LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1973

TITLE RICHARD POPE AND CHARLES G. MORRISON, Petitioner V. ILLINOIS

PLACE Washington, D. C.

DATE February 24, 1987

PAGES 1 thru 55

ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

---

RICHARD POPE AND CHARLES G. MORRISON,

Petitioners,

v. : No. 85-1973

ILLINOIS

---

Washington, D.C.

Tuesday, February 24, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

GLENN A. STANKO, ESQ., Champaign, Illinois; on behalf of the Petitioners.

MS. SALLY LOUISE DILGART, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the Respondent.



ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-1973, Pope against Illinois.

Mr. Stanko, you may proceed whenever you're ready.

ORAL ARGUMENT OF GLENN A. STANKO, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. STANKO: Mr. Chief Justice, and may it please the Court:

The constitutional test for obscenity which is applicable to the states through the First and the Fourteenth Amendments contains three parts, each part of which must exist separately and independently in order for a work to be found obscene.

The third part of that three-part test, the third component, is a value consideration. And that value consideration has been specifically crafted to protect works having value from hostile majoritarian sentiment.

Richard Pope and Charles Morrison were both tried under a State of Illinois statute which allowed the views of a majority to determine the question of whether the work was utterly without redeeming social value.

In short, community standards were applied to the value consideration.

That Illinois obscenity statute is unconstitutional in each and every possible application, no matter to whom applied or to what applied, whether it's a retailer, a distributor, a publisher, or, as in this case, a clerk in an adult bookstore, or whether it's applied to a --

QUESTION: Well, we're really just talking about this particular case. This statute has been replaced, hasn't it?

MR. STANKO: That's correct, Your Honor. Subsequent to the convictions in this case, the State of Illinois passed a new obscenity statute.

I think it's instructive to note that the obscenity statute put into place by the State of Illinois legislature conforms precisely to the construction for which we argue in this case.

And explicity, it puts community standards into the first element of the test, which is the

patently offensive part of the test.

It includes community standards in the second element, which is the -- excuse me, the first is prurient interest; the second is patently offensive. And it omits community standards from the value determination.

So what we have is the State of Illinois arguing for a construction of the statute which is really consistent -- inconsistent with what it has on the books right now.

QUESTION: Well, Mr. Stanko, I don't understand your point when you say that the issue is whether, you know, the majority can run roughshod over -- it really isn't an issue of whether the majority can or not.

Your complaint is that it has to be the majority that does it, and that you can't use community standards.

You're perfectly willing to have literary works banned because the majority considers that they have no literary merit.

MR. STANKO: That's not true at all.

QUESTION: All you're insisting is that it be a nationwide standard and not a community standard. It's just a question of how big the majority has to be,

isn't it?

MR. STANKO: That's not true, Your Honor.

QUESTION: Oh, then I don't understand your --

MR. STANKO: I'm not arguing for a standard. And I think it's improper to characterize it as a standard.

The value determination is a focus. The jury should look at value and determine it, just as it determines similar elements in any other criminal case.

If you try an aggravated battery case, for instance, the jury looks to determine whether great bodily harm was done to the individual.

They're not told to look through the eyes of the community and decide whether the average person applying some standard would find that great bodily harm was done. They take the facts and the evidence in the case and evaluate whether great bodily harm was done.

QUESTION: Well, are you saying that the jury here then should simply evaluate on its own whether or not there's redeeming value?

MR. STANKO: I'm saying that the jury should evaluate based on the evidence in the case.

QUESTION: Well, what sort of evidence would be admissible, under your view?

MR. STANKO: Any evidence which would relate

to the value of the particular work. It might be, such as in Jenkins v. Georgia, evidence of reviews, criticisms.

It might be expert testimony relating to the work.

QUESTION: And how would the judge charge the jury?

MR. STANKO: The judge would do more than charge the jury that they are to determine if the work, in Illinois, under this statute, was utterly without redeeming social value.

He would not charge them that they apply that -- they determine that applying contemporary comminity standards.

QUESTION: But he wouldn't say any -- he wouldn't have to say anything else that, you know, you must give some consideration to the expert testimony and that sort of thing?

MR. STANKO: No, I don't think he has to say anything about the expert testimony. He does, as in any criminal case, and as occurred in these two cases, tell the jury to use -- to evaluate the evidence using their own observations and experiences in life.

QUESTION: Well, what difference would this make in the outcome of any case? You know, juries, I

think, apply community standards whether they're told to or not?

MR. STANKO: Because in many cases, particularly when you have a small community, the jury could ascertain that in this community this work would be found to be unacceptable, and we find that it would be obscene, applying contemporary community standards.

But if we sit back and divorce the feelings of the community from the inquiry itself, we find that, yes, this work does have some value.

QUESTION: Do you think jurors would do that without any more charge than you've suggested from the judge?

MR. STANKO: I think they can and do that everyday, Mr. Chief Justice.

QUESTION: Mr. Stanko, may I inquire whether the petitioner offered any evidence that the materials here had redeeming social value?

MR. STANKO: There was no evidence offered in either one of these cases, Your Honor.

QUESTION: Then how would the petitioner be prejudiced here?

MR. STANKO: Well, in each of these cases, an attack was made on the validity of the statute, both as written and construed.

The attack was that the statute was unconstitutional because it allowed community standards to be applied to the value consideration.

That is sufficient, certainly under Illinois law, to raise the constitutional issue. There's no requirement that evidence, or an attempt to present evidence --

QUESTION: But you lost on that issue, and the petitioner was tried and convicted.

