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Average Person

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MILLER STANDARD

0.01 **As Judge of Community Standards and Appeal to Pruriency** - The trier of the fact must determine if the average person would find that the disputed material, taken as a whole, appeals to the interest in prurient matters as pruriency is measured by the present day standards of the community.

Pinkus v. United States, 436 U.S. 293 (1978), *on remand*, 579 F.2d 1174 (9th Cir. 1978), *cert denied*, 439 U.S. 999 (1978).

Smith v. United States, 431 U.S. 291 (1977).

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

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

Miller v. California, 413 U.S. 15 (1973).

Kois v. Wisconsin, 408 U.S. 229 (1972).

Ginzburg v. United States, 383 U.S. 463 (1966).

Mishkin v. New York, 383 U.S. 502 (1966).

Roth v. United States, 354 U.S. 476 (1957).

United States v. Battista, 646 F. 2d 237 (6th Cir. 1981), *cert. denied*, *Periano v. United States*, 454 U.S. 1046 (1981).

United States v. Bush, 582 F.2d 1016 (5th Cir. 1978).

United States v. Pinkus, 551 F.2d 1155 (9th Cir. 1977), *rev'd*, *Pinkus v. United States*, 436 U.S. 293 (1978), *on remand*, *United States v. Pinkus*, 579 F.2d 1174 (9th Cir. 1978), *cert. denied*, 439 U.S. 999

(1978).

United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185 (2d Cir. 1977), *cert. denied*, *Long v. United States*, 436 U.S. 931 (1978).

United States v. Cutting, 538 F.2d 835 (9th cir. 1976), *cert. denied*, 429 U.S. 152 (1977).

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

United States v. Eight Reels of Film, 491 F. Supp. 127 (W.D. Tex. 1978).

City of Urbana v. Downing, 539 N.E.2d 140 (Ohio 1989), *cert. denied*, 110 S.Ct. 325 (1989).

Gotleib v. State, 406 A.2d 270 (Del. 1979).

Leech v. American Booksellers Association, Inc., 582 S.W.2d 738 (Tenn. 1979).

State v. International Amusements, 565 P.2d 1112 (Utah 1977), *cert. denied*, 434 U.S. 1023 (1978).

Price v. Commonwealth, 201 S.E.2d 798 (Va. 1974), *cert. denied*, 419 U.S. 902 (1974).

Rhodes v. State, 83 So.2d 351 (Fla. 1973).

Slaton v. Paris Adult Theatre I, 201 S.E.2d 456 (Ga. 1973), *cert. denied*, 418 U.S. 939 (1973).

State v. J.R. Distributors, Inc., 512 P.2d 1049 (Wash. 1973), *cert. denied*, 418 U.S. 939 (1973).

State v. Miller, 112 S.E.2d 472 (W. Va.

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1960).

T.K.'s Video, Inc. v. State, 871 S.W.2d 522 (Tex. Crim. App. 1994).

State v. Williams, 598 N.E.2d 1250 (Ohio App. Ct. 1992).

5297 Pulaski Highway v. Town of Perryville, 519 A.2d 206 (Md. Ct. Spec. App. 1987).

State v. Henry, 717 P.2d 189 (Or. Ct. App. 1986).

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

People v. Wiseman, 341 N.W.2d 494 (Mich. Ct. App. 1983).

Showcase Cinemas, Inc. v. State, 274 S.E.2d 578 (Ga. Ct. App. 1980), *cert. denied*, 451 U.S. 934 (1981).

Cf. Ford v. State, 394 N.E.2d 250 (Ind. Ct. App. 1979).

City of Belleville v. Morgan, 376 N.E.2d 704 (Ill. App. Ct. 1978).

State v. DePiano, 375 A.2d 1169 (N.J. Super. Ct. App. Div. 1977).

City of Tacoma v. Duane, 552 P.2d 1068 (Wash. Ct. App. 1976).

Ebert v. Maryland State Board of Censors, 313 A.2d 536 (Md. Ct. Spec. App. 1973).

People v. Enskat, 109 Cal. Rptr. 433 (Cal. Ct. App. 1973), *cert. denied*, 418 U.S. 937 (1974).

State v. Bryant, 201 S.E.2d 211 (N.C. Ct. App. 1973), *aff'd*, 203 S.E.2d 27 (N.C. 1974), *cert. denied*, 419 U.S. 974 (1974).

0.0101 - A New York Court attempts to

describe the above process by saying that the court (as trier of fact) must find and seek out the mind, the spirit and sensibility of the average person in the community, determine the contemporary community standard and finally by a complete metamorphosis eradicate its own mind, spirit and sensibilities and permit the mind, spirit and sensibilities of the average person to inhabit its being and then let the average person apply the contemporary standards to the material.

Stengel v. Smith, 236 N.Y.S.2d 569 (N.Y. Sup. Ct. Erie Co. 1963), *rev'd on other grounds*, 240 N.Y.S.2d 200 (N.Y. Sup. Ct. App. Div. 1963).

0.01011 **Jury to judge by** - The jury was to determine appeal to the prurient interest as would the "average person."

Video News, Inc. v. State, 781 S.W.2d 411 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 849 (1990).

0.01012 **Assessment of the average person** - In determining a statewide standard the juror may, as a factor, give consideration to the assessment of the average person in the juror's own community.

State v. Lichon, 786 P.2d 1037 (Ariz. Ct. App. 1989).

0.0102 - Jurors define technical meanings of words in jury charges through the eyes and mind of the average person . . . Deciding what to the average person in his community is obscene.

State v. Summers, 692 S.W.2d 439 (Tenn. Crim. App. 1985).

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.01021 **Similarly** - Whether the materials viewed by an "average person"

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applying "contemporary community standards" would be considered "patently

offensive" or appealing to the "prurient interest" in sex are essentially questions of fact.

State v. J.R. Distributors, Inc., 512 P.2d 1049 (Wash. 1973), *cert. denied*, 418 U.S. 939 (1973).

0.010211 - The contemporary community standards are to be applied by the ubiquitous "average person" - the ever present "reasonable man or woman."

People v. Gilmore, 468 N.Y.S.2d 965 (N.Y. City Ct. Mt. Vernon 1983).

0.010212 **As Questions of Fact** - The United States Supreme Court has emphasized that it is a factual determination as to whether the particular material violates the community standard as viewed by the average person.

State v. Taylor, 664 P.2d 439 (Utah 1983).

0.0103 **Average Person As Judge of Appeal to Pruriency or As Person to Whose Pruriency the Matter Appeals** - The U.S. Second Circuit Court of Appeals posed without deciding the question of whether the *Roth* prurient interest appeal test means that the "Average Person" is the judge of the existence of the prurient appeal or whether someone else is to judge whether the appeal is to the prurient interest of the "Average Person." The Court says the phrase admits of either interpretation. See "Overview Obscenity Defined" ¶1,000 et seq.

