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# NOVA LAW REVIEW

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The Worldwide Influence of the United States Constitution as a Charter of Human Rights

William J. Brennan, Jr.*

Recently Anthony Lester, Q.C., the famed British barrister and world-renowned human rights advocate, delivered a speech entitled "The Overseas Trade in the American Bill of Rights." 1 His focus was on the Bill of Rights, although at the same time he accepted the broader truth that, as Professor Albert P. Blaustein phrased it, "the United States Constitution has inevitably been an influence for constitutionalism. Every nation that has a one-document constitution (or is committed in principle to having one) is inevitably following the United States precedent-model." 2

One reason for the influence of the American Constitution abroad, Professor Blaustein asserts, is "[t]he American penchant for constitutional proselytizing. . . . From the earliest days of the American revolutionary movement, its leaders were conscious that they were doing something of worldwide significance. They had convinced themselves that they were creating a new Eden, not only for America but for all of mankind. They had a story to tell and a message to deliver. They were proselytizers." 3

Perhaps these views reflect a degree of immodesty or perhaps only an excess of enthusiasm. Yet, Mr. Lester informs us that today there is an ever-increasing overseas trade in the American Bill of Rights that is "brisk and vitally important." 4 It is, he says, a trade conducted both internationally (before fora such as the European Commission and Court of Human Rights) and nationally (in constitutional litigation in-

* © 1991 by William J. Brennan, Jr.

William J. Brennan is a retired Associate Justice of the Supreme Court of the United States. This text was prepared for the speech Justice Brennan delivered at the Columbia Law School Bicentennial Celebration (November 20, 1987). The Nova Law Review wishes to thank Justice Brennan for his permission to publish the address.

3. Id. at 12.
4. Lester, supra note 1, at 541.
volving norms derived from American constitutional law): "When life
or liberty is at stake [he asserts], the landmark judgments of the Su-
preme Court of the United States, giving fresh meaning to the prin-
ciples of the Bill of Rights, are studied with as much attention in New
Delhi or Strausbourg, as they are in Washington, D.C., or the State of
Washington, or Springfield, Illinois."

These comments from such distinguished authorities as Mr. Lester
and Professor Blaustein prompt me tonight to essay an examination of
"The Worldwide Influence of the United States Constitution as a char-
ter of Human Rights."

The profound influence claimed for our Constitution on the nations
of the world has been attributed to many things. Ours was, of course,
the first written constitution in history. Moreover, as the charter of one
of the most powerful and largest nations on earth, our Constitution has
always been among the most conspicuous. And, as I already mentioned,
lest anyone dare forget its prominence, the Framers and their success-
sors took it upon themselves to proselytize the Constitution abroad.

All those factors have, no doubt, contributed to our Constitution’s
influence abroad, but they go only part way in explaining it. There
must be something about the Constitution’s substance that accounts for
its worldwide appeal. That elusive something, I believe, is the Constitu-
tion’s status as a charter of human rights. Three distinct characteristics
of American constitutionalism coalesce to distinguish our Constitution
as a human rights charter. First, is the very premise on which the Con-
stitution is based — that government springs from the People. Second,
is the Constitution’s enumeration of specific rights that are guaranteed
against government intrusion. Third, and in my view most important, is
the Constitution’s implementation of a mechanism — judicial enforce-
ment — that makes those enumerated rights meaningful. Those three
human-rights elements have, to varying degrees and in various ways,
infiltrated their way into the constitutional schemes of our neighbors
abroad.

Perhaps the Constitution’s greatest innovation and undoubtedly its
most profound impact abroad is a concept that is today so well and
pervasively established that its revolutionary character is readily over-
looked. It is the very premise on which the Constitution is based —
that sovereign individuals, “We the People,” can create a government.
Our Constitution was, in that respect, the ultimate effectuation of the

5. Id.
Enlightenment, an effectuation that went beyond the wildest musings even of some of the most prominent thinkers of the time. As one historian observes, the “European thinkers, in all their discussion of a political or social contract, of government by consent and of sovereignty of the people, had not clearly imagined the people as actually contriving a constitution and creating the organs of government. They lacked the idea of the people as a constituent power.”

Our Constitution, built on that vision of the People as a constituent power, was itself a charter of human rights and self determination, quite apart from its specific content.

The vision caught like wildfire. Within two years, France ratified a constitution which, although it lasted only two years, served as a model for the 1812 Spanish constitution and the constitutions of Naples, Sicily and much of Latin America. So, too, did Poland, whose constitution recognized that “all authority in human society takes its beginning in the will of the people.” Shortly thereafter, Venezuelans, Mexicans, and Argentinians, to name a few, seized upon our Constitution as inspiration to revolt against tyranny and oppression, and to fashion governments of the People. Today, there exist a total of 162 constitutions. All but six nations — three that follow the Koran and three that are based on the principle of parliamentary supremacy — either follow a written constitution or (in the case of the twenty that have suspended their constitutions) are committed to doing so.

Implicit in the notion that the People can and do create government is the corollary that it is the People’s prerogative and responsibility to limit the power of the government that they create. The Constitution’s accommodation of that corollary, by enumerating individual rights that the government may not invade, is the second, and perhaps most conspicuous, attribute that distinguishes it as a charter of human rights.

At the risk of preaching heresy, I will offer one simple admonition about this second attribute: As human-rights achievements go, the value of our Constitution’s enumeration of specific rights, however conspicuous and however inspirational to our sister nations they may be, ought not to be overrated. Let me explain. In so belittling the Constitution’s enumeration of rights, I am referring neither to the Framers’ initial decision to omit from its text all but a handful of what today we consider fundamental rights, nor to the fact that its content was not
particularly novel.

As to the initial omission of a Bill of Rights: that decision in no way suggests that the Framers considered those rights unimportant. Rather, they were initially content to leave the protection of other rights to the states, some of which had extraordinarily protective constitutions. In fact, some of the Framers, Hamilton among them, eschewed explicit federal rights for fear that they might be understood inferentially to permit the extension of federal powers beyond those enumerated. Moreover, that the People themselves insisted on express guarantees of certain fundamental rights as a condition for their acceptance of the Constitution evinces both the primacy and the foresight of the People in creating — and limiting — government.

And as to the novelty of our Bill of Rights: Although it is true that the 1789 French Declaration of the Rights of Man directly inspired the Bill of Rights, the former in turn was inspired at least partially by the constitutions of several of our own states, and authored in part by such American notables as Thomas Jefferson and Gouverneur Morris.

I intend, therefore, to impugn neither the vigilance or the originality of the Framers. My admonition boils down to the simple proposition that merely to enumerate rights on paper is not to guarantee them. Madison, himself, expressed doubts whether the “parchment barriers” of declared rights would be effective in a republic. The rights of the People — even if expressly enumerated — are not worth the parchment they are written on if they are easily abrogated, unenforceable, or anachronistic. So even if we cannot fairly credit the Framers of our Constitution with the notion of enumerated individual rights, and even if their articulation of those rights was less than original, we can still acclaim the genius of a system that effectively implements, not just enumerates, those rights.

A truly meaningful implementation of rights must, I think, include at least three elements: stability, enforceability, and adaptability. By “stability” I mean not necessarily permanence, but resistance to abrogation. A constitutional right is of little comfort if the government is free whimsically to repeal it the moment it is invoked. Wary of the fragility of constitutional guarantees, the Framers of our Constitution devised an amendment process that all but precludes the diminution of the textual rights. They made it extraordinarily difficult to amend any of the Constitution’s terms including the rights that were themselves

appendixed by amendment.

With the hindsight of two centuries, that device might not seem particularly remarkable. But comparing our Constitution's amendment process to the permissive amendment processes that, until recently, prevailed among most of our neighbors (with the notable exception of Australia) evinces the Framers' wisdom. For the 150-year period following the ratification of our Constitution, it was common among European nations, for example, to permit amendment of their constitution by the simple expedient of legislation. In fact, there evolved a practice — as exemplified by the constitution of the Weimar Republic — of qualifying every articulation of a particular right with the words, “unless the law provides otherwise.” A legislative act could, under those schemes, constitutionally abrogate any constitutional right.

Since World War II, however, a trend toward burdening the amendment process has emerged. Such changes have been made often with express attribution to our Constitution. The German experience is most instructive. In reaction to Hitler's manipulation of the Weimar constitution through parliament, Article 79 of the German constitution requires that any amendment be accomplished expressly, and be approved by a two-thirds super-majority of both houses of parliament. In practice, a constitutional amendment cannot pass unless supported by a national consensus. And the German constitution squarely prohibits any interference by amendment with the democratic order or basic human rights.

The resistance of a proclamation of rights to convenient amendment only goes part of the way toward full implementation of rights. After all, without enforceability — that is, a mechanism by which to enforce those rights — even an unalterable proclamation of rights could amount to little more than an impotent proclamation. (In fact, some would maintain that unenforceable pronouncements of rights are not rights at all. But that is an issue that I leave to the philosophers among us.) At any rate, the French Declaration of Rights of Man, however well-intentioned and foresighted, fell to desuetude precisely because it instituted no mechanism by which individuals could challenge infringement of the rights they purported to guarantee. The same has been said of the extensive panoply of rights that the Soviet Constitution purports to guarantee.

In the enforcement of constitutional rights under our system, the judiciary plays the pivotal role. Since Chief Justice Marshall's holding in *Marbury v. Madison* that “[i]t is emphatically the province and
duty of the Judicial Department to say what the law is,”9 judicial re-
view has been accepted as a permanent and indispensable feature of
American constitutionalism. There is a sense in which judicial review is
decidedly counter-majoritarian. The judiciary does not sit to count
votes. It rests on the principle, expressed in the Constitution, that there
are circumstances in which the majority must yield to the greater na-
tional interest in the protection of rights.

Chief Justice Marshall was therefore quite understandably at
some pain, as Hamilton was in *The Federalist, No. 78*, to square judi-
cial review with America’s dedication to government by the consent of
the governed. To cede to Congress the power claimed for the Supreme
Court would be to give the legislature “practical and real omnipo-
tence,” making a mockery of the people’s attempt “to limit a power, in
its own nature, illimitable.”10 The American people’s chosen instrument
for keeping all their governors strictly within the limits of their as-
signed powers is the power of judicial review entrusted by that Consti-
tution to the Supreme Court.11 As Alpheus Mason has said:

Judicial review is an adjunct of democracy; without it, the supreme
will of the people, embodied in the Constitution, could be flouted,
and the distinction between fundamental law and ordinary acts of
Congress, would be broken down. . . . [Thus,] when the Court
upholds the Constitution and disregards an act of Congress con-
trary to it, what prevails is not the Court’s will but the people’s will
as embodied in the Constitution. . . . [J]udicial review sustains pop-
ular power; it does not disrupt it.12

The reception abroad of our Constitution’s vision of judicial review
has, again, until recently, been lukewarm. In the mid-nineteenth cen-
tury, a handful of nations, concentrated in Central America, adopted
schemes of judicial review patterned after ours. But they were excep-
tional; in most of the world, judicial review was not well-received. For
example, the Swiss ratified a constitution that expressly withdrew from
the judiciary any power to review legislation. England, for its part, has
also definitely rejected Blackstone’s suggestion that the British courts
ought, in the exercise of their common-law powers, sometimes overrule
acts of Parliament.

11. See id.
The concept of judicial review became infinitely more attractive after World War II, once history has taught the somber lesson that totalitarian regimes could make a mockery of constitutionally guaranteed rights in precisely the manner that Hamilton and Marshall had feared 150 years earlier. Just as the movement began to stabilize constitutions against convenient amendment, there emerged a trend toward increased review of the popularly elected branches by a neutral branch, shielded from popular control. I understand that varying degrees of judicial review have emerged in Germany, France, Italy, and Austria. Perhaps the most important guardians of constitutional rights in Europe are the administrative courts (or councils of state) that review executive action for consistency with the constitution.

It seems clear that other nations have been influenced, at least conceptually, by our Constitution's accommodation of the interests of stability and enforceability in the implementation of rights. It is more difficult to measure the impact abroad of the third requisite element of meaningful rights implementation that I mentioned — flexibility in the face of changing times. None of the Framers of our Constitution was so optimistic or naive as to think that delineations of power on a piece of parchment would prevent any attempted abuse of governmental power. They were practical as well as wise men and we impugn their craftsmanship if we assume that they were blind to the inevitability of conflicts among the federal branches, between the federal government and the states, and between the individual and both governments. Of course, they knew that turf battles would develop over what belonged to which sovereignty, and how much either might infringe the liberty of the individual. Such are the limitations of human imagination, that no constitution could have delineated the precise boundaries of the authority assigned the several repositories of governmental power. Nor, in the nature of things, could the Framers have fashioned guidelines for the resolution of the myriad collisions between power exercised by any of these repositories, and the guarantees of individual liberty erected to restrain governmental oppression whatever its source.

Accordingly, we know that the Framers' choice of general language was deliberate. They were formulating a Constitution for the illimitable future. They wrote in broad outlines so that the past would not too much govern the future. In recognition of the Framers' intended flexibility, the Supreme Court has always breathed life into the Constitution's words by reexamining its interpretation in light of the changing times and emerging values.

There are those who find legitimacy in fidelity to what they call
"the intentions of the Framers" or "original intent." In its most doctrinaire incarnation, this view demands that judges attempt to discern exactly what the Framers or ratifiers thought in 1789, or 1791, or 1866, about the question under consideration in 1987 and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But, I ask, how can we gauge accurately the intent of the Framers on application of principle to specific, contemporary questions? All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves disagreed about the application of particular constitutional provisions and cloaked their differences in generality, or agreed only that the constitutional provision should not be governed by their own specific intentions. Apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. Those who would restrict claims of right to the values of 1791 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

I frankly conclude that I approach my responsibility as a Justice to read the Constitution in the only way that I can: as a Twentieth Century American. I look to the text, to the history of the time of framing, and to the intervening history of interpretation, of course. The complexity and range of constitutional issues before the Court changes to reflect the times. The Court's work is actually a daily mirror of the battles of forces going on outside the Court. So the ultimate question for me must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. The Constitution's wisdom in other times cannot be their measure to the vision of our time.

The vision of human dignity embodied in our Constitution throughout most of its interpretive history is, at least for me, deeply moving. It is timeless. It has inspired citizens of this country and others for two centuries. If we are to continue to be an example to the nations of the world, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity. The political and legal ideals that form the foundation of much that is best in American institutions — ideals jealously preserved and guarded throughout most of our history — still
form the vital force in creative political thought and activity within the nation today.

I close these remarks with the prayer with which Mr. Lester closed his speech. "I hope that, [he prayed], during the third century of the Constitution, the United States will accept that the obligation to protect human rights is an international obligation to be accepted by the United States themselves. I also hope that the United States judiciary will not retreat from the strong interpretation of the Bill of Rights into literalism, positivism and historicism. If American human rights are diminished, so are the rights of the rest of humanity." 13 My response is to repeat my conviction that as Americans we adopt our institutions to the ever-changing conditions of national and international life, those ideals of human dignity — liberty and justice for all individuals — will continue to inspire and guide us because they form the core of our Constitution. The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit inheres in the aspirations not only of all Americans, but of all the people throughout the world who yearn for dignity and freedom.

13. Lester, supra note 1, at 561.
Tribute to Justice William J. Brennan, Jr.

Justice Daniel J. O'Hern*

I am honored to be asked to write a tribute to Justice William J. Brennan, Jr. for the Nova Law Review. One of the most difficult aspects about a personal encounter with this most warm human being is the realization that we are in the presence of one of the great figures of the twentieth century.

Should you go to the United States Supreme Court Building in Washington, D.C. you will find a small museum in the basement with a majestic statute of John Marshall. And in the hallway upstairs are the busts of the Chief Justices who have served the Court over its years. Those somber faces evoke our customary idea of great jurists. Justice Brennan eludes this stereotype. His charming Irish wit and engaging warmth have never seemed to be attributes that could be carved into marble.

Yet Justice Brennan was the Senior Associate Justice of the United States Supreme Court since the retirement of William O. Douglas in 1975. Appointed by President Eisenhower in 1956, Justice Brennan served on the Court longer than all but a handful of Justices. Marshall and Story sat on the Court some thirty-four years. Justice Brennan was in his thirty-third year when he announced his retirement.

Although the era of greatest change in that span is known as that of the "Warren Court," Justice Brennan often led the way with his opinions on issues critical to the direction of the Court. Chief Justice Earl Warren's biographer has recognized Justice Brennan as the Chief Justice's most capable lieutenant and the one to whom "the Chief Justice was to assign the opinions in some of the most important cases decided by the Court." This period could perhaps be better called that of "the Brennan Court."

Many of that Court's decisions provoked strong criticism and controversy when they were handed down. Yet the words "Miranda warning" are easily understood and casually accepted by television viewers today who cannot recall the controversy evoked by the Court's decision

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in *Miranda v. Arizona*\(^1\) requiring police to inform a suspect of the right to remain silent and to have the assistance of counsel. It is hard for us to recall today that decisions such as *Gideon v. Wainwright*,\(^2\) mandating counsel for the indigent in criminal cases, or *Mapp v. Ohio*,\(^3\) protecting citizens from warrantless searches, came in the aftermath of one of the most politically repressive periods in American history. Artists, writers, public officials, could then be blacklisted, essentially barred from society, if their views did not conform to the prevalent party line. So great today is our self-confidence as a nation in the right of each of our citizens to speak and write freely that even the most repulsive speech, even the burning of a flag, is constitutionally protected.

I do not think that I exaggerate when I suggest that Justice Brennan is one of the most influential persons of the twentieth century in or out of the law. His unrelenting respect for human dignity and individual rights in the face of bureaucratic forces of government has carried the day in our country. By one of those ironic turns of fate, those from the right who have most denounced his views may be reaping the greatest benefits of Justice Brennan's respect for freedom and individual rights. I say this because the yearnings for self-government that we have seen in Russia, in Poland, in China, in Eastern Europe — indeed, throughout the world — express a burning desire for the freedom that we often take for granted in our society, but which has been so carefully preserved and nurtured by Justice Brennan.

Like many Americans, I accepted, with insufficient reflection, Justice Brennan's contributions to the life of the law, but I have had the good fortune in recent years to be in attendance at various ceremonies in his honor and have seen the respect, bordering on awe, in which he is held by law students, lawyers, and judges, even by those who probably would have never shared his opinions if they had been in the same position of power. These experiences revealed to me the shining light that Justice Brennan has upheld for all in shaping many of the freedoms which we now enjoy. And every time I visit with him I learn something more. I had occasion recently to attend a lecture on his contributions to the law (will you believe it?) of land-use planning. His overarching principle of decision — that the Constitution protects people against their government — means that government may no more invade the

\(^1\) 384 U.S. 436 (1966).
\(^3\) 367 U.S. 643 (1961).
property rights of citizens than it may invade their personal rights.

And, finally, in the field of international human rights, which is the subject of his 1987 speech at the Columbia Law School Bicentennial, he explains how the Jeffersonian and Madisonian ideals enshrined in our Constitution and Bill of Rights provide a charter for freedom throughout the world. How paradoxical it must seem to the conservative right, which has denounced him so often, that these ideals so long nurtured by Justice Brennan should be the wellspring of freedom for leaders throughout the globe. Did not Vaclav Havel, the poet, playwright, and political leader of Czechoslovakia, express in his speech to the United States Congress that world-wide yearning for freedom under law that Justice Brennan has come to symbolize? Speaking of our constitutional documents before the United States Congress he said, "They inspire us all. They inspire us despite the fact that they are over two hundred years old. They inspire us to be citizens." Did not Nelson Mandela, the long-imprisoned leader of the South African freedom movement, express the same respect for our constitutional ideals? He said:

We fight for and visualize a future in which all shall, without regard to race, color, creed or sex, have the right to vote and to be voted into all elective organs of state. We are engaged in struggle to ensure that the rights of every individual are guaranteed and protected, through a democratic constitution, the rule of law, an entrenched bill of rights, which should be enforced by an independent judiciary, as well as a multi-party political system.5

Is not the preservation of the Bill of Rights by an independent judiciary the enduring legacy of Justice Brennan’s life on the Court? This was the example that he gave.

In Justice Brennan’s words to us, published here today for all to read, he exhorts us that “if we are to continue to be an example to the nations of the world, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity.”

Leaders yet to be born throughout the world will be nurtured by the ideals of the American Constitution if we but follow the course that Justice Brennan has charted for us.

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Thirty-four years is a long time in the life of a man, and even of our nation. I wish it had been longer.

Justice William J. Brennan's years on the Supreme Court reach back to a Constitution that was shaped by a different vision than our Constitution today. When Justice Brennan was nominated by President Eisenhower in 1956, the first Brown v. Board of Education\(^1\) had only been decided two years before. The "all deliberate speed" formulation of the second Brown v. Board\(^2\) was a year old. States were constitutionally free to weight the votes of their citizens as unequally as they pleased,\(^3\) so long as they did not engage in deliberate and grotesque racial gerrymanders.\(^4\) The states were under very limited constitutional obligation to provide lawyers to those accused of crimes but unable to pay for representation.\(^5\) The practices of the police in investigating criminal behavior were largely uncontrolled by the Constitution.\(^6\) Evidence seized illegally by state police was admissible in criminal trials.\(^7\) Federal habeas corpus had limited power to free state prisoners convicted and imprisoned after trials that violated federal constitutional standards.\(^8\) State defamation laws provided little protection to untruthful but non-malicious statements about public figures.\(^9\) States were free to prohibit the sale of contraceptives, and even to prohibit the giving of advice concerning their use.\(^10\) States were free to criminalize a wo-


man's decision not to bear an unwanted child.\textsuperscript{11} The federal and state
governments were constitutionally free to discriminate against women
in employment and other matters.\textsuperscript{12}

During his thirty-four years on the Court, Justice Brennan helped
to shape the Constitution under which we now live. This brief apprecia-
tion is far too short to analyze in detail his contribution, but I can
sketch its outline.

Justice Brennan's approach to constitutional adjudication was a
sort of eclectic intentionalism. He was faithful to the vision of the Con-
stitution contained in the document itself, but the method by which he
determined that vision was pragmatic, catholic (using the word in its
non-sectarian sense), and aspirational. Justice Brennan did not pretend
that the narrow and specific "original intent" of the framers could de-
termine the course of constitutional adjudication. This, for him, was the
"facile historicism" of "persons who have no familiarity with the his-
torical record."\textsuperscript{13} Nor was constitutional adjudication determined by a
personal vision, but rather by a faithful "public reading"\textsuperscript{14} of the text
of the document, "public" both in the sense of a reading conducted in
public view and in the sense of reading on behalf of the public. That
reading was informed by the past but shaped by the present:

We current Justices read the Constitution in the only way that
we can: as Twentieth Century Americans. We look to the history
of the time of framing and to the intervening history of interpreta-
tion. But the ultimate question must be, what do the words of the
text mean in our time? For the genius of the Constitution rests not
in any static meaning it might have had in a world that is dead and

\begin{itemize}
\item \textsuperscript{11} Compare \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\item \textsuperscript{12} Compare \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973); \textit{Craig v. Boren}, 429
U.S. 190 (1976).
\item \textsuperscript{13} Brennan, \textit{The Constitution of the United States: Contemporary Ratification},
19 U.C.DAVIS L. REV. 2, 5 (1985) (speech given on October 12, 1985, at Georgetown
University as part of its Text and Teaching Symposium). When Justice Brennan gave
this speech, it was widely thought to be a direct response to Attorney General Edwin
Meese, who had advocated a jurisprudence of original intent in a July 9, 1985 speech
to the American Bar Association. See, e.g., Taylor, \textit{Brennan Opposes Legal View
Urged by Administration}, N.Y Times, Oct. 13, 1985, at 1, col. 2. It is obvious that
Justice Brennan's remarks were relevant to the ongoing debate about the proper role of
original intent in constitutional adjudication, but in fact his speech had been prepared
before Attorney General Meese spoke to the bar association and his remarks were not
directed specifically to the Attorney General.
\item \textsuperscript{14} See Brennan, supra note 13.
\end{itemize}
gone, but in the adaptability of its great principles to cope with
current problems and current needs.18

Justice Brennan’s constitutional vision is necessarily complex, as
complex as the government constituted by the document. We may dis-
cern two primary strands.

First, Justice Brennan had a deep concern for the proper structure
and operation of government, which he combined with a sense that the
Constitution has meaning beyond the bare words of the text. Many
provisions — for example, that the President be a “natural born Citi-
zen” and have “attained to the Age of thirty five Years”;16 that mem-
ers of the House of Representatives be “chosen every second Year”;17
and so forth — have such obvious applications that judicial interpreta-
tion has been, and likely will always be, unnecessary. But other parts of
the Constitution are much less determinate, almost constitutional
truths in search of a text. As Chief Justice Hughes wrote in Principal-
ity of Monaco v. Mississippi:18 “[b]ehind the words of the constitu-
tional provisions are postulates which limit and control.”

Justice Brennan’s opinion for the Court in Baker v. Carr10 is at the
heart of the constitutional vision of the Warren Court. Chief Justice
Warren, in retirement, called it the most important decision of his time
on the Court.20 Baker v. Carr, of course, held the question of numerical
malapportionment of state legislatures a justiciable question, and was
soon extended to the national legislature as well.21 Justice Frankfurter
dissent ed vigorously.22 Justice Brennan, a Harvard Law School gradu-
ate, takes great delight in telling the reaction of Justice Frankfurter, a
former Harvard Law School professor, to his new colleague on the
Court: “I always taught my students to think for themselves, but Bren-
nan takes it too far.”

The vision of Baker v. Carr was that of an activist judiciary, but it
was an activism based on a democratic vision of the equality of citizens
and the primacy of popular power. The decision quite deliberately re-
placed the previous constitutional order, and it did so without the com-

15. See Brennan, supra note 13.
18. 292 U.S. 313, 322 (1934).
22. Baker, 369 U.S. at 266 (Frankfurter, J., dissenting).
pulsion of a clear textual mandate. But for Justice Brennan, it was not the personal vision of the individual justices that produced *Baker v. Carr*, for “[w]hen Justices interpret the Constitution they speak for their community, not for themselves alone.”  

And it was not a decision arrogating power to the judiciary. Rather, it was fundamentally a decision empowering and legitimating legislative power by requiring that legislative bodies be elected in a manner that accords with the deepest ideals of American democracy.

Justice Brennan’s constitutional vision of the relation between the state and federal governments cannot be captured in a single formula. He read the Constitution to prefer national solutions to national economic problems, at least where the national political process had indicated its solution.  

But where the state and federal government each had plausible claims to regulate private economic behavior, he was reluctant to impose a national solution as a stand-in for the national political solution that Congress could have, but had not, supplied.  

He read the Constitution to require national solutions to the problem of protecting individual rights against government, siding consistently with those who found key provisions of the Bill of Rights incorporated into the fourteenth amendment and applicable against the states. But where the national Constitution did not provide a protection of individual rights, Justice Brennan actively encouraged the state judiciaries to

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find that protection in their own state constitutions. 28

Our federalism is uniquely American. It is not a system for its own sake, but rather a system whose genius is that it can always be used for substantive aims beyond itself. Justice Brennan had a more direct understanding of this than most. He started his judicial career as a state court judge in New Jersey for six years, the last two of them on the New Jersey Supreme Court. I worked for Justice Brennan during October Term 1976. I remember the pride with which he recalled his opinion for the New Jersey Supreme Court in State v. Fary 29 twenty-one years earlier, stating that a criminal defendant was privileged from having self-incriminating grand jury testimony used against him if he had been a target of investigation, even if he had failed to make an affirmative claim of that privilege while he was being questioned. Justice Brennan carefully inserted a citation to State v. Fary in his dissent to United States v. Washington, 30 in which the Court allowed such self-incriminating testimony to be used. He did not indicate in his dissent the author of State v. Fary. One would have had to have been an unusually thorough student of the Court to know that the state “laboratory” in which the case was decided was the Justice’s own. 31

Second, Justice Brennan was deeply concerned about the relation between the government and private individuals. The relationship goes both ways. Private citizens affect and control the government. And the government, for its part, acts directly on private individuals, both conferring benefits and inflicting pain. As much as any person who has ever sat on the Court, Justice Brennan has sought to provide the tools by which we may both control our government and protect ourselves from it. In New York Times Co. v. Sullivan, 32 Justice Brennan wrote for the Court, holding that damages cannot be recovered by a public figure for false and defamatory speech unless uttered with “malice.” And in Dombrowski v. Pfister 33 he provided the phrase “chilling effect” by which we now describe and assess constraints on the exercise of free speech. In both cases, we see Justice Brennan equipping the citizenry

33. 380 U.S. 479 (1965).
for self-government and for the control of their governmental institutions.

In a separate line of cases, Justice Brennan tried, usually successfully, to protect individual rights by controlling government through direct judicial order and holding it accountable for harm it has caused. In *Green v. New Kent County School Board* he spoke for the Court in saying, "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." Justice Powell, who at the time of *Green* was active in school board affairs in Richmond, Virginia, later told Justice Brennan that it was this opinion, more than any other, that signalled to those resisting desegregation in the south that the Supreme Court really meant business. *Monell v. Department of Social Services*, in which he persuaded his colleagues that 42 U.S.C. § 1983 provided for damage recoveries against subdivisions of the state, was a notable triumph. It encapsulated the idea that government should compensate for harm it has caused, and that government should be deterred from wrongdoing to the extent that damage awards can do so. Justice Brennan would go farther still, and effectively do away with the sovereign immunity of the states themselves in cases where the states have violated protected federal rights. In *Atascadero State Hospital v. Scanlon*, Justice Brennan laid out in eloquent detail the historical case for reading the Eleventh Amendment not to bar suit in federal court, but his more conservative colleagues, who are ordinarily vigorous in insisting that the the Court be governed by the intent of the framers, declined to follow Justice Brennan’s lead.

In a wide range of cases, Justice Brennan has protected individuals from the coercive power of government. The most numerous are criminal procedure cases protecting the rights of the accused. Out of the many cases, I choose *Fay v. Noia* which was effectively overruled by the Court in 1976. Justice Brennan wrote for the Court in *Fay*, establishing the principle that a state prisoner could not be foreclosed by a state procedural rule from raising a federal constitutional objection on

federal habeas corpus unless he had "deliberately bypassed" the opportunity to raise the question in state court. This was classic Brennan. At one level is theory: Constitutional rights are too important to be lost in a web of procedure and technicality. At another level is practice: In the real world, defense lawyers do make procedural mistakes to the detriment of their clients. And at the heart is a concern for fundamental justice: Such mistakes should not be held against a client in a criminal case unless their cure poses a serious threat to the state's ability to administer its criminal justice system.

The most controversial are the cases in which the Court has protected private decisions of individuals in domestic and reproductive matters against interference by the government. Of these, the most notable is *Roe v. Wade*, in which the Court struck down a Texas statute criminalizing the decision of a woman to terminate an unwanted pregnancy. The case is, of course, about freedom from state compulsion. But there is more to it than that. With the freedom from government control comes the responsibility of individuals for their own decisions. The constitutional faith of the Court, and of Justice Brennan, is that the Constitution preserved for individuals the freedom to make these profoundly important choices, informed by their own moral and religious views. This respect for the dignity, integrity, and deep seriousness of the private decisions of our citizenry lies at the heart of the privacy cases.

Two years years ago, Justice Brennan and his wife, Mary, came to Boalt Hall for the Justice to judge a moot court. My wife, Linda, and I drove the Justice and Mary back and forth between Berkeley and their hotel in San Francisco. Linda said at the time that she was nervous about driving through the city and crossing the Bay Bridge because we were carrying a "national treasure" in our car. (As it turned out, the bridge didn't go down until a year later.) We do not have a formal system in this country, as they do in Japan, for formally designating individuals as national treasures. But if we did, Linda (and I) would be first in line to nominate Justice Brennan.

The Justice had slightly over one hundred law clerks during his thirty four years on the Court, the earliest of whom are now older than the Justice when he first took his seat. All of us will tell variations of the same story. The Justice is a warm and affectionate man. He was quick to listen to us and slow to tell us we were wrong. He has an

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*39. 410 U.S. 113 (1973).*
amazingly retentive memory and a lightning fast analytical capacity, yet at the same time was patient with clerks, who were, on many days and on many topics, little more than law students. He helped and advised virtually all of us in the years following our year clerking for him. He instructed us by his example how a genuinely good person conducts himself in both his professional and personal life. And he inspired us all by the strength and wisdom of his “public reading” of the Constitution, faithful not to his personal vision and personal predilection but to his understanding of the meaning of that document in our government and our history.
Dear Boss, A Law Clerk’s Tribute to Justice Brennan

E. Joshua Rosenkranz*

Dear Boss,

An unfamiliar voice on my answering machine was the first to tell me you retired. He claimed to be a booker from Nightline who wanted to ask a former law clerk some background questions about you. Bad joke, I thought. The next message, a commiserating friend bearing the same report, convinced me otherwise. Bad dream. Countless messages repeated the theme. Try as I might, I could not rouse myself. The harsh reality crept in: Bad news.

I did not return any of my numerous messages that day. As to Ted Koppel, he would understand that I would rather speak with his booker next time, when he bears good news. As to my friends and colleagues who offered empathy, I was grateful. But I doubted that they would understand how I felt, and I lacked the words and the energy to articulate it. It has taken me until now to assimilate the barrage of thoughts and emotions your retirement triggered. Even now I write with the disheartening caveat that my words could never do you justice. I pray only that they do not cross the line separating heartfelt homage from maudlin mush.

In the moments after I eased the telephone receiver into its cradle, I was puzzled not so much by your decision to retire as by my own profound sense of loss. I thought I had prepared myself for the news. At times, part of me even wished it would arrive already. After thirty-four years wedded to the Supreme Court — forty-one years to the bench — you deserve some time to yourself. And after seven years wedded to each other, Mary and you deserve some time together. So I would never begrudge you the rest you so richly deserve. Nevertheless, the news left me with a void. While I probably could not have articulated the loss precisely, I knew it was different from the loss that so many in the general public felt.

Like others, I worry about the future of the law. From any legal perspective, your retirement is a loss. The Court’s liberal minority lost

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its anchor. The American people lost their most loyal and vocal advocate for equality, liberty, privacy, and justice. Every downtrodden individual in the country — the homeless, the needy, the victim of bigotry, the religiously oppressed, the political gadfly, the handicapped, the immigrant, the criminal defendant, the prisoner — lost a sympathetic ear. The Court lost whatever balance it had; you would no longer be there to defy all odds and whomp up an occasional astounding victory as if out of a top hat. Each of these losses is distressing.

As profound as these losses are, however, they are not the losses that I most lament. Perhaps that is because everyone else is so preoccupied with the survival of the Republic that my anxiety would be redundant. More likely, it is because I consider the hysteria exaggerated.

I share (or, more accurately, I inherited) your faith in the Court. I therefore have little fear that anyone could dismantle the jurisprudential fortress you built over a lifetime. You built it of durable stuff — compassion, justice, and eternal truths. The passage of time and the heat of debate have served only to temper it. The onslaught of eager new judicial personnel may fret your fortress’s parapets, but will never penetrate its walls.

Nor am I among those who bemoan your retirement as if it squelched your dissenting voice. Even if you never utter another word of comment on the law (an unfathomable thought, indeed), your voice, immortalized in 140 volumes of United States Reports, will continue to “soar with passion and ring with rhetoric.”¹ Like you, I am optimistic that your dissents of yesterday will become next century’s laws. You have penned much of the script that the Court will follow when it hands down edicts to my children.

So, you see, Boss, my confidence that the law and the Court will survive your departure is not so much a slight as it is a salute to the central role you have played.

Like everyone who has known you, I was saddened also by your acknowledgement that poor health forced you off the bench. It goes without saying that I feel your pain.

I confess that your submission opened up an emotion other than pure empathy, a feeling as disturbing as it was elusive. It seemed at first incongruous. Before I met you, I thought of you as a superhero — a warrior of boundless strength, undying commitment, limitless compassion, incisive intellect. You reinforced and deepened that impression

with every contact we had. As infantile as it may seem (especially for one as irreverent as I), I was never willing to entertain the possibility that any harm could penetrate you. When you publicly acknowledged a weakness, I thought you would have to relinquish your superhero status.

That thought passed quickly though. You could still be my superhero without being superhuman. In fact, that made so much more sense. In the first place, you have always been more content to view yourself as a “flesh-and-blood human being[]” than as a “demigod[] to whom objective truth has been revealed.”² More importantly, it is your humanity, limitations and all, that makes you so worthy of admiration and emulation. Your personal victories are all the more awe inspiring when viewed in light of constraints you overcame to achieve them; the most extraordinary feat becomes unremarkable when the absence of obstacles preordains success. Similarly, I could never even aspire to emulate you without some sense that you and I suffer some of the same human constraints.

The sense of loss that struck me hardest and has lingered longest stems from something that none of the pundits or commentators, in all their hysteria, ever mentioned. Not that I can blame them for missing it. It derives from an experience they never had: Your retirement means the end of a line of Brennan law clerks.

I wonder whether you could ever fully appreciate how deeply you have touched each of us law clerks — 109 in all. I trust that you could sense our love and admiration better than I am about to describe it. I went to law school because I wanted to be Atticus Finch, Harper Lee’s unflinchingly ethical and kindhearted lawyer who undertook the hopeless defense of a black laborer unjustly accused of raping a white woman.³ Law school taught me perhaps how to reason like a lawyer, but Atticus taught me what it means to be a lawyer.

When I joined your Chambers one year out of law school, you became my Atticus of the judiciary. I already knew how judges reason, but you taught me what it means to be a judge. Not until I saw you in action did I fully understand that the judge’s final question in every case should be not, “is this logical?,” but “is this right?” As you have so eloquently put it, “[s]ensitivity to one’s intuitive and passionate responses, and awareness of the range of human experience, is . . . not

³. H. LEE, TO KILL A MOCKINGBIRD (1960).
only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."\(^4\) You taught me that "the greatest threat to" liberties "is formal reason severed from the insights of passion."\(^5\) A judge "who operates on the basis of reason alone" can never adequately address "[w]hether the government treats its citizens with dignity," because such a judge cuts himself off "from the wellspring from which concepts such as dignity, decency, and fairness flow."\(^6\)

Your opinions are rife with illustrations of these principles. For me these principles come alive more in your approach to the death penalty than anywhere else. It should be no surprise to anyone that you were the first on the Court to argue that an execution is, under all circumstances, "cruel and unusual punishment."\(^7\) That proposition followed naturally from your conviction that everyone, "even the vilest criminal[,] remains a human being possessed of common human dignity,"\(^8\) and that the state's "calculated killing of a human being" amounts to the most cynical "denial of the executed person's humanity."\(^9\)

You penned those words in 1972, fifteen years before my clerkship began. Yet the words, and the sentiments they carried, recurred more often during my year at the Court than anything else you wrote. Whenever a state has executed a human being, you have issued the same words, purporting to convey no more than the reaffirmation that you were "[a]dhering to [your] view." In the dark-eyed night, when most executions occurred, I often telephoned the Clerk's office to convey that you were filing "the standard dissent," as if there was something prosaic about it: Another death, another dissent.