MR. STANKO: That's correct. We lost -- the statute was effectively construed by the trial judge to include community standards in the consideration.

So at that point to present evidence, unless it was within the community itself, of value, would have been nothing more than a useful ceremony.

QUESTION: But you didn't even make an offer of proof?

MR. STANKO: That's correct. But under Illinois law, no such offer would be required to preserve the issue.

QUESTION: (Inaudible) an instruction to consider community standards?

MR. STANKO: Yes, there was.

QUESTION: So the jury was told to look to community standards?

MR. STANKO: The phrasing of the instruction allowed the jury to apply community standards, that's correct, Your Honor.

QUESTION: What instruction did you request?

MR. STANKO: In the Morrison case, there was a specific instruction which included community standards in the first two elements and excluded it from the third element.

There was another instruction which would have, by itself, advised the jury that they could consider community standards only on the first two parts of the test.

In the Pope case, because of the construction given by the trial court both in that case and in the earlier Morrison case, there was no separate instruction tendered by the defense relating to community standards.

The instruction was crafted along the construction given by the trial court.

QUESTION: I must say, you've sort of thrown me off. Because I -- it's not your fault, I suppose, but I had thought you were seeking -- as I think the Chief Justice thought -- that you were seeking an implicit instruction that the third part has to be determined on the basis of national standards.

But you're not. All you want is the absence

of an instruction that it be determined on the basis of community standards?

MR. STANKO: Well, the relief sought in each case flows from a constitutional facial attack on the statute.

And the facial attack is that the statute allows community standards to come in on the third element.

Flowing from that is the instruction issue that as a result of that instruction, juries are being instructed that community standards are to be applied to all three elements.

We would be more than happy to not have a specific instruction which says, you may only apply it to the first two elements, but just have an instruction that lays out the elements of the test, put community into the first two elements, leave it out of the third element, and the jury has what it needs to make its consideration.

One of the promises of Miller was that the First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government, or regardless of whether a majority of the people approve of the ideas in that particular work.

Majoritarian rule is the essence of contemporary community standards. And ultimately, I think, the State of Illinois recognizes that that is the vice to be protected against in its brief.

Page 31, it says, the courts of review are the protectors of expression from suppression by majority rule.

Well, certainly if the courts of review are the protectors, the jury in the first instance should be the protector.

Page 21, Respondent admits --

QUESTION: Mr. Stanko, may I interrupt you on that point?

Is it your view that the value determination is a question of fact or a question of law?

MR. STANKO: It's a question of fact for the jury. For a court of review, I believe it would be categorized as a mixed question of fact and law to decide.

It's a constitutional fact which any court of review has to review independently.

QUESTION: Maybe there's a third category: fact, law and taste.

MR. STANKO: Well, I suppose taste might enter into the court's determination of the fact, but that's

the way I would view --

QUESTION: I'm a little unclear. You say it's a question that has to be reviewed independently. Is it sort of on a de novo standard, the judge's own view of whether there's value there? Or whether the jury could permissibly think there was no value there?

MR. STANKO: Beginning with Jacobellis v. Ohio and on through the Miller line of cases, Smith v. United States, this Court has recognized in an obscenity case any appellate court, and ultimately this Court, has an independent -- has an obligation to independently constitutionally review the facts pertaining to obscenity.

QUESTION: I understand. What I'm really asking, I guess, is, do you think the scope of review, on an appeal or by the judge ruling on a motion in the trial court is any different on the third element than it is on the first two elements?

MR. STANKO: I think it's broader on the third element, Your Honor, necessarily so. Because when community standards are applied to patently offensive or to prurient interest, certainly an appellate court, in a state that might have a countywide standard, or this Court, is not going to be in a position to know what the community standards were.

So by necessity, there's going to be some limitation of the review.

When you get to the value element, you're in a position to look at everything without community standards being imposed. Recognition was given to that in Smith v. United States: the third element of the test is particularly amenable to judicial review.

Now, I believe that's correct. I believe that's kind of the tie that binds everything together when you get up into the appellate court or to this Court.

QUESTION: Mr. Stanko, I was not being entirely facetious when I said, you know, there may be three categories.

You put it to us as though the question of whether it is utterly without redeeming social value, or under the modern test, whether it has any literary or artistic merit, is simply a question of reality. It either does or doesn't.

But you know there's a Latin maxim -- the point is so well known that there's Latin maxim: de gustibus non est disputandum. It's no use arguing about matters of taste.

You can't say as a matter of fact that a particular work of modern art is, you know, has artistic

merit or not. Some people will say it's wonderful; other people will say it's terrible.

Now, I can understand how a jury or a court can decide that matter on the basis of either local community standards, that is, most of the people in this community think it's a nice piece of art, or even national standards, most of the people nationally think it's good art.

But I don't see how a jury is to abstract itself from community standards and decide, as a matter of fact, whether this is good art or not.

Isn't that utterly unrealistic? Aren't you really driven to telling the jury, either use local standards or use national standards?

You can't tell them, as a matter of fact, is a Campbell's Soup can good art or not?

MR. STANKO: There are many situations in which something may have value, but only a minority of people, but not to a majority of people.

If you look at many of the works that were held obscene years ago -- Ulysses, God's Little Acre -- any number of things that state courts held obscene, you will understand that the majority might dislike something that ultimately does have value, does have importance to someone.

I think a jury can understand the concept that, okay, a majority of people in this community don't particularly care for this work, but we see that it conveys an idea, we see that it conveys information, that could have importance to some portion of our society.

We're going to set aside those feelings of the community and say, this work does have redeeming social value of some sort.

