Essay: Too Live a Crew

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Abstract

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I am sure that scores of serious articles will be written about the 2 Live Crew litigation which began in February, 1990. They will assess and re-assess *Miller v. California,*¹ debate "community standards," define "prurient interest," and opine on the first amendment issues which have been raised by the legal proceedings spawned by the recording, *As Nasty As They Wanna Be.*² Because I have had the pleasure of being among those in the center of the dispute, I thought it might be helpful to share some of the things I learned, and perhaps encourage others to write about specific matters which I think are important.

A. The Role of the Press

Since the 2 Live Crew cases involved "high" law, "low" language, race, and show business, they tapped an enormous well of publicity. I was not surprised at the intensity or duration of the publicity, and I think the media coverage may be one of the most overlooked first amendment lessons of the cases.

The first amendment is a restraint on governmental power. Governmental power is exercised by politicians. Politicians live and die in the media: newspapers, television, radio, magazines. Nothing inhibits government misconduct more than criticism from a free press. I have not scientifically surveyed the press response to Broward County Sheriff Nick Navarro's 2 Live Crew crusade, but the clippings, cartoons, editorials and my conversations with reporters around the country lead me

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to conclude that the vast majority of words used on the 2 Live Crew cases supported freedom of speech and condemned or poked fun at the Sheriff’s actions.

Prosecutors, officers and politicians are all sensitive to public opinion. Even Sheriff Navarro, after the acquittal of three performing 2 Live Crew members, seemed to want an end to the controversy. But the interesting news is not Nick Navarro’s reaction throughout these cases, but the fact that out of the tens of thousands of prosecutors, police and public officials, only a handful warred with *As Nasty As They Wanna Be*, which when the controversy began, had been bought by 1.2 million people.

So, I am more sanguine than many about the health of the first amendment. The fact that throughout the country only a score of cases were brought against those who sold the recording, and even fewer attempts were made to censor 2 Live Crew’s performances, attests to the good judgment and constitutional loyalty of the overwhelmingly vast majority of the law enforcement and political constabulary. Three explanations exist for the self-restraint exhibited by these officials: (1) a clear understanding of the first amendment, and the difficult task of overcoming the protections accorded presumptively protected speech, music and art; and (2) a fear of critical press coverage which could coalesce public opinion against the officials’ actions. Representing 2 Live Crew gave me the opportunity to talk to many of the people contemplating action against *As Nasty As They Wanna Be* or the group. Of the two inhibiting factors, the threat of critical press coverage was more telling than the threat of *Miller v. California*’s first amendment mandate.

3. As far as I have been able to determine, the few prosecutor-players were those with a track record of over-zealousness. The State Attorney in one mid-Florida Circuit has crusaded against what he perceives as pornography while delighting in publicly describing in ancient Anglo-Saxon terms the sexual practice he decries. Dallas and Cincinnati are other known anti-first amendment venues, and Westerly, Rhode Island, which unsuccessfully sought to stop a performance (Atlantic Beach Casino v. Morenzoni, 749 F. Supp. 38 (D.R.I. 1990)), seemingly shares a puritanical heritage with Dedham, Massachusetts, which precluded *Henry and June*, the first NC-17 movie, from its city’s theaters. Coakey, *Dedham Film Cancellation Draws Battle Lines*, The Boston Globe, Oct. 6, 1990, Metro Region, at 17.
The most threatening first amendment governmental misconduct is a prior restraint. Since speech is presumptively protected, its suppression usually cannot precede judicial review. The 2 Live Crew brouhaha began as a response to a blatant prior restraint.

A deputy sheriff purchased a copy of the As Nasty As They Wanna Be cassette from a large Fort Lauderdale record store. His mission was prompted by a sour grapes letter to Sheriff Navarro from a Miami golf-pro-turned-lawyer who had recently run against the incumbent Dade County (Miami) State Attorney with a spectacularly unsuccessful campaign, in which Luther Campbell, 2 Live Crew’s leader, had supported the incumbent with a rap advertisement broadcast on black radio stations. I think Sheriff Navarro paid little heed to the letter, shipping it down his chain of command where, at some point, William Kelly, a long retired J. Edgar Hoover pornography apparatchik who was the Sheriff’s “special consultant” on pornography, triggered the order to buy the record. Kelly had close ties to certain “conservative family oriented” fundamentalist organizations. The Miami lawyer was similarly “connected.”