There wasn't. The words remain the same, but each execution is a wrenching experience in your Chambers. Each execution sends another pang through your heart. Even though some find you "simply contrary, tiresome, or quixotic,"\(^10\) you refuse to play any part in an injustice that so thoroughly hacks away at "common human dignity." Your repeated incantation in the face of majority will is your way of saying what Atticus captured in the precept, "before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority

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4. Id. at 10.
5. Id. at 17.
6. Id. at 21-22.
7. U.S. Const. amend. VIII.
9. Id. at 290.
rule is a person's conscience."

You defend that line with the vigor and valor of a knight defending the king's palace. I learned this one day when I handed you a draft of a dissent from the Court's decision to deny a stay of execution. It was a particularly troublesome case. This indigent prisoner would not be facing execution if his court-appointed trial lawyer had been minimally competent. The last paragraph of my draft contained the most spirited attack that I had ever drafted. I said to you, "Boss, please focus closely on the last paragraph. I think it may cross the line." You took the draft with one hand and held my arm with the other and interrupted, "Josh, when it comes to state-sponsored death, there is no line."

We lost that one. The prisoner met his death on schedule at precisely 1:00 a.m. (midnight in Louisiana). At 1:45 a.m., I left my office. On my way home I gazed up at the inscription that capped the Court's towering columns: the facade of "Equal Justice Under Law."

The hypocrisy still burned in my mind the next morning, when I delivered the news to you. I asked you the same question Atticus's son asked after the jury of twelve white men returned a cowardly guilty verdict: "How could they do it, how could they?" Atticus's answer was: "I don't know, but they did it. They've done it before and they did it tonight and they'll do it again and when they do it — seems that only children weep." ¹³

Your response, eloquent in its silence, was at the same time disturbingly similar and comfortingly different. First, you held up five fingers, a gesture whose meaning we understood all too well: "Five justices have the power to do whatever they want. They've done it before and they did it last night and they'll do it again." Then you uncharacteristically turned away from me. As you did, I saw a tear in the corner of your eye. To this day, I am not sure why you tried to hide it from me. Didn't you realize that it meant everything to me to know that Atticus was partially wrong? Sometimes the children are not alone.

Remarkably, though, your tears are never bitter or prostrate. Through thick and thin, you retain your optimism that one day — and it will be "a great day for our country, [because] it will be a great day

¹² Brennan, supra note 1, at 437.
¹³ H. Lee, supra note 11, at 215.
for our Constitution”\textsuperscript{14} — the Court will look back at the enormity of its mistake and adopt your view. That optimism, as much as your compassion and keen intellect have combined to make you a model judge.

As much as you taught me about being a judge, you taught me even more about being a human being.

My mind wanders to you often, more often these days than even when I first left those marble halls. The picture of you that usually comes to mind is not the picture one might expect. It is not the portrait that peers at me from the wall of my office, that robed figure who would look austere but for the sparkle in his eyes. It is not the image of you on the bench, listening intently to every twist of every argument, hanging on to every word of your colleagues’ questions for the slightest hint of their inclination. It is not even the picture of you that I grew most accustomed to seeing: the Boss, dwarfed behind that enormous double desk that used to be Louis Brandeis’, poring over an opinion.

The picture that comes to mind most often is this: You are talking to someone in the hallway or on the stairs — a guard, a gardener, a janitor. You pick up your previous conversation with him, and remember it as if he were your closest friend. You talk about him, and never about yourself. You use his name in every sentence. Or you call him, “Pal.” You grasp onto his arm while talking, and you never let go as long as the conversation lasts. (We used to call it “taking the pulse.” I would bet that each of your law clerks at some point dreamt up some inane topic to discuss with you, just to feel the assurance of your grip.) As you part, you reiterate how delighted you are to have seen him. And he believes that he has made your day just by talking to you. He feels that way not because you put on a good act, but because it is true.

That same tenderness permeates every one of your relationships, whether with friends, colleagues, family, or passing acquaintances. Your law clerks all felt it. I will never forget the first time I handed you a proposed draft of a dissent. I had spent weeks planning it, researching it, and writing it. In keeping with our routine, my three co-clerks all tinkered with it before you laid eyes on it. You took the draft and exclaimed, “Oh, splendid, Josh. Thank you very, very much.” To hear your tone, one would have thought I had just contributed profoundly to the law.

I am embarrassed to confess that, for a moment, you had me believing that was true. Just then something drew my eyes to the book-

shelf to your left. The bottom three shelves were filled with those tired old books — probably 50 or so — with dusty red bindings. Each bore the same title: “The Opinions of Mr. Justice Brennan.” The first one was dated 1956. As I turned to leave, my head still in the clouds, the absurdity hit me. You were thanking me, as if the opinion would never have been written but for me; as if the U.S. Reports would have had twenty-three blank pages under the caption, “BRENNAN, J., dissenting.” You really meant it. But you had been authoring Supreme Court opinions without my help for six years longer than I had been alive.

Even so, no matter how many corrections you make; you return every draft, emblazoned with the word, “SPLENDID,” followed by a battalion of exclamation points. (The running joke is, we can tell how much you really like a draft by counting the exclamation points. Any less than four is the Brennan equivalent of, “this sucks.”)

Your gentleness and generosity to those around you is surpassed only by your graciousness. At the last clerk’s reunion, one of my predecessors recounted a particularly telling illustration, with which we are all familiar. The only task, outside of our legal work, that you ever permitted us to perform for you was to prepare your coffee when we met with you each morning at 9:00 a.m. sharp. Like the Levites’ offerings, it became a ritual that was passed down from one “Coffee Clerk” to the next. “Decaf, black, no sugar,” was the formula. “Be sure it is very weak, like dishwater.” Finally, “always check to see how much he drank, because he will never tell you if you’ve done it wrong.”

There is a humorous, and equally telling, epilogue to this story. I was the designated Coffee Clerk among my generation of clerks. (The honor fell automatically to the only one of us who was unmarried and therefore had no claim of entitlement to be in bed at 7:30 a.m., when you arrived at the Court.) You polished off the cup on the first day. I congratulated myself heartily for mastering the technique, and painstakingly adhered to the same formula every morning for a year with equally satisfying results.

It was not until two years later that I learned the truth, Boss. The revelation came from your last Coffee Clerk. As she tells it, one morning the whole group went down to the cafeteria because the Chambers coffee machine was on the blink. She noticed you serving yourself undiluted decaf, and adding milk and sugar. Only through rigorous cross-examination did she extract your confession that this was how you have always preferred your coffee. As an avid coffee drinker, I am incredulous at the grace of a man who could tolerate years of drinking our tepid concoction just to avoid any possibility of embarrassing us.
All these reminiscences bring me back to a comment that a friend made not too long ago. It referred to the time you, Mary, and I went out to dinner in Georgetown. We were with close friends, so I abandoned the formality that I might have displayed in public, and called you, "Boss" — like we all did in Chambers — rather than "Justice." Months later, one of our dinner companions commented to me that the title sounded too informal, even disrespectful. I explained that he could not have been further from the truth: "Boss" is a term of endearment, a way of expressing both our love and our deep admiration for you. "Boss" evokes all those wonderful images of you — on the bench delivering opinions brimming with passion and dissents rife with optimism; behind your massive desk, scrawling, "Splendid," on a clerk's draft; listening patiently to an admiring acquaintance; advising and caring for your clerks. At least eleven other people in the building could be called "Justice," but no one else merits the title, "Boss."

Just after you resigned, The New York Times interviewed a would-be law clerk, who no longer had a Brennan clerkship to complete her legal education. Her closing thought was this: "His clerks called him 'Boss' and I don't think I ever will. I felt kind of sad that that would never happen." I suspect she could not have appreciated the full significance of her words.

I feel privileged to be among the group who will always call you "Boss." I lament the loss for all those would-be law clerks over the years who will not have the chance.

I. Introduction

On July 26, 1990, in a joyous ceremony on the south lawn of the White House, President George Bush signed the "Americans with Disabilities Act of 1990" into law. Before over 2000 invited guests, the President declared:

The Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today . . . . It promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation and telecommunications.  

In signing the Americans with Disabilities Act (hereinafter "ADA") into law, President Bush fulfilled a campaign pledge to provide people with disabilities with the same civil rights protections applicable to women and minorities.
The Administration strongly supported enactment of the ADA because of the staggering social and economic cost of disability dependency and discrimination. As Vice President, George Bush stated:

On the cost side, the National Council on the Handicapped states that current [federal] spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks cost[s] society literally billions of dollars annually in support payments and lost income tax revenues.4

A private economist recently estimated that in 1986 total federal, state, and private expenditures on disability exceeded $169.4 billion annually.5 Discrimination undermines the governmental efforts at rehabilitation and education of disabled children and adults. The federal and state governments spend billions of dollars annually on such programs, the beneficiaries of which then find their entry or re-entry into the workforce barred by discrimination. The ADA, combined with simple self-interest, should begin to break down the barriers to opportunity for people with disabilities. A shrinking labor force caused by the aging baby boom generation compels business to turn to segments of society that have not participated fully in the labor force, including people with disabilities.6

The need for the ADA is clear. In enacting the Americans with Disabilities Act, Congress made the following findings:

- Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
- Discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- Individuals with disabilities continually encounter various forms

4. Id. at 43 (quoting Statement by Vice President George Bush on Disabled Americans, March 31, 1988 at 2).
6. Id. at 44.
of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;  
- Census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severally disadvantaged socially, vocationally, economically, and educationally;  
- The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and  
- The continued existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.  

As President Bush stated, "the statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America." The Committee reports describe the appalling socio-economic status of individuals with disabilities. The House Committee on Education and Labor made the following comments in its report on the ADA:

According to a recent Louis Harris poll, "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are [not] working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons who are not working, say that they would like to have a job.  

In 1988, men who reported a work disability earned 36 percent less than men with no disability; in the same year women with a work disa-
bility earned 38% less than women without a work disability. Americans with disabilities had a high school drop-out rate three times greater than that of other Americans. Household income for persons with disabilities is also significantly below that of non-disabled persons. Fifty percent of all disabled adults had incomes of $15,000 or less in 1984 as compared with only 25 percent of non-disabled adults. A majority of the people with disabilities who are not working and are out of the labor force depend on insurance payments or government benefits for support.

The ADA was crafted to respond to the principal barriers to equal opportunity facing people with disabilities. With respect to employment, the House Committee on Education and Labor identified the following:

[T]he major categories of job discrimination faced by people with disabilities include: use of standards and criteria that have the effect of denying such individuals equal job opportunities; failure to provide or make available reasonable accommodations; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others; placement into dead-end jobs; under-employment and lack of promotion opportunities; and use of application forms and other pre-employment inquiries that inquire about the existence of a disability rather than about the ability to perform the essential functions of a job.

This article provides an overview of the employment provisions of the ADA, drawing on the statute, its legislative history, and pertinent regulations and case law under the Rehabilitation Act of 1973, as amended.

The employment provisions of the ADA become effective on July 10.
26, 1992, two years after the date of enactment. The substantive requirements of Title I are drawn directly, and in many cases word-for-word from regulations implementing section 504 of the Rehabilitation Act of 1973. These regulations, first promulgated by the Department of Health, Education and Welfare, defined terms such as "handicapped person," "qualified handicapped person," "reasonable accommodation," the definition of discrimination, and the prohibition against certain pre-employment inquiries.

The entities covered by the ADA and its enforcement scheme, on the other hand, are drawn from Title VII of the Civil Rights Act of 1964, sections of which are incorporated into the ADA by reference.

II. Overview of the Act

A. Who Must Comply

Title I applies to an employer, employment agency, labor organization, or a joint labor-management committee, collectively referred to as "covered entities." The employment prohibitions are phased in over a four year period to give smaller employers more time to learn of their obligations. Beginning on July 26, 1992, the Act applies to employers with 25 or more employees; on July 26, 1994, this coverage is extended to employers with 15 to 24 employees.

The term "employer" includes virtually every form of business organization, as well as state and local governments, that employs the requisite number of individuals for each working day for 20 or more calendar weeks in the current or preceding year. Certain entities are exempted from coverage. The federal government, already covered by similar requirements under the Rehabilitation Act of 1973, is not covered. Indian tribes and tax-exempt bona fide private membership clubs are also exempt.
B. *What Employment Practices are Affected*

The ADA prohibits discrimination in all stages of employment, including "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." This statutory list of employment practices is not exclusive; Congress intended to regulate all of the employment practices covered by the regulations implementing section 504 of the Rehabilitation Act of 1973.

C. *Who is Protected from Discrimination by the ADA*

Instead of providing a list of conditions constituting a covered disability, the ADA utilizes a functional definition that is almost identical to the definition used in the Rehabilitation Act, as amended in 1974. The term "disability" is defined broadly to include not only persons with actual handicaps but persons who have a history of or who are perceived as disabled.

1. Persons with actual disabilities

The first category of persons protected are those who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Regulations implementing section 504 of the Rehabilitation Act provide a definition of several key terms used in the ADA's definition of disability and are cited with approval in the Committee reports. As in the section 504 regulations, the term "impairment" encompasses a wide range of diseases, conditions, infections and disorders, including: HIV disease; orthopedic im-

23. *Id.* at § 102(a).
26. *Id.*
27. Section 3(2) of the Act defines "disability" as follows:
   The term "disability" means, with respect to an individual—
   (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
   (B) a record of such an impairment; or
   (C) being regarded as having such an impairment.
28. The House Committee on Education and Labor states:
pairments; vision, speech, and hearing impairments; multiple sclerosis; muscular dystrophy; cerebral palsy; mental retardation; cancer; heart disease; diabetes; drug addiction and alcoholism; and many other conditions. 29 Certain personal characteristics, such as age or left-handedness, and economic or social disadvantages, such as illiteracy or conviction for a criminal offense, are not "impairments" and are therefore not covered by the Act. 30

The more difficult question is what it means for an impairment to "substantially limit one or more [of an individual's] major life activities." Neither the term "substantially limits" nor the term "major life activities" is defined in the statute. The Committee reports do, however, shed some light on the meaning of this phrase. The House Committee on Education and Labor noted in its report that not all impairments are substantially limiting:

A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. 31

The Committee reports also sanction the list of major life activities provided in the section 504 regulations: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking,

The first prong of the definition includes any individual who has a "physical or mental impairment." A physical or mental impairment means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

House Report, supra note 3, at 51; Senate Report, supra note 24, at 22.

29. Id.
30. Id.
31. House Report, supra note 3, at 52; Senate Report, supra note 24, at 23.
breathing, learning, and working."

In most cases, it will not be difficult to determine whether a person is substantially limited in a major life activity. A paraplegic is substantially limited in walking; a person with mental retardation is substantially limited in learning; a person who is deaf is substantially limited in hearing; and a person with serious lung disease is substantially limited in breathing.

The Committee reports also indicate that mitigating measures such as reasonable accommodation, auxiliary aids or medication should not be considered when determining whether an individual has a disability. Thus, a person who is hard of hearing is substantially limited in hearing even if the hearing loss is corrected with hearing aids, and a person with epilepsy may be substantially limited in one or more major life activities even if the condition is controlled with medication.

Two other categories of the definition protect individuals for whom fears, myths and stereotypes rather than the impact of any impairment have proven to be the basis for discrimination. This subgroup includes persons who have a "record of" a substantially limiting impairment and those who are "regarded as" having such an impairment.

2. Persons with a record of a disability

Persons who have a "record of" a disability include those who have recovered in whole or in part from a disability, such as cancer or mental illness, as well as persons who have been misclassified as having a disability that the individual in fact does not have.

3. Persons regarded as being disabled

More controversial, and difficult to analyze, is the third prong of the definition applying to persons being "regarded as" having a disability. As with the other two categories of the definition, the third category was adopted from the section 504 regulations:

36. *Id.* at § 3(2)(C).
“Is regarded as having an impairment” means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment. 38

The “regarded as” part of the definition covers a person who does not have an actual disability. This includes a person who has no impairment. It also includes an individual with an impairment that does not substantially limit a major life activity if an employer treats the impairment as imposing greater limitations on an individual’s activities than it does in fact. Finally, where an employer treats an individual adversely because of the possible negative reactions of third parties, such as customers, co-workers or insurers, an individual with a non-disabling impairment may also be protected. 39 Being regarded as disabled focuses on the intent and state of mind of others rather than the self-perception of the person with an impairment. 40

Congress recognized that “disability” was not simply defined by physiology but also by the reaction of others to a person’s impairment. Persons with stigmatizing impairments that do not limit a person’s activities may be victims of discrimination because of widespread fears or stereotypes about the impairment or its effect on others. The Committee reports cite severe burn victims as one example of such discrimination. 41 As the Committee reports discuss, the need to define the definition of disability broadly to protect against societal discrimination also was recognized by the Supreme Court in interpreting section 504.

The rationale for this third prong was clearly articulated by the U.S. Supreme Court in School Board of Nassau County v. Arline. 42 The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was

41. Id.
about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. The Court explained: “Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”

The Court went on to conclude:

By amending the definition of “handicapped individual” to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.

4. Denial of a single job for a single employer

Significant conceptual difficulties are raised when the definition of disability is applied to an individual claiming to be disabled only in the major life activity of working as a result of being denied an employment opportunity because of an actual or perceived impairment. It is possible to argue that any adverse employment action taken on the basis of a person’s impairment means that such person was substantially limited in the major life activity of working or regarded as such by the employer. Commentators have attacked this interpretation as expanding the definition of disability to the point of being meaningless, a conclusion reached by at least one court.

The legislative history is unclear and inconsistent on this issue. The House Judiciary Committee acknowledged that factors unique to a particular job or job site that prevented a person from performing a

43. Id. at 283.
44. Id.
45. Id.
particular job because of an impairment did not render the person substantially limited in working, but then noted:

However, if a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. 49

It is not clear from the Committee's example whether the individual with the skin rash is substantially limited in working or some other unspecified major life activity. The Committee also noted: "A person with an impairment who is discriminated against in employment is also limited in the major life activity of working." 50

Cases arising under section 504 have grappled with this question as more and more persons with minor impairments have sought the protection of the Rehabilitation Act after being denied employment or discharged from a job. The weight of judicial authority under the Rehabilitation Act indicates that denial of one job for one particular employer does not establish that a person is substantially limited in working. 51 While a clearly defined legal standard has not yet emerged under the Rehabilitation Act, several courts have looked to the number and

49. HOUSE REPORT, supra note 3, pt. 3, at 29. It is worth noting that the original version of the bill, the "Americans With Disabilities Act of 1988," S. 2345, 100th Cong., 2d Sess. (1988), prohibited discrimination because of a physical or mental impairment, perceived impairment or record of impairment, regardless of whether an impairment substantially limited a major life activity.

50. Id.


However, one commentator directly involved in the drafting of the legislation pointed to certain parts of the legislative history and the minority judicial view under the Rehabilitation Act, and interpreted the definition broadly to cover any individual who is denied a job because of any impairment, no matter how minor the disability. See Burgdorf, supra note 39.
types of jobs from which the individual is excluded, the geographical area to which the individual has reasonable access, and the individual's job expectations and education in order to establish whether a person's employment opportunities are seriously affected by an impairment. 52

The legislative history is only slightly more helpful in determining whether a person is always "regarded as" disabled when denied an employment opportunity by an employer because of an impairment. One committee stated broadly:

A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability. 53

Another Committee noted:

Thus, a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by workers and customers.

This list of frequent workplace concerns is not exhaustive. It illustrates, however, the attitudinal barriers that Congress clearly intended to include within the meaning of "regarded as" having a disabling condition.

disability under the Rehabilitation Act and now under the ADA.

It is not necessary for the covered entity to articulate one of these concerns. In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the employer’s perception is inaccurate, e.g., that he will be accepted by others, or that insurance rates will not increase, in order to be qualified for the job.

For example, many people are rejected from jobs because a back x-ray reveals some anomaly, even though the person has no symptoms of a back impairment. The reasons for the rejection are often the fear of injury, as well as increased insurance or worker’s compensation costs. These reasons for rejection rely on common barriers to employment for persons with disabilities and therefore, the person is perceived to be disabled under the third test.54

Case law arising under the Rehabilitation Act has not always interpreted this aspect of the definition as broadly. For example, in Forrisi v. Bowen,55 the U.S. Court of Appeals for the Fourth Circuit rejected the claim of a utility systems engineer who asserted that he was regarded as handicapped when he was denied a job because his acrophobia prevented him from climbing a ladder. The court, however, concluded that "[f]ar from being regarded as having a substantial limitation in employability, Forrisi was seen as unsuited for one position in one plant—and nothing more.”56 Said the court, “[t]he Rehabilitation Act seeks to remedy perceived handicaps that, like actual disabilities, extend beyond this isolated mismatch of employer and employee.”57 Most other courts have reached similar conclusions.58

54. SENATE REPORT, supra note 24, at 30-31.
55. 794 F.2d 931 (4th Cir. 1986).
56. Id. at 935
57. Id.
5. Persons with a known association with a disabled person

In addition to protecting persons with disabilities, the ADA also prohibits discrimination against a person who is known to associate with a disabled person.\(^{59}\) The provision is limited to persons who are qualified and who suffer discrimination because of their known association with a person whose disability is also known to the employer.\(^{60}\) Efforts to limit the scope of the provision to relationship by blood, marriage, guardianship or adoption were twice rejected.\(^{61}\) The provision is intended to prohibit employers from denying employment to a qualified applicant with a disabled spouse because the employer is under the mistaken assumption that the applicant will miss too much work caring for the spouse with a disability. Of course, if the applicant is hired and misses work in violation of the employer’s policy on attendance or tardiness for this reason, the employer is free to discharge the employee for poor attendance and need make no allowance even if the cause of the poor attendance or tardiness is because the employee is caring for the disabled spouse.\(^{62}\)

6. Exclusions from the definition of disability

Excluded from the definition is any person who currently engages in the illegal use of drugs if the employer acts on the basis of such illegal use.\(^{63}\) Also excluded as not constituting impairments are homosexuality and bisexuality. Additionally, transvestitism, transsexualism, voyeurism, pedophilia and certain other gender identity disorders are not covered. Persons who are compulsive gamblers, have kleptomania or pyromania, and persons with psychoactive substance use disorders resulting from current illegal use of drugs are also not protected from discrimination by the Act.\(^{64}\)

D. Who is a "Qualified Individual with a Disability?"

The ADA protects only those persons with a disability who are

\(^{59}\) Americans With Disabilities Act § 102(b)(4).
\(^{60}\) HOUSE REPORT, supra note 3, pt. 3, at 38.
\(^{61}\) Id., pt. 2, at 60-61.
\(^{62}\) Id. at 61-62.
\(^{63}\) Americans With Disabilities Act §§ 104(a),(b), & 510.
\(^{64}\) Id. at §§ 508, 511.
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qualified to perform a particular job in spite of their disability. The statute defines the term to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The individual with a disability must possess the necessary knowledge, skills and physical and mental ability to perform the essential job functions, with or without reasonable accommodation.

Congress provided little guidance on the distinction between essential and non-essential job functions except to indicate:

As the 1977 regulations issued by the Department of Health, Education, and Welfare pointed out "inclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job." 42 Fed. Reg. 22686 (1977). For example, many employers have a policy that, in order to qualify for a job, an employee must have a driver's license even though the job does not involve driving. The employer may believe that someone who drives will be on time for work or may be able to do an occasional errand. This requirement, however, would be marginal and should not be used to exclude persons with disabilities who can do the essential functions of the job that do not include driving.

In determining what functions of a job are essential rather than marginal, Congress directed that a job description, prepared in advance of advertising or interviewing for a job, be considered as evidence of what the employer considers to be essential, and that the employer's judgment must be considered. However, both the legislative history of the ADA and case law under the Rehabilitation Act indicate that an employer's judgment is subject to challenge and rebuttal by a

65. Id. at §§ 101(8), 102(a). "[T]his legislation does not undermine an employers ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability."

66. Id. at § 101(8).


plaintiff.\textsuperscript{70}

The definition of "qualified individual with a disability" also indicates that if an individual is not qualified because a disability prevents performance of essential job functions, the individual may become qualified with a reasonable accommodation. That an unqualified person may become qualified through an employer provided reasonable accommodation is a central requirement of disability nondiscrimination law.\textsuperscript{71}

The U.S. Supreme Court adopted a similar two step analysis in \textit{School Board of Nassau County v. Arline}.\textsuperscript{72} First, an employer must determine whether an applicant with a disability can perform the essential functions of the position in spite of the disability and, if not, whether the employer can provide a reasonable accommodation that would permit the individual to perform those functions.\textsuperscript{73} In order to avoid "deprivations based on prejudice, stereotypes, or unfounded fear," courts and administrative agencies "will need to conduct an individualized inquiry and make appropriate findings of fact."\textsuperscript{74}

E. \textit{Qualification Standards and Selection Criteria}

The ADA provides that it is discriminatory to:

us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria as used by the covered entity is shown to be job-related for the position in question and consistent

\begin{itemize}
\item \textsuperscript{70} See, e.g., Hall v. United States Postal Service, 857 F.2d 1073, 1079-80 (6th Cir. 1988); Davis v. Frank, 711 F. Supp. 447, 454 (N.D. Ill. 1989).
\item \textsuperscript{71} Burgdorf, \textit{supra} note 39, at 109.
\item \textsuperscript{72} 480 U.S. 273 (1987).
\item \textsuperscript{73} \textit{Id.} at 287 n.17.
\item \textsuperscript{74} \textit{Id.} at 287. Although recognizing that blanket criteria that exclude an entire class of disabled persons are disfavored because they preclude an individualized assessment of ability, some courts have approved blanket exclusions in particular circumstances: Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), \textit{aff'd}, 865 F.2d 592 (3rd Cir. 1989) (insulin-dependent diabetics excluded from being FBI special agents); Local 1812, American Fed. of Gov't. Employees v. Dep't of State, 662 F. Supp. 50 (D.D.C. 1987) (persons with HIV disease excluded from State Department Foreign Service positions); Sharon v. Larson, 650 F. Supp. 1396 (E.D. Pa. 1986) (visually-impaired persons with bioptic lenses excluded from obtaining drivers license); Anderson v. USAir, 619 F. Supp. 1191 (D.D.C. 1985), \textit{aff'd}, 818 F.2d 49 (D.C. Cir. 1987) (prohibiting blind persons next to emergency plane exits).
\end{itemize}
Drawn from section 504 regulations, this standard is intended to ensure that persons with disabilities are not excluded from jobs by selection criteria that are not in fact necessary for effective job performance. While this limitation on selection criteria bears a distant relationship to the disparate impact theory of discrimination developed by the courts under Title VII of the Civil Rights Act of 1964, it is quite different in several important details. First, unlike Title VII, a statistical showing that a class of individuals has been disparately affected by a neutral standard is not required. The neutral selection criteria need only screen out "an individual with a disability or a class of individuals with disabilities . . . ." As the analysis to the original section 504 regulations indicated, "the small number of handicapped persons taking tests would make statistical showings of 'disproportionate, adverse effect' difficult and burdensome."77

Second, the ADA appears to place the burden of proving that a selection criteria is job related and consistent with business necessity on the employer rather than the claimant, as is currently the case under Title VII. The Committee reports indicate that the burden of proof should be assigned as it is under section 504 implementing regulations which explicitly required employers to justify challenged selection criteria.78 Section 504 case law similarly required employers to show that qualifications and selection criteria were reasonable, necessary and legitimate.79 The Committee reports make clear that employers may still establish physical ability criteria so long as they are job-related:

Under this standard, employers may continue to establish legitimate, job-related physical requirements for a particular position. Thus, for example, an employer may adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is

75. Americans With Disabilities Act § 102(b)(6).
78. HOUSE REPORT, supra note 3, pt. 2, at 72; pt. 3, at 42.
necessary to an individual's ability to perform the essential functions of the job in question. Or, for example, security concerns may constitute valid job criteria. For example, jewelry stores often employ security officers because of the frequency of "snatch and run" thefts. Mobility and dexterity may be essential job criteria in such jobs. 80

Formal job validation studies were not required under the Rehabilitation Act to demonstrate job-relatedness. 81

The Committee reports also instruct how the legitimacy of selection criteria and qualification standards relate to an employer's determination whether an applicant with a disability is qualified with or without a reasonable accommodation:

The three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job are:

(1) the requirement that individuals with disabilities not be disqualified because of their inability to perform non-essential or marginal functions of the job;

(2) the requirement that any selection criteria that screen out or tend to screen out individuals with disabilities be job-related and consistent with business necessity; and

(3) the requirement to provide a reasonable accommodation to assist individuals with disabilities to meet legitimate criteria.

These three legal requirements . . . work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process.

The interrelationship of these requirements of the selection process procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However,

80. HOUSE REPORT, supra note 3, pt. 2, at 56; see also SENATE REPORT, supra note 24, at 27.

81. 45 C.F.R. pt. 84, app. A, at 352 states: "A recipient is no longer limited to using predictive validity studies as a method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related." The Uniform Guidelines on Employee Selection Procedures (UGESP) do not apply to cases arising under the Rehabilitation Act of 1973. 29 C.F.R. § 1607.2(d) (1990).
the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.\textsuperscript{82}

The Committees’ explanation of the interplay was embodied in the statute, which provides that an employer is not liable if a person with a disability is adversely affected in employment because of the application of a qualification standard that is job-related and consistent with business necessity and the person with a disability cannot satisfy the standard with a reasonable accommodation.\textsuperscript{83}

F. Qualifications Relating to the Safety of Others

The ADA also provides that employers may require, as a qualification standard, that an individual not “pose a direct threat to the health or safety of other individuals in the workplace.”\textsuperscript{84} The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.\textsuperscript{85} The ADA’s legislative history indicates that this provision codifies the Supreme Court’s decision in \textit{Arline}.\textsuperscript{86} In remanding the case back to the district court to determine whether a school teacher who had tuberculosis would pose a risk of harm to her school children, the district court was instructed to make:

\begin{quote}
[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk . . . (b) the duration of the risk . . . (c) the severity of the risk and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.\textsuperscript{87}
\end{quote}

\begin{flushright}
\textsuperscript{82} House Report, supra note 3, pt. 2, at 71; Senate Report, supra note 24, at 62.
\textsuperscript{83} Americans With Disabilities Act § 103(a).
\textsuperscript{84} Id. at § 103(b).
\textsuperscript{85} Id. at § 101(3).
\textsuperscript{86} 480 U.S. 273 (1987).
\textsuperscript{87} Id. at 288. On remand, the district court concluded that plaintiff Arline was discharged illegally from her employment in violation of section 504 and the school board was ordered to reinstate her or offer her front pay. Arline v. School Bd. of Nassau County, 692 F. Supp. 1286 (M.D. Fla. 1988). The Conference Report also provides that an employer may:
\end{flushright}

\begin{quote}
take action to protect the rights of its employees and other individuals in
\end{quote}
As in the ADA, the court concluded that if a significant risk of harm was found to exist as a result of the individualized inquiry, the district court must then inquire as to the availability of a reasonable accommodation. The court indicated that “[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be . . . qualified for his or her job if reasonable accommodation will not eliminate that risk.”

The ADA also provides that the Secretary of the Department of Health and Human Services (HHS) shall publish and update annually a list of communicable and infectious diseases which are transmitted by handling food. Any individual having a communicable disease contained on the HHS list may be denied a job involving food handling unless the risk can be eliminated by reasonable accommodation.

G. Reasonable Accommodation and Undue Hardship

The reasonable accommodation requirement is a key element in disability nondiscrimination law. First mandated by Department of Labor regulations issued in 1976 to implement section 503 of the Rehabilitation Act of 1973, the requirement has been a controversial one since its inception. The rationale for such a requirement was clearly articulated by the U.S. Commission on Civil Rights in its 1983 report, Accommodating the Spectrum of Individual Abilities:

Discrimination against handicapped people cannot be eliminated if programs, activities and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to per-

the workplace. Such employer action would include not assigning an individual to a job if such an assignment would pose a direct threat to individuals in the workplace and such a threat could not be eliminated by reasonable accommodation . . . . In determining what constitutes a significant risk, the Conferees intend that the employer may take into consideration such factors as the magnitude, severity or likelihood of risk to other individuals in the workplace and that the burden would be on the employer to show the relevance of such factors in relying on the qualification standard.

H.R. CONF. REP. NO. 596, 101ST CONG., 2D SESS. 60 (1990) [hereinafter HOUSE CONFERENCE REPORT].
88. Arline, 480 U.S. at 288.
89. Id. at 287 n.16.
90. Americans With Disabilities Act § 103(d); see also HOUSE CONFERENCE REPORT, supra note 87.
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mit handicapped people to participate fully have been broadly termed reasonable accommodation.91

The concept of reasonable accommodation as individualizing employment opportunities is applied in the ADA. The ADA defines as prohibited discrimination:

(A) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.92

The Committee reports make clear that determining what accommodation is required necessitates a highly fact specific inquiry.93 As the House Judiciary Committee stated: "A reasonable accommodation should be tailored to the needs of the individual and the requirements of the job."94 Reasonable accommodation, however, is defined in the statute only by a list of examples:

The term "reasonable accommodation" may include—

(A) making existing facilities used by employers readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.95

91. U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, 102 [hereinafter Civil Rights].
92. Americans With Disabilities Act § 102(b)(5).
93. SENATE REPORT, supra note 24, at 31; HOUSE REPORT, supra note 3, pt. 2, at 62; pt. 3 at 39.
95. Americans With Disabilities Act § 101(9).
The statutory list of examples is taken from regulations implementing section 504 of the Rehabilitation Act of 1973, and is not intended to be exhaustive.\textsuperscript{97}

The addition of “reassignment to a vacant position” settles a dispute that arose in the courts under section 501 of the Rehabilitation Act where a majority of courts had held that reassignment was not a form of reasonable accommodation.\textsuperscript{98} The Committee reports indicate, however, that efforts should be made to accommodate the employee in his or her current position before reassignment to a vacant position is considered and that bumping another employee to create a vacant position is not required.\textsuperscript{99}

\textsuperscript{96} See 45 C.F.R. § 84.12(b)(regulation implementing § 504).

\textsuperscript{97} See Civil Rights, supra note 91.


\textsuperscript{99} Senate Report, supra note 24, at 32; House Report, supra note 3, pt. 2, at 63. The Equal Employment Opportunity Commission is proposing to address the issue of reassignment as part of its restructuring of the federal government’s equal employment opportunity complaint process. Under proposed 29 C.F.R. § 1614.203(g) (1990), reassignment is considered an affirmative action obligation of federal agencies pursuant to section 501(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(b) (1988), rather than a part of an agency’s reasonable accommodation obligation. The proposal limits the affirmative duty to reassign to non-probationary employees who are unable to perform satisfactorily in their current positions even with reasonable accommodation. When a non-probationary employee becomes unable, because of a disability, to perform his or her current position, an agency is obligated to reassign the employee to a funded vacant position within the same appointing authority for which the person is qualified, with or without reasonable accommodation. The vacant position should be within the same commuting area and at the same pay level or at the next highest pay level available below the employee’s current pay level. If the vacant position has already been announced at the time the agency determined the individual to be incapable of performing in his or her current position, however, the individual need
With respect to alterations to existing facilities, the employment title does not appear to require employers to undertake the wholesale retrofitting of existing buildings in order to provide full accessibility for people with disabilities generally, in advance of an individual’s request and without regard to a particular person’s needs. Accessibility requirements applicable to public accommodations, on the other hand, focus on barrier removal for mobility-impaired and sensory-impaired persons as a class. The public accommodation title requires differing degrees of accessibility for new construction major renovations, and readily achievable modifications to existing facilities. The focus of barrier removal as a reasonable accommodation under Title I is on the needs of a specific applicant or employee with a disability and is subject to the undue hardship limitation, not the much lower “readily achievable” standard applicable to modifications made to an existing facility of a public accommodation to provide access for customers. 100

With respect to job-restructuring, the Committee reports indicate that “[j]ob restructuring means modifying a job so that a person with a disability can perform the essential functions of the position,” and that this legislation does not require an employer to make any adjustment, modification or change in the job description or policy that an employer can demonstrate would fundamentally alter the essential functions of the job in question. 101 Case law under the Rehabilitation Act is clear that job restructuring does not require the elimination of essential job functions nor the creation of a new job by combining essential job tasks from other jobs. 102 Similarly, an employer is not required to lower performance standards relating to the quantity or quality of an employee’s work. 103 Technological advances have produced a wide array of prod-

100. House Report, supra note 3, pt. 2, at 109; pt. 3, at 59-62. Of course, an employer in a large metropolitan area where there is likely to be a large number of mobility-impaired persons may well wish to make its existing facilities accessible based on the likelihood that it will receive such a request.


103. Jasany v. United States Postal Service, 755 F.2d 1244, 1250-51 (6th Cir. 1985)(section 504 did not require recipients to lower or substantially modify their standards) (citing Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979));
ucts that enable individuals with disabilities to compete successfully in the workplace. The provisions of such assistive devices are a common form of reasonable accommodation. Committee reports refer to adaptive computer hardware and software, electronic visual aids, talking calculators, magnifiers, audio or braille material for blind and visually impaired persons. Deaf persons can also benefit from the use of technological devices including Telecommunication Devices for the Deaf (TDDs), telephone headset amplifiers, and telephones compatible with hearing aids. However, hearing aids, eyeglasses or other personal use items are not considered reasonable accommodations.

Appropriate adjustment of examinations and training materials may be required; training should be offered in accessible locations and material should be offered in an accessible format. In addition, the

see also Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987) (agency not required to provide stool or platform to person with dwarfism as that would reduce efficiency below a tolerable level). But see Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988) (assuming that lowering an employee's quantity of work standard was an accommodation); Bruegger v. Burke, 696 F. Supp. 674 (D.D.C. 1988) (reduction in volume of work is a reasonable accommodation but lowering the high degree of accuracy required as a critical element of position is not an accommodation), cert. denied, Bruegger v. Wilson, 488 U.S. 1009 (1989).

104. Senate Report, supra note 24, at 32-33; House Report, supra note 3, pt. 2, at 64.

105. Id. The obligation to make training accessible to all employees without regard to disability, like other ADA obligations, applies whether the training is provided by the employer directly or by contract with third parties. See Americans With Disabilities Act § 102(b)(2). The report of the House Committee on Education and Labor explains:

For example, assume that an employer is seeking to contract with a company to provide training for the first entity's employees. Whatever responsibilities and limitations of reasonable accommodation that would apply to the employer if it provided the training itself would apply as well in the contractual situation. Thus, if the training company were planning to hold its program in a physically inaccessible location, thus making it impossible for an employee who used a wheelchair to attend the program, the employer would have a duty to consider various reasonable accommodations. These could include, for example, (1) asking the training company to identify other sites for the training that are accessible; (2) identifying other training companies that use accessible sites; (3) paying to have the training company train the disabled employee (either one on one or with other employees who may have missed the training for other reasons), or any other accommodation that might result in making the training available to the employee.