And I think a jury -- it's difficult --

QUESTION: But each one is to judge on the basis of his own determination, not looking to national standards, do art critics nationally think so, do other communities think so, but rather, the juror is to look at it and say, this has artistic merit.

That's what you want them to ask the jury to do?

MR. STANKO: I want the jury to look at it based on the evidence. I don't want the jury to decide it based on personal opinion. And certainly jurors are instructed not to apply their own personal opinion.

QUESTION: Art is personal opinion, is what I'm suggesting.

MR. STANKO: Well --

QUESTION: Unless you look to a national

standard or a community standard, there's nothing else but opinion.

MR. STANKO: I would suggest that evidence can be adduced about works that could show the jury that although their taste did not extend to these works, that there was a significant segment of society had value.

Look at the --

QUESTION: Now you're back to saying that what the instruction has to be, ask the jury whether nationally a lot of people would consider this to have artistic merit.

So you are saying that they are to apply a national standard; not their own judgment.

MR. STANKO: The evidence could be national in scope. And certainly if the evidence came in from Washington, D.C., that a particular work had value, an Illinois jury could consider that evidence.

But when you talk about a standard, you're talking about comparing one thing to another. And a standard implies a majority determination of some kind.

We are not asking the jury to compare the value of a work to a majority determination across the United States.

We are asking the jury to look at whatever evidence may be available, whether it's in the State of

Illinois, or whether it's on the West Coast or up in Maine or whatever, regarding this particular work, and make a decision whether or not it has some value.

I think that's the distinction.

QUESTION: Is there ever in these cases, or was there in this, any attempt by the judge to tell the jury what value meant?

MR. STANKO: No. No, other than putting in the term, utterly without redeeming social value, that was the extent of it.

QUESTION: Except that they said community standards.

MR. STANKO: Community standards applied to all three elements, yes. And I don't this case is really a case where --

QUESTION: Was there a definition of community standards?

MR. STANKO: No. Well, ordinarily adults in the State of Illinois. The community in -- the community in the State of Illinois, in every case, no matter where tried, is a statewide.

QUESTION: So it's a statewide standard?

MR. STANKO: That's a statewide standard, that's correct.

QUESTION: And the jury is told that?

MR. STANKO: Yes, they are.

The value independent, an independent value element, is extremely important to anyone whose in the business of publication, distribution of literature of any kind.

It's difficult to determine what the community standard is from state to state, county to county, city to city.

And certainly anyone in the national publishing business would not realistically be in a position to do that.

But if that person who wants to disseminate the material knows that that material has value in it, then that person has a safe harbor.

All lawyers like to look for the safe harbors. Well, in obscenity, the safe harbor is, I may have a work that some patently offensive sexual conduct, I may have a work that appeals to the prurient interest, but I also know this work has value.

And knowing that, even if the ideas I convey are unorthodox, even if they're unpopular, I can go ahead and convey that material, I can sell that material, whether or not it is consistent with the norms of taste in the community.

On the other hand, an obscenity statute such

as Illinois', as it has been construed, has a negative impact. Any determination of obscenity is made on a parochial basis. Prevailing local tastes become the standard.

And the resulting chill destroys the opportunity for persons to have unimpeded access to information and ideas.

I think this idea of unimpeded access is important. And if we look back 20, 25 years ago, there are many things that a majority of the people would have felt were not of value; certain information about contraception. The Joy of Sex is a book that --

QUESTION: (Inaudible) just parochial?

MR. STANKO: It's a State of Illinois. Somehow Chicago is amalgamated into the State of Illinois for determining the standard.

But they would be, for terms of trying a case, going into the city, you have to ascertain the community standard for that particular city.

QUESTION: Where was this case tried? In Chicago?

MR. STANKO: No, this case was tried in Rockford.

QUESTION: Rockford.

MR. STANKO: Ninety miles northwest of Chicago.

QUESTION: Winnebago County.

MR. STANKO: The jury was selected on a -- juries in Illinois of course come from the country.

So what you are in a position of having a jury from one particular country ascertain what the statewide community standard is.

QUESTION: What's the population of that country? About 100-, 150,000?

MR. STANKO: Of Winnebago County?

QUESTION: Yes.

MR. STANKO: 250,000.

QUESTION: 250,000.

MR. STANKO: The idea is, with majoritarian rule, when it comes to value, we freeze the state of knowledge on certain things.

If the idea is not acceptable to the majority, it doesn't have the opportunity to germinate; it doesn't have the opportunity to develop.

On the other hand, if we let an idea that may be acceptable to a minority of people grow, if we don't ban it just because a majority of people feel it's an unpopular idea, an unorthodox idea, then at some point in the future, 15 or 20 years from now, it may have worth to a significant segment of society.

QUESTION: I don't understand what you just

said. If a minority of people think it has value, it has value. Is that it?

MR. STANKO: What I'm saying is that if we suppress works based on majority view, then works that may have value, albeit to a significanit -- albeit to a majority --- minority of society, may never have the opportunity to grow and develop.

QUESTION: That may be true, but how do you charge the jury? Do you charge the jury, if any minority of people think this has value, you have to let it --

MR. STANKO: Well, I don't think case involves the scope of what the charge would be. But going beyond that, I think you charge the jury that the jury determines whether the work is utterly without redeeming social value, and leave it at that, and let the jury make its determination based on the evidence and based on other instructions given.

QUESTION: And you're confident that on the basis of that instruction the jury is going to come to a conclusion that if a minority somewhere thinks it has redeeming social value, the jury has to find it has redeeming social value?

