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Obscenity, Music and the First Amendment: Was the Crew 2 Lively?

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Abstract

For many years, courts all over the United States have told us what kind of movies we can watch,⁴ what kind of books we can read and what kind of photographs we can view.⁶ Now, one court in Florida has told its citizenry that there are certain kinds of music that should not be heard.

KEYWORDS: music, obscenity, amendment

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“WARNING: EXPLICIT LANGUAGE CONTAINED.”¹

“We should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for the things themselves.”²

“Whatever narrows the boundaries of the material fit to be used in art hems in also the artistic sincerity of the individual artist. It does not give fair play and outlet to his vital interest. It forces his perceptions to channels previously worn into ruts and clips the wings of his imagination.”³

I. Introduction

For many years, courts all over the United States have told us what kind of movies we can watch,⁴ what kind of books we can read,⁵

1. Be forewarned: This article contains quotations from 2 Live Crew’s *As Nasty As They Wanna Be* (1989), as well as other sexually explicit lyrics from popular songs. This precise warning was used on the cover of the 2 Live Crew recording. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 583 (S.D. Fla. 1990). Interestingly enough, by using these words in the context of an “intellectual” exposition of the issues, these words would not be deemed obscene. Although lawyers may use this language in discussing what is obscene without suffering any negative effects, the general public may not be exposed to these recordings. Thus, it just goes to show that George Orwell was correct in *Animal Farm* when he explained: “All pigs are equal, but some pigs are more equal than others.”

2. J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (1960), cited in, E. OBOLER, *THE FEAR OF THE WORD: CENSORSHIP AND SEX* 20 (1974). Arguably, the only difference between the ideas expressed in 2 Live Crew’s recording and other provocative popular music is their word choices. See *infra* text accompanying notes 219-254. Furthermore, pornography and obscenity represent *ideas* and *information* about sexual activity. See *infra* text accompanying notes 339-47.

3. J. DEWEY, *ART AS EXPERIENCE* (1934), cited in, E. OBOLER, *supra* note 2, at 102. This article proposes that pornographic art has been a significant force in liberating society’s attitudes toward sexuality. See *infra* text accompanying notes 204-218.

4. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Regulation of obscenity is censorship of speech about sexuality that the censors, whether they are courts, legislators, prosecutors, or editors of artistic works, have deemed inappropriate for society. All censors have the following characteristics:

1. They know better than the prospective reader what is “right” for him [or her] to read.
2. They themselves may read the censorable matter without being delete-

riously affected.

3. They know conclusively what bad effects reading "bad" stuff will have.

4. They can see no possibility of good results from reading the fit-to-be-censored items.

E. OBOLER, *supra* note 2, at 4.

Censorship has occurred throughout all ages. However, it is not good policy.

Oboler stated:

1. The widespread dissemination of all possible knowledge is a good thing for mankind.

2. Censorship is clearly an attempt to narrow down, if not eliminate, man's self-knowledge, as well as his [or her] knowledge of extra-human activity.

3. Therefore, censorship, no matter for what reason, is bad for humanity.

Id. at 5-6.

Oboler described the personified Censor:

There he stands — the Eternal Censor, the true believer in the Everlasting Nay. He is proud of his calling and willing, fanatically, to give up a great deal . . . to keep the Bad from affecting the Good. He knows intuitively what is evil, and he needs no legalistic definitions to clarify his thinking. Only he, the Censor, among all men, unerringly can tell the obscene and the pornographic and the scatological and the blasphemous and the subversive from what is good, without more than a moments consideration. His mind has a built-in dowsing rod for all the words of sin, and his divination of where the dirtiest of dirt can be found is never less than accurate.

Through his eyes the work comes in just two shapes — the *lingam* and the *yoni* — and the artistic creators always seem to manage to mold whatever they are creating into these two forms. There is no use trying to fool the Censor; he can always tell what those rascally creatures, the imaginative artists, are *really* doing. What others might accept as reality, he recognizes as exaggeration. What most might consider artistic exaggeration, he can readily identify as obscene and pornographic. Whatever is obscene and pornographic by his standards must at least be expurgated, better barred, at best obliterated for all time.

The Censor is not to be gulled by the literary fustian which the critics and authors have draped around their presumably "artistic" goals. The Censor knows that there is almost a direct correlation between practically anything called "literature" and just plain filth — particularly today. Nowadays, says the Censor . . . , only a very few [artists] are [producing works] about anything that doesn't come down, if properly understood, to just raw sex. And the idea of sex promulgated by these [artists] has nothing to do with the *right* way to think . . . about it; they dare to [describe] sex as if it were — can you believe it? — pleasurable and joyous, fun and games.

One cardinal tenet of the Censor is that, of all bad things, sex is the worst. And the Censor is on intimate terms with the truth about sex — the

and what kind of photographs we can view.⁶ Now, one court in Florida has told its citizenry that there are certain kinds of music that should not be heard.⁷ Even in the wake of informal agreements by the music

ultimate truth that is too truthful for the mass of men. . . .

The Censor alone is entitled to lower himself into that cloacal abyss which is writing about sex; somehow the fifth which would enmire and besmirch the average man never affects *him*. He is thrice armed by his preordained and appropriate roles of combined judge, jury, and appeals agency, a position which places him far above the average run of impressionable men. It is from that lofty pinnacle that he asserts his own purity and the innate impropriety of all other men. His strength is both a result and a cause of the weakness and impressionability of others.

The sock of comedy and the buskin of tragedy, to the Censor, are both equally guilty accomplices in helping make appealing and palatable to the masses the iniquitous, the perverse, the base. Indeed, it is not really the morally unfit book or magazine or play [or musical work] which appalls the Censor, so much as the very idea that sex *exists*.

Id. at 222-23 (emphasis in original). See Roberts, *infra* note 330, at 1, for another commentator's remarks on the humor of having the Supreme Court Justices retire to the privacy of the screening room to view these types of movies. *Id.* Can't you just imagine them sitting there, saying: "Hey, we do that at our house. That's acceptable," or better yet, acting like Siskel and Ebert giving it a thumbs up. For more information on censorship and obscenity, see M. ERNST & A. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* (1964); M. ERNST & W. SEAGLE, *TO THE PURE . . . A STUDY OF OBSCENITY AND THE CENSOR* (1928).

5. Print censorship can be traced back as far as Plato and his attempts to restrict poetical expression. E. DE GRAZIA, *CENSORSHIP LANDMARKS* 287 (1969); see also A. CRAIG, *THE BANNED BOOKS OF ENGLAND* (1937); A. CRAIG, *SUPPRESSED BOOKS: A HISTORY OF THE CONCEPTION OF LITERARY OBSCENITY* (1963); A. HAIGHT, *BANNED BOOKS* (3d ed. 1970) (books since Homer's *The Odyssey* have been banned); J. JEFFRIES, *LEGAL CENSORSHIP OF OBSCENE PUBLICATIONS: SEARCH FOR A CENSORING STANDARD* (1968); D. LOTH, *THE EROTIC IN LITERATURE: A HISTORICAL SURVEY OF PORNOGRAPHY AS DELIGHTFUL AS IT IS INDISCREET* (1961). One of the earliest cases of book banning in the United States was *United States v. One Book Entitled Ulysses* by James Joyce, 72 F.2d 705 (2d Cir. 1934). In *One Book Entitled Ulysses*, a customs collector attempted to restrict James Joyce's *Ulysses* from being imported because it allegedly contained obscene passages. *Id.* The court compared *Ulysses* to works of science and held that where a book is not intended to be sexually arousing in its dominant part, that book is deserving of first amendment protection. *Id.* at 707. The court stated that the work must be considered as a whole, and objectionable passages cannot be isolated and examined out of context. *Id.* at 707 Despite its offensive nature to some people, the court permitted *Ulysses* to be imported. *Id.* at 708-09.

6. See, e.g., *Osborne v. Ohio*, 110 S. Ct. 1691 (1990) (child pornographic photographs).

7. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990). The present controversy surrounding music has not been instigated solely by 2 Live Crew's

industry to regulate itself through labeling,⁸ one court has declared a

recording *As Nasty As They Wanna Be*. Recently a suit was brought against Judas Priest in Nevada. The plaintiffs sued Judas Priest, claiming that the subliminal lyrics found on a recording encouraged two young men to enter a suicide pact. One of the young men died as a result of their suicide attempt. See *Vance v. Judas Priest*, 16 Med. L. Rptr. (Nev. Dist. Ct. 1988) (preliminary ruling that subliminal messages are not protected by the first amendment); *Vance v. Judas Priest*, No. 86-5844, 86-3939 (Nev. Dist. Ct. Aug. 24, 1990) (defendant rock singers won lawsuit). See also Keen, *Heavy Metal on Trial: Nevada Judge Will Decide Landmark Suit*, U.S.A. Today, July 16, 1990, at 1A; 2 *Families Sue Heavy-Metal Band As Having Driven Sons to Suicide*, N.Y. Times, July 17, 1990, at C13, col. 1. A similar case was brought against rock singer Ozzy Osbourne. See *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988) (court held that the facts did not meet the incitement test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

8. There have been attempts at lyric regulation. See Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPPERDINE L. REV. 421 (1987). Currently, there is an agreement to which companies can subscribe that would in some ways regulate the explicit content of recordings. Among these include placing a warning on albums: "Explicit Lyrics-Parental Advisory." *Id.* at 424 n.9. Although this agreement at present is voluntary, one commentator believes this type of censorship is in direct contravention of first amendment principles, stating that at the very least, artists could "lose their outlets for self-expression and be forced into self-censorship." Note, *Song Lyric Advisories: The Sound of Censorship*, 5 CARDOZO ARTS & ENT. L. J. 225 (1986). This commentator noted that the market for explicit music is likely to continue: "There exists a perpetual need for non-conformist outlets of expression in every democratic society." *Id.* at 238 n.78. Certainly, companies that choose not to comply with the voluntary agreement are free to generate recordings with lyrics that could be objectionable.

Some artists whose recent or forthcoming records carry the warning label are: *Rap*: King T, CPO, Boogie Down Productions, Intelligent Hoodlum, Too Short, Master Ace, and Smooth Ice; *Rock*: Mojo Nixon, Too Much Joy, and Mother Love Bone; *Hard Rock/Heavy Metal*: Suicidal Tendencies and Meliah Rage. Landis, *Albums Start Getting 'Explicit' Label*, U.S.A. Today, July 24, 1990 (Life) (labels will hurt lesser-known artists). One of the most vocal groups in the campaign for record labeling has been the Parents' Music Resource Center. See *The PMRC's Record-Stickering Campaign: A Five-Year History*, BILLBOARD, April 14, 1990, at 87-88. Although the labels that are currently placed on some recordings are voluntarily included, legislation requiring labeling continues to be an issue in a number of states. See Newcomb, *Anti-Stickering Rally Draws Thousands in St. Louis*, BILLBOARD, April 28, 1990, at 8 (Missouri, Pennsylvania, Florida, and Delaware have considered bills in 1990); Holland, *13 State Lawmakers Back Off Sticker Bills*, BILLBOARD, April 14, 1990, at 1, 87 (states where bills were withdrawn included Alaska, Minnesota, Kansas, Iowa, Illinois, New Mexico, Rhode Island, and New York); Holland, *Support for Stickering Bills Seems to Erode*, BILLBOARD, April 7, 1990, at 1, 93 (Arizona, Tennessee, Maryland, West Virginia, and Oklahoma have considered bills in 1990); *Louisiana Governor Vetoes Bill Requiring Record Labeling*, Dow Jones Highlights, Westlaw, July 25, 1990.

rap⁹ album by 2 Live Crew legally obscene.¹⁰ For this U.S. district court in Florida, 2 Live Crew's recording, *As Nasty As They Wanna Be*, [hereinafter *Nasty*] proved to be too "nasty" in *Skywalker Records, Inc. v. Navarro* [hereinafter *2 Live Crew*].¹¹

See also Goldberg, *The Great Lyrics Debate Will Not Go Away: How to Answer Warning Label Advocates*, BILLBOARD, April 28, 1990, at 9.

9. See *infra* text and accompanying notes 83-86 for a discussion of rap music. In this article, examples from hard rock, heavy metal, pop, soul, and rap are used. This article does not specifically target examples solely from rap due to the tremendous crossover of songs that exist on the Billboard charts today. In particular, rap songs often appear on both the soul music and pop music charts, as do ballads by heavy metal and hard rock artists.

10. *Skywalker Records, Inc.*, 739 F. Supp. at 596. This was a civil suit in Florida. However, since the judge's determination that the recording is legally obscene, there have been several arrests in Florida, as well as Texas, for selling the recording. See Browne, *The Rap on Obscenity: The 2 Live Crew's Album is Ruled More Than Just 'Nasty' In Florida Court*, ENTERTAINMENT WEEKLY, June 29, 1990, at 48-49 (local record store owner in Florida arrested); *Record Store Owner Pleads Not Guilty to Obscenity Charge*, Reuters, July 24, 1990 (Lexis, Nexis Library, Current File) (San Antonio record store owner arrested for violating state obscenity statutes for selling the recording) [hereinafter *Record Store Owner*].

An Indiana judge recently ruled that the recording is obscene, and prosecutors have filed charges against two store chains for selling the recording. See *2 Live Crew Album Ruled Obscene in Indiana*, Lincoln Journal-Star, July 29, 1990.

In Tennessee, the district attorney general for Williamson County declared both *Nasty* and *Niggers with Attitude's Straight Outta Compton* obscene under Tennessee law. Morris & Haring, *2 Live Crew, N.W.A. Called Obscene by Tenn. Judge*, BILLBOARD, April 7, 1990, at 4, 93.

There have also been arrests for the live performance of *Nasty* songs. See *Band Arrested for Performing 2 Live Crew Song*, Lincoln Journal-Star, Aug. 12, 1990, at 2A (New York band arrested after playing songs from *Nasty*); Browne, *supra*, at 48 (all members of 2 Live Crew — except the drummer who did not sing — arrested after they performed songs from *Nasty*). There has been controversy in many cities about whether the band should be allowed to perform the songs from *As Nasty As They Wanna Be*. See, e.g., *Morning Report: Pop/Rock*, L.A. Times, July 16, 1990, at F2, col. 1 (Anchorage, Alaska officials planning to bar band from appearing live); *Residents Ask Council to Ban 2 Live Crew Show in Anaheim*, L.A. Times, July 19, 1990, at F3, col. 4 (Mayor of Anaheim, California said, "the city would make no effort to halt" the live performance; district attorney in Sacramento said, "[the] album would not violate California's" obscenity laws).

11. 739 F. Supp. 578, 596 (S.D. Fla. 1990). Following this ruling, the State proceeded with criminal prosecutions of Charles Freeman, a local record store owner, and the members of the band, for their live performance of these songs. Mr. Freeman was convicted of violating Florida's obscenity statute. *State v. Freeman*, No. 90-17446-MM-10 A (Broward County Ct., Oct. 3, 1990) (appeal pending). The members of 2 Live Crew were acquitted by a different jury, assessing the very same lyrics. *State v.*

There has been a great deal of outrage about the *2 Live Crew* decision by liberals,¹² by individual recording artists,¹³ and by the music industry in general.¹⁴ Many people, in fact, have claimed that this

Campbell, Nos. 90-17616-MM-10 A, B, C (Broward County Ct., Oct. 20, 1990). Sexually explicit lyrics can be found on many other albums besides *2 Live Crew*. For example, Prince recorded "Darling Nikki" on *Purple Rain* (1984): "Met a girl named Nikki. Guess you could say she was a sex fiend. I met her in a hotel lobby masturbating with a magazine." Similarly, Motley Crew's "Bastard" on *Shout at the Devil* (1983) says: "Out go the lights/In goes my knife/Pull out his life/ Consider that Bastard dead/Get on you knees/Please beg me, please/You're the King of the Sleaze/ Don't you try to rape me." See also *infra* notes 89-92, 246, and text accompanying notes 234, 239, 244, for additional sexually explicit lyrics.

12. People concerned with their right of freedom of speech have been very verbal in the *2 Live Crew* controversy. Such individuals have spoken out on *Donahue* (July, 1990) and *Geraldo* (July 1990).

13. A number of well-known musicians including Frank Zappa and Axl Rose, have spoken out on behalf of *2 Live Crew*. In fact, Bret Michaels of *Poison* stated that the entire campaign against *2 Live Crew* is political. Anderson, *Pop Notes*, *Newsday*, July 22, 1990, at Part II, page 10.

14. See Haring & Newman, 'Nasty' Ruling, Arrests Galvanize Industry, *BILLBOARD*, June 23, 1990, at 1, 5; Philips, *Obscenity Ruling Rocks Industry*, *L.A. Times*, June 9, 1990, at F1, col. 4 (concern regarding the impact the Florida court's decision will have); Soocher, *2 Live Crew: Taking the Rap*, *ROLLING STONE*, August 19, 1990, at 19 (music industry experts disagree whether case signals start of "obscenity witch hunt" aimed at music industry). See also Philips, *Virgin Records to Strike Back with Free-Speech Stickers: The Chief of the Album Label Urges an Industry Wide Campaign Against a National 'Witch Hunt'*, *L.A. Times*, July 19, 1990, at F11, col. 1 (the recording industry is "getting blamed for everything that's going wrong in the country;" Jeff Ayeroff of *Virgin Records* stated, "it's time for the record industry to strike back against what [appears] to be a national 'witch hunt' against pop music"). In fact, *Virgin Records* is using a red, white and blue label which reads: "The First Amendment gives you the right to choose what you hear, what you say and what you think. CENSORSHIP IS UNAMERICAN. Don't let anyone take away that right. Raise your political voice. Register to vote." *Id.* (emphasis in original).

Luther Campbell has come out with a solo single entitled "Banned in the U.S.A." Bruce Springsteen allowed Campbell to use the chorus of "Born in the U.S.A." on the recording because he was concerned about the principles involved. In addition, Doug Morris, President of *Atlantic Records*, has agreed to distribute the recording. This alignment with a major label is important because it gives Campbell, whose recordings had been released by an independent and less powerful label, more "corporate muscle." This added backing may be helpful in influencing stores to carry the *Nasty* recording, as well. Hilburn, *Pop Album Review: Macho and Mean Rap From Luther Campbell*, *L.A. Times*, July 23, 1990, at F1, col. 4. See also Dwyer, *2 Live Crew Principle: How to Make Money*, *Newsday*, July 20, 1990 (News) at 2 ("[*2 Live Crew*] can't sing [or] dance, have practically no rhythm or beat, no stage presence, no lyrics or rhyme. And the only jokes appear to be about their penises. . . . But talent was no obstacle. The

decision is a direct attempt to suppress development in culture — to be specific, black culture.¹⁵ One commentator stated that the reason this music is being suppressed is because the

'lower orders' are particularly susceptible to obscenity's baleful effects Black youth are seen as dry kindling, ready to burst into fire with any stray spark [White America has] the potent image of a mass of unthinking, animal-like black youth waiting to erupt into a frenzy of wilding or rioting, depending on the provocation.¹⁶

Atlantic Records music company issued a statement about its courage and devotion to Free Speech and signed a contract with Campbell.”).

15. Rap is an “urban, do-it-yourself music which upsets conservatives and is usually independently produced.” Philips, *supra* note 14. Rappers interpret the arrest of 2 Live Crew, as well as labeling attempts, “as part of a plot by middle-class whites to stop their children from empathizing with black Americans.” Turner, *Right-On Rebels*, N.Y. Times, July 21, 1990 (Features) (quoting Ice T., a popular rapper). “Rap is the most powerful joining music. That’s why they want to shut it down” *Id.* See also Philips, *supra* note 14 (Florida court’s decision “could be perceived by some as an attempt to restrict culture.”).

While it is true that 2 Live Crew’s music appeals to some segment of the black American population, the music does not appeal to all blacks. Many black people would argue that 2 Live Crew does not represent their culture. However, this should not negate the import of the music to some segment of the black culture. Similar statements may be made about Jewish culture being portrayed in film, in particular. For example, the recent Academy Award winning film *Driving Miss Daisy* portrayed Reform Jews in the South. For the “stereotypical, Woody Allen-type Jew from New York City,” this portrayal certainly does not represent all Jews.

Nevertheless, it has finally become clear to much of the entertainment industry that there is a distinct “Black Culture.” For example, Spike Lee’s *Do The Right Thing* portrays the lives of inner city blacks in New York City. Similarly, *In Living Color*, a new television series on the FOX network, deals almost exclusively with different segments of the black population. The show confronts racial stereotypes. For example, a regular character is a homeless black man who panders on the subway and has tried to build a home out of a cardboard box. Similarly, there are two black men who operate the “Home Boys’ Shopping Network,” in which they offer stolen merchandise for sale. Besides stereotypes, this show also deals with cultural differences even within the black population. One segment portrays a West Indian family in “Hey Mon,” which focuses on their strong work ethic. See also *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990) (in upholding FCC policies allowing minorities’ advantages in certain broadcasting ownership programs, the Court recognized that minorities treat issues differently, including news programming that focuses on racial issues).

16. Gales, *The Case of 2 Live Crew Tells Much About the American Psyche*, N.Y. Times, July 15, 1990, § 4 at 18, col. 4 (letter to editor by an English professor at Duke University). This same image brought about concern for the effects of Spike

Allegations that this record was singled out from many sexually explicit recordings¹⁷ has some intuitive appeal and some truthfulness.

Nevertheless, outrage about the *Nasty* recording cannot be analyzed in a vacuum. Social and political changes have occurred within American society that have both led to the creation of the album and the outrage which it has engendered.¹⁸ Amid the confusion about the National Endowment of the Arts funding decisions for potentially indecent or obscene art,¹⁹ there seems to be an Inquisition in society with respect to sexual matters.²⁰ The political climate in our society has rip-

Lee's *Do the Right Thing*. *Id.* The term "wilding," in fact, became widely known after the gang rape of the female jogger in Central Park in 1989. See generally Kunen, *Madness in the Heart of the City*, PEOPLE MAGAZINE, May 22, 1989, at 106 (cover story: "The Central Park Outrage: Night of the 'Wilding'"); Stone, *What Really Happened in Central Park: The Night of the Jogger — And the Crisis of New York* NEW YORK MAGAZINE, August 14, 1989, at 30 (incident has had major impact on New York City's pre-existing racial tensions).

This paternalistic attitude toward black youth is not isolated. In general, all pornography regulation is designed to protect what the majority perceives to be a "deviant few" who will be adversely affected by the pornographic material. See *infra* note 363.

17. Cf. Andrew Dice Clay's recent release *The Day the Laughter Died* (1989) (also contains explicit language). However, the *2 Live Crew* court noted that there had been no complaints about Clay's recording. *Skywalker Records, Inc.*, 739 F. Supp. at 583. This should at least hint of the potential for selective prosecutions in the obscenity area.

18. See Ellis, *Sensing the Shift in Political Winds, Bush Drops the Conservative Agenda*, L.A. Times, July 22, 1990, at M4, col. 1 (mentioning recent controversy over Andrew Dice Clay's appearance on NBC's *Saturday Night Live*, the photography of Robert Mapplethorpe, and the general proliferation of cultural conservatism in the entertainment industry as a political issue).

19. See, e.g., Bernstein, *Subsidies for Artists: Is Denying a Grant Really Censorship?*, N.Y. Times, July 18, 1990, at C11, col. 4 ("They're trying to starve organizations and artists that have unwanted ideas . . .") (quoting Martha Wilson, director of Franklin Furnace); Commack, *Who Can Define What Is Obscene*, Newsday, July 19, 1990, at 65 (discussing generally the problem of the National Endowment of the Arts defining obscenity); *Performance: Front and Center*, Washington Post, July 16, 1990, at D7 (four artists appealing decision by NEA to deny their grants). One commentator stated: "What we're seeing here is people trying to control society by controlling the arts." Keen, *supra* note 7, at 1A (quoting Trish Heimers of the Recording Industry Association of America).