Sergeant Mark Wichner was the officer assigned the task of buying the $8.99 cassette. He took it to his office, listened to it, and made an attempt to transcribe many of the songs. Armed with the cassette, his transcription, and an affidavit setting forth the details of his purchase, he went to Broward County Circuit Court for a “probable cause” determination. Although Florida law is silent on this process, and United States District Judge Jose Gonzalez later viewed the procedure as “bizarre,” the concept is not so legally farfetched. Rather than having an officer determine whether something is “obscene” and then arresting the purveyor, a de facto practice has existed of purchasing books, magazines, or videotapes and presenting them to a judge for his or her scrutiny. The Broward County Circuit Court Clerk’s office maintained a “Probable Cause of Obscenity” file which contained 150 similar orders obtained over the past few years by police officers from various municipal jurisdictions throughout the county.

Historically the practice has been to obtain the probable cause finding and then return to the book or video store, repurchase the item, and arrest the seller. That process then permitted the seller a full crim-

inal trial on the issue of whether or not the item was obscene under the applicable Florida statutes and *Miller v. California.*

In this case, Officer Wichner went to Circuit Judge Mel Grossman, who was the duty judge on the day of Wichner's courthouse trip. Judge Grossman kept the cassette for several days before ultimately issuing a probable cause order which, because it was the starting point for all that ensued, is printed in its entirety below.

Armed with the probable cause order, and its improbable reliance on the *Miami Herald*'s editorial decision-making, Wichner, at the direction of his supervisors, began the prior restraint which triggered the 2 Live Crew litigation. A memorandum was prepared by Wichner for

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6. Florida Statutes, section 847.001(7), provides the applicable definition of obscenity, mirroring *Miller:*

   "Obscene" means the status of material which:
   
   (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
   
   (b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and
   
   (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

7. *ORDER OF DETERMINATION OF PROBABLE CAUSE OF OBSCENITY*

   Upon application of Detective Mark Wichner of the Broward County Sheriff's office, and prior to the filing of any criminal charges with the office of the Broward State Attorney, the Court, in its Magistrate capacity, on March 2, 1990, did review in its entirety the following material, to-wit, a recording: "AS NASTY AS THEY WANNA BE", by the 2 Live Crew as released by Skyy Walker [sic] Records, 3050 Biscayne Boulevard, Suite 307, Miami, Florida.

   THE COURT being fully aware of the contents of the aforesaid material and in conformity with this Court's duty to satisfy the requirements for a speedy judicial determination as to the issue of obscenity, finds probable cause to believe that the aforesaid material is obscene within the purview of Florida Statute Section 847.011 and the applicable case law.

   THE COURT also notes that this application of contemporary community standards is shared by as avid a First Amendment proponent as the *Miami Herald.* That newspaper stated in an article appearing in its edition of February 28, 1990, that "Many of 2 Live Crew's lyrics are so filled with hard-core sexual, sadistic and masochistic material that they could not be printed here, even in censored form."

   DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of March, 1990.

   /s/

   CIRCUIT COURT JUDGE MEL GROSSMAN

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distribution to deputies around the county. They were instructed to, and did, inform all record store owners in the county that selling *As Nasty As They Wanna Be* subjected them to possible arrest for violating section 847.011, Florida Statutes.

Thus the Sheriff, through the actions of his deputies, effectively removed all copies of *As Nasty As They Wanna Be* from vendors' record racks. No arrests were made because no vendor was willing to risk a criminal prosecution over an $8.99 recording. No civil action was initiated by the Sheriff to determine whether *As Nasty As They Wanna Be* was actually obscene. The probable cause order, and the Sheriff's "friendly advices" were the end of Broward County sales, although subsequent events prompted a second million copies to be sold around the country.

While similar probable cause findings had been made in a handful of places, including at least two by grand juries under the direction of a Volusia County, Florida, State Attorney, 2 Live Crew made the decision to litigate in Broward County because it was convenient, close to 2 Live Crew's Miami base, and because South Florida was viewed as less hostile to the first amendment than were other Florida venues.

The original federal complaint brought by the record company and the four members of 2 Live Crew (Luther Campbell, Mark Ross, Chris Wongwon and David Hobbs) sought a declaratory judgment that the recording was not obscene. The complaint was quickly amended to include a count challenging the Sheriff's actions as a prior restraint.

Lost amidst the wave of publicity caused by Judge Gonzalez' June 6, 1990 decision that the record was obscene, was the half of his opinion which condemned the Sheriff's procedures as "Nasty Suppression:"

> [T]he Sheriff's actions in this case constituted a seizure of presumptively protected speech within the scope of the First and Fourteenth Amendments.

> The First Amendment rights of 2 Live Crew and the music store owners to publish the recording and the public's right as an audience were all infringed.

* * *

Indeed, the facts of this case demonstrate just how dramatically informal censorship can impair the First Amendment. With relative ease, every copy of *Nasty* in Broward County was suppressed . . . . 8

Judge Gonzalez then enjoined the Sheriff from engaging in future prior restraint and ordered him to pay substantial attorneys' fees to 2 Live Crew for prevailing on its prior restraint claims.