MR. STANKO: I think if there's evidence to that effect, and the jury believes that evidence, it can

make that determination.

QUESTION: I would find that a confusing (inaudible) way as a juror member who got that charge. I wouldn't think that that's what it meant, if there's a minority who likes it --

MR. STANKO: Well, certainly, there would be opportunities for states to develop that charge. And once again, the scope of this case, the issue in this case, doesn't involve exactly how you would charge the jury.

The question is, are you going to let the jury make the determination based on what a majority of people feel about the work in the community? Are you going to let parochial test prevail?

And that's what should be avoided.

QUESTION: Mr. Stanko, it occurs to me, there might be cases in which it would be more favorable to the defendant to use the local standard rather than the national standard.

Supposing you had a work that had special appeal to Scandanavians, who would understand some particular message; or it might appeal to a lot of people in Rockford but not nationwide.

So maybe there would be cases it seems to me where you might be better off with a local standard.

MR. STANKO: Well, that may be true. But at the same time, if that's correct, then evidence could be brought in to bear on the value determination, and I think that evidence will be relevant on how the jury ultimately decides that question.

Obscenity is both a local and a national concern. And certainly this Court in Miller, when it told us that the people in one city or country do not have to accept what people in another city or county find tolerable, indicated that.

In Smith, we were also told that to the extent that local concern is relevant, the jury's application of contemporary community standards fully satisfies that interest.

On the other hand, we have the interest that fundamental limitations on the First Amendment -- fundamental limitations on the state through the First Amendment do not vary from community to community.

If the local community standards, and the values, are to be tied together, ultimately it's the value concern which gives the works the national protection.

It's a consistent element. It's always there for a court of review to draw on. Ultimately it's here for the Supreme Court to draw on.

And it's been present ever since the beginning when Roth was decided. Although not stated as part of the test in Roth, value was certainly talked about, and the Court said that something was obscene only because it was utterly without redeeming social importance.

It was present again explicitly in Memoirs when we used -- when the Court used an "utterly without redeeming social value" test. And finally, in Miller, when the more restrictive "lacking serious literary, artistic, political or scientific value" was adopted, it was present.

It's always been there. And it's always been there for a jury or a court, an appellate court or this Court, to reach in and rescue a work because a parochial jury had determined that work to be obscene.

And that's really consistent with what we talked about earlier, the scope of review, particularly amenable to judicial review, as this Court indicated in Smith.

The Illinois obscenity statute is unconstitutional in each and every application. It's unconstitutional as applied to Mr. Pope and Morrison. It would be unconstitutional no matter to whom or to what applied, in any circumstances.

Sensitive tools are required to operate along

that dim, uncertain line between protected speech and obscenity. This is not a sensitive tool. This is a bludgeon.

We would ask the Court, as it did in Pinkus, Pinkus v. United States, where children were included in the community, to reverse the conviction in this case.

We would also ask the Court to hold the statute facially invalid.

If the Court has no more questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stanko

We'll hear now from you, Ms. Dilgart.

ORAL ARGUMENT OF MS. SALLY LOUISE DILGART, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. DILGART: Mr. Chief Justice, and may it please the Court:

I'd like to supplement Petitioners' summary of evidence in this case, because this record reveals that petitioners were pandering sexually exclusive material of the hard-core variety solely for its prurient appeal and commercial gain.

These six magazines were purchased from two adult bookstores in Rockford, Illinois, that advertised magazines and marital aids for sale, and video films to watch inside the stores.

Access to those stores was limited to adults only, and there hundreds of magazines just like these for sale inside those stores.

Everone of the magazines was sexually explicit, and the proprietors had even grouped the magazines in categories, categories that advertised the prurient appeal of the particular subject matter involved.

The titles alone of these magazines revealed that their extensive -- their exclusive purpose is to appeal to prurient interest. Each one of the magazines which you have before you today contains an uninterrupted series of photographs depicting the same kind of offensive hard-core sexual conduct described by this Court in Miller and defined by Illinois law.

Not one of those magazines contains any stories or any attempts at literature. There are only extended captions, captions that reiterate in graphic terms the explicit nature of the photographs themselves.

So I submit to you, then, in this context, that there is no evidence within this record upon which any jury could find some type of value.

Petitioners pandered materials portraying hard-core sexual conduct. The authors of these magazines do not even try to convey ideas or artistic

messages.

So I submit to you that a jury applying any value standard, under either of the parties' tests, would necessarily find these magazines to be obscene.

At issue before this Court today is --

QUESTION: Is it your view that in order to decide this case we have to read these magazines?

MS. DILGART: It's been my understanding of the Court's decisions in the past, Your Honor, under appellate review, that the Court will undertake that duty, and has a constitutional obligation to conduct a review to make sure that the First Amendment has not been violated in this case.

QUESTION: Were they set forth in the Joint Appendix, the parts that you're saying we should look at?

MS. DILGART: I'm sorry, I couldn't hear the first part.

QUESTION: Are the portions of the magazines that you think we should look at in the Joint Appendix?

MS. DILGART: No, it's my understanding that all the magazines as people's exhibits, and are within the record in that matter.

QUESTION: But you think we should read them, even though you didn't bother to put them in the Joint Appendix?

MS. DILGART: That would be correct, Your Honor.

Today this Court is asked to decide whether value determinations should be made with reference to ordinary adults within the community.

We wish to make two arguments. First, that such an instruction does indeed serve the First Amendment. And secondly, even if value determinations may not be made in this manner, the petitioners' convictions must nevertheless be affirmed because they were not materially prejudiced by the instructions at their trials.