20. With the advent of Acquired Immune Deficiency Syndrome (AIDS), society has been concerned with safe-sex practices, in particular, for both heterosexuals and homosexuals. See *The Escape Club*, "Wild, Wild West," *Wild Wild West* (1988) (reflecting society's concern about the transmission of disease, they sing, "Give me, give me 'safe sex'") (transcribed from tape). Furthermore, although the Supreme Court did not directly address the AIDS issue in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the

ened the obscenity issue for reconsideration.²¹ While one can agree or disagree whether a particular book, movie, photograph, or recording is obscene when applying the legal standards advanced in *Miller v. California*,²² doing so merely begs the question: Should we be regulating this type of material at all?²³

This paper examines the *2 Live Crew* case as a starting point in the debate on obscenity. Even if the case were to be reversed on appeal, the fact that any court can declare a piece of music obscene should be objectionable to a free thinking society.

In Part II of this paper, the Supreme Court's most important obscenity opinions are discussed.²⁴ The current obscenity test from *Miller v. California* is presented in preparation for an analysis of the *2 Live Crew* case.²⁵

In Part III, the facts of the *2 Live Crew* case are presented,²⁶ and the court's application of the *Miller* test is explained.²⁷ Additionally, the court's application of the *Miller* test will be criticized at all levels:

Court stated that homosexual sodomy was not constitutionally protected, a result that directly opposes the "sexual revolution" that continues to take place in America.

One commentator recently said that this Inquisition of the arts has occurred because America does not really have any other significant political problems. Dionne, *Who's Winning the Culture Wars? Censorship: Redrawing the Lines of Tolerance*, Washington Post, July 15, 1990, at 61. He sees the "obscenity issue as 'filling a void for a lack of social issues.'" *Id.* (quoting Michael Cromartie, a research associate at the Ethics and Public Policy Center).

21. As early as 1977, one member of the Court pointed out the need to reexamine the obscenity issue. In *Smith v. United States*, 431 U.S. 291 (1977) (Stevens, J., dissenting), Justice Stevens pointed out "the need for a principled re-examination of the premises" on which *Miller* rests.

22. 413 U.S. 15 (1973).

23. See, e.g., Allan, *A Right to Pornography?*, 3 OXFORD J. LEGAL STUD. 376 (1983); Chemerinsky, *Outlawing Pornography: What we Gain, What we Lose*, 12 HUM. RTS. 24 (1985); Kamp, *Obscenity and the Supreme Court: A Communication Approach to a Persistent Judicial Problem*, 2 COMM. & L. 1 (1980); Katz, *Regulating Obscenity*, 5 WHITTIER L. REV. 1 (1983); Stone, *Obscenity Law Reform: Some Practical Problems*, 130 NEW L.J. 872 (1980); Young, *News from the Front — The War on Obscenity and the Death of Doctrinal Purity*, 25 OSGOOD HALL L.J. 305 (1987).

For information about exactly what type of pornography is sold in "adult bookstores," see Dietz & Sears, *Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films in Four American Cities*, 21 U. MICH. J.L. REF. 1 (1987-88).

24. See *infra* text accompanying notes 50-76.

25. The *Miller* test was used in the *2 Live Crew* case.

26. See *infra* text accompanying notes 80-104.

27. See *infra* text accompanying notes 106-70.

1) whether appropriate community standards were applied;²⁸ 2) whether *Nasty* appealed to a “prurient interest” in sex; 3) whether *Nasty* was patently offensive;²⁹ and 4) whether *Nasty* had any serious value.³⁰ In this section, the weaknesses of the *Miller* test itself are revealed. For a number of reasons, including the fact that this music was designed to appeal to a subpopulation, namely black Americans, the community standards approach is not desirable.³¹ Furthermore, notions of what appeals to the “prurient interest” and what is “patently offensive” have changed over time.³² The lyrics used in *Nasty* are similar to other types of lyrics widely available today, with the exception that they use laymen’s terminology for genitalia and sexual acts. It will be argued that penalizing the group for its word choices in expressing the same ideas is an inappropriate suppression of free expression.³³ Finally, the appropriateness of the court’s determination of artistic value is questioned.³⁴

In Part IV, the bases upon which the Supreme Court has seen fit to regulate speech dealing with sexual matters is explored.³⁵ One rationale that has been offered for such regulation has been that obscenity appeals to the emotional rather than the intellectual aspects of humans.³⁶ Besides obscenity, many have argued that this same rationale applies to music itself.³⁷ This is an inappropriate rationale on which to deny protection to either music or speech dealing with sexual matters. If all speech is mediated by cognition, then emotional effects can occur with any type of speech, including the most protected form of speech — political speech.³⁸

An additional rationale for the regulation of obscenity has been to

28. See *infra* text accompanying notes 172-93.

29. See *infra* text accompanying notes 195-257.

30. See *infra* text accompanying notes 258-83.

31. See *infra* text accompanying notes 178-80.

32. See *infra* text accompanying notes 197-218.

33. See *infra* text accompanying notes 219-54.

34. See *infra* text accompanying notes 260-61, 275-83.

35. See *infra* text accompanying notes 284-388. It is important to recognize what pornography and obscenity is. It is *speech* dealing with sexual issues. By labeling it as obscenity, the courts have been able to turn their backs on the fact that there is speech involved. See Dunlap, *Sexual Speech and the State: Putting Pornography in its Place*, 17 GOLDEN GATE U.L. REV. 359 (1987) (also recognizing what the content of the speech is, i.e., dealing with sexual matters).

36. See *infra* text accompanying notes 328-48.

37. See *infra* text accompanying notes 292-327.

38. See *infra* text accompanying notes 326-27.

deter the allegedly harmful affects of obscene materials.³⁹ However, it will be argued that the social science evidence cannot answer this question for the courts. Conflicting studies exist that in no instance account for a 100% causal relationship.⁴⁰ Thus, *values* must be determinative.

Given that values have always played a role in the regulation of speech dealing with sexual matters, what is probably the real basis for regulation of this speech — morality — must be explored. It will be argued that the majoritarian morality has sought to prevent change by suppressing speech about sexuality.⁴¹ However, this justification is inappropriate in a free society where change is an inevitable result from all types of free speech, including political speech, which is very rarely suppressed.⁴²

In Part V, the author proposes that the most defensible position in the arena of obscenity regulation is the absolutist position of Justice Black; all speech should be protected.⁴³ “Obscenity” and “pornography” are merely labels for speech dealing with sexuality.⁴⁴ Because this is speech, it should be protected under the first amendment.

In Part VI, it will be concluded that society has traditionally devalued sexual speech based on its moral conventions.⁴⁵ However, with other types of speech, society does not attempt to impress its moral views by suppressing the speech. A society that believes wholeheartedly in democracy does not suppress speech about communism. Why should sexual speech be singled out for suppression?⁴⁶

One of the reasons the government has sought to regulate speech regarding sexual activities is because of the power and mystery of sex.⁴⁷ However, sex is a great deal less mysterious than it used to be because of more open debate about sexuality. Part of that debate has included “obscenity”.⁴⁸ Thus, this type of sexual speech should be protected, for if it is not, as Justice Black questioned, how long will it be before other types of speech that we value are suppressed?⁴⁹

39. See *infra* text accompanying notes 350-70.

40. See *infra* text accompanying notes 363-67.

41. See *infra* text accompanying notes 371-88.

42. See *infra* text accompanying notes 384-86.

43. See *infra* text accompanying notes 389-404.

44. See *infra* text accompanying note 70.

45. See *infra* text accompanying notes 405-29.

46. See *infra* text accompanying note 408.

47. See *infra* text accompanying notes 415-16.

48. See *infra* text accompanying notes 417-18.

49. See *infra* text accompanying notes 425-27.

II. Obscenity and the First Amendment

The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."⁵⁰ Free speech is one of the most critical rights citizens have in fostering self-government, self-realization, and truth-seeking. Typically, governmental action designed to curb free speech will pass judicial review only when it is shown that governmental action is necessary to further a "compelling governmental interest" by narrowly drawn means to achieve that purpose.⁵¹

Nevertheless, the United States Supreme Court has never hesitated to point out that the first amendment's guarantees of free speech are not absolute. In fact, there are various types of speech that are not protected under the first amendment. In *Chaplinsky v. New Hampshire*,⁵² the Court stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵³

Although the *Chaplinsky* Court made this statement in dicta in 1942, in 1957, the Court directly confronted the issue of whether ob-

50. U.S. CONST. amend. I. The first amendment is applied to the states through the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

51. *See* *Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981).

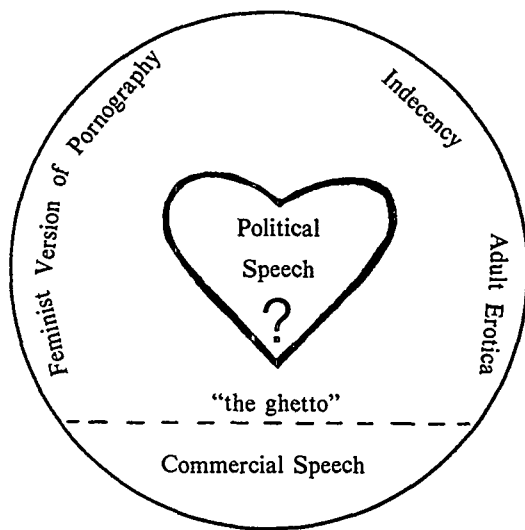
52. 315 U.S. 568 (1942).

53. *Id.* at 571-72 (footnotes omitted). In addition to obscenity, other types of speech are outside the scope of first amendment protection. These include commercial speech that is false, misleading or advocates a crime, *see* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); defamation, *see, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public officials); fighting words, *see* *Cohen v. California*, 403 U.S. 15 (1971); and child pornography, *see* *Osborne v. Ohio*, 110 S.Ct. 1691 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). *See generally* J. Snowden, "The Circle of First Amendment Protection," Mass Communications Law Lecture, July 1990, U. of Neb. C. L., Lincoln, Neb.

scenity was protected speech. In *Roth v. United States*,⁵⁴ the Court sustained a conviction under a federal statute punishing the mailing of “obscene, lewd, lascivious or filthy . . .” materials.⁵⁵ The Court held that obscenity was outside the protection available under the Constitution. Justice Brennan, writing for the majority, stated:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the [constitution’s] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance We hold that obscenity is not within the area of constitutionally protected speech or press.⁵⁶

THE CIRCLE OF FIRST AMENDMENT PROTECTION



Outside: Obscenity
 Fighting Words
 Defamation
 Child Pornography

54. 354 U.S. 476 (1957).

55. *Id.* at 479 n.1.

56. *Id.* at 484-85 (footnotes omitted). It is unclear from *Roth* whether obscene

In *Roth*, a majority of the Court decided that obscene materials could be identified by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest."⁵⁷ Materials appealing to a "prurient interest" were those that had "a tendency to excite lustful thoughts,"⁵⁸ or those that appealed to "a shameful or morbid interest in nudity, sex, or excretion, and [that go] substantially beyond customary limits of candor in description or representation of such matters."⁵⁹

Not long after *Roth*, however, the Court began to have difficulty separating protected from unprotected speech, specifically separating obscene and non-obscene pornography.⁶⁰ In *Memoirs v. Massachusetts*,⁶¹ the Court articulated a new test of obscenity, expanding on the *Roth* standard:

[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the

speech is even considered to contain ideas, or whether the ideas it contains are not acceptable. In any event, one commentator has argued that historically there was no such recognition of obscenity as being without importance or considered to be "non-ideas." Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1566 n.3 (1988), states that even Benjamin Franklin wrote what for the time would probably have been viewed as "obscene" stories. Franklin invented the tale of Polly Baker, the story of a woman prosecuted five times for bearing illegitimate children. At her fifth trial, the woman defended herself on the basis that the court should not "turn natural and useful Actions into Crimes." Franklin, *The Speech of Miss Polly Baker*, General Advertiser (London), April 15, 1747, reprinted in, M. HALL, BENJAMIN FRANKLIN & POLLY BAKER app. 165 (1960), cited by, Gey, *supra*.

57. *Roth*, 354 U.S. at 489 (1957).

58. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949) which defines *prurient*, in pertinent part, as follows: "Itching; longing; uneasy with desire or longing; or persons, having itching, morbid or lascivious longings; or desire, curiosity, or propensity; lewd . . .").

59. *Id.* (citing the MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957)).

60. In fact, the Court spent a great deal of time reversing convictions for obscenity without hearing oral argument or writing opinions whenever at least five members of the Court, using their own tests, concluded that the material in the case was not obscene. See, e.g., *Redrup v. New York* 386 U.S. 767 (1967). See generally *Miller v. California*, 413 U.S. 15, 22 n.3 (1973) (Court decided 31 cases in this manner). For the distinction between obscenity and pornography used in this paper, see *infra* note 70.

61. 383 U.S. 413 (1966).

description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁶²

Memoirs which moved beyond *Roth*, required proof that the material was "utterly without redeeming social value."⁶³ Nevertheless, the Court ultimately found this third prong of the test to be problematic for it made it very difficult for the states to prove that materials were obscene.⁶⁴ Apparently, the Court believed there were types of materials that should be prohibited and made it easier for states to prohibit these materials with the use of yet another revised test in *Miller v. California*.⁶⁵

Miller is currently the state of the law for obscenity produced by adults and directed to adults.⁶⁶ In *Miller*, the appellant conducted a mass mailing campaign to advertise the sale of adult books. He was

62. *Id.* at 418.

63. *Id.*

64. Although the Court was concerned with the state having to prove a negative, i.e., that the work was utterly without redeeming value, oddly enough, every time a person attempts to prove that a statute is unconstitutional, he or she has to prove a negative.

65. 413 U.S. 15 (1973).

66. There is a different standard for materials directed to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). See Weller, *See No Evil: The Divisive Issue of Minors' Access Laws*, 18 CUMB. L. REV. 141 (1987-88). Furthermore, there is a different standard for materials that contain child pornography. See *Osborne v. Ohio*, 110 S. Ct. 1691 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). See also Kent & Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 OR. L. REV. 363 (1989); Loken, *The Federal Battle Against Child Sexual Exploitation: Proposals for Reform*, 9 HARV. WOMEN'S L.J. 105 (1986); Potuto, *Stanley Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15 (1987-88); Note, *Child Pornography: Ban the Speech and Spare the Child? — New York v. Ferber*, 32 DE PAUL L. REV. 685 (1983); Note, *Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws*, 4 COMM. ENT. L.J. 115 (1981); Note, *Child Pornography: Greater State Power to Protect the Interest of the Child*, 7 J. JUV. L. 227 (1983); Note, *Constitutional Law — First Amendment — New York Statute Proscribing Distribution of Nonobscene Materials Depicting Minors Engaged in Sexual Conduct Does Not Violate the First Amendment Because the Materials Are Outside First Amendment Protection and the Statute Is Not Substantially Overbroad. New York v. Ferber*, 28 VILL. L. REV. 416 (1983); Note, *Constitutional Law — Obscenity-Child Pornography Laws Need Not Comply with the Legal Definition of Obscenity. New York v. Ferber*, 61 U. DET. J. URB. L. 154 (1983); Note, *New York v. Ferber: Compelling Extension of First Amendment Infringement*, 13 GOLDEN GATE U.L. REV. 475 (1983); Note, *No First Amendment Protection for the Sexploitation of Children*, 29 LOY. L. REV. 227 (1983).

convicted under a California law which prohibited the knowing distribution of obscene matter.⁶⁷ He distributed unsolicited brochures for his adult materials that contained pictures and drawings "very explicitly depicting men and women in groups of two or more engaged in a variety of sexual activities, with genitals often prominently displayed."⁶⁸ The Court noted that the recipients of these brochures were "unwilling recipients,"⁶⁹ and thus, the state had a strong interest in protecting them.

The Court articulated a new test to clarify the standard for determining "what constitutes obscene, pornographic material subject to regulation under the states' police power."⁷⁰ The Court held:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious

67. CAL. PENAL CODE §§ 311.2(a) and 311, *cited in*, *Miller v. California*, 413 U.S. 15 n.1 (1973).

68. *Miller*, 413 U.S. at 18.

69. *Id.*

70. *Id.* at 22. The Court distinguished between "obscene material" and "pornographic material." *Id.* at 18-19 n.2. "Obscene material" was "1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle," or "offensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome." *Id.* (citing first WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged 2d ed. 1949), and then, OXFORD ENGLISH DICTIONARY (1933 ed.)). In contrast, it was "pornographic" material that had to do with sexual activity: "1: a description of prostitutes or prostitution; 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." *Miller*, 413 U.S. at 19 n.2 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*). According to the Court, "[p]ornographic material which is obscene forms a sub-group of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language. [Thus,] 'obscene material' [has] a specific judicial meaning which derives from the *Roth* case, i.e., obscene material 'which deals with sex.'" *Id.*

In this article, generally, the word "obscenity" will be specifically used when referring to materials that have been declared legally obscene using the *Miller* test. However, both pornographic materials and obscene materials deal with sexuality. Because I believe that there is no principled way to distinguish between obscenity and "plain 'ole'" pornography, I will use these two terms both simultaneously and interchangeably when speaking of materials dealing with sexual activity.

literary, artistic, political or scientific value.⁷¹

Although the Court was not willing to give concrete examples of what would be considered obscene under this newly articulated test, it was willing to offer some general guidance. Works that contained "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated"⁷² would be obscene, as well as "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."⁷³

Using this test, a number of books,⁷⁴ magazines,⁷⁵ and motion pictures⁷⁶ have been challenged as being legally obscene.⁷⁷ It is precisely this test that was applied recently in the *2 Live Crew* case to declare a musical recording obscene.⁷⁸

71. *Miller*, 413 U.S. at 24 (citations omitted).

72. *Id.* at 25.

73. *Id.*

74. *Id.* at 16-18. *Miller* itself was a challenge based on books.

75. *See Pope v. Illinois*, 481 U.S. 497 (1987).

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

77. Thus, it is clear from the cases that obscene speech has no protection under the first amendment. *See also Sable Communications of Cal., Inc. v. FCC*, 109 S. Ct. 2829, 2835 (1989). For more general information on pornography and obscenity, see M. COAKLEY, *RATED X: THE MORAL CASE AGAINST TV* (1977) (discussing obscenity on television); G. HAWKINS & F. ZIMRING, *PORNOGRAPHY IN A FREE SOCIETY* (1988); R. KUH, *FOOLISH FIGLEAVES? PORNOGRAPHY IN AND OUT OF COURT* (1967); D. MORETTI, *OBSCENITY AND PORNOGRAPHY: THE LAW UNDER THE FIRST AMENDMENT* (1984); *PORNOGRAPHY AND CENSORSHIP* (D. Copp & S. Wendell eds. 1983); *PORNOGRAPHY, OBSCENITY AND THE LAW* (A. Sobel ed. 1979); R. RANDALL, *FREEDOM & TABOO: PORNOGRAPHY AND THE POLITICS OF A SELF-DIVIDED* (1989). *See also* G. BYERLY & R. RUBIN, *PORNOGRAPHY, THE CONFLICT OVER SEXUALLY EXPLICIT MATERIALS IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1980); J. NORDQUIST, *PORNOGRAPHY AND CENSORSHIP* (1987) (bibliography); W. TABB, *SOURCES OF INFORMATION ON THE PORNOGRAPHY ISSUE* (1973) (bibliography).

78. "The rationale is simple: the message conveyed by obscene speech is of such slight social value that it is always outweighed by the compelling interests of society, as manifested in the laws enacted by its elected representatives." *Skyywalker Records, Inc.*, 739 F. Supp. at 584. Florida in particular had a comprehensive set of laws that would criminalize the distribution, sale or production of any obscene materials including a recording. *See* FLA. STAT. § 847.001(1)(a) (1986). However, most states have some statutory prohibition on the sale and distribution of obscene materials. *See, e.g.*, ALA. CODE §§ 13A-12-130 to 198 (1982 & Cum. Supp. 1989); ARIZ. REV. STAT. ANN. §§ 13-3501 to 3512 (1989); CAL. PENAL CODE ANN. §§ 311 to 312.5 (West 1988); D.C. CODE ANN. §§ 22-2001 to 2014 (1989); GA. CODE ANN. §§ 26-2101 to 26-2104 (1981); KY. REV. STAT. ANN. §§ 531.010 to 531.370 (Baldwin 1984); LA. REV. STAT.

III. The Case of 2 Live Crew⁷⁹

A. Facts

The plaintiff, Skywalker Records, Inc.,⁸⁰ is a Florida corporation headquartered in Miami, Florida. The plaintiffs, Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon, better known as 2 Live Crew, released a recording entitled *As Nasty As They Wanna Be*. *Nasty* was released to the public in 1989. As of the date of the district court case, the public had purchased approximately 1.7 million copies of the recording.⁸¹ 2 Live Crew also released a "clean" version of this same recording entitled *As Clean As They Wanna Be* [hereinafter *Clean*]. This recording contains the same instrumental background music but not the explicit sexual lyrics. *Clean* had sold approximately 250,000 copies as of the date the case was decided.⁸²

Especially noteworthy was the fact that the allegedly obscene material was music, in particular, "rap" music.⁸³ Music from the rap genre is noted for an emphasis on the lyrics accentuated by strong mu-

ANN. § 14:106 (West 1986); N.C. GEN. STAT. §§ 14-190.1 to 14-190.8 (1989); TEX. PENAL CODE ANN. §§ 43.21 to 43.26 (Vernon 1989). *But cf.* State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) (obscene materials could not be suppressed because the Oregon constitution prohibited any law from being "passed restraining the expression of [speech] freely on any subject whatsoever").

79. Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990).

80. The company is now known as Luke Records. The company had to change its name as a result of a trademark suit by the makers of Star Wars in which their trademark — Luke Skywalker — was being confused with Skywalker Records. *See Lucasfilm Sues Luther Campbell Over Use of 'Skywalker' Name*, BILLBOARD, April 7, 1990, at 85, col. 6.

81. *Skywalker Records, Inc.*, 739 F. Supp. at 582.

82. *Id.*

83. Rap music emerged in the late 1970's from New York's streetwise "hip-hop" culture. This same culture provided the world with graffiti art and break-dancing. Rap has "fostered separatism, creating a new language of black codes and street lingo designed to exclude outsiders." MacDonald, *Rap Music is Shaking Things Up*, Seattle Times, July 15, 1990, at J1. Rap music "cannot be denied. It's the most significant, most exciting music happening at the moment. It's a window into a world many people know little about — the black ghetto — and it has revitalized dancing, the lifeblood of pop music." *Id.* Rap is reflective of the "high level of anger" many African Americans feel due to unemployment and poverty. *Id.* "This frustration has exploded in rap music, sometimes with frightening intensity. But it is a healthy way of expressing what is being said, thought and felt in the black community. Rap is often a bulletin from the streets . . ." *Id.*

sical beats.⁸⁴ Rap music originated in Black American culture some ten years ago.⁸⁵ While rap music does not always contain lyrics regarding sexual activity,⁸⁶ the plaintiffs chose to create a recording that on the whole concerned sexual matters.⁸⁷ Many of the titles of the songs even reveal the subject matter to be discussed in the music, including "Me So Horny,"⁸⁸ "Dick Almighty,"⁸⁹ "Dirty Nursery Rhymes,"⁹⁰ "The

84. *Skywalker Records, Inc.*, 739 F. Supp. at 595.

85. See *supra* note 83. Although rap music has been around in the black community for some time, it is now becoming popular with the white culture via the pop charts. Some of these songs include Young MC, "Bust A Move"; MC Hammer, "Can't Touch This," and "Please Hammer Don't Hurt 'Em"; Technotronic, "Pump Up the Jam"; "Get Up On It"; Bell Biv DeVoe, "Poison" (on video, self-proclaimed appeal to pop music lovers because of combination of hip-hop, rap, and pop styles). In fact, NBC is planning a new sit-com about rap music: *The Fresh Prince of Bel Air*. Marin, *It's Rap, Yo: Fresh Show Hops at NBC*, Washington Times, July 19, 1990, at E1.

86. In fact, much of rap music has been used to address political issues, including police brutality. For example, Snap's "The Power" argues for a response to continued harassment: "It's getting kind of hectic. . . . I've got the power. . . . Equality I possess . . . The microphone that I am holdin' . . . can't be stolen. If they are 'Snap!' . . . No 'nigger' police will try to save them. . . . Stay off my back or I will attack, and you don't want that." Rap has "exhumed the word 'nigger' using it with impunity in rap songs and even in the names of groups (one of the top rap groups is NWA, or Niggers With Attitude)." MacDonald, *supra* note 83. Furthermore, some rappers are expressing the current frustrations of Black Americans with Jews. Public Enemy, whose album *It Takes A Nation of Millions to Hold Us Back*, was chosen as 1988 album of the year by the Village Voice, has been criticized for its "anti-Semitic rhetoric of Minister Louis Farrakhan." MacDonald, *supra* note 83.

