CONSTITUTIONAL LAW—FIRST AMENDMENT—OBSCENITY TEST REQUIRES TRIER OF FACT TO DETERMINE WHETHER "REASONABLE PERSON" WOULD FIND MATERIAL LACKS SERIOUS VALUE AND ERRONEOUS JURY INSTRUCTION CONCERNING OBSCENITY STANDARD IS SUBJECT TO HARMLESS ERROR ANALYSIS—*Pope v. Illinois*, 107 S. Ct. 1918 (1987).

The first amendment explicitly guarantees freedom of expression.[1] Despite this guarantee, all forms of expression are not constitutionally protected.[2] Obscenity has often been recognized as a category of expression that is outside the safe confines of the first amendment.[3] Although a majority of the Justices of the United States Supreme Court agree that obscenity is not protected by the first amendment,[4] the law of obscenity has traveled a meandering path.[5] This path has led to the United States

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[1] *See* U.S. CONST. amend. I. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* The first amendment protection of freedom of expression applies to the states through the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The Supreme Court recognized that certain types of speech do not merit constitutional protection since they are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572 (footnote omitted).

[3] *See* Roth v. United States, 354 U.S. 476, 485 (1957). The *Roth* Court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press." *Id. See also* New York v. Ferber, 458 U.S. 747, 763 (1982) (child pornography not protected by first amendment); Paris Adult Theater I v. Slaton, 413 U.S. 49, 66 (1973) (constitutional doctrine of privacy does not extend to a person's right to watch obscene movies in public places); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (lewd and obscene speech not protected by first amendment). *See generally* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L. J. 899 (1979).

[4] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). Only two Justices, Douglas and Black, have taken the view that obscene expression is protected by the first amendment. Ginsberg v. New York, 390 U.S. 629, 705 (1968) (Harlan, J. concurring).

[5] *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968). Justice Harlan commented that "[t]he subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Id.* at 704-05 (Harlan, J., concurring). *See also* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("It is possible to read the . . . in a variety of ways."). A two year study by the Commission on Obscenity and Pornography also highlights the difficulties and uncertainties related to the laws of obscenity. *See* COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT OF THE COMMISSION ON OB-

Supreme Court's recent decision, *Pope v. Illinois*,[6] which addressed the standard by which a material's "literary, artistic, political, or scientific" value is to be judged.[7] Additionally, the Court considered whether an erroneous jury instruction pertaining to the appropriate obscenity standard is subject to harmless error analysis.[8]

Richard Pope and Charles Morrison, petitioners, were both employed as part-time attendants at separate adult bookstores located in Rockford, Illinois.[9] Both adult bookstores had large signs outside advertising the nature of their business[10] and notifying minors that they were prohibited from entering the stores.[11] Both stores offered for sale a variety of magazines which depicted explicit sexual activities.[12]

On July 21, 1983, Rockford, Illinois detectives entered the bookstores where the petitioners were employed and purchased several magazines from the petitioners.[13] Shortly thereafter,

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SCENITY AND PORNOGRAPHY 53 (Comm. Print 1970) [hereinafter COMMISSION ON OBSCENITY].

> Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed "obscene" for adults only if, as a whole, it appeals to the "prurient" interest of the average person, is "patently offensive" in light of "community standards," and lacks "redeeming social value." These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials.

Id. at 53.

6 107 S. Ct. 1918 (1987).

7 *See id.* at 1920 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

8 *See id.* at 1921.

9 *Id.* at 1920.

10 *Id.* at 1929. A sign on one of the stores claimed that it had "The Largest Selection of Adult Merchandise in Northern Illinois." *Id.*

11 *See id.* at 1929 n.9. One store had a sign posted describing the premises as an "Adult Book Store" and requiring that "patrons must be 18 years of age to enter." People v. Pope, 138 Ill. App. 3d 726, 732, 486 N.E.2d 350, 353 (1985), *vacated sub nom.*, Pope v. Illinois, 107 S. Ct. 1918 (1987).

12 People v. Morrison, 138 Ill. App. 3d 595, 597, 486 N.E.2d 345, 347 (1985), *vacated sub nom.* Pope v. Illinois, 107 S. Ct. 1918 (1987); *Pope*, 138 Ill. App. 3d at 732, 486 N.E.2d at 353.

13 *Pope*, 107 S. Ct. at 1920. In the case of both purchases the detective positioned the magazines face down on the counter which forced the petitioners to observe both covers of the magazines containing sexually explicit photographs.

each petitioner was arrested[14] and later charged with the crime of "obscenity" for the sale of obscene material.[15]

At trial, defendants Pope and Morrison each filed a motion to dismiss the charges against them, maintaining that the Illinois obscenity statute violated the first and fourteenth amendments of the United States Constitution.[16] Both defendants asserted, inter alia, that the statute should have required the application of an objective "reasonable person" standard in determining whether the allegedly obscene materials were "utterly without redeeming social value."[17] Lack of such an objective standard, Morrison and Pope contended, rendered the statute unconstitutional.[18] The trial court rejected these arguments and directed the respective juries to apply "contemporary community standards" in determining the social value question.[19] Both defendants were subse-

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[14] *Morrison*, 138 Ill. App. 3d at 597, 486 N.E.2d at 347; *Pope*, 138 Ill. App. 3d at 732, 486 N.E.2d at 353.

[15] *Pope*, 107 S. Ct. at 1920. Both petitioners were charged with three counts of obscenity under the then applicable Illinois obscenity statute. *Morrison*, 138 Ill. App. 3d at 597, 486 N.E.2d at 346; *Pope*, 138 Ill. App. 3d at 731, 486 N.E.2d at 352. The statute provided in part:

> A person commits obscenity when, with the knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof he . . . sells, delivers, or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene . . . .

ILL. ANN. STAT. ch. 38, § 11-20(a)(1) (Smith-Hurd 1979).

[16] *Pope*, 107 S. Ct. at 1920.

[17] *Id.* The allegedly invalid Illinois statute incorporated the third component of the tripartite obscenity test articulated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966). *Id.* at 1920 n.1. The third component of the obscenity test required that the material be "utterly without redeeming social value." *Memoirs*, 383 U.S. at 418 (Brennan, J., plurality opinion). *See infra* notes 54-58 (discussing *Memoirs*). The statute also called for the application of "contemporary community standards" to the question of whether the materials were "utterly without redeeming social value." *Pope*, 107 S. Ct. at 1920.

[18] *Pope*, 107 S. Ct. at 1920.

[19] *Id.* The jury instruction in the *Morrison* case stated:

> A thing is obscene if considered as a whole, its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and, it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals, and, it is utterly without redeeming social value.
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> In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois

quently convicted of obscenity on all counts and each appealed their conviction.[20]

On appeal, the Second District Court of the Illinois Court of Appeals rejected the appellants' contention that the "reasonable person" standard applied, and therefore affirmed the convictions.[21] The Supreme Court of Illinois denied a subsequent petition for review[22] and the United States Supreme Court granted certiorari.[23] The United States Supreme Court held that the appropriate standard for determining obscenity requires the trier of fact, inter alia, to determine whether a reasonable person would find that the material, taken as a whole, lacks serious "literary, artistic, political, or scientific value."[24] The Supreme Court also ruled that the obscenity convictions should stand despite an improper jury instruction if a state appellate court concludes that "no rational juror, if properly instructed, could find value" in the materials in question.[25] The Court vacated the decision and remanded the case to the Illinois Court of Appeals for a determination of the harmless error issue.[26]

The constitutional rights to free speech and freedom of the press have played an important role in the development of our society.[27] Any restrictions of these rights, therefore, are consid-

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rather than by the people in any single city or town or region within the State.