United States v. Klaw, 350 F.2d. 155 (2d Cir. 1965).

0.0104 - Jurors must apply their individual views "of the community standard

as the average person would apply it."

State v. Taylor, 664 P.2d 439 (Utah 1983).

0.01041 - The trier of fact determines whether the average person would be offended by the material.

Beir v. State, 681 S.W.2d 124 (Tex. Crim. App. 1984), *rev'd on their grounds*, 687 S.W.2d 2 (Tex. Crim. App. 1985).

0.01042 - The trier of fact may utilize his own sense of the views of the hypothetical average person in the community.

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

0.0105 **How Impact is Measured** - The trier of fact considers prurient appeal through intended audiences eyes using the "ordinary adult" standard before determining other obscenity factors.

People v. Spargo, 431 N.E.2d 27 (Ill. App. Ct. 1982).

0.01051 **Need not be aroused** - The test is whether sexual arousal is the object of the work. The actual arousal of the average person is not required.

Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989).

0.01053 **Judge takes skin and mind of** - When the trier of fact in an obscenity case is a judge, he must assess the material as if it were viewed by the "average person."

City of Urbana v. Downing, 539 N.E.2d 140 (Ohio 1989), *cert. denied*, 110 S.Ct. 325 (1989).

0.01054 **Average Person Standard** -

Average Person

The judge if trier of the case must gauge the reaction of the community when and as if the average person had viewed it.

State v. Video Express, 695 N.E.2d 38 (Ohio Ct. App. 1997).

0.0106 As Judge of Prurient Interest Appeal to Deviant Sexual Groups - If the material appeals to the sexual interest of deviant sexual groups and the average person finds such interest to be shameful and morbid, the prurient interest appeal will be satisfied notwithstanding the absence of feelings of shame and morbidity in the members of such deviant sexual groups.

United States v. Ewing, 445 F.2d 945 (10th Cir. 1971), *vacated and remanded in light of Miller*, 413 U.S. 913 (1973).

0.01061 Similarly, it has been held that whether or not material appealing to sexual interest of deviates is obscene is to be judged by normal and not abnormal people.

Coon v. State, 871 S.W.2d 284 (Tex. Crim. App. 1994).

People v. Mishkin, 207 N.Y.S.2d 390 (N.Y.C. Ct. Spec. Sess. N.Y. Cty. 1960), *modified*, 234 N.Y.S.2d 342 (N.Y. Sup. Ct. App. Div. 1962)), *aff'd*, 204 N.E.2d 209 (N.Y. 1964), *aff'd*, 383 U.S. 502 (1966).

0.01062 Material that has Prurient Appeal to Sexual Deviates Need Not Appeal to the Prurient Interest of the Average Person - Materials designed for deviates need not appeal to the prurient interest of the average person if the materials appeal to the prurient interest in sex of members of the deviant group.

Mishkin v. New York, 383 U.S. 502 (1966).

United States v. Hill, 500 F.2d 733 (5th Cir. 1974), *cert. denied*, 42 U.S. 952 (1975).

United States v. Pellegrino, 467 F.2d 41 (9th Cir. 1972).

United States v. 56 Cartons of a Magazine Entitled "Hellenic Sun", 373 F.2d 635 (4th Cir. 1967), *rev'd, sub nom. Potmac News Co. v. United States*, 389 U.S. 47 (1967).

Manual Enterprises v. Day, 289 F.2d 455 (D.C. Cir. 1961) *rev'd*, 370 U.S. 478 (1962).

City of Belleville v. Morgan, 376 N.E.2d 704 (Ill. App. Ct. 1978).

State v. Grabill, 579 P.2d 316 (Or. Ct. App. 1978).

0.010621 Deviant Groups - Where the material is designed for and primarily disseminated to a clearly defines deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the "average" or normal person was employed in *Roth* to serve the essentially negative purpose of rejection of the *Hicklin* test of the most susceptible person.

People v. Spargo, 431 N.E.2d 27 (Ill. App. Ct. 1982).

0.0106211 Materials targeting deviant groups are not beyond the scope of obscenity laws just because they appeal to the prurient interest of a sexual deviant rather than the average adult.

T.K.'s Video, Inc. v. State, 883 S.W.2d 300 (Tex. Crim. App. 1994).

0.010622 Materials which do not appeal to the prurient interests of the average person must be assessed in terms of the sexual interests of the intended and probable

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recipient group.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

Coon v. State, 871 S.W.2d 284 (Tex. Crim. App. 1994).

0.010623 The jurors viewed the films, and, with such help as the expert witnesses provided on zoophiliacs were competent to make the proper determination as the appeal to the prurient interest of the members of that group.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.010624 *Miller* did not stand for the proposition that the literary, artistic, political or scientific value of the work were to be determined by their effect upon the average person, applying contemporary community standards.

Moses v. County of Kenosha, 649 F. Supp. 451 (E.D. Wis. 1986), *modified*, 826 F.2d 708 (7th Cir. 1987).

0.010625 Neither the Supreme Court nor the legislature intended that tasteful pornography be suppressed while distasteful pornography be unregulated.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.010626 The prurient interest with respect to acts of sexual perversion is not an appeal to the prurient interest of the average person but, rather, an appeal to the prurient interest of the small sub-group of sexual deviants or perverts who derive pleasure from such sexually perverted or deviant acts.

State v. Wolfe, 534 N.E.2d 920 (Ohio Ct. App. 1987).

0.010627 It is said that the materials would not appeal to the average man's prurient interest in sex "because they would be sexually abhorrent to him. If this is true, the obscenity amounts to hardcore pornography in its strongest sense.

State v. J.R. Distributors, Inc., 512 P.2d 1049 (Wash. 1973), *cert. denied*, 418 U.S. 939 (1973).

O.L.R. Note 1

Ripplinger v. Collins, 868 F.2d 1043 is to the same effect.

0.0106271 Individuals eager for a forbidden look need not all be average persons.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.010628 Where first prong is tested by appeal to members of deviant groups, the second and third prong are still to be tested by the 'ordinary adult' standard.

People v. Spargo, 431 N.E.2d 27 (Ill. App. Ct. 1982).

0.010629 The district court was not required to ask the jury to find whether there was such a thing as an average zoophiliac and the appeal of the films to such a person.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.01063 A charge to the jury to determine the appeal to the Average Person or to members of deviant groups is proper.

Average Person

Pinkus v. United States, 436 U.S. 293 (1978), *on remand*, 579 F.2d 1174 (9th Cir. 1978), *cert denied*, 439 U.S. 999 (1978).

United States v. Palladino, 475 F.2d 65 (1st Cir. 1966), *vacated and remanded in light of Miller*, 413 U.S. 916 (1973).

