919)).

44. 383 U.S. 413 (1966).

45. *Id.* at 418, 419.

46. See *Miller*, 413 U.S. at 25 n.7.

47. See *id.* at 22. Of course, the state still arguably was required under *Miller* to "prove a negative," that the material did not have serious value of the right sort. See *Paris Adult Theatre I*, 413 U.S. at 98 (Brennan, J., dissenting).

all value of the proper sort is (some amount of) serious value, and that the work's value, as somehow quantitatively determined, need not be found to be of a magnitude sufficient to somehow outweigh the work's less attractive qualities. The language of "redeeming value" retains some current vitality in Supreme Court⁴⁸ and other⁴⁹ opinions construing state obscenity statutes. However, it is either unnecessary or misleading in suggesting a balancing of judicially determined value against the egregiousness of the work, as though a particularly offensive work could perhaps only be "redeemed" by some sort of proportionately great perceived value. Balancing the precise degree of offensiveness of a work against its precise degree of, for example, literary merit, should be a daunting task.

Taking the formulations as a whole, it is clear that the Court assumed that the *Miller* "serious value" of a specified category standard would be easier for the government to meet than the *Memoirs* "utterly without redeeming social value" standard.⁵⁰ Despite the consensus on the correctness of this assumption,⁵¹ it has been rightly observed that since the *Miller* formulation took effect, the country witnessed no substantial reduction in the quantity or explicitness of sexual materials,⁵² and apparently "neither the total number of obscenity prosecutions nor the nationwide conviction rate in cases actually brought has substantially changed since the [*Miller*] decision was rendered."⁵³ It has been found, contrary to expectations, "that the conviction rate under the old standard was fairly high and that *Miller* did not materially affect it."⁵⁴

48. See *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2801 (1985).

49. See, e.g., *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1027 (5th Cir. 1981) ("serious redeeming value" standard allegedly under *Miller*), cert. denied sub nom. *Theatres West, Inc. v. Holmes*, 455 U.S. 913 (1982); *People v. Hall*, 143 Ill. App. 3d 766, 491 N.E.2d 757 (1986).

50. See the explicit comparison drawn in *Hamling v. United States*, 418 U.S. 87, 116 (1974). See also Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 71 (1974) (lighter burden on prosecution under *Miller* than under *Memoirs*); Leventhal, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U. L. REV. 810, 811, 929 (1977) (discussing case disposition trends). Dean Choper has similarly argued that "*Miller v. California* permits government a substantially broader authority to regulate sexual materials than did *Roth v. United States* and its progeny." J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 126 (1980).

51. See, e.g., *supra* note 50.

52. See Leventhal, *supra* note 50, at 930. See also *United States v. Various Articles of Obscene Merchandise*, Schedule No. 2102, 709 F.2d 132, 136 (2d Cir. 1983) (Meskill, J., concurring in result) (raising the possibility that if the materials at issue are as a matter of law not patently offensive by contemporary New York standards, nothing is obscene in New York).

53. Leventhal, *supra* note 50, at 928.

54. *Id.* at 929. Note, incidentally, that the convictions in the *Pope* and *Morrison* cases addressed recently by the Court were obtained under the "virtually impossible" to discharge *Memoirs* standard. See *infra* note 102 and accompanying text.

Assuming the accuracy of such empirical findings, there may be numerous contributing causes of various sorts. One step toward an explanation is the recognition that a jury might well not find the *Memoirs* and *Miller* standards substantially different, or not find the latter to be significantly laxer. *Memoirs* requires an "utter absence," but a jury might interpret *Miller* to require an "utter absence" as well, on the theory that absence or lack means "utter" absence. While a jury under *Miller* might ask whether the value of the work is "serious," a jury under *Memoirs* might ask whether the work's value is truly "redeeming" or not. Moreover, a jury under *Miller* might tend to assume that all genuine value is "serious" value. It is even possible that a jury that finds literary or artistic value under *Miller* might narrowly interpret the term "social," and fail to find "social" value in the work under *Memoirs*.