People v. Morrison, 138 Ill. App. 3d 595, 599, 486 N.E.2d 345, 348 (1985), *vacated sub nom.* Pope v. Illinois, 107 S. Ct. 1918 (1987).

20 *Pope*, 107 S. Ct. at 1920.

21 *Morrison*, 138 Ill. App. 3d at 602, 486 N.E.2d at 350; People v. Pope, 138 Ill. App. 3d 726, 745, 486 N.E.2d 350, 362 (Ill. App. Ct. 1985), *vacated sub nom.* Pope v. Illinois, 107 S. Ct. 1918 (1987).

22 *Pope*, 107 S. Ct. at 1920.

23 Pope v. Illinois, 107 S. Ct. 61 (1986).

24 *Pope*, 107 S. Ct. at 1921. In support of the reasonable person standard the Court concluded that "[t]he proper inquiry is not whether an ordinary number 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." *Id.* (footnote omitted).

25 *Id.* at 1922.

26 *Id.* at 1923.

27 *See* J. MADISON, REPORT TO THE VIRGINIA HOUSE OF DELEGATES ON THE VIRGINIA RESOLUTIONS OF 1798 (1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION 571 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES]. The importance of freedom of the press was illustrated in the remark that "[i]n every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description which has not been confined to the strict limits of the common law." *Id.* at 570.

ered inherently dangerous.[28] It is thus imperative that the measures developed for judging obscenity recognize and protect these fundamental freedoms.[29]

The English case of *Regina v. Hicklin*[30] sets forth the early common law standard for judging obscenity.[31] *Hicklin* enunciated that material was to be judged in terms of its effect on the most susceptible members of the community.[32] Moreover, the *Hicklin* court determined that allegedly obscene material should be scrutinized by the impact of individual passages and not by the entire work as a whole.[33] Initially, several American courts followed this standard,[34] but later decisions rejected *Hicklin* in favor of a definition of obscenity which evaluated the effect of the material as a whole on the average person in the community.[35] In

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[28] Miller v. California, 413 U.S. 15, 23 (1973). The Court specifically noted "the inherent dangers of undertaking to regulate any form of expression" and cautioned that "[s]tate statutes designed to regulate obscene materials must be carefully limited." *Id.* at 23-24.

[29] Roth v. United States, 354 U.S. 476, 488 (1957). The Court emphasized that:

> The 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. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.

Id. at 488.

[30] 3 L.R.-Q.B. 359 (1868).

[31] *Id.*

[32] *Id.* at 369. The court posited that the test of obscenity was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.*

[33] *See id.* at 374.

[34] *See, e.g.*, MacFadden v. United States, 165 F. 51, 52 (3d Cir. 1908); United States v. Clarke, 38 F. 500, 502 (E.D. Mo. 1889); United States v. Bennett, 24 Fed. Cas. 1093, 1093 (C.C.S.D.N.Y. 1879); Commonwealth v. Buckley, 200 Mass. 346, 347, 86 N.E. 910, 911 (1909).

[35] *See* United States v. One Book Called "Ulysses", 5 F. Supp. 182, 184-85 (S.D.N.Y. 1933), *aff'd sub nom.*, United States v. One Book Entitled "Ulysses" by James Joyce, 72 F.2d 705 (2d Cir. 1934). In *One Book Entitled "Ulysses,"* customs officials, pursuant to a federal tariff statute seized an allegedly obscene book written by James Joyce entitled Ulysses. *One Book Entitled "Ulysses,"* 72 F.2d at 706 (citation omitted). Random House Inc. intervened denying that the book was obscene and contended that the book was therefore illegally seized. *Id.* The lower court entered a decree declaring that the book did not violate the federal statute. *Id.* The court of appeals affirmed the lower court decision that the book was not obscene, observing

> the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved

1957, this new standard of obscenity became the law in the landmark case of *Roth v. United States*.[36]

In *Roth*, the United States Supreme Court, for the first time in its history, examined the constitutional ramifications of a state obscenity statute.[37] The Court first concluded that the framers of the Bill of Rights intended the first amendment to protect the free interchange of ideas of social and political value.[38] The *Roth* Court asserted that by definition obscenity is "utterly without redeeming social importance."[39] The Court therefore held that obscenity was not protected under the first amendment and as such could be regulated by the states.[40]

In *Roth*, the United States Supreme Court promulgated the test for obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to the prurient interest."[41] The Court specified further that such material is of the type that has "a tendency to excite lustful thoughts."[42] This new definition of obscenity, calling for the application of "contemporary community standards," marked a clear change in direction from

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> critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content.

Id. at 708-09.

36 354 U.S. 476 (1957).

37 *See* F. SCHAUER, THE LAW OF OBSCENITY 30-48 (1976). The *Roth* case was presented under both the California Penal Code and a federal obscenity statute which prohibited the mailing of obscene material. *Roth*, 354 U.S. at 479 n.1 (citations omitted).

38 *See Roth*, 354 U.S. at 484. The Court noted that this objective was made known as early as 1774 in a letter of the Continental Congress which stated:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Id. (quoting Letter from Continental Congress to Inhabitatants of Quebec, *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)).

39 *Id.* at 484-85.

40 *See id.*

41 *Id.* at 489. The *Roth* Court was the first to use the term "contemporary community standards." F. SCHAUER, *supra* note 37, at 116-17. This standard was a reformulation of the test used by many lower courts. *Id.* at 117. The first opinion to articulate such a test was written by Judge Learned Hand in United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913). *Id.* at 117 n.5.

42 *Roth*, 354 U.S. at 487 n.20.

the *Hicklin* standard.[43]

The *Roth* Court's new definition of obscenity differed from the *Hicklin* standard in two significant respects.[44] First, the *Hicklin* standard permitted material to be evaluated "merely by the effect of an isolated excerpt."[45] The *Roth* standard, however, required that "the dominant theme of the material taken as a whole appeal to prurient interest."[46] Second, the *Hicklin* standard was based on whether the most susceptible persons in a community would find that a material was obscene.[47] The *Roth* standard, on the other hand, required the trier of fact to determine "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appealed to prurient interest."[48] The *Roth* Court reasoned that the standard promulgated in *Hicklin* could result in the suppression of artistic and aesthetic sexual material, and therefore rejected that standard as placing undue constraints on the constitutionally protected rights of free speech and press.[49] The Court further stated that the new standard would adequately protect legitimate material against a constitutional assault based on the first amendment.[50]

Although it held that obscenity was not a constitutionally protected form of expression, the *Roth* Court disavowed that its holding would open the door to censorship.[51] Support for the fundamental first amendment values of free speech and freedom of the press was emphasized by the Court's warning that "ceaseless vigilance" would be required to forestall the deterioration of these fundamental freedoms "by Congress or by the States."[52] The Court added that "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent

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43 *See* Curtis, *Obscenity: The Justices' (Not So) New Robes*, 8 CAMPBELL L. REV. 387, 391 (1986).