People v. Young, 143 Cal. Rptr. 604 (Cal. App. Dep't Super. Ct. 1977).

0.010631 The average person would view such material with an intellectual curiosity, but not experience a whetting of sexual appetite.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.010632 There may be an extreme case of materials addressed to such a bizarre deviant group that the experience of the trier of the fact may be plainly inadequate to judge whether the material appeals to the prurient interest.

State v. J.R. Distributors, Inc., 512 P.2d 1049 (Wash. 1973), *cert. denied*, 418 U.S. 939 (1973).

State v. Anderson, 354 S.E.2d 264 (N.C. Ct. App. 1987), *rev'd on other grounds*, 366 S.E.2d 459 (N.C. 1988), *cert. denied*, 109 S.Ct. 513 (1988).

State v. Summers, 692 S.W.2d 439 (Tenn. Crim. App. 1985).

0.010633 The average person has ideas of the type of activities young people should be engaged in, and this does not include participating in explicit and unnatural sexual activities.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.010634 Reference to the prurient interest of the average person do not convert into a rule that if the material is so offensive as to be more disgusting to the average person than appealing to his prurient interest, it may not be found to be obscene.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.01064 **Average person as judge of standards/not appeal to him** - It is not error to provide an instruction that the average person is the judge of the prurient appeal and need not charge appeal to the prurient interest of the average person.

United States v. Easley, 927 F.2d 1442 (8th Cir. 1991), *review denied, sub nom., Hunter v. United States*, 112 S.Ct. 199 (1991).

0.0107 The *Miller* standard is adjusted in child pornography cases so a trier of fact "need not find that the material appeals to the prurient interest of the average person."

State v. Jordan, 665 P.2d 1280 (Utah 1978).

0.0108 **As Person Upon Whom Impact of Erotica Is Measured** - The primary concern with requiring a jury to apply the standard of the "Average Person" applying "contemporary community standards" is to be certain that it will be judged by its impact on the average person rather than a particularly susceptible or sensitive person, or a totally insensitive one.

Smith v. United States, 431 U.S. 291 (1977).

Miller v. California, 413 U.S. 15 (1973).

Mishkin v. New York, 383 U.S. 502 (1966).

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United States v. Battista, 646 F. 2d 237 (6th Cir. 1981), *cert. denied*, *Periano v. United States*, 454 U.S. 1046 (1981).

United States v. Cutting, 538 F.2d 835 (9th cir. 1976), *cert. denied*, 429 U.S. 152 (1977).

H.B.O. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

State v. International Amusements, 565 P.2d 1112 (Utah 1977), *cert. denied*, 434 U.S. 1023 (1978).

Commonwealth v. 707 Main Corp., 357 N.E.2d 753 (Mass. 1976).

City of Belleville v. Morgan, 376 N.E.2d 704 (Ill. App. Ct. 1978).

0.01081 **"Impact" is not judged by the most sensitive person** - As referred to in Supreme Court cases, the "impact" and "effect" on the average person means the standards of the average person will judge the material, not the standards of the most sensitive person in the community.

Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989).

0.01082 The primary concern with requiring a jury to apply the standard of the average person applying contemporary community standards is to be certain that, insofar as material is not aimed as a deviant group, it will be judged by its impact on an average person.

State v. Taylor, 664 P.2d 439 (Utah 1983).

0.0109 Sensitive and insensitive persons are to be included in the community.

Pinkus v. United States, 436 U.S. 293 (1978), *on remand*, 579 F.2d 1174 (9th Cir. 1978), *cert denied*, 439 U.S. 999 (1978).

United States v. Pinkus, 551 F.2d 1155 (9th Cir. 1977), *rev'd*, *Pinkus v. United States*, 436 U.S. 293 (1978), *on remand*, *United States v. Pinkus*, 579 F.2d 1174 (9th Cir. 1978), *cert. denied*, 439 U.S. 999 (1978).

0.01091 **Miller's First Prong** - The first prong of the *Miller* test to determine whether material is obscene is whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.

State v. Caudill, 599 N.E.2d 395 (Ohio Ct. App. 1991), *appeal dismissed*, 581 N.E.2d 1097 (Ohio 1991).

0.0111 A book is to be judged in terms of its effect on the average normal reader, and a film tested with reference to its effect upon the normal average person.

American Civil Liberties Union v. City of Chicago, 121 N.E.2d 585 (Ill. 1954), *cert. denied*, 48 U.S. 979 (1955).

0.01111 The question is whether the film was unnecessarily offensive to the visual, intellectual and emotional sensibilities of the "Average Person."

United States v. A Motion Picture Entitled "Pattern of Evil", 304 F. Supp. 197 (S.D.N.Y. 1969).

0.01112 A motion picture is obscene when offensive to the common sense of decency of the community and when the dominant theme of the motion picture, considered as a whole, is calculated to and is likely to excite lustful thoughts and lecherous desires or to stir the sex impulses or to lead to sexually impure thoughts in the ordinary average person who is likely to see the film.

State v. Scope, 86 A.2d 154 (Del. Super. Ct. 1952).

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0.0112 To determine if material is "obscene for children" the diversity of viewpoints within the entire class of children is considered as a whole by the trier of fact.

Freeman v. Commonwealth, 288 S.E.2d 461 (Va. 1982).

0.0113 The test is appeal to the prurient interest of the "Average Person."

New York v. Ferber, 458 U.S. 747 (1982).

Pinkus v. United States, 436 U.S. 293 (1978), *on remand*, 579 F.2d 1174 (9th Cir. 1978), *cert denied*, 439 U.S. 999 (1978).

United States v. Sanders, 592 F.2d 788 (5th Cir. 1979), *rev'd on other grounds*, *Walters v. United States*, 447 U.S. 649 (1980).

United States v. Palladino, 475 F.2d 65 (1st Cir. 1966), *vacated and remanded in light of Miller*, 413 U.S. 916 (1973).

State ex rel. Chobot v. Circuit Court for Milwaukee City, 212 N.W.2d 690 (Wis. 1973).

State v. Gay Times, Inc., 274 So.2d 162 (La. 1973), *vacated*, 414 U.S. 994 (1973), *on remand*, 294 So.2d 496 (La. 1974).

0.01131 An appeal to the prurient interest of the average person is not invalid in light of the *Hamling* case.

Dunlap v. State, 728 S.W.2d 155 (Ark. 1987).

0.0114 The test is the sensibility to prurieny of the average man in the community.

United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185 (2d Cir. 1977), *cert. denied*,

Long v. United States, 436 U.S. 931 (1978).

Keuper v. Wilson, 268 A.2d 760 (N.J. Super. Ct. 1970).

People v. Rotto, 213 N.Y.S.2d 536 (N.Y. Sup. Ct. App. Div. 1961).