*Bantam Books, Inc. v. Sullivan,* the precedent for Judge Gonzalez' ruling, involved a Rhode Island pornography commission's review of various publications, and letters to publishers warning them that their books and magazines were objectionable and could be the subject of state prosecutions. Justice Brennan wrote:

People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications . . . It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity.

Judge Gonzalez concluded that the Sheriff's approach was inconsistent with *Freedman v. Maryland,* *Southeastern Promotions, Ltd. v. Conrad* and *Vance v. Universal Amusement Co., Inc.*, which demanded adherence to three rules in order to avoid an unconstitutional prior restraint:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Officer Wichner took no action designed to secure any of these
mandates. No judicial action other than the probable cause order was ever contemplated by the Sheriff's office. The restraint was for an extended period, and there never would have been a judicial determination were it not for the 2 Live Crew federal lawsuit. Indeed, it was as if *As Nasty As They Wanna Be* had been imprisoned for life, without a trial. Therefore the federal suit was like a habeas corpus action, designed to secure the freedom of the recording.

C. *The Obscenity Trials*

Having been forced to file an action to liberate their music, the plaintiffs sought to place the burden of proof on the Sheriff to prove the record was obscene, just as the State would have had that burden had a criminal prosecution, or a civil proceeding, been instituted by the State. The plaintiffs also sought to require proof of obscenity beyond a reasonable doubt.

Those arguments were made despite the fact that the plaintiffs were seeking the declaratory judgment and would ordinarily have had the burden to prove by a preponderance of the evidence that they were entitled to relief (*i.e.*, that *As Nasty As They Wanna Be* was not obscene).

The argument went this way: Although in the vast majority of declaratory judgment actions the plaintiff has the burden of proof, that is not always the case. In assigning the burden, the court must first examine the underlying issues.\(^\text{17}\) Especially when the suit is one to determine non-liability, the burden may shift to the defendant.\(^\text{18}\) This suit was in that peculiar posture — the plaintiffs were forced to bring a civil action to declare the record non-obscene — because the Sheriff failed to provide a full, fair, and prompt adversary proceeding. The burden of proving obscenity must fall on the censor\(^\text{19}\) precisely because the Constitution is a restraint on governmental power. The government must prove its basis for not observing the limits imposed upon it by the first amendment.\(^\text{20}\)


\(^{18}\) BARCHORD, DECLARATORY JUDGMENTS, 404-405 (2d ed. 1941).

\(^{19}\) Southeastern Promotions, Ltd., 420 U.S. at 560.

\(^{20}\) Compare Aero Spacelines, Inc. v. United States, in which the plaintiff challenged a government board's conclusion of excessive profits:

...the burden of proving, by a fair preponderance of the evidence, the existence of the fact or facts upon which the rights and liabilities of the parties depend is upon him who has the affirmative of the issue which
The appropriate standard of proof for a federal declaratory judgment action involving the issue of obscenity has never been addressed by the Supreme Court. There is abundant precedent, however, for using a "clear and convincing" standard in certain civil cases. The reasonable doubt standard has rarely been applied in civil litigation. Because this federal action was one to protect the most important of federal rights, and to avoid subsequent criminal actions against retailers, the plaintiffs requested a reasonable doubt standard — to be the defendant's burden — or at least a clear and convincing standard. Deforms the basis of the controversy, without regard to whether he is plaintiff or defendant in the suit.

530 F.2d 324, 331 (Ct. Cl. 1976) (citations and footnotes omitted).

21. Standard of proof was addressed at length in California v. Mitchell Brothers' Santa Ana Theater:

The purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Three standards of proof are generally recognized, ranging from the "preponderance of the evidence" standard employed in most civil cases, to the "clear and convincing" standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved "beyond a reasonable doubt" in a criminal prosecution. See Addington v. Texas, 441 U.S. 418, 423-424 (1979). This Court has, on several occasions, held that the "clear and convincing" standard or one of its variants is the appropriate standard of proof in a particular civil case. See Addington, 441 U.S. at 431 (civil commitment); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (libel); Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 159 (1943) (denaturalization). However, the Court has never required the "beyond a reasonable doubt" standard to be applied in a civil case. "This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the 'moral force of the criminal law,' In re Winship, 397 U.S., at 364, and we should hesitate to apply it too broadly or casually in noncriminal cases." Addington, 431 U.S. at 428.