If no accommodations were available that would make the training
ADA explicitly requires that employers select and administer examinations in a manner calculated to measure the knowledge, skills, and abilities of the applicant or employee, rather than his or her impaired manual, sensory or speaking skills.¹⁰⁶

The provision of qualified readers and interpreters has been included as a form of reasonable accommodation since the section 504 regulations were first issued in 1977.¹⁰⁷ The committee reports also indicate that provision of an attendant may also be an appropriate

program accessible, or if the only options that were available would impose an undue hardship on the employer, the employer would then have met its requirements under the Act. The Committee anticipates, however, that certainly some form of accommodation could be made such that the disabled employee would not be completely precluded from receiving training that the employer may consider necessary.

As a further example, assume that an employer contracts with a hotel for a conference held for the employer's employees. Under the Act, the employer has an affirmative duty to investigate the accessibility of a location that it plans to use for its own employees. Suggested approaches for determining accessibility would be for the employer to check out the hotel first-hand, if possible, or to ask a local disability group to check out the hotel. In any event, the employer can always protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, including the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a duty on the employer to investigate accessibility of places that it contracts for will, in all likelihood, be the impetus for ensuring that these types of contractual provisions become commonplace in our society.

House Report, supra note 3, pt. 2, at 60.

¹⁰⁶ Americans With Disabilities Act § 102(b)(7); see, e.g., House Report, supra note 3, pt. 2, at 71-72 (discussing Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983)).

1. Who is eligible for reasonable accommodation

An employer's obligation to provide a reasonable accommodation may arise at any stage in the employment process, including applicant testing and interviewing, hiring and placement, training, promotion, transfer, and discharge or retirement. Any time a person's job or disability changes, a new accommodation may be required or an existing accommodation may have to be adjusted. The statute is clear that an applicant or employee must be an individual with a disability in order to qualify for an accommodation.

Second, as the statutory language indicates, the duty to accommodate is to the "known" physical or mental limitations of a person with a disability. This provision codifies section 504 case law which indicated that an employer is not obligated to accommodate a person's physical or mental limitations of which it had no knowledge. This usually means that an employee must make his or her disability known and request an accommodation before an employer has a duty to provide one. Since it is a stereotype that all people with disabilities will need accommodation, an employer should not assume, in the absence of a request, that a particular individual will require an accommodation, and it is discriminatory to force an accommodation on a disabled person who does not need one. Indeed, the ADA specifically provides that "[n]othing in this Act . . . require[s] an individual to accept an accommodation, aid, service, opportunity or benefit which such individual chooses not to accept."

111. Senate Report, supra note 24, at 34; House Report, supra note 3, pt. 2, at 65; pt. 3, at 39. Of course, if an individual with a known disability is having difficulty performing on the job, an employer may wish to inquire whether an accommodation would be of assistance. Id.
113. See, e.g., Chalk v. Dist. Court, 840 F.2d 701 (9th Cir. 1988).
Third, only an "otherwise qualified" individual with a disability is entitled to accommodation. The term "otherwise qualified" should not be confused with that term as used in section 504, where it meant "qualified in spite of a handicap." Rather, the legislative history indicates that "otherwise qualified" refers to an applicant or employee who is able to meet all of an employer's job-related selection criteria except the criterion the individual cannot meet because of a disability. Thus, the individual must be able to satisfy all legitimate knowledge, education, and experience requirements in order to be considered for an accommodation. 115 Providing a reasonable accommodation then permits the individual to satisfy the remaining criterion by enabling the individual to perform the essential functions of the job. 116

2. The reasonable accommodation process

Because the reasonable accommodation requirement responds to the unique abilities and limitations of an applicant or employee in relation to specific job duties, it is not possible to set out specific rules dictating what accommodations are required for specific disabilities and specific jobs. Employers must have the flexibility to make accommodation decisions that reflect both the employee's needs and the particulars of the job to be performed. The House Committee on Education and Labor and the Senate Committee on Labor and Human Resources analyze reasonable accommodation as a process:

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability. 117

Frequently, the applicant or employee will know exactly what ac-


116. Id.

117. Id.
commodation is needed from prior experience in similar employment or in coping with the disability on a daily basis. The Committee reports recognize, however, that this will not always be the case. Where an individual with a disability is unable to identify an accommodation that will enable successful job performance without imposing undue hardship on the employer, the Committees suggest that the employer undertake "four informal steps" to identify and provide an appropriate accommodation.

The first step is to identify the barriers to the employment opportunity. An employer must distinguish between essential and marginal functions of the job. Next, with the cooperation of the disabled person, the employer must identify the abilities and limitations of the applicant or employee. The employer is then in a position to identify the essential functions of the job or aspects of the work environment that the disabled person cannot satisfy because of his or her disability.

The second informal step is to identify possible accommodations. The disabled person should be consulted first and throughout the accommodation process. The Committee reports indicate that, where necessary, an employer may need to consult the state vocational rehabilitation services agency, the Job Accommodation Network of the President's Committee on Employment of People with Disabilities, or other employers.

The degree of an employer's affirmative duty to find possible accommodations is not clear. A majority of the case law under section 504 has held that once a plaintiff makes a facial showing that reasonable accommodation is possible, the burden shifts to the defendant to demonstrate that no accommodation was available that would enable the plaintiff to perform the essential functions of the job or that the only accommodations would impose an undue hardship. Then the burden shifts back to the plaintiff to rebut the employer's evidence. A number of courts interpreting the Rehabilitation Act have indicated that employers have a duty to use experts to identify possible accommodations. For example, the U.S. Court of Appeals for the Ninth Cir-

118. Arneson v. Heckler, 879 F.2d 393 (8th Cir. 1989); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Jasany v. United States Postal Service, 755 F.2d 1244, 49-50 (6th Cir. 1985); Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981); see also Carter v. Bennett, 840 F.2d 63 (D.C. Cir. 1988); Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Simon v. St. Louis County, 735 F.2d 1082, 84 (8th Cir. 1984); Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983).
cuit stated that, "an employer has a duty under the [Rehabilitation] Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job safely."\(^{119}\)

On the other hand, it is clear that an employer's duty to investigate possible accommodations is not limitless. A court recently ruled that an employer had made sufficient efforts to accommodate an employee allergic to dust and chemical fumes when it transferred him five times and gave him a respirator which he refused to wear.\(^{120}\)

The third informal step is to assess the possible accommodations identified in terms of their effectiveness, reliability, and ability to be provided without undue delay. The Committees emphasized that a reasonable accommodation is to provide a "meaningful equal employment opportunity," which the committees defined as "an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities."\(^{121}\)

The final step in the accommodation process is selection and implementation of the appropriate accommodation. The Committees note that although the employee's preferred accommodation is to be given "primary consideration," the ultimate choice is the employer's. An employer is free to choose among effective accommodations and to select the accommodation that is less expensive or easier to implement as long as the selected accommodation provides a meaningful equal employment opportunity.\(^{122}\)

3. Undue hardship

A particular reasonable accommodation is not required if an em-
ployer can demonstrate that it would impose an undue hardship on the operation of its business.\textsuperscript{123} The ADA defines "undue hardship" as "an action requiring significant difficulty or expense" when viewed in light of four factors.

The House Committee on the Judiciary indicates that a definition of "undue hardship" was provided in order to distinguish it from the \textit{de minimis} undue hardship standard applicable to religious reasonable accommodation under Title VII of the Civil Rights Act of 1964 and to differentiate the employment limitation from the definition of "readily achievable" applicable to the removal of structural barriers in existing facilities of public accommodations.\textsuperscript{124} The Senate Committee on Labor and Human Resources and the House Committee on Education and Labor indicate that "significant difficulty or expense" means an action "that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."\textsuperscript{125} A specified dollar figure or numerical formula was not provided by Congress. Efforts to create a presumption that an accommodation costing 10\% of an employee's annual salary would constitute undue hardship, were rejected by the House Judiciary Committee\textsuperscript{126} and on the floor of the House of Representatives as arbitrary and unduly restrictive.\textsuperscript{127}

The statutory language and legislative history also indicate that what constitutes a "significant difficulty or expense" is relative rather than absolute and will depend on the particular employer's operation and resources in relation to the nature and cost of the accommodation. Accordingly, whether an accommodation would impose an undue hardship on a covered entity must be made on a case-by-case basis, by applying four statutory factors:

(i) the nature and cost of the accommodation needed . . . ;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number

\textsuperscript{123} Americans With Disabilities Act §§ 105, 101(10).
\textsuperscript{124} \textit{HOUSE REPORT}, \textit{supra} note 3, pt. 3 at 40.
\textsuperscript{125} \textit{Id}.
\textsuperscript{126} \textit{HOUSE REPORT}, \textit{supra} note 3, pt. 3, at 41.
\textsuperscript{127} 136 \textit{CONG. REC.} H2470-2475 (daily ed. May 17, 1990).
of its employees; the number, type, and location of its facilities; and
(iv) the type or types of operations of the covered entity, including
the composition, structure, and functions of the workforce of such
entity; the geographic separateness, administrative or financial re-
lationship of the facility or facilities in question to the covered
entity. 128

While the factors indicate that larger employers may be required
to accept a greater level of cost for a needed accommodation than
smaller employers, the resources of the employer alone are not necessa-
rily determinative. The House Judiciary Committee report explained
why Congress adopted factors permitting the EEOC and the courts to
consider the impact of an accommodation on the facility providing it,
as well as the effects on the overall employer:

The ADA also sets forth additional factors which are specifi-
cally addressed to entities which operate more than one facility.
Concerns were expressed that a court would look only at the re-
sources of the local facility involved, or only at the resources of the
parent company, in determining whether an accommodation im-
posed an undue hardship. The Committee believes that both of
these alternatives are unsatisfactory. Instead, the Committee in-
tends that the resources of both the local facility involved and of
the parent company as well as the relationship between the two, be
relevant to the undue hardship determination.

The Committee is responding particularly to concerns about
employers who operate in depressed or rural areas and are operat-
ing at the margin or at a loss. Specifically, concern was expressed
that an employer may elect to close a store if it is losing money or
only marginally profitable rather than undertake significant invest-
ments to make reasonable accommodations to employees with disa-
abilities. The Committee does not intend for the requirements of the
Act to result in the closure of neighborhood stores or in loss of jobs.
The Committee intends for courts to consider in determining "un-
due hardship," whether the local store is threatened with closure by
the parent company or is faced with job loss as a result of the re-
quirements of this Act. 129

The House Education and Labor Committee report also notes that
additional factors may be considered in determining whether an accom-

129. HOUSE REPORT, supra note 3, pt. 3, at 40-41.
modation imposes an undue hardship. These factors include whether an accommodation may be shared by or used by other applicants and employees with disabilities and whether external funding, e.g., a tax credit, tax deduction,130 or payment from a vocational rehabilitation agency, is available to pay for all or a part of the cost of an accommodation. Only the net cost to the employer should be used in determining undue hardship where external funding is received or could be received.131

H. Illegal Use of Drugs and Alcohol

While persons who are addicted to the use of illegal drugs have a "disability" as that term is defined under the ADA,132 the illegal use of drugs133 removes a person from the protection of the Act when an employer discharges or fails to hire a person because of such drug usage.134 However, an individual who has successfully completed a drug rehabilitation program or who is erroneously regarded as illegally using drugs or who is successfully rehabilitated and is no longer using drugs illegally is not excluded from the definition of a "qualified individual with a disability."

130. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing barriers, providing readers and interpreters, and acquiring or modifying equipment or devices.


132. Id. at pt. 2, at 51; pt. 3, at 28.

133. A "drug" is defined in section 101(6)(B) as a "controlled substance" as defined in schedules I through V of the Controlled Substance Act. In general, these schedules include drugs with varying degrees of potential for addiction and abuse, some of which also have legitimate medical uses and which may be prescribed by a physician.

134. Americans With Disabilities Act § 104(a). In addition, such an individual is also removed from the definition of an individual with a disability pursuant to section 510(a). A similar provision was made applicable to Title V of the Rehabilitation Act of 1973 by amending the latter act's definition of an "individual with handicaps." See 29 U.S.C. § 706(8).

135. Americans With Disabilities Act § 104(b).
used as a weapon by persons using illegal drugs against an employer who was trying to rid its workplace of drugs and drug users. The Conference Committee made this point plainly:

The provision excluding an individual who engages in the illegal use of drugs from protection is intended to ensure that employers may discharge or deny employment to persons who illegally use drugs on that basis, without fear of being held liable for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current. 136

In order to protect employers, the ADA specifically provides that an employer may prohibit the use of illegal drugs or alcohol in the workplace and to prohibit employees from being under the influence of illegal drugs or alcohol while on the job. An employer may hold an employee who is an alcoholic or drug user to the same standards of performance and conduct that it requires of all its employees even if performance or behavior problems result from the illegal use of drugs or the use of alcohol. Employers may comply with the requirements of the Drug Free Workplace Act of 1988, 137 and otherwise comply with any regulations pertaining to drug or alcohol use by employees in industries regulated by the Department of Defense, the Department of Transportation, and the Nuclear Regulatory Commission. 138 Finally, the ADA explicitly permits employers to utilize drug tests to screen applicants and employees and to take action based upon the results of such a test. 139

136. House Report, supra note 3, at 64.
137. 41 U.S.C. § 701 et. seq.
138. Americans With Disabilities Act § 104(c).
139. Id. at § 104(d)(2). A drug test is not considered a medical examination under the ADA. § 104(d)(1). A person with a positive drug test that indicates the illegal use of drugs still may challenge the accuracy of the test and allege that he or she is being "erroneously regarded" as an illegal user of drugs pursuant to section 104(b)(3). The ADA itself does not provide any standard by which the accuracy or validity of a drug test result is to be determined. H.R. Rep. No. 101-596, 101st Cong., 2d Sess. 65 (1990).
I. Medical Examinations and Inquiries About Disability

Historically, job applications and medical examinations frequently inquired about an applicant's general health and fitness and were used as screening devices to exclude persons with disabilities from positions without any inquiry into an applicant's capacity to perform the position in question.\textsuperscript{140} The ADA strictly regulates such inquiries. An employer may not, in a job application or in an interview, ask whether an applicant has a disability or about the nature or severity of a disability. The Act permits employers to inquire of an applicant's ability to do essential job functions. An employer may require post-offer, pre-entry medical examinations if required of all new employees for a particular job classification (e.g., firefighters, and police officers) regardless of disability. The medical examination is allowed if conducted prior to assuming job duties and if the results of the examination are used in compliance with the legislation, including provisions for a reasonable accommodation for an applicant whose medical examination reveals an inability to perform an essential function of the job. The results of such an examination must be kept confidential and in separate medical files, except where it is necessary to inform supervisors or managers of work restrictions or needed accommodations, safety personnel if the disability might require emergency treatment or government officials investigating compliance with the ADA.\textsuperscript{141}

Inquiries concerning an employee's health or disability status must be job-related and consistent with business necessity.\textsuperscript{142} Examinations and inquiries permitted under this standard include those mandated by federal, state or local law applicable to the transportation industry and other industries where public safety is a paramount concern.\textsuperscript{143} Also explicitly permitted are voluntary medical examinations offered by an employer as part of an employee health program.\textsuperscript{144} Examinations and inquiries of current employees are subject to the same confidentiality restrictions and the same prohibition against discriminatory use of the information that are applicable to pre-employment inquiries.\textsuperscript{145}

\textsuperscript{140} Senate Report, supra note 24, at 37; House Report, supra note 3, pt. 2, at 73.
\textsuperscript{141} Americans With Disabilities Act § 102(c)(2).
\textsuperscript{142} Id. at § 102(c)(4)(A).
\textsuperscript{143} Id.
\textsuperscript{144} Id. at § 102(c)(4)(B).
\textsuperscript{145} Id. at § 102(c)(4)(C).
J. Enforcement and Administration

The ADA incorporates the powers, remedies and procedures of Title VII of the Civil Rights Act of 1964 for its enforcement scheme. The Equal Employment Opportunity Commission is charged with responsibility for implementing and enforcing the ADA's employment provisions, except with respect to litigation against state and local governments, which is granted to the Attorney General. The Commission must issue substantive regulations by July 26, 1991. An individual who believes he or she has been discriminated against in employment on the basis of disability may file an administrative charge of discrimination with the Equal Employment Opportunity Commission or with state or local fair employment agencies having work-sharing agreements with the Commission. In addition to possible litigation by the Commission, a charging party may institute a private action in federal or state court after receiving a right to sue letter from the Commission. The remedies available for violations of the ADA are the same as under Title VII: equitable and injunctive relief including hiring or reinstatement, backpay, restoration of benefits and attorneys' fees for the prevailing party. The ADA also prohibits any covered entity from retaliating against any individual who opposes a practice he or she believes is unlawful under the Act or who files a charge or participates in any proceeding under the ADA. Also prohibited is any attempt to coerce, intimidate or threaten any person from the enjoyment of any right provided by the ADA.


147. Americans With Disabilities Act § 106.


149. Curiously, the ADA has two different attorneys' fees provisions, applicable to employment litigation. Section 706(k) of Title VII, provides for attorneys' fees to the prevailing party other the the government as part of the award of court costs. Section 505 provides for attorneys' fees for administrative and judicial proceedings and specifically authorizes the award of “litigation expenses.” Americans With Disabilities Act § 505.

150. Id. at § 503.
Burdens of Proof Under Title VII in the 90’s: Wards Cove vs. The Civil Rights Act of 1990

By Kenni F. Judd*

Introduction

Equal employment opportunity ("EEO") law, despite a roaring start in the late 1960’s and early 70’s,¹ fell into a quiet decline in the 1980’s, under the Reagan/Bush administrations. Agency enforcement declined,² while scant attorneys' fee awards, coerced fee waivers and other difficulties discouraged private representation of EEO plaintiffs.³ Last term, the United States Supreme Court rendered a series of significant EEO decisions.⁴ These decisions substantially altered the

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1. During its first five years of existence, the EEOC investigated more than 8,000 charges of sex discrimination; in 1972, the number of charges filed was still increasing. H.R. REP. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2139.

2. The EEOC filed seventy percent fewer cases in 1982 than in 1981. Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems, Hearings before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 99th Cong., 2d Sess. 237 (1986) (testimony of Judy Goldsmith, President, National Organization for Women). Ms. Goldsmith attributes the decline to personnel and budget cuts overseen by President Reagan and to the appointment of "high level personnel who are hostile to effective enforcement." Id. at 236-37; contra id. at 662 (testimony of Clarence Thomas, Chair, EEOC) (most of the 10,000 EEO charges filed annually with the EEOC resolved within one year).

3. Terry, Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy, 5 LAB. LAW. (No. 1) 63 (Winter 1989); see also Bronner, Civil Rights Act of 1990: Inside the Negotiations, Boston Globe, July 23, 1990, National/Foreign Section, at 1 (judges appointed by Presidents Reagan and Bush perceived as less likely to rule in favor of discrimination victims); Weiner, With Addition of Souter to Court, Conservative Bulwark is in Place, Miami Herald, Oct. 14, 1990, at 18A (federal "bench has grown increasingly hostile to claims brought by women and minorities") (quote attributed to Nan Aron, Alliance for Justice).

4. The primary decisions targeted by the Civil Rights Act of 1990 are: Wards
framework for determining EEO cases by raising significant additional barriers to potential discrimination suits. Congress reacted by passing the Civil Rights Act of 1990, H.R. 4000, S. 2104 (1990), designed to restore and, in a few instances, strengthen the rights and remedies previously available to EEO plaintiffs.

Despite substantial amendments aimed at making the bill acceptable to the Bush administration, the proposed Civil Rights Act continues to face the threat of a presidential veto. The veto threat is based primarily upon the Act's provisions concerning the burden of proof in cases based upon "unintentional" discrimination. President Bush, and other opponents of the bill, claim that the bill will lead to the use of hiring quotas. According to the bill's detractors, employers will institute hiring quotas to ensure that their work forces contain appropriate percentages of women and racial, ethnic or religious minorities to avoid potential litigation in which they would be required to demonstrate the job-related nature of their employment practices. The bill's propo-

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5. See infra text accompanying notes 68-75. The initial version of the bill (H.R. 4000, 101st Cong., 2d Sess., introduced February 7, 1990) and the version which passed the Senate (S. 2104, 101st Cong., 2d Sess.) are included in an Appendix to this article. The Senate passed the amended bill by a 65-34 vote, despite the threatened presidential veto. Senators OK Bill to Protect Civil Rights, Miami Herald, July 19, 1990, at 1A, col. 1; Editorial, Fill Civil-Rights Needs, Miami Herald, August 2, 1990, at 20A, col. 1. The House of Representatives subsequently passed a substantially identical amended bill by a vote of 272-154. The Civil Rights Act of 1990, CONG. DIG. 196, 205 (August-September 1990).


7. "The number one concern that has been voiced by the bill's opponents was the danger that the original language would result in hiring quotas." The Civil Rights Act of 1990, CONG. DIG. 196, 214 (statement of Senator Dodd); Senators OK Bill to Protect Civil Rights, Miami Herald, July 19, 1990, at 1A, 12A ("Most of the controversy" surrounding the bill comes from provisions overruling Wards Cove).

8. E.g., The Civil Rights Act of 1990, CONG. DIG. 196, 213 (statement of Senator Hatch). The bill's opponents have ignored the holding of Connecticut v. Teal, 457 U.S. 440 (1982), that a "bottom line" appropriate racial balance is no defense to a Title VII claim. The proposed Civil Rights Act does not purport to overrule Teal. Ad-
ments, on the other hand, claim that the bill, for the most part, simply re-establishes long-standing precedent concerning the burden of proof in such cases.9 Advocates of the bill further stress the absence of any evidence that the standards to be restored by the bill have encouraged the use of quotas.10 These burden of proof issues will be the primary focus of this article.11

Additionally, at least some of the quota fears are based on misperceptions concerning the availability of compensatory and punitive damages. The bill permits such damages only in cases of intentional discrimination, not in adverse impact cases. See CONG. D.IG. at 210 (statement of Senator Kennedy).


10. A Red Herring in Black and White, N.Y. Times, July 23, 1990, at 14A ("The best evidence of that danger [quota hiring] would be that from 1971 to 1989, many employers in fact adopted quotas. But the Administration cites no such evidence."); Battle of the Minorities, Miami Herald, May 28, 1990, at 14A ("When pressed to say when in the past these criteria had created such quotas, Mr. Thornburgh couldn't."); The Civil Rights Act of 1990, CONG. D.IG. 196, 218 (statement of Senator Simon); see also infra notes 68-75 and accompanying text.

11. The proposed Civil Rights Act of 1990 also:

a. seeks to assure the availability of counsel to prospective plaintiffs by prohibiting settlements predicated upon fee waivers. This section simply provides that cases may not be settled, either by stipulation or dismissal, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement. Such a provision is a necessary and predictable solution to the moral, ethical and financial dilemma facing the plaintiff's lawyer confronted with a settlement offer conditioned upon a waiver of fees. See Terry, supra note 3, at 71.

b. authorizes compensatory and punitive damage awards in cases of intentional discrimination. These remedies were previously available only to victims of race discrimination under section 1981, but not to Title VII or age discrimination claimants. According to Senator Graham, a ten-year study of intentional race discrimination cases found that no damages were awarded in 85 percent of the cases; the average award in the remaining fifteen percent of the cases was about $40,000.00. The Civil Rights Act of 1990, CONG. D.IG. 196, 220 (remarks of Senator Graham, D-FL). If cases involving allegations of intentional discrimination on other bases follow this pattern, the resulting litigation is unlikely to pose a critical problem for employers. Moreover, as Senator Kennedy put it, "[w]omen and minorities are not second-class citizens; they do not deserve second-class remedies under the civil rights laws." Id. at 208.

c. limits challenges to court-ordered affirmative action programs;

d. provides that the statute of limitations for challenging seniority systems begins to run when discriminatory effects occur, not when the systems themselves are first implemented;

e. modifies the holding of Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989),
HISTORY OF EEO DEVELOPMENT

One of the earliest significant federal EEO statutes was enacted as part of the Civil Rights Act of 1964. Title VII, as the statute came to be known, prohibited discrimination in employment on the basis of race, color, religion, sex or national origin. Protections for older employees and for handicapped workers in the public sector followed; the frameworks developed in Title VII litigation were adapted for use in these new areas as well.

Intentional Discrimination vs. Adverse Impact

The simplest and most obvious form of discrimination prohibited by Title VII, intentional discrimination against members of a protected class, came to be known as "disparate treatment." When Title VII became effective in mid-1965, intentional race and sex discrimination was rampant and, to a great extent, socially acceptable. Indeed, newspapers continued to run sex-segregated "help wanted" ads for several more years. Employers, and many segments of the public, saw nothing wrong in refusing to hire women or minorities for certain positions, or paying them less than white males for similar work.

concerning mixed-motive cases of intentional discrimination, to provide that any significant reliance upon discriminatory motives constitutes a violation of the Act (see infra note 28); and

f. overrules Patterson v. McLean Credit Union, 108 S.Ct. 1419 (1988), by restoring Section 1981's application to the enforcement as well as the making and termination of employment contracts.

12. After the passage of the Civil Rights Act of 1964, several earlier statutes (included within the Civil Rights Acts of 1866 and 1871, now codified at 42 U.S.C. §§ 1981, 1983 and 1985) began to be used to fight employment discrimination. Not until 1968, however, did the Court permit section 1981 to be used against private employers. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). Other limitations continue to restrict the utility of these statutes, including the recent holding in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989), one of the cases the proposed Civil Rights Act of 1990 would overturn.


In time, the concept of intentional discrimination came to be publicly frowned upon, perhaps because of the enforcement of Title VII. Instances of blatant, clearly intentional discrimination declined. The overall problem of employment discrimination, however, had hardly been dented. By 1970, Congress recognized employment discrimination as “a far more complex and pervasive phenomenon,” appropriately described in terms of “systems” rather than isolated intentional acts. Even now, persistent patterns of job segregation separating white men from women and men of color, and the ever-present wage gap, suggest that employment discrimination remains a substantial factor in the modern American marketplace.

In 1971, the Supreme Court recognized this dilemma and decided *Griggs v. Duke Power Co.* In *Griggs*, the Court held that Title VII did not contain an intent requirement, but instead prohibited “not only overt discrimination but also practices that are fair in form, but discriminatory in practice.” As a result, the facially neutral criteria imposed by the *Griggs* employer—a high school degree requirement and intelligence/aptitude tests—were subject to challenge under Title VII because black employees and applicants were more often adversely affected by the requirements than were white employees and applicants. The *Griggs* Court went on to hold, however, that such facially neutral criteria, even if discriminatory in practice, were nevertheless permissi-
ble if they were demonstrably job-related:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.

These types of cases, which do not require proof of discriminatory intent, are commonly called "adverse impact" cases.

Models of Proof

Intentional Discrimination

The standard model of proof for intentional discrimination (disparate treatment) cases became firmly established in *McDonnell Douglas Corp. v. Green* and its progeny. In these cases, the plaintiff must present a prima facie case of intentional discrimination. The employer

23. *Id.* at 436.
24. In practice, many courts and commentators use terms such as "disparate impact" (probably a corruption of "disproportionate impact") and other labels to describe adverse impact cases. To avoid the confusion generated by the use of two such similar terms as "disparate treatment" and "disparate impact," this article will use only the term "adverse impact" in referring to cases based upon unintentional discrimination.
27. The precise parameters of the prima facie case will vary depending upon the type of allegedly discriminatory employment practice. In a hiring case, for example, a plaintiff would be required to demonstrate membership in a protected class, qualification for the position applied for, rejection, and subsequent efforts by the employer to fill the position with a person of similar qualifications. Promotion, compensation and discharge cases require similar but not identical proofs. Of course, in the rare case in which a Title VII plaintiff has compelling direct evidence of discrimination, he or she need not use the *McDonnell Douglas* model. *E.g.*, Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556-57 (11th Cir. 1983). In this day and time, however, most employers are too sophisticated to permit the availability of such direct evidence. *E.g.*, *id.* at 1556; *see also* Ledvinka, *New Perspectives on Compensation Administration* 51, 55 (D. Balkin & L. Gomez-Mejia eds. 1987) ("[E]vidence of intent is usually hard to find. Managers know that differential treatment of men and women is illegal, and they
is then required to articulate a legitimate, non-discriminatory reason for the adverse employment action against the plaintiff. The articulation standard requires no quantum of proof; the employer need only state a non-discriminatory reason for the adverse employment action. The plaintiff must then prove that the employer's articulated reason is a pretext, masking a discriminatory intent. The burden of proving the employer's discriminatory intent remains at all times with the plaintiff.\textsuperscript{28} With the exception of mixed motive cases,\textsuperscript{29} this model of proof was not affected by last term's decisions, nor is it addressed by the proposed Civil Rights Act of 1990.\textsuperscript{30}

\textsuperscript{28}E.g., \textit{Watson v. Forth Worth Bank and Trust}, 108 S.Ct. 2777, 2788-89 (1988). So-called "mixed motive" cases may be deemed a narrow exception to this rule. \textit{See generally Price Waterhouse v. Hopkins}, 109 S. Ct. 1775 (1989) (plurality opinion). In a mixed-motive case, where the plaintiff establishes that a discriminatory motive played some role in causing the adverse employment decision, the burden of proof shifts to the employer to prove, by a preponderance standard, that it would have made the same decision even if it had not been influenced by the discriminatory motive. If it can do so, it will not be found to have violated Title VII. \textit{Id.} at 1787-92. The focus in a mixed motive case, however, is primarily on causation. The plaintiff is still required to prove the existence of discriminatory intent.

The proposed Act addresses this decision by clarifying the fact that any reliance at all upon discriminatory motives violates Title VII, even though available remedies may be limited if the employer can establish that it would have reached the same decision absent the improper motive. This section appears consistent with the position previously taken by the Eighth Circuit in \textit{Bibbs v. Block}, 778 F.2d 1318, 1320-24 (8th Cir. 1985) (en banc). Four Circuits had previously required plaintiffs to prove "but for" causation, while five had shifted the burden of proof to the employer to show that it would have taken the same action regardless of the discriminatory factors. Of these, four required only a preponderance of the evidence, while one required clear and convincing proof. The Circuits had also been divided upon the issue of whether such a showing negated a violation of Title VII, or merely prevented the imposition of equitable relief such as reinstatement. \textit{Price Waterhouse}, 109 S.Ct. at 1784 & n.2.

\textsuperscript{29} \textit{See supra} note 28.

\textsuperscript{30} The Act does, however, expand the available remedies in this type of litigation to conform to the remedies available to victims of intentional race discrimination under section 1981. \textit{See supra} note 11.
Adverse Impact

In adverse impact cases, a different model of proof developed. The plaintiff’s prima facie case required proof that the challenged criteria had a significantly disproportionate adverse impact upon otherwise qualified members of a protected class. Plaintiffs typically accomplished this proof through statistics comparing the percentage of protected class members in the relevant workforce to the percentage of qualified protected class members in the relevant labor market,31 and showing that the imbalance was caused by the challenged practices.32 In Dothard v. Rawlinson,33 for example, women comprised almost 37 percent of the total labor force, but less than 13 percent of the state’s correctional counselors. The reasons for the imbalance were minimum height and weight requirements which excluded far more women than men.34

Several tests developed to determine whether the adverse impact caused by a particular selection device was “significantly disproportionate,” none of which has gained uniform acceptance. The EEOC guidelines proposed a “four-fifths” or “eighty percent” rule of thumb: a criterion is generally deemed discriminatory if it results in a selection rate, for any protected class, of less than eighty percent of the rate of selection for the class with the highest selection rate under the same criterion.35 Some courts have adopted this rule; others look to see if the differential exceeds two or three “standard deviations.”36 Still others

31. This segment of the plaintiff's case may not always be necessary, as evidenced by Connecticut v. Teal, 457 U.S. 440 (1982). See supra note 8.
32. E.g., Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (“[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.”).
34. The height requirement, for example, disqualified about a third of all women, but only a little over one percent of all men. The weight requirement excluded 22.29 percent of women and only 2.35 percent of men. The combination of the two requirements excluded over forty percent of Alabama’s female workers from the position in question. Dothard, 433 U.S. at 329-30.
35. The eighty percent rule is neither a safe haven nor an absolute minimum. Smaller disparities have been found discriminatory, and larger disparities have been found acceptable. 29 C.F.R. § 1607.4(D) (1990).
36. 29 C.F.R. § 1607.4(D), 1607.16(R) (1990).
37. A standard deviation is a statistical term describing some of the properties of a data distribution. Most populations, when measured for any particular property, will form a bell curve in which the majority of the population clusters around the average
simply judge the significance of the adverse impact on a case by case basis.\textsuperscript{38}

If the plaintiff proved his or her prima facie case, the employer was then required to establish "business necessity." Business necessity has traditionally been treated as an affirmative defense, so that the burden of proof on that issue has been allocated to the employer. Accordingly, the employer has been required to demonstrate that the challenged criteria were important to successful job performance.\textsuperscript{39} Prior to the Court's decision in \textit{Wards Cove Packing Co. v. Atonio},\textsuperscript{40} an employer could justify the use of tests or other devices shown to have a discriminatory impact only by demonstrating through "professionally accepted methods," that the criteria were "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated."\textsuperscript{41} If an employer established that the challenged practices were sufficiently job-related, the plaintiff was then given an opportunity to show that less discriminatory methods would accomplish the same purpose equally well.\textsuperscript{42}

\textbf{The Evolving Model of Proof in Adverse Impact Cases}

Last term, by a scant 5-4 majority, the Supreme Court decided \textit{Wards Cove Packing Co. v. Atonio}.\textsuperscript{43} The \textit{Wards Cove} employers operated canneries in remote areas of Alaska during the summer "salmon run" season. Each cannery had two general types of positions: unskilled cannery jobs and skilled non-cannery jobs. At each cannery, the un-

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\textsuperscript{38} B. \underline{SCHLEI} & P. \underline{GROSSMAN}, \textit{ supra} note 27, at 98-99.


\textsuperscript{40} 109 S. Ct. 2115 (1989).

\textsuperscript{41} Albemarle Paper Co., 422 U.S. at 431; accord Dothard, 433 U.S. at 329.

\textsuperscript{42} \textit{E.g.}, Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm., 630 F.2d 79, 110 (2d Cir. 1980). Few opinions have even reached this step, and in none of them has the plaintiff succeeded in demonstrating the viability of a less discriminatory alternative. B. \underline{SCHLEI} & P. \underline{GROSSMAN}, \textit{ supra} note 27, at 156-57.

\textsuperscript{43} 109 S. Ct. 2115 (1989).
skilled positions were filled predominantly by non-whites (Filipinos and
Native Alaskans) hired through a local union, while the skilled posi-
tions were held primarily by whites, hired through other offices of the
companies located on the mainland. The employers maintained sepa-
rate dormitories and mess halls for the skilled and unskilled workers.44

The *Wards Cove* plaintiffs were a class of nonwhites who were or
had been employed in unskilled cannery positions. They alleged that
the employers used a number of hiring practices which adversely im-
pacted their protected class: nepotism, a rehire preference, lack of ob-
jective hiring criteria, separate hiring channels, and a policy against
promoting from within the workforce. The district court initially re-
fused to apply adverse impact analysis to any of the employers’ subjec-
tive practices, but the Ninth Circuit Court of Appeals, sitting en banc,
reversed this holding. The Ninth Circuit panel determined that the
plaintiffs had made a prima facie adverse impact case, and remanded
the case to the district court for further proceedings with instructions
that the employer bear the burden of proving that its discriminatory
practices were job related.46

On *certiorari* review, the Supreme Court approved the application
of adverse impact analysis to subjective employment practices, but re-
versed the Ninth Circuit’s determination that the plaintiffs had estab-
lished a prima facie case. The Court held that the plaintiffs’ statistics
did not compare the appropriate groups.48 Having resolved the issue
before it, the *Wards Cove* majority went on, in unabashed dicta,47 to
impose new evidentiary burdens upon adverse impact plaintiffs and to
reallocate the burden of proof on the issue of business necessity.

44. *Id.* at 2119-20.
45. *Id.* at 2120.
46. *Id.* at 2121-22.
47. The Court specifically admitted that “any inquiry into whether the disparate
impact that any employment practice may have had was justified by business neces-
sity” was pretermitted by its finding that the statistics relied on by the Ninth Circuit
did not suffice to make out a prima facie case. *Id.* at 2124. The Court then continued,
however, to address additional issues which were likely to surface upon remand. *Id. But
see County of Washington v. Gunther*, 452 U.S. 161, 166 n.7 (1981) (“We are not
called upon in this case to . . . lay down standards for the further conduct of this
litigation.”).
New Evidentiary Requirements and Shifting the Burden of Proof

First, relying on dicta from the plurality opinion in Watson v. Fort Worth Bank & Trust,48 the Wards Cove majority stated that adverse impact plaintiffs must "isolat[e] and identify the specific employment practices that are allegedly responsible for any observed statistical disparities."49 Moreover, the Wards Cove standard will require proof that "each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."50 Adverse impact plaintiffs will never be permitted to challenge a group of employment practices as a whole.

The Wards Cove majority attempted to justify this ruling on the grounds that Title VII plaintiffs will have access to the records which most employers are required to keep concerning their employment practices under existing EEOC guidelines.51 There are, however, many businesses which, although subject to Title VII, qualify for exemptions or exceptions to the record-keeping requirements of the guidelines. Ironically, the Wards Cove employers themselves had not kept any such records.52

Secondly, the Wards Cove majority, again relying upon dicta from the Watson plurality opinion, reallocated the burden of proof on the business necessity issue, thus implicitly overruling Griggs and the substantial body of case law applying the Griggs standard. According to the Wards Cove majority, the employer bears only the burden of pro-

48. 108 S.Ct. 2777 (1988). In Watson, a unanimous Court held that adverse impact analysis may be applied to subjective, as well as objective, employment practices, thus resolving a long-standing division among the federal circuit courts. A plurality consisting of Justices Rehnquist, White, O'Connor and Scalia then went on to discuss the allocation of the burdens of proof in adverse impact cases, thus laying the groundwork for the Wards Cove decision. Justices Stevens and Blackman frankly acknowledged that the issues discussed in the plurality opinion were unnecessary to the resolution of the question presented. Id. at 2787 n.1. Some commentators interpreted Watson as changing the rules of adverse impact analysis only when applied to subjective criteria, as in Watson itself. See, e.g., When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755 (1989). The Wards Cove Court, however, adopted the new analysis for use in all adverse impact cases. See infra notes 68-73 and accompanying text.

50. Id.
51. Id. at 2125.
52. Id. at 2133 n.20 (Stevens, J., dissenting).
ducing evidence of a business justification for the challenged practices. The burden of persuasion, or proof, on this issue now falls on the plain-
tiff, who must demonstrate that the practice is not “job-related.”