0.0115 The *Roth* test requires that the material offend the common conscience of the community using the average person in the community as the basis for judgment.

Overstock Book Co. v. Barry, 305 F. Supp. 842 (E.D.N.Y. 1969), *aff'd*, 436 F.2d 1289 (2d Cir. 1970).

Walthall v. State, 594 S.W.2d 74 (Tex. Crim. App. 1980).

0.0116 "Average Person, applying contemporary community standards, constituting the first prong of the *Miller* test, necessarily implies the possibility of changing mores."

United States v. Various Articles of Obscene Merchandise, Schedule 2101, (S.D.N.Y. 1982).

0.01161 As with the average man, a judge's perception of the community may change.

People v. Illardo, 426 N.Y.S.2d 212 (N.Y. Buffalo City Ct. 1980).

0.01171 What is indecent to one person may not be indecent to another and that is why we believe that the United States Supreme Court opted for the average person standard.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.011711 The age or apparent age of the models is relevant only to the question of whether this material is patently offensive to

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the average person because the average person would find material depicting adolescents in these activities more offensive than similar material depicting adults likewise engaged.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.01172 **Patent Offensiveness** - We assume that the trial court, sitting as the trier of the fact, determined the issue of patently offensive and appeal to the prurient interest by assuming the perspective of the average person.

Sanders v. State, 649 S.W.2d 59 (Tex. Crim. App. 1982).

0.01173 The average person in the Western District of Texas would find that the materials contained within these films, taken as a whole, appeal to the prurient interest.

United States v. Eight Reels of Film, 491 F. Supp. 127 (W.D. Tex. 1978).

0.01174 **Any Audience of Average Persons** - The content of the photos is such that the work as a whole is necessarily obscene for any audience of average persons in the relevant community.

United States v. Various Articles of Merchandise, 600 F. Supp. 1383 (N.D. Ill. 1985).

0.01175 Based on how the average person in the community would view it, the court has no trouble concluding that this work appeals to the prurient interest.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.0122 **Factual Issues** - The trier of the fact must use an average citizen of the

county not a particularly susceptible or particularly insensitive one.

State v. Harrold, 593 N.W. 2d 299 (Neb. 1999), *cert. denied*, 528 U.S. 1142 (2000).

AVERAGE SEX INSTINCTS

0.2 **Person with Average Sex Instincts As Average Person** - What must be measured is the effect on a person with average sex instincts-What the French would call "l'homme moyen sensuel."

Volanski v. United States, 246 F.2d 842 (6th Cir. 1957).

0.2001 **Average sex instincts** - For purposes of the *Miller* test, the average person is one with average sex instincts.

City of Urbana v. Downing, 539 N.E.2d 140 (Ohio 1989), *cert. denied*, 110 S.Ct. 325 (1989).

0.201 **Judge or Juror As Person With Average Sex Instincts** - Although material must be tested by its effect on a person with average sex instincts, a judge or juror should be able to estimate that rather closely by the reaction he, himself, has to the material.

City of Cincinnati v. Walton, 145 N.E.2d 407 (Ohio Mun. Ct. 1957).

COMMUNITY REPRESENTATIVE

0.3 **Appeal to the Average Person in the Community is the Test.** -

State v. Henry, 198 S.2d 889 (La. 1967), *rev'd*, *Henry v. Louisiana*, 392 U.S. 665 (1968).

Coon v. State, 871 S.W.2d 284 (Tex. Crim. App. 1994).

State v. DePiano, 375 A.2d 1169 (N.J. Super. Ct. App. Div. 1977).

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People v. Bloss, 184 N.W.2d 299 (Mich. Ct. App. 1970), *rev'd*, 201 N.W.2d 806 (Mich. 1972), *vacated*, *Michigan v. Bloss*, 413 U.S. 909 (1973), *on remand*, *People v. Bloss*, 228 N.W.2d 384 (Mich. 1975).

0.301 Material is to be judged by what the community as a whole would consider obscene.

Jacobellis v. Ohio, 378 U.S. 184 (1964).

0.302 It is the impact on the community as measured by the average member of the community.

United States v. Battista, 646 F. 2d 237 (6th Cir. 1981), *cert. denied*, *Periano v. United States*, 454 U.S. 1046 (1981).

0.303 Material alleged to be obscene must generally be judged on the basis of appeal to the average member of the community.

State v. Jackson, 356 P.2d 495 (Or. 1960).

0.3031 **Knowledge of views** - The trier of the fact must use an average citizen of the county not a particularly susceptible or particularly insensitive one.

State v. Harrold, 593 N.W. 2d 299 (Neb. 1999), *cert. denied*, 528 U.S. 1142 (2000).

0.305 **Jurors as Representative of Average Member of Their Community** - Lay jurors as the usual fact finders in criminal prosecutions have been historically permitted to draw on the standards of their own community to determine the views of the average person.

Smith v. United States, 431 U.S. 291 (1977).

Hamling v. United States, 418 U.S. 87

(1974).

Miller v. California, 413 U.S. 15 (1973).

Eckstein v. Melson, 18 F.3d 1181 (4th Cir. 1994).

United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185 (2d Cir. 1977), *cert. denied*, *Long v. United States*, 436 U.S. 931 (1978).

Leech v. American Booksellers Association, Inc., 582 S.W.2d 738 (Tenn. 1979).

State v. International Amusements, 565 P.2d 1112 (Utah 1977), *cert. denied*, 434 U.S. 1023 (1978).

Commonwealth v. 707 Main Corp., 357 N.E.2d 753 (Mass. 1976).

District Attorney v. Three Way Theatres Corp., 357 N.E.2d 747 (Mass. 1976).

T.K.'s Video, Inc. v. State, 859 S.W.2d 85 (Tex. Crim. App. 1993).

0.30501 In the determination of contemporary community standards, "you should judge how the average adult person in this community would view the material."

Richards v. State, 461 N.E.2d 744 (Ind. Ct. App. 1984).

0.30502 The "average person" need not necessarily share the community consensus of what is obscene, but rather must be able to apply that community standard without his or her sensitivities coloring his perspective.

State v. Taylor, 664 P.2d 439 (Utah 1983).

0.305021 Under state and federal law, a juror is permitted to draw upon his

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knowledge of the community and decide whether the average person, applying

community standards, would find the material in question to be obscene.

T.K.'s Video, Inc. v. State, 859 S.W.2d 85 (Tex. Crim. App. 1993).

0.30503 **Availability** - The mere availability of similar materials does not demonstrate that they are acceptable to the average person in the community, but where its availability and public viewing of the same or comparable materials is widespread, the trial judge was entitled to draw the inference therefrom that the challenged articles enjoy a reasonable degree of community acceptance.