44 *See Roth*, 354 U.S. at 488-89. *See also* Curtis, *supra* note 43, at 391.

45 *Roth*, 354 U.S. at 488-89 (citing *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868)).

46 *See id.* at 489.

47 *See Hicklin*, 3 L.R.- Q.B. at 369. *See also supra* notes 30-35 and accompanying text (discussing *Hicklin* standard).

48 *Roth*, 354 U.S. at 489 (footnote omitted). The Court defined prurient as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longing; of desire, curiosity, or propensity, lewd." *Id.* at 487 n.20 (citation omitted).

49 *Id.* at 489.

50 *Id.*

51 *See id.* at 488.

52 *Roth*, 354 U.S. at 488. *See also supra* note 29.

encroachment upon more important interests."[53]

Nine years later, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[54] the Court reaffirmed its conviction to the first amendment values of free speech and freedom of the press.[55] Extrapolating from the *Roth* Court's characterization of obscene materials as "utterly without redeeming social importance,"[56] the Court formulated a new three prong test for judging obscenity.[57] Obscene material was (1) "utterly without redeeming social value," (2) "appeal[ed] to a prurient interest in sex," (3) was "patently offensive because it affront[ed] contemporary community standards relating to the description of sexual matters."[58]

The creation of a new definition of obscenity by a plurality of the *Memoirs* Court reflected the lack of consensus over how to delineate obscenity from other forms of speech.[59] From 1957 to 1966, the Court's efforts to agree upon a definition of obscenity failed.[60] The Court started a policy of summarily reversing obscenity judgments because of an inability to agree on a single obscenity standard.[61] Between 1967 and 1973, the Supreme Court

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53 *Id.*

54 383 U.S. 413 (1966).

55 *See id.* at 417 (Brennan, J., plurality opinion). In *Memoirs*, the Attorney General for Massachusetts tried to have the book *Memoirs of a Woman of Pleasure*, known as *Fanny Hill*, declared obscene pursuant to state statute. *Id.* at 415 (Brennan, J., plurality opinion) (citation omitted). The trial court determined that the book was obscene and as such "not entitled to the protection of the First and Fourteenth Amendments." *Id.* at 417 (Brennan, J., plurality opinion). The Supreme Court of Massachusetts subsequently affirmed this conclusion and the United States Supreme Court noted probable jurisdiction. *Id.*

56 *Roth*, 354 U.S. at 484.

57 *See Memoirs*, 383 U.S. at 418 (Brennan, J., plurality opinion).

58 *Id. See generally* United States v. 35mm Motion Picture Film Entitled "Language of Love," 432 F.2d 705 (2d Cir. 1970) (explaining *Memoirs*' three prong test).

59 *See* F. SCHAUER, *supra* note 37, at 44.

60 *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 480-81 (1966) (Black, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); Roth v. United States, 354 U.S. 476, 508-10 (1957) (Douglas, J., dissenting). Justice Black commented in *Ginzburg* on the tremendous amount of confusion surrounding the definition of obscenity: "After the fourteen separate opinions handed down . . . today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity'. . . ." *Ginzburg*, 383 U.S. at 480-81 (Black, J., dissenting).

61 *See* F. SCHAUER, *supra* note 37, at 44. The divergence of opinions among the Justices was evidenced by the fact that:

> [o]ne year after *Memoirs*, the Supreme Court agreed to review three state cases dealing with magazines of predominantly sexual content such as *Lust Pool, Shame Agent, Gent, Modern Man, High Heels* and *Spree*. In a short

overturned thirty-one obscenity convictions by summary judgment.[62] For the first time since *Roth*, a majority of the Court in *Miller v. California*[63] agreed upon a set of rules for distinguishing obscenity from constitutionally protected speech.[64]

The *Miller* Court announced a new definition of obscenity which was not expected to have the problems of vagueness and overbreadth associated with prior definitions.[65] The Court formulated a new three part test for obscenity.[66] The test required the trier of fact to determine

> (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeal[ed] to the prurient interest; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[67]

The "utterly without redeeming social value standard" promulgated by the *Memoirs* Court was replaced with a new standard which required that the material contain meritorious value.[68]

Despite Chief Justice Burger's observation in *Miller* that the Court's obscenity definition would overcome problems associated

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> per curiam opinion, the Court noted the differences in views among its members as to the proper test for obscenity or scope of obscenity regulation, but the conclusion of the Court was merely an acknowledgment of their divergence.

Id.

62 *Id.*

63 413 U.S. 15 (1973). The Supreme Court issued decisions in four other obscenity cases the same day that *Miller* was decided. *See* United States v. Orito, 413 U.S. 139 (1973) (first amendment does not prohibit federal government from regulating interstate transportation of obscene materials); United States v. Twelve 200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973) (first amendment protection does not prevent federal government from regulating importation of obscene materials for personal use); Kaplan v. California, 413 U.S. 115 (1973) (first amendment does not protect sale and distribution of obscene books to consenting adults); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (first amendment does not prevent states from regulating the display of obscene films in commercial theatres). *See also* Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1838 n.1 (1975).

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

65 *See id.* at 27.

66 *Miller*, 413 U.S. at 24.

67 *Id.* (citation omitted).

68 *See id.* at 24-25. In rejecting the *Memoirs* test the Court stated that "[w]e do not adopt as a constitutional standard the 'utterly without redeeming social value' test of *Memoirs*; that concept has never commanded the adherence of more than three Justices at one time." *Id.* (footnote omitted).

with prior definitions,[69] there still remained important unanswered questions.[70] While the *Miller* Court posited that "contemporary community standards" must be applied by triers of fact when determining whether material is obscene, problems arose in the application of such standards.[71]

An important unanswered question after *Miller* was whether the value of allegedly obscene material was to be judged by reference to community standards.[72] The Court has recognized that although the *Miller* Court defined value, such value was not discussed in conjunction with contemporary community standards.[73] It was not until fourteen years after *Miller* that the United States Supreme Court fully addressed this issue in *Pope v. Illinois*.[74]

In *Pope*, the United States Supreme Court expressly rejected the contention that the trier of fact must refer to contemporary community standards when determining whether an allegedly obscene material lacks serious value.[75] Justice White, writing for a majority of the Court, first noted that the third component of the *Miller* test requires the fact-finder to determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[76] Accordingly, the Justice posited that the obscenity issue in *Pope* was "whether, in a prosecution for the sale of allegedly obscene materials, the jury may be instructed to apply community standards in de-

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69 *See id.* at 27.

70 *See* Note, *supra* note 63, at 1839. "Neither *Miller* . . . nor its progeny settle the fundamental questions of whether government should, as a matter of policy, suppress the distribution of obscenity, and of whether such suppression is consistent with the first amendment values. Nor have these cases resolved the question of what obscenity is." *Id.* (footnotes omitted).