The *Wards Cove* majority avoided expressly overruling the volumi-
 nous body of precedent applying the *Griggs* standard, under which the
employer bore the burden of proof of business necessity. They insisted
that these cases “should have been understood to mean an employer’s
production—but not persuasion—burden.” The language of the
Court’s prior rulings, however, renders this evasion disingenuous.
*Griggs* has long been understood by both courts and commentators
to allocate the burden of proving business necessity to the employer.

53. *Id.* at 2126.

that the challenged requirements are job related . . . ”); Albemarle Paper Co. v.
Moody, 422 U.S. 405, 425 (1975) (“Title VII forbids the use of employment tests that
are discriminatory in effect unless the employer meets ‘the burden of showing that any
given requirement [has] . . . a manifest relationship to the employment in ques-
tion.’”); *id.* at 407 (“if an employer does then meet the burden of proving that its tests
are ‘job related’ ”); *Griggs*, 401 U.S. at 431 (“If an employment practice which oper-
ates to exclude Negroes cannot be shown to be related to job performance, the practice
is prohibited.”); *id.* at 432 (“Congress has placed on the employer the burden of showing
that any given requirement must have a manifest relationship to the employment in ques-
tion.”).

55. *E.g.*, Powers v. Alabama Dep’t of Educ., 854 F.2d 1285, 1292 & n.11 (11th
Cir. 1988):

We are aware that four members of the Supreme Court recently have indicated
that the burden of *proof* on the absence of business necessity rests
2777, 2790, 101 L.Ed. 2d 827 (1988). A plurality opinion, however, is not
binding precedent, and in the meantime, we are bound by several decisions
of this court (as well as the Supreme Court cases cited in the text) stating
flatly that the employer bears the burden of *proving* that a practice is job-
related.

(emphasis in original); Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989) (describing
the term “‘business necessity’ defense” as a misnomer after *Wards Cove* because
“the ‘defense’ does not require a showing of necessity and is no longer an affirmative
defense”); *see also* Chirsner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1263 (6th
Cir. 1981) (“Once the defendant in a Title VII disparate impact case has rebutted
the plaintiff’s prima facie case by proving a business necessity defense, the burden shifts
back to the plaintiff.”).

56. *E.g.*, LEDVINKA, *supra* note 27, at 53-55 (“If the court decides that the
plaintiff has established a prima facie case, the burden of proof shifts to the defendant.
The defendant’s burden is to rebut by presenting evidence that the practice is job-
related or a business necessity.”); B. SCHLEI & P. GROSSMAN, *supra* note 27, at 81-92,
& 17 (Supp. 1983).
Application of Wards Cove and Watson

Isolating the Impact of Each Specific Practice

The new evidentiary requirements established in Wards Cove may be devastating to many potential Title VII plaintiffs, particularly where statistical proof is involved. In many cases, it may be difficult or impossible to isolate the effects of one of a group of employment practices because two or more of the practices may be "multicolinear." In Griggs, for example, it seems likely that the high school degree requirement eliminated many of the same individuals who would also have been eliminated by their scores on the intelligence/aptitude tests. A statistical model testing the effects of both practices simultaneously, therefore, could easily show that neither practice had a statistically significant impact on black applicants. While there are statistical methods for detecting and correcting for such difficulties, they are far from foolproof.

Another potential problem arises in cases in which the employers, like those in Wards Cove, fail to keep the records necessary to permit detailed statistical analyses of each individual employment practice. Typical Title VII plaintiffs are in no position to maintain, or attempt to reconstruct, such records. The typical plaintiffs are not privy to those type of records because they typically do not hold upper management positions. Often these plaintiffs have lost their jobs and are no longer even authorized to be on the premises. Under Wards Cove, therefore, a Title VII plaintiff's cause of action may be destroyed by an employer's failure to keep adequate records—a result unlikely to be permitted in any other area of the law.

Even more problematic are cases in which two or more practices combine to have a significant discriminatory effect even though no single practice, used alone, would do so. Under Wards Cove and Wat-

58. See id. at 491.
59. In many areas of the law, the burden of proof has been shifted from one party to another to combat such problems. 29 Am. Jur. 2d, Evidence § 131, at 164-65 (2d ed. 1967); see also E. Cleary, McCormick on Evidence § 337, at 787 (1984); cf. Bell v. Birmingham Linen Serv., 752 F.2d 1552, 1558 & n.13 (11th Cir. 1983).
60. "One can envision a situation in which there are two subjective practices, such as a performance rating by a supervisor and an interview, which work together to produce a significant adverse impact." When Doctrines Collide: Disparate, Treatment Disparate Impact, and Watson v. Fort Worth Bank & Trust, 137 U. Pa. L. Rev. 1755,
son, a group of practices will never be subject to challenge. Not even the amicus brief of the United States Solicitor General, submitted on behalf of the employers, urged this result. The Solicitor General's brief readily admitted that a complex, multi-factor selection test could be challenged as a whole, at least where it was not feasible to separate the effects of the individual factors. 61

Proving Business Necessity

As Justice Stevens noted in his Wards Cove dissent, business necessity has, since the 1971 Griggs decision, been regarded as an affirmative defense—a legal justification for the use of an employment practice despite its proven discriminatory effect. 62 As such, the burden of proof must fall on the defendant, as does the burden of proving all manner of affirmative defenses in various fields of law. 63 The Wards Cove majority, however, disregarded the defensive nature of the issue and instead analogized to the “articulation” and “pretext” standards used in disparate treatment cases.

The pretext standard serves as a means for determining the existence of discriminatory intent, which is a necessary element of proof in disparate treatment cases. If a specific, isolated adverse employment action was not motivated by discriminatory motive, then it was not discriminatory for purposes of Title VII, even if the victim happened to belong to a protected class. 64 An unfair or irrational employment decision, motivated by non-discriminatory reasons, does not violate Title VII. Pretext analysis, therefore, measures a necessary element of the plaintiff's case.

In impact cases, on the other hand, intent is not at issue. Impact analysis focuses upon widely-used employment practices which affect many employees, not on specific employment actions affecting only one employee. Business necessity does not come into play until after such a

61. Wards Cove, 109 S. Ct. at 2132 n.19 (Stevens, J., dissenting) (quoting the Solicitor General’s brief at page 22).
practice has been shown to discriminate against protected class members. Business necessity is then used to justify or excuse the established discrimination. Business necessity, therefore, unlike pretext analysis, fits the classic definition of an affirmative defense: It acknowledges the existence of a prima facie case, but offers a means of avoiding liability. Accordingly, the Wards Cove analogy between pretext and business necessity either mixes apples (elements) and oranges (defenses), or implies a hidden intent requirement—a requirement that facially neutral employment practices be used as a "mere pretext" to hide intentional discrimination—where there has been no such requirement for nearly twenty years.

The Civil Rights Act of 1990

The proposed Civil Rights Act of 1990, as originally introduced in the House on February 7, 1990, addressed the Watson/Wards Cove opinions by expressly providing that Title VII plaintiffs may challenge a group of employment practices, defined as "a combination of employment practices or an overall employment process," without being required to demonstrate which particular practice or practices caused the adverse impact. Additionally, the initial version of H.R. 4000 specifically placed the burdens of both proof and production of business necessity on the employer. Moreover, the original version of H.R. 4000 incorporated one of the Court's most stringent characterizations of the business necessity defense: "essential to effective job performance."

These provisions provoked a storm of protests that the bill would require employers to use "quotas" to avoid racial, ethnic or gender imbalances in their work forces to avoid Title VII liability. The revised

66. Id. at § 4 (amending 42 U.S.C. § 2000e-3(k)).
67. Id. § 3 (amending 42 U.S.C. § 2000e(o)). This characterization of the business necessity defense was apparently drawn from Dothard v. Rawlinson, 433 U.S. 331, 332 n.14 (1977) ("[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."). Most cases do not apply such a strict definition of business necessity, and use the term more or less interchangeably with the term "job relatedness." E.g., Griggs, 401 U.S. at 424.
68. E.g., Kilpatrick, Employee Provision Unfair—and Perverts Bias Fight, Miami Herald, July 19, 1990, at A2; see also Wards Cove, 109 S.Ct. 2115, 2122 (1989).
bill, as passed by the Senate, eliminates much of the basis for such fears, but remains unacceptable to the Bush administration.\footnote{Bronner, \textit{Civil Rights Act of 1990: Inside the Negotiations}, Boston Globe, July 23, 1990, National/Foreign Section, at 1.} The revised bill\footnote{See Appendix following this article of S. 2104, 101st Cong., 2d Sess.} allows plaintiffs to challenge a discrete group of practices, but not to simply claim that the "overall employment process" discriminates. Moreover, multi-practice challenges can be blocked "if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available[,]" the specific practice or practices responsible for the disproportionate adverse impact.\footnote{Id. at § 4(k)(1)(B)(iii).} In that event, Title VII plaintiffs will be required to follow the \textit{Wards Cove} standards in isolating the specific practices allegedly responsible for the adverse impact. Only when the effects of multiple employment practices are inextricably mingled, whether because of their inherent natures or because of inadequate employer records, will plaintiffs be permitted to proceed against the practices as a group. Because the employer controls both the practices used and the recordkeeping process,\footnote{"[I]t is the employer who designs and evaluates job requirements and possesses all the evidence and information relating to its own hiring practices." \textit{Cong. Dir.}, supra note 8, at 222 (statement of Senator Reigle).} such an exception seems both fair and reasonable, particularly when compared with the alternative. The revised bill also replaces the onerous "essential to effective job performance" definition of the initial bill with more detailed language, set forth below, coupled with a proviso that the bill's intent is to restore the \textit{Griggs} "job related" standard. The detailed definitional section provides:

\begin{quote}
\begin{enumerate}
\item[(o)(1)] The term 'required by business necessity' means—
\begin{enumerate}
\item in the case of [selection] practices . . . , the practice or group of practices must bear a significant relationship to successful performance of the job; or
\item in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.\footnote{See supra note 70, at § 3(o)(1).}
\end{enumerate}
\end{enumerate}
\end{quote}

The revised bill, unlike its predecessor, goes on to describe the quantum of proof an employer must present to prevail on a business necessity defense:
(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate. 74

These provisions essentially restore and clarify the \textit{Griggs} standard which, in eighteen years of application, has never been shown to cause any employer to resort to the use of a "quota" system. 75

On July 31, 1990, the House Judiciary Committee reported H.R. 4000 to the House floor with revisions almost identical to those made by the Senate. The revised bill subsequently passed the House by a vote of 272-154. 76 Both versions of the bill expressly provide that they are not to be construed to require the use of quotas. The technical differences between the House and Senate versions of the proposed Act were easily reconciled via House-Senate conference, but the Act still could not avoid presidential veto. 77 The Act missed "veto-proof" status by only two votes in the Senate, but by twelve in the House. 78

\textbf{Conclusion}

There can be no doubt that \textit{Wards Cove} and the other decisions targeted by the Civil Rights Act of 1990 represent a serious departure from an established body of precedent applying Title VII adverse impact analysis. The Court often attempts to underplay the importance of

74. \textit{Id.} at § 3(o)(2).
75. \textit{Quota Hogwash}, \textit{supra} note 9; \textit{Red Herring in Black and White}, \textit{supra} note 6; Gerstel, \textit{Threat of Racial Quotas Dogs Civil Rights Bill}, \textit{Washington News}, July 19, 1990; Edelman, \textit{supra} note 6; \textit{Cong. Dig.}, \textit{supra} note 8, at 218 (remarks of Senator Graham from Senate floor debate of July 18, 1990) ("In a series of four hearings on the bill, the Senate Committee on Labor and Human Resources discovered no evidence to suggest that the \textit{Griggs} standard—which this bill will return to—has led to quotas.").
76. \textit{Cong. Dig.}, \textit{supra} note 8, at 205. The House version contains an additional subsection concerning the burden of proof in impact cases which expressly provides that a mere statistical imbalance in a workforce may not constitute a prima facie case of adverse impact discrimination.
78. \textit{Cong. Dig.}, \textit{supra} note 8, at 205; \textit{N.Y. Times}, Oct. 23, 1990, at 1A.
its rulings by pointing to Congress' ability to overturn them. Reliance upon that maxim in the case of last term's decisions, however, is as transparently inappropriate as the Wards Cove Court's denial that its decision reversed the voluminous body of case law applying the Griggs standard. Congress has had many opportunities to review the Griggs opinion since that case was decided in 1971. Its election not to do so constitutes at least tacit approval of the decision. Moreover, many commentators construe the 1972 amendments to Title VII as an express legislative approval of the Griggs doctrine. The Wards Cove Court preempted Congress' prerogative by overruling established case law, thus forcing Congress to act to simply maintain the approved status quo. Such conduct is as much an example of judicial activism as many of the decisions derided by the Justices who, although allegedly subscribing to theories of judicial restraint, made up the Wards Cove majority.

Although it should not have been required to do so, Congress has now acted to restore the settled and approved application of Title VII. The proposed Civil Rights Act of 1990, despite the flood of rhetoric launched by its critics, does not deserve the notoriety it has gained. The most controversial provision of the bill does little more than restore long-standing, legislatively-ratified precedent in the field of EEO law. The Griggs standard, which the Act would restore, became known and understood by all participants in the employment law arena during its eighteen years of operation, without resulting in the use of quota systems or crippling litigation. Passage of the Act will simply restore that familiar standard.

The Watson/Wards Cove standards, on the other hand, would deprive many deserving EEO plaintiffs of any opportunity for relief, and encourage the continued use of ineffective, discriminatory employment practices that cannot be shown to have any relationship to the jobs in question. To permit these decisions to stand would eviscerate the adverse impact doctrine and eliminate years of progress in the battle for

81. LEDVINKA, supra note 27, at 53 ("Personnel specialists are quite familiar with the concept of disparate impact, partly because so many personnel practices are undertaken with the best of motives but end up working to the disadvantage of some race, sex, or ethnic group.")
equal employment opportunity for all qualified workers.

Author's Note:

As this article went to press, President Bush vetoed this bill, and the Senate failed, by one vote, to override the veto. The bill's sponsors, however, have already announced plans to reintroduce it in 1991.
To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

_Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,_

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Civil Rights Act of 1990".

**SEC. 2 FINDINGS AND PURPOSES.**

(a) _FINDINGS._—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) _PURPOSES._—The purposes of this Act are—

(1) to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

**SEC. 3. DEFINITIONS.**

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

“(1) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

“(m) The term 'demonstrates' means meets the burdens of production and persuasion.

“(n) The term 'group of employment practices' means a combination of employment practices or an overall employment process.
“(o) The term ‘required by business necessity’ means essential to effective job performance.

“(p) The term ‘respondent’ means an employer, employment agency, labor organization, joint labor-management committee, or those Federal entities subject to the provisions of section 717.”.

SEC. 4 RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.
Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

“(1) An unlawful employment practice is established under this subsection when—

“(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

“(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that—

“(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

“(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

“(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.”.

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by
adding at the end thereof the following new subsection:

“(1) Discriminatory Practice Need not be Sole Motivating Factor.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.”

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: “or, in a case where a violation is established under section 703(1), if the respondent establishes that it would have taken the same action in the absence of any discrimination”.

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

“(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—

“(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights law—

“(A) by a person who, prior to the entry of such judgment or order, had—

“(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

“(ii) a reasonable opportunity to present objections to such judgment or order;

“(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order.
prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) Statute of Limitations.—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later.";

(3) by striking out ", except that in" and inserting in lieu thereof ".In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) Application to Challenges to Seniority Systems—
Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice."

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent; in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury."

SEC. 9. CLARIFYING ATTORNEYS' FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee;"

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment
or order granting relief under this title is challenged, the
court, in its discretion, may allow the prevailing party in the
original action (other than the Commission or the United
States) to recover from the party against whom relief was
granted in the original action a reasonable attorney's fee
(including expert fees and other litigation expenses) and costs
reasonably incurred in defending (as a party, intervenor or
otherwise) such judgment or order.”.

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE
STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE
FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)
is amended—

(1) in subsection (c), by striking out “thirty days” and
inserting in lieu thereof “ninety days”; and

(2) in subsection (d), by inserting before the period “, and the
same interest to compensate for delay in payment shall be
available as in cases involving non-public parties”.

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.)
is amended by adding at the end thereof the following new section:

“SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS
LAWS

“(a) EFFECTUATION OF PURPOSE.—All Federal laws protecting the
civil rights of persons shall be broadly construed to effectuate the
purpose of such laws to eliminate discrimination and provide effective
remedies.

“(b) NONLIMITATION.—Except as expressively provided, no Federal
law protecting the civil rights of persons shall be construed to restrict
or limit the rights, procedures, or remedies available under any other
Federal law protecting such civil rights.”.

SEC. 12 RESTORING PROHIBITION AGAINST ALL RACIAL
DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF
CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42
U.S.C. 1981) is amended—

(1) by inserting “(a)” before “All persons within”; and

(2) by adding at the end thereof the following new subsection:

“(b) For purposes of this section, the right to ‘make and enforce
contracts’ shall include the making, performance, modification and
termination of contracts, and the enjoyment of all benefits, privileges,
terms and conditions of the contractual relationship.”.

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) paragraphs (2) through (4) of section 7(a) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) TRANSITION RULES.—

(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2) through (4), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months
after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2) through (4), or 12.
APPENDIX 2

101st CONGRESS
2d Session

S. 2104

AN ACT

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This Act may be cited as the “Civil Rights Act of 1990”.

SEC. 2. FINDINGS AND PURPOSES.
(a) FINDINGS.—Congress finds that—
   (1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and
   (2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.
(b) PURPOSES.—It is the purpose of this Act to—
   (1) respond to the Supreme Court’s recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and
   (2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.
Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:
   “(l) The term ‘complaining party’ means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.
   “(m) The term ‘demonstrates’ means meets the burdens of production and persuasion.
   “(n) The term ‘group of employment practices’ means a
combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

“(o)(1) The term ‘required by business necessity’ means—

“(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

“(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

“(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

“(3) This subsection is meant to codify the meaning of ‘business necessity’ as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule Ward’s Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).

“(p) The term ‘respondent’ means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).”

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—

“(1) An unlawful employment practice based on disparate impact is established under this section when—
"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that—

"(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

"(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

"(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

"(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules
I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin.”.

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Section 4) is further amended by adding at the end thereof the following new subsection:

“(1) Discriminatory Practice Need Not Be Sole Contributing Factor.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.”.

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: “or, in a case where a violation is established under section 703(1), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(1), damages may be awarded only for injury that is attributable to the unlawful employment practice”.

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

“(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—

“(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent
A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or
“(D) authorize or permit the denial to any person of the
due process of law required by the United States Constitution.
“(3) Any action, not precluded under this subsection, that
challenges an employment practice that implements and is within
the scope of a litigated or consent judgment or order of the type
referred to in paragraph (1) shall be brought in the court, and if
possible before the judge, that entered such judgment or order.
Nothing in this subsection shall preclude a transfer of such action
pursuant to section 1404 of title 28, United States Code.”.

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO
CHALLENGES TO SENIORITY SYSTEMS.
(a) STATUTE OF LIMITATIONS.—Section 706(e) of the Civil Rights
Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—
(1) by striking out “one hundred and eighty days” and
inserting in lieu thereof “2 years”;
(2) by inserting after “occurred” the first time it appears “or
has been applied to affect adversely the person aggrieved,
whichever is later,”;
(3) by striking out “, except that in” and inserting in lieu
thereof “. In”; and
(4) by striking out “such charge shall be filed” and all that
follows through “whichever is earlier, and”.

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.—
Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by
inserting after the first sentence the following new sentence: “Where a
seniority system or seniority practice is part of a collective bargaining
agreement and such system or practice was included in such agreement
with the intent to discriminate on the basis of race, color, religion, sex,
or national origin, the application of such system or practice during the
period that such collective bargaining agreement is in effect shall be an
unlawful employment practice.”.

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF
INTENTIONAL DISCRIMINATION

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-
5(g)) is amended by inserting before the last sentence the following
new sentences: “With respect to an unlawful employment practice
(other than an unlawful employment practice established in accordance
with section 703(k), or in the case of an unlawful employment practice
under the Americans with Disabilities Act of 1990, other than an
unlawful employment practice established in accordance with
paragraph (3)(A) or paragraph (6) of section 102 of that Act, as it
related to standards and criteria that tend to screen out individuals with disabilities)—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury."

SEC. 9. CLARIFYING ATTORNEYS' FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,;"

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order."

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)
is amended—
(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and
(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties, except that prejudgment interest may not be awarded on compensatory damages".

SEC. 11. CONSTRUCTION.
Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:
SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) Effectuation of Purpose.—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) Nonlimitation.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

"(c) Interpretation.—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act."

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—
(1) by inserting "(a)" before "All persons within"; and
(2) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against
impairment by nongovernmental discrimination as well as against impairment under color of State law."

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to require an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: Provided, however, that nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) Application of Amendments.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) Transition Rules.—

(1) In general.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.—Any orders entered between June 12, 1989
and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) Period of Limitations.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2), or 12.

SEC. 16. CONGRESSIONAL COVERAGE.
Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 et seq.) is amended by adding at the end thereof the following new section:
SEC. 719. CONGRESSIONAL COVERAGE.
"Notwithstanding any other provision of this title, the provisions of this title shall apply to the Congress of the United States, and the means for enforcing this title as such applies to each House of Congress shall be as determined by such House of Congress."
Passed the Senate July 18 (legislative day, July 10), 1990.
Attest:
Secretary.
The Federal Courts in the 21st Century

Maurice Rosenberg*

Introduction

In forecasting the future, one should undoubtedly pick a target date far enough ahead to assure that mortality will get here first.1 My safe selection is the year 2033, which will be the 100th anniversary of FDR’s New Deal. Picking that year allows us to conjure up the prospect of a New Deal for the federal courts. If it comes, what sort of new deal will the nation be giving to and getting from its judiciary? That depends on what kind of federal judicial system we ideally would want. This in turn depends, at least in part, on what changes the next 43 years will bring, and especially, what effect the changes will have on phenomena that might shape the work, structure, operations and personnel of the federal courts.

Luckily, this forecasting enterprise can draw upon the results of a recently completed study by a very capable congressionally established committee that set itself a similar goal. Its target was about 25 years out instead of 43, but I see no problem in using its product as a springboard for this discussion on the coming role of the federal courts.

The Federal Courts Study Committee

In November 1988 in response to widespread, though not unanimous, fears that the federal judicial system was in serious and worsening difficulties, Congress enacted the Federal Courts Study Act.2 The Act created a Federal Courts Study Committee (FCSC) to be set up

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2. STAFF OF SENATE COMM. ON THE FEDERAL COURTS, 100TH CONG., 2D SESS., REPORT OF THE FEDERAL COURTS STUDY COMM. 31 (Comm. Print 1990) [hereinafter REPORT].
within the Judicial Conference of the United States, with 15 members and a 15-month lease on life. The Committee was to "make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute."\(^3\) It did so. On April 2, 1990, the FCSC delivered a thoughtful, comprehensive and lucid assessment of the problems facing the United States federal courts,\(^4\) and made more than 100 recommendations for their cure or alleviation.\(^5\) Each recommendation was explicitly directed either to Congress, the courts, the Department of Justice, the Executive branch generally, or, in a few instances, to the State Justice Institute and the state courts.\(^6\)

Besides calling for an examination of current federal court problems, Congress required the Committee to develop a long-range plan for the future of the federal judiciary, identifying four subjects on which assessments were needed: (1) alternative methods of dispute resolution; (2) the structure and administration of the Federal court system; (3) methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and (4) the types of disputes resolved by the Federal courts.\(^7\)

In January 1989 Chief Justice William H. Rehnquist appointed Judge Joseph F. Weis, Jr., of the United States Court of Appeals for the Third Circuit to chair the committee and named as members two other circuit courts of appeals judges, two district judges, two United States Senators, two Representatives, an Assistant Attorney General, several practitioners, a state chief justice and a university president.\(^8\) A small full-time staff and a large number of unpaid advisers and consultants aided the FCSC in the remarkably intensive and expeditious dis-

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3. *Id.*
4. The Report did not deal in a substantial way with problems of the state courts.
5. *Report, supra* note 2, at 172-85. Addressing each recommendation to an identified agency is an excellent way to focus attention. It undoubtedly has shortened the time to implement a number of recommendations. *See, e.g.*, FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT OF 1990, H.R. 5316, 101st Cong., 2d Sess. (1990).
7. *Id.* at 189-91.
8. *Id.* at 31, 193-98.
charge of its duties. At its outset the final report of the Committee identifies the flood of incoming cases as a threat to the effective functioning of the federal courts:

It is no doubt a compliment to the federal judiciary that so many people are so eager to use its services in preference to those of other adjudicatory institutions. Many of these people do not realize, however — or do not care — that the demands they place on the system make it less able to serve the needs of other groups, or even their own needs in the long run.

Similarly straightforward is the FCSC's response to the problem of perceived overuse of the federal courts:

The committee believes . . . that the primary and preferred course, while time exists, is to limit the federal judiciary to just those functions that its unique federal role requires, so as to avoid the perhaps overwhelming impact of further unchecked growth. We have therefore concentrated upon incremental reforms that may at least postpone the need for more extreme ones.

Before examining the recommended reforms we should note briefly how the Committee went about its work. In its early days the FCSC organized itself into three subcommittees corresponding to its main concerns. One was the Subcommittee on Workload, which focused on: the size and mix of the federal courts' civil and criminal caseload; alternative dispute resolution methods; complex multi-district litigation; and improving the courts' capacity to deal with scientific evidence. Another was the Subcommittee on Role and Relationships, concerned with the federal courts' relation to Congress, Article I courts, administrative agencies and state courts. The third, the Subcommittee on Administration, Management and Structure, concentrated on the way the system is organized and run, with emphasis on appellate structure.
To identify specific issues for its agenda the FCSC conducted a survey of federal judges and citizens' groups, bar organizations, research groups, civil rights groups, professors and others. It held public hearings in 13 cities, drawing testimony from more than 250 witnesses.\(^{14}\) The Committee also had the benefit of written comments from hundreds of sources.\(^{16}\) In the end, the FCSC produced in a commendably short period of time a report that may well be the most comprehensive and searching study of the federal courts in their 200-year history.\(^{16}\)

**Recommendations of the FCSC**

The FCSC grouped its recommendations under eight subject matter headings: (1) reallocating business between the state and federal systems; (2) creating non-judicial alternative forums for some types of cases; (3) enlarging the federal courts' capacity; (4) reducing the complexity and speeding the flow of litigation; (5) mitigating appellate court overload; (6) revising sentencing rules; (7) improving federal court administration; and (8) protecting against bias in the judicial branch and its processes.\(^{17}\) For present purposes those headings are somewhat diffuse. I find it useful to limit this discussion to a few of the headings, to revise them somewhat and to rearrange the contents. My aim is to highlight several of the large problems.

First, some of the recommendations would reduce the volume and workload of the Article III courts. In part this would be accomplished by diverting whole categories of cases to other tribunals, mainly state courts and non-judicial forums.\(^{18}\) In part it would be achieved by expediting dispositions through more settlements and simplified litigation procedures.\(^{19}\)

Drug cases receive extended attention.\(^{20}\) The Report argues that, in order to protect the federal courts from being capsized by drug cases which the state courts could absorb, federal enforcement officials

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14. *Id.* at 32-33.
15. *Id.* at 32.
16. *REPORT,* supra note 2, at 32.
17. *Id.* at 33.
18. *Id.* at 35.
19. *Id.* at 49.
20. *Id.* at 35.
should target only the relatively few cases (those with international or interstate elements) that state authorities cannot or will not effectively prosecute. 21

Federal jurisdiction based on diversity, now accounting for about one in every four cases in the federal district courts, should be eliminated, the Report urges, except for alienage, interpleader and a new category of multistate litigation involving complex issues, such as mass torts. 22 If near-total elimination of diversity cases is not acceptable, the FCSC falls back to lesser curtailments, such as barring plaintiffs from invoking diversity jurisdiction in their home states. 23

Disability claims, 24 small-size tort claims against the federal government, 25 tax cases, 26 bankruptcy appeals, 27 and claims by railway workers and seamen for job injuries, 28 should all be deflected from the Article III courts to a variety of other tribunals, most of them to be newly created. 29 Another flood-control proposal would authorize the Equal Employment Opportunity Commission to install a five-year pilot program to arbitrate employment discrimination cases with the consent of both parties. 30

Second, there are proposals that deal with the structure of the judicial system, with a heavy emphasis on the appellate courts. 31 The Report opposes creation of a “national intermediate court of appeals” of the kind proposed in 1975 by the Commission on Revision of the Federal Court Appellate System. 32 But, noting that “caseload pressures are inexorable” 33 in the courts of appeals, the Report describes and diagrams five alternative structures that are designed to increase the capacity of the courts of appeals without adding to the potential for intercircuit or intracircuit conflicts. 34 Besides urging serious study of the

21. REPORT, supra note 2, at 37.
22. Id. at 38-40.
23. Id. at 42.
24. Id. at 55.
25. Id. at 81.
26. REPORT, supra note 2, at 69.
27. Id. at 74.
28. Id. at 62.
29. Id. at 55.
30. Id. at 60.
31. REPORT, supra note 2, at 109, 116-17.
32. Id. at 116-17.
33. Id. at 117.
34. Id. at 117-23.
alternative versions of the appellate system presented (none of which it endorses), the Report calls upon Congress to authorize a five-year experimental project to deal with intercircuit conflicts.\textsuperscript{35} The Supreme Court could, if it chooses, refer selected cases to an en banc court of appeals for a decision that would be a nationwide precedent.

Third, there are recommendations to increase available judge-power: "More judges are essential. But they are not the ultimate solution to the federal courts' caseload crisis."\textsuperscript{36} In this category is the proposal to limit incoming tax cases to the Article I trial division of the Tax Court and to create an Article III appellate division with exclusive jurisdiction over appeals in all tax cases.\textsuperscript{37}

An Office of Judicial Impact Assessment is proposed.\textsuperscript{38} It would act in liaison with Congress by advising on the impact on the courts of contemplated legislation. The Committee also recommended that when drafting laws, Congress use a checklist to eliminate the need for post-enactment litigation and judicial interpretation. The checklist would include issues such as the applicable statute of limitations, whether the statute means to preempt state law, whether the statute created a private cause of action, and similar recurring questions.\textsuperscript{39}

Some of the FCSC's recommendations have already been put into effect or into the legislative hopper. For instance, the Federal Courts Study Committee Implementation Act of 1990 calls for a study by the Federal Judicial Center of Intercircuit Conflicts and provides a fallback 4-year statute of limitations for future federal legislation that omits to specify a limitations period.\textsuperscript{40}

The Role of the Federal Courts

Not all observers accept the FCSC's premise that it is essential "to limit the federal judiciary to just those functions that its unique role requires, so as to avoid" the harmful effects of unchecked growth. Nevertheless, the premise has a venerable pedigree. As far back as 1954, Professor Henry M. Hart, Jr., said that the "time has long been overdue for a full dress examination by Congress of the use to which [the

\begin{itemize}
  \item 35. \textit{Id.} at 126.
  \item 36. \textit{REPORT, supra} note 2, at 36.
  \item 37. \textit{Id.} at 69.
  \item 38. \textit{Id.} at 89.
  \item 39. \textit{Id.} at 91.
\end{itemize}
The reexamination is sure to spark a fiery debate, for there are deep differences of opinion regarding the basic functions of the federal courts in American society. In my view, a fair delineation goes something like this:

The federal courts’ central purposes and functions are to protect the individual liberties, freedoms and rights of these people; to give definitive interpretation and application to constitutional provisions and federal laws, and to assure the continued vitality of democratic processes of government. These are vital functions for the welfare of the nation and its people. No other agency or institution of government can perform these duties as effectively as the federal courts.42

Because the question of which disputes belong in the federal courts and which ones do not is so sensitive, any recommendation to pare their jurisdiction must be approached with utmost caution. The decision must rest on principled criteria that are as free as possible from political or ideological agenda. A good example is the address of this subject by the late Judge Henry J. Friendly in his 1972 Carpentier Lectures at Columbia University. He described both a “minimum” and a “maximum” model of federal jurisdiction. Those who espouse the minimum model, he pointed out, proceed on the theory that the best course is to trust the state courts, subject to appropriate federal appellate review. In the hypothetical minimum model he identified many types of cases that were excluded from federal jurisdiction, but not cases where “everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts.”43 The following categories of actions were in the minimum model: (1) cases where the United States is seeking to enforce its own laws; (2) civil claims by the United States; (3) suits against the United States; (4) civil cases in the admiralty and maritime jurisdiction; (5) bankruptcy cases (but he went on to say there is no reason why bankruptcy laws could not be confided to state courts, since they involve only private rights).44

Judge Friendly observed that the minimum model of federal jurisdiction would be broader than that of the First Judiciary Act, with the

44. Id. at 10.
notable exception that diversity jurisdiction would not be present.45 The minimum model would also eliminate general federal question jurisdiction. Vindicating federal rights would be a job for the state courts, with review by the Supreme Court or, if needed, by intermediate federal appellate courts.

In contrast, the maximum model would go to the full extent of constitutional judicial power. It would place considerable reliance on the argument that federal courts provide a "juster justice" than state courts; thus, the more cases in the federal system the better.46 Although the issue of the proper allocation of jurisdiction to the federal courts is today debated frequently on ideological lines, with conservatives calling for studies of the proper division of federal-state judicial competence and liberals opposing any such studies as likely to lead to restrictions on the federal courts' jurisdiction, this was not always so. The American Law Institute's landmark "Study of the Division of Jurisdiction Between the Federal and State Courts" (1969) originated in a suggestion of Chief Justice Earl Warren in an address to the Institute at its annual meeting in 1959. He said, "[I]t is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism."47

Forecasting The Federal Court's Future

As already noted, forecasting the far-off needs and problems of the federal courts is risky business. A sure way to be wrong is to project present trends. Former Attorney General Griffin Bell was fond of pointing out that based on the trend in Georgia's prison population, by the year 2016 every inhabitant of the state would be in prison.48

Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals has observed that: "Not only do changing conditions affect the trend lines, but sometimes the trends themselves result in a counteraction."49 Yet, with all their unreliability as predictors, trends can stimulate the imagination. A decade ago it was calculated that if trends for the pe-

45. Id. at 11.
46. Id. at 12.
49. Id. at 227.
period 1975-80 were to continue to the year 2000, the number of district court judgeships would increase by about 50%, district court filings by 37%, appellate court filings by 223%, and appellate court judgeships by 25%.50

To some extent, both the nature of the work the federal courts do and the structure of the federal judicial system will depend upon the demands for judicial time and energy. This requires translating the data on the quantity of filed cases into more realistic dimensions — that is, by assigning weights to the various components of the caseload in order to reflect the work demands they will make. The result will be to purge the caseload figures of statistical fluff in the form of thousands of pro forma actions such as the student-loan collection cases brought by the United States Government. These almost never produce opposition, let alone a trial. They require very little judicial energy and should not be assigned statistical parity with antitrust and other complex lawsuits. Determining the impact of intake volume on the courts requires analyzing the nature as well as the number of filed cases.

Today there are about 835 authorized federal judgeships.51 Should there be any resistance to continuing to expand the size of the federal judiciary? How many more federal judges would it be desirable to have? The FCSC suggested that 1,000 is the practical ceiling on the number of judges if the Article III judiciary is to remain capable of performing its essential functions without significant degradation of quality.52 The FCSC offered this argument for limiting the number:

Even if a highly competent federal judiciary consisting of thousands of judges could be created and maintained, the coordination of so many judges would be extraordinarily difficult. The more trial judges there are, the more appeals judges there must be; the more appeals judges there are, the higher the rate of appeal, because it becomes more difficult to predict the behavior of the appellate court; the more appeals there are, the more difficult it is for the Supreme Court to maintain some minimum uniformity of federal decisional law, because its capacity to review decisions of the

50. Id. at 228.

51. The Federal Judgeship Act of 1990 (H.R. 5316), which passed both houses of Congress on October 26, 1990, established 11 new court of appeals judgeships and 74 district court judgeships for a total of 85 new judgeships. As this article goes to press, the authorizing legislation awaits President Bush’s action.

52. REPORT, supra note 2, at 8.
lower federal courts is limited.\textsuperscript{53}

Although this is a reasonable argument, it does not persuade the large constituency that admires and trusts the federal courts above all other agencies of government, state or federal. Members of that constituency hold fast to the view that every federal right must be heard by an Article III judge. If there are not enough federal judges, they say, "Get more!" And, they add, there are thousands of qualified persons among the three quarters of a million lawyers in America. In effect, they say: "If we need more, we can afford more, and we can find more." Thus, the dilemma: systemic limits are on a collision course with substantive expansion. Congress has been legislating new rights at a merry and unchecked pace. Courts have been recognizing more and more federal rights and some new federal defenses. Neither Congress nor the courts are likely to stop legislating or creating rights and defenses. That means that there will be more and more litigation. If we can forecast anything about 2033, it is that barring some major change in the psychology, economics or utility of litigating, Americans will continue to litigate in huge numbers.

What factors in American society will affect the nature of legal rights and the desire to litigate them in federal courts in the decades ahead? That is a question futurists, jurists, and lawyers have been energetically discussing in recent times. Among the frequently mentioned factors of change that may affect the courts are demography, science-technology, and economics. How these amorphous phenomena may make their effects felt on the work of the federal courts involves undis- ciplined speculation, not prediction. So be it.

Among demographic problems: As the population gets grayer — even white-haired — will there be contests between the younger, more productive, and the older, more affluent, segments of the society for scarce goods and services? As the population gets more heterogeneous, will more than the English language be standard in the courts of the United States? Will briefs have to be written in two languages? Or perhaps we will return to the innocent idea of esperantist days — that there ought to be a world-wide tongue.

Science and technology offer myriad possibilities of generating great volumes of federal litigation. Environmental issues are a prime example. In just a few centuries human beings have progressed from garbage in the streets to garbage all over the globe — in land, water

\textsuperscript{53} Id. at 7.
and in the atmosphere. The environment is here to stay, not only as a resource but as a problem. Indeed, I see it as the major problem of the twenty-first century. How shall we keep civilization from strangling in its own waste, and what is the role of the federal courts in vindicating the rights of people with conflicting views and priorities regarding environmental issues?

With genetic engineering advancing at a feverish pace, the shape of looming legal issues is apparent. Competing claims to replacement parts for worn-out limbs and organs and the use of fetal tissue for medical purposes are two such issues. Is the day coming when human beings who give up the ghost, or who never get that far because they were never born, are used for spare parts?

Communication advances have certainly not run their course. Exploding communications technology will not be without problems. Once it becomes possible to see or hear activities behind closed doors and thick walls, what happens to privacy? How will Congress and federal courts deal with those issues?!

