Comparison Evidence in Obscenity Trials

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"[S]ex and obscenity are not synonymous": sexually explicit material is obscene only when it tends to incite shameful or lustful thoughts and thus appeals to the prurient interest. A critical constitutional distinction exists between such obscene matter and portrayals of sex which do not appeal to the prurient interest. While nonprurient sexual depictions enjoy full first amendment freedoms, the purveyor of obscene material cannot claim the protections of the first amendment, and indeed may be subject to state or federal prosecution for violating obscenity statutes.
The Supreme Court, in *Miller v. California*, fashioned a three-part obscenity test which reflects this distinction. A work


The *Miller* test reformulates earlier standards having their roots in *Roth v. United States*, 354 U.S. 476 (1957), which were promulgated by a plurality of the Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Under the *Roth-Memoirs* test, sexually explicit material would be obscene if: "(a) the dominant theme of the material taken as a whole appeal[ed] to the prurient interest in sex; (b) the material was patently offensive because it affront[ed] contemporary community standards relating to the description of sexual matters; and (c) the material [was] utterly without redeeming social value." Id. at 418. Many lower courts, with later approval from the Supreme Court, see Marks v. United States, 430 U.S. 188, 193-94 (1977), relied upon the *Roth-Memoirs* test. See, e.g., United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976); Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), rev'd on rehearing, 502 F.2d 419 (D.C. Cir. 1974); United States v. Miller, 455 F.2d 899 (9th Cir. 1972), vacated, 413 U.S. 913 (1973); United States v. Klaw, 350 F.2d 155 (2d Cir. 1965); Woodruff v. State, 11 Md. App. 202, 273 A.2d 436 (1971); State v. Blair, 32 Ohio St. 2d 237, 291 N.E.2d 451 (1972), vacated, 413 U.S. 905 (1973).

*Miller* departed most significantly from the *Roth-Memoirs* formulation by relaxing the requirement that obscene material be "utterly without redeeming social value." Yet the same three basic elements of prurient appeal, patent offensiveness, and lack of social value must be present under either test for the material to be obscene, and both *Miller* and *Roth-Memoirs* require that contemporary community standards provide the ultimate rule of decision. See Benjoya, Zisson & LaCroix, *Obscenity: The New Law and Its Enforcement—Two Views*, 8 SUFFOLK U.L. REV. 1, 2 (1975); Shugrue & Zeig, *An Atlas for Obscenity: Exploring Community Standards*, 7 CREIGHTON L. REV. 157, 176 (1973-1974). Thus, any discussion of the admissibility of comparison evidence in cases using the *Roth-Memoirs* standards, see, e.g., United States v. Groner, 479 F.2d 577 (5th Cir.), vacated, 414 U.S. 969 (1973); Woodruff v. State, 11 Md. App. 202, 273 A.2d 436 (1971), is applicable to later cases applying the *Miller* test. Furthermore, the *Miller* standards apply to federal as well as state obscenity prosecutions, see United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 (1973); thus this Article draws upon cases dealing with both federal and state obscenity statutes.

Persons indicted for conduct occurring before *Miller* are entitled to all the benefits which *Miller* might confer, as well as the application of the *Roth-Memoirs* "utterly with-
will be adjudged obscene only if it (1) appeals to the prurient interest of the average person applying contemporary community standards,\(^8\) (2) is a patently offensive depiction of sexual conduct which has been proscribed by statute, and (3) is devoid of any serious social value.\(^9\) The concept of "community standard" is often referred to as the "redeeming value" standard. See Marks v. United States, 430 U.S. 188, 196-97 (1977); United States v. Sandy, 605 F.2d 210, 212 (6th Cir. 1979). See generally Project, An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity, 52 N.Y.U. L. Rev. 810, 825-57 (1977) (discussing the history of the Supreme Court decisions from Roth to Miller).

Not every court would agree that a prurient, patently offensive work should be considered obscene merely because socially valuable. In Salt Lake City v. Piepenburg, 571 P.2d 1299 (Utah 1977), the Utah Supreme Court pressed the point with particular zeal:

It would appear that [the] argument [that a work must lack serious social value to be obscene] ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste. \(\text{Id. at 1299-300.}\)

8. Prurient appeal is measured by the impact on the average adult rather than on a child, cf. Pinkus v. United States, 436 U.S. 293, 297-98 (1978) (error to instruct that children are part of the relevant community if no evidence is in the record that material was intended for children or that defendant believed children would likely receive the material), or on a person particularly sensitive or insensitive to prurient appeal, provided the material is directed to the public at large. See Miller v. California, 413 U.S. 15, 33 (1973). But the jury properly may consider the sensitive along with the insensitive in assessing prurient interest. See Pinkus v. United States, 436 U.S. at 298-300.

If sexually explicit material is directed at a special group rather than the public at large, the appeal to the prurient interest of a member of that group rather than of the average adult will be the relevant standard for determining obscenity. See Mishkin v. New York, 383 U.S. 502, 508-09 (1966); United States v. 31 Photographs, 156 F. Supp. 350, 354 (S.D.N.Y. 1957); Woodruff v. State, 11 Md. App. 202, 216, 273 A.2d 436, 445 (1971); State v. Von Cleef, 102 N.J. Super. 102, 120, 245 A.2d 436, 445 (1968), rev'd on other grounds, 395 U.S. 814 (1969). Materials which may be obscene if directed to the public at large may not be obscene if directed to the medical community. See United States v. Nicholas, 87 F.2d 510, 512 (2d Cir. 1938); United States v. One Package, 86 F.2d 737, 738 (2d Cir. 1936); Davis v. United States, 62 F.2d 473, 474 (6th Cir. 1933); Commonwealth v. Landis, 8 Phila. 453, 454-55 (Phila. Pa. Quart. Sess. 1870). See also Lockhart & McClure, supra note 2 (arguing for a variable concept of obscenity dependent upon the appeal to and the effect upon the target audience).

9. Sexually oriented work is not obscene unless all three elements of the Miller test are satisfied. An offensive work, even when appealing to the prurient interest, will nonetheless be constitutionally protected if socially valuable. See, e.g., United States v. Palladino, 475 F.2d 65, 71 (1st Cir.) (holding the work Anal and Oral Love nonobscene because not utterly lacking in social value, even though the dominant theme was prurient and the work's discussion may have exceeded national standards in its offensiveness), vacated, 413 U.S. 916 (1973); Commonwealth v. Dell Publications, Inc., 427 Pa. 189, 233 A.2d 840 (1967) (reversing obscenity conviction for sale of Candy because the book had some social value), cert. denied, 390 U.S. 948 (1968).

Likewise, an offensive work without social value that lacks appeal to the prurient interest will not be obscene. See, e.g., United States v. Klaw, 350 F.2d 155, 164-65 (2d Cir. 1965); Penthouse Int'l Ltd. v. McAuliffe, 29 Crim. L. Rep. (BNA) 2284 (N.D. Ga. May 15, 1981); People v. Biocic, 80 Ill. App. 2d 65, 70, 224 N.E.2d 572, 575 (1967); Cohen,
"standards" thus forms the heart of the obscenity test: these standards explicitly measure whether a work appeals to the prurient interest and implicitly define a work's offensiveness. A vital element, therefore, of a defense to obscenity charges would be a demonstration that the material at issue did not transgress contemporary community standards, in terms of both offensiveness and appeal to the prurient interest.