71 *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Hamling v. United States, 418 U.S. 87, 103-10 (1974); United States v. Various Articles of Obscene Material, 709 F.2d 132 (2d Cir. 1983). The *Jenkins* Court enunciated that the "community" considered does not have to be a statewide community and it is "constitutionally permissible to permit juries to rely on [their own] understanding of the community from which they came" when determining "contemporary community standards." *Id.* at 157. The Court asserted that *Miller* did not mandate that a "statewide" standard of obscenity be used. *See Jenkins*, 418 U.S. at 157. *Various Articles of Obscene Material* highlighted one additional problem inherent in the application of "contemporary community standards." Because "under *Miller* the trier of fact is at liberty to identify and apply community standards as he sees them," the Court pronounced that "the trier's finding that the material is non-obscene is virtually shielded from appellate scrutiny." *Id.* at 136.

72 *See* F. SCHAUER, *supra* note 37, at 122-24.

73 *See* Smith v. United States, 431 U.S. 291, 301 (1977) (citing F. SCHAUER, THE LAW OF OBSCENITY 123-24 (1976)).

74 107 S. Ct. 1918 (1987).

75 *See id.* at 1921.

76 *Id.* at 1920 (quoting *Miller*, 413 U.S. at 24).

ciding the value question."[77]

Justice White observed that there was no precedent for Illinois' contention that the value of allegedly obscene material was to be determined by reference to community standards.[78] The Justice then pointed out that "unlike [the] prurient appeal and patent offensiveness" portions of the *Miller* test, "literary, artistic, political, or scientific value . . . is not discussed in terms of contemporary community standards."[79] Justice White asserted that this omission by the *Miller* Court was deliberate.[80]

Concluding his analysis of the obscenity issue, Justice White recognized that the protection afforded to artistic and aesthetic works of value by the first amendment is not contingent upon approval by the government or widespread popularity.[81] He then remarked that the value of a work, with regard to the first amendment, does not vary from one community to another.[82] For this reason, the Court reasoned that the proper inquiry for a trier of fact 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."[83] Accordingly, the Court held that the jury instruction at issue was unconstitutional.[84]

In a concurring opinion, Justice Scalia agreed with the Court's objective "reasonable person" standard for determining the value of allegedly obscene material.[85] However, Justice Scalia also concluded that it was virtually impossible to objectively determine what constitutes literary or artistic value.[86] Therefore, he suggested that

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77 *Id.*

78 *Id.*

79 *Id.* (quoting Smith v. United States, 431 U.S. 291, 301 (1977)).

80 *Id.* at 1921.

81 *Id.* (citing *Miller*, 413 U.S. at 34).

82 *Id.*

83 *Id.* (footnote omitted).

84 *Id.* The instruction directed the jury to determine obscenity by deciding "how [the material] would be viewed by ordinary adults in the whole State of Illinois." *Id.* at 1920 & n.2. *See also supra* note 19 and accompanying text.

85 *Id.* at 1923 (Scalia, J., concurring).

86 *Id.* Justice Scalia observed:

> Since ratiocination has little to do with esthetics, the fabled "reasonable" man is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste"—a description that betrays the lack of an ascertainable standard. If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in cases that matter. I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum.* Just as there is no use arguing about taste,

the Court reexamine *Miller*.[87]

Justice Blackmun wrote a separate opinion, concurring with the majority on the obscenity issue.[88] Justice Blackmun rejected Justice Stevens' dissenting argument that an objective person standard for determining whether a material lacks serious value would lead to censorship by the majority of the population.[89] He reiterated the Court's position that "even a minority view among reasonable people that a work has value may protect that work from being judged 'obscene.' "[90]

Justice Brennan, in a dissenting opinion, supported Justice Stevens' argument that "criminalizing the possession or sale of 'obscene' materials to consenting adults" was unconstitutional.[91] He asserted that the notion of obscenity is nebulous and defies definition.[92] Consequently, any regulation of allegedly obscene material could not adequately provide notice to persons dealing with such matter and would therefore violate their constitutional rights to due process and free speech.[93]

Justice Stevens, joined by Justice Marshall, voiced his disagreement with the majority on the obscenity issue.[94] Justice Stevens noted that although the first amendment protects the distribution of magazines, this protection does not extend to obscene material.[95] The Justice then proceeded to question the Court's analysis of the third element of the *Miller* test concerning the aesthetic and social value of a particular material.[96]

According to Justice Stevens, the third prong of the *Miller* test was designed to assure that materials having appeal only to a minority of the population would not be unduly suppressed by obscenity

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there is no use litigating about it. For the law courts to decide "What is Beauty" is a novelty even by today's standards.

Id.

87 *Id.*

88 *Id.* (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun joined Part I of Justice Stevens' dissenting opinion, agreeing that "harmless error" analysis in this instance is not fitting. *Id.* For discussion of Justice Stevens' view on harmless error analysis, *see infra* notes 188-99 and accompanying text.

89 *See id.* at 1923-24 (Blackmun, J., concurring in part and dissenting in part).

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

91 *Id.* (Brennan, J., dissenting).

92 *Id.*

93 *See id.*

94 *Id.* at 1924 (Stevens, J., dissenting). Justice Brennan joined in with this entire dissent except for footnote 11. *Id.* at 1931 (Stevens, J., dissenting). Justice Blackmun also joined in Part I of Justice Stevens' dissent. *Id.*

95 *Id.* (Stevens, J., dissenting).

96 *See id.*

regulations.[97] Despite the fact that the *Pope* majority enunciated an objective standard for determining the value of a work,[98] Justice Stevens expressed concern that the Court's obscenity standard might fail to protect materials which do not appeal to the majority interest.[99] According to the Justice, a juror instructed to apply a "reasonable person" standard "might well believe that the majority of the population who find no value" in a particular material "are more reasonable than the minority who do find value."[100]

Justice Stevens presented several additional arguments supporting his dissent on the obscenity issue.[101] Referring to his dissenting opinion in a previous case, Justice Stevens reasserted his position that the government cannot "constitutionally criminalize" the sale of obscene material, "absent some connection to minors, or obtrusive display to unconsenting adults."[102] Justice Stevens also reiterated his position that penal statutes which are vague and overbroad, and criminalize certain classifications of speech, are inherently unconstitutional.[103] The Justice concluded by declaring that because of the great difficulty in agreeing on the value of a material, "we must 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."[104]

Since its inception the harmless error rule has had a significant impact on the criminal appeals process.[105] The rule itself stems from the recognition that some trial errors have such a trivial impact

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97 *See id.* at 1927 (Stevens, J., dissenting). Justice Stevens asserted that "[t]he purpose of the third element of the *Miller* test is to ensure that the obscenity laws not be allowed to 'level the available reading matter to the majority or lowest common denominator of the population.' " *Id.* (quoting F. SCHAUER, *supra* note 37, at 144).

98 *Id.*

99 *Id.*

100 *Id.* Justice Stevens observed that the difficulties with the obscenity standard announced by the *Pope* Court become more apparent when a "discrete segment of the population" finds value in a particular material although "the ordinary 'reasonable person' would not." *Id.* at 1927 n.5 (Stevens, J., dissenting).