Conclusion

If trends are unreliable predictors and if the advent of a Gorbachev, an asbestos-case deluge, or a crack-cocaine epidemic is totally unforeseeable — in short, if we are at the mercy of the unexpected — how can we forecast what needs and problems the federal courts face in 40-odd years? I fear we cannot do even a poor job of prophesying. That means we cannot program the federal judiciary to be elite or populist, bureaucratic or individualistic, restricted in jurisdiction or expansive, proceeding by general rules or by case management, concerned with systemic fairness as well as case-by-case fairness, etc.

What we can and should do, in my opinion, is to prepare for whatever the future holds by three steps. The first need is for a planning capability for the federal judicial system. It is certain the work of the federal courts will continue to change rapidly and substantially. The course of responsibility is to anticipate problems and develop possible responses before the problems reach a crisis stage. A long-range planning capability within the Judicial Conference was proposed by the FCSC. Although opinions may differ as to the exact structure and makeup of the planning agency, the need seems clear and its location in the third branch reasonable.

A second need is for built-in flexibility in the federal judiciary. This can only come by understanding, through research and analysis,
the dynamics of case flow, the indicia of case durability, and the weighted judicial-time requirements of the caseload at both the trial and appellate level. This will prepare the judiciary for dealing with court problems of the future, whatever form they take.

A final need is to appreciate that the federal courts, like the state courts, are part of a dispute resolution system that includes many alternatives to full-blown litigation as ways of resolving disputes. If that concept can be absorbed and acted upon, the chances of a better deal for the courts in 2033 will be much improved.
EDITORS’ NOTE

The Editors of this issue intended to send a cassette tape of the controversial recording, *As Nasty As They Wanna Be*, along with this book, as an exhibit for the following three articles on music and obscenity. It is our belief that any legitimate inquiry into the constitutionality of banning the 2 Live Crew’s music is not complete without actually listening to the work *taken as a whole*. Reading only the lyrics skews the reader’s impression of the material at issue, and cannot possibly allow one to evaluate artistic value.

We considered, at great length, whether such a distribution would violate state and federal obscenity statutes, subjecting ourselves, the University, and even the recipients of the tape to serious criminal liability. The *Miller* standard and the related statutes do not specifically exempt material with “educational” value from prosecutorial zeal. Yet, we concluded that such a limited distribution for a clearly academic purpose had serious value and was justifiable despite the uncertainty in the law.

Unfortunately, our decision was vetoed for non-academic, non-legal considerations—in favor of protecting the perceived sensibilities and sensitivities of those upon whose support this University is dependent. Thus, we are reminded again of the power of speech, the fear it engenders, and the preciousness of the right to litigate—when necessary—for the freedoms protected by the first amendment.
Race, Rap and the Community Standards Test of Obscenity: The Community of Culture*

Steven I. Friedland**

Most of us, I suspect, hardly know our neighbors if we know them at all.¹

I. Introduction

Controversy and obscenity laws appear to go hand in hand.² Within the past year, for example, obscenity issues have cropped up in disparate areas around the country, creating a public outcry³ stretching far beyond the locales in which the issues arose.⁴ In Cincinnati, an ex-

* © 1990 by Steven I. Friedland. I would like to extend my thanks & appreciation for useful comments on earlier drafts to Michael Cohn, Larry Corman, Simone Sommer, Joseph Weiss, Jr., Michael Shames, Anthony Chase, Johnny Burris, Bruce Rogow, Beverly Pohl, Shirley DeLuna, Brenda Pagliaro, and Leslie Deckelbaum.

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². As one commentator aptly noted, “over the years, few tasks have proven more frustrating and elusive for the Supreme Court than its attempt to define obscenity.” How A 'Reasonable Person' Might Define Obscenity, Nat'l L. J., May 18, 1987, at 5; see, e.g., Gliedman, Obscenity Law: Definitions and Contemporary Standards, 1985 ANN. SURV. AM. L. 913 (1985); Kamp, Obscenity and the Supreme Court: A Communication Approach to a Persistent Judicial Problem, 2 COMM. AND THE LAW 1 (1980).

³. Cf. H. Kalven, Jr., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 6 (Harper and Rowe 1988) (“It is a paradox of modern life that speech, although highly prized, enjoys its great protection in part because it is so often of no concern to anyone. To an almost alarming degree, tolerance depends not on principle but on indifference.”); see also Bollinger, Harry Kalven, The Prost of the First Amendment, 87 MICH. L. REV. 1576, 1578 (1989).

⁴. In fact, obscenity prosecutions by the Department of Justice increased from 37 in 1988 to 120 in 1989. Soocher, It's Bad, It's Def - Is It Obscene, Nat'l L.J., June 4, 1990, at 1. “We're definitely in the middle of an anti-obscenity boom . . . [a]nd when you have a ratcheting up of obscenity prosecutions in one area of the arts, you have a ratcheting up in other areas, too.” Id. (quoting first amendment attorney Martin
hibit by artist Robert Mapplethorpe was the source of an obscenity prosecution against the museum curator who agreed to display the artist’s work. In Alabama, a district attorney brought criminal charges against a New York cable television company (with subscribers nationwide) for beaming pornographic programs into the homes of 50 consenting families. The charges effectively drove the company out of business. In Congress, Jesse Helms led a determined movement to limit funding by the National Endowment For the Arts to artists whose works include sexually explicit scenes. In Broward County, Florida, a rap group named 2 Live Crew, once known only to devotees of hip-hop music, was thrust into the national spotlight when a federal district court judge in *Skyywalker Records, Inc. v. Navarro* found the group’s recording, “As Nasty As They Wanna Be,” to be obscene.

The significance of these cases, particularly the ruling in *Skyywalker Records, Inc.*, is both direct and periphrastic. At a mini-

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5. City of Cincinnati v. Contemporary Art Center and Dennis Barrie (Museum Curator), Case Nos. 90 CRB 11699AB, and 90 CRB 11700AB. These cases resulted in an acquittal upon a trial by jury.
7. See Soocher *supra*, note 4, at 1 (“At the national level, the use of restrictions on federally funded arts projects containing sexually explicit material have been the focus of heated Congressional debates on budgeting for the National Endowment for the Arts.”)
9. *Id.* A declaratory judgment action was brought by the members of the 2 Live Crew and its leader’s record company, Skywalker Records, Final Order (2nd cir.) (No. 90-6220-CIV-JAG) against the sheriff of Broward County, Nicholas Navarro. The judge who decided this declaratory judgment action was federal district court Judge Jose Gonzalez. The court found, by a preponderance of the evidence, that the plaintiffs’ album was not only nasty, but legally obscene. In so doing, the federal district court judge found that the song satisfied the requirements of Miller v. California, 413 U.S. 15 (1973). The three prong test of Miller concluded that material is obscene only when:

- the average person, applying contemporary community standards would find that the words, taken as a whole, appeals to the prurient interest . . .
- whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . and . . .
- whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 24.

The case was a declaratory judgment action and not a criminal matter. Regardless, further sale and distribution of the record in Broward County ceased.
10. Periphrastic is derived from the root “periphery” which refers to “the out-
mum, this was the first time in the United States a federal district court judge had ruled that a musical recording was obscene. In addition, the ruling created precedent regarding the scope of obscene matter, and opened the door for additional findings about other songs. On a different level, the ruling sent economic and creative tremors through-out the music industry, from performers to producers to other business personnel.

The most significant impact of these recent obscenity disputes, however, is on the legal definition used to judge whether material is obscene. The criticism of the Supreme Court’s attempts to define obscenity has been widespread since its initial declaration in 1957 in Roth v. United States. One observer has commented, “[T]his unlikely issue has proved uniquely stubborn and resistant. The court has been handicapped by a treacherous political under-tow: the justification for obscenity regulation may be faint, but the political passions invested in the issue are fierce.”

*Skywalker Records, Inc.*, in particular, offered judges simply one more text-book reminder of the recurring problem of defining obscenity. This problem of epistemology has burdened not only the district court judge in *Skywalker Records, Inc.*, but many members of the Supreme Court as well. Members of the Supreme Court have expressed their dissatisfaction with the obscenity test since the Court first

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13. Soocher, supra note 4, at 1. The National Law Journal noted, “But the industry barely had time to catch its breath before anti-obscenity attacks over music releases - particularly rap - increased at an alarming rate.” Id.


16. H. Kalven, supra note 2, at 34.

attempted a generalized standard in Roth.\textsuperscript{18} Even Justice Brennan, the author of the majority decision in Roth, subsequently noted that while he attempted to find a workable definition for obscenity, he could not do it.\textsuperscript{19} Instead, after years of trying, he was prepared to conclude that a tolerably vague rule could not be constructed.\textsuperscript{20}

The Court found the subjectivity of the obscenity definitions to be particularly nettlesome. Justice Douglas succinctly summarized this problem when he wrote, "what may be trash to me, may be prized by others."\textsuperscript{21} Justice Stewart agreed with this assessment in Cohen v. California,\textsuperscript{22} when he wrote "[i]t is often true that one man's vulgarity is another man's lyric."\textsuperscript{23} Even those who believe that an administrable definition of obscenity exists undoubtedly would be forced to conclude that the Supreme Court's attempt to adequately define obscene speech had taken the Supreme Court down a twisting and sometimes tortuous path since Roth.\textsuperscript{24}

Yet, the existing definition has had a somewhat stable existence for more than sixteen years. The parameters of the present obscenity definition are set forth in the seminal case of Miller v. California.\textsuperscript{25} There, former Chief Justice Burger, writing for the majority, offered a three-pronged test for determining whether a particular work could be found obscene.\textsuperscript{26}

\begin{itemize}
  \item 18. Roth, 354 U.S. 476.
  \item 19. Justice Brennan stated:
  \begin{quote}
  Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 16 years of experimentation and debate, I am reluctantly forced to the conclusions that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level
  \end{quote}
  \item 20. Id.
  \item 21. United States v. 12 200-ft Reels of Super 8 MM Film, 413 U.S. 123, 137 (Douglas, J., dissenting).
  \item 22. 403 U.S. 15 (1971).
  \item 23. Id. at 25.
  \item 24. See, e.g., How a 'Reasonable Person' Might Define Obscenity, supra note 3, at 5. "Last week the high court revisited the thorny issue [in Pope v. Illinois, 481 U.S. 497 (1987)] and cast more light, but not enough for some groups constantly drawn into these murky waters, on how to judge allegedly obscene material." Id.
  \item 25. Miller, 413 U.S. 15.
  \item 26. Id.; see also Note, First Amendment - The Objective Standard for Social Values in Obscenity Cases, 78 J. CRIM. L. & CRIMINOLOGY 735 (1988).
\end{itemize}
(1) that the average person, applying contemporary community standards, find that the work, taken as a whole, appeals to the prurient interest;
(2) that measured by contemporary community standards, the work must depict or describe in a patently offensive way sexual conduct specifically defined by the applicable state law; and
(3) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 27

When these three prongs are applied to specific cases, numerous questions about the prongs' application arise. 28 One important but overlooked issue is how to define "community standards," which is the measuring device used for the first two prongs. 29

The court in *Skyywalker Records, Inc.*, for example, defined the relevant community as comprising a geographic area of three contiguous counties in Florida — Palm Beach, Broward and Dade. 30 These counties extend for approximately 100 miles within the southeast corner of the State, and contain more than 3 million people of many different races and ethnicity. 31 Ascertaining the "community" values of such a large, diverse group of people would be difficult at best. Even if a public opinion poll is used, new questions would arise. Would the

28. The defendant in *Miller* sent five unsolicited advertising brochures through the mail to a restaurant in Newport Beach, California. These brochures advertised various books, including books titled "Intercourse," "Man-Woman," "Sexual Orgy Illustrated," and "An Illustrated History of Pornography." The brochures also advertised a film entitled "Marital Intercourse." The brochures included graphic pictures of men and women engaged in sexual activities. The defendant was convicted upon a jury trial of violating the California Penal Code, which makes it a misdemeanor for "knowingly distributing obscene matter." CAL. PENAL CODE § 311.2(a). The defendant appealed to the appellate department of the Supreme Court of California, but the appeal was summarily denied.

29. The United States Supreme Court, in *Pope v. Illinois*, 481 U.S. 497 (1987), has held that the third prong of the *Miller* test should not be based on community standards but on an objective test, based on the reasonable person. Yet, the question of value for prong three is not resolved by labeling that value artistic, scientific, literary or political; the determination of whether such value exists leaves open the question of what kind of norms shall inculcate the predicate determination of the eventual significance of the material. Thus, it is still unclear as to the role culture, technology, and other important variables of modern day life play in determining whether any work has scientific, literary, artistic or political value.

31. *Id.*
majority of those polled dictate the community's standards? How would the undecided vote be considered? Would strength of conviction be relevant? These and other administrability problems associated with a geographic-based definition of community standards were not confronted in the case of 2 Live Crew. Instead, in evaluating this tri-county "community's" standards, the federal district court judge relied on his own experiences within Broward County, without justifying or articulating either the method by which he ascertained what the community's standards were, or how they intersected with his own views.\footnote{32. Id. at 590.}

This article proposes that the reliance on a geographically based "community" to evaluate prongs one and two of the \textit{Miller} test is constitutionally infirm. The "geographic community" test is unworkable because a geographic area does not provide an adequate measure of a community's value structure or a sufficient indication of a group's collective morality. Upon applying a geographic test, the community's values remain indeterminant. This lack of moral coherence occurs because geographically based communities which exhibit some moral cohesiveness no longer predominate in the 1990's—if such communities ever predominated at all, even in the 1950's and 1960's during the infancy of \textit{Roth}. Instead, collective morality today is more dependent on cultural influences and technology such as cable television, than on the geographic proximity of individuals. Thus, such cultural considerations must be used to provide the moral content for any measure\footnote{33. Even if it can be done, the speech form of obscenity would have sufficient value to survive prong three of the \textit{Miller} test. As Professor Ronald Dworkin has noted, "[r]estricted publication leaves a certain hypothesis entirely unmade: the hypothesis that sex should enter all levels of public culture on the same standing as soap opera romance or movie trivia . . . ." Wright, \textit{Defining Obscenity: The Criterion of Value}, 22 \textit{NEW ENG. L. REV.} 315, 330 (1987-88) (quoting R. DWORKIN, A MATTER OF PRINCIPLE 342 (1985)).} of community standards under \textit{Miller}.\footnote{34. While this article focuses on the detrimental relativism of the community standards definition, it is further the belief of the author that the obscenity test is invalid for several other reasons as well. One of these reasons is the inadministrability of the third prong, which attempts to place a value on obscenity vis a vis other forms of speech. This valuation notion is extremely subjective and cannot be applied in a constitutionally acceptable manner.} In effect, the lack of content\footnote{35. One commentator noted that a community standards test must have a clear and articulable definition: "the use of juries, expert evidence, or perhaps an administrative board, may increase the credibility of a community standards test; however, these} in a
The geographic-based test can only be overcome through the addition of cultural concerns.

The article further notes, however, that even if cultural considerations are used as a value-producing supplement to a geographic boundaries test, a local community's value structure still may be too dynamic to serve as a constitutional guideline. The sub-cultures within the community may simply prove to be too unstable to provide for a valid measurement.

Yet, if the Miller approach is maintained, the article concludes that using cultural considerations is substantially more effective than not, regardless of the potential for cultural instability. Perhaps the greatest significance of utilizing cultural concerns lies in the educational value of forcing jurors and judges to struggle with the question of valuation and to consider disparate perspectives.

This article contains six sections. After the introduction, Section II of the article traces the history of obscenity law. Section III discusses the deficiencies of a geographically-based community standard. Section IV demonstrates that a culturally-based analysis is more appropriate than a geographically-based approach. Section V suggests that even if cultural considerations are utilized as a supplement to geographic boundaries, a stable set of community values still may be difficult to ascertain. The last section provides a conclusion.

II. Obscenity and the First Amendment

The first amendment to the United States Constitution states in part, "Congress shall make no law . . . abridging the freedom of speech." Freedom of speech has long been considered one of the most


36. The embracement of a particular valuation structure as evidenced in prong three lacks a realizable definition since the terms literary, artistic, political or scientific must be based upon varying mores emanating from culture, tradition, and technological sources. The presence of these variables would be satisfactory if the jury was merely determining whether an individual should be morally condemned for committing an act in violation of minimally acceptable standards for a particular geographic community. As a structure of constitutional law, however, this test is woefully inadequate. Any attempt to place a particular value on a work that avoids objective criteria or that relies on a community-based determination, cannot be adequately applied to meet constitutional parameters of fairness and consistency.

37. U.S. CONST. amend I. This provision is applicable against the states through the fourteenth amendment due process clause. See, e.g., Chaplinsky v. New Hamp-
sacred of constitutional rights. Its protection is viewed as essential to an informed electorate; the full and robust debate about ideas it promotes are believed to lead to the truth. The conceptualization of the first amendment is that it serves to promote “free trade in ideas.” In this respect, it constitutes a preservative of other constitutional rights and liberties, embodying the Western liberal traditions of, among others, John Stewart Mill, Thomas Emerson and Oliver Wendell Holmes, Jr. These traditions include a healthy respect for the extrinsic value of speech as a facilitator of a vibrant and growing society.

Despite the strong traditional regard for free speech, not all forms of speech are protected. Speech such as fighting words, perjury, defamation and obscenity are considered to fall outside of the first amendment’s protection, and may be prohibited by the state. The rationales for excluding certain types of speech from the protection of the first amendment generally fall into two categories. One is the lack of social or other value of the particular speech form, and the second is the harm of the speech to others. With obscenity, it long has been believed that this form of speech corrupts the morals of a society, particularly its youth. This concept extends back to the common law of England. Even in modern times, studies have been performed attempting

39. See id.; see also Whitney, 274 U.S. at 375-76.
41. See, e.g., Chaplinsky, 315 U.S. at 571; Roth, 354 U.S. at 483.
42. Obscenity laws were originally motivated by religious purposes. See Note, Balancing Community Standards Against Constitutional Freedoms of Speech and Press: Pope v. Illinois, 41 Sw. L. J. 1023, 1025-27 (1987). The first state anti-obscenity law was enacted in 1822 by Vermont. Id. at 1027. And the federal government followed suit in 1842. Id; see also 5 STAT. 566, § 28 (1842) (codified as amended at 19 U.S.C. § 1305 (1988)) (the major purpose of this law, apparently, was to permit the confiscation of imported French postcards); F. Schauer, THE LAW OF OBSCENITY 10 (1976).
43. See, e.g., Roth, 354 U.S. at 485; Chaplinsky, 315 U.S. at 571-72 (1942); see generally L. Tribe, AMERICAN CONSTITUTIONAL LAW, §§ 12-16 (1988); Berry & Wolin, Regulating Rock Lyrics: A New Wave of Censorship?, 23 HARV. J. ON LEGIS. 595, 597 (1986).
44. The first statute regulating obscenity was adopted by the federal government in 1842. See 5 STAT. 566 § 28 (1842).
45. See Kamp, supra note 3, at 6 n.14 (citing Regina v. Hickland, L.R. 3QB 360 (1868)).
to link obscenity with other harms such as the commission of crimes.\textsuperscript{46} Important Supreme Court rulings supplemented the harm approach with the premise that obscenity has no social value.\textsuperscript{47}

To be obscene,\textsuperscript{48} speech must at a minimum be erotic.\textsuperscript{49} Yet, not all speech about sex is obscene,\textsuperscript{50} and not all pornography is obscene. In 1957, the Court in \textit{Roth v. United States}\textsuperscript{51} set forth a test describing the kind of material that is obscene. The \textit{Roth} test posed a single question: "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."\textsuperscript{52}

Because of dissatisfaction with the \textit{Roth} test, the Supreme Court modified \textit{Roth} in several respects in \textit{Memoirs v. Massachusetts}.\textsuperscript{53} The one prong test of \textit{Roth} was expanded to three separate prongs, which included the \textit{Roth} test as the first prong. Justice Brennan, writing for


\textsuperscript{47} See, \textit{e.g.}, Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966); \textit{Roth}, 354 U.S. 476.

\textsuperscript{48} The definition of obscenity contains perhaps even more variables than other forms of unprotected speech. The stringency of the test, for example, turns on whether the speech involves children. See \textit{e.g.}, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); C. Berry & D. Wolin, \textit{supra} note 43, at 599-600; see also Schauer, \textit{The Return of Variable Obscenity?} 28 HASTINGS L. J. 1275, 1279 (1977); Note, \textit{supra} note 26, at 751; Krauss, \textit{Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing}, 64 IND. L. J. 617, 648 (1989); Note, \textit{supra} note 42, at 1023. Wright, \textit{supra} note 33, at 315. Furthermore, the test depends on local community standards, since the first two prongs of the \textit{Miller} test expressly rely on those standards. Jacobellis v. Ohio, 378 U.S. 184 (1964); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Miller v. California, 413 U.S. 15 (1973).

\textsuperscript{49} \textit{Cohen}, 403 U.S. at 20.

\textsuperscript{50} See, \textit{e.g.}, \textit{Miller}, 413 U.S. at 24 (requiring that the "work taken as a whole appeals to the prurient interest"); \textit{see also} Kimsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 687-88 (1959)(holding that a state may not deny the issuance of permission to show a motion picture film simply because the film portrays adultery in a favorable manner).

\textsuperscript{51} 354 U.S. 476 (1957).

\textsuperscript{52} \textit{Id}. at 489.

\textsuperscript{53} 383 U.S. 413 (1966). The full name of this case was \textit{John Cleland's "Memoirs of a Woman of Pleasure" v. Attorney General}. The book was more widely known as "Fanny Hill." This book was originally penned by Cleland in 1748.
the majority, added as a second test the question of whether the material was patently offensive based on contemporary community standards as a result of the way the material depicted sexual matters. Justice Brennan also added a third test requiring the material to be "utterly without redeeming social value." This test emerged from language found in Roth, which stated that the first amendment did not protect material "utterly without redeeming social importance."

In the years following the enunciation of the Roth - Memoirs test, the majority of the Supreme Court could not agree on how to apply it. In his now famous statement, Justice Stewart, in his concurring opinion in Jacobellis v. Ohio, stated that he might not be able to define obscenity, but would know it when he saw it.

The Court subsequently overhauled the Roth - Memoirs test in Miller v. California in 1973. Miller eliminated the question of "utterly without redeeming social value," and replaced it with a determination of whether the material was "without serious literary artistic, scientific or political value."

Chief Justice Burger concluded that:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer of such materials that these public and commercial activities may bring prosecution.

Although the Court conceded that the language of these standards may well be imprecise, it nevertheless pointed out that adequate warn-
The existence of marginal cases, noted the Court, is not a sufficient basis for adopting an "anything goes" approach to obscenity. The Court in Miller stated, "[N]o amount of 'fatigue' should lead us to adopt a 'convenient institutional' rationale - an absolutist, 'anything goes' view of the First Amendment - because it will lighten our burdens.

While the Court did not provide states with an illustrative statute that would survive a first amendment challenge, it did provide examples of areas of permissible state regulation. The Court also attempted to provide further guidance on the intent and scope of its new delineation of the obscenity standard.

The first two prongs of Miller are measured by the contemporary community's own standards. The size of the relevant community and the description of the average person in that community are questions of fact determined by the trier of fact. The third prong of the test, which asks whether the material has any serious literary, artistic, scientific or political value, is judged not by community standards, but by the reasonable person standard, taking the material as a whole.

While the government has the burden of proving the three prongs, the government need not introduce specific evidence about the

63. Id.
64. Miller, 413 U.S. at 29.
65. Id. at 29.
66. In addition, the three prongs of Miller do not merge together, but rather must be considered separately. Unless a state can meet all three prongs, the material will not be considered legally obscene. See Memoirs, 383 U.S. at 418.
67. These included: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Miller, 413 U.S. at 25.
68. The court rejected an attempt to evaluate the value of alleged obscene material based on its "social importance." Id. at 25 n.7 (citing Justice White dissenting in Memoirs, 383 U.S. at 461).
69. The Court labeled the social importance standard an "ambiguous concept."
70. Id.
71. Id. at 30.
72. One commentator has argued that the valuation prong, prong three, was deemed to be based on an objective standard by the Court because the Court did not want to create "a prospective of holding a work hostage to local tyranny . . . ." Wright, supra note 33, at 338.
73. Id.
74. United States v. 2,200 Paperback Books, 565 F.2d 566,570 (9th Cir. 1977).
community’s standards.\(^7\) The trier of fact may derive community standards from the hypothetical average person in the community,\(^7\) including variables such as "the characteristics of the community, the different attitudes within it, the extent to which persons reveal their true opinions, and the nature of the ‘hard core’ material under attack."\(^7\)

Thus, the trial judge, if acting as the trier of fact, may take into account his or her own knowledge of the members of the community.\(^7\)

Significantly, the Court in *Miller* rejected a national community standard,\(^7\) and stated that community standards "need not be precisely defined."\(^8\) In leaving the definition of contemporary community standards open, the Court left to speculation its constitutional scope.\(^8\)

Subsequent Supreme Court holdings attempted to limit the scope of the community by noting that the primary focus of the "community standards" test is to judge the material based on "its impact on an average

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76. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 135 (2d Cir. 1983).

77. *Id.* at 135-36.

78. This is what occurred in the case of 2 Live Crew. *Id.* at 136.

79. *See, e.g.*, Hamling, 418 U.S. at 107. The progeny of *Miller* cleared up several questions that were raised but not resolved in the case. The question of whether the valuation prong, the third test, was based on community standards was confronted in 1987 in Pope v. Illinois, 487 U.S. 497 (1987). Justice White, writing for the majority, observed that the presence of scientific, literary, artistic or political value of material is not dependent upon the local community; the proper method for determining the presence and amount of that value was the reasonable person test. *Id.* at 500-01. In essence, the Court stated that it was up to the jury to determine whether a reasonable person would find serious literary, artistic, scientific or political value in the material in question. Because the Court claimed that this standard did not vary from community to community, it was in effect adopting a national standard for prong three. See Note, *Balancing Community Standards Against Constitutional Freedoms of Speech and Press, Pope v. Illinois*, 41 Sw. L.J. 1023, 1039 (1987); *see also* Note, *First Amendment - the Objective Standard for Social Value in Obscenity Cases, Pope v. Illinois*, 78 J. CRIM. L. & CRIMINOLOGY 735 (1988).

80. *See* Various Articles of Obscene Merchandise, 709 F.2d 132, 135 at n. 4 (2d Cir. 1983)(the court further noted that "[i]n this case Judge Sweet properly equated the district in which he sits with the 'community'").

person,\textsuperscript{82} rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one."\textsuperscript{83} Thus, the triers of fact were to be representatives of the community who make their decisions based on "the community's moral sense, not their own."\textsuperscript{84}

In some ways it is ironic that the legislature—a body elected to represent the people—is not permitted to set obscenity guidelines pursuant to \textit{Miller} and its progeny.\textsuperscript{85} This restriction is perhaps understandable, however, since constitutional line drawing has been committed to the judicial branch from the time of \textit{Marbury v. Madison}, which was decided in 1803.\textsuperscript{86} The jurors, of course, may consider the legislative determinations as evidence of community standards, but are not required to do so.\textsuperscript{87} One commentator has noted that, "[o]ne cannot infer anything about a community's values from the existence (or the lack) of an obscenity statute unless the law was enacted (or rejected) by a legislature representing the identical 'community.'"\textsuperscript{88}

The flexibility of the community standards analysis has been tested by its use in many different contexts.\textsuperscript{89} It has been applied to a

\textsuperscript{82} Yet even if such an average person test is used, by including the notion of community standards, there remains the epistemological problem of defining "the average person in the community." Two related problems arise. The first deals with the method used to gather evidence or information leading to the revelation to community standards. The second involves how that evidence is to be compiled and evaluated. One commentator, in discussing the question of gathering input, noted, "[r]eliance on opinion polls or other indications of popular sentiment is too fleeting a gauge upon which to base a judicial standard." Gliedman, \textit{Obscenity Law: Definitions and Contemporary Standards}, ANN. SURV. OF AM. L. 913, 919 (1985); see also Note, \textit{Community Standards and Federal Obscenity Prosecutions}, 55 S.CAL. L. REV. 693 (1982).

\textsuperscript{83} \textit{Miller}, 413 U.S. at 33 (1973); see also Pinkus v. United States, 436 U.S. 293, 298-301 (1978).

\textsuperscript{84} Krauss, \textit{supra} note 81, at 624; see also Kahn, \textit{Community in Contemporary Constitutional Theory}, 99 YALE L.J. 1, 15 (1989).

\textsuperscript{85} Smith v. United States, 431 U.S. 291, 307-08 (1977) (the lack of state standards regulating the distribution of pornography in a federal obscenity prosecution was considered "relevant evidence of the mores of the [state wide] community . . .").

\textsuperscript{86} 5 U.S. (1 Cranch) 137 (1803). The triers of fact, on the other hand, are generally laypersons without prior knowledge of constitutional and first amendment law, yet these laypersons are given plenary power to determine community standards and, consequently, the parameters of the first amendment.

\textsuperscript{87} \textit{See Smith}, 431 U.S. at 302-03 (1977).

\textsuperscript{88} Krauss, \textit{supra} note 81, at 633 n. 73.

\textsuperscript{89} It was not applied to the comedy dialogue of George Carlin, however, which the court concluded was indecent and therefore subject to F.C.C. regulation in \textit{Pacifica}, 438 U.S. 726.
popular movie, "Carnal Knowledge," to books without pictures, and to practices which discriminate against women. The standard also has been the backdrop of disputes over the subject matter of cable television programming, and other matters.

While some Justices abandoned the community standards test along with the rest of the definition advanced in Miller, the majority of the Court has stood by it. It remains the law today.

III. The Problem with a Geographically-Based Community Standard

"Many of my fellow judges live in Riverdale, but try as I might, I cannot find a common approach among them on this obscenity thing." - Judge Howard Goldfuss, Criminal Court of New York.

While geographically defined "traditional" communities may still exist in some locales, and people may still have a community of friendly neighbors, the paradigm of the contiguous self-contained geographic area no longer dominates today, if it ever did at all. Instead, a wide variety of considerations shape and define the value structure of the modern community in America. These influences range from culture to technology to the different configurations of physical living conditions. While geographic boundaries provide the limitation of a defi-

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92. See, e.g., N.Y. Times, supra note 6.
93. Justice Brennan, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) stated: "I am convinced that the approach initiated 16 years ago in Roth, 354 U.S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental [f]irst [a]mendment values . . . ." Id. at 73.
95. Judge Howard Goldfuss of the Criminal Court of the City of New York described his hometown of Riverdale as follows:

If you zig-zag through Riverdale, crossing over Henry Hudson Parkway at 236 Street, and then double back, you may find a group of disciples of the Marquis de Sade who would find social redeeming value in anything and everything. On the other hand, outside of that perimeter, move toward the west, and a little to the north, there may be those who see Little Red Riding Hood as perversion.

Id.
finite number of people, the fact that people live in close proximity to
each other in modern America does not suggest that those individuals
share common moral bonds or values.

Since a mere geographic division lacks any substantive content,
the Miller test's reliance on geographic boundaries to inform the com-
munity standards analysis is improper.\textsuperscript{96} Not only is the "geography-
only" analysis inadequate, but such an evaluation ignores cultural and
other considerations that determine the parameters of community tol-
erance. Consequently, the geographic-based traditional formulation of
community is misplaced and unworkable. To better understand why a
community is much more than those people living within a contiguous
area, it is helpful to explore the meaning of community.

IV. Community

The concept of community has several different configurations.\textsuperscript{97} It
has been defined as "any collectivity of people,"\textsuperscript{98} and as "the maximal
group of persons who normally reside together in face-to-face associa-
tion."\textsuperscript{99} One common formulation is that of a group of people who re-
side in the same geographic locale.\textsuperscript{100} Yet, the notion of community has
significant spiritual overtones. A moral community, for example, may
constitute "people who have chosen to live together because they share
a unitary conception of the Good."\textsuperscript{101} In essence, in any moral com-
unity, "the operative aim is always the promotion of a good quality of
life."\textsuperscript{102}

\begin{thebibliography}{99}
\bibitem{96} The use of geographical boundaries as the basis for defining community has been assumed by most judges. Judge Howard Goldfluss, Criminal Court of the City of New York, has stated, "[t]he problem is that the Supreme Court has never defined 'community.' I can only guess that it meant some sort of geographical subdivision - smaller than a state; bigger than a bread box; probably a section of a city or town." \textit{Id.}
\bibitem{98} Chesler, \textit{supra} note 97, at 458.
\bibitem{100} As one author notes, "the community appears always to be associated with a definite territory, whose natural resources its members exploit in accordance with the technological attainment of the culture." G. Murdock, \textit{supra} note 97, at 81.
\bibitem{101} R. Chesler, \textit{supra} note 97, at 458 (1983).
\end{thebibliography}
The community is a universal social group. That is, it occurs in some form in all human societies. The reasons for humans to band together in communities are several:

Community organization provides individuals with increased opportunities for gratification through social intercourse, with more abundant substance through cooperative food-getting techniques, and with insurance against temporary incapacity or adversity to mutual aid and sharing. These advantages may be added protection through numbers in the economies possible with specialization and a division of labor. The chances of survival thus seem to be materially enhanced through community organization and this, together with the directly perceived gains, doubtless accounts for its universality.

The concept of community has survived from the time of the Ancient Greeks. Classical Athens provides perhaps the closest approximation of the ideal community. According to Aristotle, the friendship found in a community informed the polity with a stronger foundation than even laws or rules, "when people are friends, they have no need of justice, but when they are just, they need friendship in addition."

This Aristotelian vision of community has required considerable adaptation in the modern technologically advanced, industrial United States. As one commentator has noted, "More recently, improved communication and transportation have accelerated the pace at which new values, ideas, and ways of life penetrate the individual’s consciousness. The moral community, as defined by Aristotle, has almost ceased to exist."

Changes in the modern configuration of the community also have created a shifting morality. This shifting morality owes its movement

103. G. Murdock, supra note 97, at 79.
104. Id.
105. Id. at 80.
106. Chesler, supra note 97, at 458 n. 3 (in Athens “the idea of the polis as the only setting in which virtue could develop for true Athenians” created unity among its members). The idea of community was illustrated by the New England town. Id.
107. Aristotle, Nichonachena Ethics, 215 (M. Oswald trans. 1980); see also R. Chesler, supra note 97, at 459 n. 6.
108. R. Chesler, supra note 97, at 459-60.
109. See generally A. Moore, The Young Adult Generation, at 87 (1969) (“the first is that a shift in morality is taking place in our society”) (emphasis in text). "A liberalizing trend is clearly discernable, particularly among young adults.” Id.
to both pragmatic and humanistic concerns. The shifting of morality may be affected by many influences, including a dependency on religion within the group.

A community's values are important to many different legal determinations. In addition to assisting in determining the parameters of obscenity, the community's values provide the moral condemnation of a criminal defendant in a criminal case, and a representative determination of facts in any jury matter. As one commentator noted, "contemporary theories of community offers a new model of the relationship between the individual and the constitutional order. Instead of a problematic relationship of part (citizen) to whole (state), in which either the part or the whole threatens to subsume the other, the new communitarians understand the relationship of the individual to the political order as that of the microcosm to the macrocosm."

The concept of egalitarianism within the community provides legitimacy for the use of a community to inform legal standards and rules. This egalitarianism presupposes a common bonding or set of commonalities that permit the individuals to be treated as a group.

The construct of unity between individual and community is reflected in a statement by Michael Sandel, "[t]he story of my life is always embedded in the story of those communities in which I derive my identity . . . [w]e cannot conceive our personhood without reference to our role as citizens, and as participants in a common life." Modern communities in the 1990's are shaped and influenced by their "mode of life" as well as their location. Whether the community is migratory or non-migratory, urban or rural, intra-city or suburban, will have a profound influence on the structure of the commu-

110. Id. at 88; see generally F. MERRILL, Society and Culture, (1957).
111. A. MOORE, supra note 109.
113. See Kahn, supra note 112, at 5 ("[w]e create and maintain our personal identity in the very same process by which communal identity is created and maintained. Thus, the historically specific discourse, which is at the center of communitarian theory, simultaneously creates the individual and the community. Individual identity does not exist apart from the discourse that creates and sustains the community").
114. Id. at 5 n. 15 (quoting M. SANDEL, LIBERALISM AND ITS CRITICS 5-6 (1984)).
115. G. MURDOCK, SOCIAL STRUCTURE, supra note 97, at 80.
nity. Modern communities often witness a shifting ethnic population that further impacts on the normal configuration of the sub-groups within it.

The character of the living unit also strongly effects the nature of the community. For example, community configurations are impacted by trends toward the nuclear family unit, urbanization, and increasing evidence of groups of homeless persons. Modern planning also has permitted segregation of uses, including certain areas devoted to commercial development and other areas devoted solely to residential use. Perhaps the ultimate irony is the relatively recent trend toward returning to mixed-use communities, called "new towns," which congregate shops and residences in close proximity. These small self-contained communities putatively promote a moral bonding in a manner similar to the small European town.

The significance of the many and subtle variables that influence the moral fiber of the community—i.e., its standards—is readily discernable in Skyywalker Records, Inc.

A. Skyywalker Records, Inc. v. Navarro: An Illustration of the Inadequacy of Defining a Community Solely by Geographic Boundaries

Whether a sense of community exists at all in a transient county [such as Broward County, Florida], so undefinable in character is moot. Most of us, I suspect, hardly know our neighbors if we know them at all.

The first amendment furor surrounding the rap group 2 Live Crew arose from the distribution and sale of the group's album, "As

116. See generally id.
118. Id.
119. Braucher, Trial Hassle is a Repeat Performance, Miami Herald, Oct. 12, 1990, at 5BR, Col. 4 (Broward County ed.).
120. The rap group was created by its leader, Luther Campbell of Liberty City, Florida. Campbell started out as a solo act, producing and distributing a dance-song named "Ghetto Style Jump." The Flipside of a Raw-Talk Rapper, Miami Herald, June 17, 1990, at 12A, col. 4. It received little notoriety and did not become a commercial success. His second song, "Throw the D," which he sold from his car for $2.20 per single, was better received. Id. "Throw the D" sold 250,000 copies. From the money he earned from that song, Campbell started both 2 Live Crew and his own recording com-
Nasty As They Wanna Be.” The album, which contains sexually explicit lyrics, has sold more than 1.7 million copies.

The Skyywalker case was triggered when the sheriff of Broward County, Florida began an obscenity investigation of the “As Nasty As They Wanna Be” album in February, 1990. In March, 1990, a Florida circuit court judge issued an order finding probable cause to believe that the recording was obscene. Shortly thereafter, Skyywalker Records, Inc. filed suit in federal district court seeking a declaratory judgment of its legal rights.


Campbell adopted the stage name of Luke Skyywalker, and proceeded to produce several albums with 2 Live Crew. Luther Campbell was sued for using the name “Luke Skyywalker” by movie impresario Steven Spielberg. The basis of the suit was that Luke Skyywalker was a name used by and associated with Spielberg’s “Star Wars” movies. See, e.g., “Star Wars” and “The Return of the Jedi.” In 1989, the group recorded “As Nasty As They Wanna Be.” As of the date of this publication, sales have exceeded 1.7 million copies. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 582 (S.D. Fla. 1990). The issue decided by the court was, “whether the first amendment absolutely permits one to yell another ‘F’ word anywhere in the community when combined by graphic sexual descriptions.” Id.