Consider the example of Larry Flynt, well-known publisher of Hustler and Chic magazines. Flynt, prosecuted in Atlanta for selling those magazines, was found guilty on eleven counts of distributing obscene materials. The prosecution presented its

*Obscenity Cases: Anatomy of a Winning Defense, 14 CRIM. L. BULL. 225 (1978).*

Furthermore, a work, though a valueless piece appealing to the prurient interest, will not be obscene if not patently offensive. See, e.g., Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Huffman v. United States, 502 F.2d 419, 423 (D.C. Cir. 1974). The "patently offensive "hard core" sexual conduct [must be] specifically defined by the regulating state law, as written or construed." Miller v. California, 413 U.S. 15, 27 (1973). See, e.g., State v. Tara Enterprises, Inc., 202 Neb. 260, 274 N.W.2d 875 (1979) (reversing obscenity conviction because magazine content did not fall within definitions proscribed by statute). For an example of a state obscenity statute proscribing fewer sexually explicit depictions than may constitutionally be forbidden, see Iowa Code Ann. § 728.4 (West 1979) (forbidding only the sale of material depicting sadomasochistic abuse, excretory functions, sex with children, or bestiality).

In addition to the requirement that all three prongs of the Miller test be satisfied, prurient appeal and social value must be determined by considering the material as a whole rather than in isolated parts. See Roth v. United States, 354 U.S. 476, 489 (1957); United States v. Levine, 83 F.2d 156 (2d Cir. 1936). Parts condemned by an obscenity statute, however, are considered separately when wholly unrelated to the rest of the work. See, e.g., Kois v. Wisconsin, 408 U.S. 229, 231 (1972) (per curiam) ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ."); United States v. Groner, 479 F.2d 577 (5th Cir.) (obscene photos were not redeemed by being bound together with unrelated textual material), vacated on other grounds, 414 U.S. 969 (1973); United States v. 392 Copies of Magazine "Exclusive," 253 F. Supp. 485, 498 (D. Md. 1966) (written portions termed "secondary" because unrelated to the offensive illustrations), aff'd, 373 F.2d 633 (4th Cir.), rev'd on other grounds sub nom. Central Magazine Sales, Ltd. v. United States, 389 U.S. 50 (1967). But see State v. Walden Book Co., 386 So. 2d 346 (La. 1980) (finding an issue of Penthouse magazine nonobscene because a number of articles had literary or social value, although dissent argued that the articles comprised only 67 pages and were totally unrelated to 96 pages of obscene materials).


11. This may not be the only available line of defense. The defendant might also try to show that the material at issue has serious social value or that another element of the crime, such as scienter, *see Smith v. California, 361 U.S. 147, 152-54 (1959), is lacking. If other avenues are foreclosed, however, the defendant will have no choice but to attempt to show that the material in question does not transgress contemporary community standards. *See id. at 164-66 (Frankfurter, J., concurring) (evidence of community standards "goes to the very essence of the defense and therefore to the constitutional safeguards of due process").*


case-in-chief merely by introducing into evidence eight copies of \textit{Hustler} and three copies of \textit{Chic}; no witnesses were called.\footnote{Several expert witnesses were called by the State in rebuttal on the obscenity question. \textit{Flynt v. State}, 153 Ga. App. at 232, 264 S.E.2d at 672.}

Flynt’s defense consisted in part of various attempts to demonstrate that \textit{Hustler} was not obscene by contemporary community standards. As evidence of those standards, he proffered an opinion poll, sales records of \textit{Hustler}, numerous comparison exhibits bearing a “reasonable resemblance”\footnote{Id. at 249, 264 S.E.2d at 681 (Dean, C.J., concurring) (quoting F. Schauer, \textit{The Law of Obscenity} 133 (1976)); see \textit{Hamling v. United States}, 418 U.S. 87, 125-27 (1974). In addition to comparison evidence, prevailing community standards could be demonstrated through the use of surveys, expert testimony, or other means. See, e.g., id.; \textit{Kaplan v. California}, 413 U.S. 115 (1973); Schauer, \textit{Obscenity and the Conflict of Laws}, 77 \textit{W. Va. L. Rev.} 377, 388 (1975).} to \textit{Hustler} and \textit{Chic}, and the testimony of an expert and a public librarian regarding sexually explicit material available in the area. The trial court, however, rejected all these attempts to demonstrate that Flynt’s magazines did not transgress contemporary community standards on obscenity.\footnote{Id. at 237-43, 264 S.E.2d at 675-78.}

Comparison evidence, such as the magazines similar to \textit{Hustler} and \textit{Chic} assembled by Flynt, is “[o]ne of the most often attempted and most rarely successful methods of presenting evidence of contemporary community standards.”\footnote{Id. at 249, 264 S.E.2d at 681 (Dean, C.J., concurring) (quoting F. Schauer, \textit{The Law of Obscenity} 133 (1976)); see \textit{Hamling v. United States}, 418 U.S. 87, 125-27 (1974). In addition to comparison evidence, prevailing community standards could be demonstrated through the use of surveys, expert testimony, or other means. See, e.g., id.; \textit{Kaplan v. California}, 413 U.S. 115 (1973); Schauer, \textit{Obscenity and the Conflict of Laws}, 77 \textit{W. Va. L. Rev.} 377, 388 (1975).} As the term suggests, comparison evidence is proffered for the jury to com-

\textit{ment denied}, 446 U.S. 981 (1980). Flynt received a suspended jail sentence and was fined $27,500. \textit{N.Y. Times}, Mar. 29, 1979, § 1, at 18, col. 3.

pare with the material directly at issue. For example, Flynt's attorney claimed that if the jurors had been permitted to view the preferred comparison exhibits, which sold 1.3 million copies in the county during the six-month period covered by Flynt's indictments, they would have recognized that *Hustler* and *Chic* did not overstep contemporary community standards.\(^{18}\)

Flynt's inability to introduce comparison evidence is a common though not typical experience. Courts have varied markedly in their treatment of comparison evidence:\(^{19}\) some have admitted it;\(^{20}\) some have excluded it;\(^{21}\) some have reversed lower courts for

18. See Harris, *Publisher Larry Flynt Has a Tough Week in Atlanta Court*, Washington Post, March 25, 1979, at A6, col. 1. The Georgia Court of Appeals found the excluded comparison evidence to be similar to the copies of *Chic* and *Hustler* at issue. Nonetheless, it upheld the trial court's exclusion of these exhibits because Flynt's preferred evidence of sales figures for the comparison exhibits was not the best evidence. Although Flynt had shown that the comparison exhibits were distributed to 324 retail outlets in the county, the court found this demonstrated availability rather than the requisite community acceptance. Flynt v. State, 153 Ga. App. at 239-43, 264 S.E.2d at 676-78.

While obscenity defendants commonly make proffers of comparison evidence, prosecutors might also wish to introduce comparison exhibits to illustrate sexually explicit material considered obscene by the community. See, e.g., People v. Luros, 4 Cal. 2d 84, 86, 480 P.2d 633, 634, 92 Cal. Rptr. 833, 834, cert. denied, 404 U.S. 824 (1971); Lockhart & McClure, supra note 2, at 26 (Solicitor General in Roth v. United States, 354 U.S. 476 (1957), presented the Court with a carton containing hard-core pornographic materials).