87. In addition, the cover of the recording features four women's rear ends clothed in only t-back bathing suits with the members of 2 Live Crew lying on the sand, their faces visible through the standing females' legs. *Compare* City of Los Angeles v. Boucher (L.A. Mun. Ct. No. 31364354), cited in, Bishop, *Porn in the USA*, 6 CAL. LAW. 60, 64 (December 1986) (poster insert in Dead Kennedy's recording, *Frankenchrist*, of H.R. Giger's *Penis Landscape* depicting ten sets of male and female genitals engaged in sex acts).

88. See *infra* text accompanying note 234 for the lyrics in their entirety. Note, it does a great disservice to this music to only focus upon the lyrics. This music is a combination of words and rhythm with instruments and drums often accentuating the message. The music should be considered "as a whole." Cf. *Skywalker Records, Inc.*, 739 F. Supp. at 595-96 (court examined the lyrics and found the background music to be comparatively insignificant).

89. Part of the lyrics are:

What the fuck is your name, motherfucker?

Long rod, thick frank, stiff peter. . . .

And my greatest thrill is to bust my nuts in a bitch's mouth.

That dick almighty, that dick almighty. . . .

It'll fuck all the bitches, all shapes and size.
 She'll climb a mountain, even run the block
 Just to kiss the head of this big black cock.
 He'll tear the pussy open, 'cause it's satisfaction.
 The bitch won't leave, it's fatal attraction.

2 Live Crew, "Dick Almighty," *As Nasty As They Wanna Be* (1989) (transcribed from tape). Lyrics from "Dick Almighty" by Luther Campbell, David Hobbs, Mark Ross, Chris Wongwon. © 1989 by PAC JAM Publishing. Administered in the U.S. and Canada by Longitude Music Co. All rights reserved. Reprinted by permission of Windswept Pacific Entertainment Co. D/B/A Longitude Music Co. (BMI). These lyrics are also cited in Plaintiff's Exhibit A, "Affidavit for Order of Determination of Probable Cause of Obscenity [filed by the Sheriff of Broward County]," Amended Complaint for Declaratory and Injunctive Relief, March 23, 1990.

90. Part of the lyrics are:

Jack and Jill went up the hill to have a little fun,
 Jack got mad, hit Jill in the ass,
 'Cause she couldn't make him come.
 Momma Bear and Papa Bear were walking through the forest,
 Momma Bear and Papa Bear could he eat her porridge.
 Papa Bear said, "Shit, bitch. You must think I'm sick.
 Just get down here on your knees, and suck this bear ass dick."
 Abraham Lincoln was a good old man,
 He hopped out the window with his dick in his hand,
 He said, "Excuse me, ladies, I'm doing my duty.
 So pull down your pants and give me some booty."
 There's an old lady who lives in a shoe,
 Got a house full of kids, don't know what to do.
 She sucked and fucked all the niggers around.
 When it was time to pay the rent, could none be found.
 Little Miss Muffet sat on a tuffet,
 With her legs gapped open wide.
 Up came a spider, looked up inside her,
 And said: "That pussy's wide!"
 Little Jack Horner sat in the corner
 Fucking this cutie pie,
 Sucking his thumb, made the bitch come,
 Said: "Hell of a nigger am I!"

2 Live Crew, "Dirty Nursery Rhymes," *As Nasty As They Wanna Be* (1989) (transcribed from tape). Lyrics from "Dirty Nursery Rhymes" by Luther Campbell, David Hobbs, Mark Ross, Chris Wongwon. © 1989 by PAC JAM Publishing, Administered in the U.S. and Canada by Longitude Music Co. All rights reserved. Reprinted by permission of Windswept Pacific Entertainment Co. D/B/A Longitude Music Co. (BMI). These lyrics are also cited in Plaintiff's Exhibit A, "Affidavit for Order of Determination of Probable Cause of Obscenity [filed by the Sheriff of Broward County]," Amended Complaint for Declaratory and Injunctive Relief, March 23, 1990.

Andrew Dice Clay is well-known for his "dirty" versions of popular nursery rhymes. See Andrew Dice Clay, "Rhyme Renditions," *The Day the Laughter Died*

Fuck Shop,"⁹¹ and "If You Believe in Having Sex."⁹² 2 Live Crew also

(1990) ("Eeny meeny miney moe, suck my dick and swallow slow. . . Hickery dickery dock, your wife was suckin' my cock. The clock struck two; I dropped my gue; I kicked the bitch down the fuckin' block.") (transcribed from tape).

91. The lyrics for this song are in part:

I know a place just down there two streets.
Baby, they don't ask no questions, and give you clean sheets . . .
Welcome to the fuck shop.
There's only one place where we can go.
Where the price is right, just a buck a blow.
It's always popular with the girls and the guys,
'Cause for all my money, it's the best buy.
Ten dollars, two hours
It's more than enough time to play.
Each room has a bed and also a sink,
So you can wash your dick after fucking
But be careful of the things that you use
'Cause you can get arrested for sex abuse.
So as you hit the door, and the panties drop
Whole lot of suckin' and fuckin'
At the fuck shop.

2 Live Crew, "The Fuck Shop," *As Nasty As They Wanna Be* (1989) (transcribed from tape). Lyrics from "The Fuck Shop" by Luther Campbell, David Hobbs, Mark Ross, Chris Wongwon. © 1989 by PAC JAM Publishing, Administered in the U.S. and Canada by Longitude Music Co. All rights reserved. Reprinted by permission of Windswept Pacific Entertainment Co. D/B/A Longitude Music Co. (BMI).

92. This song uses a "call and response" mode with the audience. Part of the lyrics are as follows:

"If you believe in having sex, say 'Hell yeah!'"
"Hell yeah!"
"If you believe in having sex, say 'Hell, fuck yeah!'"
"Hell, fuck yeah!"
"When I say 'S,' you say 'E.' When I say 'X,' you say 'Sex'. . . ."
"All hoars"
"Suck dick"
"All niggers"
"Eat pussy"
"All hoars"
"Drink dick"
"All niggers"
"Eat pussy"
"Suck my cock and I'll eat your pussy"
"Suck my cock and I'll eat your pussy"
"Now I wanna know why everybody likes havin' sex, more than they like doin' anything else in the whole world. Okay, fellas, I wanna know what ya'll like about having sex. Is it less filling?"

includes a statement on the cover of the recording: "WARNING: EXPLICIT LANGUAGE CONTAINED."⁹³

In mid-February of 1990, the Broward County Sheriff's office began an investigation of the *Nasty* recording in response to complaints by South Florida residents.⁹⁴ A deputy purchased a cassette tape of *Nasty* from a display rack marked "Rap Music."⁹⁵ This deputy had six of the eighteen songs on the album transcribed, prepared an affidavit detailing the facts of his purchase, attached a copy of the cassette to the affidavit, and requested that the Broward County Circuit Court find probable cause that the *Nasty* recording was legally obscene.⁹⁶ On March 9, 1990, the duty judge⁹⁷ of the Broward County Circuit Court issued an order finding probable cause to believe the recording was obscene under Florida law.⁹⁸

The Broward County Sheriff's office distributed the judge's order to county wide retail establishments that might be selling the *Nasty* recording as a "courtesy" warning to stores instead of making arrests.⁹⁹ Even those stores that did not receive personal visits from deputies

"No, it tastes great"

"Now, ladies, I wanna know what all ya'll fine ass ladies like about having sex Does it taste great?"

"No, it's less filling."

2 Live Crew, "If You Believe in Having Sex," *As Nasty As They Wanna Be* (1989) (transcribed from tape). Lyrics from "If you Believe in Having Sex" by Luther Campbell, David Hobbs, Mark Ross, Chris Wongwon. © 1989 by PAC JAM Publishing, Administered in the U.S. and Canada by Longitude Music Co. All rights reserved. Reprinted by permission of Windswept Pacific Entertainment Co. D/B/A Longitude Music Co. (BMI).

93. *Skywalker Records, Inc.*, 739 F. Supp. at 583.

94. *Id.*

95. The deputy noted that the purchase could have been made by anyone of any age. *Id.* at 583. The fact that the products could be available to minors may have had some role in the judge's decision in this case. However, the case really turns on access to adults. Many stores, in fact, had a policy of not selling this specially marked recording to any minors. *Id.* The issue of minor's access rights and or protecting minors is beyond the scope of this article. For more information, see *supra* note 66.

96. *Skywalker Records, Inc.*, 739 F. Supp. at 583. This affidavit contains all of the "obscene" words without any hyphens or dashes to mask the content. See Plaintiff's Exhibit A, "Affidavit for Order of Determination of Probable Cause of Obscenity [filed by the Sheriff of Broward County]," Amended Complaint for Declaratory and Injunctive Relief, March 23, 1990.

97. The Honorable Mel Grossman issued the order.

98. *Skywalker Records, Inc.*, 739 F. Supp. at 583.

99. *Id.*

ceased selling the record after hearing about the deputies' visits from television and radio reports.¹⁰⁰ Within days, all retail stores in Broward County ceased selling the *Nasty* recording.¹⁰¹

On March 16, 1990, the 2 Live Crew plaintiffs filed suit in federal district court for a determination that the recording was not obscene under state law and that the actions by the Broward County Sheriff's office were improper prior restraints.¹⁰² A non-jury trial was held before the court on these issues.¹⁰³ Although the court ruled that the actions by the Sheriff's office were improper prior restraints because of the lack of procedural protection,¹⁰⁴ the court did find that the *Nasty* recording was legally obscene under Florida law, which opened the door for the State to prosecute distributors and performers of those songs under the Florida obscenity laws. This article will explore the obscenity determination by the federal district court.¹⁰⁵

B. *Applying the Miller Test*

The 2 Live Crew court applied the *Miller* test of obscenity.¹⁰⁶ The court's application of each prong of the *Miller* test will be discussed below.

1. Prong 1 of the *Miller* Test

The first prong of the *Miller* test requires that the trier of fact determine whether "the average person, applying contemporary com-

100. *Id.*

101. Some stores continued to sell the *Clean* version. *Id.*

102. Plaintiffs brought suit seeking a declaration of their legal rights under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1989) and injunctive relief under § 2202(b) (1989).

103. There is no constitutional right to a trial by a jury in obscenity cases. *See Alexander v. Virginia*, 413 U.S. 836 (1973). At some level this presents some difficulty because of the community standards approach to be discussed *infra* at text and accompanying notes 171-192.

104. *Skywalker Records, Inc.*, 739 F. Supp. at 600. Undoubtedly, the obscenity decision will be used in later prosecutions against 2 Live Crew for their live performance of this material, as well as the record store owner's prosecution for selling this recording. *See supra* note 10.

105. This paper will argue that the *Miller* test produces an unsatisfactory result in this case. The court's application of the test will be criticized, as will the test itself. *See infra* text and accompanying notes 172-283.

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

munity standards would find that the work, taken as a whole, appeals to the prurient interest."¹⁰⁷ This test requires that the relevant community be identified, as well as that community's standards. Once the standards are identified, it can be determined whether the particular work in issue appeals to the prurient interest.

a. The Relevant Community and Its Standards

The first time the "community standards" approach was used by the Supreme Court was in *Roth*,¹⁰⁸ although it was merely a restatement of the test used in many lower court opinions prior to *Roth*.¹⁰⁹ These lower courts placed considerable emphasis on local prevailing notions of morality, and recognized that what is obscene at one time and place may not be at another.¹¹⁰

Issues regarding the size of the appropriate community, its composition, and the view of the average person in the community become questions of fact for the trier of fact.¹¹¹ As this was a non-jury trial,¹¹²

107. *Id.* at 24. This test requires that the work be considered as a whole. Virtually all songs on the *Nasty* recording deal with sexual activity. However, I would like to at least pose the question of whether this is a proper test for a music recording. Generally, individual songs from a recording become popular and become "hits." Radio stations do not play entire albums, but rather select the single releases to be played on the radio. Furthermore, even if a person buys the recording, he or she is unlikely to always play the entire recording at once. Perhaps this part of the test is inappropriate for musical works.

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

109. *See United States v. Kennerly*, 209 F. 119, 121 (S.D.N.Y. 1913) (Learned Hand may have been the first to enunciate this concept). *See also* F. SCHAUER, *THE LAW OF OBSCENITY* 116-17 (1976).

110. F. SCHAUER, *supra* note 109, at 117. For more information about the community standards approach, see Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgement Preclusion*, 7 SETON HALL 543 (1976); Gliedman, *Obscenity Law: Definitions and Contemporary Standards*, 1985 ANN. SURV. AM. L. 913; Mott & Kellett, *Obscenity, Community Standards, and the Burger Court: From Deference to Disarray*, 13 SUFFOLK U.L. REV. 14 (1973); Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C.L. REV. 1 (1978); Waples, *Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and Common Law*, 64 VA. L. REV. 399 (1978); Note, *"Contemporary Community Standards" in Obscenity Prosecutions — Smith v. United States*, 30 BAYLOR L. REV. 317 (1978).

111. *Skywalker Records, Inc.*, 739 F. Supp. at 587. *See* F. SCHAUER, *supra* note 109, at 69-95, 116-135.

112. *Skywalker Records, Inc.*, 739 F. Supp. at 587.

the judge determined that the relevant community in the case was not only Broward County, Florida, where the records were being restricted, but also included the area of Palm Beach and Dade counties. He did so because: they are close geographically; they are linked via common transportation (air, water, and highway); they share the same tourists; the three counties generally share access to the same radio and television stations and newspapers; people of different ethnic backgrounds attend some of the same cultural events; trade is not restricted to county lines, and; there is overlap of political and judicial federal district areas.¹¹³

Despite the fact that the *2 Live Crew* court found that "the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state,"¹¹⁴ the judge still found that the music would appeal to the prurient interest and was patently offensive.¹¹⁵

Several types of evidence were presented by the plaintiffs in favor of a finding that the community would be tolerant of their work. The plaintiffs pointed to the fact that the Sheriff's office had not received many "written complaints." The court did not give this fact great weight. The court stated that there might be many reasons "why concerned citizens" did not complain. The court stated that the fact that the recording was not released until 1989 was important because "it takes time for even a *popular* musical release to reach the public consciousness."¹¹⁶ Furthermore, the court stated that the sheriff had a duty

113. *Id.* at 588. In determining who the "average person" is to apply the community standards, the court considers all adults in the area. The court noted that even the most sensitive should be considered in reaching an aggregate "average person." See *Pinkus v. United States*, 436 U.S. 293, 298-302 (1978). *But see* *Smith v. United States* 431 U.S. 291, 304-05 (1977) (courts should not focus solely on the "most prudish or the most tolerant").

It is important to note, however, that the standard for minors is different. See *supra* note 66. In the present case, the court did not consider minors because "there was not sufficient evidence adduced at trial that the music was targeted at such persons or that it actually reached children." *Skywalker Records, Inc.*, 739 F. Supp. at 589.

114. *Skywalker Records, Inc.*, 739 F. Supp. at 589.

115. *Id.* at 591-92.

116. *Id.* at 589 (emphasis added). The judge does not seem to have a grasp of how the music industry operates. When music is released, it is promoted at that time. Under ordinary circumstances, songs either become "hits" right away, or they die unnoticed. Luther Campbell, in "Banned in the U.S.A.," see *supra* note 14, which even notes that *Nasty* was a year old, and that the case has brought a new interest to music, and with it a completely different audience than the 1.7 million people who originally

to enforce obscenity law “regardless of community protest”¹¹⁷ despite the fact that the Sheriff’s office had conceded that the reason other recordings were not being investigated was because of lack of complaints.¹¹⁸ The court placed a great deal of weight on the fact that the state legislature had enacted laws prohibiting obscenity.¹¹⁹

Despite the fact that there were “other sexually explicit works” made available for the court’s review, the judge did not believe this evidence was entitled to great weight in determining community standards.¹²⁰ The *2 Live Crew* court noted that the Supreme Court has recognized that this type of evidence does not have to be considered even when the comparable works have been declared non-obscene.¹²¹ The court found that much of the evidence presented was irrelevant because “[e]vidence of depictions of sexual conduct in pictures, moving or still, is not substantially equivalent to musical lyrics.”¹²² The court found that the most comparable works were writings or audio tapes including *Raw* by Eddie Murphy¹²³ and *The Day the Laughter Died* by Andrew Dice Clay.¹²⁴ In contrast to pictorial depictions, these works focus on a “verbal message.”¹²⁵ Nevertheless, the court noted that these works might also be legally obscene, and thus, did not give them

bought it.

117. *Id.* at 589.

118. *Id.* The court stated that the explanation of why this “particular” album was singled out could be reasonably linked to significant community discontent, whether communicated by telephone calls, anonymous messages, or letters to the police. Furthermore, the vast majority of complaints in the file, although not exclusively from Broward County, were from residents of the relevant community.” *Id.*

119. *Id.* at 587.

120. *Id.* at 589.

121. *Hamling v. United States*, 418 U.S. 87, 126-27 (1974). *See infra* notes 247-51.

122. *Skywalker Records, Inc.*, 739 F. Supp. at 589.

123. *Id.* Eddie Murphy’s stand-up comic routine in the video *Raw* is filled with all of the four letter words that society deems inappropriate. However, Eddie Murphy is a Black comedian who is revered by both Blacks and Caucasians. Therefore, it seems unlikely that the White majority would find his material legally obscene.

124. Andrew Dice Clay’s *The Day the Laughter Died* is replete with descriptions of vulgar sex practices, including incest. *See* Andrew Dice Clay, “Turn-On Words,” *The Day the Laughter Died* (Warner Bros. 1990) (Clay accuses a man in the audience of wanting to have sex with his daughter when he saw her at age 14 in her first bikini bathing suit). However, Dice, as a White, Jewish male, is still within the mainstream of American society. Unlike *2 Live Crew*’s vulgarities, Clay’s are heard by mostly white audiences.

125. *Skywalker Records, Inc.*, 739 F. Supp. at 589. (emphasis added)

great weight.

The plaintiffs argued that the court would be unable to determine the community standards regarding prurient interest, in part, because the defendants failed to introduce expert testimony.¹²⁶ Furthermore, they alleged that this court's opinion would "only reflect the personal opinion of the undersigned judge, not the relevant community."¹²⁷ The court refused to empanel a jury, and noted that "[e]ven if the court had used an advisory jury, the verdict of six other citizens on the issue of community standards would have been of doubtful value. The individuals would have only been Broward County residents."¹²⁸ Furthermore, the judge said, "even if [I] would not find *As Nasty As They Wanna Be* obscene, [I] would be compelled to do so if the community's standards so required."¹²⁹ With the relevant community identified and with some notions of what the community standards would be regarding the *Nasty* recording, the judge evaluated whether the material appealed to the prurient interest.¹³⁰

b. Appealing to the "Prurient Interest"

The Supreme Court has defined "prurient" as "material having a tendency to excite lustful thoughts."¹³¹ The material must exhibit a "shameful or morbid interest in nudity, sex, or excretion."¹³² Materials which appeal only to "normal, healthy sexual desires" are not

126. *Id.* at 590. Expert testimony, however, is not required in obscenity cases. See Comment, *Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards*, 10 LOY. ENT. L. J. 619, 634-40 (1990); Note, *Is Expert Testimony Necessary to Obscenity Litigation? The Arizona Supreme Court Answers — NO! — in the Consolidated Cases of State v. Superior Court and State v. Coulter*, 19 ARIZ. ST. L.J. 821 (1987).

127. The plaintiffs were probably correct in thinking that the judge could not separate his views of what is obscene from those of the "community." See Scott, Eitle, & Skovron, *Obscenity and the Law: Is it Possible for a Jury to Apply Contemporary Community Standards in Determining Obscenity?* 14 LAW & HUM. BEHAV. 139, 147 (1990) (results of study showed that "a judge's instruction that jurors apply not their own standards but rather those of the average member of the community has little meaning because jurors' perceptions of the community standard are likely to be determined primarily by their own personal standards").

128. *Skywalker Records, Inc.*, 739 F. Supp. at 590.

129. *Id.*

130. *Id.*

131. *Roth*, 354 U.S. at 487.

132. *Id.* at 487. See also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

obscene.¹³³

The recording was found to appeal to the prurient interest for several reasons.¹³⁴ First, the lyrics and titles of the songs were replete with references to genitalia, excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of a penis, masturbation, cunnilingus, sexual intercourse, and "the sounds of moaning," all of which had been defined by the Florida legislature as "sexual conduct" which includes "actual or simulated sexual intercourse, deviate sexual intercourse, . . . masturbation, . . . sadomasochistic abuse, [and] actual lewd exhibition of the genitals."¹³⁵ The court stated that the "frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity."¹³⁶

Despite the fact that the court was unwilling to place much weight on the prevalence of pictorial and movie representations of the same activities as evidence that this particular recording was not obscene, the court held, "depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in the pictures in periodicals or films."¹³⁷

Second, the court placed special emphasis on the fact that the material was music. However, the court had no difficulty finding this musical work obscene.¹³⁸ Although generally the meaning of music "is

133. *Brockett*, 472 U.S. at 498.

134. The court also considered the plaintiff's commercial motive. *Skywalker Records, Inc.*, 739 F. Supp. at 592. This factor, however, should not be dispositive in any speech case because virtually all artists must consider what will sell if they expect to make a living by selling their work. Even William Shakespeare had a sense of what would appeal to the masses, *i.e.*, lots of sexual innuendo in Shakespeare's *The Taming of the Shrew* and violent battle scenes in Shakespeare's *Julius Caesar*.

135. *Skywalker Records, Inc.*, 739 F. Supp. at 591 (citing FLA. STAT. § 847.001(11), 847.001(2) and 847.001(8) (1989)).

136. This case, however, was not one of incitement in which a speaker is seen as urging his or her listeners to act. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). I have spoken of the application of the incitement test with respect to television violence in Campbell, *Television Violence: Social Science vs. The Law*, 10 LOY. ENT. L.J. 413 (1990).

137. *Skywalker Records, Inc.*, 739 F. Supp. at 596.

138. One expert testified that material is art if it causes a reaction in the audience perceiving it. *Id.* However, the court was able to dodge that supposition by finding that even if that were so, if the reaction met all three prongs of the *Miller* test, then "the law does not call that art — it calls it obscenity . . ." *Id.* For information about the role of sex in the arts, see H. KATCHADOURIAN & D. LUNDE, *FUNDAMENTS OF HUMAN SEXUALITY* 321-420 (1972) (the use of eroticism in art beginning with the ancient cultures of India, Greece, and Rome; literature; and film — complete with

subjective and subject only to the limits of the listener's imagination,"¹³⁹ the emphasis on this recording's lyrics distinguished it from other types of music. The central characteristic of "rap"¹⁴⁰ music is the emphasis on the verbal message. Rhythm is stressed over melody, but is used to accentuate the lyrics. Despite the consideration of the music and the lyrics jointly, the court found that the work taken as a whole was obscene.¹⁴¹

Third, the court found the plaintiffs' apparent intent was to appeal to the prurient interest.¹⁴² Probably most damaging to the plaintiffs was the fact that they had produced two versions of the recording; the second recording used the same background music but excluded the *Nasty* lyrics.¹⁴³ The court emphasized the fact that the plaintiffs' expert testified that the *Nasty* recording without the "salacious lyrics" would not have been expected to sell more than 500,000 copies nationwide.¹⁴⁴ The fact that the *Nasty* version sold over 1.7 million copies

illustrations); M. PECKHAM, ART AND PORNOGRAPHY: AN EXPERIMENT IN EXPLANATION 124 (1969) ("pornographic art in its formal function is indistinguishable from [other types of] art"); SEX IN THE ARTS: A SYMPOSIUM (J. McDermott & K. Taft ed. 1932) (sex has been used in every artistic medium including poetry, fiction, drama, dancing, movies, music, advertising, painting, and sculpture).

139. *Skywalker Records, Inc.*, 739 F. Supp. at 595 (citing ACLU Amicus Brief at 3).