22. Id. at 97 n. 5 (Stevens, J. dissenting) (citing to cases referred to in 9 J. Wigmore, Evidence § 2498, nn. 2-12 (J. Chadbourn rev. 1981)). Justice Stevens points out that the Court has used the reasonable doubt standard in several civil contexts, and cites to: Radio Corp. of America v. Radio Engineering Laboratories, Inc., 293 U.S. 1, 7-8 (invalidity of patent); Ward & Gow v. Krinsky, 259 U.S. 502, 522 (1922) (constitutional invalidity of state statute); Moore v. Crawford, 130 U.S. 122, 134 (1889) (invalidity of title); cf. Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902).
spite the Supreme Court's past flexibility on this issue, Judge Gonzalez would not bend.

The Sheriff's counsel accepted the burden of proof, but the Court refused to require a standard of proof beyond a preponderance of the evidence. One important issue which may be resolved by the pending appeal of the federal order is the proper standard of proof to be used in cases where a plaintiff is forced by an unconstitutional prior restraint to litigate as a civil plaintiff the right to first amendment protection for his or her work. It certainly is an issue demanding critical analysis.

The unique posture of the federal litigation brought against Sheriff Navarro led to an ironic conclusion: the presumptively protected record was freed from the prior restraint, but then reincarcerated as obscene in a civil proceeding using only a preponderance of the evidence standard. Strong doctrine supports the argument that where critical factual findings are to be made on important constitutional issues, at least "clear and convincing," if not "beyond a reasonable doubt" must be the standard to insure the integrity of such important fact finding.24

Whatever the standard of proof, a district court's findings of fact ordinarily are subject to appellate review under the difficult "clearly

23. Compare Santosky v. Kramer:

Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." Woody, 385 U.S. at 284. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" Addington, 441 U.S. at 425, (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (CA 4, 1971) (opinion concurring in part and dissenting in part), cert. dism'd sub nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)). This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." Addington, 441 U.S. at 424. Notwithstanding "the states' 'civil labels and good intentions,'" id., at 427,(quoting In re Winship, 397 U.S. at 365-366), the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U.S. at 425, 426.


24. See California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 (1981) (the choice of standard of proof in a civil nuisance abatement case involving obscenity, is a matter of state law, but the first and fourteenth amendments do not require proof beyond a reasonable doubt).
erroneous" standard. In a first amendment case, however, the appellate court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Although Bose Corporation v. Consumers Union involved libelous speech and not obscenity, the Court analogized the need for independent appellate review of facts impacting on first amendment rights. Citing Justice Harlan's opinion in Roth v. United States:

I do not think that reviewing courts can escape this responsibility by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

Thus, while the Rule 52(a) "clearly erroneous" standard insulates most lower court findings of fact from adverse appellate review, Judge Gonzalez' finding that As Nasty As They Wanna Be is obscene is not similarly insulated. The trial record of the plaintiffs' case offers much in the area of artistic and literary value that Judge Gonzalez ignored. So even though Sheriff Navarro had the advantage of a civil burden of proof, his victory may not withstand appellate review.

No matter what the ultimate outcome, it was a direct result of the civil finding of obscenity in federal court which prompted the two criminal proceedings in state court. This lead to the confusing scenario of a record seller being found guilty of the criminal obscenity charge of selling the record declared civilly obscene by Judge Gonzalez, while three 2 Live Crew members were acquitted of obscenely performing the same songs before a paying audience.

Charles Freeman

Judge Gonzalez' Order was released on June 6, 1990, to a packed

25. FED. R. CIV. P. 52(a).
28. Id. at 507 n. 25 (emphasis in original).
federal courtroom. The first amendment precedent he set condemning prior restraints was swallowed up by his declaration that *As Nasty As They Wanna Be* appealed to the prurient interest of the average person in Broward County, described sexual conduct defined by the State in patently offensive ways, and that the recording lacked serious literary, artistic, scientific or political value.

The fact that a record had never before been declared obscene, added to the racial issues generated by the record's ghetto patois, combined with the press' natural protectiveness of first amendment rights, made the order big news. So big that one record merchant, Charles Freeman, the owner of E. C. Records in a Fort Lauderdale African-American community, decided to protest the ruling and capitalize on the publicity.

Freeman, a savvy, charming, militant entrepreneur, was stunned to learn that the recording was now federal contraband. A quick study, he decided to continue carrying the record and challenged the Sheriff to arrest him. The press, delighted with this solo example of civil disobedience, flocked to E. C. Records, and was present when Eugene McCloud, a black detective in the Sheriff's Organized Crime Tactical Unit, appeared to make an undercover purchase of *As Nasty As They Wanna Be* on Friday, June 8, 1990. McCloud asked for a copy and Freeman obligingly asked McCloud if he wanted to hear a few cuts from the album before buying it. McCloud said "yes" and Freeman placed an album on a turntable, sending the sounds of "The Fuck Shop" to the television cameras, and then McCloud, happy with what he heard, bought a record and a cassette for $18. Then he arrested Freeman, to the delight of the press and of the Sheriff, who had Freeman held outside his shop for forty minutes until the Sheriff himself could arrive to make the misdemeanor collar of Freeman official, and escort him to jail.