19. See United States v. Womack, 509 F.2d 368, 374 (D.C. Cir.) ("There has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily."); cert. denied, 422 U.S. 1022 (1974).


refusing to admit it;22 some have suggested it never is admissible.23 Moreover, the courts' reasoning has been as disparate as their conclusions. A few courts have admitted comparison evidence without discussion,24 while many others have summarily excluded it.25 Some find comparison evidence relevant if freely available in the community,26 yet other courts have argued that


25. See United States v. Wasserman, 504 F.2d 1012, 1016 (5th Cir. 1974); United States v. Thevis, 490 F.2d 78, 77 (5th Cir. 1974) ("If expert testimony is not required to determine obscenity, it is certainly within the trial judge's discretion not to allow comparable evidence."); cert. dismissed, 419 U.S. 801 (1975); United States v. Jacobs, 433 F.2d 932, 933 (9th Cir. 1970); Miller v. United States, 431 F.2d 655, 659 (9th Cir. 1970), vacated and reh'gd on other grounds, 413 U.S. 913 (1973), aff'd, 507 F.2d 1100 (9th Cir. 1974); Dumas v. State, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

26. See United States v. Miscellaneous Pornographic Magazines, 400 F. Supp. 353 (N.D. Ill. 1975); In re Harris, 56 Cal. 2d 879, 366 P.2d 305, 16 Cal. Rptr. 889 (1961) (error to exclude either comparison evidence of materials already adjudicated nonobscene or comparable books and publications sold in community); Yudkin v. State, 229 Md. 223, 229-30, 314 Md. 223, 229-30, 182 A.2d 798, 802 (1962) (error to exclude books on sale in the community that were proffered as comparison exhibits); Woodruff v. State, 11 Md. App. 202, 220-21, 273 A.2d 436, 447 (1971) (abuse of discretion to exclude, for comparison purposes, newspapers and magazines circulating freely in the area).
mere availability of the exhibits has no relevance to assessing whether a particular work is obscene.\textsuperscript{27} Still other courts have found countervailing factors, such as the desire to avoid either cumulative evidence\textsuperscript{28} or jury confusion,\textsuperscript{29} sufficiently persuasive to justify excluding relevant comparison evidence. A more recent approach, based upon the formulation set forth in United States v. Womack,\textsuperscript{30} assesses the relevancy of comparison evidence based upon its similarity to the materials in question and its acceptability to the community.\textsuperscript{31}

\textsuperscript{27.} See United States v. Manarite, 448 F.2d 583, 593 (2d Cir.), cert. denied, 404 U.S. 947 (1971); Books, Inc. v. United States, 358 F.2d 935, 939 (1st Cir. 1966) ("It is, of course, true that what is sold in the market reflects to some extent community standards. But it is not true that every item sold is necessarily not obscene. Hence, not every book in the market is admissible to test the obscenity of Lust Job."); rev'd on other grounds, 388 U.S. 449 (1967); United States v. West Coast News Co., 357 F.2d 855, 860 (6th Cir.) ("[T]he establishment of a fait accompli by the purveyors of pornography is [not] proof that they have already succeeded in destroying every remaining standard of our contemporary society. Nor has that society endowed these men with the right to establish our standards. License to continue does not follow each victory in spreading obscenity."); rev'd per curiam on other grounds sub nom. Aday v. United States, 388 U.S. 447 (1967); United States v. Hochman, 175 F. Supp. 881, 882 (inmaterial to prosecution whether other persons were violating any laws, legal or moral, or were selling obscene literature), aff'd, 277 F.2d 631 (7th Cir.), cert. denied, 364 U.S. 837 (1960); Matheny v. State, 313 So. 2d 547, 549-50 (Ala. Crim. App. 1975), cert. denied, 425 U.S. 982 (1976); State v. Jungclaus, 176 Neb. 641, 647, 126 N.W.2d 858, 862-63 (1964) (other materials are not necessarily acceptable merely because not selected for prosecution); People v. Finkelstein, 11 N.Y.2d 300, 305, 183 N.E.2d 661, 663-64, 229 N.Y.S.2d 367, 371 (1962) (fact that publications were seen in bookstores does not indicate that the books were sold or read). But see State v. Short, 368 So. 2d 1078, 1082 (La.), cert. denied, 444 U.S. 884 (1979) (that evidence of availability does not itself prove acceptability or tolerance is an argument addressed to the weight, not the admissibility, of such evidence).


\textsuperscript{29.} See United States v. Pinkus, 448 F.2d 583, 589 (1st Cir. 1966), cert. denied, 365 U.S. 859 (1961), cert. denied, 422 U.S. 1022 (1975).


Although the Supreme Court has not gone so far as to find comparison evidence never admissible, in *Hamling v. United States* the trial court had rejected defendant’s proffer of two types of comparison evidence: material that had been found constitutionally protected speech in previous litigation, and material openly available at newsstands. The Court found no abuse of discretion in the exclusion of either type of evidence — the comparison exhibits were not necessarily relevant merely because readily available or previously adjudicated nonobscene. Even assuming the relevance of the exhibits, however, the Court found their exclusion to be justified by the possibly confusing effects upon the jury. Furthermore, the Court argued that any error in the exclusion of comparison evidence was rendered harmless by the opportunity to present expert evidence regarding prevailing community standards.

This Article critiques the approach endorsed in *Hamling*, particularly regarding the Court’s failure to consider how the presentation of proof in an obscenity trial affects the defendant’s constitutional rights. The Article urges that relevant comparison evidence should be admissible despite the risk of confusion or

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32. 418 U.S. 87 (1974). With the exception of *Hamling*, the Supreme Court has not considered directly the extent to which evidence may be admitted or excluded in an obscenity trial. The issue was raised in Smith v. California, 361 U.S. 147 (1959), but the majority declined to address the question — although Justices Frankfurter and Harlan would have ruled it error to exclude all proffered evidence of community standards. *Id.* at 164-67 (Frankfurter, J., concurring); *id.* at 171-72 (Harlan, J., concurring in part and dissenting in part). Similarly, in Pinkus v. United States, 436 U.S. 293, 304-05 (1978), the Court remanded to the Court of Appeals the question of admissibility of comparison evidence. *See United States v. Pinkus, 579 F.2d 1174, 1175 (9th Cir.) (applying the Woodcock test for admissibility on remand), cert. dismissed, 439 U.S. 999 (1978).*

33. The defendant in *Hamling* also proffered as evidence of community standards materials which had received second-class mailing privileges. The Court rejected this proffer, however, reasoning that the receipt of special mailing privileges had no bearing on determining community standards because postal inspectors have no power of censorship. *See 418 U.S. at 126.*

34. *Id.* at 124-27.
the opportunity to present expert testimony, and furthermore, that a court should be required to make explicit its findings regarding the relevancy of comparison evidence. Part I of the Article demonstrates the constitutional significance to the obscenity defendant of evidence, particularly comparison exhibits, bearing on prevailing community standards. Part II considers the assessment of the relevancy of comparison evidence and the need for written evaluation from a trial court excluding comparison evidence as irrelevant. Finally, part III argues that countervailing factors normally should not be considered sufficiently weighty to justify exclusion of relevant comparison evidence.

I. THE IMPORTANCE OF COMPARISON EVIDENCE TO PROTECTING THE CONSTITUTIONAL RIGHTS OF THE OBSCENITY DEFENDANT

A. Community Standards and Due Process

Due process requires that a defendant be presumed innocent unless the prosecution has proved every element of the crime beyond a reasonable doubt.\footnote{35. See Taylor v. Kentucky, 436 U.S. 478, 490 (1978); Estelle v. Williams, 425 U.S. 501, 503 (1976); In re Winship, 397 U.S. 358, 364 (1970).}

Three different burdens of proof are present in any criminal jury trial: (1) the burden of pleading the issue; (2) the burden of producing evidence on the issue; and (3) the burden of persuading the jury. Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 171-73 (1969). While the burden of pleading is a mere formality, \textit{id.} at 172, the burden of production requires a party to come forward with evidence sufficient to support a finding on a particular issue. If the party having the burden of production fails to produce sufficient evidence, the court takes the issue from the jury and rules against that party. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1300 n.3 (1977). In the obscenity case, neither party has the burden — other than that placed upon the prosecution to introduce the allegedly obscene materials into evidence — to produce evidence regarding the three elements of the \textit{Miller} obscenity test. The jury may decide questions of prurient appeal, patent offensiveness, or social value without benefit of any evidence other than the material at issue. See, e.g., United States v. Davis, 353 F.2d 614, 615 (2d Cir. 1965), cert. denied, 384 U.S. 953 (1966); notes 38-42 and accompanying text \textit{infra}. Thus, in an obscenity trial, the only important burden of proof is that of persuasion: the burden of convincing the jury to the required degree of certainty.

For a brief historical background of the presumption of innocence, see Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior To Trial, 1978 Wis. L. Rev. 441, 459-65.