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

0.3051 The trier of fact can determine how the average person would apply contemporary community standards. The trier of fact can determine the common conscience of the community.

Rachleff v. Mahon, 124 So.2d 878 (Fla. Dist. Ct. App. 1960).

0.30511 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.

State v. Taylor, 664 P.2d 439 (Utah 1983).

State v. Henry, 717 P.2d 189 (Or. Ct. App. 1986).

Richards v. State, 461 N.E.2d 744 (Ind. Ct. App. 1984).

0.3052 Even if relevant evidence of the prevailing community standard is

introduced, the trier may disregard it and rely exclusively on his own knowledge of the views of the average person in the community.

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

City of Miami v. Florida Literary Distributors Corp., 486 So.2d 569 (Fla. 1986), *aff'g*, 460 So.2d 1028 (Fla. Dist. Ct. App. 1985), *cert. denied*, 107 S.Ct. 248 (1986).

State v. Henry, 717 P.2d 189 (Or. Ct. App. 1986).

Richards v. State, 461 N.E.2d 744 (Ind. Ct. App. 1984).

0.3053 **Role of Trier of Fact** - Material to be obscene had to be patently offensive to the average person applying contemporary community standards. The right to make the determination of identifying whether the average person would find the material facially offensive and appealed to the prurient interest in sex was left to the trier of fact.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.3054 **Judge as Trier of Fact** - When the judge is the trier of the fact in an obscenity case, he must gauge the reaction of the community when and as if the average person viewed the material.

State ex rel Eckstein v. Video Express, 695 N.E.2d 38 (Ohio Ct. App. 1997).

0.306 **Average Person is not measured by a majority in the Community** - The term "Average Person" does not include any number of people, the majority or a few, or some, but it is a term connoting a corporate or synthesis of the community.

Average Person

United States v. Treatment, 524 F.2d 320 (8th Cir. 1975).

0.3061 **As aggregate of attitudes** - The "average person", a legal concept, is not that of a singular persuasion, but that conclusion derived from the aggregate of all attitudes.

Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd, sub nom. Luke Records v. Navarro*, 960 F.2d 134 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 659 (1992).

0.3062 **"Average person" denotes community synthesis** - "Average person", as a term, does not mean a numerical group, but rather connoting a composite or synthesis of the community.

City of Urbana v. Downing, 539 N.E.2d 140 (Ohio 1989), *cert. denied*, 110 S.Ct. 325 (1989).

AVERAGE ADULT

0.4 **Average Person as Average Adult** - The "Average Person" means the average adult person. If the statute enjoins or punishes sales to adults as well as to minors, the average person must be an adult or the statute is unconstitutional-and by the "Average Person" is not meant the abnormal adult of noxious tendencies or the person of defective or subnormal mentality.

Attorney General v. The Book Named "Tropic of Cancer", 184 N.E.2d 328 (Mass. 1962).

State v. Mahoning Valley Distributing Agency, Inc., 186 N.E.2d 631 (Ohio Ct. App. 1962).

0.40001 Determination of contemporary community standards requires that you should judge how the average adult person in this community would view the material.

Richards v. State, 461 N.E.2d 744 (Ind. Ct. App. 1984).

0.40002 You must apply what the average adult person would consider to be obscene.

Commonwealth v. Dane Entertainment Services, Inc., 454 N.E.2d 917 (Mass. App. Ct. 1983).

0.40003 The "average person" in this case (obscenity as to minors) is that person 18 years of age or older, the trier of fact (not a person under 18) since it is his very irresponsibility, immaturity and inability to cope with adult materials that warrants the special consideration.

State v. Siegal, 354 A.2d 103 (N.J. Super. Ct. App. Div. 1975).

0.4001 **Children are not part of the Community where no indication they are part of the audience** - In the context of a particular case involving a federal prosecution for mailing obscenity, the United States Supreme Court held that in determining the average person, children were to be excluded from the base since there was no evidence that petitioner had reason to know children were likely to receive the materials.

Pinkus v. United States, 436 U.S. 293 (1978), *on remand*, 579 F.2d 1174 (9th Cir. 1978), *cert denied*, 439 U.S. 999 (1978).

United States v. Sanders, 592 F.2d 788 (5th Cir. 1979), *rev'd on other grounds, Walters v. United States*, 447 U.S. 649 (1980).

United States v. Bush, 582 F.2d 1016 (5th Cir. 1978).

0.4002 **Statutory Provision Requiring Average Adult as Criterion** - The meaning of the term "Average Adult" in the

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California Statute is a hypothetical composite person who typifies the entire community including persons of both sexes; the religious and irreligious of all nationalities and all adult ages; all economic, educational and social standings neither a libertine nor a prude, but with normal, healthy average contemporary attitudes, instincts and interests concerning sex.

People v. Young, 143 Cal. Rptr. 604 (Cal. App. Dep't Super. Ct. 1977).

0.4003 A refusal to charge that the average person must be an adult and that others must be excluded from the jury's consideration was held not to be error where the trial court paraphrased the charge given in *Roth*.

Books, Inc. v. United States, 358 F.2d 935 (1st. Cir. 1966), *rev'd on other grounds*, 388 U.S. 449 (1967).

0.4004 A work that does not appeal to the sophisticated may still appeal to the prurient interest of the average adult.

People v. Kirkpatrick, 316 N.Y.S.2d 37 (N.Y. City Crim. Ct. N.Y. Cty. 1970), *appeal dismissed*, 414 U.S. 948 (1973), *aff'd*, 329 N.Y.S.2d 769 (N.Y. Sup. Ct. 1971), *aff'd*, 343 N.Y.S.2d 70 (N.Y. 1973).

0.4005 Appeal to the prurient interest of the average adult citizen is the test. [Court quotes American Law Institute 1962 Model Penal Code Sec. 251.4(1).] [See however, 2,000 in main text and previous O.L.R. Explanation.]

United States v. Pellegrino, 467 F.2d 41 (9th Cir. 1972).

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. Sup. Jud. Ct. 1978).

0.40051 Instruction adequately informed the jury that they were to apply not their own

personal standards but rather those of the average adult in the community.

State v. Smith, 360 S.E.2d 495 (N.C. Ct. App. 1987).

0.400511 **May not use own standards** - The trier of the fact must use an average citizen of the county not a particularly susceptible or particularly insensitive one.

State v. Harrold, 593 N.W. 2d 299 (Neb. 1999), *cert. denied*, 528 U.S. 1142 (2000).

0.40053 A Psychiatrist testified that although sexual conduct depicted was normal it would appeal to the prurient interest of some average adults.

People v. Sequoia Books, Inc., 496 N.E.2d 740 (Ill. App. Ct. 1986).

0.4006 Ordinary Adult is the criterion in Illinois.

People v. Mazzone, 368 N.E.2d 207 (Ill. App. Ct. 1977) *vacated*, 383 N.E.2d 947 (Ill. 1978).