101 *See id.* at 1927-30 (Stevens, J., dissenting).

102 *Id.* at 1927 (Stevens, J., dissenting) (citing Smith v. United States, 431 U.S. 291, 320-21 (Stevens, J., dissenting)). The Justice asserted that one of the main problems with the obscenity standard announced by the majority is its vagueness. *Id.* at 1927 n.6 (Stevens, J., dissenting).

103 *Id.* at 1928-30 (Stevens, J., dissenting). *See also* Smith v. United States, 431 U.S. 291, 302-03 (1977) (legislation must define what type of conduct is prohibited).

104 *Pope*, 107 S. Ct. at 1930 (quoting Smith v. United States, 431 U.S. 291, 320-21 (Stevens, J., dissenting)).

105 *See* Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 421 (1980).

on the overall integrity of the trial process that they may be overlooked.[106] Historically, at common law, automatic reversal of a judgment was often caused by the slightest of trial errors.[107] This often resulted in a serious miscarriage of justice.[108] For this reason, today, all state and the federal government have rules or statutes which bar the automatic reversal of judgments for any "error or defect which does not alter the parties' substantive rights."[109]

One of the first major cases decided by the United States Supreme Court involving the harmless error rule was *Bollenbach v. United States*.[110] In *Bollenbach*, the Court reversed a conspiracy conviction that was based on a supplemental jury instruction which included an improper presumption.[111] Rejecting the Government's argument that the improper instruction constituted harmless error, the Court stated that "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."[112]

Another major case involving the violation of constitutional rights and the harmless error rule was *Fahy v. Connecticut*.[113] *Fahy* involved the admission of incriminating evidence at trial which had been illegally seized.[114] Despite the petitioner's objection, the trial judge allowed the evidence to be admitted.[115] On appeal, the Connecticut Supreme Court of Errors held that the trial court erroneously admitted the evidence but upheld the petitioner's conviction

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106 *See* Chapman v. California, 386 U.S. 18, 22 (1966).

107 *See* Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538, 540 (1979). The rationale for this rule was that "any other rule would force appellate courts to usurp the function of the jury." *Id.* (footnote omitted).

108 *See id.*

109 *Chapman*, 386 U.S. at 22 (citation omitted).

110 326 U.S. 607 (1946).

111 *Id.* at 608-09, 613-15. The trial judge charged the jury that:

> Possession of stolen property in another State than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case.

Id. at 609.

112 *Id.* at 614.

113 375 U.S. 85 (1963).

114 *Id.* at 86. In *Fahy*, two individuals were charged with having painted swastikas on a synagogue in Norwalk, Connecticut. *Id.* at 85-86. Without obtaining a search or arrest warrant, the police entered one individual's garage and seized paint and a paint brush in violation of the fourth amendment. *Id.* at 87 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

115 *Id.* at 86.

on the grounds that the error was harmless.[116] The United States Supreme Court granted certiorari[117] and concluded that the proper approach for determining the harmlessness of an error was to ascertain "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[118] Applying this analysis, the Court held that the error was harmful and reversed the conviction.[119] Although the *Fahy* Court established a rule for deciding whether an error was harmless, the Court left open the question of whether a violation of a constitutional right could be deemed harmless.[120] That question was answered four years later in *Chapman v. California*.[121]

Chapman involved a state constitutional provision[122] which permitted the prosecutor during a criminal trial to comment on the failure of the accused to testify.[123] In addition to the prosecutor's extensive comments during the trial, the trial judge instructed the jury that it was permissible to draw negative inferences from the defendants' decision not to testify.[124] The defendants were convicted of first-degree murder, among other crimes, and the case was appealed to the California Supreme Court.[125] Although acknowledg-

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116 *Id.* The court upheld the conviction based on Connecticut's harmless error statute which provides that a judgment below need not be reversed if the error "complained of [has] not materially injured the appellant." *Id.* at 86 n.2 (quoting CONN. GEN. STAT. § 52-265 (1958)).

117 372 U.S. 928 (1963).

118 *Fahy*, 375 U.S. at 86-87.

119 *Id.* at 86.

120 *See id.*

121 386 U.S. 18 (1967).

122 CAL. CONST. art. I, § 13. The California Constitution provided in pertinent part that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." *Id.*

123 *Chapman*, 386 U.S. at 19.

124 *Id.* The trial judge instructed the jury:

> It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

Id. at 19 n.2.

125 *See* People v. Teale, 63 Cal. 2d 178, 182-83, 404 P.2d 209, 211-12 (1965), *rev'd sub nom.*, Chapman v. California, 386 U.S. 18 (1967). The defendants were

ing that the petitioners' federal constitutional rights had been violated, the California Supreme Court upheld the conviction.[126]

The United States Supreme Court granted certiorari[127] and held that not all constitutional violations mandate the automatic reversal of a trial verdict.[128] The *Chapman* Court reasoned that certain errors, based on the particular circumstances of the case, are so trivial and insignificant that they may be designated "harmless."[129] Justice Black, writing for the majority, stated that in order for a constitutional error to be deemed harmless, a reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt."[130] The Court also held that certain constitutional rights are so fundamental to a fair trial that their violation can never constitute harmless error.[131] These rights included the right to counsel, the right to an impartial judge, and the right to be free from coerced confession.[132]

Since *Chapman*, the Court has been reluctant to expand the category of constitutional rights which are exempt from harmless error analysis.[133] In *Sandstrom v. Montana*,[134] the Supreme Court addressed the effect of a presumption of malice in a jury instruction.[135] The Court held that a jury instruction that relieved the state of its duty to prove each element of a crime beyond a reasonable doubt was unconstitutional under the fourteenth amendment.[136] The Court in *Sandstrom* specifically left unanswered the issue of whether a jury's reliance upon a presumption within a jury instruction constituted harmless error.[137] This issue was addressed by the Court four years later in *Connecticut v. Johnson*.[138]

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also convicted of first degree robbery and simple kidnapping. *Id.*, 404 P.2d at 211-12. Defendant Teale was sentenced to death and defendant Chapman to life imprisonment. *Id.* at 183, 404 P.2d at 212.

126 *Id.* at 196-98, 404 P.2d at 220-21.

127 Chapman v. California, 383 U.S. 956 (1966).

128 *Chapman*, 386 U.S. at 22.

129 *Id.*

130 *Id.* at 24. Justice Black explained that "[w]hile appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts and . . . its adoption will provide a more workable standard." *Id.* (footnote omitted).

131 *Id.* at 23.

132 *Id.* at 23 n.8.

133 *See* Rose v. Clark, 106 S. Ct. 3101, 3106-07 (1986).

134 442 U.S. 510 (1979).

135 *Id.* at 512.

136 *Id.* at 521-23.

137 *Id.* at 526-27. The Court did not address the harmless error issue since it was not considered by the Montana Supreme Court. *Id.* at 527.

138 460 U.S. 73 (1983).