This Article will not consider whether the definition of obscenity denies due process by being unconstitutionally vague, except insofar as the difficulties in admitting comparison evidence suggest community standards to be an unworkable concept. See pt. III \textit{infra}. The Supreme Court has held the definition of obscenity not to be unconstitutionally
fore, the material at issue must be shown beyond a reasonable doubt to satisfy all three prongs of the \textit{Miller} test;\textsuperscript{36} a defendant cannot be convicted on obscenity charges if the jury has reasonable doubt whether the work in question transgresses contemporary community standards.\textsuperscript{37} The Supreme Court held in \textit{Hamilton v. United States},\textsuperscript{38} however, that the prosecution in an obscenity case need not introduce evidence other than the material in question to prove a violation of community standards.\textsuperscript{39}
Rather, the prosecution could proffer only the putatively obscene material, leaving the jury to apply the Miller test based upon its own knowledge of prevailing standards in the community. The Court assumed that the jury, being competent to determine the course followed by the "reasonable man," likewise could gauge the content of prevailing community standards. In making this assumption, the Court appears to have entrusted the jury with a Herculean task.

Contrary to the Court's reasoning, the nature of the inquiry into community standards differs fundamentally from questions involving the reasonable man. While questions of reasonableness and community norms both draw upon objective standards rather than jurors' subjective beliefs, reasonable man principles are based upon abstract, idealistic notions, while community standards are gleaned from concrete attitudes of specific people. The reasonable man standard does not depend upon what people actually think or do; people do not necessarily think or act reasonably. Community standards, in contrast, are considered tangible criteria dependent upon actual views held by specific people — including the "sensitive and the insensitive" — so to reflect "the collective view" of everyone in the community. Unless a consensus exists regarding community acceptance of sexu-


41. See Hamling v. United States, 418 U.S. 87, 104-05 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . ."). Various courts have perceived the jury as the embodiment of the community, thus obviating the need for any independent evidence regarding the views of that community. See, e.g., United States v. A Motion Picture Film, 404 F.2d 196 (2d Cir. 1968); United States v. West Coast News Co., 228 F. Supp. 171, 184 (W.D. Mich. 1964), aff'd, 357 F.2d 855 (6th Cir. 1966), rev'd per curiam on other grounds sub nom. Aday v. United States, 388 U.S. 447 (1967); People v. Better, 33 Ill. App. 3d 58, 66, 337 N.E.2d 272, 278 (1975); Commonwealth v. Isenstadt, 318 Mass. 543, 559, 62 N.E.2d 840, 848-49 (1945); City of Duluth v. State, 283 N.W.2d 533, 538 (Minn. 1979).


43. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 151 (4th ed. 1971) ("The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical [reasonable] person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard.").

44. Pinkus v. United States, 436 U.S. 293, 300 (1978) ("the community includes all adults who constitute it, and a jury can consider them all in determining relevant community standards").
ally oriented material — a highly unlikely prospect — the jury cannot know community standards without knowing the views held by all members of the community. Considering that the relevant community may be boundless, or as far-ranging as an entire state, this task borders on the impossible unless specific evidence is introduced to reflect those standards.


46. Furthermore, the jury would need to know the views of most members of the community even to determine if a consensus existed. The Supreme Court has rejected as too abstract a national “community” standard for measuring obscenity, but has declined to specify a smaller geographic unit as constituting the appropriate community for purposes of applying the Miller test. Thus the jury may apply contemporaneous community standards without any specified geographic boundary. See Hamling v. United States, 418 U.S. 87, 103-05 (1974); Jenkins v. Georgia, 418 U.S. 153, 157 (1974); United States v. Cutting, 538 F.2d 835, 841 (9th Cir. 1976), cert. denied, 429 U.S. 1052 (1977); United States v. Dachsteiner, 518 F.2d 20, 22 (9th Cir.), cert. denied, 421 U.S. 954 (1975); State v. Schwartz, 199 Neb. 17, 255 N.W.2d 859 (1977); Hunt v. State, 601 P.2d 464, 469 (Okla. Crim. App. 1979).


Furthermore, even assuming that jurors might have an accurate perception of prevailing attitudes, their application of community standards may well be distorted. Justice Stevens has suggested that a juror viewing sexually explicit material will often react differently in the social context of a jury room than if the material were viewed in a purely private setting.\footnote{Smith v. United States, 431 U.S. 291, 315 (1977) (Stevens, J., dissenting); Brigman, supra note 17; see generally Brigman, supra note 17, at 539 (social science data demonstrate that neither jury nor grand jury are representative of the community); U.S. COMM’N ON OBSCENITY AND PORNOGRAPHY, REPORT 354-57 (1970) (studies suggest that Americans tend to estimate prevailing sexual attitudes as more restrictive than they are in fact, and that little consensus exists on what is offensive or prurient). First, jurors may well be ignorant of attitudes held by members of the opposite sex. Studies show that men and women differ in their experiences, attitudes, and views on the portrayal of sexual acts. See Wallace, supra note 45, at 64; Wilson & Abelson, supra note 45, at 28, 32. Second, jurors are likely to be ignorant of the scope of sexually explicit works available in the community. Prosecutors, by using preemptory challenges, can exclude most jurors familiar with relevant community standards on obscenity. Dennison, supra note 45, at 222; cf. United States v. 2,200 Paper Back Books, 565 F.2d 566, 569 (9th Cir. 1977) (trial judge “had very limited experience in determining what was pornographic, (little professionally and none personally)”).}

Without relevant evidence demonstrating prevailing community standards, the jury cannot avoid making a personal reaction to sexually explicit material,\footnote{See Smith v. United States, 431 U.S. 291, 315 (1977) (Stevens, J., dissenting); Brigman, supra note 17, at 542; Comment, Expert Testimony in Obscenity Cases, supra note 17, at 171-72.} thus contravening the constitu-

\footnote{Ginzburg v. United States, 383 U.S. 463, 479 (1966)(Black, J., dissenting); United States v. Various Articles of Obscene Merchandise, 562 F.2d 185, 189 (2d Cir. 1977) (“In reality, no judge or jury can be expected to determine ‘community standards’ . . . . The best that anyone can do is give his or her personal reaction to it.”), cert. denied, 436 U.S. 931 (1978); United States v. Klaw, 350 F.2d 155, 167 (2d Cir. 1953); In re Giannini, 69 Cal. 2d 563, 574, 446 F.2d 535, 543, 71 Cal. Rptr. 655, 663 (1968), cert. denied, 395 U.S. 910 (1969); Fahringer, supra note 17, at 33; Shugrue & Zieg, supra note 8, at 165; Comment, Expert Testimony in Obscenity Cases, supra note 17, at 176.}
tional requirement that there be an objective assessment of a work's relation to community norms. The difficulty — nigh impossibility — of the jury's task cannot be eased simply by placing the materials at issue into evidence. Those materials themselves communicate nothing about the community's views; prevailing community standards necessarily are external to the materials at issue and must be discovered through other evidence. Without such evidence of prevailing standards, courts should rule that a critical element of an obscenity prosecution — proof that the material in question transgresses community standards regarding prurient interest and offensiveness — has not been established beyond a reasonable doubt.

B. Community Standards and Compulsory Process

The sixth amendment affords the defendant in an obscenity case the constitutional right to muster a defense and to present evidence relevant to that defense. Given the significance of community standards in determining obscenity, evidence regarding those standards clearly will be relevant to the defendant's case in an obscenity prosecution. Because the right to produce a defense will thus include the right to demonstrate prevailing community standards, the obscenity defendant has a sixth amendment right to introduce comparison evidence bearing on those standards.