0.4007 **Average Adult is Measure of the Existence of Prurient Appeal** - Existence of prurient appeal is measured in reference to the average and ordinary adult.

Childs v. State of Oregon, 300 F. Supp. 649 (D. Ore. 1969), *rev'd*, 431 F.2d 272 (9th Cir. 1970), *rev'd*, 401 U.S. 1006 (1971).

0.4008 **Adulthood as Achieved At Various Ages** - In applying the average adult test a jury was instructed that it must determine when a person becomes an adult. In that connection, a jury was entitled to consider laws of other states, common law, age of physical or mental maturity and perhaps even the age of puberty as the possible threshold.

Butler v. Michigan, 352 U.S. 380

Average Person

(1957).

Olsen v. Doerfler, 165 N.W.2d 648 (Mich. Ct. App. 1968).

0.4009 The rule enunciated in *Redrup* protects the average normal adult.

People v. Stabile, 296 N.Y.S.2d 815 (N.Y. City Crim. Ct. N.Y. Cty. 1969).

0.401 Since the state has adopted a statute controlling what is obscene for minors, its general obscenity statute will be construed as incorporating an average adult standard (even though that phrase is not used in the statute).

Newman v. Conover, 313 F. Supp. 623 (N.D. Tex. 1970).

0.4011 The standards of men, women and children in the community are to be considered in determining the common conscience of the community.

United States v. Manarite, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, 404 U.S. 947 (1971).

O.L.R. Note 2

The reference F.N. 10 in *Manarite* to the charge given in *United States v. Roth* is error. The quote is actually from *Ginzberg v. United States*, 224 F. Supp. 129 (E.D. Pa. 1963), *aff'd*, 338 F.2d 12 (3rd Cir. 1964), *aff'd*, 383 U.S. 463 (1966).

0.40111 The jury must evaluate what judgment will be made by a hypothetical average person applying the collective view of the adult community.

United States v. Pryba, 674 F. Supp. 1504 E.D. Va. 1987), *companion cases*, 674 F. Supp. 1502 (E.D. Va. 1987), 674 F. Supp.

1518 (E.D. Va. 1987), *and* 678 F. Supp. 1225 (E.D. Va. 1988).

0.4012 **Average Citizen** - Appeal to prurient interest depends on whether the average citizen so views the material.

State v. Miller, 112 S.E.2d 472 (W. Va. 1960).

Commonwealth v. Mascolo, 375 N.E.2d 17 (Mass. App. Ct. 1978), *cert. denied*, 439 U.S. 899 (1978).

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. Sup. Jud. Ct. 1978).

0.40121 **Average Citizen** - The trier of the fact must use an average citizen of the county not a particularly susceptible or particularly insensitive one.

State v. Harrold, 593 N.W. 2d 299 (Neb. 1999), *cert. denied*, 528 U.S. 1142 (2000).

0.4013 **Average Person As Average Reader** - Literary critics generally do not represent that hypothetical character, the "Average Reader."

Grove Press, Inc. v. Christenbery, 175 F. Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

0.4015 **Average Male as Criterion** - Where pictures of females are involved, an appeal to the prurient interest of the average male was cited as the test of prurient appeal. The erotic stimulus of pictures of women may be tested by their appeal to the average man.

United States v. 1,000 Copies of Magazine Entitled "Solis", 254 F. Supp. 595 (D. Md. 1966).

0.40151 The materials appeal to the prurient interest of the average man.

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State v. J.R. Distributors, Inc., 512 P.2d 1049 (Wash. 1973), *cert. denied*, 418 U.S. 939 (1973).

0.4016 **Hicklin Test** - Most susceptible test is rejected.

Roth v. United States, 354 U.S. 476 (1957).

0.40161 Obscenity may not be so lightly found as when judged by its effect upon the most susceptible.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

PRURIENT APPEAL

0.5 Appeal to prurient interest of jurors is not required.

United States v. Pryba, 674 F. Supp. 1504 E.D. Va. 1987), *companion cases*, 674 F. Supp. 1502 (E.D. Va. 1987), 674 F. Supp. 1518 (E.D. Va. 1987), *and* 678 F. Supp. 1225 (E.D. Va. 1988).

State v. Grabill, 579 P.2d 316 (Or. Ct. App. 1978).

0.5001 **Role of review court** - Appellant may not argue that State's argument (that a video tape that is erotically arousing is enough for the average viewer to make a determination that it appeals to the prurient interest in sex) was not a statement of law and now is a statement of law.

T.K.'s Video, Inc. v. State, 832 S.W.2d 174 (Tex. Crim. App. 1992)

0.501 **Appeal to a Substantial Number of Members of Public Sufficient** - While the average juror may not find photographs of a nude pre-teenage girl engaged in masturbation sexually arousing, the average juror is qualified by experience to conclude

that such materials appeal to the prurient interests of a substantial number of individuals.

State v. Grabill, 579 P.2d 316 (Or. Ct. App. 1978).

People v. Richmond County News, 179 N.Y.S.2d 76 (N.Y. Ct. Spec. Sess. Richmond Cty 1958), *rev'd*, 205 N.Y.S.2d 94 (N.Y. 1960), *aff'd*, 216 N.Y.S.2d 369 (N.Y. 1961).

0.502 **Jury Determining "Obscene for Children"** - Jurors are qualified to judge pictures from a child's viewpoint.

Freeman v. Commonwealth, 288 S.E.2d 461 (Va. 1982).

0.503 **Municipal Ordinance** - The failure to include the phrase "average person applying contemporary community standards" on the face of a municipal obscenity ordinance was not fatal.

City of Tacoma v. Duane, 552 P.2d 1068 (Wash. Ct. App. 1976).

0.5041 **As judge of prurient appeal** - In the obscenity test the "average person" is the judge not the object of the prurient appeal.

Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989).

0.51 The average person is the judge and not the object of the test as to appeal to prurieny.

United States v. Pryba, 674 F. Supp. 1504 E.D. Va. 1987), *companion cases*, 674 F. Supp. 1502 (E.D. Va. 1987), 674 F. Supp. 1518 (E.D. Va. 1987), *and* 678 F. Supp. 1225 (E.D. Va. 1988).

0.5101 The average person comes into the test not as the object of the appeal but as its judge.

Average Person

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.51011 Judgment Of the Average Person - It is the judgment of the average person in the community, rather than the most prudish or most tolerant.

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

O.L.R. Note 3

It is clear that third prong is not judged by contemporary community standards but by the reasonable person standard enumerated in *Pope v. Illinois*, 107 S.Ct. 1918 (1987).