140. The court noted that the "rap" style itself was not on trial. *Id.* at 594. Furthermore, the court stated: "Obscenity is not a required element for socially valuable 'rap' or 'hip-hop' music. 2 Live Crew itself proved this point by the creation of its Clean recording." *Id.* at 596.

141. *Skywalker Records, Inc.*, 739 F. Supp. at 596. *Nasty* includes "riffs" from other artists. The court did not find that these "riffs" raised the music to the level of serious artistic work. In fact, Luther Campbell's new solo recording "Banned in the USA" contains "riffs" from Bruce Springsteen's "Born in the USA." See *supra* note 14. However, the 2 Live Crew court stated: "Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value." *Skywalker Records, Inc.*, 739 F. Supp. at 596. However, in the music world today remakes, see, e.g., Sweet Sensation, "Love Child" (remake of Diana Ross and the Supremes original hit); remixes, see, e.g., Paula Abdul, *Shut Up and Dance* (remixes of her hits from *Forever Your Girl*); and the addition of "riffs" into original recordings, see, e.g., M.C. Hammer's "Can't touch this" (contains "riffs" from Rick James's "Superfreak") often creates a new artistic expression.

142. *Skywalker Records, Inc.*, 739 F. Supp. at 592. See *Pinkus v. United States*, 436 U.S. 293 (1978); *Splawn v. California*, 431 U.S. 595 (1977).

143. See *supra* text and accompanying note 81 for information about the Clean recording.

144. See L. GROSSMAN, A SOCIAL HISTORY OF ROCK MUSIC 11 (1976) ("In a pop song the subject matter may be incidental to the commercial motive and so second-

while the *Clean* version had sold only 250,000 copies was important.¹⁴⁵ “The difference between the actual sales of the two recordings can reasonably be found to have been motivated by the ‘leer of the sensualist.’”¹⁴⁶ The court stated that the plaintiffs could not claim that they “needed the vulgar lyrics to promote *their message* since the plaintiffs’ own experts testified that music from neither the ‘rap’ nor ‘hip-hop’ genre does not require the use of such language.”¹⁴⁷

Finally, even though the plaintiffs presented both lay and expert testimony that “the Nasty recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play,” the court stated that “based on the graphic deluge of sexual lyrics about nudity and sexual conduct,” the recording appealed to a “shameful and morbid interest in sex.”¹⁴⁸

2. Prong 2 of the *Miller* Test

The second prong of the *Miller* test requires the trier of fact to determine whether the work depicts or describes sexual conduct in a “patently offensive way.”¹⁴⁹ Although not all speech dealing with sex is obscene,¹⁵⁰ some works are believed to go beyond what is considered normal candor on the subject of sex.¹⁵¹ While subtleties and innuendo may be protected, graphic details may often put a work that would otherwise be protected speech outside the circle of first amendment protection.¹⁵²

ary to the mode of presentation or the manner of marketing. This emphasis on the commerciality of the pop song is . . . to point out that in the pop world commercial considerations loom large.”).

145. *Skywalker Records, Inc.*, 739 F. Supp. at 592.

146. *Id.*

147. *Id.* (emphasis added).

148. *Id.*

149. *Miller*, 413 U.S. 24.

150. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (the film, *Carnal Knowledge*, contained scenes of a woman with a bare midriff and several lovemaking scenes which were not graphic).

151. See *Roth*, 354 U.S. at 487.

152. In *Jenkins*, 418 U.S. 153, the Court stated:

While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including “ultimate sexual acts” is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors’ genitals, lewd or otherwise, during these scenes. There are occa-

The most significant factor in the court's determination that the recording was patently offensive was the use of "what are commonly known as 'dirty words.'" ¹⁵³ The court found that although the use of profanity when not rising to the level of fighting words, was constitutionally protected,¹⁵⁴ the combination of these so-called "dirty words" with "explicit sexual descriptions" was a different matter.¹⁵⁵ Even in the face of testimony that the *Nasty* recording was made to be "listened and danced to," the court found that the "goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to 'dirty' *thoughts* and the loins, not to the intellect and the mind."¹⁵⁶ Thus, the recording was deemed "patently offensive."

3. Prong 3 of the *Miller* Test

The third prong of the *Miller* test requires the court to determine whether the work lacks "serious literary, artistic, political or scientific value."¹⁵⁷ In *Miller*, the Supreme Court concluded that the first amendment protected works with

serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the peo-

sional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Id. at 161.

153. *Skywalker Records, Inc.*, 739 F. Supp. at 593. Another factor was the depictions of female abuse and violence. *Id.* (citing American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985)). Furthermore, the court considered the potential for a "captive audience." The court found that music could be more intrusive to the unwilling listener. *Id.* There were, however, no claims that others were hearing the music besides those purchasing the recordings themselves. Thus, this problem seems tangential to the obscenity issue in this case and will not be discussed further. For more information on the "captive audience" problem, see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In addition, the *2 Live Crew* court again considered the commercial exploitation of sex to promote sales. See *supra* note 134 for a discussion of the role of a commercial motive.

154. See *Cohen v. California*, 403 U.S. 15 (1971); *Jersey v. Rosenfeld*, 623 N.J. 594, 303 A.2d 889 (1973).

155. *Skywalker Records, Inc.*, 739 F. Supp. at 593.

156. *Id.* at 591. (emphasis added)

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

ple. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.¹⁵⁸

This third prong of the *Miller* test is not to be measured by community standards.¹⁵⁹ Rather, courts must ask whether a "reasonable person" would find serious social value in the material.¹⁶⁰ This standard is intended to be an objective one.¹⁶¹

In applying this test, the *2 Live Crew* court stated that it did not view its role as a censor or critic of art and music. The court held: "If the *Nasty* recording has serious literary, artistic, political, or scientific value, it is irrelevant that the work is not stylish, tasteful, or even popular."¹⁶²

In proving their case, the plaintiffs called several experts to testify to the value of the work. One expert testified that there was cultural content that rose to the level of serious "sociological value."¹⁶³ According to the expert, "white Americans 'hear' the *Nasty* recording in a different way than black Americans because of their different frames of

158. *Id.* at 34-35.

159. See generally Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political or Scientific Value*, 11 S. ILL. U. L. J. 1159 (1987); Wright, *Defining Obscenity: The Criterion of Value*, 22 NEW ENG. L. REV. 315 (1987-88); Comment, *An Assessment of the Value Inquiry of the Obscenity Test*, 76 ILL. B.J. 512 (1988).

160. See *Pope v. Illinois*, 107 S. Ct. 1918, 1921 (1987); see generally Note, *Obscenity and the Reasonable Person: Will He "Know It When He Sees It?"*, 30 B.C.L. REV. 823 (1989) [hereinafter Note, *Obscenity and the Reasonable Person*]; Note, *Pope v. Illinois: A Reasonable Person Approach to Finding Value*, 20 TOL. L. REV. 230 (1988).

161. See Note, *First Amendment — The Objective Standard for Social Value in Obscenity Cases: Pope v. Illinois*, 107 S. Ct. 1918, 78 J. CRIM. L. & CRIMINOLOGY 735 (1988).

162. *Skywalker Records, Inc.*, 737 F. Supp. at 594.

163. *Id.* The expert testified that there was a political message in the *Nasty* recording when viewed from a Black American's perspective. *Id.*

Furthermore, the expert attempted to give the recording credence as a literary work. *Id.* at 36. The music uses rhyme and allusion, as in a song entitled "Dick Almighty," in which "personification" is used. See *supra* note 89 for the lyrics. However, the court did not find this feature to be redeeming in light of the explicit sexual nature of the work. The district court noted that in *Miller*, the Supreme Court had stated: "A quotation from Voltaire in the fly leaf of a book . . . will not constitutionally redeem an otherwise obscene publication." *Miller*, 413 U.S. at 25 n.7 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)).

reference."¹⁶⁴ The expert identified three cultural devices in the work: "call and response,"¹⁶⁵ "doing the dozens,"¹⁶⁶ and "boasting."¹⁶⁷ However, the court found none of these arguments persuasive. Although these devices were found in the culture of black Americans, the court stated that "these devices are also found in other cultures. 'Doing the dozens' is commonly seen in adolescents, especially boys of all races. 'Boasting' seems to be a part of the universal human condition."¹⁶⁸

Furthermore, the plaintiffs argued that the recording had serious value as comedy and satire. Again, the court found this argument unpersuasive. Despite the fact that people "can and do laugh at obscenity,"¹⁶⁹ there could be many reasons why an audience would laugh at the recording, including being embarrassed by the words. The court found that this laughter did not reflect any satirical value.¹⁷⁰

C. *What's Wrong With the Result? Everything*

The court's application of the *Miller* standard reveals the inadequacies of the *Miller* test for obscenity in a society filled with diversity.¹⁷¹ Criticisms of the district court's findings on the facts of this case will be given, as well as criticisms of the *Miller* test itself.

1. Community Standards

In *Miller*, the Supreme Court rejected a national standard for de-

164. *Skywalker Records, Inc.*, 739 F. Supp. at 594.

165. In "If You Believe in Having Sex," males and females yell in repetitive verse "Tastes Great — Less Filling." See *supra* note 92 for the lyrics.

166. "Doing the dozens" is a word game composed of a series of insults escalating in their satirical content. "Doing the dozens" can also be found in the critically acclaimed Spike Lee film, *Do the Right Thing*, which deals with the relationship between Blacks and Italians in New York City. There is one scene in this film where various characters give a rendition of insults directed at various ethnic groups, e.g., Italians, Blacks, Koreans, and Jews.

167. "Boasting" is a way for people to overstate their virtues, including their sexual prowess. *Skywalker Records, Inc.*, 739 F. Supp. at 594.

168. *Id.*

169. *Id.* at 595.

170. *Id.*

171. See, e.g., Mills, *The Judge vs. 2 Live Crew: Is the Issue Obscenity or Young, Black Males?*, Washington Post National Weekly Edition, June 25-July 1, 1990, at 9 (*Nasty's* artistic value is as comedy and satire; judge's decision "demonstrates the danger of a cultural outsider passing judgment on something he doesn't understand;" *Nasty* has "real cultural underpinnings").

termining when a work is obscene.¹⁷² Despite the fact that we have a “national Constitution,” the Court isolated obscenity as being subject to review under “community standards.”¹⁷³ The Court believed that people in different states varied in their “tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.”¹⁷⁴

Diversity is the key to the problem of imposing obscenity restrictions even within what may well be a “community.”¹⁷⁵ Even within a particular geographical region, there are different cultures, different ideologies, different opinions about the function of government, and different ideas about what is obscene. Even in making a case for the identification of a “community,” the *2 Live Crew* court noted that although people of different cultural backgrounds would attend public events together, each county has a “distinct mix of ethnic peoples.”¹⁷⁶ More remarkably, in deciding the composition of the citizens of the area, the judge, based on his own personal knowledge of the area, stated:

In a word, this area is remarkable for its *diversity*. The three counties are a mecca for both the very young and the very old. Because of the beaches and the moderate year round climate, this area includes young persons establishing homes and older residents retiring to enjoy life under the sun. There are both families and single individuals residing in the communities. Generally, the counties are *heterogeneous* in terms of religion, class, race, and gender.¹⁷⁷

The *2 Live Crew* case presents a particularly unique problem in

172. *Miller*, 413 U.S. at 30-32 (no error in instructing jury to apply the “contemporary community standards of the State of California;” requiring a state to “structure obscenity proceedings around evidence of a *national* ‘community standard’ would be an exercise in futility;” constitution does not require that “people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City”) (emphasis in original).

173. *Id.*; see also F. SCHAUER, *supra* note 109, at 120-24.

174. *Miller*, 413 U.S. at 33. Interestingly enough, this same analysis would not be applied to Northern attitudes that were eventually imposed upon reluctant Southern communities in order to bring about desegregation. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

175. I will concede the fact that there *may* be some areas of the country that are so homogeneous that a community standards approach may be effective. However, almost all places have some population of minorities, for example, and this makes them diverse at least in terms of racial composition, and presumably cultural experiences.

176. *Skywalker Records, Inc.*, 739 F. Supp. at 588.

177. *Id.* (emphasis added).

terms of determining the relevant community because many experts and commentators have argued that this particular music is reflective of a particular culture and is directed at that culture, namely a certain segment of the Black American population.¹⁷⁸ The “community” identified in Florida has a Black population, as well as an Hispanic population.¹⁷⁹ Yet, the community identified in the case was neither black nor white, but was an “average” of all the people living there. Is this “average” a proper community reference point? Arguably, it is a majority of objectors to *Nasty* that have the right to preserve its standards for acceptable sexual speech at the expense of a minority of acceptors of *Nasty*.¹⁸⁰ In this case, the primary group of intended receivers of this information is, in fact, a legally recognized minority — Black Americans.

This analysis can be taken one step further. While the vast majority of a given population may object to the materials being distributed even in the absence of racial undertones, the minority who are purchasing them are being subjected to discrimination in terms of receiving these materials. In such cases, the relevant community should be the community to whom these materials are targeted — namely the purchasers of pornography.

The community standards approach does not make much sense in a free market economy.¹⁸¹ The fact that records were selling in Florida indicates that at least some segment of the population was interested in receiving this material.¹⁸² This type of material does not become impressed upon an unwilling populace.¹⁸³ For example, an ice cream store may move into a community at the North Pole, but most likely will not profit there because the consumers will not want to purchase ice cream

178. See, e.g., Mills, *supra* note 171 (black scholars and intellectuals should be able to place 2 Live Crew's recording in its cultural context).

179. Florida has a large population of Hispanics partly because of the influx of Cuban refugees.

180. See *infra* text accompanying notes 371-88 for a discussion of the imposition of the majority's morality on the rest of the country.

181. In *Smith v. United States*, 431 U.S. 291, 321 (1977) (Stevens, J. dissenting), Justice Stevens concluded: “In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.” *Id.*

182. In fact, the headquarters for Skyywalker Records is Miami, Florida.

183. See J. WEATHERFORD, *PORN ROW: AN INSIDE LOOK AT THE SEX-FOR SALE DISTRICT OF A MAJOR AMERICAN CITY* (1986). Cf. W. STANMEYER, *THE SEDUCTION OF SOCIETY, PORNOGRAPHY AND ITS IMPACT ON AMERICAN LIFE* (1984).

in that cold climate. In contrast, a hot chocolate and coffee shop might fare very well there, not because it was able to impress itself upon an unwilling community, but because it was able to meet a commercial demand. By analogy, an X-rated movie theater might avoid opening up in a town where regular "church-going" people who listen weekly to the sins of pornography at Sunday services live. If these people are following the tenants of their faith, the movie theater would not be able to find any customers who would be interested in seeing movies there. However, if the people of another community are interested in having this type of entertainment available, the movie theater will probably open up and do business with this group of people.

In the Florida community, no one was forcing anyone to buy *Nasty*. *Nasty* was made available as part of a nationwide distribution system, as are almost every type of mass media product today.¹⁸⁴ If the record stores did not believe they could sell the recording, they would probably not have ordered it. The fact that they ordered *Nasty* and consequently sold the recordings is evidence that at least some portion of a "willing" population was interested in this type of material.

Obviously, this type of argument could be carried to an extreme. A similar argument could be made that in a free market economy there might be a market for murder. If one could pay a "hit man," he or she could kill. The market theory would allow this activity for willing suppliers and consumers.

However, this type of free market theory is appropriate for the "marketplace of ideas."¹⁸⁵ For the moment, assume that obscene materials contain ideas.¹⁸⁶ Given there were 1.7 million people in the United States who purchased the recording at the time it was declared obscene, and another million or so who have purchased it since the dec-

184. While the Supreme Court in adopting the *Miller* standard wanted to distinguish between materials that might be viewed in New York versus some tiny community that wanted to be sheltered from the rest of the country, this type of analysis does not make sense in modern society. With the advent of cable television, modern media links the entire country. There may be a segment of the population who never heard of 2 Live Crew, namely the white population. However, with time, more people would be exposed to this and other recordings. Furthermore, why should even one person willing to receive information be penalized because he or she happens to reside in Broward County, Florida, instead of New York City? Should he or she have to relocate in order to receive the sexual messages of 2 Live Crew?

185. See *infra* note 387.

186. See *infra* Part IVA, arguing that obscene materials' physical effects, if any, are cognitively mediated.

laration,¹⁸⁷ there is obviously some market for these ideas about sexual activity. In fact, although no exact numbers were given for how many Florida residents had purchased the recording, the fact that the company is located in Florida would indicate that some number of purchasers were from Florida. Thus, at least some members of a community were willing to listen to this music, while those that were not did not purchase it.¹⁸⁸

Presumably, because the material was directed at Black adults, Black adults probably made up the bulk of the purchasers.¹⁸⁹ This subpopulation or subculture had an interest in receiving this information, and the market provided it.¹⁹⁰ For other groups, the market provides other sources of information about sexual activity. The members of 2 Live Crew express themselves by directing their music to a specific populace. The fact that it reached a larger segment of the population is notable because it further emphasizes the fact that this Florida community is not homogeneous, but is "heterogenous in terms of religion, class, race, and gender."¹⁹¹

In light of this heterogenous community, of which could be said for every community in America, how can one "average" the community without giving deference to the white, conservative culture which predominates? Obviously, that is the point pertaining to any form of

187. See *infra* note 277.

188. To my knowledge, this recording has not been aired on the radio. Thus, this case does not present the captive audience problem presented in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See *supra* note 153 (discussing the captive audience problem). However, the video of "Me So Horny" has been shown on cable's MTV. Prior to *Pacifica*, the FCC had requested broadcaster self-censorship of obscene programming. In *Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974), the court held that a radio call-in show's broadcast of "explicit discussions of ultimate sexual acts in a titillating context" could be constitutionally regulated. Such regulation did not constitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene.

189. To my knowledge, there are no published statistics on the exact demographics of the purchasers. However, even if the bulk of consumers were Caucasian, these individuals would also be considered willing consumers.

190. The notion that there are "subcommunities" or "subcultures" living within a particular community seems particularly relevant. Even in New York City, there are sections of the city that are primarily Black, Asian, Italian, Jewish, and Hispanic. It is this large mix of ethnic people that makes it more likely that a New York City "community" would be more tolerant of *Nasty*.

191. *Skywalker Records, Inc.*, 739 F. Supp. 579. (emphasis added) See Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

pornography. The majority of people in a community wish to suppress information, prohibiting access by a minority of individuals, namely those individuals who in fact buy pornographic or obscene materials.¹⁹² This type of “intentional infliction” of morality upon a subpopulation of society is precisely the type of activity the first amendment forbids when it comes to *speech*.¹⁹³ This concept of moral paternalism will be explored further in Part IVC,¹⁹⁴ but for now it should suffice to point out the weakness of using the elusive and oppressive community standard including identifying what that community standard is in light of cultural and ideological diversity.

2. Prurient Interest and Patent Offensiveness

What is a prurient interest *really*? What types of materials are patently offensive?¹⁹⁵ The Supreme Court’s definition of prurient is not particularly helpful, as ideas about what is prurient change over time. Similarly, the notion of what is patently offensive does not remain unchanged.¹⁹⁶

The Supreme Court illustrated this point in an important obscenity case, *Brockett v. Spokane Arcades, Inc.*¹⁹⁷ In *Brockett*, several

192. There is some question of whether the buyers of pornography are a “minority” any longer, as annual sales reach approximately \$8 billion. See, e.g., W. STANMEYER, *supra* note 183, at 1 (in 1981 the industry was making at least \$4 billion).

193. *Actions* such as murder, rape, and child sexual abuse can be distinguished from *speech*. Interestingly enough, the court stated that the sheriff had a duty to enforce the obscenity law “regardless of community protest.” This would seem to contradict the notion of community standards and reinforce the notion of paternalism. Also, the state legislators enacted laws that, while they may be representative of an entire state, may not be representative of any particular community to which the issue of whether *Nasty* is obscene is posed. Paradoxically, if the entire state of Florida were considered, the recording would arguably not be obscene because of the inclusion of extremely diverse cities such as Miami, Tampa, Orlando, and Fort Lauderdale.

194. See *infra* text accompanying notes 371-88.

195. The original definition of what is obscene included that which is repulsive or disgusting. However, the Court singled out sexual issues, as opposed to violence, for example. See *supra* note 70.

196. Many ideas have changed in the entertainment industry besides sex. For example, violence in films has escalated since *A Clockwork Orange* (1971) was featured with all of its brutality that by today’s standards seems relatively benign. See Appelo, *Ultra-violence: Why Has This Been the Bloodiest Summer in Movie History?* Entertainment Weekly, August 3, 1990, at 51-55 (features a chronological exploration of the escalation of violence in movies).

197. 472 U.S. 491 (1985).

adult book and movie vendors challenged the constitutionality of a Washington statute that penalized persons dealing with "obscene matter" that appealed to the "prurient interest."¹⁹⁸ "Prurient interest" was defined as that which encouraged "lasciviousness or lust."¹⁹⁹ The Ninth Circuit Court of Appeals held that the statute was unconstitutionally overbroad.²⁰⁰ The court objected to the inclusion of "lust" in the definition of what appeals to the "prurient interest."²⁰¹ Noting that the law must take into account the changing meaning of words, the court determined that the meaning of "lust" had changed since its use in *Roth*. No longer were "lustful" thoughts objectionable, because lust was found to be "healthy" and "wholesome," as well as "common to millions of well-adjusted persons."²⁰²

The United States Supreme Court deferred to the lower court's finding that the statute was overbroad. However, instead of striking the entire statute, the Court maintained that if the statute were invalidated "only insofar as the word 'lust' is taken to include normal interest in sex," the statute could still serve to prohibit obscene materials.²⁰³ Thus, the statute could be cured by merely deleting the word "lust".

The notion that the concepts of lust can change over time is an important one.²⁰⁴ In the early 1900's, women were still wearing long skirts, and the thought of women showing their ankles in public made the moralists shudder.²⁰⁵ Since then, clothing styles have permitted the halter top and the miniskirt to exist, styles that would never have been permissible had it not been for a loosening of the screws of the Puritanism that proliferated.²⁰⁶ Similarly, bathing suit styles have changed

198. WASH. LAWS, ch. 184 47th Legis. (effective April 1, 1932).

199. *Brockett*, 472 U.S. at 491.

200. *J-R Distributors, Inc. v. Eikenberry* 725 F.2d 482 (9th Cir. 1984), *rev'd in part sub nom. Brockett*, 472 U.S. at 491.

201. *Brockett*, 472 U.S. at 499.

202. *J-R Distributors, Inc.*, 725 F.2d at 490.

203. *Brockett*, 472 U.S. at 504-505.

204. Without changes in sexual mores, society would never advance. Since our society overcame the Puritan oppression of the early days of our country, every generation has been bolder than the previous one. From the 1920's with the flappers, to the sexual revolution of the 1960's and 1970's, books, movies and music have played a role in the liberation of our attitudes toward sex. With the liberation of our attitudes toward sex has come the recognition of equal rights for women and an openness about sexual relationships and roles.

205. See, e.g., *SEX IN THE ART: A SYMPOSIUM*, *supra* note 138, at 279-313 (role of clothing).

206. See generally P. SOROKIN, *THE AMERICAN SEX REVOLUTION* (1956).

both for men and women.²⁰⁷ From the bathing suit that covered “everything,” society has allowed the Speedo and the “thong” to be worn.²⁰⁸ Notions of nude bathing still trouble many people, but on some public beaches, even nude sun bathing is permissible.²⁰⁹

The relaxing of society’s values about clothing styles is a reflection of the changes in attitudes toward sexuality.²¹⁰ These changes have also been reflected in books and movies. Today, the daily soap opera and movies such as *Fatal Attraction* all but display the genitals openly.²¹¹ Some “main stream,” “artsy” movies, fearing an X-rating which would mean certain death at the box office, refuse to receive a rating from the Motion Picture Association of America; without a rating, they will be

207. All one has to do is to take a look at the *Sports Illustrated* swim suit issues from the past two decades to see the difference in styles.

208. Even now in Florida, there is much public controversy over whether the “t-back” bathing suit should be worn on public beaches. See *Naked Truth: Florida City Really Hates Adam & Eve Mural*, Chicago Tribune, July 15, 1990 (discussing the “moral outrage” Florida has been experiencing over a variety of issues including *Nasty*, the t-back bathing suit, and a new mural that shows Adam and Eve from a rear view sitting on the beach nude).