121. The album also was produced in a “clean” version entitled “As Clean As They Wanna Be.” Id. That recording has sold at least 250,000 copies to date. Id. In 1989, attorney Jack Thompson, who works out of his Coral Gables home, sent copies of the lyrics of “As Nasty As They Wanna Be” to all 67 county sheriffs in the State of Florida as well as Governor Bob Martinez. Governor Martinez referred the issue to a state-wide prosecutor, who declined to pursue the matter, saying that it was up to the individual communities to decide. Washington Post, June 17, 1990, at A10.

122. Shortly thereafter, on February 28, 1990, a deputy sheriff sought a probable cause determination that the material was legally obscene.


125. Id.

126. Soon thereafter, on March 27, 1990, Sheriff Navarro filed an in rem proceeding in Broward County Circuit Court against the album seeking a judicial determination that the “As Nasty As They Wanna Be” recording was obscene under state law. Navarro v. The Recording “As Nasty As They Wanna Be”, No. 90-09324 (S.D. Fla. 1990); see also Skyywalker Records, Inc., 739 F. Supp. 578, 583-84; Miami Herald, June 12, 1990, at 16A, col. 3. (Broward County ed.); Stein, Nasty Protestors Missing the Target, Sun-Sentinel, June 20, 1990, at 1B, col. 1; Raunchy Songs: Critics Rejoice Over Ruling, Miami Herald, June 8, 1990, at 2B, col. 1 (Palm Beach ed.). But see
In the declaratory judgment action, the plaintiff offered several witnesses. These witnesses included a well-known media critic from the newspaper *Newsday*, John Leland, and Professor Carlton Long, a Rhodes Scholar who discussed the relevance of rap music to Black culture, including the history of rap. The defense offered no witnesses, just a tape recording of the song.

After hearing all of the evidence, the court issued a written ruling. The ruling began with the statement, "this is a case between ancient enemies: anything goes and enough already." The court found that the recording failed the three prongs of the *Miller* test. It decided that the frequency and graphic nature of the sexual lyrics appealed to the prurient interest, and that the graphic detail and the specific nature of the descriptions were patently offensive. In assessing whether the record had serious artistic value, the court noted that "the Philistines are not always wrong, nor are the guardians of the [f]irst [a]mendment always right." The court concluded that the recording failed the third "serious value" test requirement as well, and was therefore...

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Stein, *Rhetoric Takes Stage in Rap-Group Hoopla*, Sun-Sentinel, June 8, 1990, at 1B, col. 1 ("But I don't blame the judge as much as I blame grandstanding politicians like our very own Gov. Silly, who acts as if a record is more dangerous to the public than assault weapons.").

127. The public response to these law suits and the issues involved were immediate. The reaction in Broward County was divided, and often depended on previously held opinions about the flamboyant Sheriff Nick Navarro. Reaction around the country was also divided. *See* BILLBOARD MAG., Mar. 10, 1990, at 85. The conviction of an Alabama retailer, who was convicted by a jury of selling a cassette of 2 Live Crew's "Move Somethin'" was reversed. *Id.* In other areas around the country, reactions were similarly mixed. In that case a municipal court judge found the retailer guilty of selling obscene materials and fined the retailer $500. *Id.* Pursuant to Alabama law, the case was retried by a jury which reversed the Judge's ruling and cleared the retailer. *Id.*

128. *Id.*


130. *Id.* at 591-93 (regarding prong one and prong two of the *Miller* test).

131. *Id.* at 594. The court also concluded that there was insufficient literary, political, artistic, or scientific content within the recording to survive prong three of the *Miller* test.

132. The court noted that the plaintiff's evidence indicating the widespread availability of other explicit sexual works in the tri-county area was not entitled to great weight in determining whether 2 Live Crew's work was obscene. *Id.* at 589. "[T]he Supreme Court has recognized that this type of evidence does not even have to be considered even if the comparable works have been found to be non-obscene." *Id.* The court stated that most of the other material offered was irrelevant because it was not equivalent to musical lyrics. *Id.* The material offered was pictorial depictions, "moving..."
obscene.\textsuperscript{133}

In reaching this conclusion, the court determined that the relevant community standards by which to evaluate prongs one and two were derived from the tri-county area of Broward, Dade, and Palm Beach counties. The court noted that this tri-county area was quite diverse,\textsuperscript{134} and observed that the counties included both the very young and the very old as well as individuals of many different religions, socio-economic classes, races and gender.\textsuperscript{135} The court believed that this area was more liberal than on the average.\textsuperscript{136}

In the opinion, the court never defined what the tri-county community standards actually were. The judge simply stated that since he had lived in the geographic community and served as a judge for a significant length of time, he was able to discern the community's standards. The judge failed to explain whether the counties differed in morality, whether he was accounting for changes in population over time or in particular areas, or whether he was defining moral standards as those opinions based on a majority vote, a super-majority or something else.

The only inference that could be drawn from the opinion is that the community's standards were obviously "high enough" to flunk the 2 Live Crew album. The problem with this inference, however, is that it does nothing to dispel the belief that the judge's conclusion was an ad hoc one, no more based on reason than Justice Stewart's famous concession to the inadministrability of an obscenity standard: "I know it when I see it."\textsuperscript{137} In a sense, no evidence at all would have been more convincing than the court's own idiosyncratic anecdotal experience.

\textsuperscript{133} Not all judges, when confronted with obscenity cases, find the material in question to be obscene. In a federal prosecution in the United States District Court in Los Angeles, California, District Judge David Kenyon declared that video tapes, including one which depicted a gang rape in a mental hospital, were not obscene based on community standards. The judge stated "I cannot say beyond a reasonable doubt that community standards were violated." U.S. v. Gottesman, No. 88-00295 (C.D. Cal. 1988) (quoting California Lawyer, November 1989, at 21, col. 2).

\textsuperscript{134} Skyywalker Records Inc., 739 F. Supp. 578, 588.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 589.

\textsuperscript{137} Jacobellis v. Ohio, 373 U.S. 184, 198 (1964) (Stewart, J., concurring).
V. The Preferable Approach: Utilizing the Moral Bonds of the Cultural Community to Inform Community Standards

A preferable alternative exists to relying on geographically-based standards to discern community values - that of employing the standards of the "cultural" community. The premise underlying this alternative approach is that moral bonding in today's society is more likely based on sub-culture identification than on communities described merely by geographic location. In modern America, the cultural background of groups is simply a much more powerful creator and inculcator of values than geographic location. Thus, if a community standards analysis applies, the cultural background in which the work was created and distributed is an integral and likely dispositive component.

This section first describes the meaning of culture more fully. It then suggests how cultural values can and should be considered in any obscenity evaluation, using *Skyywalker Records, Inc.* as an illustration.

A. Culture

A group of people often share a culture or sub-culture.\(^{138}\) Culture has been defined as "the patterned behavior resulting from social interaction."\(^{139}\) In its broadest sense, culture can be considered the "complex web which includes knowledge, belief, art, morals, lure, custom and any other characteristics and habits"\(^{140}\) of those people within it.\(^{141}\)

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139. F. Merrill, Society and Culture 473 (1957). See generally J. Downs, Cultures in Crisis (2d ed. 1975); Popular Culture in America (P. Buhle ed. 1987). The definition of culture depends upon whether it is being defined by an historian, sociologist, or a member of some other discipline. A. Lawrence Lowell, best known as a former president of Harvard University, defined culture as "the enjoyment of the things the world has agreed are beautiful; interest in the knowledge that mankind has found valuable . . ." R. Bierstedt, The Social Order 126 (4th ed. 1974) (citing A. Lowell, Culture, at War with Academic Traditions in America 117 (1934)).

140. Bierstedt, supra note 139, at 127 (citing E. Tylor, Primitive Culture 1 (1872)).

141. There are many more definitions of culture than can be repeated in this article. For example, two anthropologists defined culture as "those historically created selective processes which channel men's reactions both to internal and to external stimuli." Bierstedt, supra note 139, at 127. (citing C. Kluckholn and W. Kelly, The Concept of Culture, in The Science of Man in the World Crisis 84 (R. Linton ed. 1944)).
The concept of culture is essential to the growth and development of any community. In fact, the relationship between the two entities is symbiotic - the structure of a community nurtures and facilitates the growth of culture. One way of measuring the success of a culture is by the achievements reached by those within it. Furthermore, culture offers the community both instrumental and intrinsic advantages: "Culture is used; and any analysis of its use immediately brings into view the arrangements of persons and social groups, for whom cultural forms confirm, reaffirm, maintain, change or deny particular arrangement of status, power, and identity." Yet, cultures do not always support their host communities. In fact, a culture may be out of sync with a society. It consequently may be labeled deviant or anti-authoritarian.

Although the middle class appears to be the dominant culture in the United States, there are really many different variants of the dominant or mainstream culture. The dramatic variance within American culture can be traced to the influx of immigrants into the United States from around the world primarily in the latter half of the 19th century and early part of the 20th century. This influx, coupled with a broad land area, permitted America to grow in numerous cultural directions. Instead of a culture dominated by particular aesthetic achievements or artistic traditions, America's considerable natural resources created what one commentator called a multi-faceted "culture of abundance." As a result, literally "hundreds of sub-cultures" with their

142. BIERSTEDT, supra note 139, at 127.
144. Society, with its economic as well as social components, is not synonymous with culture. As historian E. P. Thompson noted, "We should not assume any automatic, or over-direct correspondence between the dynamics of economic growth and the dynamics of social or cultural life." OSTENDORF, supra note 143, at 15.
147. In addition, the United States, unlike Europe or the Far East, grew up with "shallow historic traditions and a vibrant commercial culture." POPULAR CULTURE IN AMERICA, supra note 139, at XIII. See also R. BELLAH, R. MADSSEN, W. SULLIVAN, A. SWIDLER, AND S. TIPTON, HABITS OF HEART 35 (1985).
148. POPULAR CULTURE IN AMERICA, supra note 139, at XIV.
149. MAURER, supra note 146, at 384.
own set of overlapping but distinctive cultural values and a strong belief in freedom of speech, have proliferated within the dominant culture. 150

Although there has been great pressure to assimilate in American culture, there also has been increasing cultural "ethnification." 151 These ethnic cultures revolve around a value infra-structure adapted from and based on traditions from the country of origin. Yet many other types of sub-cultures exist. Sub-cultures range from occupation sub-cultures, such as accountants, to the technological sub-culture of television, 152 to the criminal sub-culture. 153

Sub-cultures not only generate their own values, but even their own language: 154 A special form of communication often is used to signify who "belongs" to the culture. 155 The use of slang, for example, serves as one indicator of the existence of a sub-culture with its own set of values. 156 An illustration of this phenomenon involves the group of truckers who use citizen's band (CB) radios to communicate with each other in a specific, stylized manner. 157

A sub-culture's identity is maintained in its language. Specifically, "[t]he continuity of any sub-culture is dependent on keeping its language exclusive, since a sub-culture tends to lose its identity once its language becomes widely known and used by the outsiders." 158 When the words 159 of the sub-culture are assimilated into the dominant cul-

150. Id.
151. OSTENDORF, supra note 143, at 7.
152. "Television, for bad or worse, is the national culture of 20th-century America. To deny the fact is poor research. To ignore the fact is suicidal politics." Marc, T.V. Critics' Code, in POPULAR CULTURE IN AMERICA 3 (P. Buhle ed. 1987).
153. MAURER, supra note 146, at 384. See generally SCHWENDINGER, supra note 138.
154. MAURER supra note 146 at 384; see also C. LEVI-Strauss, STRUCTURAL ANTHROPOLOGY 55-56 (1963).
155. MAURER, supra note 146, at 388. As noted by Anthropologist Claude Levi-Strauss, "Language is a social phenomenon . . ." LEVI-Strauss, supra note 154, at 56.
156. MAURER, supra note 146, at 388. See generally E. FOB, BLACK VERNACULAR VOCABULARY 3-10 (UCLA Center for Afro-American Studied Monograph 5 (1984)).
157. See generally MAURER, supra note 146, at 384.
158. Id. at 387.
159. Freedom of speech is not only an essential ingredient of an independent sub-culture, but as a concept is shaped by cultural considerations as well. The impact of culture on speech may be significant. For example, culture that looks to mythology for its values may not rely on language and communication in the same way as a culture
ture, this signifies that the sub-culture is deteriorating and its structure is merging with the dominant culture.

There is often a cause-and-effect relationship between a culture and its sub-cultures. A linkage of sub-cultures can dictate a power structure within a larger culture.\(^{160}\) Conversely, if sub-cultures are threatened or opposed by other sub-cultures or the dominant culture, the structure of the sub-culture may change.\(^{161}\) Consequently, "as a sub-culture becomes more aware of its functional identity, a self-image is generated which must be bolstered by word and deed."\(^{162}\)

Understanding the values and rituals of a particular sub-culture is often difficult. This is due to ethnocentrism - judging others by one's own cultural values and mores.\(^{163}\) Ethnocentrism is not a new phenomenon, and was present even in ancient Greek and Chinese societies.\(^{164}\) Sub-cultural differences may be exacerbated by the ethnocentric lenses through which sub-cultures view and evaluate each other. That is, when sub-cultures view other sub-cultures through their own perceptions, there may not be any neutrality. Misperceptions may result, so that "[t]he standards themselves may be fine, but, when wrongly applied, they are meaningless."\(^{165}\)

1. Music: A Reflection of Culture

Music often has been described as reflecting the existence of a spe-

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that relies on reason. Maurer, supra note 146, at 387 ("when large numbers of words escape from the subculture, this may be an indication of sub-cultural diffusion and suggests that assimilation is under way with a consequent deterioration of the microsystem. We have good examples of this in the subcultures of the jazz musician and that of the criminal narcotic addict. Words from both these subcultures are now the basis of the slang vocabulary millions of young people, and neither subculture is nearly so exclusive as it was some 40 years ago"). See generally Popular Culture in America, supra note 139; Minow, Book Review: Listening the Right Way, 64 N.Y.U. L. Rev. 946 (1989) (reviewing P. Chevigny, More Speech: Dialogue Rights and Modern Liberty (1988)).

160. Id. at 386; see also D. Claerbaht, Black Jargon in White America 48-55 (1972).


162. Maurer, supra note 146, at 386.

163. See Downs, supra note 139, at 29. ("one of the greatest stumbling blocks to understanding other peoples within or outside of a particular culture is the tendency to judge other's behavior by our own standards.").

164. Id.

165. Id. at 34.
cial sub-culture. The integral role music plays in providing and augmenting the meaning or content of culture is based in large part on the premise that a sub-culture's music is inextricably linked to other parts of the same sub-culture. Thus, the music cannot be fully understood or evaluated without its associated cultural context.

Of course, the lyrics of music play a large role in the impression the music makes on the listener. In addition to the direct and literal meanings of the words used, the words provide a form of communication of the sub-culture's ideas and values. As one commentator has noted, "[i]t is language that serves as the catalyst by which groups and individuals interact and transmit many of their culturally important ideas and attitudes, thoughts, beliefs, etc..."

The sub-culture from which certain kinds of music springs, for example, may be characterized as rebellious, or at least anti-authoritarian. Music often may be associated with the language of political change or discontent. Perhaps the most notorious musical sub-culture in recent years is "rock n' roll" music. Yet, rock n' roll has not been the only music form to be viewed as containing counter-culture values. In 1921 the Reverend A. W. Beaven described jazz as "a combination of nervousness, lawlessness, primitive and savage animalism, and lasciviousness." In the 1950's, Peter Porter, the host of the CBS show "Juke Box Jury," described rhythm and blues records as "dirty and as bad for kids as dope." Yet, rock n' roll was particularly singled out for attack. Garrett Buirne, Massachusetts District Attorney, stated in the 1950's that, "Rock n' roll is a new monster, a sort of nightmare of rhythm... rock and roll gives young hoodlums an excuse to get to-

166. See generally Maurer, supra note 146, at 385. ("other subcultures are found in the entertainment world past and present...").

The study of music and its cultural content is done by ethnomusicologists. The premise of such study is that the message of music arguably can best be understood by the study of the cultural background from which the music was created. See generally B. Nettl, Theory and Method in Ethnomusicology (1981).

167. Nettl, supra note 166, at 271. See generally Popular Culture in America, supra note 139.

168. Maurer, supra note 146, at 390.


171. Taking a Rap, supra note 170.
Friedland

gether. It inflames teenagers and is obscenely objective."

Particular musicians were viewed as the knowing leaders of the rock n' roll subculture. The New York Daily news critic in 1955 stated that Elvis Presley "gave an exhibition that was suggestive and vulgar, tinged with the kind of animalism that should be confined to dives and bordellos."

B. The Black Culture and Rap Music

1. Black Culture

The Black culture has been described as "a quest for literacy, freedom, and respect... which used any strategy to overcome oppression, [and] circumvent legal and institutional barriers..." The development of Black culture can be understood by retracing history and also from tracing symbols of the culture such as its language, literature, and music. "[D]iscrete cultural artifacts, say, a novel or the blues, are meaningful as self-contained symbolic systems and may be understood from a variety of cultural perspectives. But they acquire their full resonance from their form-giving context." The 'full resonance' of Black culture also can be culled from its long and often uncharted oral history as told by poets and song writers.

The line separating Black culture from the "dominant" American culture is sometimes blurred. The dominant culture and other subcultures, such as late adolescents, have borrowed jazz, blues, and other aspects of the Black culture. As one commentator noted,

the sixties will also be remembered for a musical revolution: White popular music culture acknowledged the Afro-American style as its

172. Id.; see also, Crackdown, supra note 170.
174. B. OSTENDORF, BLACK LITERATURE IN WHITE AMERICA at 8 (1982).
175. Id.
176. Id. at 118 ("expression of Black reality, the earliest formal poetry by Blacks is an example of upward cultural mimesis.").
177. Id. at 164 ("after being chevied and chased through a series of prefabricated identities, after trying on a variety of masks from Sambo to the 'angry splib,' many Blacks of the 60's and 70's are tired of playing roles and wearing masks forced upon them and designed for them by the dominant culture.").
178. Id. at 164.
chief inspiration. There had been constant borrowing all along. Noted Phil Garland Wright, 'Unfortunately, it has been a part of the American pattern for the originators of Black music to be shunted into the background once their creations had been adopted by whites and made lucrative as well as popular.'

Yet, the fact that some of the demarcations are blurred does not mean that the Black culture has merged with the dominant culture. It still can be identified by its own language, music and other norms. The Black culture has maintained its "own characteristics, despite being impeded by unwarranted [assimilation], particularly those that are identical with the self-image of a dominant group . . . ."181

The development of Black culture can be observed in its language. "Black English" has been called in a National Science Foundation Study "a healthy, living form of language [that] shows the signs of people developing their own grammar [and] separate development."182 That study also suggested that the Black vernacular was becoming more dissimilar to other linguistic forms over time.183

2. The Origins of Rap Music

The roots of the 2 Live Crew music, and other rap music as well, can be found in a form of music called "hip hop." Hip hop music is a combination of musical influences that has been likened to "pop music cubism." As musical expression it is identified foremost with the

179. Id. at 148.
180. See id. at 165 n.2.
181. Id. at 1.
185. Dave Marsh, a noted music critic has written:

   Like all the great hip-hop hits, 'looking for the perfect beat' is as much a clustering sound collage as it is a 'song' in the conventional sense. Music like this couldn't have existed before the early 80's, because 'looking for the perfect beat' is the pure product of contemporary microchip technology, built upon rapping voices overlaying electronic noises that sound like the ones they used on computer games, heavy doses of mixing consul effects a top a synthetic rhythm bed. The result is a fascinating form of pop music cubism that never abandons the hope of achieving a mass audience. D. MARSH, THE HEART OF ROCK AND SOUL, 139 (1989) (reviewing A. BAMBAATA,
Black American culture. Hip hop originated in Harlem and the South Bronx in New York City. It was political in both its genesis and presentation. As one commentator noted, "[t]his cultural expression was nurtured by a long heritage of slavery and resistance to racial, economic, political, social, and cultural oppression." 

The message communicated by hip hop was illustrated and enhanced by its particular style of language. The hip hop style incorporated recitations and other speech forms adapted to the streets of New York. In essence, the language of hip hop was forged from "historical experiences and realities." This statement especially means that, "in hip hop culture, Black English is the language of verbal expression spoken within the context that reflects the pain and struggles of Black life in the United States."

Originally, hip hop music existed almost exclusively within the Black culture, but, as its popularity increased, it became part of the mainstream culture. The increased attention paid to hip hop by the media and numerous musicians caused it to "cross over" into the mainstream culture.

Yet, hip hop was not the only music form influencing the development of rap. A different antecedent was African jive. The jive form consisted of rhyming stories often filled with "violent, scatological" language, that had "been used for decades to while away time in situations of enforced boredom, whether prison, armed services, or street corner life." Within African jive, there were various strains of music. Even boxer Mohammed Ali's rhymes, narrative poems called

"toasts," were a form of African jive. Some toasts had hundreds of different forms. Most of these toasts glorified the criminal way of life.

The evolution of rap music was gradual, with bits and pieces of various art forms being used to create its foundation. Part of its evolution was out of necessity. "Vocal entertainment became necessary to keep the crowd under control, . . . [w]hen people first came to the park, they would start dancing. Then everyone would gather around and watch the DJ . . . you need the vocal entertainment to keep everyone dancing." The genre also developed from "friendly musical competition." Noted early rapper, Grandmaster Caz, "‘The way rap evolved is from people trying to outdo each other.’" The same commentator noted, "that was rap, but we didn’t know it at the time. Then everybody started singing nursery rhymes. Then Flash started the whole thing of having real groups. Then people started coming to parties just to see the emcees." The emcees thus moved from the background, offering commentary only to fill in the spaces between the songs, to the forefront, where they became the creative artists. The emcees became free to develop their own techniques including "an inventive use of slang, the percusive effect of short words, and unexpected internal rhymes . . . ."

C. The Significance of Cultural Context to Obscenity Determinations

The issue of whether certain rap music is obscene based on community standards consequently depends on its cultural context. The cultural context comes from the different subcultures within the community, including both the ethnic and non-ethnic forms. Skyywalker Records, Inc. would have had greater legitimacy if the court had considered culture - whether the culture was Black, youth, socio-economic

196. Id. at 29.
197. See S. HAGER, supra note 188, at 45 ("Probably the oldest and most famous toast, ‘the signifying monkey,’ had hundreds of different versions by 1976.").
198. See S. HAGER, supra note 188, at 45.
199. See id. at 47.
200. Id. at 49.
201. Id.
202. Id. at 48.
status, or other - in its obscenity determination. Instead, the court completely failed to consider culture to inculcate its tri-county "community" - which, as the court conceded, contained a wide diversity of people - with values or standards.

The omission of culturally-based morality from the court’s decision was particularly important to the striking nature of the 2 Live Crew’s music. That music repetitiously portrays women in a negative light and, if taken literally, goes so far as to consistently brutalize them. Although the Seventh Circuit Court of Appeals has held that the brutalization of women is not a sufficient basis for finding material to be obscene, the offensiveness of 2 Live Crew’s work - and particularly whether the work appeals to the prurient interest - can best be ascertained by evaluating the roles of men and women within the cultural community. In light of those roles, the relevant questions are: "Would such music be taken literally? Would it be valued or would it be acceptable in certain locations and at certain times?" "Is it a parody?" The issue, therefore, becomes whether the "boasting" of 2 Live Crew is an acceptable expression of male street talk within a particular cultural vernacular - such as when it occurs as a substitute for fighting or as a means of passing a time of enforced idleness like a jail term.


204. See also Strossen, Book Review, 62N.Y.U. L. REV. 201 (1987) (reviewing V. BURSTYN, WOMEN AGAINST CENSORSHIP (1985)).

205. While it is permissible under the fuzzy parameters of the community standards test drawn by the Supreme Court to apply Miller without evidence of community standards, Judge Gonzalez did not rely on any evidence that defined the moral framework of those counties other than his own experiences.

206. The irony of finding that lyrics that brutalize women appeal to the prurient interest was noted by one of 2 Live Crew's attorneys, Alan Jacobi, of Miami’s Jacobi and Jacobi: "2 Live Crew’s music can be gross, rude and outrageous... But that's why it's unlikely anyone would find it sexually exciting." S. Soocher, It's Bad, It's Def - Is it Obscene? Nat'l L.J., June 4, 1990, at 28; see also McKinnon, Not a Moral Issue YALE L. & POL’Y REV. 321 (1984).

207. See American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

On the other hand, it also must be asked whether this conceptualization of the music’s message is merely an after-the-fact justification for exploitation, that sells records due to its shock value but otherwise in no way comports with the values of the average members of the culture.\(^{209}\) At least one observer has argued that the race of 2 Live Crew has been used to obfuscate the real issue, which is the sexist nature of the songs.\(^{210}\) Another observer, a black woman, has sounded a parallel claim, urging that 2 Live Crew’s music should not be identified with the Black culture simply because the band members are black,\(^{211}\) and that Black culture does not support “violence or irresponsible sex” by anyone, Black or White.\(^{212}\)

Thus, while culture is relevant, it is incorrect to assume that a culture automatically endorses the value system of all of its members.\(^{213}\) Just as the Hispanic culture does not accept the values of all of its Hispanic members, and the White culture does not accept the values of all of its white members, the Black culture does not accept the value of all of its Black members, including Black musicians. A Black columnist has reiterated this belief: “The cultural differences between the races don’t give . . . 2 Live Crew the right to traffic in dirt without being challenged . . . in or out of the ghetto.”\(^{214}\)

Yet, the use of cultural considerations does not complete the community standards analysis. It still must be determined whether societal toleration or intolerance of a particular form of speech is based on moral principle or no reason at all.\(^{215}\) Without such introspection, it

\(^{209}\) See generally MacKinnon, Not a Moral Issue, 2 YALE L. & POL’Y REV. 321, 323 (1984). Similarly, other cultural communities may look upon the verbal denigration of women as blasphemous, and as an extraordinary insult. Still others may view it as sexually based for certain adult segments of society.

\(^{210}\) Hamblin, Conviction of Record Store Owner as a Victory for the Entire Community, Sun Sentinel, Oct.11, 1990, at 23A, col. 5.

\(^{211}\) N.Y. Times, June 25, 1990, at A16, col. 3-5 (letter to the Editor by Michele MM. Moody-Adams.)

\(^{212}\) Id.

\(^{213}\) The reconciliation of cultural differences in a multi-cultural society, moreover, does not automatically render a cultural analysis unworkable. Often, different cultures share a similar value structure.

\(^{214}\) Hamblin, supra note 210, at 23A.

\(^{215}\) Thus, a feminist critique of pornography as insuring “male power as a system” may be relevant to the culture even if not voiced so long as it rests on the existing moral principles of the average person in the community. If the denigration of women is merely a curiosity or an attempt to shock without any principled basis, it is more likely to violate community standards.
would be difficult to discern the basis for the objection to the material, and whether the community's tolerance depends on principle or indifference.\(^{218}\)

Thus, perhaps the greatest advantage of a culturally-based approach to community standards is that it forces the trier of fact to struggle over defining a community's values. In fact, the process of struggle may be more important than the end results. Such an attempt would educate the trier of fact so that it may better understand the purpose behind protecting the material in the first place. By tracing the history and context of alleged obscene material, the trier would be making a more informed and more deliberate decision. That is, a less pre-judged decision would likely occur. As Harry Kalven, Jr. has noted, the struggle over defining a free speech test is often more significant to revealing the purpose underlying the test than to the development of the test itself.\(^{217}\)

In this regard, the lack of substance associated with the court's assessment of community standards in *Skyywalker Records, Inc.* may be viewed as symptomatic of a deeper issue: the apparent lack of willingness of courts and juries to struggle with the concept of community standards. Unless juries and courts are willing to engage in a full-fledged debate, there will continue to exist the tendency to judicially void the community standards inquiry, and to substitute personal, idiosyncratic viewpoints in its place.

The court's rejection in *Skyywalker Records, Inc.* of the role of cultural considerations was evidenced by the way the court treated the testimony of Professor Long, who testified about the cultural background of rap music. The judge stated, "[w]hile this court does not doubt that both 'boasting' and 'doing the dozens' are found in the culture of Black Americans, these devices are also found in other cultures. 'Doing the dozens' is commonly seen in adolescence, especially boys of all races. 'Boasting' seems to be part of the universally human condition."\(^{218}\) The judge did not further add, however, that "doing the 'dozens' " and 'boasting' in rhyme has special significance in the Black cul-


\(^{218}\) *Skyywalker Records, Inc.*, 739 F. Supp. at 578.
ture. The fact that generic boasting exists in other cultures does not undermine the special significance of this language form to the Black community, and should not permit the avoidance of dealing directly with the music’s cultural implications.

Moreover, the comparison drawn by the court between boasting in the Black culture and other cultures, far from negating the cultural significance of such a musical technique, illustrates instead the slippery slope of using comparisons to illustrate community standards. If, for example, the geographic community enthusiastically supports entertainers such as Eddie Murphy or comedian Andrew Dice Clay, does this insulate 2 Live Crew’s music from being singled out for prosecution?

In United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, the United States Second Circuit Court of Appeals held that a trier of fact can consider the level of availability of comparable materials to determine the community’s tolerance for such literature. The problems with such a comparative analysis though, are numerous. The existence of material for sale does not indicate how the average person in the community views such material, raising the dilemma previously noted of whether a community’s toleration is based on principle or indifference. Furthermore, the determination becomes not so much about any specific material, but how much material a community had tolerated previously within its geographical boundaries. The superficial advantage of permitting such an analysis is that it allows the trier of fact once again to avoid defining community standards and examining what people in the “community” actually think. Instead, the comparative analysis facilitates a decision based on limited

219. See Eddie Murphy Raw,(Paramount 1988) (which is replete with numerous epitaphs and other “vulgarity”).
220. 678 F.2d 433 (2nd Cir. 1982) (per curium).
221. United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132, 137 (2nd Cir. 1983); see also 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. 2112, 709 F. 2d 132 (2d Cir. 1983), 52 CINCINNATI L. REV. 1131, 1132 (1983).
223. The irony of this quantitative measure is that crusaders against pornography have a much more difficult task of getting any material declared obscene because of the quantity already permitted within geographic community boundaries.
information or even abstract conjecture. Most significantly, to use comparisons with other cultures avoids having to evaluate the role of such music within any one particular culture. Thus, a strictly personal idiosyncratic approach fails to confront the true basis of moral bonding within the modern community.

Perhaps the comment that most aptly summarizes the importance of considering culture in attempting to ascertain community standards was made by Professor Henry Louis Gates of Duke University, an expert on African-American culture. He stated, "I don't see how people can jump into somebody else's culture with completely no knowledge of that culture, and then decide what's obscene and what's not."

VI. The Cultural Community and Relativism: The Persistent Deficiency in Community Standards

Even if the cultural context is considered in determining community standards, the analysis may still be subject to attack. Sometimes, no matter how searching the inquiry into cultural concerns may be, a stable set of community values still may be difficult to ascertain. Essentially, in some instances, reliance on cultural values may not create sufficient substance to the community standards test to significantly improve on a bald geographic-based inquiry.

The deficiency in relying on the cultural community inheres in one of its major premises. The cultural community is predicated on the moral bonding that occurs between its members. The community is forged from the putative consent of its members, reflecting the will of those within it. Yet, a culture's moral bonds simply may not bridge

224. Note, supra note 221, at 1141.

225. In Various Articles of Obscene Merchandise, Schedule No. 2102, 678 F.2d 433, the trial court judge had to consider various materials including the movie "Deep Throat." The trial court judge concluded that that movie was not patently offensive to the New York community. He further found that the other articles for consideration (which were listed in Schedule 2102), were no more offensive than "Deep Throat" and thus survived the Miller test. It was this type of comparative reasoning that was skewed by Judge Gonzalez.


227. Yet the exercise of volitional choice is not always clear, and certainly does not define our legal order alone. See Kahn, Community and Contemporary Constitutional Theory, 99 Yale L. J. 1, 4 (1989):
the differences in the morality of its individual members who are influenced by sources such as other cultures, technology, and an urban lifestyle. Indeed, cultural values may mask the fundamental differences in the members of a culture who come from different generations, socio-economic statuses, and other such factors which strain the concept of a singular community value system.

The evolution and overall dynamic nature of culture adds to the destabilization of the concept. The media is a particularly powerful destabilizer creating its own popular culture. One commentator noted, "[t]his is not the age of enlightenment, but of mass media. Few believe that the synthesis of reason and will can be accomplished through a national debate in which will is persuaded by reason . . . [c]ommunity functions not as a geographical place, but as a conceptual model of order that combines elements of reason and will." The difficulty of locating an accurate measuring device for a shared community morality compounds the inherent instability of this standard. Unlike a jury verdict, where a consensus is actually obtained after a full and - hopefully - fair discussion, there is no probability of an equivalent exchange of ideas among community members. The town meeting, or Hyde Park political stump, for example, are forms of exchange not commonly used in modern America. The American media, while permitting the expression of opposing views, still does not provide for exchanges that would permit an adequate measure of a community's morality. While religious groups likely foster such a sharing, measuring this segment of a community would not in itself derive the overall cultural community's standards.

A theory of constitutional order based on will overcomes the gaps between individual and the state by relying on the concept of consent. On this view, in confronting the constitutional order, the individual confronts that to which she has already consented to be bound. The bonding character of law derives from an affirmative act of the individual; that act alone overcomes the divide between citizen and state. The state may not be our better self, but nevertheless we still confront only an objective occasion of ourselves.


228. See generally Kahn, supra note 227, at 7.
230. Kahn, supra note 227, at 3.
The problem of reaching a consensus about the cultural community's moral standards is thus the achilles heel in the culturally-based community standards analysis. Even the most widely recognized method of consensus, the public opinion poll, would be inadequate. In addition to a lack of debate and a failure to screen for the existence of outside biases on the same level of jury deliberations, a poll does not reach everyone in the community, fails to measure the strength of any one individual's convictions, and may be manipulated by the nature and number of the questions asked. Attempts to divine the community's moral essence without an opinion poll are even more precarious and less precise. Thus, within any given cultural community, there not only may be a lack of common moral bonding, but also an inability to identify the morals of the community. One commentator noted that, "culture in the United States is often viewed as one all-encompassing entity - a majority approach which conveniently buries the identity of Black and other disenfranchised peoples." The cultural community test thus may itself become vague to the point that it becomes completely malleable, and lacking in consistency.

In Justice Douglas' dissent in Roth v. United States, he spoke of...
the "battle between the literati and the Philistines." In Judge González's decision in *Skywalker Records*, he wrote that "the Philistines are not always wrong." The relativity of cultural values qualifies these assertions, suggesting that, while a battle may be occurring, the values of the warriors may be changing all the time. To try to identify sufficiently clear standards from such a dynamic situation may be difficult, and on some occasions, impossible.

Yet this critique of cultural variability does not undermine the continued use of cultural considerations in the analysis. The culturally-based community still provides the best opportunity for an accurate assessment of community values from any of the alternatives. Furthermore, its inclusion would force judges and jurors to engage in a more thorough and searching process, regardless of the final outcome.

VII. Conclusion

As evidenced by *Skywalker Records, Inc.*, a geographic-based community standards analysis is unworkable. The geographic-based community standards test fails primarily because in the 1990's, those people living within a geographic area generally lack common moral bonding. Instead to inform the community standards test with substantive content, it is necessary to consider cultural bonding as well. Cultural and sub-cultural relationships provide a more common form of moral bonding in modern America.

The inclusion of cultural considerations to infuse the community standards analysis with substance has several advantages. In addition to providing more realism to the test, the utilization of culture at least forces the trier of fact to undertake a thorough and more objective evaluation of the community's moral structure in a manner somewhat removed from the trier's own biases and predilections.

Yet, even if cultural ties are considered as a part of the analysis, the indeterminacy of cultural bonding may still undermine the legitimacy of the test. Under some circumstances, the common values within cultural groups are extremely difficult if not impossible to articulate precisely. The use of cultural considerations to discern a tolerably vague common morality from numerous dynamic sub-cultures may in those instances be futile, and the community standards test consequently may not pass constitutional muster.

Until the community standards analysis of *Miller v. California* is abandoned, however, the preferable approach is to include cultural considerations in the analysis whenever feasible.
Obscenity, Music and the First Amendment: Was the Crew 2 Lively?

Emily Campbell*

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"WARNING: EXPLICIT LANGUAGE CONTAINED." 

"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."

"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."

I. Introduction

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

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. Skyywalker 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."


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. Now, one court in Florida has told its citizenry that there are certain kinds of music that should not be heard. Even in the wake of informal agreements by the music...
industry to regulate itself through labeling, 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.
rar\textsuperscript{a} album by 2 Live Crew legally obscene.\textsuperscript{10} For this U.S. district court in Florida, 2 Live Crew’s recording, \textit{As Nasty As They Wanna Be}, [hereinafter \textit{Nasty}] proved to be too “nasty” in \textit{Skyywalker Records, Inc. v. Navarro} [hereinafter 2 Live Crew].\textsuperscript{11}


\textsuperscript{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.

\textsuperscript{10} \textit{Skyywalker 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. \textit{See} Browne, \textit{The Rap on Obscenity: The 2 Live Crew’s Album is Ruled More Than Just ‘Nasty’ In Florida Court}, \textit{ENTERTAINMENT WEEKLY}, June 29, 1990, at 48-49 (local record store owner in Florida arrested); \textit{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 \textit{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. \textit{See} 2 Live Crew \textit{Album Ruled Obscene in Indiana}, Lincoln Journal-Star, July 29, 1990.

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

There have also been arrests for the live performance of \textit{Nasty} songs. \textit{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 \textit{Nasty}); Browne, \textit{supra}, at 48 (all members of 2 Live Crew — except the drummer who did not sing — arrested after they performed songs from \textit{Nasty}). There has been controversy in many cities about whether the band should be allowed to perform the songs from \textit{As Nasty As They Wanna Be}. \textit{See}, e.g., \textit{Morning Report: Pop/Rock}, L.A. Times, July 16, 1990, at F2, col. 1 (Anchorage, Alaska officials planning to bar band from appearing live); \textit{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).

\textsuperscript{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,\textsuperscript{12} by individual recording artists,\textsuperscript{13} and by the music industry in general.\textsuperscript{14} Many people, in fact, have claimed that this

\textsuperscript{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 \textit{Donahue} (July, 1990) and \textit{Geraldo} (July 1990).

\textsuperscript{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, \textit{Pop Notes}, Newsday, July 22, 1990, at Part II, page 10.