After that, *Good Morning America* 's satellite television truck and a host of other media made their way to E. C. Records, making it a kind of cult stop for first amendment groupies.

**Club Futura**

At the same time, the press was building the confrontation between Luther Campbell and Sheriff Navarro. Campbell, a 29 year-old record entrepreneur, had built a multi-million dollar a year business in five years, starting by selling his records from the trunk of his car, and had catapulted to fame (or infamy) with a series of explicitly sexual
rap records. He was scheduled to lead 2 Live Crew's performance at a Hollywood, Florida night club called Club Futura. The date had long preceded Judge Gonzalez' order.

The Sheriff, whose political career was based upon his breaking Florida law by switching parties (Democrat to Republican) too close to official qualifying time, and who had been, as Sheriff, threatened with contempt by both federal and state judges (for jail overcrowding and lack of courthouse security, respectively), now was faced with a performance which the press led him to perceive was in violation of Judge Gonzalez' order.

Detective McCloud again got the call. As the press carried messages back and forth between Campbell and Navarro, McCloud was designated the point man in a fourteen person mixed-gender task force culled from the Organized Crime and Public Corruption units of the Sheriff's Department. Their job was to go to Club Futura as undercover couples to hear, in McCloud's words, whether *any* song from *As Nasty As They Wanna Be* was sung.

Four couples, eight deputies, in their sportiest clothes, armed with mini-microcassette recorders, and provided with $60 per couple to purchase tickets and drinks, staked out the 2 Live Crew show at Club Futura shortly after midnight on June 10, 1990. Another six detectives formed the backup team to effectuate the arrests which were pre-ordained because the sounds of "C'mon Babe," "Me So Horny," "If You Believe In Havin' Sex," and "The Fuck Shop" were an essential element of 2 Live Crew's show.

Rather than risk the ire of the crowd, the deputies apprehended Campbell and Chris Wongwon after the show, as they were being driven home by Campbell's driver. Mark Ross, the lead rapper, went home separately and the fourteen officers, apparently unable to follow two cars, did not arrest him that night. He was given a misdemeanor summons at my house two weeks later, in an effort to avoid another a media event. Campbell and Wongwon were transported to the County Jail and booked on the misdemeanor charge of participating in an obscene performance "before live people." David Hobbs, the fourth Crew member who mixed the records at Club Futura, making the instrumentals for this unique form of hip hop music which formed the backdrop for the four-letter words, was not arrested. The deputies did not

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see him singing; he only hummed.

The Trial Issues

The defenses of Freeman, and of Campbell, Ross and Wongwon were rife with small issues which were essential to a complete defense. Although the burden of proof was clear — proof beyond a reasonable doubt — many evidentiary issues had to be addressed. The State wanted to introduce Judge Gonzalez' civil judgment of obscenity. Defense in limine motions in both cases successfully precluded introduction or mention of the Gonzalez order.\textsuperscript{32}

The State also wanted to introduce a State prepared transcript of the recording, \textit{As Nasty As They Wanna Be}, in Freeman, and a transcript of the taped "Club Futura" performance in the Campbell case. Defense in limine motions were successful in both cases, under section 90.403 of the Florida Evidence Code.\textsuperscript{33} Excluding the transcript in the Freeman case was a clear victory, but throughout the trial the prosecutors unsuccessfully sought to use the transcripts (which took officers over five working days to prepare) as memory recollection aids so the officers could interpret their sometimes unintelligible recordings. Their unsuccessful recollection struggles with the Crew's common language descriptions of fellatio, cunnilingus, masturbation (but not pederasty — why do these words sound so nasty?)\textsuperscript{34} made the trial amusing.\textsuperscript{35}

\textsuperscript{32} The basis of exclusion was that civil judgments, even if final (and this one was not), are not admissible in criminal cases because the higher burden of proof in a criminal case makes the civil judgment irrelevant, and because the only value, if there were any relevancy, would be to prejudice the defendant. See Forrest v. State, 513 So. 2d 151 (Fla. 1st Dist. Ct. App. 1987); State v. Dubose, 11 So. 2d 477 (Fla. 1943).

\textsuperscript{33} That section provides in pertinent part: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." FLA. STAT. § 90.403 (1989).


\textsuperscript{35} The press' problems in reporting the trial were captured by Mike Clary's \textit{New Times} review of the trial:

The trial of the 2 Live Crew on obscenity charges was billed as a First Amendment case, so all of the serious newspapers and network television stations sent reporters, each one dispatched by an editor who saw not only a chance to use words such as "sex," "horny," and "nasty" in daily coverage, but also the phrase "chilling effect." Nothing sends more chills of righteousness up the tingling spines of serious editors than the threat of
Entertainment aside, the important legal issues raised by a first amendment criminal trial really turn on the beginning and end of the case: jury selection and jury instructions.