209. Nude sunbathing is popular in Europe, particularly in France. In fact, Europeans overall have a much more liberal view of obscenity than Americans. Furthermore, Amsterdam’s “red light district” is famous all around the world for its live sex shows, “porn shops,” and legalized prostitution. See NATIONAL COUNCIL FOR CIVIL LIBERTIES: LONDON, AGAINST CENSORSHIP (1972) (Great Britain); A REPORT ON DENMARK’S LEGALIZED PORNOGRAPHY (G. Schindler ed. 1969); SEXUAL UNDERWORLD OF THE ENLIGHTENMENT (G. Rousseau & R. Porter eds. 1988). Cf. McFarlane, *Indecency and Obscenity: The View from Europe*, 140 NEW L.J. 50 (1990) (discussing recent cases in the United Kingdom preventing the importing of obscene materials); Reiman, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. L.J. REFORM 301 (1987-88) (West Germany uses a standard based on the concept of “human dignity” to regulate pornography).

210. There have clearly been changes in society’s views of sexuality, although some of the conservatives clearly oppose such changes. See TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY (R. Francoeur ed. 1987).

211. Some films have been able to avoid “obscenity” labels by merely hinting at what is occurring. For example, in *Fatal Attraction*, in the “elevator” sex scene, at no time does the audience see either Glenn Close’s or Michael Douglas’s genitals. However, the way the scene is shot, it is very erotic, and does everything *but* show the genitals. For more information about erotica, see M. DAVIS, SMUT: EROTIC REALITY, OBSCENE IDEOLOGY (1983); G. GORDON, EROTIC COMMUNICATIONS: STUDIES IN SEX, SIN & CENSORSHIP (1980); E. KRONHAUSEN & P. KRONHAUSEN, PORNOGRAPHY AND THE LAW: THE PSYCHOLOGY OF EROTIC REALISM (2d ed. 1964); A. LORDE, USES OF THE EROTIC: THE EROTIC AS POWER (1978); Comment, *Regulation of Pornography: Is Erotica Self-Expression Deserving of Protection?* 33 LOY. L. REV. 445 (1987).

able to exhibit their movie in conventional theaters rather than the familiar "XXX Cinemas."²¹² In addition, buckling under the conservative pressure that dominates many parts of the country, objectionable portions are often removed from films in order to receive an R-rating.²¹³

Some of the types of entertainment that today seem commonplace and would be labeled as exciting a "normal, healthy desire in sex" would have been labeled obscene ten years ago. Obviously, what excites a "normal" interest in sex has changed over time.²¹⁴ In fact, the dialogue for discussion about sexual behavior has been facilitated by the changing mores in society. Now, talk shows like Donahue,²¹⁵ books,²¹⁶ movies²¹⁷ and music²¹⁸ have begun to talk more openly about sexual

212. For example, *The Cook, the Thief, His Wife, and Her Lover*, a movie originally shown in Europe, would have had no movie left if the nudity (including the rare, male-frontal nudity) and the sex scenes were removed. Thus, the makers of this very well done "artsy" movie took no rating.

213. For example, when *Wild Orchid*, originally released in Europe, came to America, the movie makers had to remove "objectionable scenes" in order to receive an R-rating. Similarly, David Lynch's *Wild at Heart*, winner of the 1990 Cannes Film Festival, will be cut in order to receive an R-rating. Recently, MPAA instituted NC-17 (No Children under 17) to replace the X rating. Movies like *Henry and June* were shown in their uncut version. (CBS News, September 26, 1990).

214. Distinguishing a prurient interest in sex from a "wholesome" or "healthy" interest in it is not a simple task. Researchers of sexual behavior are still trying to understand what degree of interest is, in fact, healthy. Gliedman, *supra* note 110, at 920. See generally H. KATCHADOURIAN & D. LUNDE, *supra* note 138, at 171-72 (studies on different cultures in particular reveal different attitudes toward sexuality as well as different behaviors).

215. Almost weekly on *Donahue*, some sort of sexual issue is the topic for the show. For example, a show about how wearing the appropriate lingerie could improve people's sex lives was televised. *Donahue* (CBS television broadcast, August 1990).

216. Almost every bestseller today has some graphic sexual descriptions. For example, Scott Turrow's bestseller *Presumed Innocent* contains the following passage describing the main character's feelings about having sex with the then dead victim of a brutal murder. S. TURROW, *PRESUMED INNOCENT* 106-107 (Warner Books ed. 1987) ("On my knees, straining and blind, driving my face inside her . . . [I]n time I would be called upon to slam myself inside her").

217. Some movies have taken it upon themselves to discuss sexual issues, including *Casual Sex?* and *Sex, Lies, and Videotape*.

218. Recording artists like Madonna are fascinated with sexual issues. Her songs "Like a Virgin," discussing a woman's experience with a man who makes her feel as if she has never had sex with other men, and "Papa Don't Preach," about a woman who finds herself pregnant and wants advice about what to do about the pregnancy, deal with sexual issues of our time.

behavior. The specific music contained in *Nasty* is a natural progression in the dialogue about sexuality. The fact that it contains words like "fuck," "dick," and other "street language" is indicative of the fact that people have become more open about discussing sex. Although 2 Live Crew may not use what white society deems as correct language, e.g., intercourse and penis, the layman with less sophistication uses this type of street language.

The *2 Live Crew* court was concerned with the fact that the plaintiffs had chosen these "salacious lyrics" in order to sell their recording.²¹⁹ By comparing the sales of the *Nasty* version with the *Clean* version of the recording, the court found that there was a clear difference due to the "leer of the sensualist."²²⁰ The court stated that 2 Live Crew did not need these lyrics to promote their message because rap music does not require that type of language.²²¹

This analysis by the Florida court misses the mark. Recognizing that the plaintiffs, in fact, had a message, the court misidentified it. The message was not the music²²² but rather the open discussion of sexual activity. The fact that the plaintiffs chose to create a *Clean* version should not have been dispositive. In fact, the *Clean* version has a different message. The important point is that the plaintiffs chose to create a recording about sex.²²³

This case seems to be one in which 2 Live Crew was penalized for their word choices. The district court was quick to point out that the "dirty words" coupled with descriptions of sexual behavior were what pushed this recording over the edge of acceptable dialogue.²²⁴

Although the content of the speech was sexual, if the group had been more careful to use sophisticated allusion and metaphor as much

219. Judge Gonzalez stated: "Today, this court decides whether the First Amendment absolutely permits one to yell [the] 'F' word in the community when combined with graphic sexual descriptions." *Skywalker Records, Inc.*, 739 F. Supp. at 592.

220. *Id.* at 595.

221. *Id.*

222. See M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1966) (arguing that the medium *is* the message).

223. Similar problems have arisen with respect to lyrics that deal with the use of drugs. For example, Peter Townsend's, "Acid Queen" in *Tommy* (1969), a rock opera, says "I'm the gypsy, the Acid Queen/ pay before we start/ I'm the gypsy, the Acid Queen/ I'll tear your soul apart/ My work is done now, look at him/ his head shakes, his fingers clutch, watch his body writhe/ I'm guaranteed to break your little heart."

224. *Skywalker Records, Inc.*, 739 F. Supp. at 593.

music does today, would *Nasty* have passed muster? Even the Supreme Court in *Cohen v. California*,²²⁵ in which the defendant had been arrested while wearing a jacket with the words "Fuck the Draft," noted that "one man's vulgarity is another's lyric."²²⁶ The Court did not see the language used by Cohen as "obscene," but instead analyzed it as "fighting words." However, that same word "fuck" is used repeatedly on 2 Live Crew's album. A word is a word, is a word, or at least one would think. This is true, absent content regulation. However, content regulation is what is occurring.²²⁷

While it is permissible for a person to say "Fuck the Draft" because of its political content, it is impermissible for someone to say, "I

225. 403 U.S. 15 (1971).

226. *Id.* at 25. In contrast to 2 Live Crew's use of sexual language, the *Cohen* Court stated that the case did not involve obscenity. Although the word used was "fuck," the "vulgar allusion to the Selective Service System would [not possibly] conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* at 20.

While the *2 Live Crew* case and *Cohen* are not identical, there was important dicta in *Cohen* relevant to the present analysis. The Court stated that Cohen's conviction was based entirely upon the "offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish [was] the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech'" *Id.* at 18 (emphasis in original). The Court concluded:

[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

Id. at 26. *Cf.* Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (permissible to ban from broadcasts the seven "words you couldn't say on the public . . . airwaves". They were, "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits").

227. The Supreme Court has repeatedly stated that content regulation is impermissible. Presumably courts would not eliminate songs that have "positive messages," even rap songs such as Partners In Kryme, "Turtle Power" (advocating use of positive actions) from the movie *Teenage Mutant Ninja Turtles*. However, there are other types of popular music that express views that many people would disagree with, but which are not obscene. For example, Calloway, "I Wanna Be Rich," (transcribed from radio broadcast) expresses the ultimate materialism: "I want money. Lots and lots of money. I want the pie in the sky . . . I wanna be rich . . . I want my cake, wanna eat it too. I want the stars and the silver moon. I spend my money on lottery. My favorite numbers are 1, 2, 3 . . ." Would the courts be willing to eliminate this type of speech? Presumably, not.

Wanna Fuck,” because that contains a sexual reference. The fact that the topic was sexuality seems to be pure content regulation, as does all obscenity law. While content regulation is generally thought to be forbidden, there are a surprising number of examples in which the Court permits it, including defamation and child pornography, to list but a few.²²⁸

Nevertheless, there does seem to be a problem with the plaintiffs' particular choice of words, that choice of verbiage pushing them over the edge from material that is pornographic to material that is obscene.²²⁹ However, how are such distinctions to be made?²³⁰ Perhaps a comparison of lyrics that have not met with any challenge in any court of law is warranted.²³¹

The song that has received the most publicity on the *Nasty* recording is “Me So Horny.”²³² The song begins with dialogue between a prostitute and band members. It continues with a man singing the verses and a woman singing the chorus.²³³ The lyrics are as follows:

‘What do we get for \$10?’ ‘Everything you want Me so

228. See *supra* text accompanying note 53.

229. Arsenio Hall, a popular late-night talk show host on the FOX network, commented that words should be used in satire so that the forbidden words' power can be taken away. He stated: “If we don't joke and laugh, we're gonna kill each other.” Interview with Arsenio Hall on *Donahue* (CBS television broadcast, July, 1990).

230. One commentator stated,

the ambiguous nature of lyrics in music may render some words more difficult to rate, as opposed to striking visual imagery in films which present unmediated concepts. Whereas [the motion picture raters] can immediately ascertain what constitutes excessive nudity requiring an “R” or an “X” rating, for example, determining what combination of words constitutes sexually explicit lyrics would arguably be subject to ongoing debate. And, since music is subject to a plethora of varying interpretations, it would be virtually impossible to render absolute determinations of what can be categorized as sexually explicit, violent, or profane lyrics.

Note, *supra* note 8, at 22 (Westlaw citation). However, with *Nasty*, there can be no doubt the recording was intended to describe sexual activity. Thus, the question of whether (as opposed to how) songs should be censored because of their sexual content must be asked.

231. Courts are not constitutionally required to consider such evidence. See *supra* note 121, and see *infra* text and accompanying notes 247-52.

232. This song has probably received the most publicity because it is the first song on the recording.

233. I have used ellipses to indicate omissions in the original, and I have used quotation marks to indicate the two parties “rapping,” *i.e.*, the prostitute and the members of the group.

horny . . . Sock it to me . . . Love you long time . . . Me so horny’

Sitting at home with my ‘dick all hard,’ I got the black book for a freak to call. Pick up the telephone, and dial the seven digits, said ‘Yo, . . . baby, are you down with it?’

I arrived at her house, knocked on the door, Not having no idea of what the night had in store. I’m like a dog in heat, a freak without warning; I have an appetite for sex, ‘cause me so horny.

‘Me so horny Love you long time’

Girls always ask me why I fuck so much, I say, ‘What’s wrong . . . with the crew cut?’ It’s all in fun, and she shouldn’t be mad. I won’t tell your Mama, if you don’t tell your Dad.

I know you’ll be disgusted, when you see your pussy busted. Won’t your Mama be so mad, if she knew I got your ass? I’m like a dog in heat, a freak without warning; I have an appetite for sex, ‘cause me so horny.

‘Me so horny Love you long time’

You can say I’m desperate, you can call me perverted, But you’ll say I’m a dog when I leave you fuckin’ deserted. I’ll play with your heart, just like it’s a game. I’ll be blowin’ your mind, while you’re blowin’ my brain.

I’m just like that man they call Georgie Puddin’ Pie, I fuck all the girls, and I make ‘em cry. I’m like a dog in heat, a freak without warning; I have an appetite for sex, ‘cause me so horny.

‘Me so horny Love you long time Sock it to me’

It’s true you were a virgin until you met me. I was the first to make you hot and wetty-wetty. You tell your parents that we’re going out, never to the movies, just straight to my house.

You said it yourself, you like it like I do. Put your lips on my dick and suck my asshole too. I’m like a dog in heat, a freak without warning; I have an appetite for sex, ‘cause me so horny.’²³⁴

The music is also interspersed with moans from the woman who is sing-

234. 2 Live Crew, “Me So Horny,” *As Nasty As They Wanna Be* (1989) (transcribed from tape). Lyrics from “Me So Horny” by Luther Campbell, David Hobbs, Mark Ross, Chris Wongwon. © 1989 by PAC JAM Publishing. Administered in the U.S. and Canada by Longitude Music Co. All rights reserved. Reprinted by permission of Windswept Pacific Entertainment Co. D/B/A Longitude Music Co. (BMI). These lyrics are also cited in Plaintiff’s Exhibit A, “Affidavit for Order of Determination of Probable Cause of Obscenity [filed by the Sheriff of Broward County],” Amended Complaint for Declaratory and Injunctive Relief, March 23, 1990.

ing the chorus.²³⁵ The song discusses a woman who is sexually excited — horny, as slang — who is about to have sexual intercourse with the singer. He describes various sexual acts, including oral sex. While the language used is “graphic,” it is simplistically so. The listener is able to understand in common, lay terms what the meaning of the song is. Similar music has been produced,²³⁶ but with more restraint on language uses.²³⁷ Allusion and metaphor without the explicitness of the colorful slang is used in the songs that follow.

One popular song by the Pointer Sisters, discusses a woman being sexually excited in “I’m So Excited.”²³⁸ She wants to have sex with the man who excites her, and asks him to “move real slow,” so she can have an orgasm:

Tonight’s the night we’re gonna make it happen. Tonight we’ll put all other things aside. Get in this time and show me some affection. We’re going for those pleasures in the night.

I want to love you, feel you, wrap myself around you. I want to squeeze you, please you. I just can’t get enough, and if you move real slow, I’ll let it go.

I’m so excited, and I just can’t hide it. I’m about to lose control and I think I like it. I’m so excited and I just can’t hide it, and I know . . . I want you.

We shouldn’t even think about tomorrow. Sweet memories will last a long, long time. We’ll have a good time, baby; don’t you worry. And if we’re still playing around, boy that’s just fine.

235. More than a few years ago, Donna Summer released “Love to Love You,” that contained the sounds of a woman moaning, presumably in pleasure. There was no legal action taken with respect to this recording. *See also* Samantha Fox “Touch Me”, *infra* note 246.

236. Music about sexual behavior is “everywhere.” *See infra* note 246 for other examples.

237. In order for music to get “air time” on radio stations, it has to meet with broadcast regulations. Indecency on broadcast media is strictly controlled by the Federal Communications Commission. *Federal Communications Comm’n v. Pacifica Found.*, 438 U.S. 726 (1978). *See* Feldman, *The FCC and Regulation of Broadcast Indecency: Is There A National Broadcast Standard in the Audience?* 41 FED. COMM. L.J. 369 (1989); Hsiung, *Indecent Broadcast: An Assessment of Pacifica’s Impact*, 9 COMM. & L. 41 (1987); Comment, *The FCC’s Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871 (1989); Comment, *Indecency and the First Amendment: Special Problems of the Broadcast Industry*, 13 LINCOLN L. REV. 101 (1982).

238. This song continues to be played on radio stations nationwide. In fact, I transcribed this song from KFRX’s (Lincoln, Nebraska) telecast (August, 1990).

Let's get excited. We just can't hide it. I'm about to lose control, and I think I like it. I'm so excited and I just can't hide it, and I know . . . I want you . . . I want to love you, feel you, wrap myself around you. I want to squeeze you, please you. I just can't get enough, and if you move real slow, I'll let it go.

I'm so excited. . . .

Look what you do to me. You've got me burning up . . .

I'm so excited

How did you get to me? I've got to give it up

I'm so excited²³⁹

Although this song does not use the words that 2 Live Crew used to describe sexual acts, it refers to some of the same acts. Is the Pointer Sister's song any less sexually suggestive than 2 Live Crew's song? Yet, the Pointer Sisters are revered by pop music devotees, which includes a large white audience.²⁴⁰ This particular song has been around for several years, and continues to be played without objection on the pop radio stations around the country.²⁴¹ Certainly, this music could be objectionable, but the fact that no objection has been made is certainly relevant in determining what appeals to the prurient interest or is patently offensive.²⁴²

239. "I'm So Excited" by Trevor Lawrence, June Pointer, Ruth Pointer and Anita Pointer. © 1983 EMI Blackwood Music Inc./Till Dawn Music/Anita Pointer Publishing/Ruth Pointer Publishing/Leggs Four Publishing Rights for Till Dawn Music Controlled and Administered by EMI Blackwood Music Inc. Rights for Anita Pointer Publishing, Ruth Pointer Publishing Controlled and Administered by Braintree Music. All rights reserved. International Copyright secured. Used by Permission.

240. The Pointer Sisters are Black Americans, but unlike 2 Live Crew who are also Black, their music is appreciated by a considerable number of Caucasians.

241. See *supra* note 238.

242. I believe that the plaintiffs made the mistake of introducing a variety of pornographic materials none of which was music. Besides *Nasty* itself, the plaintiff introduced the following evidence: PLAYBOY (June 1990); HUSTLER (June 1990); PENTHOUSE (June 1990); TIGHT PUSSIES (magazine); ASS PARADE (magazine); DEEP THROAT GIRLS (magazine); TURN-ONS (magazine); CLUB (magazine); CALIFORNIA CREAMIN (book); READY MADE BRIDE (book); MORE FUN FOR THE WIFE (book); *Teasers Number 1* (videocassette); *The Day the Laughter Died* (dual cassette); *Raw* (videocassette); 303 BONDAGE PHOTOS (magazine); NAKED STRANGER (magazine). Order Sealing Evidence, *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 579 (June 7, 1990) (Case No. 90-6220-Civ-Jag) (evidence available to adults upon request).

I believe the plaintiffs should have introduced other music such as that presented in this article that show the use of sexuality in popular music today. Even Eddie Murphy's *Raw* and Andrew Dice Clay's *The Day the Laughter Died* are not music, but rather comedy routines filled with "dirty" jokes.

The Pointer Sister's rendition of sexual pleasure is not the only one on the pop scene. George Michael's "I Want Your Sex," while banned in many clubs when it was first released, enjoys quite a bit of air time on radio stations across the country:²⁴³

There's things that you guess/ And things that you know/
There's boys you can trust/ And girls that you don't/ There's little
things you hide/ And little things that you show/ Sometimes you
think you're gonna get it/ But you don't and that's just the way it
goes/

I swear I won't tease you/ Won't tell you no lies/ I don't need
no bible/ Just look in my eyes/ I've waited so long baby/ Now that
we're friends/ Every man's got his patience/ And here's where
mine ends/

I want your sex/ I want you/ I want your . . . sex/

It's playin on my mind/ It's dancing on my soul/ It's taken so
much time/ So why don't you just let me go/ I'd really like to try/
Oh I'd really love to know/ When you tell me you're gonna regret
it/ Then I tell you that I love you but you still say NO!/

I swear I won't tease you/ Won't tell you no lies/ I don't need
no bible/ Just look in my eyes/ I've waited so long baby/ Out in
the cold/ I can't take much more girl/ I'm losing control/

I want your sex/ I want your love/ I want your . . . sex

It's natural/ It's chemical (let's do it)/ It's logical/ Habitual
(can we do it?)/ It's sensual/ But most of all . . . / Sex is some-
thing we should do/ Sex is something for me and you/

Sex is natural — sex is good/ Not everybody does it/ But
everybody should/ Sex is natural — sex is fun/ Sex is best when
it's . . . one on one one on one/

I'm not your father / I'm not your brother/ Talk to your sis-
ter/ I am your lover/

C-c-c-c-come on/

What's your definition of dirty baby/ What do you consider
pornography/ Don't you know I love you till it hurts me baby/
Don't you think it's time you had sex with me/ Sex with me/ Sex
with me/ Have sex with me

Oh so much love/ That you've never seen/ Let's make love/
Put your trust in me/

Don't you listen to what they told you/ Because I love you/

243. I transcribed these lyrics from the lyric sheet available with the recording. Here the ellipses are in the original. I have not deleted anything from this section. I use the "/" sign in order to indicate the end of a line from the original "poetry" typesetting.

Let me hold you/ Oh/

I'm not your brother/ I'm not your father/ Oh will you ever
change your mind/ I'm a gentle lover with a heart of gold/ But
baby you've been so unkind, oh/

Come on/ I want your sex/ Come on, I want your sex/ That's
right, all night/ Oh, I want your sex/ I want your . . . sex/

Sexy baby's/ Sexy body/ Keeps me guessing/ With a prom-
ise/ I know we can come together/ But the question is/ Will we
ever?/

Sexy baby's /Sexy body/ Keeps me guessing/ With a prom-
ise/ I know we can come together/ But the question is/ Will we
ever?/

Together — you and me.²⁴⁴

George Michael's recording of "I Want Your Sex," is in fact a good example of the merit of sexual speech. It takes a stand about the utility of sex: "Sex is natural — sex is good."²⁴⁵ It is truly sexual speech.²⁴⁶ George Michael uses the generic term "sex" for sexual intercourse, but clearly "invites" the woman whom he addresses to have "sex with me."

244. George Michael, "I Want Your Sex," *Faith* (CBS Records 1987). "I Want Your Sex" (George Michael) © 1987 Morrison-Leahy Music LTD. (PRS) All rights for United States administered by Chappell & Co. All rights reserved. Used with permission.

245. *Id.*

246. Other references to sexuality abound in popular music today. See Samantha Fox, "Touch Me" ("I wanna feel your body, your heart beat next to mine;" "I could not decide between pleasure and pain;" "Like a tramp in the night, I was beggin' you to treat my body like you wanted to;" "I want your body, all the time") (also has quite a bit of moaning) (transcribed from radio broadcast); Frankie Goes to Hollywood, "Relax," *Welcome to the Pleasuredome* (1984) ("Relax go to it . . . when you wanna come . . .") (referring to sexual climax) (transcribed from tape); Frankie Goes to Hollywood, "Two Tribes (for the victims of ravishment)," *Welcome to the Pleasuredome* (1984) ("Orgasm has become a most mystified state of feeling. Um, no one can be quite sure if they've had it or not. Um, is it just ejaculation, or is it orgasm? Is it just involuntary pelvic contractions, or is one having orgasm?"); Julio Iglesias & Willie Nelson, "To All The Girls We've Loved Before" (Julio sings: "To all the girls . . . who filled my nights with ecstasy") (transcribed from radio broadcast); Madonna, "Hanky Panky" *I'm Breathless* (1990) ("I don't want you to thank me, you can just spank me;" "Tie my hands behind my back, and ooh, I'm in ecstasy;" "Like Hanky Panky, nothing like a good spanky") (implying sado-masochistic behavior) (transcribed from tape); John Cougar Mellencamp, "Jack and Diane" ("Let's run off behind the shady trees, dribble off those Bobbie Brooks pants and do what I please") ("paints" a clear visual image of the two teens having sex in the grass) (transcribed from radio station broadcast).

If he had used the term “fuck” instead of “sex,” would that have placed this song in the same category as *Nasty*?