In Hamling v. United States, however, the Supreme Court dismissed as harmless any error arising from the exclusion of defendant's comparison exhibits, endorsing the lower courts' conclusion that the defendant had been fully able to present a de-

52. The sixth amendment provides:
   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.
54. See notes 10-11 and accompanying text supra.
fense through the introduction of expert testimony regarding community standards. The Court's analysis, though, failed to recognize significant differences between the two types of evidence; comparison evidence may be far more effective than expert testimony in demonstrating prevailing community standards. The Court itself has noted that experts commonly are inappropriate in obscenity cases, and indeed, often have made a "mockery out of the otherwise sound concept of expert testimony." Moreover, one researcher has found that jurors are particularly likely to ignore the testimony of experts in obscenity trials.

Comparison evidence offers a substantial advantage over any expert testimony: the comparison exhibits may be taken into the jury room for examination at greater length and in greater detail. Thus, the jury may draw its own conclusions from careful evaluation of the comparison evidence, rather than having to rely upon the testimony of an expert witness it may find incredible. If the right to fashion a defense to obscenity charges has real substance, that right should not be limited to permitting the obscenity defendant to use evidence which even the Court acknowledges is likely to be ineffective. Channelling the obscenity defendant into the use of expert testimony rather than relevant comparison evidence may seriously hamper the proof of contemporary community standards, thus impinging upon the constitutional right to present a defense.

C. Community Standards and Free Speech

Obscene materials may be prohibited, and its purveyors prosecuted, only because obscenity falls outside the protections of the first amendment. Nonobscene material, assuming it does not fall within another category of unprotected speech, enjoys the

57. Id. at 127.
59. See McGaffey, supra note 17, at 221-32.
63. See generally L. Tribe, American Constitutional Law §§12-8, at 602-08 (1978). One commentator argues that the Supreme Court's isolation of obscenity as unprotected
safeguards of two mechanisms devised by the Supreme Court to ensure effectuation of first amendment rights. The first mechanism — the test for obscenity promulgated in _Miller_64 — embodies the Court’s intent that only hard-core pornography, as illustrated by various examples set forth in _Miller_,65 would satisfy the three-prong obscenity test and thus be beyond first amendment protection.

The allocation of responsibility for determining obscenity provides the second means for protecting the first amendment rights of purveyors of sexually explicit material. Assessment of whether a particular work is obscene involves a factual determination by the jury as to whether the work meets the legal definition66 of obscenity set forth in _Miller_. In the general case, such factual findings by the jury are accorded conclusive effect by the trial and appellate courts if supported by substantial evidence.67 In contrast, because of the dangers of infringing upon the right to free speech, the jury verdict in an obscenity case is not given its usual conclusive effect.68 Rather, both the trial and appellate courts must make independent reviews of the evidence to determine, as a factual matter, if the material at issue satisfies the _Miller_ test.69


64. See notes 7-9 and accompanying text supra.


An unsettled question exists as to whether the appellate court must actually view the
Meaningful independent review of the jury's factual findings, however, cannot occur, especially at the appellate level, unless independent evidence has been introduced regarding prevailing community standards. The appellate court in an obscenity case often will be far removed from the relevant community and likely will have no ability to gauge community standards. If no evidence is admitted at trial bearing on the content of prevailing community standards, the record on appeal will be barren of any definition of community norms. This seemingly presents an insuperable burden for the appellate court which must apply prevailing community standards when it independently reviews the obscenity vel non of the material in question. The problem presents itself at the trial level as well: one frustrated federal district court found itself unable to adjudge material obscene when no independent evidence had been introduced as to prevailing community standards. Although the Supreme Court has yet to require the admission of evidence on community stan-

material at issue to ensure that there is evidence sufficient to support the finding of obscenity. In United States v. Marks, 585 F.2d 164, 170-71 (6th Cir. 1978), for instance, the Sixth Circuit noted that actual viewing of the material at issue would not always be necessary in order for the court to make an independent review of the jury findings. While the Supreme Court has not expressly required the appellate court to view the material in question, see id. at 170-71 & n.6, such a requirement makes sense given the Court's decisions in the first amendment area. The Court observed that application of the Miller obscenity test would not abridge free speech rights because "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." Miller v. California, 413 U.S. at 25. The contours of this independent review had been hinted at in Kois v. Wisconsin, 408 U.S. 231: "A reviewing court must, of necessity, look at the context of the material, as well as its content." A reviewing court in an obscenity case could hardly consider context and content, and review all the evidence, without viewing the material in question.

Appellate courts unquestionably have the power to view the material in question when making an independent determination as to the obscenity of the work. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing the decision of the Georgia courts that the movie Carnal Knowledge was obscene); Penthouse Int'l, Ltd. v. McAluliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980); United States v. Cutting, 538 F.2d 835, 840 (9th Cir. 1976), cert. denied, 429 U.S. 1052 (1977); United States v. Womack, 509 F.2d 368, 384 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975); United States v. Hill, 500 F.2d 733, 738 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975); United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F.2d 196, 199 (2d Cir. 1968); United States v. Kaehler, 353 F. Supp. 476, 477 (N.D. Iowa 1973).


dards, lower courts should recognize that the additional layer of factual review provided in obscenity cases becomes a hollow means for safeguarding first amendment rights unless the record contains independent evidence regarding prevailing community norms on obscenity.

II. ASSESSING THE RELEVANCY OF COMPARISON EVIDENCE

Comparison evidence proffered by the defendant purports to demonstrate that the material in question does not transgress community standards on sexual explicitness. Such evidence will be relevant and thus admissible whenever it bears upon determining whether the work at issue satisfies either of two factual prongs of the Miller test. First, the comparison evidence could tend to disprove the obscenity of the material in question by showing that works like those at issue did not appeal to the prurient interest of the average person applying contemporary community standards. Second, the proffered comparison evidence might indicate that the putatively obscene material, though perhaps having appeal to the prurient interest, was acceptable rather than offensive to the community.

Implicit in either theory of the proffer of comparison evidence are the two foundation requirements for relevancy articulated in United States v. Womack. In order for comparison exhibits to

74. Relevancy is established whenever the proposition to be proved is more, or less, probable with than without the proffered evidence. See Fed. R. Evid. 401 (relevancy defined as "any tendency to make the existence of . . . the action more probable or less probable than it would be without the evidence"); McCormick, supra note 60, § 185, at 437; 1 J. Wigmore, supra note 29, at § 32. Evidence need not by itself be dispositive of a given issue in order to be relevant. See R. Lempert & S. Saltzburg, A Modern Approach to Evidence 140-41 (1977); 1 J. Wigmore, supra note 29, at §§ 28, 29, 32.
75. Evidence is admissible at trial only when relevant to an issue having legal significance. See Fed. R. Evid. 401, 402; R. Lempert & S. Saltzburg, supra note 74, at 140-41; 1 J. Wigmore, supra note 29, at § 12.
76. See notes 7-9 and accompanying text supra.
77. Such a demonstration would be relevant because material cannot be obscene unless it appeals to the prurient interest. See Roth v. United States, 354 U.S. 476, 487 (1957); notes 2-3 and accompanying text supra.
78. 509 F.2d 368, 376 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975); see cases cited notes 30-31 supra.

The Womack court, in formulating its two-part relevancy test, distinguished the proffer of comparison evidence intended to demonstrate prevailing community standards from the introduction of comparison exhibits either (1) to impeach a witness or (2) to prove nonobscenity as a matter of law. See 509 F.2d at 374-82; Dennison, supra note 45, at 212-13. This Article similarly limits its analysis to considering the proffer of comparison evidence as a means for showing contemporary community standards on obscenity.
be considered relevant and therefore admissible, *Womack* re-

For instances where courts have allowed comparison evidence to be introduced on cross-examination for impeachment purposes, see *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on other grounds*, 502 F.2d 419 (D.C. Cir. 1974); *Matheny v. State*, 55 Ala. App. 119, 313 So. 2d 547 (1975), *cert. denied*, 425 U.S. 982 (1976). Some courts, however, have not allowed the use of comparison evidence on cross-examination. *See*, e.g., *United States v. Womack*, 509 F.2d at 380; *State v. Henry*, 250 La. 682, 198 So. 2d 889 (1967), *rev'd per curiam on other grounds*, 392 U.S. 655 (1968); *State v. Blair*, 32 Ohio St. 2d 237, 291 N.E.2d 451 (1972), *vacated on other grounds*, 413 U.S. 905 (1973). Because impeachment necessarily raises issues collateral to the trial, greater dangers of confusion or undue delay arise when comparison evidence is used to impeach rather than to demonstrate community standards. Therefore, while the risk of confusion cannot justify the exclusion of comparison exhibits bearing upon contemporary community standards, *see* pt. III *infra*, the use of comparison evidence for impeachment purposes should be left to the discretion of the trial judge. *See generally 2 J. Wigmore, *supra* note 29, at § 464.