After Memoirs and Miller, jurors are required in the first instance to sit as fact-finders to determine if the material appeals to prurient interest, depicts sexual conduct in a patently offensive way, or whether the material has value.

This Court has indicated that those three elements coalesce in a community definition of obscenity. So in submitting the case to the jury for its initial determination, then, there's no reason to treat value determinations in any other way.

Jurors need a consistent frame of reference when making these three determinations.

In these particular cases, the Pope and

Morrison juries were instructed to discard their personal opinions, to consider the views of ordinary adults within the whole State of Illinois.

We submit to you that that instruction was constitutionally proper.

Jury determinations of value should be made with reference to community standards. And I use the term "community" in the sense that, by definition, it will look beyond the idiosyncratic opinion of a single person to focus on common views held by a larger group of people.

Juries were designed to bring a sense of community to the law, and jurors perform their intended function when they make judgments of this very sort.

Contrary to petitioners' claim, community standards are, in a sense, objective, because they prevent jurors from indulging their personal opinions or tastes.

That does not mean that the First Amendment requires any particular geographic designation of the community, because I submit to you that decisions of those nature are best left to the states.

Allow the states to decide the geographical designations in a manner consistent with our traditions of local government, in matters of public welfare.

Yet the contrary -- the inference here is that if a state wishes to adopt a statewide standard, as it did in this case, to facilitate the juries' decision-making, then that state may constitutionally do so.

QUESTION: What do you do about the publisher who thinks that he has something of artistic merit, but it has material in it that he thinks would offend some communities' sensitivities, explicit sexual material. Nonetheless, he thinks it has artistic merit, and he would be very confident to send it out there under our three-part test except that there may be some little community that just doesn't like this kind of art.

Now you're saying he's just at risk.

MS. DILGART: I would submit three things to you, Your Honor.

First of all, that that's not the situation in our case.

QUESTION: I understand that.

MS. DILGART: Because, again, there was no intent to convey ideas.

QUESTION: I understand that.

MS. DILGART: Secondly, I would submit that there is not a significant notice problem of a nature that you suggest, because under the standard that we

advocate today, people can -- authors and distributors can reasonably know the contours of that community definition.

In this case, in fact, petitioners introduced evidence of the statewide standard. Petitioners here knew the contours of the community standard.

QUESTION: Of what the community thought was good art and what was bad art? I think it's a lot easier to learn the community standard on the first two points than on the third.

I have no idea what they consider good art out -- I don't even know what they consider good art inside the beltway.

MS. DILGART: The problem that we would have is, under the alternative approach advocated by petitioners, they'd have no indication whatsoever, because we would not even know what the standard was.

If there is to be an objective standard, such as that advocated by petitioners, some sort of abstract definition, a per se value test, then I submit to you that the notice and chilling problems would be significantly -- significantly greater there.

The best approach that we can present to the Court in this case today is an approach in which people may sit as ordinary adults within a particular

community, a community from which they are drawn, where they will reasonably be expected to know the views of that community.

It is a better approach than an objective per se standard or a national standard, which as I understand it, are the options in this case.

QUESTION: May I ask you, following up on Justice Scalia's thought, supposing a publisher had a book that he wanted to sell in Illinois, and he's in New York, and he took it to the art critic or the literary critic of the New York Times, and that person told him, this has got a lot of value. It's going to be great art in the next couple of generations.

And he asks somebody at the Chicago Tribune, and he says, this is junk. Don't bother selling it in Illinois.

I take it the evidence of what the New York Times critic told him would not even be admissible in the case?

MS. DILGART: We do not agree, Your Honor. We would -- we would submit to you that any evidence which is relevant to the value of the material is admissible as relevant to the material's value.

QUESTION: Relevant to the value as measured by the Illinois standard? Why would the New York Time's

critic's opinion have any value for that?

MS. DILGART: It would be admissible as any other sort of expert testimony. The New York Times critic in that case could not usurp the jury's function and make the ultimate determination; but the juries could consider that.

QUESTION: What if the New York Times critic said to the author, this is great stuff in New York and east of the Hudson, but I know they wouldn't like it in Illinois. It would be considered junk in Illinois.

Would his evidence be admissible or not?

MS. DILGART: To the extent that a defendant would seek to introduce evidence pertaining to a community reaction outside the state standard employed, no, it would not be admissible in that context.

Where is here, then, the Hamling approach? The subjective, idiosyncratic approach has been rejected. And jurors will look beyond personal opinions to consider the views of ordinary adults within a community.

I submit to you that the demands of the First Amendment have been satisfied.

To the extent the petitioners decry the possibility of parochial determinations of value in this standard, I submit the petitioners' fears are not well

founded.

The First Amendment does not require a national standard. It does not require homogenous expression.

This Court, in the Hamling decision for example, has indicated that different judicial districts may have different community determinations, just as different states may regulate in different ways or not at all.

And as a logical conclusion, I feel that different states may reach different conclusions concerning, say, the artistic value of a work.

The proper check against unconstitutional results has already been provided by the existing safeguard of appellate review. Under the broad scope of appellate review for First Amendment cases described in Bose, this Court, regardless of the community standard employed, may exercise its independent judgment to review any of the three --

QUESTION: What standard would the appellate court have to apply on appellate review of this third part of the Miller test?

Would it have to review what the Illinois community standard is, I suppose?

MS. DILGART: I must be candid and say that

the Court has not spoken with utter clarity in the past, because this issue has never been before the Court.

As I read Miller, Miller approved and required the use of community determinations, community standards, for the first two prongs.