While these lyrics have not been challenged as being obscene, that, of course, does not mean that they would not be declared “obscene.” The district court was quick to point out that the Constitution does not compel comparable materials be considered in determining what would be acceptable to a community.²⁴⁷ These types of comparable materials may be pervasively listened to in the community by choice²⁴⁸ or may exist in the community because of indifference by the majority but listened to only by a minority of individuals.²⁴⁹ Nevertheless, the acceptability of comparable materials in the community should be considered as directly relevant in determining whether the community would object to this particular recording.²⁵⁰ If comparable evidence is not considered, the judgment of the recording can be based on no more than the views of the jury or judge.²⁵¹

Other comparable material would reveal that *Nasty* is no more or less sexually provocative than other recordings with the exception of *word choices*.²⁵² One cannot draw a line between these types of lyrics unless one bases it on mere word choice because all of these lyrics deal with sexuality. Some lyrics are more sophisticated, as they only allude to the sexual act itself. The Pointer Sister’s “I’m So Excited” might be subject to other interpretations, but it cannot be disputed that the singers are talking about the sex act when they say “I want to squeeze you,

247. *Skyywalker Records, Inc.*, 739 F. Supp. at 589.

248. Lentz, *Comparison Evidence in Obscenity Trials*, 15 J. L. REFORM 45, 66 (1981).

249. *Id.*

250. *Id.*

251. See Scott, Eitle, & Skovron, *supra* note 127.

252. Courts are not constitutionally required to consider comparable evidence. See Lentz, *supra* note 248; Note, *Constitutional Law — Appellate Procedure — Obscenity — In Determining Whether Materials are Obscene, The Trier of Fact May Rely Upon the Widespread Availability of Comparable Materials to Indicate that the Materials Are Accepted by the Community and Hence Not Obscene Under the Miller Test — United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983), 52 CINN. L. REV. 1131 (1983). The introduction of the *Nasty* recording into evidence was sufficient. The judge stated “As noted by the Supreme Court in *Paris Adult Theatre I* [413 U.S. at 56 & N.6.], when the material in question is not directed to a bizarre, deviant group not within the experience of the average person, the best evidence is the material, which ‘can and does speak for itself.’” *Skyywalker Records, Inc.*, 739 F. Supp. at 590.

please you, wrap myself around you.”²⁵³ “God forbid” they should say, “I want to fuck you;” even though they may mean the same thing, they cannot say that.²⁵⁴

Professor Schauer, a leading scholar in obscenity jurisprudence, has argued that the types of distinctions the courts want to make about what are permissible references to sexual activity can be made on the basis of classifying that which is obscene as causing a physical rather than an intellectual response in the perceiver.²⁵⁵ Even if one accepts that as a valid identifier of the obscene,²⁵⁶ there still appears to be no way to distinguish between that which merely excites a normal healthy interest in sex and that which excites a morbid interest. If both types of sexual materials stimulate the perceiver, which arguably the lyrics by the Pointer Sisters and George Michael do, why should only the 2 Live Crew recording be prohibited? Schauer’s argument does not adequately answer that question, perhaps because it is no better than Justice Stewart’s method of identification: “I know it when I see it.”²⁵⁷

253. Pointer Sisters, “I’m So Excited,” *supra* note 239.

254. There are many other examples of less explicit matter, but are nevertheless frowned upon when used. For example, the term “illegitimate child” is a euphemism for “bastard.”

Similar word choice discussions were raised at the trial court that was ruling on whether James Joyce’s *Ulysses* was obscene:

COUNSEL: Judge, as to the word “fuck,” one etymological dictionary gives its derivation as from *facere* — to make — the farmer fucked the seed into the soil. This, your honor, has more integrity than a euphemism used every day in every modern novel to describe precisely the same event.

JUDGE WOOLSEY: For example . . .

COUNSEL: Oh — “They slept together.” It means the same thing.

JUDGE WOOLSEY (smiling): But, Counselor, that isn’t usually the truth!

United States v. One Book Called “Ulysses,” 5 F. Supp. 182 (S.D.N.Y. 1933), *aff’d* 72 F.2d 705 (2d Cir. 1934), *cited in*, A. GERBER, SEX, PORNOGRAPHY, AND JUSTICE 99-100 (1965). Judge Woolsey decided that the book was not obscene.

255. Interestingly enough, the plaintiffs presented evidence that the recording did not physically excite anyone, and, in fact, caused boredom after repeated play. If the purpose of identifying a work as obscene is so that it will not be viewed by people who might get sexually excited, it would seem that this type of evidence would be important in finding that the material was not obscene. However, the 2 Live Crew court still found that the recording appealed to a “shameful and morbid interest in sex.” This finding seems ludicrous if the concern is preventing physical excitation.

256. In Part IVA2 *infra*, it will be argued that this is not a valid basis upon which to distinguish it. See *infra* text and accompanying notes 328-49.

257. See *infra* note 336.

3. Serious Value

The serious value prong of the test presents the most difficulties.²⁵⁸ While the test is the objective, based on the "reasonable person,"²⁵⁹ the test requires that the court become an art critic.²⁶⁰ This is a task, like many other court-appointed tasks, that is inappropriate.²⁶¹

Despite expert testimony,²⁶² the *2 Live Crew* court was unable to find that the *Nasty* recording had any serious sociological value.²⁶³ The expert testified that the work reflected specific aspects of Black culture.²⁶⁴ In particular, the expert testified about the concept of "boasting." Boasting is a way in which a person overvalues their sexuality.²⁶⁵ The court was unable to find serious value in this despite the fact that "[b]oasting" seems to be a part of the universal human condition.²⁶⁶

Judge Gonzalez recognized that not only is this recording specifically reflective of a particular subculture within American society, but "seems to be a part of the universal human condition,"²⁶⁷ thereby, unintentionally, making a strong case for regarding this work with serious artistic value. The act of sex itself is part of the universal human condition, and discussing it in common, layman's terms is also part of the universal human condition. That realization alone is enough to give the work credence in the art world.²⁶⁸ Nevertheless, the court was unwill-

258. See Main, *supra* note 159; Wright, *supra* note 159.

259. See Note, *supra* note 160.

260. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Justice Holmes wrote: "It would be a dangerous undertaking for persons trained only [in] the law to constitute themselves final judges of the worth of [art] At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their [artist] spoke.").

261. See also Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) (arguing that the entire post-modern art movement uses sexuality in a way that could be deemed "obscene;" the art form seeks to defy traditional values).

262. Expert testimony is not required in obscenity cases. See *supra* note 126.

263. *Skywalker Records, Inc.*, 739 F. Supp. at 594. Cf. MacDonald, *supra* note 83; Mills, *supra* note 171.

264. *Skywalker Records, Inc.*, 739 F. Supp. at 594.

265. *Id.*

266. *Id.*

267. *Id.*

268. Art is generally understood to be a reflection of the human condition. See P. MICHELSON, *THE AESTHETICS OF PORNOGRAPHY* (1971), cited in, E. OBOLER, *supra* note 2, at 236:

Pornography exists, not because unscrupulous fiends print and sell it, but

ing to accept this realization.

In addition, the court did not acknowledge the comedic or satirical value of the recording.²⁶⁹ Finding the fact that people laughed at the recording to be irrelevant, the court stated:

In a society, where obscenity is forbidden, it is human nature to want [to] taste forbidden fruit. It is quite another thing to say that this aspect of humanity forms the basis for finding that *Nasty* has serious artistic value. Furthermore, laughter can express much more than enjoyment and entertainment. It is also a means of hiding embarrassment, concealing shame, and releasing tension. The fact that laughter was only heard at the time that the first song of the tape was played is probative on what the audience's outbursts really meant. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.²⁷⁰

Anyone who has listened to the recording would probably laugh for a variety of reasons. Some would genuinely find the recording amusing, while others might be embarrassed. However, this latter group would have the option to turn the recording off if the message was too much for them.²⁷¹ Why should this first group be penalized because this latter group is unable to genuinely laugh at the message?

Even for the group that would find the recording funny, repeated play would tend to detract from its comedic impact. In fact, the plaintiffs conceded that repeated play caused boredom and not sexual excitement.²⁷² Isn't this the effect of any comedic experience that is repeated? After all, how many times can a person see a comedy and still

because it is part of our nature. There is, therefore, no question of whether we will have pornography. We will have it, as we have it now, and as we have always had it. The question is quite simply whether we can stand our own humanity.

269. *Skywalker Records, Inc.*, 739 F. Supp. at 595. Cf. Pareles, *Raunchy Rap From the 2 Live Crew*, N.Y. Times, July 20, 1990, at C3 ("hard to imagine the performance as anything more than lowbrow comedy, hardly a serious threat to the moral tone of the republic") (emphasis added).

270. *Skywalker Records, Inc.*, 739 F. Supp. at 595. Again, the judge "hit the nail on the head" but refused to see the real import of what he was saying. If it is human nature to want to taste forbidden fruit, the fact that this recording appeals to human nature should render it as having serious value.

271. Again, this is not a captive audience problem. See *supra* note 153.

272. *Skywalker Records, Inc.*, 739 F. Supp. at 592.

laugh at the same jokes? Furthermore, satire, in particular, does not necessarily evoke laughter. An important and controversial comedian, Andrew Dice Clay noted, “[My] show is not about laughter. It’s about comedy. You don’t have to laugh to enjoy it.”²⁷³

Furthermore, because each individual song deals with some of the same subject matter, the jokes become less and less laughable. However, given that most music is made to be “listened and danced to,”²⁷⁴ as the court acknowledged, if there is any comedic effect, it is merely an added plus. The music has value already because of its rhythm, its discussion of sexual activity, and then, if necessary to find any value in it, its comedic effect.

Courts are least qualified to determine what is art. In fact, if the marketplace theory is allowed to work, it should work at this stage.²⁷⁵ Not only have experts in the field recognized the value of the plaintiffs’ work,²⁷⁶ but almost three million people to date across the country²⁷⁷

273. Andrew Dice Clay, “Laughter vs. Comedy,” *The Day the Laughter Died* (1990) (transcribed from tape). Interestingly enough, Clay’s recording also contains a warning about the explicit language: “WARNING: This Comedy Album Contains Filthy Language and No Jokes!!! Over 100 Minutes of New DICE!!!” Clay is very controversial because of his graphic language and explicit sexual comments. Many people perceive his comedy to be negative toward women in particular. See Oates, *The Diceman Numbeth*, ENTERTAINMENT WEEKLY, July 27, 1990, at 44-47.

274. *Skywalker v. Navarro*, 739 F. Supp. 578.

275. See *supra* text accompanying notes 181-191.

276. Not all commentators agree that the work is valuable even as “art,” but most would agree that there is no more reason to declare this piece of music obscene than any other. One music critic stated:

Despite the greater comic invention and the more sophisticated musical grooves this time, [2 Live Crew’s] basic approach continues to offer a dour, ultimately ugly view of sex. It’s all relentless, macho posturing with men giving the orders and women simply following. . . . After the Miami rap group’s . . . album . . . became . . . the first pop recording ever declared obscene by a U.S. District Court, more than a million people have bought the album, probably to see what the fuss was all about. What they discovered was a collection of mostly boring, X-rated stag-party tunes by a largely undistinguished rap group.

However shallow and stupid the music, it was also clear that there was no more reason to declare “Nasty” obscene than the thousands of similarly sexually explicit books and videos that are available in every city in the land.

Hilburn, *supra* note 14. See also Milward, *Wrapping Nasty in the Flag*, Newsday, July 20, 1990, at Part 2, page 2 (although bad art, “anybody with a belief in the Bill of Rights [would defend] 2 Live Crew’s right to be stupid jerks”).

277. See *Skywalker Records, Inc.*, 739 F. Supp. 578 (1.7 million copies sold

have recognized the value of the plaintiffs' work.²⁷⁸

The serious value standard does not require that the value be identified only by community standards. In effect, some commentators have argued that this creates a national standard.²⁷⁹ If this is the case, certainly three million people should qualify as giving credence to the work.²⁸⁰ Even in the absence of that many consumers, the art might still be found to have value.²⁸¹ Many works that today are revered masterpieces were not recognized at the time they were created.²⁸²

While the courts are called upon to answer many questions for which they are not qualified, this is a particularly dangerous area for them. If the courts are allowed to make decisions about what has serious artistic value, a conservative morality forced on the nation will stifle creativity.²⁸³ Stifling a society as diverse as ours, for no legitimate reason, is particularly troublesome. Despite claims that the recordings induce criminal behavior, the fact remains that the serious value judgment is a judgment based on what is good for society — in other words

before the court decision); *see also* Hilburn, *supra* note 14 (1 million copies sold after ruling).

278. In fact, some have argued that the value of the *Nasty* recording has turned out to be its role in the discussion on what the first amendment should protect. "First Amendment Rights," *Oprah Winfrey* (CBS, July 1990) (flag burning controversy and 2 Live Crew).

279. *See supra* text accompanying notes 159-61.

280. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986). Historically, 1 to 10% of the population has always been homosexual, but this did not affect the Court's decision regarding homosexual sodomy.

281. Even Adolf Hitler allowed works which he deemed obscene and politically incorrect to be displayed both in a parade and a museum built for the purpose of displaying such works.

282. Many artists have not been recognized until after their deaths. Edgar Allen Poe, who had what many would call a morbid or obscene interest in death, for example, died a pauper, and this is why people who visit his grave in Baltimore, Maryland, place pennies there.

Camille Claudel, the sculptor, was not particularly recognized for her work, as she was competing with her former teacher, Rodin. Today, her work is remembered for its strength, as well as for its sexual provocativeness.

The Supreme Court noted: "What is good literature, . . . what is good art, varies with individuals as it does from one generation to another." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946). *See also* H. GARDNER, *ART THROUGH THE AGES* 690-93 (6th ed. 1975) (French salon denied access to painters such as Manet), *cited in* Note, *supra* note 261, at 1377 n.124.

283. Art was designed to challenge society, to challenge the status quo. *See* Note, *supra* note 261, at 1378 (Post-Modernism is a "rebellious movement").

a moral judgment.

IV. The Basis for Regulation of Speech Dealing with Sexuality

It is apparent that there are several problems with the *Miller* approach. While government may want to stamp out certain types of speech that it regards as harmful, it is prohibited from doing so with some exceptions.²⁸⁴ People in a democratic society, for example, may disapprove of those who espouse communism as a way of life. However, absent a "clear and present danger" to the nation, such individuals' speech cannot be suppressed.²⁸⁵ Their speech deals with bringing about political change, and the appeal of communism at any given time is a valuable barometer for politicians and sociologists. Similarly, the Ku Klux Klan is allowed to march, despite the violence that can be incited by such marches.²⁸⁶

Following this logic, the state should not be able to exclude discussions of sexual matters from public debate, even if we fear the further denigration of women or increased sexual promiscuity. Sexuality is a topic that is certainly relevant, if not critical, to "social change." Changing mores in society about the role of women, styles of clothing, and sexual behavior itself come about through open debate on sexuality.

There seem to be several bases upon which regulating speech dealing with sexual matters has been deemed acceptable. Three of those will be dealt with here. First, some claim that this type of speech appeals to the emotions rather than the intellect, and thus, constitutionally permissible to regulate it.²⁸⁷ Second, many claim that certain types

284. *See supra* note 53.

285. *See* *Schenck v. United States*, 249 U.S. 47 (1919) (pamphlet interfering with recruiting by urging men to violate the draft law); *Abrams v. United States*, 250 U.S. 616 (1919) (pamphlet calling for strike of munitions workers); *Gitlow v. New York*, 268 U.S. 652 (1925) (prosecution under New York statute prohibiting the advocacy of an overthrow of government by violence); *Whitney v. California*, 274 U.S. 357 (1927) (prosecution under California Criminal Syndicalism Act for joining and assisting in organization of Communist Labor Party); *Dennis v. United States*, 341 U.S. 494 (1951) (prosecution of Communist Party members for conspiring to advocate forcible overthrow of the government). *Cf.* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Klu Klux Klan members prosecuted for advocating racial and religious bigotry; formulating incitement test).

286. Political speech is at the heart of the first amendment. *See supra* note 53.

287. *See infra* text accompanying notes 328-49.

of pornography should be regulated because they induce sexual crime or are otherwise harmful (particularly to women).²⁸⁸ Finally, some have expressed the *real* reason for regulating pornography; the regulation of society's morals.²⁸⁹ While those supporting these theories believe them to be legitimate bases for regulation of speech dealing with sexuality, it will be demonstrated that none are appropriate reasons for such regulation.

A. *The Falsity of Music and Obscenity as Purely Emotive Speech*

Until now, this article has proceeded on the assumption that music is protected speech. Yet, this assumption may not be warranted.²⁹⁰ As will be discussed in this section, music and pornography are purported by some to be outside the scope of protection of the first amendment because they appeal to humans' emotions rather than humans' intellect. Because the *2 Live Crew* case dealt with music, as well as obscenity, it might be helpful to demonstrate why both music and obscenity do appeal to the intellect, and thus, should be given constitutional protection.²⁹¹

1. Music

While a song's lyrics utilize words and are thus, "speech," some commentators have argued that the combination of lyrics and background music constitute something entirely different.²⁹² Nevertheless, music serves an important social function, as well as an important artistic one.²⁹³

288. See *infra* text accompanying notes 350-70.

289. See *infra* text and accompanying notes 371-88.

290. For example, there are those who claim that political speech was the only type of expression to be protected under the first amendment. Query whether Luther Campbell's new solo recording, "Banned In The U.S.A.," see *supra* note 14, would be protected, as it deals with the first amendment right of free speech and the aftermath of the *2 Live Crew* case. In addition, Billy Joel's "We Didn't Start the Fire" catalogues a variety of social and political events throughout this century including the dropping of the atomic bomb and censorship of such books as *The Catcher in the Rye*.

291. Even if music and obscenity merely catered to the emotions, I would still consider it to be protected *expression*.

292. Comment, *Musical Expression and First Amendment Considerations*, 24 DE PAUL L. REV. 143, 159 (1974).

293. *Id.*

As a traditional art form, music²⁹⁴ provides social order, providing a context for the confrontation of ideas: "Conflict engenders dialogue; dialogue results in communication; communication leads to understanding."²⁹⁵ However, even with its important social function, is music deserving of first amendment protection?

First amendment protection has been extended to a number of socially important activities, including speeches,²⁹⁶ solicitation,²⁹⁷ broadcasting,²⁹⁸ movies,²⁹⁹ parades and demonstrations,³⁰⁰ and symbolic protests.³⁰¹ In each of these cases, there are elements of communication or "speech."³⁰²

One commentator recognized that speech, like all forms of communication, transfers messages.³⁰³ Messages were defined as "any patterned output no matter how primitive the patterning, from simple exclamatory directions to highly complex ideational structures."³⁰⁴ In this vein, writing, filming, and performing music would all be types of speech. Writing³⁰⁵ and films³⁰⁶ have been recognized as generally protected by the Constitution. However, the Supreme Court has never been confronted with a case such as the present one where the *content* of the music is at issue.³⁰⁷

294. Here and throughout this paper, music will be considered to be both the lyrics and the instrumental background sounds.

295. Comment, *supra* note 292, at 159. At least one commentator has argued that "since music serves a considerable social function and at the same time represents an important mode of artistic expression," it should be protected. Comment, *Drug Songs and the Federal Communications Commissions*, 5 U. MICH. J.L. REFORM 334, 343 (1972).

296. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

297. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

298. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

299. *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961).

300. *Cox v. Louisiana*, 379 U.S. 536 (1965).

301. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1965) (arm bands).

302. Comment, *supra* note 292, at 160.

303. Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761, 763-64 (1970).

304. *Id.*

305. *See United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (books).

306. *See Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (movies).

307. In *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), the Supreme Court was confronted with a mere time, place, and manner regulation, in which a band was required to use sound equipment provided by the city in order to prevent excess

While verbal expression has the acknowledged capacity to communicate ideas, pure music, i.e., music without lyrics, arguably does not have that capability.³⁰⁸ Yet, one commentator has stated that this feature of pure music

is not insurmountable. A work of pure music can express and . . . convey feeling and emotion. Beginning with the conception in the mind of the composer, the idea can be expressed as rhythm, mel-

noise from disturbing nearby residents. Providing that music is protected by the first amendment, the Court stated:

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the *intellect* and the *emotions*, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

Id. at 2753 (emphasis added; citations omitted). However, the Court was quick to point out that it was not faced with a content regulation case. The Court stated: "We need not discuss whether a municipality which owns a band stand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality." *Id.* See also *Carew-Reid v. Metro. Transp. Auth.*, 903 F.2d 914 (2d Cir. 1990) (upholding ban on use of amplifiers by musicians on New York City subway platforms as reasonable time, place, or manner restriction); *Calash v. City of Bridgeport*, 788 F.2d 80 (1986) (denial of access to municipal stadium used for non-profit activities to profit-making rock concerts was permissible; not pretext for hostility to rock music); *Cinevision Corp. v. City of Burbank*, 745 F.2d. 560 (9th Cir. 1984) (music is protected by first amendment; could not exclude "hard rock" music from municipally owned amphitheater); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (municipality could not forbid playing rock music even if music had no political message).

One court discussing the protection of music stated:

Important First Amendment rights are at stake when music formats are regulated. Music and other forms of cultural expression are traditionally protected under the First Amendment. In addition to its artistic value, music, both classical and popular, can be an important mode of political and moral expression. There is even the possibility of repression when, for example, the lyrics of popular songs communicate controversial ideas.

Citizens Comm. to Save WEFM v. Federal Communications Commission, 506 F.2d 246, 251 (D.C. Cir. 1974) (footnotes omitted).

308. Scientists are still trying to determine how humans perceive and understand music. See DeAngelis, *How Music is Heard is Focus of New Field: Study at APA-Sponsored Meeting Suggests Music Sense in Infants*, 21 A.P.A. Monitor 8-9 (August 1990); DeAngelis, *Musical Paradox Study Scales the Cutting Edge*, 21 A.P.A. Monitor 8, 10 (August 1990).

ody, harmony and all of the other intricate devices of musical expression. Indeed, it has been suggested that just as words serve as symbols for concepts music also serves to convey meaning and concepts that cannot be borne by words.³⁰⁹

In contrast to "pure music," analysis of *songs* suggests a bifurcated approach.³¹⁰ Words and music could exist separately giving protection for one, the other, or both as a unit.³¹¹ If words and music are taken as a unit, the words would take on a secondary importance and would be "obscured by the tones of the music."³¹² However, if words and music do not blend, the words *as words* can no more be suppressed than a poem or short story when they deal with speech that is protected.³¹³

However, one of the primary problems with traditional first amendment analysis has been that certain types of speech are labeled as emotive rather than intellectual.³¹⁴ As the commentator above pointed out, music can convey feeling and emotion. Yet, in order to convey such feelings and emotions, something must happen within the perceiver's mind.³¹⁵ He or she must receive information, process it, un-

309. Comment, *supra* note 292, at 161 (emphasis in original & footnotes omitted).

310. *Id.* at 161.

311. *Id.*

312. *Id.*

313. Of course, the problem is that these *words* are not protected because they have been deemed "obscene."

314. One commentator uses similar terminology when he refers to some works including "obscenity" as being "non-cognitive." Non-cognitive works provide a contrast to works that appeal to the intellect. See Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986). See also Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967) (citing sources from Plato, Aristotle, and Freud in support of the reason/passion dichotomy). For an indepth criticism of Sunstein's approach, see Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420. Cf. Sunstein, *The First Amendment and Cognition: A Response*, 1989 DUKE L.J. 433.