Where the obscenity defendant seeks to use comparison exhibits to demonstrate non-obscenity as a matter of law, there will be a proffer of material previously adjudicated nonobscene. The *Womack* court noted that the trial judge properly could enter a judgment of acquittal — either on a motion to dismiss or a motion for acquittal — if the material previously found nonobscene "equal[led] or exceed[ed]" the sexual content of works at issue. 509 F.2d at 374.


"[R]arely is it argued with any force that the material in question is as a matter of law not obscene, and that claim is not made here. One reason for this, we suspect, is that where material has any remote relation to the values protected by the obscenity tests, a generally tolerant society tolerates it in all events. A second, more important reason, we suspect, is that the commercial marketability of obscene materials depends in major part upon the very absence of those qualities which lift that material into the area of First Amendment protection."

In a civil proceeding where obscenity may be proved by a mere preponderance of the evidence rather than by the reasonable doubt standard, the court may be less willing to rule in the defendant's favor on the obscenity issue. *See Dunn v. Maryland State Bd. of Censors*, 240 Md. 249, 254-56, 213 A.2d 751, 754-55 (1965) (*in a civil proceeding denying a license, judge cannot rule materials are nonobscene as a matter of law where the obscenity vel non is a disputed fact)*.

Although the court may rule that the defendant's material is nonobscene as a matter of law, it never may find material obscene as a matter of law. To allow the court to determine obscenity as a matter of law would be to deprive the defendant of confrontation and jury trial rights guaranteed by the sixth amendment. *See* Hirsch & Ryan, *I Know It When I Seize It: Selected Problems in Obscenity*, 4 Loy. L.A.L. Rev. 9, 79-80 (1971).

Many cases have considered prior adjudicated material on a motion to dismiss or a motion to acquit. *See*, e.g., *Smith v. United States*, 431 U.S. 291 (1977); *United States v. Palladino*, 475 F.2d 65, 70-71 (1st Cir.), *vacated and remanded on other grounds*, 413 U.S. 916 (1973); *United States v. Hill*, 473 F.2d 759 (9th Cir. 1972); *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on other grounds*, 502 F.2d 419 (D.C. Cir.)
quires a threshold demonstration that the proffered evidence be
(1) similar to the material in question, and (2) acceptable to the
community.\textsuperscript{79} Without proof of similarity, the comparison
evidence is not relevant to assessing whether the material at issue
offends contemporary community standards; without proof of
acceptability, the comparison exhibits are no more illustrative of
prevailing community attitudes toward sexually explicit materi-
als than is the material in question.

While the \textit{Womack} test for admissibility of comparison evi-
dence appears clear on its face, application of the test has not
been easy. The concepts of similarity and acceptability were left
undefined in \textit{Womack} and have entrusted considerable discre-
ption in courts wrestling with the standards.\textsuperscript{80} Undefined stan-
dards for determining the relevancy of comparison exhibits,
though, present significant constitutional dangers. If the \textit{Wo-
mack} test vests unbridled discretion in the trial court to pass on
the admissibility of comparison exhibits, evidentiary protections
for the due process and free speech rights of the obscenity de-
fendant\textsuperscript{81} may be seriously compromised. Moreover, uncertainty
regarding the admissibility of comparison evidence creates
problems for the distributor of sexually explicit material who
will have trouble measuring what lies beyond prevailing commu-
nity standards without knowing what illustrates those standards.
This raises the danger that constitutionally protected speech
will be chilled in order to avoid the uncertain risks of crimal

\begin{footnotesize}
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\item \textsuperscript{79} 509 F.2d at 377.
\item \textsuperscript{80} See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 99 (1973) (Brennan, J., dis-
senting) (the \textit{Miller} test "apparently requires an effort to distinguish between 'singles' and
'duals,' between 'erect penises' and 'semi-erect penises,' and between 'ongoing sexual ac-
tivity' and 'imminent sexual activity' "); Smith v. California, 361 U.S. 147, 164-65 (1959)
(Frankfurter, J., concurring); United States v. Pinkus, 579 F.2d 1174, 1175 (9th Cir.) (the
admissibility of comparison evidence "is a difficult area and the standards are ill de-
finite"), cert. dismissed, 439 U.S. 999 (1978); Dennison, supra note 45, at 216.
\item \textsuperscript{81} See \textit{pt. I} supra.
\end{itemize}
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liability.\textsuperscript{82} As the following sections demonstrate, very few concrete standards can be derived from the courts' approaches to assessing the similarity and acceptability of comparison evidence.

\textit{A. The Acceptability of Comparison Evidence}

Acceptability is not a self-defining concept; it could mean anything on a continuum from whole-hearted community approval to indifferent toleration. At the very least, however, a community will be deemed not to accept material defined as obscene by \textit{Miller}; the test reflects at its core local community feelings regarding sexually explicit material.\textsuperscript{83} Thus, as a threshold matter, comparison exhibits cannot be considered acceptable if obscene under the \textit{Miller} test.

Beyond this threshold determination, though, the means for demonstrating acceptability become muddled. Defendants making a proffer of comparison exhibits commonly will argue either (1) that the exhibits previously were adjudicated nonobscene and so must be acceptable, or (2) that the exhibits are acceptable because widely available in the community.\textsuperscript{84}

\textit{1. Comparison evidence previously adjudicated nonobscene}\textsuperscript{85}—Comparison exhibits which previously were the subject of an obscenity prosecution resulting in acquittal will not always be relevant to assessing the obscenity of other materials.\textsuperscript{86} Even assuming the similarity of the comparison evidence to the material at issue,\textsuperscript{87} the previous acquittal involving such evidence does not necessarily show the extent of community acceptance of sexually explicit material. The prior adjudication involving the comparison exhibits, for instance, might have resulted in acquittal not because the exhibits were constitutionally protected speech under the \textit{Miller} test, but because other vital elements of

\textsuperscript{82} See Grayned \textit{v.} City of Rockford, 408 U.S. 104, 109 (1972).

\textsuperscript{83} Protection of the quality of life and the total environment of the community constitutes a legitimate state justification for prohibiting obscenity. See Paris \textit{Adult Theatre I v. Slaton}, 413 U.S. 49, 58 (1973).

\textsuperscript{84} See, \textit{e.g.}, United States \textit{v.} Womack, 509 F.2d 368, 373 n.6, 379-80 (D.C. Cir. 1974), \textit{cert. denied}, 422 U.S. 1022 (1975).

\textsuperscript{85} This section discusses the question of when material previously found nonobscene may be given to the jury as evidence of community acceptability. A related issue — whether materials already adjudicated nonobscene can be used to take the case from the jury — is discussed at note 78 \textit{supra}.

\textsuperscript{86} See Hamling \textit{v.} United States, 418 U.S. 87, 125-27 (1974); United States \textit{v.} Wasserman, 504 F.2d 1012, 1016 (5th Cir. 1974).