Jury Selection

No other crime uses "community standards" as an essential element of the offense. Burglary, auto theft, drug dealing, robbery, rape and murder prosecutions do not require a jury to determine "whether the average person, applying contemporary community standards," would find that the act appeals to or offends any community view or interest. All other crimes provide real notice to the alleged wrongdoer, and require only that the jury determine the facts relevant to the elements or the defenses.

Only criminal "obscenity" turns on an after the fact determination by a jury as to the mores of the average person vis a vis the prosecuted conduct. If we are to continue using this strange test conjured by Miller v. California,68 one that imposes a burden upon six or twelve people to assess the values, experience, religious, cultural, generational, racial, ethnic, sexual preference, political, economic, psychologic, and educational profiles of thousands or millions of people in a community, then to determine whether their "prurient interest" has been appealed to,37 or if they would be patently offended, then the jury selection process must provide a reliable vehicle for finding these omniscient people.

Just stating the problem reveals the farcical nature of the attempt, but given the present status of the law, defense counsel's job is to play an effective role in this serious judicial soap opera of sex.

Florida utilizes voter registration lists as its only source of poten-

censorship.

Of course none of the mainstream media represented was actually to print or air any of the words at issue in the trial. The irony of this was not lost on the reporters, many of whom spent ergs of creative energy trying to come up with inventive euphemisms to reflect the Crew's lyrics. Many newspapers, including the Miami Herald and the St. Petersburg Times, went for dashes, as in "f—.” The New York Times' Sara Rimer spoke of the "power of the penis," and did use the rappers' favorite form of female address, "bitch." Other papers, including the Los Angeles Times, wouldn't even go that far.

36. 413 U.S. 15.
37. In Florida, "prurient interest" is defined as a "morbid or shameful interest in sex." Fla. Standard Jury Instruction § 847.
tial jurors. The data in Broward County revealed that black citizens, who comprise 13.5% of the population, are only 8.5% of the registered voters.\(^{38}\) Persons under 25 years of age are 23.5% of the population,\(^{39}\) but are registered voters at an even lower percentage.\(^{40}\)

The jury pools in \textit{Freeman} and \textit{Campbell} starkly attested to these disparities. In \textit{Freeman}, only one of 35 persons in the venire was black. There appeared to be no persons under 25, and of the twelve put in the box for initial consideration, none was under 25 and all were white.

An objection was made in \textit{Freeman}, but the trial judge, correctly citing Florida law,\(^{41}\) ruled that since the voter registration lists were non-discriminatory, the random and natural consequences of their use was not a basis for challenging the venire.

The first twelve in the box, nine upper-middle-class white women and three men, were as far as we got in \textit{Freeman}. The trial judge, Judge Paul Backman, did not believe in a free associational voir dire. (He told me, as the later \textit{Campbell} case went into the fourth of its six days of jury selection, that he would have had a jury on the first day.) But even had he granted more latitude, the twelve offered no valid challenges for cause, and with the three peremptories per side\(^{42}\) we never got beyond those twelve. The State struck a young man who worked in a newspaper press room; the defense struck a man who seemed antagonistic. The jury was comprised of five well educated white professional women and an hispanic man. After the conviction of \textit{Freeman}, the press profiled the jury members (who were unwilling to even talk to the media), revealing that one of them lived in the fourth most expensive assessed value house in Broward County — $3.6 million — probably more than the assessed value of all of Sistrunk Boulevard, the main African American business street in Fort Lauderdale. There is no legal relevance to this fact, but it underscores the distance between Miami's Liberty City, home of the 2 Live Crew music and the

\(^{40}\) The Broward County Voter Registration Office data as of October 8, 1990 showed that registered voters age 18-20 comprise only 2.9% of the total registration. Ages 21-35 represent 22.9% of the total.
\(^{41}\) \textit{See} FLA. STAT. § 40.01 (1989); Valle v. State, 474 So. 2d 796, 800 (Fla. 1985). The constitutionality of the use of voter registration lists was recently upheld in California. People v. Sanders, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (Cal. 1990).
\(^{42}\) \textit{See} FLA. R. CRIM. P. 3.350.
site of recent race riots, and the jury's white upper-middle-class community. The jury was obviously drawn from lists which under-represented the Crew's and Freeman's peer groups.