X. IDEAS AND ARTISTIC EXPRESSION

The range of interpretive questions raised by the *Miller* value formulation is nearly inexhaustible. Many of the most important can be resolved along the lines suggested above. It is still possible to argue, though, that the emphasis on "ideas," even in the literary and artistic realms, is insensitive to the nature of art and artistic expression, and that our approach in this respect in fact amounts to "the constitutional canonization of sheer philistinism."⁵⁵

Professor Finnis observes that:

Aesthetics contains a welter of conflicting doctrines, but there is universal agreement that artistic work does not derive its *artistic* value from any "message" which it may happen to convey and which could be presented in the form of ordinary discursive thinking. Aesthetic attention is not looking at something in order to *find out about* something.⁵⁶

However, the approach endorsed above does not commit the courts to protect artistic works only to the extent that the work constitutes a kind of tract in which an otherwise plainly articulable message is distortedly expressed in translation through art. What is an "idea" for, say, scientific purposes need not be the same kind of thing as an idea for aesthetic purposes. An idea, and its expression in the artistic realm, need not be purely intellectualized or essentially propositional.⁵⁷

Potential disagreement in this regard falls away when it is recognized that:

What makes art art is not that it stimulates feelings, which any family picture album can do, but that it expresses them symbolically. To be

55. Finnis, "*Reason and Passion*": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 231 (1967).

56. *Id.* (emphasis in original).

57. Cf. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 77 (1974) (interpreting *Miller* as protecting non-propositional artistic "expression").

more precise, art expresses *ideas* of feeling, and it does this by embodying these ideas in the more or less conventional symbolic forms of music, painting, sculpture, architecture, poetry, drama, and prose.⁵⁸

On Professor Finnis' own emphasis, art necessarily involves the expression of ideas of one sort or another. One may, of course, wish to question whether the emphasis on "feeling" is always satisfactory — a Beethoven Trio might appeal as much to the intellect⁵⁹ as to the senses, or emotions, or to "feelings" — but this does not affect our argument. One may simply adopt one's own substitute conception to fill in the blank left by "ideas of —," however one likes.

Courts must not become too cavalier, though, in conferring free speech protection on art merely because art may express something, in some sense. Minimally, an idea of the sort described above must be present. Courts should not take too sweepingly Professor Feinberg's remark that "when the only 'conduct' involved is the expression of some proposition, attitude, or feeling in speech or writing, or of whatever it is that gets 'expressed' in art, music, drama, or film, then restrictive legislation would seem to contravene the explicit guarantees of the first amendment."⁶⁰ If a particular work of art expresses nothing more than, say, the craftsmanship or prideful attention to detail that might be "expressed" by a skilled bricklayer in virtually all of his work, it is not clear why the artist should be able to invoke the protection of the free speech clause any more than the bricklayer, because we will have been given no reason to relevantly distinguish the alleged artistic expression from ordinary, unpretentious bricklaying.

XI. PORNOGRAPHIC VALUE

Even if it is agreed that mere invocation of the honorific title of art does not necessarily confer free speech protection, it may be argued that the alleged value of some or all pornographic works transcends the category of artistic or literary value. Some or, perhaps more disquietingly, all pornography has been defended on independent value grounds. In one case, "the district court noted that the behavioral psychologist, B.F. Skinner, had recently cited with approval the theologian Paul Tillich for his defense of pornography as 'extending sexuality into

58. Finnis, *supra* note 55, at 232-33 (citations omitted) (emphasis in original).

59. Finnis quotes the Bloomsbury art critic Clive Bell to the following effect: "Before we feel an aesthetic emotion for a combination of forms, do we not perceive intellectually the rightness and necessity of the combination? If we do, it would explain the fact that passing rapidly through a room we recognize a picture to be good, although we cannot say that it has provoked much emotion." Finnis, *supra* note 55, at 237 n.98 (quoting C. BELL, ART 26 (1914)).

60. Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 576 (1979).

old age.'"⁶¹

This value-defense of pornography would seem to apply to at least some degree to all pornography, without distinction. On this approach, pornography is "valuable," if not of "serious" value. This implication itself may give us pause. The more significant issue, however, is the relationship between the value of extending sexuality into old age, on the assumption that this cannot be accomplished without materials that would otherwise be legally obscene, and the value categories listed in *Miller*. The hedonic or sensuality value involved would appear not to fit readily within the categories of literary, artistic, political, or scientific value except in some controversially attenuated sense. So much the worse, it may be thought, for the unduly restrictive *Miller* categories. But the *Miller* value categories should not be viewed as an obviously failed attempt by the Court to sum up all possible kinds of value in the world into four categories. Some or all pornography may be of hedonic value. Some or all pornography may be of commercial value. These sorts of value, however, simply do not count, in the context of obscenity determinations, because they have no substantial relation to the range of purposes or values underlying our common desire to specially protect a realm of free speech.⁶²

A fair reading of even the great champion of freedom of speech, John Stuart Mill, or any of his historical predecessors in this regard, leaves the door open to reasonable state suppression of materials that even the *Miller* test itself is normally thought to protect.⁶³ It is clear that "Mill did not consider . . . public displays of 'dirty pictures,' and the like, to be forms of 'symbolic speech,' or expressions of *opinion* of any kind."⁶⁴ Professor Feinberg goes on to observe, in accord with the broad values underlying our devotion to the special protection accorded speech, that "[t]he presumption in favor of liberty is much weaker in the case of conduct that does not have the 'redeeming social importance' peculiar to assertion, criticism, advocacy, and debate; and hence, even 'mere offensiveness' in the absence of harm may be a valid ground for suppressing it."⁶⁵

Similar responses could be made to other formulations of the values arguably deriving from some or all pornography, or deriving in greater measure from otherwise constitutionally unprotected material. Material is occasionally held obscene despite expert psychiatric testimony that

61. See *United States v. Various Articles of Obscene Merchandise*, Schedule No. 2102, 709 F.2d 132, 134 (2d Cir. 1983) (citing district court opinion).

62. For a leading, mainstream, consensus-based discussion of the purposes or values underlying the special protections afforded freedom of speech, see Emerson, *Toward A General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-86 (1963).

63. See Wright, *supra* note 19.

64. J. FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 71 (1980) (emphasis in the original).

65. *Id.*

the materials at issue at least "had some educational value."⁶⁶ It is possible, though, to "educate" oneself about matters of only tangential first amendment concern. It is equally possible, allegedly, to "educate" oneself, or to derive educational value, through the voluntary ingestion of hallucinogenic substances. That educational value may be allegedly derived from an activity does not convert that activity into speech, let alone protected speech.

It is possible, however, to "rationalize" pornographic activity through the allegation that pornography at least implicitly sends a cognizable message, or conveys an arguably important idea. It has thus been argued, for example, that "[i]n opposition to the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords the alternative idea of the independent status of sexuality as a profound and shattering ecstasy."⁶⁷ Alternatively, Professor Dworkin has argued that in this context, "[r]estricted publication leaves a certain hypothesis entirely unmade: the hypothesis that sex should enter all levels of public culture on the same standing as soap opera romance or movie trivia. . . ."⁶⁸

These sorts of ideas may qualify as sufficiently implicating political value under *Miller*. What seems more dubious is whether, in a given transaction involving allegedly obscene materials, any such message or idea would have been genuinely intended by the sender or seller of the material, or even whether any such message would actually have been "received" by the purchaser. No one doubts that such transactions may be "rationalized" by acute, uninvolved third parties who may seek to invest with political value a transaction otherwise devoid of such value. Similarly, diligent criminal defense attorneys should be able to incorporate such intellectualizations, post hoc, into their theory of the case. In a given case, however, a reasonable juror might well conclude that none of this Olympian discourse was any sufficient part of the intent of the seller, or of either buyer or seller, and the law might reasonably hold that this fact matters for free speech purposes. After all, a flower in a crannied wall may inspire articulate political reflections in a sufficiently sensitive observer. This does not make the deliberate placing of the flower an act of protected speech, independent of the actual intent of the person placing the flower.

As to Professor Dworkin's "unmade hypothesis" argument,⁶⁹ it

66. *People v. Sequoia Books, Inc.*, 146 Ill. App. 3d 1, 3, 496 N.E.2d 740, 741 (1986).

67. Richards, *supra* note 57, at 81 (citing, *inter alia*, S. SONTAG, *STYLES OF RADICAL WILL* 35-73 (1969) for the proposition that pornography can be a "unique medium for giving expression to the transcendence of the personality by sexual transgression").