\textsuperscript{87} See pt. II B \textit{infra}.
the prosecution's case, such as scienter, were lacking. 88

There will be many cases, however, where the record clearly reflects that "the [work itself] was on trial." 89 In such instances, ample justification exists for concluding that the previously adjudicated materials are acceptable to the community: the community must accept what it cannot constitutionally prohibit. Thus, in a subsequent obscenity defense, this previously adjudicated material should be admissible as comparison evidence without any further demonstration of acceptability to the community. Principles of collateral estoppel 90 should bar the prosecution — after failing previously to prove a lack of community acceptance under the Miller test — from asserting that the proffered comparison exhibits are not acceptable to the community.

2. Comparison evidence widely available— The Supreme Court observed in Hamling that the mere availability of comparison evidence does not necessarily demonstrate its acceptability. 91 Rather, availability of comparison exhibits might show "nothing more than that other persons are engaged in similar activities." 92 At some point, however, a work widely available must be considered inferentially acceptable. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." 93 Thus, in Womack, the court drew a distinction between comparison exhibits having "mere

90. Issues actually litigated and necessarily decided will be binding in a subsequent action, through principles of collateral estoppel, upon a party to the first action which had the incentive and a full and fair opportunity to litigate those issues. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971). Thus, when the state has failed in its attempt to prove a particular work obscene in a case not decided upon peripheral issues, collateral estoppel should bar the state from subsequently reasserting that the work is obscene. See Ashe v. Swenson, 397 U.S. 436 (1970) (applying collateral estoppel in a criminal law setting). See generally Hirsch & Ryan, supra note 78, at 76-81; Note, Subsequent Use of Civil Adjudications of Obscenity, 13 TULSA L.J. 146 (1977).
91. Hamling v. United States, 418 U.S. 87, 126 (1974); see cases cited note 27 supra.
availability," and those having a "reasonable degree of community acceptance."³⁴

To presume that available, sexually explicit material is acceptable and thus demonstrative of prevailing community standards presupposes community awareness of the material. On this basis, the Womack court properly rejected defendants' proffer of comparison exhibits purchased from suppliers in New York because the availability of these exhibits without more did not indicate community acceptance in the District of Columbia.³⁵ Vast elements of the community likely will have no knowledge of material available only outside the community; "such esoteric materials purchased from a few vendors known only to those in the trade with no general circulation are not probative on the issue of contemporary community standards."³⁶ In contrast, comparison exhibits have been admitted into evidence, for instance, when purchased nearby the federal courthouse housing an obscenity trial.³⁷

Another argument advanced to support the acceptability of comparison exhibits is that sexually explicit and available material must be accepted if it has not been subject to prosecution for violating obscenity statutes.³⁸ In general, though, the lack of prosecution cannot be taken as an accurate barometer of community acceptance. While the initiation of proceedings against a particular work will tend to rebut an inference that the community accepts the work, the converse will not necessarily be true. Public inertia in making complaints or the lack of prosecutorial resources, rather than general acceptance, may account for the unhindered presence of sexually explicit material in the community.³⁹ The government's silence regarding a sexually oriented

³⁵ United States v. Womack, 509 F.2d at 380.
³⁹ Moreover, if the lack of criminal prosecution were deemed sufficient to establish the acceptability of comparison evidence, the state could face a quandary in initiating a
work will bear directly upon community acceptance only if the obscenity defendant establishes that factors other than acceptability cannot explain the failure to prosecute.

The sales records of comparison exhibits are perhaps the best evidence of their acceptability in the community. Sales figures help indicate the local perception of works which, even though available, are not necessarily accepted in the community. For instance, Larry Flynt, during his trial for distribution of obscene materials, attempted to show the community acceptance of various proffered comparison exhibits by introducing into evidence the distribution records for those exhibits. The court, in rejecting the proffered exhibits, noted that Flynt could have proven the acceptability of the comparison evidence if he had introduced sales figures, but that distribution figures bore solely upon availability. Even had Flynt mustered sales records for the comparison exhibits, however, he would have faced difficulties in showing community acceptance without proving that the sales were distributed among a cross-section of the community. If purchasers of the comparison exhibits were a distinct minority, or people from outside the community, or curiosity buyers, then even sales figures might not establish acceptance.

B. The Similarity of Comparison Evidence

Determining whether a proffered comparison exhibit is similar to the material at issue in an obscenity trial, for purposes of the Womack relevancy test, raises vexing problems. The critical inquiry in assessing similarity will be the identification of significant differences between the comparison evidence and the putatively obscene material; "'slight' variations in format may well produce vastly different consequences in obscenity determinations." The courts, however, have not always taken account of

prosecution against a distributor of sexually explicit material. A vendor charged for the first time with distributing obscene material could proffer his wares, other than those at issue, as comparison exhibits and claim them to be accepted by the community. See State v. Jungclaus, 176 Neb. 641, 126 N.W.2d 858 (1964) (defendant seller of sexually explicit works argued that items in his store not seized as obscene were acceptable and admissible as comparison evidence).

100. See note 18 and accompanying text supra.

101. Id.; see cases cited note 27 supra.

102. See United States v. Levine, 83 F.2d 156, 158 (2d Cir. 1936) (refusing to permit introduction of list of buyers of sexually explicit works, because even respectable people may have a taste for salacity).

103. See notes 78-79 and accompanying text supra.

104. United States v. Womack, 509 F.2d 368, 378 (D.C. Cir. 1974), cert. denied, 422
the definition of obscenity when determining questions of similarity, and thus have failed to develop a consistent, logical approach to evaluating these "slight variations."^{105}

Comparison exhibits are introduced to show that the material at issue does not transgress contemporary community standards on obscenity. Thus, the inquiry into similarity should relate to the definition of obscenity; comparison evidence should be assessed for its similarity to the material at issue with respect to the three-part *Miller* test.\(^{106}\) Comparison evidence which varies from the material at issue only in ways not bearing upon the obscenity determination should be considered similar and thus admissible.\(^{107}\)

In general, though, the courts have not articulated in this fashion their approach to assessing the similarity of comparison evidence. While there may be good reason, for instance, to find comparison evidence depicting "normal" heterosexual activity different from putatively obscene material depicting "perverse" activities such as sadomasochism or bestiality,\(^{108}\) dissimilarity has been merely asserted without reference to underlying analysis under the *Miller* test.\(^{109}\) Likewise, courts have found adult heterosexual activity different from homosexual activity\(^{110}\) and have distinguished "skin" magazines from marriage manuals or medical textbooks.\(^{111}\) In addition to questions of subject matter,
proffered comparison evidence of a medium different from the work at issue frequently has been found not similar and thus inadmissible. Films have been distinguished from books or magazines,\(^{112}\) live dance from other forms of expression,\(^{113}\) and still photographs from classic oil paintings, magazines, or books.\(^{114}\) At least one court has found comparison evidence dissimilar to the work in question on the basis of intended audience and presentation, rejecting the proffer of a comparison between a sex education slide show and the movie *Deep Throat*.\(^{115}\)

In many instances, valid justifications grounded in the *Miller* test may be developed to support the distinctions drawn by the courts. For example, “skin” magazines or explicit photographs safely can be found dissimilar to classical oil paintings, marriage manuals, or medical textbooks on the basis of social value of the works. A failure to articulate such a rationale, though, may raise problems in close cases. Social value is a concept susceptible of distortion. Thus, it requires careful examination whenever the proffered comparison evidence differs from the material in question on that basis — “what is pornography for one man is the laughter of genius to another.”\(^{116}\)

As another example, distinctions between comparison exhibits and putatively obscene material based upon the age, gender, and activities of the participants probably reflect an emphasis upon similarity in terms of offensiveness and appeal to the prurient interest. Yet human sexual activity can take almost infinitely variable forms, with different effect upon the target audience or grounds sub nom. *Aday v. United States*, 388 U.S. 447 (1967); *United States v. Gower*, 316 F. Supp. 1380, 1395 (D.D.C. 1970) (instructive manuals distinguished from pictures because manuals might have social value), *vacated and remanded on other grounds*, 413 U.S. 914 (1973).


the general public. If courts do not engage in critical reasoning, they run the risk of substituting visceral reactions for reasoned decisions when assessing whether proffered comparison exhibits are similar to the material at issue in terms of offensiveness or appeal to the prurient interest.\textsuperscript{117}

C. Requiring the Trial Court to Make Written Relevancy Determinations

The foregoing discussion amply demonstrates the difficulties involved in establishing the relevancy of comparison evidence. Yet these difficulties do not justify perfunctory exclusion of comparison evidence; rather, they only illustrate the obstacles facing the defendant attempting to show the nonobscenity of sexually explicit materials. If the difficulty of introducing relevant comparison evidence warrants its exclusion, the obscenity defendant may lose his only avenue for proving prevailing community standards — and thus the only avenue for vindicating his constitutional rights.