\textsuperscript{14} \textit{See} Haring & Newman, 'Nasty' Ruling, Arrests Galvanize Industry, \textit{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, \textit{Rolling Stone}, August 19, 1990, at 19 (music industry experts disagree whether case signals start of "obscenity witch hunt" aimed at music industry). \textit{See also} Philips, \textit{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." \textit{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 \textit{Nasty} recording, as well. Hilburn, \textit{Pop Album Review: Macho and Mean Rap From Luther Campbell}, L.A. Times, July 23, 1990, at F1, col. 4. \textit{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
The decision is a direct attempt to suppress development in culture — to be specific, black culture. 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.

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 recordings 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. Amid the confusion about the National Endowment of the Arts funding decisions for potentially indecent or obscene art, there seems to be an Inquisition in society with respect to sexual matters. The political climate in our society has rip-


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. Skyywalker 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

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ened the obscenity issue for reconsideration. 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*, doing so merely begs the question: Should we be regulating this type of material at all?

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. The current obscenity test from *Miller v. California* is presented in preparation for an analysis of the *2 Live Crew* case.

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

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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.


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; 2) whether *Nasty* appealed to a "prurient interest" in sex; 3) whether *Nasty* was patently offensive; and 4) whether *Nasty* had any serious value.

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.

Furthermore, notions of what appeals to the "prurient interest" and what is "patently offensive" have changed over time. 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. Finally, the appropriateness of the court's determination of artistic value is questioned.

In Part IV, the bases upon which the Supreme Court has seen fit to regulate speech dealing with sexual matters is explored. One rationale that has been offered for such regulation has been that obscenity appeals to the emotional rather than the intellectual aspects of humans. Besides obscenity, many have argued that this same rationale applies to music itself. 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.

An additional rationale for the regulation of obscenity has been to

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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. 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. 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. 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.

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. "Obscenity" and "pornography" are merely labels for speech dealing with sexuality. 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. 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?

One of the reasons the government has sought to regulate speech regarding sexual activities is because of the power and mystery of sex. 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". 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?

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." 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.

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*, 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.

Although the *Chaplinsky* Court made this statement in dicta in 1942, in 1957, the Court directly confronted the issue of whether ob-
 obscenity was protected speech. In *Roth v. United States*, the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. 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.

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### THE CIRCLE OF FIRST AMENDMENT PROTECTION

![Diagram of the circle of First Amendment protection]

- Feminist Version of Pornography
- Indecency
- Political Speech
- Adult Erotica
- "the ghetto"
- Commercial Speech

Outside: Obscenity
- Fighting Words
- Defamation
- Child Pornography

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.” Materials appealing to a “prurient interest” were those that had “a tendency to excite lustful thoughts,” 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.”

Not long after *Roth*, however, the Court began to have difficulty separating protected from unprotected speech, specifically separating obscene and non-obscene pornography. In *Memoirs v. Massachusetts*, 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

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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*.


58. *Id.* (citing Webser’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.

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.
convicted under a California law which prohibited the knowing distribution of obscene matter.\textsuperscript{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.”\textsuperscript{68} The Court noted that the recipients of these brochures were “unwilling recipients,”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{67} \textsc{Cal. Penal Code} §§ 311.2(a) and 311, \textit{cited in}, Miller v. California, 413 U.S. 15 n.1 (1973).
\textsuperscript{68} Miller, 413 U.S. at 18.
\textsuperscript{69} Id.
\textsuperscript{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 counteracting 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 \textsc{Webster’s Third New International Dictionary} (Unabridged 2d ed. 1949), and then, \textsc{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 \textsc{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 \textsc{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 \textsc{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.\textsuperscript{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”\textsuperscript{72} would be obscene, as well as “patently offensive representations of descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”\textsuperscript{73}

Using this test, a number of books,\textsuperscript{74} magazines,\textsuperscript{75} and motion pictures\textsuperscript{76} have been challenged as being legally obscene.\textsuperscript{77} It is precisely this test that was applied recently in the \textit{2 Live Crew} case to declare a musical recording obscene.\textsuperscript{78}

\begin{enumerate}
\item \textit{Miller}, 413 U.S. at 24 (citations omitted).
\item \textit{Id.} at 25.
\item \textit{Id.}
\item \textit{Id.} at 16-18. \textit{Miller} itself was a challenge based on books.
\item \textit{See} Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
III. The Case of 2 Live Crew

A. Facts

The plaintiff, Skyywalker Records, Inc., 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. 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.

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

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


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!”


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 miny moe, suck my dick and swallow slow. . . . Hickery dickery dock, your wife was suckin’ my cock. The clock struck two; I dropped my gee; 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.


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."[983]

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."[98] 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 judge[97] 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).

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. Skyywalker 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.
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 \textit{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 \textit{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. \textit{Applying the Miller Test}

The 2 Live Crew court applied the \textit{Miller} test of obscenity. \(^{106}\) The court’s application of each prong of the \textit{Miller} test will be discussed below.

1. Prong 1 of the \textit{Miller} Test

The first prong of the \textit{Miller} test requires that the trier of fact determine whether “‘the average person, applying contemporary com-

\(^{100}\) \textit{Id.}

\(^{101}\) Some stores continued to sell the \textit{Clean} version. \textit{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 \textit{Alexander v. Virginia}, 413 U.S. 836 (1973). At some level this presents some difficulty because of the community standards approach to be discussed \textit{infra} at text and accompanying notes 171-192.

\(^{104}\) \textit{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. \textit{See supra} note 10.

\(^{105}\) This paper will argue that the \textit{Miller} test produces an unsatisfactory result in this case. The court’s application of the test will be criticized, as will the test itself. \textit{See infra} text and accompanying notes 172-283.

Campbell

Community 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.


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).


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." Skyywalker 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"\textsuperscript{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.\textsuperscript{118} The court placed a great deal of weight on the fact that the state legislature had enacted laws prohibiting obscenity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{122} The court found that the most comparable works were writings or audio tapes including Raw by Eddie Murphy\textsuperscript{123} and The Day the Laughter Died by Andrew Dice Clay.\textsuperscript{124} In contrast to pictorial depictions, these works focus on a "verbal message."\textsuperscript{125} Nevertheless, the court noted that these works might also be legally obscene, and thus, did not give them bought it.

\textsuperscript{117.} Id. at 589.

\textsuperscript{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.

\textsuperscript{119.} Id. at 587.

\textsuperscript{120.} Id. at 589.


\textsuperscript{122.} Skyywalker Records, Inc., 739 F. Supp. at 589.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{125.} Skyywalker 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.\textsuperscript{126} Furthermore, they alleged that this court’s opinion would “only reflect the personal opinion of the undersigned judge, not the relevant community.”\textsuperscript{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.”\textsuperscript{128} Furthermore, the judge said, “even if [I] would not find \textit{As Nasty As They Wanna Be} obscene, [I] would be compelled to do so if the community’s standards so required.”\textsuperscript{129} With the relevant community identified and with some notions of what the community standards would be regarding the \textit{Nasty} recording, the judge evaluated whether the material appealed to the prurient interest.\textsuperscript{130}

b. Appealing to the “Prurient Interest”

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

\begin{itemize}
\item \textsuperscript{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, \textit{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”).
\item \textsuperscript{128} \textit{Skyywalker Records, Inc.}, 739 F. Supp. at 590.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Roth}, 354 U.S. at 487.
\item \textsuperscript{132} \textit{Id.} at 487. See also Brockett v. Spokane Arcades, Inc., 472 U.S 491, 498 (1985).
\end{itemize}
The recording was found to appeal to the prurient interest for several reasons. 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." The court stated that the "frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity."

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."

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. Although generally the meaning of music "is

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

134. The court also considered the plaintiff's commercial motive. *Skyywalker 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. *Skyywalker 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).


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 imagina-
tion,"^{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' ex-
pert testified that the Nasty recording without the "salacious lyrics"
would not have been expected to sell more than 500,000 copies nation-
wide.^{144} The fact that the Nasty version sold over 1.7 million copies

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^{139} Skyywalker 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 valua-
ble 'rap' or 'hip-hop' music. 2 Live Crew itself proved this point by the creation of its
Clean recording." Id. at 596.

^{141} Skyywalker 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 re-
mains is the rhythm and the explicit sexual lyrics which are utterly without any re-
deeming social value." Skyywalker 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} Skyywalker Records, Inc., 739 F. Supp. at 592. See Pinkus v. United

^{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.\textsuperscript{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.’"\textsuperscript{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."\textsuperscript{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.”\textsuperscript{148}

2. Prong 2 of the \textit{Miller} Test

The second prong of the \textit{Miller} test requires the trier of fact to determine whether the work depicts or describes sexual conduct in a "patently offensive way."\textsuperscript{149} Although not all speech dealing with sex is obscene,\textsuperscript{150} some works are believed to go beyond what is considered normal candor on the subject of sex.\textsuperscript{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.\textsuperscript{152}
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.’” The court found that although the use of
profanity when not rising to the level of fighting words, was consti-
tutionally protected, the combination of these so-called “dirty words”
with “explicit sexual descriptions” was a different matter. Even in
the face of testimony that the Nasty recording was made to be “lis-
tened 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.” 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.” 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. Skyywalker 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 poten-
tial 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.


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.


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)).
The expert identified three cultural devices in the work: "call and response," "doing the dozens," and "boasting." 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.”

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," 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.

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. 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-

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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. *Skyywalker 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. Despite the fact that we have a "national Constitution," the Court isolated obscenity as being subject to review under "community standards." 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."

Diversity is the key to the problem of imposing obscenity restrictions even within what may well be a "community." 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." 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.

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.


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. The "community" identified in Florida has a Black population, as well as an Hispanic population. 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. 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. The fact that records were selling in Florida indicates that at least some segment of the population was interested in receiving this material. This type of material does not become impressed upon an unwilling populace. 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.
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. 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.” For the moment, assume that obscene materials contain ideas. 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, 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.

Presumably, because the material was directed at Black adults, Black adults probably made up the bulk of the purchasers. This subpopulation or subculture had an interest in receiving this information, and the market provided it. 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.”

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.
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.\textsuperscript{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 \textit{speech}.\textsuperscript{193} This concept of moral paternalism will be explored further in Part IVC,\textsuperscript{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.

\textbf{2. Prurient Interest and Patent Offensiveness}

What is a prurient interest \textit{really}? What types of materials are patently offensive?\textsuperscript{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.\textsuperscript{196}

The Supreme Court illustrated this point in an important obscenity case, \textit{Brockett v. Spokane Arcades, Inc.}\textsuperscript{197} In \textit{Brockett}, several

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

\textsuperscript{193} \textit{Actions} such as murder, rape, and child sexual abuse can be distinguished from \textit{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 \textit{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.

\textsuperscript{194} \textit{See infra} text accompanying notes 371-88.

\textsuperscript{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. \textit{See supra} note 70.

\textsuperscript{196} Many ideas have changed in the entertainment industry besides sex. For example, violence in films has escalated since \textit{A Clockwork Orange} (1971) was featured with all of its brutality that by today's standards seems relatively benign. \textit{See} Appelo, \textit{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).

\textsuperscript{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, 1982).
199. Brockett, 472 U.S. at 491.
201. Brockett, 472 U.S. at 499.
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).
both for men and women. From the bathing suit that covered “every-thing,” society has allowed the Speedo and the “thong” to be worn. Notions of nude bathing still trouble many people, but on some public beaches, even nude sun bathing is permissible.

The relaxing of society’s values about clothing styles is a reflection of the changes in attitudes toward sexuality. 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. 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).


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." 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.

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. In fact, the dialogue for discussion about sexual behavior has been facilitated by the changing mores in society. Now, talk shows like Donahue, books, movies and music 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. 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." 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.

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 music 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.

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.

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


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."

music does today, would Nasty have passed muster? Even the Supreme Court in Cohen v. California, 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. 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.

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


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.  

The music is also interspersed with moans from the woman who is sing-
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, but with more restraint on language uses. 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." 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.


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 excited . . . .

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. This particular song has been around for several years, and continues to be played without objection on the pop radio stations around the country. 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.


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, Skywaker 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 something 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 on one/

I'm not your father / I'm not your brother/ Talk to your sister/ I am your lover/

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 promise/ I know we can come together/ But the question is/ Will we ever?/
Sexy baby’s /Sexy body/ Keeps me guessing/ With a promise/ 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,

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." God forbid" they should say, "I want to fuck you," even though they may mean the same thing, they cannot say that.

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. Even if one accepts that as a valid identifier of the obscene, 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."

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!


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.\textsuperscript{258} While the test is the objective, based on the "reasonable person,"\textsuperscript{259} the test requires that the court become an art critic.\textsuperscript{260} This is a task, like many other court-appointed tasks, that is inappropriate.\textsuperscript{261}

Despite expert testimony,\textsuperscript{262} the 2 Live Crew court was unable to find that the Nasty recording had any serious sociological value.\textsuperscript{263} The expert testified that the work reflected specific aspects of Black culture.\textsuperscript{264} In particular, the expert testified about the concept of "boasting." Boasting is a way in which a person overvalues their sexuality.\textsuperscript{265} The court was unable to find serious value in this despite the fact that "'boasting' seems to be a part of the universal human condition."\textsuperscript{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,"\textsuperscript{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.\textsuperscript{268} Nevertheless, the court was unwill-

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\textsuperscript{258} See Main, supra note 159; Wright, supra note 159.
\textsuperscript{259} See Note, supra note 160.
\textsuperscript{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 repellent until the public had learned the new language in which their [artist] spoke.").
\textsuperscript{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).
\textsuperscript{262} Expert testimony is not required in obscenity cases. See supra note 126.
\textsuperscript{263} Skyywalker Records, Inc., 739 F. Supp. at 594. Cf. MacDonald, supra note 83; Mills, supra note 171.
\textsuperscript{264} Skyywalker Records, Inc., 739 F. Supp. at 594.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{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. 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.

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. 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. 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.


270. SKYYWALKER 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. SKYYWALKER 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 country 277

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.


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.


277. See Skywalking 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").
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. 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. 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.

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. Second, many claim that certain types

284. See supra note 53.
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). Finally, some have expressed the real reason for regulating pornography; the regulation of society’s morals. 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. 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.

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. Nevertheless, music serves an important social function, as well as an important artistic one.

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.
293. Id.
As a traditional art form, music provides social order, providing a context for the confrontation of ideas: "Conflict engenders dialogue; dialogue results in communication; communication leads to understanding." 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, solicitation, broadcasting, movies, parades and demonstrations, and symbolic protests. In each of these cases, there are elements of communication or "speech." One commentator recognized that speech, like all forms of communication, transfers messages. Messages were defined as "any patterned output no matter how primitive the patterning, from simple exclamatory directions to highly complex ideational structures." In this vein, writing, filming, and performing music would all be types of speech. Writing and films 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.

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).

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


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).

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

The concern over songs "promoting" drug use,\textsuperscript{322} sexual activ-

\textsuperscript{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 recognition process. They are inserted by . . . the listener, during the course of analysis.


\textsuperscript{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.

\textsuperscript{318} This is precisely the problem because the images being described are deemed "obscene."

\textsuperscript{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. \textit{See N. Friday, Men in Love — Men's Sexual Fantasies: The Triumph of Love Over Rage} (1980) (collection of men's sexual fantasies).

\textsuperscript{320} Chevigny, supra note 314, at 429.

\textsuperscript{321} \textit{See supra} note 315.

\textsuperscript{322} \textit{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, or suicide 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. In addition, the nonverbal speech of wearing armbands can make people feel angry when it is done in protest to war, or sad when it is done to remember dead heroes, and the nonverbal speech of burning the flag can enrage people. 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.


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*.


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.\textsuperscript{328} The chief proponent of this view is Professor Schauer.\textsuperscript{329} Schauer believes that obscene material does not communicate ideas of any sort, and is thus not speech.\textsuperscript{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.\textsuperscript{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.\textsuperscript{332}

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

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

\textsuperscript{328} See, e.g., F. Schauer, Free Speech: A Philosophical Inquiry (1982).
\textsuperscript{329} Id. See also Sunstein, supra note 314.
\textsuperscript{330} Roberts, The Obscenity Exception: Abusing the First Amendment, 10 Cardozo L. Rev. 677, 708 (1989).
\textsuperscript{331} Id. at 709 (citing F. Schauer, supra note 328, at 900, 905-07).
\textsuperscript{332} Roberts, supra note 330, at 709 (citing F. Schauer, supra note 328, at 96-97).
\textsuperscript{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 voyeristic satisfaction. Id. at 709 (citing F. Schauer, supra note 328 at 922-23).
\textsuperscript{334} Id. at 710.
\textsuperscript{335} Id. (citing F. Schauer, supra note 328, at 924-25).
\textsuperscript{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.

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.


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.*
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.\textsuperscript{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.\textsuperscript{349} A discussion of this rationale as the basis for regulating materials dealing with sexual activity is discussed below.

\section*{B. Harm}

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

\begin{itemize}
\item \textsuperscript{348} See Jenkins, 417 U.S. 153.
\item \textsuperscript{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 upon it simply because there is no conclusive evidence or empirical data.
\item \textsuperscript{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).
\item \textsuperscript{351} The Supreme Court protects nude dancing. See Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).
\item \textsuperscript{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
\end{itemize}
Typically, the “hard core” pornography censors argue that these materials are harmful to individuals.\(^3\) 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.\(^4\) 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.


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


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).

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


359. See Pollard, supra note 358.


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. 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 Behavior 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, it is still a value judgment. Some research after Brown v. Board of Education indicated that desegregation might have particularly negative effects on Black children’s self-esteem. 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.

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, 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.

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.


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 of 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).

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, or a Black man cast as a thief? 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*, the Supreme Court explicitly rejected the notion that scientific data was needed to justify prohibiting obscenity. Instead, the Court's focus was on morality. Making clear what had been implied in earlier cases, 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-

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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*.
372. *Id.* at 60.
cent society."  

Many commentators have recognized that the Court's central function in identifying material that is obscene has been to maintain the moral status quo. 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." 

While this argument stems from the notion that all law is based on morality, 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, these laws exist because of a consensus regarding the morality of such action. 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)).


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 year 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, the values justices are attempting to protect are not as homogenous as they would like to think. 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.”

The dominant morality can no more be objectively “true” than views about the equality of all men and women under the law. 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. Certainly, their speech is contrary to our moral values about the equality of all humans.

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.


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 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.


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, nor the need to uphold the majority's morality are appropriate reasons to regulate speech. Furthermore, the idea that obscenity is somehow nonspeech is simply not true. 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. He thinks that, absent some legitimate reason to regulate speech, i.e., a clear and present danger to the country, or inciting violence, 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.
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 it 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,

397. See Bishop, Porn in the U.S.A., 6 CAL. L. 60, 64 (Dec. 1964).
should not be allowed.\textsuperscript{398}

The reasons offered to support regulation of obscenity are not acceptable. While other laws rest on moral consensus,\textsuperscript{399} there are a great many people who purchase pornographic materials.\textsuperscript{400} Pornography is an $8 billion dollar industry.\textsuperscript{401} Given the lack of a consensus on this issue, and the risk of suppressing a significant number of individuals' expressive activity,\textsuperscript{402} as well as people's right to receive that information,\textsuperscript{403} any speech dealing with sexuality should not be regulated.\textsuperscript{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,\textsuperscript{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 \textit{Miller} test of obscenity produces an anomalous result for \textit{Nasty}. The community standards approach does not account for the music being targeted to a subculture, namely the Black community,\textsuperscript{406} and it suppresses artistic expression.\textsuperscript{407} The prurient interest and patent offensiveness standards are illusory. There is no justifiable basis upon

\textsuperscript{398} See supra note 350.
\textsuperscript{399} See supra text accompanying notes 379-382.
\textsuperscript{400} See supra note 192.
\textsuperscript{401} See id.
\textsuperscript{402} Many singers today use lyrics that are sexually provocative. See supra note 246 text and accompanying notes 239, 244.
\textsuperscript{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).
\textsuperscript{404} I think the most defensible type of regulation would be for violent pornography. However, much of mainstream entertainment, see, e.g., \textit{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 \textit{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").
\textsuperscript{405} See supra text accompanying note 14.
\textsuperscript{406} See supra text and accompanying notes 15-16.
\textsuperscript{407} See supra text accompanying note 3.
which to distinguish the "bad stuff" — obscenity — from the "tolerable stuff" — pornography. Finally, the social value standard places the courts in the tenuous position of being art critics.

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. 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.

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. 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.

Traditionally, society has devalued sexual speech. This has been based on morality. 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. 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. Skywylarker 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.\textsuperscript{416} However, sex is a great deal less mysterious than it used to be because of more open debate about sexuality.\textsuperscript{417} Part of that debate has included pornography and obscenity.\textsuperscript{418}

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

It is unfortunate that the first amendment has never been absolute.\textsuperscript{424} Justice Black’s view is a view that should have dominated first amendment jurisprudence — an absolutist view.\textsuperscript{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


\textsuperscript{417}. \textit{See supra} text accompanying notes 204-18.

\textsuperscript{418}. \textit{See id}.

\textsuperscript{419}. \textit{Skyywalker Records, Inc.}, 739 F. Supp. at 585.

\textsuperscript{420}. \textit{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 \textit{Nasty} used would be deemed “obscene.” \textit{See} Miller v. Civil City of South Bend, 904 F.2d 1081 (1990) (Orff’s \textit{Carmina Burana}, if it were not sung in Latin, could not be broadcast).

\textsuperscript{421}. This outrage over \textit{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.”

\textsuperscript{422}. \textit{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.

\textsuperscript{423}. \textit{See supra} note 53.

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

\textsuperscript{425}. \textit{See supra} text accompanying notes 392-95.
"road of censorship," we can never go back. The Court has long been on the "road of censorship," allowing no protection for other "categories" of speech such as defamation.

More than fifteen years ago, Justice Stevens noted that the obscenity issue was overdue for reconsideration. 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.
Essay: Too Live a Crew

Bruce Rogow*

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.
**B. The Role of Bantam Books, Inc. v. Sullivan**

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-

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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
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. . . . "

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

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9. Id. at 603.
12. Id. at 68-69 (emphasis added).
16. Skyywalker Records, Inc., 739 F. Supp. at 601 (citing Southeastern Promotions, 420 U.S. at 560 (emphasis in original)).
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.17 Especially when the suit is one to determine non-liability, the burden may shift to the defendant.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 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.20

18. BARCHORD, DECLARATORY JUDGMENTS, 404-405 (2d ed. 1941).
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) (de-naturalization); Schneiderman v. United States, 320 U.S. 118, 159 (1943) (de-naturalization). 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.

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

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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, 383 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.' Al-

though Bose Corporation v. Consumers Union involved libelous speech and not obscenity, the Court analogized the need for independent ap-pellate 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
federal courtroom. The first amendment precedent he set condemning prior restraints was swallowed up by his declaration that \textit{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 \textit{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, \textit{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.

\textbf{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,\(^\text{30}\) and who had been, as Sheriff, threatened with contempt by both federal\(^\text{31}\) 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. 32

The State also wanted to introduce a State prepared transcript of the recording, 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. 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?) 34 made the trial amusing. 35

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).

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).


35. The press' problems in reporting the trial were captured by Mike Clary's 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, 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, 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.\textsuperscript{38} Persons under 25 years of age are 23.5% of the population,\textsuperscript{39} but are registered voters at an even lower percentage.\textsuperscript{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,\textsuperscript{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\textsuperscript{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 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

\begin{itemize}
\item \textsuperscript{38} Miami Herald, Oct. 2, 1990 (BR), at 1.
\item \textsuperscript{39} Broward Economic Development Board, 1989 data (personal communication, Lou Sandora).
\item \textsuperscript{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.
\item \textsuperscript{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).
\item \textsuperscript{42} \textit{See} FLA. R. CRIM. P. 3.350.
\end{itemize}
site of recent race riots, and the jury's white upper-middle-class community. The jury was obviously drawn from lists which underrepresented 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.  

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.

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, the luck of drawing a varied lot (some of whom educated the whole potential panel by their responses to prosecution questions), 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-
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, and the foreman, who was gay, "came out of the closet" in an interview with a South Florida news and arts weekly.

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. As explained by Pope v. Illinois, 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-

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.\(^6\)

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.\(^7\)

\(^5\) *Id.* at 500, 501.


\(^7\) 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,

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*Advice Offered to 2 Live Crew Jurors*, Sun Sentinel, Oct. 14, 1990, at 1B.

The 2 Live Crew jury was moved to find political value by the rhythmic chants of “F— Navarro and F— Martinez,” the Broward Sheriff and the Florida Governor. The artistic and literary evidence came from John Leland, *Newsday*’s music critic, and Henry Louis Gates, Jr., a Duke University English Professor.


55. *Henry v. State*, 359 So. 2d 864-868 n.3 (Fla. 1978) (citing, *United States v. Carter*, 491 F.2d 625, 633 (5th Cir. 1974)) (“a trial judge must be acutely sensitive to the probability that the jurors will listen to his additional instructions with particular interest . . . . Thus the court must exercise special care to see that . . . inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial.”).

56. *Id.* at 867 (1978) (citing *East v. State*, 339 So. 2d 1104, 1106 ( Ala. Crim. App. 1976)) (“When a jury calls for additional instruction and clearly delineates the area of its request, it is usually better for the trial court to remain within such area.”).
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.\footnote{The \textit{Freeman} case presents other appellate issues, among them the failure to instruct the jury that the "average person" meant \textit{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.}

**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.\footnote{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.} 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:

\begin{quote}
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.\footnote{\textit{Pope}, 481 U.S. at 505 (Scalia, J., concurring).}
\end{quote}

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
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 — anyplace — other than the courts.
The Search for a Section 1983 Right Under the Dormant Commerce Clause

Since its inception in 1871, and characterization in the Supreme Court case of *Monroe v. Pape*, 42 U.S.C. § 1983 has caused turmoil among commentators concerned with this statute's application in the area of constitutional rights.\(^1\) The focus of this comment is to describe

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   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


the nature of the constitutional rights which are covered by section 1983 for the purpose of awarding attorney's fees under 42 U.S.C. § 1988. The obvious choices are those individual or personal rights which fall within the purview of the Bill of Rights and the Civil War amendments, and these will be addressed in the sections which follow. However, the more controversial issue is whether the Commerce Clause of the Constitution embodies personal rights which are implicated in the statutory language of section 1983 and section 1988 to allow the courts to award attorney's fees to plaintiffs who have been granted relief from burdensome state statutes.

The Supreme Court has denied certiorari several times to cases involving the Commerce Clause issue, but has now granted certiorari.

2. Section 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1980). Courts have also stated that a party who prevails on a ground other than section 1983 is entitled to attorney's fees under section 1988 if section 1983 would have been an appropriate basis of relief. See J & J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1473 (10th Cir. 1985). Thus, it is not mandatory that a section 1983 claim of relief be brought in the plaintiff's original complaint in order to get attorney's fees later.

3. These rights were expressly considered by the Forty-second Congress in the debates prior to passage of the then Ku Klux Klan Act of 1871 because the act was passed in the wake of the fourteenth amendment. See Monroe v. Pape, 365 U.S. 167, 180 (1960).

4. This comment is concerned with state regulation under the dormant commerce clause doctrine where a state may regulate or infringe upon, within certain limits, interstate commerce when Congress has not legislated pursuant to its Commerce Clause power. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). This situation is to be distinguished from that where the state passes statutes in conflict with extant congressional statutes enacted under the Commerce Clause and which, therefore, causes the Supremacy Clause to be invoked to defeat the conflicting state regulation of interstate commerce. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 8.1 (3d ed. 1986); Note, Dormant Commerce Clause Claims, supra note 1, at 158 n.11.

to *Dennis v. State*, in which the Nebraska Supreme Court denied plaintiff’s motion for attorney’s fees under 42 U.S.C. § 1988. In *Dennis*, the Nebraska court based its reasoning on that of several federal courts which have also determined that the Commerce Clause does not confer individual rights within the meaning of section 1983 which would allow an award of fees under section 1988. However, the courts that have considered the Commerce Clause issue failed to define what a right was before considering whether a right existed under the Commerce Clause.

The goal of this comment is to derive the meaning of rights, and then to see if these rights are included as part of the Commerce Clause structure. Section one discusses the reasoning of the Nebraska Supreme Court’s decision in *Dennis* in order to gain some bearing on this analysis. Section two’s analysis results in a definition of “rights” which fits into the scheme of 42 U.S.C. § 1983. This definition is derived from a consideration of the plain meaning and the legislative history of section 1983, as well as from the history of the Commerce Clause, and the Supreme Court’s jurisprudence in this area. Section three considers the nature of the Commerce Clause as a mechanism which allocates power between the state and federal governments. This section shows that the Commerce Clause serves only to provide “benefits” for individuals that are not encompassed by section 1983’s meaning of “rights.” Section

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7. See, e.g., *Consolidated Freightways Corp.*, 730 F.2d 1139; *Private Truck Council*, 503 A.2d 214. These and other cases denying the existence of Commerce Clause rights to plaintiffs seeking attorney’s fees based on section 1983 and section 1988 will be considered in more detail in section four of this comment.

8. See Note, *Section 1983 Remedies*, supra note 1; Note, *Dormant Commerce Clause Claims*, supra note 1. Several commentators also fail to define what a right is before questioning whether one exists under the Commerce Clause. See Note, *Dormant Commerce Clause Claims*, supra note 1; Comment, *The Commerce Clause*, supra note 1.

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Kenncott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), and would have granted certiorari on this basis. *Private Truck Council*, 476 U.S. at 1129. This opinion shows that there are members of the Court who recognize that an issue exists concerning whether the Commerce Clause secures individual rights within the meaning of 42 U.S.C. § 1983.

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four uses these considerations to examine the Nebraska Supreme Court's decision in *Dennis* and concludes that it was correct in holding that the Commerce Clause is not a source of rights cognizable under 42 U.S.C. § 1983, and therefore, that section 1988 attorney's fees were precluded.

I. The Decision In *Dennis v. State*

*Dennis v. State* is a typical case involving yet another state's attempt to tax out-of-state people for use of the state's highways. However, the case is one of the relatively few involving a plaintiff attempting to secure a claim of relief under 42 U.S.C. § 1983 for an impingement of a Commerce Clause "right" in order to get attorney's fees under section 1988. In *Dennis*, the plaintiff, Mark E. Dennis, claimed that Nebraska had exacted taxes pursuant to two statutes


11. The first statute read: *Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks . . . and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks . . . owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks . . . are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska."

*Dennis*, 234 Neb. at 443, 451 N.W.2d at 685-86 (emphasis in original) (quoting Neb. Rev. Stat. § 60-305.02 (1984)). The second statute provided:

(1) In case a foreign state . . . is not reciprocal as to license fees on commercial trucks . . . the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks . . . other than license fees, and the reciprocity law of any other foreign state . . . does not act to exempt Nebraska trucks . . . operating in that state from payment of all fees whatsoever, the owners of such foreign trucks . . . shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks . . . .

(7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) *the jurisdiction in which a commercial vehi-
which violated the Commerce Clause\textsuperscript{12} and the Privileges and Immunities Clause\textsuperscript{13} of the United States Constitution, and which also gave rise to a claim of relief under 42 U.S.C. § 1983 by depriving him of constitutional rights.\textsuperscript{14}

The plaintiff in \textit{Dennis} owned and operated a trucking company with its principal place of business in Ohio.\textsuperscript{16} As part of this business, plaintiff owned one tractor and two trailers, all registered in Ohio.\textsuperscript{16} Due to the Ohio registration, plaintiff was subject to a one to two cent tax per mile while driving in Nebraska, because Ohio exacted the same tax of Nebraska-registered vehicles operating in Ohio.\textsuperscript{17}

The trial court held that the statutes constituted an undue burden on interstate commerce in violation of the Commerce Clause and enjoined their enforcement.\textsuperscript{18} However, the trial court dismissed the counts under the Privileges and Immunities Clause and 42 U.S.C. § 1983 for failure to allege facts sufficient to support the action.\textsuperscript{19} Rather than award attorney’s fees pursuant to 42 U.S.C. § 1988, the trial

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\textbf{Dennis,} 234 Neb. at 443-44, 451 N.W.2d at 686 (emphasis in original) (quoting \textit{NEB. REV. STAT.} § 60-305.03(1), (7) (1984)). Both statutes were amended after the trial court’s decision, thus making the Commerce Clause issue moot in respect to Nebraska. \textit{Dennis,} 234 Neb. at 429, 451 N.W.2d at 678 (referencing \textit{NEB. REV. STAT.} §§ 60-305.02 to .03 (1988)).
\end{flushleft}
court stated that the "plaintiff and his attorneys are entitled under the [e]quitable [f]und [d]octrine to payment of their expenses and reasonable fees."20 Based on the trial court’s opinion, the pertinent issue raised on appeal to the Nebraska Supreme Court was whether the statutes’ impermissible burden on interstate commerce created a claim cognizable under section 1983 so as to allow attorney’s fees under section 1988.21

20. The equitable fund doctrine provides that,
when one by active litigation creates, or increases a fund in which others are entitled to share, those others should bear a portion of the litigation expenses, and that they can be made to do so by charging the fund with the reasonable expenses of the litigant who preserves or augments it.

D. Dobbs, Remedies § 3.8, at 200 (1973). The plaintiff claimed that the fund consisted of the total amount of taxes collected by Nebraska that would be subject to refund. Dennis, 234 Neb. at 429, 451 N.W.2d at 678. The trial court did not agree with this contention and left to another day the determination of what fund, if any, was available for payment of the fees. Id.

21. This is the same issue upon which the United States Supreme Court granted certiorari. Dennis v. Higgins, 58 U.S.L.W. 3749 (U.S. May 29, 1990) (No. 89-1555). Two other issues were raised to the Nebraska Supreme Court: first, whether enforcement of the statutes violated the Privileges and Immunities Clause, and also, whether the trial court erred in awarding fees under the equitable fund doctrine. Dennis, 234 Neb. at 429, 451 N.W.2d at 678. On the first issue, the Nebraska Supreme Court held that the Privileges and Immunities Clause was not violated by the taxation of the out-of-state trucks. Id. at 445, 451 N.W.2d at 686. The court first noted that the Supreme Court decision in Toomer v. Witsell, 334 U.S. 385, 398 (1948), precluded only "‘classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" Dennis, 234 Neb. at 443, 451 N.W.2d at 685. The Nebraska Supreme Court then observed that Nebraska’s statutory scheme did not impose taxation based on the resident or nonresident status of the motor carrier, but [was] based upon the state where the particular vehicle [was] registered." Id. at 444, 451 N.W.2d at 686. Under this statute then, even residents of Nebraska would be taxed if they drove vehicles which were covered by the statute and registered in a state other than Nebraska. Id. The court concluded that since plaintiff was taxed simply because his tractor was registered in Ohio, and because Nebraska residents would also be taxed under the same circumstances, the statute was not one which discriminated against out-of-state citizens in violation of the Privileges and Immunities Clause. Id. at 444-45, 451 N.W.2d at 686.

In an alternative holding on the Privileges and Immunities Clause issue, the court first reasoned that only out-of-state citizens had standing to challenge violations of the Privileges and Immunities Clause. Id. at 445, 451 N.W.2d at 686. See also Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). The court concluded that because plaintiff did not even allege that he was a citizen of another state in his complaint, he did not have standing to bring the Privileges and Immunities Clause challenge against the statutes. Dennis, 234 Neb. at 445, 451 N.W.2d at 686.
The Nebraska Supreme Court held that the Commerce Clause did not secure rights cognizable under section 1983 which would allow an attorney's fee award under section 1988. Therefore, the court affirmed the trial court's dismissal of this claim. In its decision, the court first noted that there was a conflict of authority on the Commerce Clause issue and decided, after considering the main cases in the area, that the "better reasoned cases hold that there is no cause of action under section 1983 for violations of the [C]ommerce [C]lause." The court relied primarily on the Eighth Circuit decision in Consolidated Freightways Corp. v. Kassel, and other cases which make reference to it, for the proposition that the Commerce Clause is a constitutional

The next issue was raised by the defendant, the State of Nebraska, and questioned whether the trial court erred in allowing plaintiff his fees and costs pursuant to the equitable fund doctrine. The court stated that the doctrine "presupposes the existence of a fund . . . and requires the prevailing party to have brought suit to preserve or protect [the] fund . . . ." Id. at 445, 451 N.W.2d at 687. Moreover, the fund must be an "immediate fund" which the court must have control over from the beginning of the trial, and from which the court can award attorney's fees and costs at trial. Id. at 446, 451 N.W.2d at 687. In Dennis however, the court stated that "[t]here is no fund in this case, much less a fund within the jurisdiction of the trial court." Id. On this note, the court held that it was error for the trial court to award fees based on the equitable fund doctrine. Id. at 445, 451 N.W.2d at 688. The court also noted that Nebraska "has not waived its sovereign immunity as to attorney fees under the circumstances such as this case." Id. at 448, 451 N.W.2d at 688. Thus, in a second alternative holding, the court reversed the trial court's decision to award fees under the doctrine.

Finally, the Commerce Clause violation was not appealed by Nebraska because the state revised the two tax statutes that were in issue. See supra note 11.

22. Dennis, 234 Neb. at 430, 451 N.W.2d at 678.
23. Id. at 448, 451 N.W.2d at 688.
24. Id. at 430, 451 N.W.2d at 678.
26. Dennis, 234 Neb. at 430-32, 451 N.W.2d at 678-80 (citing Consolidated Freightways Corp., 730 F.2d 1139). The Dennis court also relied on several federal and state cases which had cited Consolidated Freightways Corp. in support of their decisions. See Kraft v. Jacka, 872 F.2d 862 (9th Cir. 1989); J & J Anderson v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Pesticide Pub. Policy Found. v. Village of Wauconda, 622 F. Supp. 423 (N.D. Ill. 1985), aff'd, 826 F.2d 1068 (7th Cir. 1987); State v. Private Truck Council, Inc., 258 Ga. 531, 371 S.E.2d 378 (1988); Private Truck Council, Inc. v. State, 221 N.J. Super. 89, 534 A.2d 13 (1987), aff'd, 111 N.J. 214, 544 A.2d 33 (1988); Private Truck Council, Inc. v. Secretary of State, 503 A.2d 214 (Me.), cert. denied, 476 U.S. 1129 (1986); Private Truck Council, Inc. v. State, 128 N.H. 466, 517 A.2d 1150 (1986). In all of these cases, the court distinguished sections of the Constitution which confer individual rights from those which serve only to allocate power between the levels of government. These cases, and their distinction, will be considered in more detail in section four of this comment. Note at this point,
provision which allocates power between the state and the federal governments. Further, the court recognized, in reliance upon the Consolidated Freightways Corp. decision, that the most individuals can expect of the dormant commerce clause limit on the states is an indirect benefit from its enforcement, a benefit which is "not the same thing as a 'right' secured by the Constitution within the meaning of section 1983." 27

The Nebraska Supreme Court rejected other cases which stated that individuals had a right to engage in interstate commerce. For instance, the court adopted the reasoning of Consolidated Freightways Corp., which discredited "two earlier federal cases stating terse holdings going the other way . . . neither of [which] . . . analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce Clause issue." 28 The court also dismissed several United States Supreme Court references to a right to engage in interstate commerce based on the Eighth Circuit's dismissal of the same in Consolidated Freightways Corp. 29 Thus concluding that the Commerce Clause did not secure however, that these cases all beg the question of what a right is. Rather than define the term, the authorities rely on the happenstance of the Forty-second Congress' limited use of the term "rights" well over 100 years ago, as well as the Supreme Court's usage in contexts unrelated to the present question of Commerce Clause rights. Beginning in section two, this comment draws on these sources in arriving at a general definition of rights which can be applied to a modern question never considered in the past debates and cases.