68. R. DWORKIN, *A MATTER OF PRINCIPLE* 342 (1985).

69. *Id.*

seems clear that such an argument confuses the expression of a given hypothesis with its realization in practice. Why, on Professor Dworkin's hypothesis, could one not argue that a misdemeanor restriction on the act of littering itself leaves entirely unmade the hypothesis that littered and unlittered landscapes should be treated as on a par? One can argue for the positive value or appropriateness of littering, or make that hypothesis, without engaging in the activity of littering itself. One can just as easily make a passionate, articulate, comprehensive defense of pornography and its value without buying or selling the materials themselves. Defending pornography is not the same as selling it, just as advocating the burning of one's draft card is not the same as burning it in protest.⁷⁰ Contrary to Dworkin, the defense, or the advocacy, itself makes the hypothesis.

This is not to suggest that the process of rescuing or not rescuing allegedly obscene works on value grounds is devoid of any irony. Professor Kalven distinguished between pornography that was "at best" unrelated to any serious human concerns, and that was "at worst" a depiction of "a degrading, hostile, alien view of the sexual experience."⁷¹ Surprisingly, it may be pornography "at its worst" that has a better claim to free speech protection than pornography "at its best" in this sense. Pornography at its "best," devoid of any reference to serious human concerns, may simply not implicate the *Miller* value categories. At least some pornography at its "worst," in taking a degrading "view" of the sexual experience, may claim protection precisely in virtue of taking, more or less intentionally, a coherent, articulate, if unpopular "view" of serious matters.⁷²

If, on the other hand, it is possible to treat some or all alleged obscenity as not intending to convey an ideological or political point, it becomes possible for the prosecution to more readily and uncontroversially meet the "value" absence criterion of *Miller*. Perhaps "[t]he pornographic item is a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification in that way."⁷³ To the extent this characterization is an accurate depiction of at least some pornography, such materials should present easy cases under the *Miller* value criterion as interpreted above.

70. See *United States v. O'Brien*, 391 U.S. 367 (1968).

71. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 13 (P. Kurland ed. 1960).

72. Thus the double edge of the feminist critique of some or all pornography as expressing a disfavored repressive male ideology. See, on this issue, the contrasting views of Judge Easterbrook in *American Booksellers' Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986); Mackinnon, *Pornography as Sex Discrimination*, 4 LAW & INEQUALITY 38 (1986); Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

73. F. SCHAUER, FREEDOM OF SPEECH: A PHILOSOPHICAL ENQUIRY 181 (1982).

XII. THE ROLES OF EXPERTS AND JURIES

This Article's approach to the *Miller* value criterion admittedly may require limitations on some lines of analysis that have found favor with the Court. As seen above, value may be attributable to a work, or a coherent impersonal idea may have been evidently intended by a work, without a jury necessarily perceiving such value, or such an idea, without assistance. In the detection of value in a work, a consensual expert may be able to convincingly make manifest, to the jury's satisfaction, literary value that the jury might otherwise not have perceived. While evaluating books or films is not categorically beyond the ken of ordinary persons, expert opinion may well, in a particular case, aid the jury's understanding of the relevant value considerations.⁷⁴

In the context of value determinations, therefore, courts should be reluctant to extend the Supreme Court's observation that the allegedly obscene materials themselves "are the best evidence of what they represent,"⁷⁵ or that placing the materials themselves in evidence supplants the need for expert testimony.⁷⁶ While in some respects, even "hard core pornography . . . can and does speak for itself,"⁷⁷ our society is not so utterly democratic as to invariably assume that the opinion, on artistic value, of the curator of the local museum is no better or worse than the untutored reactions of the local jury. In some sense, James Joyce's *Ulysses* is the best evidence of its own literary value, but an expert witness may appreciably aid the jury in mediating the confrontation between text and jury. In certain respects, then, it is not true that "[s]tudying the material for hours doesn't tell a judge any more about its obscene character than he knew when he first looked at it."⁷⁸ The difficult, even insoluble, issues center instead on the precise deference to be given to jury verdicts that are inconsistent with some portion of the expert testimony, or all of the expert testimony, introduced on the issue of the work's value. The obscenity cases have been read by at least one commentator to imply that "[t]o prevail on appeal, the defendant would have to show that as a matter of law the material was so clearly meritorious that the jury should not have been allowed to find it otherwise."⁷⁹ This is a demanding standard in the free speech area, particularly in conjunction with the settled principle that the jury is

74. See MCCORMICK ON EVIDENCE 33 (E. Cleary 3d ed. 1984).

75. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973).