And about two paragraphs later, the Court noted that of course it would have independent appellate review, of the New York Times nature, available to it.

That suggests to me two possibilities. Either community determinations can be reviewed, and that the courts will not have difficulty in doing so.

Or, that the courts are not necessarily restricted to assessing the sufficiency of evidence underlying the community standard employed.

QUESTION: Well, Ms. Dilgart, in Jenkins v. Georgia, we reviewed, was it, a patently offensive determination, and said there just wasn't enough evidence to support a patently offensive. And I gather that all concede that "patently offensive" should go under community standards.

MS. DILGART: I read Jenkins a little bit differently, Your Honor, because Jenkins, as I understand it, looked to see whether or not the described types of hard-core sexual conduct were present within the movie, Carnal Knowledge.

QUESTION: Oh, the first part of the prong of Miller? The things that were permitted and not permitted as described in Miller?

MS. DILGART: Under the second prong of patently offensive sexual conduct, yes. I read the case more narrowly.

Respondent believes that petitioners proposed instructions for value determinations will not assist a jury. In fact, we believe that petitioners' proposals might actually encourage unconstitutional results.

To the extent that petitioners would exorcise any reference to ordinary adults within a community, petitioners, we feel, would remove that portion of the insutruction that jurors will not indulge their personal or intolerant views.

And I would like to address some of the Court's questions in the opening part of the argument, and discuss the three possibilities for petitioners' standards here as I see them.

First of all, I find reference within petitioners' briefs to some sort of objective standard. It is my belief that if petitioners are asking this Court to enumerate all possible criteria for value in the abstract, in order to formulate some sort of other objective test, then we would oppose any shorthand per

se value test.

These simply are not susceptible to definition. There is no Merck Manual for obscenity. There's no field guide to literature.

Nor should any per se test be adopted in advance of the material's distribution, for that material may be pandered.

These matters, we believe, are best left to the initial determination of a jury drawing on their own knowledge, considering any expert testimony which may have been admitted at trial, and with the safeguards of the Miller case and appellate review.

The second possibility for petitioners' standards concerns a national standard. Because they repeatedly fear in their brief the possibility of parochial determinations, they also, at least to my mind, seem to favor a national community standard.

We find three flaws with that approach. First, parochial determinations are not per se unconstitutional. The First Amendment does not require a national standard.

Secondly, we doubt that that sort of standard could ever be defined. I do not know how anyone in Illinois can divine the -- at least of artistic value or literary merit for Las Vegas and New York.

And finally, I think it's been suggested earlier by the Court, that a national standard could actually work to petitioners' disadvantage, in the event that distribution of some magazines was ultimately discouraged in some portions of the country.

The third and final standard that's suggested by petitioners, and amici especially, would place value determinations in the hands of experts, upon the dubious assumption that jurors cannot be trusted to determine value within a work.

We suggest -- we reject, rather, any suggestion that obscenity determinations be made by blue ribbon panels of experts.

Jurors have been deciding questions of obscenity (inaudible) all along. The courts have always assumed that laymen can recognize value.

Jurors, we believe, can be trusted to recognize bona fide expressions of ideas, even if they don't personally approve of those ideas, or even if those works don't suit their particular taste.

Ultimately, any of petitioners' standards will mandate the use of expert testimony in obscenity prosecutions, because all of petitioners' standards presuppose some body of knowledge beyond the ken of the average juror.

We reject both that assumption and the conclusion requiring expert testimony in these cases.

In contrast, we believe that jurors sitting as ordinary adults are entitled to determine which magazines have value to them. A community standard, with an appropriate scope of appellate review, will best serve that goal.

We'd like to talk for a moment, too, if we may, about some of the safeguards that are inherent within the system.

Petitioners, I feel --

QUESTION: Excuse me, General Dilgart, before you get to that, you asserted earlier that it doesn't matter here anyway, because even under the standard that the petitioner asserts, these magazines would have failed.

Why isn't this just a typical First Amendment situation in which a party is allowed to raise the rights of a third party not before the Court?

That is, even though this petitioner has no proper cause to complain, there are other people who do have cause to complain, and he's allowed to assert their attacks on the statute.

Why doesn't that line of cases apply?

MS. DILGART: It's my understanding that that

line of cases -- there's been conflicting opinions within the Court in the past on that topic, I know.

But it's been my understanding that in a recent decision, New York v. Ferber, I believe, that this Court, referring to the Broderick v. Oklahoma substantial overbreadth analysis, indicated that that would not be necessary because of the values to be protected by the First Amendment.

QUESTION: Indicated what? I didn't -- indicated what?

MS. DILGART: That these standing rules would be relaxed because of the values permitted by the First Amendment.

QUESTION: Would be relaxed?

MS. DILGART: Uh-huh.

QUESTION: Well, that's exactly my point. So the petitioner here would be allowed to raise points that he has no real reason to complain of, but somebody else has reason to complain of.

MS. DILGART: But as I understand it, the two analyses are conceptually distinct. Because I understand the standing concept in the overbreadth analysis, whereas in this case, petitioners' convictions could not be reversed because they can't demonstrate material prejudice for the instructions they received at

trial.

QUESTION: You say this is not overbreadth -- okay, I'll have to think about that.

QUESTION: But in any event, we have to determine whether the convictions can stand, don't we?

MS. DILGART: Absolutely, Your Honor.

QUESTION: Now, would you clarify for me, did the court, the trial court, give the defendants instruction number two, which asks that they apply statewide standards to all aspects?