The fact that the Campbell jury was more representative does not detract from the serious defects in the jury selection process. The system is a lottery, with luck playing the major role in deciding which persons will first appear in the box for initial voir dire. Obviously every jury trial involves the same "luck of the draw," but where the offense itself turns on the ability to divine the socio-sexual views of the community, the lottery well should contain numbers which reflect the community, not just those who register to vote.43

The media attention on the Freeman jury problem may have helped to open the selection process in the 2 Live Crew performance case which commenced three days after Freeman's conviction. Freeman left the courtroom angrily shouting "[t]hey don't know nothing about the ghetto." The press, faithful reporters of race and class divisions in our society, pursued the obvious point of Freeman's remarks, researching and writing about Broward County's juries.44

In contrast to Judge Backman in the Freeman trial, Judge June LaRan Johnson provided wide latitude in voir dire for the 2 Live Crew trial. The fifty-one people who were all ultimately put in the box were slightly more diverse than the Freeman venire. Six black potential jurors were included, although only three potential jurors were under twenty-five. The ultimate jury was the product of six and one-half days of wide-ranging voir dire, the successful use of jury sequestration as a defense tactic to scare away the least acceptable jurors,45 the luck of drawing a varied lot (some of whom educated the whole potential panel by their responses to prosecution questions46), and the prosecutors' failure to keep track of the agreed-upon process of passing and striking, allowing the defense to accept the panel and foreclose the three prose-

43. A frequently recommended supplemental source of names is licensed drivers. See ALA. CODE § 12.16.57 (1975); CAL. CIV. PROC. CODE. § 197 (West 1990). The trial judge in Campbell declined our invitation to break that new ground.

44. See Miami Herald, supra note 37.

45. The least acceptable jurors were presumed to be middle-class white women with six-to-sixteen year-old children, who would find sequestration difficult.

46. One person declared himself a "fan" of 2 Live Crew. Another likened the prosecution to "Nazi Germany." A third described instances of police brutality in the black community. One prospective juror kept asking the prosecutors about topless and bottomless dancing in her efforts to understand the State's attempt to define "community standards."
cution back strikes which they should have exercised earlier.

This jury had a 65 year-old Jewish mother of a condominium circuit entertainer, a 76 year-old former sociology professor, a fortysomething principal of an integrated middle school whose sister (unknown to the State) was a criminal defense lawyer, and a 26 year-old diesel mechanic who knew of Jim Morrison’s (The Doors) arrest for indecent exposure in Miami twenty years ago. The prosecutors were too young to appreciate that anyone knowing the Morrison case would know it only out of sympathy.

A black woman juror lived six blocks from the county’s two largest adult bookstores, which are just across the street from the Sheriff’s office substation. The sociology professor taught at Howard University during the 1960’s, a fact never learned by the prosecutors, and never pursued by the defense, having heard enough of the State’s voir dire to want her. The Jewish mother knew of Redd Foxx’s bawdy songs from the 30’s, while the prosecutors only remembered him from television’s Sanford & Son. She became the post-trial jury media star, appearing on The Donahue Show and asking what was the big deal, “Even Dr. Ruth says, ‘love your penis.’”

In fact, these jurors conducted a long post-acquittal press conference; the retired sociology professor was hired to write an opinion piece for the local newspaper;47 and the foreman, who was gay, “came out of the closet” in an interview with a South Florida news and arts weekly.48

Thus, jury selection in the Campbell case liberated more than the defendants.

Jury Instructions

The critical jury instruction in an obscenity case is the “serious literary, artistic, political and scientific value” prong of Miller v. California.49 As explained by Pope v. Illinois,50 the “value” issue is not a community standard, it is a national inquiry:

Just as the ideas a work represents need not obtain majority ap-

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47. Bailey, 2 Live Crew Juror Says Trial Reminiscent of Blacklist, Sun-Sentinel, Oct. 28, 1990, at 1H.
proval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

* * *

Of course, as noted above, the mere fact that only a minority of a population may believe a work has serious value does not mean the “reasonable person” standard would not be met. 5

In both the Freeman and Campbell trials the prosecution sought to turn Pope and Miller inside out and convince the trial judge that material was obscene if any reasonable person would find that the material lacks serious artistic, etc. value. In the Freeman case the trial judge initially took the State seriously, but overnight re-read the cases provided to him and came back in the morning with this instruction:

The value of the material: In order for you to find that this material is obscene you must also find that taken as a whole it lacks serious literary, artistic, political or scientific value. If any reasonable person would find that the material has such value it is not obscene even if it appeals to the prurient interest in sex, and even if it depicts or describes sexual conduct in a patently offensive way.