76. See *id.*

77. *Id.* at 56 n.6 (quoting *United States v. Wild*, 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied*, 402 U.S. 986 (1971)).

78. Kalven, *supra* note 71, at 44 (quoting Thurman Arnold). Cf. Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 588 (1979) ("Pure pornography is easy to recognize; what are hard to spot are the 'redeeming' units or aspects of expression in such impure admixtures as artfully pornographic films and erotic realism in novels.")

79. O'Neil, *Federalism and Obscenity*, 9 U. TOL. L. REV. 731, 751 (1978).

“not bound to accept the opinion of any expert in weighing the evidence of obscenity. . . .”⁸⁰

While it is easy to imagine a reasonable jury ignoring the self-serving, overblown claims of professional “experts” in favor of the patent vacuousness of the allegedly obscene materials themselves, it is also possible to imagine a jury’s ignoring the disinterested, credible testimony of distinguished, mainstream scholars, on the “grounds” that the jury believes that sexually explicit, deeply offensive materials may be proscribed regardless of any literary value. This approach, however attractive to a particular jury, would plainly not be consistent with *Miller*. The appellate courts should not be reluctant, on appropriate occasions, and on appropriate issues, to exercise their power “to conduct an independent review of constitutional claims. . . .”⁸¹

The courts should on the other hand be extremely reluctant to, in effect, inform local juries that they were incontrovertably mistaken in finding the particular materials at issue to have been patently offensive to local community standards.⁸² It is neither especially undignified, however, nor institutionally burdensome,⁸³ nor a matter of presumptuous judicial overreaching, for the courts to review on appeal a staid amicus brief discoursing on the unsuspected literary value of the work in question. It is worth reflecting on the possibility that it is inherently prejudicial to the defendant, at least in a loose sense, to ask the jury to pass on the question of the work’s literary value just after the same jury has determined that the work appeals to the prurient interest in sex and portrays sex in a patently offensive way according to community standards.⁸⁴ As a matter of individual psychology, more than group dynamics, it may be asking a lot to expect a jury to stay its hand by finding the necessary value after it has found patent offensiveness. Searching, even aggressive appellate review on the value element may compensate for such a tendency on the part of the jury. If the court on review finds sufficient value of the proper sort, it should not be reluctant to intervene to save the material.

XIII. THE UNNECESSARY COMPLEXITY OF THE *MILLER* STANDARD

An intriguing question, though, is that of the constitutionally permissible consequences of the finding by a jury and reviewing court that the material does not meet the value standard established by *Miller*. One virtue of this Article’s interpretation of the value requirement is

80. *Hamling v. United States*, 418 U.S. 87, 100 (1974).

81. *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974).

82. *But cf. id.* at 161 (holding that the film at issue “could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way. . . .”).

83. *See Paris Adult Theatre I*, 413 U.S. at 91-93 (Brennan, J., dissenting).

84. *See Miller*, 413 U.S. at 24.

that, problems of vagueness, notice, and due process aside, it becomes insignificant from the standpoint of the free speech clause what the remaining elements of the obscenity test are, once the material is determined to lack serious value, in the strong sense of not seeking to convey an idea within the *Miller* value categories. If no such idea conveyance is intended, the remainder of the obscenity test becomes irrelevant for free speech purposes, because the values or purposes underlying the free speech clause are, by hypothesis, not significantly implicated.