315. Psychologists study what happens within the brain that allows us to comprehend sense-data. These psychologists study human perception. See generally R. BOOTZIN, G. BOWER, R. ZAJONC & E. HALL, *PSYCHOLOGY TODAY: AN INTRODUCTION* 138-41 (6th ed. 1986) (discussing mentally imposed organizing principles for incoming sense-data); R. MORGAN, *PSYCHOLOGY* 7.2 (3d ed. 1977) ("Between sensing and knowing is perceiving. Even though all knowledge comes to you through your senses, sensation might still be only . . . 'one great blooming, buzzing confusion' if there were not an internal organizing process [*i.e.*, perception]") (quoting William James).

derstand it, and translate it into something that has an emotional effect.³¹⁶ The sounds that are perceived are mere sounds, but when they are ordered into meaningful, recognizable arrangements by the perceiver, *i.e.*, the sounds become discernable as language or music, these sounds can convey information.³¹⁷ Just as a person listens to Vivaldi's *Four Seasons* and hears the changes in the music corresponding to changes in the seasons themselves and visualizes the seasons changing, when one listens to *Nasty*, he or she hears a series of rhythmic beats that emphasize lyrics on the recording and visualizes the images that are being portrayed.³¹⁸ The music itself is not merely an emotional medium. Rather, it conveys images and ideas that, when combined with a receiver's imagination,³¹⁹ may lead to emotional arousal.³²⁰ However, without the cognitive capability, the music would be merely a series of meaningless sounds that conveyed nothing.³²¹

The concern over songs "promoting" drug use,³²² sexual activ-

316. See A. REYNOLDS & P. FLAGG, *COGNITIVE PSYCHOLOGY* 102 (2d ed. 1983):

When you listen to . . . the radio the words usually seem distinct; there seems to be a well-defined separation between words. But this is not really the case, because the perceived distinctions between words do not exist in the physical sound signal. Rather they are the result of the pattern precognition process. They are inserted by . . . the listener, during the course of analysis.

See also Meichenbaum & Butler, *Cognitive Ethology: Assessing the Streams of Cognition and Emotion*, in *ASSESSMENT AND MODIFICATION OF EMOTIONAL BEHAVIOR: ADVANCES IN THE STUDY OF COMMUNICATION AND AFFECT* 139-63 (K. Blankstein, P. Pliner & J. Polivy eds. 1980) (discussing the relationship between cognition and emotion).

317. Psychologists now recognize that the "cognitive capacity" is not unitary. Cognitive capacities includes the senses as well as linguistic ways of understanding. Thinking about any subject draws on a diversity of cognitive capacities. Chevigny, *supra* note 314, at 423.

318. This is precisely the problem because the images being described are deemed "obscene."

319. Curiously, simply imagining (without any supplementary aids) can lead to emotional arousal. Chevigny, *supra* note 314, at 429. One can also remember something sad from the past, and this can make him or her feel sad in the present. Similarly, sexual fantasies can be brought to bear by the imagination alone. See N. FRIDAY, *MEN IN LOVE — MEN'S SEXUAL FANTASIES: THE TRIUMPH OF LOVE OVER RAGE* (1980) (collection of men's sexual fantasies).

320. Chevigny, *supra* note 314, at 429.

321. See *supra* note 315.

322. See Comment, *supra* note 295; Note, *Drug Lyrics, the FCC and the First Amendment*, 5 *LOY. L.A.L. REV.* 329, 329 n.4 (1972).

ity,³²³ or suicide³²⁴ cannot be merely based upon the emotional impact of the medium. While music clearly can illicit some emotional response, all other forms of protected speech can do so as well. The comedian can make the audience laugh because they become happy listening to the comic message; the actor playing Hamlet in Shakespeare's tragedy of *Hamlet* can make the audience cry because they feel sad when he contemplates suicide.³²⁵ In addition, the nonverbal speech of wearing armbands can make people feel angry when it is done in protest to war,³²⁶ or sad when it is done to remember dead heroes, and the nonverbal speech of burning the flag can enrage people.³²⁷ Yet, these types of speech are not viewed as "emotive," but rather as appealing to the intellect of the perceiver. Thus, music should be protected expression because it conveys a message perceived by the hearer's *mind*. It should not be denied protection because of any of the message's emotive by-products.

323. *Skywalker Records, Inc.*, 739 F. Supp. at 578. See Roldan, *Radio-Active Fallout and An Uneasy Truce — The Aftermath of the Porn Rock Wars*, 7 LOY. ENT. L.J. 217 (1987) (discussing the testimony before a Senate committee considering possible record labeling for music containing explicit lyrics).

The combination of music and pornography is especially troublesome. Professor Bloom, commenting on contemporary popular music, stated that "rock music has one appeal only, a barbaric appeal, to sexual desire — not love, not *eros*, but sexual desire undeveloped and untutored." A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 73-75 (1987). Bloom stated:

Rock music presents the listener with kinesthetic stimuli that suggest sexual activity through analogous rhythmic patterns and by actual imitative sounds. At the same time, the lyrics both urge and represent sexual activity. The music thus only incidentally brings the pulse of music; more fundamentally it arouses the listener through kinesthetic senses. Rock music does not express erotic or sexual longing; it does not "express" anything, but merely arouses.

Id. Furthermore, the terms "rock and roll" as in "Rock and Roll Music," used to be a reference to sexual activity. T. GORE, *RAISING PG KIDS IN AN X-RATED SOCIETY* 81 (1987).

324. See *supra* note 70 (Ozzy Osbourne and Judas Priest have been sued for bringing about teens' suicides).

325. W. SHAKESPEARE, *HAMLET*.

326. See, e.g., *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1965).

327. The Supreme Court recently ruled that flag burning is protected by the first amendment. Many people upset with this result have attempted to propose a constitutional amendment that would prohibit flag burning. See *United States v. Eichman*, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 57 U.S.L.W. 4770 (June 20, 1989).

2. Obscenity

Music is not in the "emotional boat" alone. For many years, commentators have urged that pornography is merely a conduit for eliciting an emotional or physical response in the receiver, rather than a thoughtful or intellectual response.³²⁸ The chief proponent of this view is Professor Schauer.³²⁹ Schauer believes that obscene material does not communicate ideas of any sort, and is thus not speech.³³⁰ Since obscene materials are not speech, no first amendment problem is presented.

Schauer defines speech as requiring two elements: 1) it must be communicative; and 2) the subject matter must be in the public interest.³³¹ Communicative speech includes language, signs, and symbols that denote particular words, phrases, easily understood messages that could be readily expressed in words, and pictures and photographs where there is an intent to communicate ideas and information.³³²

For Schauer, hard core pornography is merely designed to produce a *physical* effect, i.e., sexual stimulation.³³³ When a court protects material that is arousing, it protects its intellectual aspects.³³⁴ In contrast, hard core pornography is excluded because it only has a physical effect.³³⁵

The distinction between pornography as important speech versus a sexual stimulant was evident in the early Supreme Court decisions dealing with obscenity.³³⁶ The reason that obscenity was determined to

328. See, e.g., F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* (1982).

329. *Id.* See also Sunstein, *supra* note 314.

330. Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677, 708 (1989).

331. *Id.* at 709 (citing F. SCHAUER, *supra* note 328, at 900, 905-07).

332. Roberts, *supra* note 330, at 709 (citing F. SCHAUER, *supra* note 328, at 96-97).

333. Roberts, *supra* note 330, at 709. Schauer labeled hardcore pornography as a "sexual surrogate," indistinguishable from hiring prostitutes to perform sexual acts for one's voyeuristic satisfaction. *Id.* at 709 (citing F. SCHAUER, *supra* note 328 at 922-23).

334. *Id.* at 710.

335. *Id.* (citing F. SCHAUER, *supra* note 328, at 924-25).

336. For example, Justice Stewart, in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), thought that only so-called "hardcore pornography" could be constitutionally prohibited. He stated: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." *Id.* at 197 (emphasis added). Many commentators currently agree with this position. See, e.g., Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH.

lack social value was “precisely because it pertains, not to the realm of ideas, reason, intellectual content and truth-seeking, but to the realm of passion, desires, cravings and titillation.”³³⁷

As with music, pornography *may* arouse certain emotional responses. However, such arousal is not unmediated by cognitive functions. In order to support such a view, the individual would have to be seen as a passive observer in the world.³³⁸ However, modern psychologists have shown that merely looking at black marks on a printed page is unlikely to produce the relevant effect.³³⁹ In that regard, an obscene novel would be no different from one of the classics.³⁴⁰ The physical stimulation requires that one be able to read and *understand* the words that are represented by the markings on a page, and that one be “*able and willing* to convert what is understood into a sexual stimulus.”³⁴¹ The process involves communication — the sending of a message and the receiving of a message. The physical effects should not negate the intellectual process involved.³⁴² One commentator remarked:

The mere thought of pornography involving bestiality or sadism makes me feel somewhat nauseous, but this response is not merely a physical effect. What is repellent is not a particular arrangement of patches of color [or sounds in music] but the realization of just what it is that is depicted

[We have these reactions] because our responses to the world about us — indeed, our conception of it — are a function of the system of values, epistemological and moral, in which we participate. It is thus not surprising that what appear to be merely physical responses are frequently much more than that. Obscenity disgusts people because they are applying their values to what they

J.L. REFORM 255, 272 (1988) (proposing a “simple” statute defining hard-core pornography as “any material or performance that explicitly depicts ultimate sexual acts, including vaginal or anal intercourse, fellatio, cunnilingus, anilingus, and masturbation, where penetration, manipulation, or ejaculation of the genitals is clearly visible”).

337. Finnis, *supra* note 314. Cf. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (not agreeing that the levels of protection conformed to the intellectual and passionate aspects of speech but were rather the Court’s subjective judgments of social value).

338. See *supra* text and accompanying notes 315-16 that demonstrates the role of the perceiver in interpreting what he or she sees or hears.

339. Roberts, *supra* note 330, at 711.

340. *Id.* at 710-11. Similarly, with pictorial obscenity, before it can be effective, one must realize who is doing what to whom, how and why. *Id.* at 711.

341. *Id.*

342. *Id.*

see, not because certain patterns of sense data cause such responses. Indeed in terms of interpreted sense data, there is little, if any, difference between . . . a collection of obscene songs and Schubert's *Winterreise*. Perceptions of the differences between these categories and our responses to them are part of an intellectual process in which thought plays the central role. . . . Whether obscenity stimulates, whether one is revolted by it, and whether one wishes to partake of it or to have it banned, are questions whose answers depend on the interpretive and evaluative schemes of the individual and cannot be explained exclusively in terms of urges or mechanical causation.³⁴³

Pornographic or obscene ideas may be arousing, but the resulting physical effect depends on the receiver's imagination, values, beliefs, and most importantly, *thoughts*.³⁴⁴ The message about sexual activity is conveyed to the receiver, and the receiver takes the information, processes it, and has a response. That response may be repulsion, for others, it may elicit a sexual reaction,³⁴⁵ and still for others, it may be a point of dialogue to discuss sexual matters openly and honestly.³⁴⁶

If the goal of regulation is to eliminate those types of speech which elicit a sexual reaction, presumably adult erotica,³⁴⁷ which is not ob-

343. *Id.*

344. See Chevigny, *supra* note 314, at 430.

345. Some researchers attempt to measure this response by examining penile responses. See e.g., Zuckerman, *Physiological Measures of Sexual Arousal in the Human*, 25 *PSYCHOLOGICAL BULL.* 297 (1971) (penile erection most satisfactory indicator of sexual arousal in human males); R. LANGEVIN, *SEXUAL STRANDS: UNDERSTANDING AND TREATING SEXUAL ANOMALIES IN MEN* (1983) (technology extended to evaluate preferences of various deviant and nondeviant populations); Abel, Barlow, Blanchard & Guild, *The Components of Rapists' Sexual Arousal*, 34 *ARCHIVES OF GEN. PSYCHIATRY* 895 (1977) (rapists); Abel, Blanchard, Becker, & Djenderedjian, *Differential Sexual Aggressiveness With Penile Measures*, 5 *CRIM. JUST. & BEHAV.* 315 (1978) (rapists); Freund, Heasman & Roper, *Results of the Main Studies on Sexual Offenses Against Children and Pubescents*, 24 *CANADIAN J. CRIMINOLOGY* 387 (1982) (child molesters).

346. For example, married couples may use pornographic materials to explore their sexuality. See *THE JOY OF SEX: A GOURMET GUIDE TO LOVEMAKING* 208 (A. Comfort ed. 1972) (book generally contains explicit illustrations of sexual activity and argues that pornography can be a "real help" to couples); A. PENNEY, *HOW TO MAKE LOVE TO A MAN* 131-40 (1981) (utility of "sex shops").

347. See *supra* note 211. For those materials that do elicit a sexual reaction in the receiver of that information, what makes those materials different from other types of works that elicit depression or rage — types of emotion that are beyond the realm of "normal" sadness or anger?

scene, would have to be prohibited. As the current jurisprudence recognizes, such a prohibition would be overbroad because many works of art contain simple nudity, and nudity alone is not enough to make a work obscene.³⁴⁸

However, if the goal of regulation is only to eliminate that which appeals to the "prurient interest," is "patently offensive," and lacks "serious value," one is hard pressed to determine what works fall into what category. Professor Schauer would base that distinction on the work's inability to appeal to anything other than a physical response, but as has been demonstrated above, such an analysis does not logically distinguish between protected erotica and unprotected obscenity.

Perhaps the Court would distinguish between works dealing with sexuality on the basis of the harm which so-called "hard core pornography" is alleged to cause.³⁴⁹ A discussion of this rationale as the basis for regulating materials dealing with sexual activity is discussed below.

B. Harm

Those individuals who would seek to prohibit the distribution of obscene materials often do so to protect society from "harm."³⁵⁰ While they purport to recognize that some types of sexual expression should be protected, i.e., nudity,³⁵¹ they are willing to draw lines, generally at "hard core" pornography.³⁵²

348. See *Jenkins*, 417 U.S. 153.

349. Even though proof of such harm is scanty, the Court has stated that it is permissible for this material to be regulated on the *assumption* that it causes harm. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) ("From the beginning of civilized society, legislators and judges have acted on various unprovable assumptions . . . Nothing in the Constitution prohibits a State from reaching . . . a conclusion [that obscenity is harmful] and acting on it simply because there is no conclusive evidence or empirical data.").

350. In this context, harm is considered to be the alleged negative effects on the receivers of pornography rather than the effects on the participants. Linda Lovelace, for example, claimed to have been coerced into filming *Deep Throat*. See L. LOVELACE, *ORDEAL* (1980). However, unlike child participants, adults should be presumed to be consensual actors, even if some individual participants are "coerced" because of financial reasons or career steps to stardom. See Gey, *supra* note 56, at 1599-1600 (arguing for criminal or traditional tort actions to cover these situations).

351. The Supreme Court protects nude dancing. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

352. This follows the view that hard core pornography can be separated from other types of pornography. This view comports with that of Justice Stewart. See *supra* note 336. See also *Designing Women* (CBS, 1989) (commenting that the only people

Typically, the "hard core" pornography censors argue that *these* materials are harmful to individuals.³⁵³ In particular, the feminists claim that much pornography is degrading to women, leads to their negative treatment, and perpetuates the "rape" mentality of both men and women in society.³⁵⁴ MacKinnon and Dworkin, two leading com-

who don't know what hard core pornography is are the judges). However, this "I know it when I see it mentality" is very difficult to reconcile with such things as notice and other procedural necessities involved in the judicial process. However, an individual is not required to know that the material he or she possesses is obscene, but merely have an intent to possess the material.

Two commentators attempted to separate hard core pornography from other sexually explicit materials. They divided the subject into two areas: "hard core obscenity" and "erotic realism:"

In [hard core obscenity] the *main purpose is to stimulate erotic response* in the reader. And that is all. *In erotic realism, truthful description of the basic...realities of life, as the individual experiences it, is of the essence*, even if such portrayals (whether by reason of humor, or revulsion, or any other cause) have a decidedly anti-erotic effect. But by the same token, if while writing realistically on the subject of sex, the author succeeds in moving his reader, this too, is erotic realism, *and it is axiomatic that the reader should respond erotically to such writing*, just as the sensitive reader will respond, perhaps by actually crying, to a sad scene, or by laughing when laughter is evoked.

P. KRONHAUSEN & E. KRONHAUSEN, *PORNOGRAPHY AND THE LAW* (1959), cited in A. GERBER, *supra* note 254, at 190. This position reduces the problem to one of "what was the author's purpose in writing." A. GERBER, *supra* note 254, at 190. If the author intended to stimulate an erotic response, then it would be hard-core pornography, but if the writer only intended to "write realistically on the subject of sex and incidentally caused a response in the reader then it would constitute erotic realism." *Id.* While this view may have some appeal, it would be very difficult to determine what purpose the author intended, particularly when the author is not the one before the court in a given case.

353. Why isn't nudity or "soft porn" harmful? Nudity is protected. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (nudity in film *Carnal Knowledge* was not enough to make material legally obscene under *Miller* test).

354. See *FEMINISM AND CENSORSHIP: THE CURRENT DEBATE* (G. Chester & J. Dickey eds. 1988); A. SOBLE, *PORNOGRAPHY: MARXISM, FEMINISM, AND THE FUTURE OF SEXUALITY* (1986); *TAKE BACK THE NIGHT: WOMEN ON PORN* (L. Lederer ed. 1980); Ayim, *Pornography and Sexism: A Thread in the Web*, 23 U.W. ONT. L. REV. 189 (1985); Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987); Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 CONST. COMMENTARY 147 (1985); Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5 (1984); Mahoney, *Obscenity, Morality, and the Law: A Feminist Critique*, 17 OTTAWA L. REV. 33 (1985); Spaulding, *Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community*, 4

mentators in the feminist movement against pornography, have suggested that there is a large portion of pornographic materials that depict people, usually women, as existing solely for the sexual satisfaction of others and portrays them in sexually subordinate roles.³⁵⁵

All of the would-be censors believe they can distinguish between harmful and benign types of pornography. However, let us assume for argument's sake that they can do something that courts find extremely difficult to do. These individuals point to relevant social science research that attempts to demonstrate the effects of hard core pornography.

It is not the purpose of this article to describe this body of research in great detail. However, as with most social science research, there are some studies that seem to demonstrate negative effects,³⁵⁶ while others show no negative effects at all.³⁵⁷ In general, the most harmful pornography appears to be that which incorporates both sex and violence.³⁵⁸ It is this type of pornography that the feminists are

BERKELEY WOMEN'S L.J. 128 (1988); Comment, *Sexual Display of Women's Bodies — A Violation of Privacy*, 10 GOLDEN GATE U.L. REV. 1211 (1980); Comment, *Sex Discrimination and the First Amendment: Pornography and Free Speech*, 17 TEX. TECH. L. REV. 1577 (1986); Comment, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497 (1985); see also B. SELLEN, *FEMINISTS, PORNOGRAPHY & THE LAW: AN ANNOTATED BIBLIOGRAPHY OF CONFLICT 1970-1986* (1987).

355. See e.g., MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321; Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L. J. 1-29 (1985).

356. For studies that demonstrate increases in aggressive behavior following exposure to sexual stimuli, see Donnerstein, *Pornography: Its Effect on Violence Against Women*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 53 (N. Malamuth & E. Donnerstein eds. 1984); Sapolsky, *Arousal, Affect, and the Aggression-Moderating Effect of Erotica*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra*, at 85; Zillmann & Bryant, *Effects of Massive Exposure to Pornography*, in *PORNOGRAPHY AND SEXUAL AGGRESSION*, *supra*, at 115.

357. Some researchers have argued that pornographic materials may act as a means of "catharsis." See Kelley, Dawson, & Musialowski, *Three Faces of Sexual Explicitness: The Good, the Bad, and the Useful*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 57, 77 (D. Zillman & J. Bryant eds. 1989).

358. See E. DONNERSTEIN, D. LINZ, & S. PENROD, *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS* (1987) (discussing research particularly on violent pornography); Donnerstein, Champion, Sunstein, MacKinnon, *Pornography: Social Science, Legal and Clinical Perspectives*, 4 LAW & INEQUALITY 17 (1986); FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY (S. Gubar & J. Hoff eds. 1989); C. WILSON, *VIOLENCE AGAINST WOMEN: AN ANNOTATED BIBLIOGRAPHY* (1981); D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990); Pollard,

most opposed to.³⁵⁹ However, this type of pornography has not traditionally been the only type sought to be regulated.³⁶⁰ Nevertheless, even in the face of the research findings, there have been disagreements as to interpretation among both social scientists³⁶¹ and among policy makers.³⁶²

Regulating Violent Pornography, 43 VAND. L. REV. 125 (1990); Spahn, *On Sex and Violence*, 20 NEW. ENG. L. REV. 629 (1984-85); Symposium, *Violent Pornography: Degradation of Women Versus Right of Free Speech — A Colloquium*, 8 N.Y.U. REV. L. & SOC. CHANGE 181 (1978-79).

359. See Pollard, *supra* note 358.

360. Cf. *American Book Sellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (banning such material in order to protect women).

361. See Brannigan, *Pornography and Behavior: Alternative Explanations*, 37 J. COMM. 185 (1987) (attack on research); Byrne & Kelley, *Basis Legislative Action on Research Data: Prejudice, Prudence, and Empirical Limitations*, in *PORNOGRAPHY: RESEARCH ADVANCES & POLICY CONSIDERATIONS* 314 (D. Zillman & J. Bryant eds. 1986) (systematic criticism of research methods used in many studies that showed negative effects); Zillman, *Pornography Research and Public Policy*, in *PORNOGRAPHY: RESEARCH ADVANCES & POLICY CONSIDERATIONS* 314 (D. Zillman & J. Bryant eds. 1986) (discussing policy implications and proposing superior methodology).

362. For example, between the 1970 and 1986 Attorney General reports on pornography there are remarkable differences. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter 1970 REPORT] recommended that obscenity laws be repealed. The committee reasoned that the statutes inhibited freedom of expression and were unduly vague. The committee also recognized the subjectivity in defining what is obscene. See *id.* at 359-61. This Commission found no significant evidence of causation between access to pornography and sexual crime. *Id.* at 242-43. However, the 1986 Commission reached a different conclusion. The 1986 Commission examined the research and used it as well as "common sense" to support the allegation that pornography is harmful to society. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 323-29 (1986) [hereinafter 1986 REPORT]. Furthermore, although this 1986 Commission found that nudity alone was not harmful, the Commission also found that violent pornography was harmful. *Id.* at 347, 323-29. However, the Commission could not decide whether nonviolent materials portraying ultimate sexual acts was harmful although some members thought that these portrayals could lead to increased promiscuity. *Id.* at 338-40. This Commission called for more suppression of pornography. See *id.* at 433-58.

Although there had been more scientific research done since the 1970 REPORT, the research still had to be interpreted. Thus, subjective views about pornography, as well as common sense understandings of the harm possible, still played a role. See ACLU, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 73-74 (1986). For a detailed comparison of the two commissions' findings, see Comment, *supra* note 211, at 460-62. For a critical analysis of the 1986 REPORT see, *Symposium on the Attorney General's Commission on Pornography*, 1987 AM. BAR FOUND. RES. J. 641.

Social science cannot answer the question.³⁶³ As long as there is

The view that common sense ideas of harm are important has, at different points, found some support with the Supreme Court. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). See also Justice Department's Brief in *Roth v. United States*, cited in A. GERBER, *supra* note 254, at 212 (defending its power to refuse to permit the use of the mails to disseminate magazines and literature that might be regarded as obscene, the United States Government argued that "[t]he distribution of obscenity causes a substantial risk of inducing immoral sexual conduct over a period of time by breaking down the concept of morality as well as moral standards").

363. Realistically, the battle to suppress pornography is not about sex, but about deviance. *Gey*, *supra* note 56, at 1613. Many state courts have discussed the definition of prurient by referring to notions of normality and healthiness. See, e.g., *Richards v. State*, 461 N.E.2d 744, 748 (Ind. App. 1984) ("an interest in sex is normal"). The courts seem to be worried about the sex offenders who "like" pornographic materials, although no one is quite sure what the effect of the materials is. Compare 1970 REPORT, *supra* note 362, at 239 (sexual offenders are not as aroused as non-offenders) with Abel, Blanchard, Becker & Djenderedjian, *Supra* note 345 (nonrapists less aroused by rape scenes) with Baxter, Barbaree & Marshall, *Sexual Responses to Consenting and Forced Sex in a Large Sample of Rapists and Nonrapists*, 24 BEHAV. RESEARCH & THERAPY 513 (1986) (using a large sample, differences between groups disappeared). See also M. GOLDSTEIN & H. KANT, *PORNOGRAPHY AND SEXUAL DEVIANCE: A REPORT OF THE LEGAL AND BEHAVIOR INSTITUTE, BEVERLY HILLS, CALIFORNIA* (1973).