If it has serious literary or artistic effort, or if it attempts to convey scientific information or political points of view, it cannot be obscene. 52

The Campbell trial judge gave the same instruction, although she too was confused by the State’s argument, and when actually reading the instruction to the jury, slipped and said it the State’s way. A mid-instruction objection and bench conference cured the error, and actually permitted reinforcement of the value prong of Miller. The jury in this case rested upon the value test, finding the performance to have had serious political, literary and artistic value. 53

51. Id. at 500, 501.


53. The Mapplethorpe jury in Cincinnati also used Miller’s value test to acquit Dennis Barrie, the Cincinnati Art Museum Director charged with obscenity. Walsh,
Why did the *Freeman* jury come to a different conclusion? One explanation may be the trial judge's supplemental instruction requested by the jury which was obviously struggling with the *Miller* test. It had asked to be re-instructed shortly after retiring and had been told to rely upon their collective recollections. Within an hour, the jury asked to hear "the three prongs of the *Miller* test," and the judge said he would re-instruct them on the substantive law of the case. However, the judge went beyond that in his supplemental instruction, telling the jury it could determine obscenity without the aid of any expert testimony. Since the defense's entire case was expert testimony, giving that supplemental instruction which was not responsive to the jury's pointed *Miller* question may be the error upon which Freeman's conviction is ultimately reversed.

The United States Supreme Court has said: "Particularly in a criminal trial the judge's last word is apt to be the decisive word."\(^{54}\) This is especially so with regard to supplemental instructions "since the jury will rely more heavily on such instructions than on any other single portion of the original charge."\(^{55}\)

In Freeman's case, the supplemental instructions "last words" were to a jury twice seeking guidance on *Miller v. California*. Instead the jury received final, supplemental instructions which went beyond its inquiry and told the jury it had the right to disregard the defense testimony. The proper course is to limit a reinstruction "to direct response to the jury's specific request. Indeed, to do otherwise might not only create confusion in the minds of the jurors but might give the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter."\(^{56}\) Thus, like all cases, big and small,
the jury instructions are a critical matter, and error in them may be the key to making Freeman’s outcome symmetrical with 2 Live Crew’s result.\textsuperscript{57}

Conclusion

The 2 Live Crew saga will continue through federal and Florida courts for some time. Charles Freeman’s initial appeal to the Florida Circuit Court is on the horizon.\textsuperscript{58} The federal appeal to the Eleventh Circuit will probably not be argued until the Spring of 1991.

Whatever may be the outcome of those cases, the acquittal of 2 Live Crew in the Club Futura performance case seems to have left the most lasting mark. Their acquittal of obscenity for singing in public what they sang on a recording designed for private consumption, underscored the absurdity of using the law to determine the value of art.

Justice Scalia’s concurrence in \textit{Pope v. Illinois} calls for re-examination of the \textit{Miller v. California} standard:

I think we should be better advised to adopt as a legal maxim what has long been the wisdom of mankind: \textit{De gustibus non est disputandum}. Just as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide “what is beauty” is a novelty even by today’s standards.\textsuperscript{59}

The prosecutions of \textit{As Nasty As They Wanna Be}, in all their permutations, attest to the wisdom of Justice Scalia’s view. While it has been great fun for me, and a source of serious intellectual stimulation, the energies spent by all the participants could have worked toward solutions of more serious problems than what to do with some dirty

\textsuperscript{57} The \textit{Freeman} case presents other appellate issues, among them the failure to instruct the jury that the “average person” meant adult average persons; and the failure of the trial court to admit other records by The Ghetto Boys and Ice Cube, which contained comparable lyrics. In addition, the trial court refused to admit a host of salacious materials purchased throughout Broward County which the defense argued was relevant to “prurient interest,” for these materials were designed to demonstrate that term in action.

\textsuperscript{58} On November 16, 1990, the trial judge denied a motion for new trial. Freeman was later sentenced to pay the maximum fine, $1,000, to a local school for the performing arts and to pay court costs of $87. The notice of appeal was filed December 12, 1990. Under Florida law, the Circuit Court will hear the appeal, then discretionary review may lie in the District Court of Appeal.

\textsuperscript{59} \textit{Pope}, 481 U.S. at 505 (Scalia, J., concurring).
words. Even those who took the words literally, like one of the co-contributors to this volume, have misused their energies. Unpleasant words will never be erased from our society. Unpleasant deeds may be, but not by trying to censor the descriptions of unpleasantness. It is better to hear the words and address the thoughts they convey than to suppress the words so the thoughts may fester without the public airing which can lead to progress.

To know the 2 Live Crew story is to know a recurring phenomenon created by those who fail to understand history. Censorship cannot survive the human desire to know and judge things for one's self. No law judge or jury will ever eradicate that irrepressible instinct. We could have a thousand obscenity trials, but words and thoughts about sex will never be limited to a missionary view. "Prurient interest, patently offensive descriptions of sexual conduct and serious artistic, literary, political or scientific value" should be discussed someplace — anywhere — other than the courts.