MS. DILGART: Yes, Your Honor, the defendants -- two parts here. The defendants tendered instructions which applied statewide standards to all three prongs. Also --

QUESTION: Then how did -- how did the petitioners preserve, in your view, the argument that some other standard should apply?

MS. DILGART: It would be my -- petitioners -- it's a more complicated situation, inasmuch as petitioners did not even tender instructions which would define a national or an objective standard.

And I would submit that to the extent that this Court finds those factors to be relevant, it should do so.

QUESTION: Should do what?

MS. DILGART: That this Court is entitled to take into consideration the state of this record in deciding whether to affirm or reverse.

I think at this point I would like to devote some more remarks to the material prejudice issue and see if I can tie some of these things together.

Even if community determinations not -- community standards were not applied to value determinations, these convictions should be affirmed because petitioners were not materially prejudiced by the instructions used at trial.

The authors of these six magazines did not try to convey ideas or artistic messages. As a matter of fact, these magazines were found to be utterly without redeeming social value under the more rigorous Memoirs test.

Petitioners' jurors in these cases were drawn from a reasonably diversified and cosmopolitan state, and they applied an ordinary adult person standard to persons within that state.

These jurors were required to reject their personal view. Petitioners did not introduce any evidence of a national or objective standard, nor did they tender instructions which define those terms.

Petitioners on this record cannot demonstrate

material prejudice --

QUESTION: If I understand this arugment, you're saying even if the statute is obviously unconstitutional on its face, that doesn't make any difference.

MS. DILGART: Well, of course we would not agree that it's unconstitucnal itself.

QUESTION: No, of course you don't. But for the purposes of this argument, you could assume we've got an unconsitutional statute here; we've got an unconstitutional instruction to the jury.

But these people are really guilty, so we don't have to worry about all that stuff.

MS. DILGART: Well, we would also argue that the statute was not unconstitutionally applied to them.

QUESTION: Even though the instruction was obviously unconstitutional?

MS. DILGART: I would not agree that the instruction was unconstitutional.

QUESTION: I mean, even if it were obviously unconstitutional, you'd still say it wasn't, because there's no evidence of -- in your view there's no evidence of redeeming social value.

MS. DILGART: Well, I would argue that even if the jurors were improperly instructed, the Court must

affirm because there's no evidence that --

QUESTION: Right. Even if the instruction is unconstitutional, and the statute is unconstitutional, we should still affirm.

MS. DILGART: It was not unconstitutionally applied to them.

Petitioner cannot demonstrate material prejudice because they can't show that juries using any other standard would have reached a different conclusion in these cases.

I would like then to turn -- devote some of my remarks to the constitutionality of the statute at this time.

Petitioners are contending that the Illinois obscenity statute was unconstitutionally applied to them. They must necessarily claim, then, that these six magazines had some value to be discerned by a jury applying a noncommunity standard, because the authors of these magazines didn't even try to convey ideas or artistic messages. There was no possibility of a value finding under any of the parties' standards.

These magazines are, indeed, obscene.

We also dispute the argument that the Illinois statute is facially invalid or overbroad. The number of impermissible approaches always involves a prediction,

as best.

But with this record, a record containing no evidence of an objective or national standard, and no evidence that the Illinois standard differed from petitioners' standards in anyway, with this record the number of impermissible applications would be unfounded speculation at best.

Absent a real indication of substantial overbreadth, then, the Illinois statute should be permitted to stand.

I think, perhaps, that petitioners have misstated something in the opening portion of their argument. I would submit to you that the Illinois statute -- neither the Illinois statute nor the Illinois courts, through any authoritative construction, have ever required the application of any community standard to value determinations.

As a matter of fact, the Illinois appellate court in these cases merely refused to reverse on the facts of these cases. They did not mandate the use of community standards for value determinations in the future.

There is no reason then to believe that this result would ever be repeated, and as a result, invalidation of the statute would be wholly

inappropriate.

Respondent is concerned as well that perhaps petitioners have exaggerated the possibility of borderline cases or unconstitutional verdicts when this community based standard of review is used -- or community based standard of value determinations is used.

In addition to the broad powers of the appellate courts, there's a number of other important safeguards here.

A defendant is always free to seek jurors with diverse experiences and particular backgrounds during his voir dire examination.

Expert testimony will always be permissible under our approach to establish the value of a particular work or to define the relevant community attitudes.

The return a guilty verdict, the jury must deliberate within the confines of the Miller decision, and the jury must also find prurient appeal and patently offense sexual conduct.

The prosecution bears a burden of proof with respect to all three of the Miller tests, and so there is a presumption of nonobscenity in these cases.

Defendants will receive all of the safeguards

of any prosecution, including the presumption of innocence and the reasonable doubt standard.

I would submit, as well, that authors and distributors already know the types of hard-core sexual conduct that might be deemed to be patently offense. And their own pandering activities, just like in this case, will legitimately increase the risk that a particular work may be found to be obscene.

QUESTION: General Dilgart, go back a minute or so ago. Maybe I was dozing off.

But you said there was no requirement here that the jury use community standards, and it's unlikely that there would be a requirement in the future?

MS. DILGART: My point, Your Honor --

QUESTION: I thought that's what this case was about, and I thought almost all of your preceding argument was directed at the validity of using community standards.

And now you're telling me that this case doesn't involve the use of community standards?

MS. DILGART: Speaking with respect to the second issue raised by petitioners, on the unconstitutionality of the statute, our position is that no Illinois court, and neither the old nor the new Illinois statute, have ever required the application of

community determinations for value.