The obstacles involved in adducing relevant proof of community standards should induce caution among courts excluding comparison exhibits and should encourage diligence among appellate courts reviewing such evidentiary exclusions. This goal can be realized only by requiring trial courts to articulate reasons for adjudging comparison evidence not relevant. Appellate courts cannot possibly review evidentiary rulings on comparison evidence made by the trial court unless there is a clear delineation of the reasoning. If the trial court makes explicit findings, on appeal there can be a determination whether the rulings on comparison evidence were clearly erroneous,\textsuperscript{118} and the appellant challenging the exclusion of comparison exhibits will have a more realistic opportunity to prove an abuse of discretion.\textsuperscript{119}

\textsuperscript{117} The approach taken in Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), rev'd on other grounds, 502 F.2d 419 (D.C. Cir. 1974), exemplifies the problems that can arise when the similarity of comparison exhibits is evaluated without reference to the underlying constitutional standards. Applying the Roth-Memoirs test, see note 7 supra, the court found proffered comparison evidence depicting one model dissimilar to putatively obscene material showing more than one person, 470 F.2d at 403, reasoning that pictures of two or more models presented a greater likelihood of depicting sexual activity, \textit{id.} at 401. Similarity should depend, however, not upon the likelihood of portraying objectionable sexual activity, but rather whether there actually is sexually explicit material transgressing the bounds of constitutionally protected speech.

\textsuperscript{118} \textit{See} Fed. R. Civ. P. 52(a); F. JAMES & G. HAZARD, supra note 67, at § 13.8.

\textsuperscript{119} In Hamling, the defendants lost their evidentiary arguments on appeal because they had failed to prove the trial court abused its discretion. \textit{See} Hamling v. United


enable effective appellate review of decisions to exclude comparison evidence, and to maximize the protection of the obscenity defendant's constitutional rights to free speech and due process, the trial court should be required to determine in writing whether proffered comparison evidence was shown to be similar to the materials in question and acceptable to the community. 120

III. THE RISK OF CONFUSION AS A Justification FOR EXCLUDING RELEVANT COMPARISON EVIDENCE

As a general principle, relevant evidence may be excluded when its introduction would cause confusion by entangling the jury in collateral issues raised by the evidence. 121 In Hamling v. United States, 122 the Supreme Court applied this general rule in endorsing the risk of jury confusion as a valid reason for excluding relevant comparison evidence in an obscenity trial. 123 Of necessity, comparison evidence raises issues not involved directly


121. More precisely, relevant evidence may be excluded if it confuses or misleads the jury, creates unfair surprise, unfairly prejudices one party, wastes time and causes delay, or needlessly presents cumulative evidence. See Fed. R. Evid. 403; 1 J. Wigmore, supra note 29, at § 29a. See generally 2 J. Wigmore, supra note 29, at § 443(2).


123. Id. at 127.
in the trial of the purveyor of sexually explicit material. Even though the judge has found the evidence admissible, the jury still must apply the Womack test independently, deciding whether the comparison evidence truly reflects community standards, and whether the comparison exhibit is comparable to the material at issue.

Although comparison evidence raises more questions for the jury and thereby complicates the trial in one sense, it should not be considered a source of jury confusion. In fact, comparison evidence clarifies matters for the jury by providing concrete illustration of contemporary community standards with respect to sexually explicit materials — standards that the jury must evaluate under the Miller definition of obscenity. If the jury is capable, as the Court assumes, of applying community standards to determine obscenity without any evidence of those standards, then surely the jury can assess the proper weight to be given comparison exhibits without becoming unduly confused;124 the jury commonly must assess the weight of relevant evidence.

If, on the other hand, the jury cannot be presumed to have independent knowledge of community standards, as this Article concludes,125 it may not be able to assess whether comparison exhibits accurately reflect those standards. This presents the risk that the jury will rely on comparison exhibits which do not accurately reflect prevailing community attitudes on sexually explicit material.

This risk should not be avoided, however, by excluding relevant comparison evidence. Exclusion of such evidence maximizes the likelihood that the jury, having no evidence of community standards, will merely apply its own prejudices in making an obscenity determination. The response to the jury's inability to fully weigh the force of comparison evidence should not be to cast the jury further into the dark. Although introducing comparison exhibits may tend to benefit the purveyor of obscene materials along with the person exercising a legitimate right to free speech, the criminal law dictates implicitly that it is preferable to allow a guilty person to go free than to convict an innocent person exercising constitutionally guaranteed rights.

The risk of inaccurate jury evaluation of comparison evidence should be checked through careful, diligent use of the Womack relevancy test. If the foundation requirements of similarity and acceptability have been demonstrated to the satisfaction of the

124. See Dennison, supra note 45, at 217.
125. See pt. I A supra.
court, there exists little danger of improper jury reliance. Indeed, comparison evidence found relevant under Womack likely does reflect prevailing community standards. The jury remains free to disregard the evidence, and the prosecution can attack the probative value of the exhibits. The defendant who succeeds, however, in overcoming the sizable hurdles involved in demonstrating the similarity and acceptability of comparison evidence should not be thwarted by the risk of jury confusion. Under this approach, if comparison evidence satisfies the Womack test, its exclusion on the basis of possible jury confusion should be considered an abuse of discretion.

CONCLUSION

Although the concept of community standards lies at the core of the definition of obscenity, a jury cannot reasonably be expected to have an accurate perception of those standards. Thus, proof of community standards is critical to protecting the due process and free speech rights of the obscenity defendant, and comparison evidence, as a uniquely effective way of presenting those standards, may be essential to an adequate defense against obscenity charges.

Assessing the relevancy of comparison evidence necessitates troublesome determinations as to community acceptability and similarity between the proffered evidence and the work in question. But the difficulty does not stem from the proffer of comparison evidence; such evidence merely forces the jury to repeat questions that must be asked about the material in question. Rather, confusion stems from the definition of obscenity and its reliance upon community standards as a dividing line between protected and unprotected speech. The vast difficulties involved in showing the relevancy of comparison evidence suggest the near impossibility of determining in advance whether a particular work is obscene. The purveyor of sexually explicit works who thus must await a case-by-case assessment of obscenity either suffers a chilling of potentially protected speech or risks conviction under standards not easily subject to proof at trial.

Such post-hoc determinations of obscenity hardly constitute adequate protection for the defendant's constitutional rights to

126. See Hamling v. United States, 418 U.S. 87, 100 (1974) (jury was free to disregard expert testimony on community standards).
free speech and due process. Given the dilemma confronting the purveyor of sexually explicit material, relevant comparison evidence should be admitted even if it brings increased complexity to the trial; to err on the side of inclusion is to give the defendant a fighting chance.

127. See Ford v. State, 394 N.E.2d 250, 258 (Ind. App. 1979) (Garrand, J., dissenting) (the standards on obscenity "create a community of the twelve seated in the box and permit their standards to largely determine ex post facto whether material is obscene"); Schauer, Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity, 56 N.C. L. Rev. 1 (1978). But see Comment, Community Standards in Obscenity Adjudication, 66 Calif. L. Rev. 1277 (1978) (advocating retention of community standards concept in order to limit the power of trial judges and to leave obscenity determinations to the jury).