Interestingly enough, it is not just the "back alley common folks" that use pornography; many white middle class people also use some types of pornography, and they do not appear to be adversely affected, i.e., not committing crimes, sexual or otherwise. See Bryant & Brown, *Uses of Pornography*, *supra* note 357, at 25 (discussing patterns of usage). Furthermore, the Court has repeatedly distinguished between the uppercrust of society, i.e., judges and scientists, and the rest of the population when it allows the same materials to be examined by these individuals, discounting any negative effects. In *Roth v. United States*, Chief Justice Warren stated:

The line dividing the salacious or pornographic from literature or science is not straight and unwavering [T]he same object may have a different impact, varying according to the part of the community reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.

354 U.S. 476, 495 (1957) (concurring opinion). See *Gates*, *supra* note 16 (at the trial for a determination of obscenity of *Lady Chatterly's Lover* in Britain, counsel for the government asked "Is this the sort of book you would wish your maidservants to read?").

One commentator notes that rarely is any effort made to censor plays because a play caters primarily to responsible and mature adults (arguably those from the upper

not a 100% causal relationship,³⁶⁴ it is still a value judgment. Some research after *Brown v. Board of Education*³⁶⁵ indicated that desegregation might have particularly negative effects on Black children's self-esteem.³⁶⁶ However, even if it was conclusively proven that desegregation of schools has resulted in detrimental effects upon Black youth, it is not likely that the courts would determine that segregation would be permissible again. Our society values equality, and this overreaching value would lead to desegregation even in the face of contrary empirical evidence. Similarly, first amendment values should be decisive in the obscenity debate.³⁶⁷

Even if the feminists are right and pornography cannot only lead to more dangerous illegal acts against women, but also to negative attitudes toward women,³⁶⁸ deciding to prohibit this type of material is

socioeconomic strata of society), and the high costs of admission tends to limit the audiences to the sophisticated and educated. A. GERBER, *supra* note 254, at 194. Why aren't they affected?

Perhaps we should discontinue debate on any topic that might lead some individuals to act on what that speech discusses. Perhaps we should prevent people from speaking out in favor of pro-choice abortion legislation because people might vote in favor of it, and then babies would be killed.

364. Social science research is *never* able to account for every source of variance. Even in carefully controlled studies, there is error variance. See Campbell, *supra* note 136, for a discussion of the types of social science research (laboratory studies, field experiments, and correlational studies); Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law As Science and Social Policy*, 38 EMORY L.J. 1005 (1989). In *Roth*, Justice Douglas stated:

If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.

354 U.S. at 510.

365. 347 U.S. 483 (1954).

366. See Stephan, *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 PSYCHOLOGICAL BULL. 217 (1978) (concluded that there is little evidence indicating desegregation reduces prejudice; desegregation rarely increases self-esteem of Black youth and in fact often decreases it).

367. Some of the values protected by free speech include promoting individual self-fulfillment, a means for advancing knowledge and discovering truth, a means for providing participation in decision making by all members of society, and a means for achieving a more "adaptable and hence a more stable community, of maintaining the precarious balance between health cleavage and necessary consensus." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970).

368. See *supra* text accompanying notes 354-55.

clearly a value judgment. If this material is regulated, then all speech dealing with traditional homemakers, for instance, should be regulated. June Cleaver from *Leave It To Beaver* may be a poor role model for women of the 1990's should then be excised from television. Accordingly, depicting women as "barefoot and pregnant," and taking their place "in the kitchen" should also be excised. Followed to its logical extreme, this type of regulation would lead to massive censorship.

There are a number of types of speech that reinforce traditional views of Blacks' roles in society. For example, depicting Black women in a maid's position,³⁶⁹ or a Black man cast as a thief?³⁷⁰ Presumably, the feminists would not seek to prohibit this type of programming, but is it not as harmful to Blacks as they believe some types of pornography to be to women?

Values clearly play an important role in the obscenity debate, such as values about freedom of speech and the devaluing of certain types of speech. Although this country has historically placed a strong value upon freedom of expression, there has been a competing value that has led to the debate over suppression of certain speech dealing with sexual matters. Thus, the true underlying values in regulating obscenity must be considered. Those values are values about morality and will be discussed below.

C. *Morality*

In *Paris Adult Theatre I v. Slaton*,³⁷¹ the Supreme Court explicitly rejected the notion that scientific data was needed to justify prohibiting obscenity.³⁷² Instead, the Court's focus was on morality. Making clear what had been implied in earlier cases,³⁷³ the Court stated that the states' interest in preserving morality was compelling. The states had the power to regulate the "public exhibition of obscene material, or commerce in such material, [that] has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a de-

369. For example, Maime on *The Young and the Restless* (CBS) is a maid, and one of her nieces is a repeated petty thief.

370. See *supra* note 15 for a discussion of the "Home Boys Shopping Network" on *In Living Color*.

371. 413 U.S. 49 (1973).

372. *Id.* at 60.

373. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

cent society.'³⁷⁴

Many commentators have recognized that the Court's central function in identifying material that is obscene has been to maintain the moral status quo.³⁷⁵ Rather than being concerned with the prevention of criminal acts, the Court has been concerned with protecting a court-approved system of values. One commentator explained the Court's position:

The great danger is that obscenity will not merely cause specific effects that are bad according to our current moral standards, but will change our moral values for the worse. Because values define our whole society, the fear is "that pornography has an eroding effect on society, on public morality, on respect for human worth, on attitudes toward family love, on culture."³⁷⁶

While this argument stems from the notion that all law is based on morality,³⁷⁷ this particular argument should fail in the context of obscenity. While it can be said that we have laws that prohibit the indiscriminate killing of other human beings,³⁷⁸ these laws exist because of a *consensus* regarding the morality of such action.³⁷⁹ In contrast, the

374. *Paris Adult Theatre I*, 413 U.S. at 69 (quoting *Jacobellis v. Ohio*, 378 U.S. at 199 (1964) (dissenting opinion)).

375. See H. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* (1969); J. DAILY, *THE ANATOMY OF CENSORSHIP* (1973); P. MACMILLAN, *CENSORSHIP AND PUBLIC MORALITY* (1983) (Great Britain); E. OBOLER, *supra* note 2; R. RIST, *THE PORNOGRAPHY CONTROVERSY: CHANGING MORAL STANDARDS IN AMERICAN LIFE* (1975); CONNOR, *Obscenity: Its Moral Meaning and Scope*, 27 CATH. LAW. 70 (1981); *Morality Pornography and the Law*, 4 COMM. & L. 43 (1982); Comment, *Pornography, Law and Moral Theory*, 17 OTTAWA L. REV. 1 (1985). Cf. MacKinnon, *supra* note 355.

376. Roberts, *supra* note 330, at 695 (quoting 1970 REPORT, *supra* note 362, at 458).

377. The state has broad police powers to enforce morality. See, e.g., *Bowers v. Hardwick*, 475 U.S. 186 (1986) (because the majority of the population found homosexual sodomy immoral, it could be prohibited). However, as one commentator explained: "The question is not whether the enforcement of morals is legitimate, but whether it is permissible for the state to enforce moral beliefs in a manner that is inconsistent with the Constitution." Roberts, *supra* note 330, at 701. Where the first amendment is concerned, protecting a society from *ideas* about sex that it does not like is a far cry from protecting society from sexual *acts* that it does not want to tolerate.

378. While we, as a society, frown upon first or second degree murder, manslaughter, and even negligent homicide, we do allow justifications and excuses such as self-defense and insanity. Furthermore, even intentional killing is permitted during war.

379. For a discussion on the lack of consensus about musical taste much less

fact that pornography has become an \$8,000,000,000 per year³⁸⁰ industry suggests that more than an insignificant few are not bothered by the moral aspects of its existence. In fact, in the face of the pervasiveness of pornography,³⁸¹ the values justices are attempting to protect are not as homogenous as they would like to think.³⁸² The Court's protection of the moral majority's values amounts to a sanctioning of these morals as correct. In fact, such a position sanctions the dominant morality's "right not only to impose its values on dissidents, but also to prevent its replacement by alternative moral systems, a claim that is hardly consonant with the marketplace theory of the first amendment."³⁸³

The dominant morality can no more be objectively "true" than views about the equality of all men and women under the law.³⁸⁴ We allow groups such as the Ku Klux Klan to speak out about the need for white supremacy to dominate and suppress the Blacks, Jews, and other minorities of America.³⁸⁵ Certainly, their speech is contrary to our moral values about the equality of all humans.³⁸⁶

obscenity *see*, *Music and Message*, Seattle Times, July 22, 1990, at K4 (quotations from a variety of citizens regarding censorship of music).

380. *See supra* note 192.

381. *See id.*

382. Roberts, *supra* note 330, at 687 (only common morality we have are certain basic principles, such as tolerance which allows diverse moral beliefs to coexist).

383. *Id.* at 298.

384. "Changes in moral values can only be regarded as bad from the perspective of those who hold moral views contrary to the changes." *Id.* at 297-98.

385. *See* D. HAMLIN, *THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE* (1980). In *Smith v. United States*, Justice Stevens, stated in dissent that it was ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.

431 U.S. 291, 318-19 (1977) (dissenting opinion).

386. While everyone would agree that the message of the Ku Klux Klan is political, many commentators have argued about whether obscenity could qualify as political speech. *See, e.g.*, Roberts, *supra* note 330, at 703. Certainly, obscenity can serve to educate and can serve as a resource that people can use to explore sexual experience. *Id.* at 718 (citing Richards, *Pornography Commission and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 MAINE L. REV. 275, 296-97 (1987)).

However, the debate on sexual activity is more than educational; it is "intensely political." Roberts, *supra* note 330, at 718. *See also* D. DOWNS, *THE NEW POLITICS OF*

The dominant morality may be uncomfortable with ideas about sexual freedom, but should such ideas be suppressed in order to maintain that morality? Social change would never come about without challenges to existing dogma. Furthermore, reinforcement of the "proper" morality can only come about with an open and honest discussion of what is immoral.³⁸⁷

If obscene material is to be suppressed, there needs to be a greater justification than the Court in essence saying: "We don't agree with these *ideas*." Such a justification is contrary to everything the first amendment was designed to protect.³⁸⁸

PORNOGRAPHY (1989); R. RUSHDOONY, *THE POLITICS OF PORNOGRAPHY* (1974). Pornography plays a role by commenting on sexual roles, issues of monogamy, and the subordination and/or liberation of women. *Id.* at 718-719. Pornography makes society think. It is precisely this type of thought which has engendered the feminist debate about the effects of pornography. See *supra* text accompanying notes 354, 355, 368 and 369.

Even if obscenity is not considered political speech, it is at least as important as commercial speech which receives some protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976), Justice Blackmun recognized that commercial speech may even be more important than political speech, at least on a daily basis. He wrote: "As to the particular consumer's interest in the free flow of commercial information [about the prices of drugs], that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy*, 425 U.S. at 763.

387. In discussing the marketplace, John Stuart Mill stated:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. MILL, *ON LIBERTY* 20 (S. Collini ed. 1989).

388.

As a general proposition, it would seem anomalous to our democratic system to censor [works] containing offensive content which could affront the moral sensitivities of some readers. The offensive content of literary works arguably fails to represent a clear and present danger to society's moral structure. No danger flowing from speech can be deemed clear and present, unless the incident of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . . [T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Quade, *Book Censorship*, 70 A.B.A. J., Aug. 1974, at 32, col. 1. Even Tipper Gore, a leader in the movement to educate parents about what types of movies and music their

V. Prohibiting Certain Speech Dealing with Sexuality: An Untenable Position

As has been discussed above, the bases for prohibiting speech dealing with sexuality are ill founded. Neither concerns over the harm that obscenity causes,³⁸⁹ nor the need to uphold the majority's morality are appropriate reasons to regulate speech.³⁹⁰ Furthermore, the idea that obscenity is somehow nonspeech is simply not true.³⁹¹ Given that there has been no sufficiently articulated reason upon which to base regulation, it would follow that there should be no regulation of speech dealing with sexuality.

Justice Black's original absolutist position seems most useful in a free society.³⁹² He thinks that, absent some legitimate reason to regulate speech, *i.e.*, a clear and present danger to the country,³⁹³ or inciting violence,³⁹⁴ no regulation is necessary. In an early obscenity case in which the Court determined that there had to be some level of intent to possess obscene materials before a prosecution would be consistent with the constitution, Black stated:

Certainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law abridging" to mean "No law abridging." The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly "beyond the reach of Federal power to abridge." No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal

children are exposed to, agrees that censorship is not the answer. She advocates the use of additional speech to counteract the effects of pornography rather than its suppression. T. GORE, *supra* note 323, at 27.

389. See *supra* text accompanying notes 350-70.

390. See *supra* text accompanying notes 371-88.

391. See *supra* text accompanying notes 328-49.

392. Justice Black is historically known as purporting an absolutist position. However, even those who supported an absolutist view were able to find loopholes. Justice Black was able to distinguish between conduct and speech. See *infra* text accompanying notes 396-398. However, I would not allow that distinction when it comes to expressive activities.

393. See *supra* text accompanying note 285.

394. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *supra* note 136.

agencies, including Congress and this Court, have the power or authority to subordinate speech and press to what they think are "more important interests."

If, as it seems, we are on the way to national censorship, I . . . suggest that there are grave doubts in my mind as to the desirability or constitutionality of this Court's becoming a Supreme Board of Censors — reading books and viewing television performances to determine whether, if permitted, they might adversely affect the morals of the people throughout the many diversified local communities in this vast country. It is true that the ordinance here is on its face only applicable to "obscene or indecent writing." It is also true that this particular kind of censorship is considered by many to be "the obnoxious thing in its mildest and least repressive form" But "illegitimate and unconstitutional practices get their first footing in that way It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." While it is "obscenity and indecency" before us today, the experience of mankind — both ancient and modern — shows that this type of elastic phrase can, and most likely will be synonymous with the political, and maybe with the religious unorthodoxy of tomorrow. Censorship is the deadly enemy of freedom The plain language of the Constitution forbids it. I protest against the judiciary giving it a foothold here.³⁹⁵

This is the most defensible position regarding the first amendment. However, even Justice Black made distinctions between conduct and speech that would exclude a great many expressive activities.³⁹⁶ The courts should use the absolutist position without the qualifications for expressive conduct. This position, however, would not protect illegal activities used in creating pornographic material, such as having sex with children in creating child pornography, or killing an individual in the so-called "snuff" films.

Yet, this position could still be used to restrict protected expression. For example, some prosecutors have been creative and have prosecuted producers and directors for solicitation and prosecuted actors for prostitution.³⁹⁷ These types of prosecutions, absent evidence that the adults participating in the production were not consenting adults,

395. *Smith v. People*, 80 S. Ct. 215, 221-222 (1960).

396. *See Cohen v. California*, 403 U.S. 15 (1971) (Cohen's jacket was "mainly conduct and little speech") (Black, J. dissenting). *See generally* H. BLACK, A CONSTITUTIONAL FAITH 53 (1969).

397. *See Bishop, Porn in the U.S.A.*, 6 CAL. LAW. 60, 64 (Dec. 1964).

should not be allowed.³⁹⁸

The reasons offered to support regulation of obscenity are not acceptable. While other laws rest on moral consensus,³⁹⁹ there are a great many people who purchase pornographic materials.⁴⁰⁰ Pornography is an \$8 billion dollar industry.⁴⁰¹ Given the lack of a consensus on this issue, and the risk of suppressing a significant number of individuals' expressive activity,⁴⁰² as well as people's right to receive that information,⁴⁰³ any speech dealing with sexuality should not be regulated.⁴⁰⁴

VI. Conclusion

In this article, the *2 Live Crew* case acted as a starting point in the debate on obscenity. While it is an important case because of its potential impact on the entertainment industry,⁴⁰⁵ and because it is the first decision to ever declare a work of music obscene, it is a poor starting point because it brought a poor result. As has been discussed in this article, the *Miller* test of obscenity produces an anomalous result for *Nasty*. The community standards approach does not account for the music being targeted to a subculture, namely the Black community,⁴⁰⁶ and it suppresses artistic expression.⁴⁰⁷ The prurient interest and patent offensiveness standards are illusory. There is no justifiable basis upon

398. See *supra* note 350.

399. See *supra* text accompanying notes 379-382.

400. See *supra* note 192.

401. See *id.*

402. Many singers today use lyrics that are sexually provocative. See *supra* note 246 text and accompanying notes 239, 244.

403. Often the Court has focused on the public's right to receive information. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (unless overriding state interest, criminal trials are to be open to the public).

404. I think the most defensible type of regulation would be for violent pornography. However, much of main stream entertainment, see, e.g., *The Accused* (Jodie Foster won the Academy Award for Best Leading Actress for her role in which she was gang raped in a bar; while there was no explicit focus on the genitals, there was indeed more than a hint of sexual activity as Jodie Foster lay on top of a pin ball machine and several men were shown having intercourse with her), could be lumped under this category. While these materials would not be labeled obscene even under the current *Miller* test, the feminists' proposals would prohibit their distribution because of their portrayals of women in subordinate roles. See Gey, *supra* note 56, at 1606 (speaking of the prohibition of many of the "classics").

405. See *supra* text accompanying note 14.

406. See *supra* text and accompanying notes 15-16.

407. See *supra* text accompanying note 3.

which to distinguish the “bad stuff” — obscenity — from the “tolerable stuff” — pornography.⁴⁰⁸ Finally, the social value standard places the courts in the tenuous position of being art critics.⁴⁰⁹

The reasons for regulation of obscenity are no more acceptable than the particular application of the *Miller* test to the *2 Live Crew* case. The view that obscenity merely appeals to a physical or emotional interest rather than an intellectual interest is simply untenable. All incoming sense data, *i.e.*, musical sounds or verbal sounds, are mediated by cognition.⁴¹⁰ Just as Hamlet’s soliloquy can bring one to tears, or a comedian’s routine can bring the audience to laughter, pornography or obscenity can repulse people or sexually excite them. Nevertheless, the particular reaction is triggered because people cognitively understand the material.⁴¹¹

Justifications based on harm to society in the form of increased criminal activity, or as some feminists suggest, increases in negative attitudes toward women, reinforcement of traditional ideas of female subordination, and possibly encouragement of abuse of women, attempt to be supported by empirical evidence of the effects of pornography.⁴¹² However, social science cannot answer the question; there is never 100% causation accounted for by this type of evidence. Thus, society must make a value judgement about speech on sexual activity.⁴¹³

Traditionally, society has devalued sexual speech. This has been based on morality.⁴¹⁴ However, with other types of speech, society does not attempt to impress its moral views by suppressing the speech. Our society that believes whole-heartedly in democracy does not suppress speech about communism. Therefore, sexual speech should not be singled out for suppression.

One of the reasons the government seeks to regulate speech regarding sexual activities is because of the power of sex.⁴¹⁵ In *Roth*, the Court stated that sex was a “great and mysterious motive force in

408. See *supra* text accompanying notes 328-48, 350-55.

409. See *supra* text accompanying notes 258-261, 275-83.

410. See *supra* notes 315-16.

411. See *id.* See also *supra* note 307 (in *Ward v. Rock Against Racism*, the Court recognizes that music appeals to both the intellect and the emotions).

412. See *supra* text accompanying notes 350-55.

413. See *supra* text accompanying notes 363-70.

414. See *supra* text accompanying notes 371-88.

415. *Skyywalker Records, Inc.*, 739 F. Supp. at 584. Besides speech on sexual activities, states have banned sexual conduct including prostitution, incest, and rape.

Id.

human life, [and] has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."⁴¹⁶ However, sex is a great deal less mysterious than it used to be because of more open debate about sexuality.⁴¹⁷ Part of that debate has included pornography and obscenity.⁴¹⁸

Not only is sex powerful, but words themselves are powerful.⁴¹⁹ Counted among those words are musical lyrics.⁴²⁰ Words about sex are so powerful that society has sought to eliminate certain types of speech by labeling them "obscenity."⁴²¹ However, words are merely representations of ideas;⁴²² yet, it is clear that the Court has decided that certain ideas are not worthy of first amendment protection.⁴²³

It is unfortunate that the first amendment has never been absolute.⁴²⁴ Justice Black's view is a view that should have dominated first amendment jurisprudence — an absolutist view.⁴²⁵ Black questioned how long it would be before we started down the road to prohibiting other types of speech that we value because, once started down the

416. *Roth v. United States*, 354 U.S. 476, 487 (1957). Society in general will never be "safe" from pornography until it comes to grips with human sexuality. See S. FREUD, *TOTEM AND TABOO* (1912-13) (discussing the evolution of society as a function of taboos about sexuality); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 64 (J. Strachey trans. 1961) ("hunger and love are what moves the world.") (quoting the poet-philosopher Schiller). See also *SEX AND SOCIETY* (J. Edwards ed. 1972).

417. See *supra* text accompanying notes 204-18.

418. See *id.*

419. *Skywalker Records, Inc.*, 739 F. Supp. at 585.

420. *Id.* There has been sexual music throughout history. Even the culturally valued opera uses sexual speech. Sung in other languages, however, these operas if translated into the street language that *Nasty* used would be deemed "obscene." See *Miller v. Civil City of South Bend*, 904 F.2d 1081 (1990) (Orff's *Carmina Burana*, if it were not sung in Latin, could not be broadcast).

421. This outrage over *Nasty* is nothing new. In the 1950's Elvis Presley and his swinging "pelvis" were not televised on television. Elvis was filmed from the waist-up for fear of his "sexual power."

422. See *supra* text accompanying note 2. One should keep in mind that when a person uses profanity, the precise words embody the emotions. I know several people, as I am sure everyone does, that refuse to use profanity. Yet, they make up other words for "damn," "fuck," or "shit." Instead, these people might say, "Flibbity jibbet," "darnit," "heck," or even use "regular words" like "sunflower." They think that they are doing something that is different from the curser. However, I would argue that these are the same. It is the anger, the emotion, that is "hateful," not the words used.

423. See *supra* note 53.

424. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Shouting fire in crowded theatre and causing a panic).

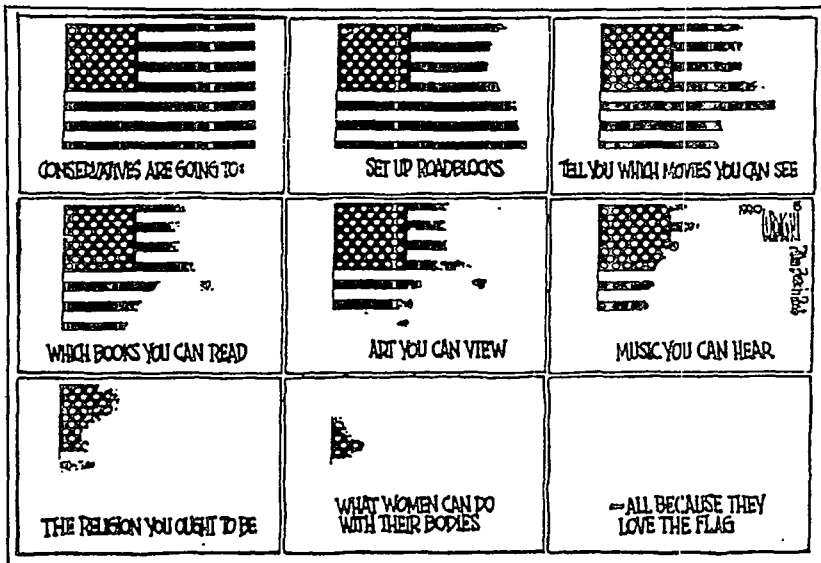
425. See *supra* text accompanying notes 392-95.

“road of censorship,”⁴²⁶ we can never go back.⁴²⁷ The Court has long been on the “road of censorship,” allowing no protection for other “categories” of speech such as defamation.⁴²⁸

More than fifteen years ago, Justice Stevens noted that the obscenity issue was overdue for reconsideration.⁴²⁹ It is now more than overdue. Perhaps in this decade, the Court will reconsider the issue, realize that there is no way to principally distinguish between pornography and obscenity, and decide in favor of protecting all speech about sexuality.

426. Since Black’s comment, more than a few types of speech have been deemed unprotectable. *See supra* note 53.

427. Since the Supreme Court’s decisions regarding the fact that flag burning is protected by the first amendment, some have called for a constitutional amendment to make this conduct impermissible. One cartoonist captured the danger of this type of censorship:



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428. *See supra* note 53.

429. *See supra* note 21.