To put the point concretely, consider the constitutional role of the prurient interest element under *Miller*. Under this element, the trier of fact is to determine whether an average person in the appropriate community, applying those community standards, and taking the work as a whole, would find that the work appeals to a prurient interest in sex.⁸⁵ Obviously, a number of practical and interpretive problems lurk in this element. The Supreme Court has taken it upon itself to discourse at length on the nature of the concept of prurience, and to authoritatively draw a distinction between normal sexual desires and those that are abnormal or morbid.⁸⁶ Whether the Court's distinctions in this regard are justified is not the point. Rather, it should simply not be necessary, as far as the free speech clause is concerned, to fret about the nature of prurience, or any related issue. Again, assuming fair notice, and the absence of vagueness or due process problems, and assuming no extraneous constitutional issues are involved, such as equal protection, the courts should be able to enforce a statutory ban on material that is without free speech value and that is patently offensive under the second element of the *Miller* test. If a work seeks to convey no idea, on the view elaborated above, and the work "depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law. . .,"⁸⁷ why should it be constitutionally protected, all else equal? Why should the state be constitutionally required to show that the sexual interest was, on someone's or anyone's standards, excessive, or abnormal, or shameful, or morbid?

It follows *a fortiori* that most partial revisions, simplifications, and reinterpretations of the prurient interest requirement would be permissible, under the free speech clause, as this Article interpreted the "serious value" requirement. And a parallel argument can easily be made for simplifying, if not utterly dispensing with, the patent offense requirement. If a work fails this Article's conception of the "value" requirement, thus not significantly implicating free speech values, and if it is found to appeal to a prurient interest in sex, on some reasonable

85. See *id.*

86. See *Brockett v. Spokane Arcades*, 105 S. Ct. 2794 (1985).

87. See *Miller*, 413 U.S. at 24.

test, then why, all else equal, should the state also be required to separately show anything like the current patent offensiveness element?

This Article's reinterpretation of the Court's "serious value" criterion may well be attractive on its own merits. Even if not, it clearly possesses the considerable practical advantage, as we have seen, of allowing a substantial legitimate simplification of the other elements of the *Miller* test, allowing the courts to bypass many intractable or vexing issues as, for example, that of the constitutionally permissible scope of the community that may be selected when applying community standards on the prurient interest and patent offensiveness elements. While the Court itself has not adopted the recommended approach in either letter or practice, it has occasionally at least verbally accepted portions of the underlying logic of such a view. Even in a case contemporaneous with *Miller*, the Court recognized that "[w]here communication of ideas, protected by the First Amendment, is not involved, . . . the mere fact . . . some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests."⁸⁸ If the communication of the requisite ideas is not involved in a given case, there is little point in imposing numerous, specific additional substantive and evidentiary burdens on the state, at least in the name of the first amendment.

XIV. COMMUNITY STANDARDS AND REASONABLE PERSON STANDARDS

The case law has established that the "prurient interest" and "patently offensive" elements of obscenity are to be shown with reference to an attempt by the finder of fact to ascertain, if they are available, and apply contemporary community standards, as somehow defined.⁸⁹ The cases following *Miller*, however, did not definitively resolve the question of whether some sort of contemporary community standards test also applies to the third element of *Miller's* obscenity test, that of "serious value."

In *Smith v. United States*,⁹⁰ the Court observed in dicta, and in non-committal dicta at that, that "[l]iterary, artistic, political, or scientific value . . . is not discussed in *Miller* in terms of contemporary community standards."⁹¹ Focusing on what *Miller* did not hold, or discuss, is hardly the equivalent of establishing what the Court actually did hold, or would have held, in *Miller*. *Smith* simply does not clearly, unequivocally

88. *Paris Adult Theatre I*, 413 U.S. at 67.

89. See *Miller*, 413 U.S. at 24, 30 (prurient interest must be decided by reference to an average person applying contemporary community standards); *Smith v. United States*, 431 U.S. 291, 301 (1977) ("the jury must measure patent offensiveness against contemporary community standards"). It may be, at least according to some courts, that no such community standards may exist. See *State v. Kam*, 726 P.2d 263, 265 (Hawaii 1986).

90. 431 U.S. 291 (1977).