Johnson involved a jury instruction that contained a conclusive presumption of intent.[139] The Connecticut Supreme Court, relying on *Sandstrom*, held that the erroneous malice presumption included in the jury instruction was unconstitutional.[140] The United States Supreme Court granted certiorari.[141] A plurality of the Court concluded that the jury instruction was erroneous and deprived the respondent of his constitutional right to a fair trial.[142] The Court asserted that such a deprivation was not harmless error.[143] The Court reasoned that the conclusive presumption in the jury instruction had the effect of enabling the jury to convict the respondent without having to consider every element of the offense.[144] Justice Blackmun stated: "There may be rare situations in which the reviewing court can be confident that a *Sandstrom* error did not play any role in the jury's verdict. . . . Such an exception, regardless of its precise boundaries, does not apply here."[145]

Justice Powell dissented, with whom Chief Justice Burger, Justices Rehnquist and O'Connor joined.[146] Justice Powell asserted that the plurality's opinion would effectively establish "an automatic reversal rule" for all *Sandstrom*-like errors.[147] The Justice rejected the plurality's argument that a *Sandstrom* error would inherently ef-

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[139] *Id.* at 78 (Blackmun, J., plurality opinion). The jury instruction included a description of intent as

> a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.

Id.

[140] *See* Connecticut v. Johnson, 185 Conn. 163, 171, 440 A.2d 858, 863 (1981), *aff'd*, 460 U.S. 73 (1983).

[141] Connecticut v. Johnson, 455 U.S. 937 (1982).

[142] *Johnson*, 460 U.S. at 87-88 (Blackmun, J., plurality opinion).

[143] *Id.* at 88 (Blackmun, J., plurality opinion).

[144] *Id.* at 85-86 (Blackmun, J., plurality opinion). Justice Blackmun explained:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict.

Id. (footnote omitted).

[145] *Id.* at 87 (Blackmun, J., plurality opinion). For situations where a reviewing court may find that a *Sandstrom* error was not a factor in the jury's verdict, see Hearn v. James, 677 F.2d 841, 843 (11th Cir. 1982) (erroneous jury instruction creating presumption of intent harmless when instruction did not apply to crime for which defendant was found guilty); Washington v. Harris, 650 F. 2d 447, 453-54 (2d Cir. 1981) (*Sandstrom* error may not be fatal if defendant concedes intent issue).

[146] *Johnson*, 460 U.S. at 90 (Powell, J., dissenting).

[147] *Id. But see supra* note 145 and accompanying text.

fect a jury's verdict.[148] Justice Powell urged the Court to adopt an approach which would assess the impact of the error in light of the evidence presented.[149] He concluded by asserting that since a presumption, unlike a directed verdict, does not completely eliminate the intent issue from the trier of fact's determination, a reviewing court should not be prevented from deciding if "the error was 'harmless beyond a reasonable doubt.' "[150]

Three years after a divided Court decided *Johnson*, the reach of the harmless error rule was expanded to include an erroneous malice instruction in *Rose v. Clark*.[151] *Rose* involved a Tennessee state court's jury instruction in a double homicide trial which stated that "[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption."[152] Based on this charge, a jury convicted the defendant of first and second degree murder.[153]

The conviction was affirmed by the Tennessee Court of Criminal Appeals.[154] The defendant sought and was granted a writ of habeas corpus by the United States District Court for the Middle District of Tennessee.[155] The district court held that the trial court's jury instructions violated the defendant's consitutional right to have his guilt demonstrated beyond a reasonable doubt.[156] The district court further concluded that the violation could not be considered a harmless error since the defendant had contested the intent of the crime at trial.[157] The Sixth Circuit Court of Appeals

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148 *Id.* at 96-97 (Powell, J., dissenting).

149 *See id.* at 97 (Powell, J., dissenting).

150 *Id.* (citing Chapman v. California, 386 U.S. 24 (1966)).

151 106 S. Ct. 3101, 3108-09 (1986).

152 *Id.* at 3104. The actual instruction given to the jury was:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the state has proven beyond a reasonable . . . doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the state.

Id. (citation omitted).

153 *Id.*

154 *Id.* The appellate court rejected the "respondent's argument that the jury instruction had impermissibly shifted the burden of proof as to malice." *Id.* (footnote omitted).

155 Clark v. Rose, 611 F. Supp. 294, 302 (M.D. Tenn. 1983), *aff'd*, 762 F.2d 1006 (6th Cir. 1985), *vacated*, 106 S. Ct. 3101 (1986).

156 *See id.* at 299.

157 *Id.* at 301-02.

affirmed,[158] and the United States Supreme Court granted certiorari, limiting its review to the harmless error issue.[159]

Justice Powell, writing for the majority,[160] vacated the judgment of the court of appeals and remanded the case for an analysis of the harmless error issue.[161] The Court held that except in the case where an error causes a fundamentally unfair trial, a conviction should be upheld "[w]here a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt."[162] In doing so, the Court made it clear that violations that mandate automatic reversal under *Chapman* are "the exception and not the rule."[163] According to Justice Powell, as long as a defendant has adequate representation and is judged by an impartial trier of fact there is a "strong presumption that any . . . errors" that occur during the trial process "are subject to harmless error analysis."[164]

Justice Blackmun, joined by Justices Marshall and Brennan, dissented.[165] Justice Blackmun questioned the majority's reasoning concerning harmless error analysis and argued that the erroneous jury instruction in this case was "analytically indistinguishable" from other errors to which the Court had previously refused to apply the harmless error rule.[166] Moreover, the Justice asserted that the effect of the instruction was to order the jury to return a guilty verdict.[167] Justice Blackmun posited that this would relieve the jury of its constitutional duty to determine if the prosecution had fulfilled its burden of proving each element of the crime beyond a reasonable doubt.[168]

Against this background the Court decided the second major issue in *Pope*, which concerned the applicability of harmless error

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158 Clark v. Rose, 762 F.2d 1006 (6th Cir. 1985), *vacated*, 106 S. Ct. 3101 (1986).

159 *See Rose*, 106 S. Ct. at 3105.

160 *Id.* at 3102-03. Justice Powell was joined by Chief Justice Burger and Justices Rehnquist, White, and O'Connor. *Id.*

161 *Id.* at 3109.

162 *Id.* at 3107.

163 *Id.* at 3106 (citing United States v. Hastings, 461 U.S. 499, 509 (1983)).

164 *Id.* at 3107. The Court emphasized that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Id.* (quoting Delaware v. Van Arsdall, 106 S. Ct. 1431, 1436 (1986); United States v. Hastings, 461 U.S. 499, 508-09 (1983)).

165 *Id.* at 3113 (Blackmun, J., dissenting).

166 *Id.* at 3114 (Blackmun, J., dissenting). *See also* Connecticut v. Johnson, 460 U.S. 73, 87-88 (1983) (jury instruction containing conclusive presumption of intent not harmless error); Bollenbach v. United States 326 U.S. 607, 614-15 (1946) (supplemental jury instruction containing improper presumption not harmless error).

167 *Rose*, 106 S. Ct. at 3114 (Blackmun, J., dissenting).