THIRD MILLER PRONG

0.55 Literary, artistic, political and scientific value is determined by the trier of the fact without regard to the average person - contemporary community standards test.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.551 Serious Value Prong - A jury is not to determine a work's literary, artistic, political, and scientific value by the community's standards as perceived by an average person.

Drummond v. State, 752 S.W.2d 181 (Tex. Crim. App. 1988).

0.552 A review of the Texas statute reveals that it is not defective under *Pope*. While it applies an "average person" standard, the Standard is not in any way linked to a determination of the value of a work. The standard is applicable in determining whether a work appeals to the

prurient interest.

Handl v. State, 763 S.W.2d 446 (Tex. Ct. App. 1988).

MISCELLANEOUS

0.6 As Person of Average Human Instincts - The Missouri Rule established by *State v. Becker*, 272 S.W. 2d 283, 287 (Mo. 1954), *overruled on other grounds*, 389 S.W. 2d 20 (Mo. 1965); that works are to be tested by persons of "average human instincts" was held not inconsistent with the average person test in *Roth*.

Search Warrant of Property v. Marcus, 334 S.W.2d 119 (Mo. 1960), *rev'd on other grounds*, 367 U.S. 717 (1961).

0.601 Normal Average Person as Criteria - Where the matters are not those which appeal only to deviates the test is the normal average person's application of contemporary community standards.

People v. Pinkus, 63 Cal. Rptr. 680 (Cal. App. Dep't Super. Ct. 1967).

0.6011 "Average Person" As Standard - The "average person" is the standard and it is irrelevant if wealthy or prominent individuals do not hold the material to be obscene.

State v. Morgan, 553 So.2d 1012 (La. Ct. App. 1989), *cert. denied*, 558 So.2d 600 (La. 1990).

0.6012 The "average person" standard is held to be the correct standard in determining whether or not communications which are sexually explicit are protected or not.

Smith v. State, 811 S.W.2d 665 (Tex. Crim. App. 1991).

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0.602 **Normal Person** - Merely arousing sexual desire in a normal person is not necessarily an appeal to the prurient interest since prurient interest is a shameful and morbid interest in nudity, sex or excretion.

United States v. 35 MM Motion Picture Film "Language of Love", 432 F.2d 705 (2d Cir. 1970), *cert. denied*, *United States v. Unicorn Enterprises, Inc.*, 403 U.S. 925 (1971).

0.603 **Average Person As Average Member of Society at Large** - The average member of society at large is the "Average Person."

City of Newark v. Licht, 200 A.2d 508 (N.J. Super. Ct. App. Div. 1964).

0.6031 **Average people applying contemporary standards** - The requirement of the *Miller* test is that average people apply contemporary community standards at the time and place when a defendant is charged.

City of Farmington v. Stansbury, 823 P.2d 342 (N. M. Ct. App. 1991).

0.604 **Average Person is community** - Where hardcore pornography is concerned, the "community" from which the average person is drawn loses importance.

Redlich v. Capri Cinema, Inc., 349 N.Y.S.2d 697 (N.Y. Sup. Ct. App. Div. 1973).

0.605 **Average Person May be Criterion Used to Measure Patent Offensiveness** -

Commonwealth v. Mascolo, 375 N.E.2d 17 (Mass. App. Ct. 1978), *cert. denied*, 439 U.S. 899 (1978).

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. Sup. Jud. Ct. 1978).

0.6051 "Patently offensive" and "appeal to the prurient interest" are determined by assuming the average person perspective and "applying contemporary standards of tolerance" (not "of decency").

Sanders v. State, 649 S.W.2d 59 (Tex. Crim. App. 1982).

0.605101 We also believe that the Court recognized that merely because such material is tolerated in one community does not mean that it is acceptable to the average person in that community applying contemporary community standards.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

O.L.R. Note 4

The standard in Texas is "Of Decency." *Sanders* case was overruled in *Andres v. State*, 652 S.W.2d 370 (Tex. Ct. App. 1983).

0.60521 **Views of Average Person** - In addition to considering all the evidence presented, a juror is entitled to draw on his or her own understanding and knowledge of the views of the average person in this community and of the tolerance of the average person in making the required determinations which are necessary for the resolution of these cases.

State v. Smith, 360 S.E.2d 495 (N.C. Ct. App. 1987).

0.60526 **Community Unspecified** - Where the trial court leaves the community unspecified, it may instruct the jury to view the alleged obscene material from the perspective of the average person applying contemporary community standards.

People v. Wiseman, 341 N.W.2d 494 (Mich. Ct. App. 1983).

Average Person

0.60527 **Diverse Communities** - The United States Supreme Court recognized that the average person in the community in one state, in applying contemporary community standards of his community, might find certain material to be patently offensive, but it also recognized that the average person in a community of another state might find the material either acceptable or at a minimum capable of being tolerated.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.60528 Obscenity is to be judged by community standards, which requires the jury to consider the average person not the most prudish or the most tolerant.

Hoover v. Byrd, 801 F.2d 740 (5th Cir. 1986).

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

0.60529 The concern here is with the average person, and the type of material found patently offensive by that person. The concern is not with the most hardened nor the most prudish person in the relevant community.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.6053 **Not the Most Prudish** - It is the average person, not the most prudish who, applying contemporary community standards, determines whether or not the work appeals to the prurient interest.

United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 731 (1988).

0.60561 **Expert testimony may be admitted** - Expert testimony may be

admissible.

Main Street Movies v. Wellman, 557 N.W.2d 641 (Neb. 1997).

0.606 To determine material patently offensive, the trier of fact must apply his understanding of the tolerance of the average person in the community.

U.S. v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983).

0.607 Jurors drawn from a single county are capable of measuring views of average citizen in state.

Commonwealth v. Mascolo, 375 N.E.2d 17 (Mass. App. Ct. 1978), *cert. denied*, 439 U.S. 899 (1978).

0.6071 **Views of Average County Citizen** - Instruction as to determination of the views of the average citizen of the county as a whole was sufficient to establish community standard.

Commonwealth v. Dane Entertainment Services, Inc., 454 N.E.2d 917 (Mass. App. Ct. 1983).

0.6072 **Voir dire** - The trial court did not prevent T.K.'s from inquiring into the feelings of individual jurors about sexually explicit movies, only from doing so in the broad fashion condemned in *Smith*

T.K.'s Video, Inc. v. State, 832 S.W.2d 174 (Tex. Crim. App. 1992)

0.6073 **Hamling** - A juror can draw on his own knowledge of local standards to decide how an average person would judge.

T.K.'s Video, Inc. v. State, 895 S.W.2d 85 (Tex. Ct. App. 1993).

0.6074 **Jury Indoctrination** - The state

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objections to voir dire questions about a juror's understanding of community standards, average person, and prurient interest as jury indoctrination are upheld.

State v. Midwest Pride, 721 N.E.2d 458 (Ohio Ct. App. 1998), *cert. denied*, 528 U.S. 965 (1999).