91. *Id.* at 301.

cally endorse a national, or "objective," or expert-based standard for the serious value determination. At the precise point in *Smith* quoted immediately above, the Court cites Frederick Schauer's text on obscenity,⁹² but Professor Schauer's analysis on this point essentially reports the lack of a definitive Supreme Court holding. Schauer indicates that the contemporary community standards analysis "does not necessarily apply"⁹³ to the serious value element. Professor Schauer then carefully observes that "[t]here has never been any indication by the Court that the merit of the material itself, as embodied in this part of the test, should or can vary from community to community."⁹⁴ On the merits, though, Professor Schauer went on to contend that:

If this test were subject to the inherent variations of local community standards, then First Amendment values would vary with time and place, a result which the courts have properly sought to avoid. Whether a work has literary, artistic, political, or scientific value, then, unlike the prurient-interest and patent-offensiveness requirements, is not subject to the community-standards factor and not affected by the change to local standards.⁹⁵

Professor Schauer's analysis on the merits is supported, in blunt fashion, by Professor Richards' declaration that applying the serious value test relative to community standards "would be absurd."⁹⁶ Professor Richards' logic is that "[t]he literary and dramatic value, for example, of Shakespeare is not affected by the disvaluation of his work by some parochial community."⁹⁷

This analysis was implicitly adopted, in the absence of a definitive Supreme Court pronouncement, in cases such as *State v. Princess Cinema of Milwaukee, Inc.*⁹⁸ In that case, the Wisconsin Supreme Court concluded that "[t]he standard for assessing the third [serious value] part of the *Miller* test is an objective one. The individual cannot be expected to anticipate whether a particular community will consider an allegedly obscene item to have serious merit under the categories enumerated in *Miller*."⁹⁹

92. F. SCHAUER, *THE LAW OF OBSCENITY* (1976).

93. *Id.* at 123.

94. *Id.* at 123-24.

95. *Id.* at 124 (citation omitted). There are even some contemporary arguments that a community standards test is too indefinite and amorphous on the issues of patent offensiveness and prurient appeal. *See, e.g., State v. Henry*, 302 Or. 510, 513, 732 P.2d 9, 10 (1987).

96. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 71 n.132 (1974).

97. *Id.*

98. 96 Wis. 2d 646, 292 N.W.2d 807 (1980).

99. *Id.* at 654, 292 N.W.2d at 811. *See also* *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982) (relying on *Smith*, 431 U.S. 291 (1977)); *State v. Regan*, 97 Wash. 2d 47, 640 P.2d 725, 731 (Utter, J., concurring) (the "serious value" element as "an objective criterion") (relying on *Smith*, 431 U.S. 291 (1977)). *Cf.*

This approach has not been universally accepted, though, as is illustrated by cases such as *People v. Morrison*¹⁰⁰ and *People v. Pope*.¹⁰¹ In *Morrison*, the Illinois Court of Appeals was confronted with appellant's claim that it was constitutionally impermissible to allow a jury to apply community, as opposed to "objective," standards in determining, on the value element, whether the magazines at issue "were utterly without redeeming social value."¹⁰² The Illinois Court of Appeals disposed of this argument in the following terms:

We choose to dismiss this argument by simply pointing out that the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value'. On the facts of this case, we see no reason why we should hold otherwise.¹⁰³

Of course the court might as easily have said that the Supreme Court has never held a community standard to be applicable, as opposed to a national, or objective, or "expertise-based" standard, and it might then have at least pointed to the dicta in *Smith*.¹⁰⁴ The court's assumption that one approach rather than another is to be logically presumed from the Supreme Court's not resolving the issue was therefore mysterious. It is equally mysterious why the court assumed, as it apparently did, that the question of whether to apply community-based or objective standards on the value element should somehow depend on the facts of the individual case.

A different panel of the same district of the Illinois Court of Appeals decided *People v. Pope*¹⁰⁵ on the same day as the *Morrison* case. The court in *Pope* was equally reticent in providing affirmative justification for adhering to or at least approving a contemporary community standards test for the value element. In *Pope*, the Illinois Court of Appeals sought to distinguish the *Princess Cinema*¹⁰⁶ case from Wisconsin without reaching the substantive policy considerations,¹⁰⁷ and in the same oddly negative tone manifested in *Morrison*, observed correctly, if not

State v. Henry, 302 Or. 510, 513, 732 P.2d 9, 10 (1987) (making an analogous argument regarding the prurient interest and patent offense elements, even where categories of proscribed depictions are statutorily specified).

100. 138 Ill. App. 3d 595, 486 N.E.2d 345 (1985).