168 *Id.* at 3115 (Blackmun, J., dissenting).

analysis to an erroneous jury instruction on the appropriate standard for judging the value of allegedly obscene material.[169] The *Pope* Court held that an erroneous jury instruction regarding the proper obscenity standard in evaluating the worth of allegedly obscene material could constitute harmless error.[170] Justice White, writing for a majority of the Court, rejected the petitioners' contention that their convictions required automatic reversal because of the unconstitutionality of the Illinois obscenity statute.[171] In denying the request to invalidate the obscenity statute and reverse the petitioners' convictions, Justice White argued that a reversal would be futile because the law under which the petitioners were convicted has since been repealed and replaced with a new statute.[172] The new statute clearly gave the petitioners adequate notice that the sale of obscene magazines was illegal and prosecution was therefore justified under this new statute.[173] The Court reasoned that a retrial was unnecessary if a reviewing court could conclude "beyond a reasonable doubt that the jury's verdict in this case was not affected by the erroneous instruction."[174]

Justice White then noted the similarity between *Pope* and *Rose*.[175] Justice White drew an analogy between *Rose*, where the Court found that an improper jury instruction on the element of intent was subject to harmless error analysis, and the erroneous instruction in *Pope*.[176] The Justice explained that the erroneous instruction in *Rose* did not prevent the trier of fact from considering

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169 *See Pope*, 107 S. Ct. at 1921.

170 *See id.* at 1922-23.

171 *See id.* at 1921.

172 *Id.* Justice White observed that "the statute under which petitioners were convicted [was] no longer on the books; it has been repealed and replaced by a statute that does not call for the application of community standards to the value question." *Id.* (footnote omitted).

173 *Id.* The new statute defines obscenity as:

> Any material or performance 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. REV. STAT. ch. 38, para. 11-20(b) (1987). Unlike the previous statute, the amended statute addressed each of the three prongs of the *Miller* test. *See Pope*, 107 S. Ct. at 1921 n.4.

174 *Id.* at 1922. *See supra* notes 151-68 and accompanying text (discussing *Rose*).

175 *See id.*

176 *See id.*

the malice question.[177] Similarly, Justice White asserted that the jury in *Pope* was not prevented from addressing the issue of whether the magazines lacked serious value.[178] The majority concluded that because the jury was given an opportunity to find each element of obscenity beyond a reasonable doubt, the trial court's instructional error did not "render the trial fundamentally unfair" and therefore was subject to harmless error analysis.[179] The Court determined that despite the trial court's erroneous instruction, the petitioners' convictions should not be reversed if on remand the appellate court determines that "no rational juror, if properly instructed, could find value in the magazines."[180]

Justice Scalia, in a brief concurring opinion, joined the Court in its analysis of the harmless error issue.[181] He expressed the unlikelihood that a "community standard" instruction would lead a jury to convict, where a "reasonable person" instruction would not.[182] The Justice reasoned that it was permissible for a reviewing court to apply the harmless error rule in this particular case.[183]

Justice Blackmun wrote a brief dissent on the harmless error issue.[184] He agreed with Justice Stevens' dissenting opinion on this question.[185] Justice Blackmun stated that harmless error analysis was not appropriate in this case.[186] Writing a separate dissenting opinion, Justice Brennan did not address the harmless error issue, but instead agreed with Justice Stevens in attacking the constitutionality of criminally penalizing the "possession or sale of 'obscene' materials to consenting adults."[187]

Justice Stevens, joined by Justice Marshall, disagreed with the Court's treatment of the harmless error issue.[188] Justice Stevens noted that the law requires the state in a criminal prosecution to prove each element of a crime beyond a reasonable doubt.[189] In an obscenity trial, the Justice observed, all three elements of the *Miller*

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177 *Id.*
178 *Id.*
179 *See id.*
180 *Id.* at 1922 (footnote omitted). The Court remarked that although it had the authority to determine whether a constitutional error was harmless, the Court exercises such authority sparingly. *Id.* at 1922-23.
181 *Id.* at 1923 (Scalia J., concurring).
182 *Id.*
183 *Id.*
184 *Id.* (Blackmun, J., concurring in part and dissenting in part).
185 *Id.*
186 *Id.*
187 *Id.* at 1924 (Brennan, J., dissenting).
188 *Id.* (Stevens, J., dissenting).
189 *Id.*

standard must be clearly established.[190] Since the trial courts in *Pope* had given improper instructions on the "value" element, the Justice reasoned that the juries did not find each of the three elements of obscenity necessary to convict the petitioners.[191] This type of error, asserted Justice Stevens, can never be deemed harmless since it flagrantly violates the petitioner's constitutional right to a jury trial on "all elements of the offense with which he is charged."[192] Justice Stevens acknowledged that harmless error analysis may be suitable when an error does not impinge upon the trier of fact's ultimate determination of guilt or innocence.[193] He further emphasized that harmless error analysis can be used to protect a jury's findings, but not to supplement them.[194] Accordingly, the Justice reasoned that such an analysis may not be utilized by a court to answer a question which must be decided by a jury.[195]

Concluding his analysis of the harmless error issue, Justice Stevens emphatically disagreed with the *Pope* Court over the seriousness of the instructional error.[196] Justice Stevens distinguished the error in *Pope* from that in *Rose*.[197] The Justice observed that in certain cases like *Rose*, where there is an abundance of evidence of intent, the use of a presumption in a jury instruction may be considered "superfluous."[198] However, in *Pope*, the Justice asserted that a court could never find that the error was merely superfluous, because the effect of the erroneous instruction was to preclude the jury from considering an essential element of the crime.[199]

Despite the Court's intensive examination of both the obscenity and the harmless error issues, the *Pope* decision leaves a number of unanswered questions. Commencing with the obscenity issue, the

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190 *Id.* The Justice explained that in a criminal prosecution of the sale or possession of obscene material the prosecutor must prove each element of the *Miller* test beyond a reasonable doubt. *Id. See also supra* notes 65-71 and accompanying text (discussing *Miller*).

191 *Pope*, 107 S. Ct. at 1924-25 (Stevens, J., dissenting).

192 *Id.* at 1925 (Stevens, J., dissenting) (quoting Henderson v. Morgan, 426 U.S. 637, 650 (1976) (White, J., concurring)).

193 *Id.*

194 *Id.*

195 *Id.* Justice Stevens specifically observed that "[i]t is fundamental that an appellate court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury would have found something that it did not find." *Id.*

196 *See id.* at 1926 (Stevens, J., dissenting).

197 *See id.*

198 *Id. See also* Connecticut v. Johnson, 460 U.S. 73, 95 n.3 (1983) (Powell, J., dissenting).

199 *Pope*, 107 S. Ct. at 1926 (Stevens, J., dissenting).