This is not a result which is required in Illinois.

I agree that this is the best approach. It is the approach that we urge the Court to adopt.

But I wish to clear up any confusion engendered by petitioners when he says that the Illinois courts have -- have mandated this approach in the past.

That simply is not the case.

QUESTION: They did affirm this conviction, where the trial judge had charged that community standards should be applied in determining the third part.

MS. DILGART: Absolutely. And the appellate court only said, on appeal, that they refused to reverse on the facts of this case, and said nothing more.

QUESTION: Oh, so you mean maybe they're going to allow community standards sometimes and not allow it other times?

You don't want us to think that that's what they're doing, do you?

MS. DILGART: To the extent that we could read anything from a silent opinion, I could only submit to you that there is no directive in there to require this result in a future case.

There's no affirmative language, in the statute or any of the court -- or any of the cases concerning this statute that would require this conclusion.

QUESTION: I understand the point you're making.

MS. DILGART: I think I'd like to make some concluding remarks, if there are no other particular areas which the Court wishes to investigate.

I'd like to summarize and tell you that value determinations should be made with reference to the views of ordinary adults living within the community.

To us, that is the soundest approach. It rejects the Hickman test. It assures that the First Amendment will be satisfied by rejecting intolerant or personal views.

And it also, unlike petitioners' standards, gives an affirmative guide to the jury. It tells them not only what they cannot consider, but also, where they must look in making this important determination.

Jurors traditionally have been allowed to rely on their own knowledge and experiences. And they should be permitted here, once again, to do so.

They should be permitted to rely on their own knowledge and experience in the community in making

these determinations.

But even if a noncommunity approach should be necessary here, then petitioners' convictions should nevertheless be affirmed, because these petitioners pandered hard-core pornography, found by a jury to be utterly without redeeming social value.

As this Court has observed in Miller, to equate a robust exchange of ideas with the commercial exploitation of obscenity is merely to demean the First Amendment.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dilgart.

Mr. Stanko, you have four minutes remaining.

REBUTTAL ARGUMENT OF GLENN A. STANKO, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. STANKO: Thank you, Your Honor.

If this isn't a construction of the statute, I don't know what is.

The issue was presented to the Illinois appellate court. The Illinois appellate court resolved the issue by saying, it should also be noted that thus far the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in the judging of materials on utterly

without redeeming social value.

When you combine that with some language in the statute about interpretation of evidence, it says, obscenity shall be judged with reference to ordinary adults, you have a construction of the statute.

And I don't think the state ever argued in their briefs that there was no construction of the statute.

To answer Justice Stevens questions, no, Justice Stevens, you do not have to view the materials in this case.

The issue in this case isn't whether the materials are obscene. The issue is the facial consitutionality of the Illinois obscenity statute.

That statute, as applied to my clients, and as applied to anyone else in the world, or in the State of Illinois, is unconstitutional.

You don't even get into the Broderick overbreadth analysis. Because there is no application of this statute which conceivably could be constitutional.

QUESTION: (Inaudible.)

MR. STANKO: No, but there was language incorporated into the jury instructions from the statute.

QUESTION: If the jury instructions had not

referred to community standards, you wouldn't be here?

MR. STANKO: Well, they would have been in error.

QUESTION: I mean, the statute was still there.

MR. STANKO: If the --

QUESTION: You wouldn't be here. You wouldn't care if the court made an error in your favor.

MR. STANKO: If the jury instruction had not included community standards on the third element, you're right, we wouldn't be here.

But that would have been a construction of the statute consistent with what we argue for. And that didn't happen.

QUESTION: Mr. Stanko, defendants' instruction was the one that was given, was it not?

MR. STANKO: In one case. In the first case -- there's two cases -- in Morrison, which was the first one tried, defendants tendered instructions which would limit community standards to the first two elements.

They also tendered -- the defendant also tendered another instruction which would say specifically that you only apply community standards to the first two elements.

QUESTION: Well, in Pope, as I understand it, defendant's instruction was requested and given, and it

specified application of statewide community standards?

MR. STANKO: Right. And Pope was tried after Morrison in front of the same trial judge, and after denial of the same motion asserting that community standards should not be included in the statute.

So we already had a construction from the state court judge as to what he was going to do. We tendered the most favorable instruction we could get, consistent with that construction.

I'd like to answer one of your concerns, Justice O'Connor, when you asked, well, what standard would this Court apply in reviewing materials?

I think you recognize the problem, and that is, that if you apply community standards to the value component, how does this Court review the materials if you're not familiar with the community standards in the State of Illinois.

And one has to remember that in many cases the state is not required to put on evidence -- in all cases, the state is not required to put on evidence of contemporary community standards.

So there really could be no meaningful judicial review of that particular finding.

In response to a question of yours, Justice Stevens, I think I heard counsel say that evidence of

value in New York could not be admitted in Illinois if the state's construction was adopted.

And that's the problem. That illustrates the problem.

In Jenkins, which was a Georgia case, there was all kinds of evidence about national acclaim, critical reviews; that type of information. The court even took judicial notice of information not originally in the record.

Now Jenkins, of course, didn't decide the case on value. But I don't think this Court would or has suggested that evidence outside a particular community should not be relevant to the constitutional determination.

Unless the Court has any further questions, I will not speak any further.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

# CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the
tached pages represents an accurate transcription of
lectronic sound recording of the oral argument before the
upreme Court of The United States in the Matter of:

#85-1973 - RICHARD POPE AND CHARLES G. MORRISON, Petitioners V.

ILLINOIS

nd that these attached pages constitutes the original
ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)