101. 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985).

102. 138 Ill. App. 3d at 600, 486 N.E.2d at 349. Obviously, the "utterly without redeeming social value" formulation, inspired by *Roth* and *Memoirs*, is no longer thought to be mandated by the federal constitution. While it is more restrictive than the *Miller* formulation in some respects, it is less restrictive in others, and may be unconstitutional under the federal constitution, even if it is thought to comport with the constitution of Illinois.

103. *Id.*

104. 431 U.S. at 301.

105. 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985).

106. See *supra* note 98 and accompanying text.

107. See 138 Ill. App. 3d at 735, 486 N.E.2d at 355.

satisfyingly, that "the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value.'" ¹⁰⁸

The United States Supreme Court took certiorari on *Pope* and *Morrison* and rendered an opinion that is notable chiefly for the divergence between what it apparently says and what it apparently intends. Repudiating the prospect of holding a work hostage to local tyranny, the Court majority declares that "[j]ust as the ideas¹⁰⁹ a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won."¹¹⁰ The logical inference is clear, and the Court evidently intends to draw it. However, it then unfelicitously concludes: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."¹¹¹ The sticking point is the not inadvertent use of the word "would," as opposed to "could." The problem is that reasonable persons differ not only as to tastes, but as to judgments as to value. The set of reasonable persons, abstracted from a community, includes persons of both demanding and permissive judgment. If the set of reasonable judges is evidently split on the value of a work, then literally, the "would find" standard, as opposed to a "could find" standard, mandates a jury finding of a lack of serious value, despite the majority's professions.¹¹²

The majority in *Pope* is clearly not unaware of the problematic nature of their formulation, if for no other reason than that Justice Stevens calls the matter to their attention in dissent as outlined immediately above.¹¹³ The Court could have more perspicuously protected allegedly obscene materials if it had wished. Such an approach might focus on the judgment of value of some significant subset of the tutored or untutored judgments of reasonable people. That it did not do so may reflect not so much an indifference to excessive linguistic fastidiousness as a certain unresolved, not fully articulated wariness in

108. *Id.* The same issue was raised on appeal, but not decided, in *People v. Hall*, 143 Ill. App. 3d 766, 491 N.E.2d 757 (1986).

109. It seems improper to infer from phrases such as this that a Supreme Court majority, or any Justice, believes that everything between front and back covers must necessarily contain "ideas" in any constitutionally relevant sense.

110. *Pope v. Illinois*, 107 S. Ct. 1918, 1921 (1987).

111. *Id.*

112. The majority reiterates that "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Id.* at n.3.

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

saving otherwise obscene materials based on what a person could believe or judge without transgressing the boundaries of reasonableness. The Court majority may fear a standard that would unequivocally protect in all communities any and all material that a reasonable, but extremely permissive, person — the “reasonable libertine” — would judge of the requisite value.

Even the majority opinion in *Pope*, therefore, manifests unresolved concerns. The response of Justice Scalia is simply to consider re-examining the *Miller* test, on the value element, or in toto.¹¹⁴ Certain Justices remain committed either to broad decriminalization¹¹⁵ or to abolition of even special civil regulation in the area of unobtrusive, consensual exchange of pornographic materials among competent adults.¹¹⁶ The Court should not feel bound, however, to adopt a more liberalized standard on the theory that the Constitution and its underlying values mandate such. The free speech and free press clauses do not enact libertarianism; the undeniable fact that persons may be motivated by “curiosity”¹¹⁷ or a quest for “amusement”¹¹⁸ to transact in otherwise obscene materials does not invariably implicate significantly any of the values or purposes that might plausibly be thought to underlie the first amendment. To the extent that the Court may feel pressed to a more liberal approach from despair over the difficulties in interpreting and implementing *Miller*, this Article has sought to provide some solace.

114. *See id.* at 1923 (Scalia, J., concurring).

115. *See id.* at 1927 (Stevens, J., dissenting).

116. *See id.* at 1924 (Brennan, J., dissenting).

117. *See id.* at 1930 (Stevens, J., dissenting) (quoting *Smith v. United States*, 431 U.S. 291, 320-21 (1977) (Stevens, J., dissenting)).

118. *Id.*