Pope decision exemplifies what Justice Harlan once called, "the intractable obscenity problem."[200] Despite the majority's gallant effort to clarify the existing test for obscenity, the truth of the matter is that the existing obscenity standard is neither less vague nor more definable than the standards of the past.[201] Justice Brennan once remarked with respect to obscenity that "[t]he problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."[202] More recently, Justice Scalia expressed this precise sentiment by recognizing the extreme difficulty in determining literary or artistic worth on an objective basis.[203] Statements like these illuminate the seriousness of the vagueness problem. As Justice Stevens observed, "[t]he Constitution cannot tolerate schemes that criminalize categories of speech that the Court has conceded to be so vague and uncertain that they cannot 'be defined legislatively.' "[204]

The uncertainty that surrounds what constitutes "obscenity" is a formidable problem.[205] Vague obscenity statutes fail to provide adequate notice to alert a person that they may be in danger of criminal prosecution.[206] The *Pope* majority reasoned that the petitioners "could not plausibly claim that the repealed statute failed to give them notice" that they would be subject to prosecution for the sale of obscene materials.[207] The majority's reasoning is flawed because although the petitioners realized the magazines were "pornographic," they might not have known that the magazines were legally "obscene."[208] Despite this consideration, however, the majority would subject the petitioners to criminal prosecution.[209] Legislation that more specifically defines the types of materials that are deemed legally obscene must be enacted to alleviate the vague-

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200 Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part).

201 *See generally* Miller v. California, 413 U.S. 15 (1973); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966); Roth v. United States 354 U.S. 476 (1957); Regina v. Hicklin, 3 L.R.-Q.B. 359 (1868). *See also* F. SCHAUER, *supra* note 37, at 57.

202 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

203 *Pope*, 107 S. Ct. at 1923 (Scalia, J., concurring).

204 *Id.* at 1929-30 (Stevens, J., dissenting) (quoting Smith v. United States, 431 U.S. 291, 303 (1977)).

205 *See* Note, *supra* note 63, at 1847-52.

206 *See Pope*, 107 S. Ct. at 1928-29 (Stevens, J., dissenting).

207 *Id.* at 1921.

208 *See id.* at 1929 (Stevens, J., dissenting).

209 *Id.* at 1921.

ness of the obscenity definition. Moreover, the utilization of criminal prosecution as the means for controlling the possession and sale of obscene material must be seriously questioned.[210] A declaratory judgment procedure which utilizes the civil process, as opposed to criminal prosecution,[211] would appear to strike a more balanced approach between the states' interest in morality and the first amendment.

The *Pope* Court's interpretation of the third prong of the *Miller* test is a small step in the right direction. As Justice White observed, the value of a work does not vary from one community to another, as far as the first amendment is concerned.[212] By substituting an objective "reasonable person" standard for the trial court's "community standards" approach, the Court adopted a seemingly less confusing approach for deciding whether a material lacks serious value.[213] Whether application of the reasonable person standard is less subjective than the "community standards" approach remains to be seen. As Justice Stevens observed in *Smith*, "[i]n the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law."[214] Since obscenity is such a subjective concept, it is likely that the Court will need to revisit the *Miller* test in the future.

The Court's ruling on the harmless error issue also leaves several issues unresolved. The first major issue that requires attention is where to draw the line between constitutional rights which are "so basic to a fair trial that their infraction can never be deemed harmless"[215] and constitutional rights which are not so basic to a fair trial. Since *Chapman*, it has generally been recognized that all constitutional violations do not necessitate the automatic reversal of a conviction.[216] However, to designate a constitutional error as harmless, a reviewing court must find that the error "was harmless beyond a reasonable doubt."[217] Although the *Pope* Court found that an erroneous jury instruction concerning application of the appro-

210 *See* Smith v. United States, 431 U.S. 291, 313 (1977) (Stevens, J., dissenting).

211 *See* COMMISSION ON OBSCENITY, *supra* note 5, at 63.

212 *Pope*, 107 S. Ct. at 1921.

213 *See* Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of the Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159, 1169-70 (1986).

214 *Smith*, 431 U.S. at 316 (Stevens, J., dissenting).

215 *Chapman*, 386 U.S. at 23 (footnote omitted).

216 *Id.*

217 *Id.* at 24.

priate obscenity standard was subject to harmless error review,[218] the Court refrained from articulating a coherent standard for determining when an infringement of a defendant's constitutional right during a criminal prosecution may constitute "harmless error." It is imperative that the Court promulgate such a standard in order to provide reviewing courts with clear-cut guidelines for addressing this important issue.

The majority's ruling also leaves open the question of how far an appellate or trial court may go in resolving issues which have been traditionally and exclusively reserved for determination by the jury. The Court held that despite the trial court's improper jury instruction, "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convictions should stand."[219] It appears that the Court is granting appellate courts the authority to "constitutionally supplement" the findings of the jury.[220] Although the Court in *Rose* held that the harmless error standard may be applied to jury instructions concerning elements of a crime and standards of proof,[221] an appellate court does not have unbridled discretion in a criminal trial to determine what a jury would have decided with a different instruction.[222] As Justice Blackmun noted in *Rose*, "[a] trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence."[223] It has been noted that "the greatest cost of the harmless constitutional error rule is its usurpation of the jury function."[224]

No analysis of a harmless error decision in a criminal prosecution would be complete without a discussion of the sixth amendment. The sixth amendment guarantees all criminal defendants "the right to a . . . trial, by an impartial jury."[225] As Justice Blackmun stated in *Rose*, each criminal defendant is guaranteed the right "to have a jury of his peers determine whether . . . [guilt] has been

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218 *See Pope*, 107 S. Ct. at 1922.

219 *Id.* The Court did not decide the harmless error issue although it noted that it did have the authority to do so. *Id.* at 1922-23. Instead, the Court remanded the case to the Illinois Court of Appeals for resolution of the harmless error issue. *Id.* at 1923.

220 *See id.* at 1925 (Stevens, J., dissenting).

221 *See* Rose v. Clark, 106 S. Ct. 3101, 3108-09 (1986).

222 *See Pope*, 107 S. Ct. at 1925.

223 *Rose*, 106 S. Ct. at 3113 (Blackmun, J., dissenting).

224 *See Goldberg*, *supra* note 105, at 430.

225 U.S. CONST. amend. VI.

proven beyond a reasonable doubt."[226] Although the *Pope* decision indicates a respectful degree of sensitivity to the defendant's sixth amendment rights, a question still remains as to how far the Court is willing to intrude upon these rights. For now suffice it to say that there appears to be a gradual trend toward the erosion of a criminal defendant's sixth amendment rights.[227]

The *Pope* decision illuminates the problematic nature of both the modern-day obscenity standard and the harmless error doctrine. Despite the majority's noble effort to elucidate the constitutional definition of obscenity,[228] there remains a need for a clear and understandable definition of obscenity that provides sufficient notice to those who may be in danger of criminal prosecution. Legislators and courts must recognize the inherent dangers associated with regulating free expression. The first amendment commands that the right of free speech must not be abridged.[229] Courts must also acknowledge the potentially catastrophic consequences of the harmless error doctrine. Reviewing courts must not be permitted to intrude upon a jury's constitutionally mandated function. To so permit, would be to fracture the foundation of the sixth amendment.

David J. Paulin

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226 *Rose*, 106 S. Ct. at 3113 (Blackmun, J., dissenting).

227 *See, e.g.*, Pope v. Illinois, 107 S. Ct. 1918 (1987); Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986); Rose v. Clark, 106 S. Ct. 3101 (1986).

228 *See Pope*, 107 S. Ct. at 1924 (Stevens, J., dissenting).

229 See U.S. CONST. amend. I.