0.608 A statute that attempts to define "average person" in fine detail is inadequate for territorial and factor limitations.

Leech v. American Booksellers Association, Inc., 582 S.W.2d 738 (Tenn. 1979).

0.609 **Not a mens rea concept** - The "average person" standard is not an element of knowledge or mental state required to commit the crime.

People v. Ford, 773 P.2d 1059 (Colo. 1989).

0.61 **Comparables** - Sexually explicit magazines which are sold to the average adult in the community are probative of community standards and it would be an error to exclude them as evidence.

Asaff v. State, 799 S.W.2d 329 (Tex. Crim. App. 1990).

0.611 **Expert testimony not needed** - A jury may ascertain the sense of the average person without expert evidence.

Main Street Movies v. Wellman, 557 N.W.2d 641 (Neb. 1997).

0.6956 **Expert testimony not needed** - A jury may ascertain the sense of the average person without expert evidence.

Main Street Movies v. Wellman, 557 N.W.2d 641 (Neb. 1997).

OFFENSIVENESS

0.7 **Appeals to Both** - The trial judge instructed the jury on the prurient interest of the film to the average citizen in Allen County, Indiana rather than its appeal to male homosexuals since a film specifically aimed at the male homosexual community, but which also appeals to the prurient interest of the community at large, must necessarily appeal to the prurient interest of the targeted groups.

Sedelbauer v. State, 455 N.E.2d 1159 (Ind. Ct. App. 1983).

0.70101 **Patently Offensive Deviant Material** - There is no requirement, in determining whether material is offensive to focus on any particular deviant sub-group as was done when determining prurient appeal. Rather, it is offensiveness based on the attitudes held by a representative cross section of the relevant community.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.70501 **Offensive to Average Person** - Any standard or criterion for judging whether certain material is offensive must be qualified by the notion of what would offend the hypothetical 'average person' in the community, as the trier of the fact perceives him.

Gholson v. State, 667 S.W.2d 168 (Tex. Crim. App. 1984).

0.70502 **Standards of Decency** - The definition of patently offensive as used in the South Carolina obscenity statute is not overbroad in prescribing contemporary community standards of decency rather than contemporary community standards of tolerance in that it does not condemn everything which the average person would

Average Person

not embrace only what the average person would find repulsive.

Olson v. Leeke, 744 F.2d 1061 (4th Cir. 1984).

0.70503 The court is required to determine if the depictions and descriptions of the material would be patently offensive to the average person in the community.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.70504 In our opinion the definition of patently offensive could be better phrased as “obviously offensive to the average member of the community.”

United States v. Levinson, 790 F. Supp. 1472 (D. Nev. 1992), *reversed on other grounds*, 991 F.2d 508 (9th Cir. 1993).

Gholson v. State, 667 S.W.2d 168 (Tex. Crim. App. 1984).

0.7050401 The gist of the second part of the *Miller* test is simply whether or not the depicted sexual conduct is “patently offensive” to the average person in the community.

Gholson v. State, 667 S.W.2d 168 (Tex. Crim. App. 1984).

0.70512 **Sense of Decency and Morality** - It would also be offensive to the average person's sense of decency and morality.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.70522 There is nothing in the statute or the court's charge in this case to suggest that “patently offensive” means anything that the average citizen would find unbecoming

or not in conformity with contemporary standards of decency in the community.

Olson v. Leeke, 744 F.2d 1061 (4th Cir. 1984).

0.70523 **Offensive on Face** - Statutory use of the word “decency” actually states a common meaning of what governs “current community standards”: Whether to the average person the material is so offensive on its face as to affront current community standards of propriety.

Hoover v. Byrd, 801 F.2d 740 (5th Cir. 1986).

0.70524 “Patently offensive” is not based on the “average person's” opinion as to what affronts community standards of tolerance.

735 East Colfax, Inc. v. Early, 697 P.2d 335 (Colo. 1985).

0.70525 Both the District Court and the Court of Appeals looked to the “average person” in the relevant issue of patent offensiveness.

United States v. Various Articles of Merchandise, 600 F. Supp. 1383 (N.D. Ill. 1985).

0.70531 Contemporary community standards for patent offensiveness purposes must look to the Judgment of the “average person in the community, rather than the most prudish or the most tolerant.”

United States v. Various Articles of Merchandise, 600 F. Supp. 1383 (N.D. Ill. 1985).

0.7054 That several avowed homosexuals did not find the film obscene does not prevent a jury from deciding that it would be offensive to the average member of the community.

Chapter 2000

Beir v. State, 681 S.W.2d 124 (Tex. Crim. App. 1984), *rev'd on their grounds*, 687 S.W.2d 2 (Tex. Crim. App. 1985).

0.70601 **Standard of Decency** - The use of the word "decency" lies not in deciding whether one may approve, "accept or tolerate obscene material," but instead lies with resolving the question of what may be identified by the average person as obscene.

Andrews v. State, 652 S.W.2d 370 (Tex. Crim. App. 1983).

0.70702 **Standards In Chicago Metropolitan Area** - The court's knowledge of the standards held by the average person in the Chicago Metropolitan area require the conclusion that the depictions would be offensive to these people.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

PERTINENT COMMUNITY

0.8071 **Patently Offensive by State Standards** - They clearly depict sexual conduct which is previously been found to be patently offensive to the average person in Illinois.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.80721 **Homosexual Magazines** - Magazines depicting explicit and unnatural sexual activities between adolescent boys are offensive taken as a whole to the average person in the Chicago metropolitan area.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.80722 While the Chicago metropolitan area probably is the most liberal community

in Illinois, it is hard to believe that the average person in this progressive community could view the material without being offended.

United States v. Various Articles of Merchandise, 625 F. Supp. 861 (N.D. Ill. 1986).

0.80723 **Statewide Standards** - Jury is to consider how the material would be viewed by ordinary adults in the whole state rather than by people in any single city or region.

People v. Sequoia Books, Inc., 496 N.E.2d 740 (Ill. App. Ct. 1986).

0.8074 Jurors are required to apply contemporary state standards of the average person.

State v. Henry, 717 P.2d 189 (Or. Ct. App. 1986).

0.8075 **County Standards** - A statement by the prosecution that "It is not whether it was offensive to Mr. Carter, but whether the average person would find it offensive to the standards of the county" is not legally objectionable.

Walthall v. State, 594 S.W.2d 74 (Tex. Crim. App. 1980).

0.8078 When an instruction has been given in terms of a local or county-wide standard the essence of the question of prejudice is whether the instruction may have led the jury to apply some specialized test that might differ from a generalized average person, applying contemporary community standards' test.

Richards v. State, 461 N.E.2d 744 (Ind. Ct. App. 1984).