27. Dennis, 234 Neb. at 432, 451 N.W.2d at 680.
28. Id. at 438-39, 451 N.W.2d at 683. The two cases cited in this reference are Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), and Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1975), aff'd on other grounds, 425 U.S. 463 (1976). These are discussed in section four of this comment.
29. Dennis, 234 Neb. at 432, 451 N.W.2d at 679-80. These cases were: Garrity v. New Jersey, 385 U.S. 493 (1967); Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910); and Crutcher v. Kentucky, 141 U.S. 47 (1891). The Garrity reference to a right to engage in interstate commerce was considered "mere dictum." Dennis, 234 Neb. at 432, 451 N.W.2d at 679. The references in Western Union and Crutcher were viewed by the Nebraska Supreme Court as focusing on the separation of powers between the federal and state legislatures which, therefore, excluded the Commerce Clause as a right securing provision. These cases are further considered in note 148, along with three other cases that were not mentioned in Dennis, but which do refer to a "right" to engage in interstate commerce: namely, Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911), Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
section 1983 rights, the Nebraska Supreme Court affirmed the trial court’s dismissal of the action. The following sections of this comment consider the underlying forces of the rights/benefits distinction, which is made by the Nebraska court in Dennis, to support the conclusion that the Commerce Clause does not afford rights to individuals which can be vindicated by a section 1983 action.

II. The Definition of a Section 1983 Right

The failing in cases like Dennis is that the courts do not define section 1983 rights before considering the Commerce Clause issue, and whether the plaintiff can get attorney's fees under section 1988. The problem the courts face in this respect is that 42 U.S.C. § 1983 uses the term “rights” without providing a definition which would aid in determining what these rights are, and whether such rights exist under the Commerce Clause. In order to discover the meaning of “rights” then, the courts must resort to statutory interpretation tools. Of importance here is the plain meaning rule which provides that “where the [statutory] language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”

However, where the statute’s language is vague or ambiguous, the courts will then look to the legislative history of the statute to surmise congressional intent on how the ambiguous term should be applied. The first inquiry, then, looks to the language of 42 U.S.C. § 1983 to determine the scope and meaning of the term “rights.”

A. The Plain Meaning of Section 1983

Under the plain meaning doctrine, two questions exist with respect to 42 U.S.C. § 1983. The first of these considers the scope of “rights,” as the word is used in section 1983, because “rights” is modified by the term “any” in the statute. The second question asks what is a “right”

30. Caminetti v. United States, 242 U.S. 470, 485 (1917) (citing Hamilton v. Rathbone, 175 U.S. 414, 421 (1899)). The import of the Court's statement is that the Court will first look to determine if terms used in the statute are vague or ambiguous. If the terms are neither vague nor ambiguous, the Court will then base its decision on the plain meaning of the statute.

within the meaning of section 1983.

Section 1983 uses the words “any rights . . . secured by the Constitution and laws . . . .” Use of the term “any,” without other words to modify it, would seem to suggest that any right which exists under the Constitution and federal statutes would be within the ambit of section 1983. However, early Supreme Court cases declined to give such a broad reading to this statute. For instance, the Court in *Holt v. Indiana Manufacturing Co.* refused to extend section 1983 coverage beyond “civil rights,” while in *Hague v. Committee for Industrial Organization* it drew a tenuous distinction between “personal” and “property” rights, the former included as section 1983 rights while the latter was not. These cases restricting the scope of section 1983 have since been overruled by the modern Supreme Court which is eager to confirm the existence of constitutionally and statutorily created rights in order to meet the broad language of “any rights” used by 42 U.S.C. § 1983. Indeed, as one commentator has noted, “the Supreme Court has never placed a constitutional provision outside section 1983.” Several cases support this proposition including *Maine v. Thiboutot,*

33. See generally Note, *Section 1983 Remedies,* supra note 1, at 1834-35.
34. 176 U.S. 68, 73 (1900).
35. 307 U.S. 496, 531 (1939). The plurality in *Hague* was actually interpreting the scope of 28 U.S.C. § 1343, the jurisdictional counterpart of 42 U.S.C. § 1983, which gives the district courts original jurisdiction in section 1983 suits. The language used in section 1343 is practically the same as that used in section 1983:

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

38. 448 U.S. 1 (1979) (stating generally, section 1983 encompasses violations of both constitutional and federal statutory rights).
Due to the Court's broad interpretation of section 1983, if an individual right exists under the Commerce Clause, this right would likely be included within the meaning of rights protected by section 1983.

Unlike its usefulness in determining the scope of "rights" which section 1983 invokes, the plain meaning doctrine provides no guidance in defining what a right is under section 1983. Indeed, it has been recognized that "'plain meaning' is too simplistic a guide to the construction of section 1983." This is especially so because the Court has not provided a clear test which could be used to determine what a right is under section 1983. Without a statutory or Court-formulated test for determining what a right is, the plain meaning rule is of no avail because it would leave the Court to answer the question on intuition alone. Where the plain meaning rule provides no guidance in determining how a statute’s terms are to be applied or interpreted, the Court should next resort to the legislative history of the statute and other "extra-statutory materials pertaining to what happened before and during the passage of the law to explain language that is ambiguous . . . ." The legislative history of 42 U.S.C. § 1983 is, therefore, invaluable, because the plain meaning rule cannot be usefully applied due to the ambiguous nature of the term "rights." Considering this history, as well as other notions of the meaning of the term "rights" will lead to a definition which can be used in determining if the Commerce Clause embraces individual rights.

39. 319 U.S. 624 (1943) (rights under the Free Exercise Clause of the first amendment are part of section 1983 rights).
41. 347 U.S. 483 (1954) (allowing a section 1983 remedy for the violation of equal protection rights under the fourteenth amendment).
42. 405 U.S. 538 (1972) (including property rights as rights cognizable under section 1983).
43. Thiboutot, 448 U.S. at 14 (Powell, J., dissenting).
45. Wald, supra note 31, at 282.
46. Justice Powell has also stated that section 1983's history should guide the Court's interpretation of this statute. See Matasar, Personal Immunities, supra note 1, at 752 (relying on the Court's opinion in Imbler v. Pachtman, 424 U.S. 409, 421 (1976) for this proposition).

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B. The Legislative History of Section 1983

In *Chapman v. Houston Welfare Rights Organization*, Justice Stevens, speaking for a majority of the Court, stated that "in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."\(^4\) The first Supreme Court case to imbue section 1983 with a substantively broad scope based on an examination of the statute's legislative history and purposes was *Monroe v. Pape*.\(^5\) In that case, the Court considered whether 13 police officers, who had broken into the petitioner's home without a search warrant and arrested him without an arrest warrant, had acted under color of state law in order to allow the petitioner's claim of relief under section 1983 against both the officers and the City of Chicago.\(^6\) In deciding that the action against the officers alone was permissible while the action against the City was not, the Court noted that section 1983 was enacted in response to the Ku Klux Klan's activities against the freedmen and other minorities in the South:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . .\(^7\)

As revealed by this statement, the proposed legislation sought to elimi-

\(^4\) 441 U.S. 600, 608 (1979) (considering whether the plaintiff's complaint stated a claim under the Supremacy Clause which was cognizable under 42 U.S.C. § 1983, and which would provide the lower court with subject matter jurisdiction).

\(^5\) 365 U.S. 167 (1961). See also Spurrier, supra note 1, at 3 (citing cases which had, prior to *Monroe*, limited the scope of section 1983 as a remedy for deprivation of rights, privileges, or immunities).


\(^7\) Id. at 172-73 (quoting President Grant's message to Congress reported in *Cong. Globe*, 42d Cong., 1st Sess. 244 (1871)). See also Spurrier, supra note 1, at 2 (stating that section 1983 was "enacted to protect the newly-freed blacks from the lawless activities of whites in southern states . . .").
enate state inactivity concerning Klan operations which resulted in denial of equal protection and due process rights to the recently freed slaves of the South.\textsuperscript{51}

The \textit{Monroe} Court went on to point out three purposes of section 1983 in alleviating this denial of fourteenth amendment rights. First, the legislation served as a tool to invalidate any "invidious legislation by States against the rights or privileges of citizens of the United States."\textsuperscript{52} Second, the Court stated that section 1983 provided a remedy where state law is inadequate, and quoted Senator Sherman for support of this conclusion:

[I]t is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.\textsuperscript{53}

\textsuperscript{51.} U.S. CONST. amend. XIV, § 1 provides:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Since this amendment was ratified in 1868, only three years before President Grant's statement, \textit{supra} at the text accompanying note 50, it is safe to draw the conclusion that the President's use of the language "effectually secure life, liberty, and property" was significantly influenced by the fourteenth amendment's Due Process Clause language that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ," because the language in his statement and that in the Clause is so similar. Also, the President's use of "enforcement of the laws in all parts of the United States" implicates the fourteenth amendment's equal protection language, "nor deny any person . . . the equal protection of the laws," for the same reason.

\textsuperscript{52.} \textit{Monroe}, 365 U.S. at 173 (quoting Congressman Sloss, CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

\textsuperscript{53.} \textit{Id.} at 173-74 (citing CONG. GLOBE, 42d Cong., 1st Sess. 345 (1871)). This statement provides an example of equal protection denial to blacks at the time. Enforcement of state laws here would have allowed only racist whites to testify as witnesses in trials of black citizens. An almost irrebuttable presumption of guilt thus arose which state law would have no effect in curing. Section 1983 presumably offered a remedy for this denial of equal protection by providing a neutral tribunal which eliminated the racist discrimination between black and white witnesses.
Finally, section 1983 provided "a federal remedy where the state remedy, though adequate in theory, was not available in practice." This is the remedy which would cut to the heart of de facto discrimination against blacks in the South. With these purposes derived from the legislative history of section 1983 in mind, the Monroe Court ultimately stated that,

one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the [f]ourteenth [a]mendment might be denied by the state agencies.

With this statement, and the preceding look at the legislative debates, it is easy to surmise, as the Court in Monroe did, that the Forty-second Congress used the term "rights" in the context of fourteenth amendment rights due to the frequent references to the terms and policies underlying this amendment.

Based on the intuitive sense of the word, "rights" under the fourteenth amendment means individual rights aimed at the protection of people who are denied due process and equal protection of the laws by state governments. This focus on rights within the context of the fourteenth amendment has been followed by later Supreme Court decisions. For instance, the Court in Lynch v. Household Finance Corp. recognized that section 1983 "was passed for the express purpose of ‘enforc[ing] the [p]rovisions of the fourteenth amendment.’" The Court went on to state, "the rights that Congress sought to protect in [section

55. De facto discrimination is the situation where the state's statutes are not discriminatory on their face, but are applied, enforced, or not enforced in such a manner which effectively discriminates against blacks, and other minorities. The Monroe Court recognized this in its quotation of Senator Burchard. 365 U.S. at 176-77 (citing Cong. Globe, 42d Cong., 1st Sess. 653 (1871)). See also Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (considering the differences between de facto and de jure discrimination).
57. This conclusion is also supported by the title given to section 1983 when it was passed by the Forty-second Congress: "An Act to enforce the Provisions of the Fourteenth Amendment and for other purposes." Cong. Globe, 42d Cong., 1st Sess. app. 335 (1871).
58. 405 U.S. at 545.
1983] were described by the chairman of the House Select committee that drafted the legislation as ‘the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.’”⁵⁹ Later, in Chapman v. Houston Welfare Rights Organization, the Court noted that “it is . . . clear that the prime focus of [C]ongress in all of the relevant legislation was ensuring a right of action to enforce the protections of the fourteenth amendment and the federal laws enacted pursuant thereto.”⁶⁰ If it was doubted before, this language unequivocally shows that Congress used the word “rights” with the intent to protect fourteenth amendment personal or individual rights. These are individual rights because neither the state nor the federal government has the power to infringe upon these rights; this is a concept which irresistibly leads to the definition of section 1983 “rights.”⁶¹

C. The Definition of a Right

The major characteristic which separates a right from other constitutional entitlements is that rights cannot be stripped from the individual by the government, whether it be state or federal.⁶² This notion

⁵⁹. Id. at 545 (quoting Representative Shellabarger, Cong. Globe, 42d Cong., 1st Sess. app. 69 (1871)).
⁶⁰. 441 U.S. at 611. See also Lugar v. Edmonson Oil Co., 457 U.S. 922, 934 (1982) (“The history of [section 1983] is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the [f]ourteenth [a]mendment affords the individual.”).
⁶¹. The state or federal government may infringe on these rights in those situations where the state is permissibly acting pursuant to its police power, or where the federal government is acting according to its constitutional prerogatives. See generally L. Tribe, American Constitutional Law §§ 15-1 to 16-59 (2d ed. 1988). However, in either of these instances, the governing entity must still pass the Court formulated strict scrutiny test for statutes and other regulations which infringe on the due process and equal protection rights of the individual. The reasoning behind such a stringent test is that neither the states nor the federal government are empowered to regulate these rights under the Constitution. See J. Nowak, R. Rotunda & J. Young, supra note 4, § 11.4, at 357, § 11.7, at 367. This reasoning will be elaborated upon in the following sections of this comment.
⁶². See generally J. Choper, Judicial Review and the National Political Process 195-205 (1980). Prior articles attempt to establish the existence of Commerce Clause “rights” by relying on precedential use of the term by the Supreme Court. See, e.g., Note, Dormant Commerce Clause Claims, supra note 1. The point of the following historical discussion in the text is to avoid any misapplication of these usages, which were derived from specific sets of facts before the Court, by establishing a com-
of individual rights, if it must be attributed to some point of origin in United States history, evolved from the "natural law" concept which flourished in the 18th and 19th centuries.\(^\text{63}\) During this time, all branches of the federal and state governments were considered to have a limited "sphere of authority defined by the nature and function of that level or branch and by the inherent rights of citizens."\(^\text{64}\) These "inherent rights" included the rights to personal security and liberty, and the right to keep private property. They were rights that in no way could be limited by the government, simply because its authority and jurisdiction did not include such a power.\(^\text{65}\) The natural law concept was a guide to the Court even after ratification of the fourteenth amendment in 1868, when it would seem that the Court would no longer need the concept.\(^\text{66}\)

As discussed above, the fourteenth amendment was passed with the intent to provide federal authorities with the means to protect due process and equal protection rights of people who were plagued in the South by the Ku Klux Klan. These are the same rights which the Supreme Court previously included in the natural law category. However, the Court construed the fourteenth amendment's protection quite narrowly when presented with the *Slaughter-House Cases*.\(^\text{67}\) The reason for this restricted reading was the Court's fear that the fourteenth amendment's scope would expand so much that the Court would find itself adjudicating cases which were properly within the states' jurisdiction.\(^\text{68}\) However, the amalgamation of the natural law concept and the

\begin{itemize}
\item \textit{L. Tribe, supra} note 61, § 8-1, at 560, § 15-3, at 1309-10.
\item \textit{Id.} at 560 (emphasis added).
\item \textit{Id.}
\item \textit{Id.} at 565.
\item \textit{Id.} at 562. The *Slaughter-House Cases* (Butchers' Benevolent Association v. Crescent City Live-Stock Landing and Slaughter-House Co.) decision was that the Privileges and Immunities Clause of the fourteenth amendment guaranteed only those rights of national citizenship including, as the Court stated in dicta, the right, to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the substreasuries, land offices, and courts of justice in the several States.
\item 83 U.S. (16 Wall.) 36, 79 (1872) (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867)).
\item \textit{L. Tribe, supra} note 61, § 8-1, at 565. Recall that this was a period in his-
language of the fourteenth amendment would alleviate this fear and allow the Court to embark upon its now infamous journey into the *Lochner* era.69 The crux of the line of cases during this period was the Court's move toward review of government regulations with an eye to substantive economic due process based on the fourteenth amendment and natural law concepts.

The Court used the well established limits of natural law to limit the reach of the fourteenth amendment, and thus protect the states' existing field of sovereign rights. As Professor Tribe states, "[j]ust as inherent limitations on government guided natural law scrutiny of legislative action, so could they guide federal judicial review under the fourteenth amendment."70 The important development of this time was the individual right to freedom of contract which arose from the natural law aspect of the Court's review under the fourteenth amendment.71 The freedom of contract theory's evolution began with *Allgeyer v. Louisiana*,72 continued with *Lochner v. New York*,73 and ended with *West Coast Hotel v. Parrish*.74 For purposes of this comment, it is sufficient to note that freedom of contract was an individual right derived from the now discredited field of substantive economic due process review. However, the natural law concept underlying the Court's review in this area is useful in forming a definition of the rights implicated by 42 U.S.C. § 1983.75

70. *Id.* at 565.
71. Specifically, freedom of contract arose from the natural law concept of the individual's right to personal liberty. Professor Tribe states that the Court in *Barbier v. Connolly*, 113 U.S. 27, 31 (1885), "warned that the [D]ue [P]rocess [C]lause protected the freedom to contract and prevented arbitrary deprivations of common-law liberty—deprivations which by definition could not amount to exercises of the police power, whose mission was the protection of common-law rights." L. TRIBE, *supra* note 61, § 8-1, at 566 (emphasis in original). Freedom of contract was derived of the natural law because the government could not interfere with the individual's exercise of this right. Interference with this right was not part of the nature and function of the government entity. Thus, freedom of contract was seen as a limit on the scope of the individual rights created by the fourteenth amendment, because the Court was already well versed in the limits of the individual's right to personal liberty.

72. 165 U.S. 578 (1897).
73. 198 U.S. 45 (1905).
74. 300 U.S. 379 (1937). *See also* L. TRIBE, *supra* note 61, § 8-2, at 567.
75. As the Court in *Moore v. City of East Cleveland* stated:

Substantive due process has at times been a treacherous field for this
Merging the plain meaning and legislative history of section 1983 with the theory underlying the natural law notion results in a definition of "rights." The plain meaning reveals only that any rights which may exist under the Constitution and federal laws will be included in section 1983's coverage. The legislative history of section 1983 reveals that the Forty-second Congress intended the statute to reach those deprivations of due process and equal protection rights which the people of the South suffered during the reconstruction period after the Civil War. What makes these fourteenth amendment guarantees "rights" lies in the natural law concept which was commonly accepted when both section 1983 and the fourteenth amendment were created. As Professor Tribe states, natural law considered that governing entities were limited by both the "nature and function" of the entity and by the "inherent rights" of the citizens governed by the entity. Stated another way, the government was powerless to infringe upon the inherent rights of the people, due to the concept of natural law, because it was not part of the nature and function of this entity to do so. It follows then that the rights held by people under the fourteenth amendment, the rights which were in the express contemplation of Congress while enacting section 1983, are immune from government interference because the purpose of this amendment was to take away the states' power to rampantly continue their interference.

The definition of "rights" can now be placed on this framework of section 1983's plain meaning and legislative history, and the natural

Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court [footnote omitted]. That history counsels caution and restraint. But it does not counsel abandonment . . . . 431 U.S. 494, 502 (1977). Implicit in this language is the fact that the Court will continue to draw on concepts of the past, such as natural law concepts, in order to define certain rights which may be implicated in the future.

76. See supra part A of this section.
77. Id.
79. See Katzenbach v. Morgan, 384 U.S. 641, 651-52 n.10 (1966). This construction of fourteenth amendment rights is as applicable today as it was at the turn of the century. Though fourteenth amendment rights are not impervious to government burdens, the governing body must demonstrate some compelling interest for the burden; otherwise, the encroachment is constitutionally invalid. See supra note 61.
law. Rights are all things which inure to the person upon which that person can claim to be free of governmental action.\textsuperscript{80} The term "all" is derived from the plain meaning of the word "any" used in section 1983, because by this language, Congress intended that the statute cover all rights which may exist under the Constitution and federal laws.

Several courts and commentators have argued about the scope of section 1983 rights being a factor in determining whether a particular phrase in the Constitution confers rights within the meaning of this statute.\textsuperscript{81} Questioning the scope of section 1983 rights is inconsequential to a determination of what the rights are, because defining the scope of section 1983 rights merely begs the question. As discussed in part A of this section, the language employed in section 1983, "any rights," clearly shows that if a right exists, it is within the ambit of section 1983 rights. Basing the definition of rights upon fourteenth amendment considerations in no way subtracts from this scope. Rather, the focus of the fourteenth amendment argument is on this amendment's underlying rights existing as a subset of those rights which are characteristically immune from governmental interference. This definition does not attempt to limit section 1983 rights to those included in the fourteenth amendment, or any other constitutional provision. Indeed, it is illogical to say that fourteenth amendment rights are in-

\textsuperscript{80} Professor Choper is in accord with this definition. See generally Choper, The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review, 86 YALE L.J. 1552 (1977). In his discussion of individual rights versus states' rights, Choper observes that "[t]he essence of the individual rights claim is that no organ of government, national or state, may undertake the challenged activity." \textit{Id.} at 1555. The very reason this is a right is because the right is immune from government interference in the same way as the above definition of rights is described. In contrast to individual rights violations, Choper states that there is the scenario "[w]hen the contention is made that the national government has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern . . . ." \textit{Id.} In this circumstance, it is conceded that either the state or the federal government has the power to act, "the issue is simply whether the particular level that has acted is the constitutionally proper one," not whether some individual right has been violated. \textit{Id.} As will be discussed in section three of this article, this distinction is crucial in determining whether the Commerce Clause confers individual rights, because a right cannot exist in an area where one of the governmental actors has the power to act at the exclusion of the others.

\textsuperscript{81} See, \textit{e.g.}, Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900); Thompson v. New York, 487 F. Supp 212 (N.D.N.Y. 1979); Poirier v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978); Note, Dormant Commerce Clause Claims, \textit{supra} note 1, at 184; Comment, \textit{The Commerce Clause, supra} note 1, at 764.
cluded in section 1983, but that other rights under the Constitution and laws are not, in the face of the absolute use of the term “any” to modify “rights.”

Section 1983’s legislative history reveals that the rights Congress intended to protect were those that “inured” to the individual, for example, under the fourteenth amendment. Finally, the natural law concept, upon which the fourteenth amendment and section 1983 were based, dictates that these “things” are rights because they define the limits of government power. The next section considers whether a right exists under the Commerce Clause in light of this definition of the term “rights.”

III. The Relationship Between Rights and the Commerce Clause

Section one of this comment noted that in its Consolidated Freightways Corp. v. Kassel decision, the Eighth Circuit avoided defining a right before concluding that the Commerce Clause does not secure any rights.\(^\text{82}\) The court reasoned that the Commerce Clause served only to alter the power structure between the state and federal governments, not to secure section 1983 rights.\(^\text{83}\) Though the court cited in detail many authorities to support its proposition, it failed to explain why the Commerce Clause served only to allocate power.\(^\text{84}\) In fact, the allocation hypothesis is based on the idea that commerce is subject to regulation by both the state and federal governments. The Supreme Court has recognized this principle since the time of Gibbons v. Ogden\(^\text{85}\) and Cooley v. Board of Wardens.\(^\text{86}\) The Commerce Clause

\(^{82}\) 730 F.2d at 1144.

\(^{83}\) Id.

\(^{84}\) The same issue has been discussed in the context of the Supremacy Clause of the Constitution, which has also been deemed a power allocation provision. See Note, Section 1983 Remedies, supra note 1 (discussing the Ninth Circuit’s decision in White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir.), cert. denied, 479 U.S. 1060 (1987)); cf. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 449 (1989) (stating, “the Supremacy Clause, of its own force, does not create rights enforceable under [section] 1983 . . .”).

\(^{85}\) 22 U.S. (9 Wheat.) at 196 (Congress’ power to regulate under the Commerce Clause, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution.”).

\(^{86}\) 53 U.S. (12 How.) 299 (1851). Cooley established the dormant commerce clause doctrine which relies on the principle that “if the item [to be regulated] is such
acts to shift the power of commercial regulation between the state and federal governments. Where Congress has passed regulatory legislation pursuant to its Commerce Clause power, the states are precluded from occupying the field with their own statutes. Where Congress has not acted to regulate commerce in a particular area, the states may be allowed to do so under the dormant commerce clause doctrine. The Commerce Clause thus serves to allocate power between Congress and the States because in any given context, commerce between the states is subject to regulatory power, and the Commerce Clause determines which entity may exercise this power. The final question is whether a right cognizable under section 1983 exists within this structure of the Commerce Clause. This inquiry reveals that the bifurcated nature of a right, that which inures to the individual and must be free from government interference for its existence, precludes the existence of a right under the Commerce Clause.

A. Does the Commerce Clause Inure to the Individual?

The first step in determining whether the Commerce Clause secures an individual right for 42 U.S.C. § 1983 purposes is to discover whether the Commerce Clause provides for something which inures to the individual. This inquiry reveals a possible problem with the allocation of power hypothesis. At least one commentator has asserted that if the Commerce Clause serves only to allocate power with disregard to the individual who is affected, then this individual should not have standing to bring an action seeking invalidation of a state statute which violates the Commerce Clause, when in actuality he does. The argument continues that because individuals do have standing to bring

that national uniformity is necessitated, then [c]ongressional power is exclusive, but if the item is representative of a peculiarly local concern (even though within the reach of the [c]ongressional [C]ommerce [C]lause power . . . ) warranting a diversity of treatment, then concurrent state regulation is authorized in the absence of congressional preemption.” J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 4, § 8.4, at 266.

87. This was the issue presented in Gibbons where New York’s licensing law was in direct conflict with that enacted by Congress pursuant to the Commerce Clause. 53 U.S. (12 How.) 299 (1851). Because the statute was within Congress’ Commerce Clause power, the Supremacy Clause acted to invalidate the conflicting state statute. L. TRIBE, supra note 61, § 5-4, at 306.

88. L. TRIBE, supra note 61, §5-4, at 306.

89. Note, Dormant Commerce Clause Claims, supra note 1, at 167-69.

90. See J. CHOPER, supra note 62, at 209.
Commerce Clause challenges, an implied right exists under this Clause, which is within the meaning of section 1983 rights. The Commerce Clause is thus seen to “inure or work for” the use of the individual, and, therefore, to confer an individual right. However, this conclusion is not required by the standing doctrine. Further analysis reveals that even though the Commerce Clause inures to the individual in some respects, it does not provide for individual rights due to its power allocating nature.

Though the Commerce Clause serves to allocate power between the state and federal governments, this is not to say that individuals are not affected by the Commerce Clause. The individual can, and usually does, have standing in federal courts to challenge a statute that burdens interstate commerce.® The reason lies in the elements of standing which the Supreme Court has developed based on Article III of the Constitution: namely, personal stake, injury-in-fact, causation, and redressability.® Based only on the Commerce Clause as an allocation provision between the state and federal governments, these elements are easily satisfied using Dennis v. State® as an example.

The Nebraska tax statutes applied to tractor-trailer rigs registered in states other than Nebraska.® On this basis, the statutes were declared unconstitutional under the Commerce Clause.® Dennis’ tractor was within this class affected by the unconstitutional statutes,® therefore, he had a personal stake in the outcome of the case. Enforcement of the unconstitutional tax statutes directly caused Dennis to be deprived of his money.® This satisfies the injury-in-fact requirement. Dennis' injury is individuated in that the statutes impacted directly on the tractor he owned, as well as those similarly situated.® Finally, the judicial remedy, in this case an injunction barring enforcement of the statutes, served to alleviate the harm caused by the statutes.®

Since the elements of the standing doctrine are satisfied, Dennis

91. Id.
92. The Article III “case or controversy” requirement derives from U.S. CONST. art. III, § 2, cl. 1. See L. Tribe, supra note 61, § 3-14, at 108.
94. See supra note 11 and accompanying text for a discussion of the statutes that were in issue.
95. Dennis, 234 Neb. at 428, 451 N.W.2d at 678.
96. Id. at 442, 451 N.W.2d at 685.
97. Id.
98. Id.
99. Id. at 428, 451 N.W.2d at 678.

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would have standing to bring the case into federal court. But at no point in this analysis is it necessary, or even helpful, to say that an individual right must exist under the Commerce Clause in order for the individual to have standing in the federal courts. However, it is apparent that Dennis is somehow affected by the Clause's operation in this case, and that this operation inures to him as an individual, because applying the Clause to invalidate the Nebraska statutes is a direct benefit to Dennis who no longer has to pay the taxes while driving in the state. Thus, it is possible to satisfy the "inures to the individual" part of the definition of "rights" related in section two.

A Commerce Clause plaintiff must also satisfy the Court's prudential standing requirements. As the Supreme Court stated, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." Use of the term "individual rights" would seem to imply that if the Court recognizes the plaintiff's standing to sue, it must also, impliedly, recognize that the plaintiff is vindicating a right. Further, because the Supreme Court has allowed plaintiffs to sue based on state violations of the Commerce Clause, this arguably implies that the plaintiffs are vindicating an individual right under this Clause. However, this conclusion does not follow from a consideration of the Court's prudential standing elements.

Three "prudential principles" exist which can bar a litigant from suing in federal court. The Commerce Clause litigant easily meets all three of these requirements without the hypothesized implication of

100. See Note, Dormant Commerce Clause Claims, supra note 1, at 168-69.


102. These principles are: "plaintiff's interest must come within the 'zone of interests' arguably protected or regulated by the law in question, [Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970);] . . . the courts will not hear 'generalized grievances' shared in substantially equal measure by all or a large class of citizens, [United States v. Richardson, 418 U.S. 166 (1974);] . . . [and] plaintiff must assert his own legal interests rather than those of third parties, [Tileston v. Ullman, 318 U.S. 44 (1943)]." C. WRIGHT, LAW OF THE FEDERAL COURTS § 13, at 70-71 (4th ed. 1983). See also L. TRIBE, supra note 61, § 3-14, at 108 (discussing the Court's prudential standing requirements).
an individual right under the Commerce Clause. This is evident by again using Dennis v. State\textsuperscript{103} as an example.

First, Dennis was in the “zone of interests” regulated by the Nebraska tax statutes, because he was within the class of people who had to pay road-use taxes pursuant to the statutory scheme.\textsuperscript{104} The second tier of the prudential standing limitations is satisfied, because Dennis’ complaint is more than a generalized grievance shared by citizens at large. Rather, Dennis sustained injury-in-fact by having to pay one to two cents per mile of highway driven in Nebraska due to this state’s error in enacting the tax statutes.\textsuperscript{105} Finally, though Dennis can be seen to have asserted Congress’ interests under the Commerce Clause in protecting interstate commerce from burdensome state statutes by seeking to enjoin their enforcement, Dennis was also asserting his own interests in alleviating the injury caused him by the unconstitutional Nebraska tax statutes. Thus, even though assertion of Congress’ “rights” helped Dennis in his case against Nebraska, the point of Dennis’ complaint was not vindication of Congress’ interests, but vindication of his own injury, lost money, caused by the Nebraska statutes. With this, Dennis’ complaint satisfies the Court’s prudential standing elements without invoking an individual right under the Commerce Clause.

As this example demonstrates, satisfaction of the Supreme Court’s prudential standing requirements is not predicated on the plaintiff’s assertion of an individual right under the Commerce Clause. The simple fact that the plaintiff had to, for instance, pay money when he was not legally obliged to do so is sufficient to satisfy these standing requirements. The prudential standing limitations do not necessitate the plaintiff’s assertion of his own rights. Rather, the plaintiff need only show sustained injury in order to overcome the prudential standing hurdle. Commerce Clause plaintiffs meet this requirement due to the economic injury, as in the Dennis case, caused to them by enforcement of state statutes which violate the Commerce Clause.\textsuperscript{106} However, it is apparent

\begin{itemize}
\item \textsuperscript{103} 234 Neb. 427, 451 N.W.2d 676 (1990).
\item \textsuperscript{104} Id. at 442, 451 N.W.2d at 685.
\item \textsuperscript{105} Id. See also J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 6.3, at 327 (1985) (stating that this element requires a showing of injury-in-fact).
\item \textsuperscript{106} Singleton v. Wulff, 428 U.S. 106 (1976), is also a case where the prudential standing limitations were met based on economic injury. The Court allowed the plaintiff doctor to assert the constitutional rights of his patients where enforcement of the state statute against the patients would have caused the doctor injury in the form of lost medical fees. Also, in Craig v. Boren, 429 U.S. 190 (1976), reh’g denied, 429 U.S.
here, as with the Article III standing analysis above, that the Commerce Clause does provide some protection which inures to the individual. For the Clause to confer an individual right, though, it must also protect the individual from government action at both the state and federal levels.

B. Does the Commerce Clause Enable the Individual to be Free from Government Interference?

The Commerce Clause falls short as a provision for rights due to its failure to provide something that could be called a right upon which a person could claim to be free of government interference. The district court opinion in Consolidated Freightways Corp. v. Kassel explicitly recognized this principle by quoting Professor Choper's work in the field of federalism. The court relied on Choper's statement that "the essence of a claim . . . which falls into the individual rights category of constitutional issues . . . is that no organ of government, national or state, may undertake the challenged activity" to distinguish rights from benefits under the Commerce Clause. The court quoted further from Choper: "In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government—national or state—has power to engage in the questioned conduct," and stated that "the dormant commerce clause doctrine is clearly a 'federalism' provision within Professor Choper's framework, because a dormant commerce clause action does not deny government power altogether . . . ."

The district court's reasoning in Consolidated Freightways Corp. relied on the notion that the Commerce Clause is a power allocating provision of the Constitution, as evidenced by the court's recognition that commerce is subject to regulation, and that it is just a matter of which "level" of government can regulate within the Commerce Clause

1124 (1977), the Court found standing with a dealer of 3.2% beer who asserted the equal protection rights of males under an Oklahoma drinking age statute which injured the dealer due to the lost profits of sales to the restricted males.

107. 556 F. Supp. 740, 746 (1983), aff'd, 730 F.2d 1139 (1984). In affirming the district court's reasoning, the court of appeals noted that the district court opinion was "well reasoned." Consolidated Freightways Corp., 730 F.2d at 1143.


109. Id.
limitations. As this comment's definition of rights states, in order for a right to exist, the individual who claims its existence must also be able to claim that the right is free from government interference or revocation. As the court concludes in Consolidated Freightways Corp., based in part on Choper's reasoning, because the Commerce Clause always admits to at least one government entity with power over commerce, the concomitant presence of a right is precluded due to the nature of that right's existence, requiring freedom from government power at all levels.\textsuperscript{110}

However, the question arises that if the Commerce Clause does not secure rights, then how is the individual affected by the operation of this clause? The answer was succinctly given by the Eighth Circuit in Consolidated Freightways Corp.: "[I]ndividuals are oftentimes benefitted through the indirect protection resulting from the limitations placed on the states through the dormant commerce clause doctrine . . . ."\textsuperscript{111} The court's statement is true in the sense that what individuals derive from the Commerce Clause can be taken away at an instant. This is the nature of a benefit as the word is used by the above court. No matter what it is called, the effect of the Commerce Clause on the individual is not a right, because the effect, whether beneficial or not, can be legislated away by the state or federal government at any time. The distinction, therefore, between a right and a benefit is that a right exists of its own force and is not subject to government action abridging its exercise by the individual. A benefit, on the other hand, exists according to some governmental provision which can be taken away at any time. This distinction is clear in Champion v. Ames\textsuperscript{112} where the Court upheld federal legislation, enacted pursuant to Congress' Commerce Clause power, which forbade the interstate transport of lottery tickets. If there is an individual right to engage in the interstate commerce of lottery tickets, or to be free of state statutes which forbid such commerce, how is it that Congress can eradicate this right? By nature, a right is something that cannot be taken away by government, such as the right to free speech under the first amendment, or the right to be free of warrantless searches and seizures under the fourth amendment.\textsuperscript{113} Therefore, Congress, as well as the states, should not be able to take away the "right" to engage in interstate transport of lottery

\begin{footnotes}
\item[110.] Id. at 748.
\item[111.] Consolidated Freightways Corp., 730 F.2d at 1145.
\item[112.] 188 U.S. 321 (1903).
\item[113.] See supra section two of this comment.
\end{footnotes}
tickets, or to be free of state statutes which do this, under the Commerce Clause if it confers a right. The answer to the question lies in the fact that it is based on an improper premise that a right exists under the Commerce Clause.

Before the congressional legislation banning transport of lottery tickets, the individual could claim the benefit, under the Commerce Clause's allocation of power to Congress, of being free to transport lottery tickets in interstate commerce. This is not a right though, because Congress could act at any time, as it did, to forbid the transport. The individual also does not have the right to be free of state statutes which forbid this commerce because either Congress could act to allow the states to do this, or the Court may determine that the state was pursuing a permissible governmental interest in forbidding the transport. Either way, the freedom to engage in interstate commerce is subject to termination by a government entity, termination which is not compatible with the existence of a right but which is compatible with the existence of a benefit. This distinction made between rights and benefits under the Commerce Clause by the court in *Consolidated Freightways Corp.* is viable, and is supported by the Nebraska Supreme Court's decision in *Dennis v. State* and the cases cited therein.

IV. Cases in Support of the Commerce Clause as an Allocation Provision

The Nebraska Supreme Court in *Dennis v. State*, relied on the majority of cases speaking to the "rights" issue which held that the Commerce Clause, as a power allocation provision of the Constitution, did not include individual rights as the term is used in 42 U.S.C. § 1983. The foremost authority in this area is the court of appeals opinion in *Consolidated Freightways Corp. v. Kassel*, based on the number of courts which have adopted the Eighth Circuit's reasoning in this case. These courts concluded, as the Nebraska Supreme Court and the Eighth Circuit did, that the nature of the Commerce Clause as a

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116. 234 Neb. 427, 451 N.W.2d 676.
117. *Id* at 427, 451 N.W.2d at 676. It was stated in *Private Truck Council of America v. Quinn*, that "the weight of authority" supports the prior decisions that violation of the Commerce Clause "is not cognizable in an action under 42 U.S.C. § 1983." 476 U.S. 1129 (1986) (White, J., dissenting) (Justices Brennan and O'Connor joined in this dissent.).
power allocation provision of the Constitution precludes the existence of an individual right for the purposes of a section 1983 claim of relief.

One of the cases which adopted the Consolidated Freightways Corp. reasoning was Kraft v. Jacka118 which involved “a section 1983 action against members of the Nevada Gaming Control Board after the board refused to extend further licensing to the plaintiffs when their 1-year limited gaming licenses expired.”119 The plaintiffs argued that their Commerce Clause “rights” had been violated when the Gaming Board issued a stop order on the sale of out-of-state securities in which plaintiffs had an interest.120 Relying in part on the Consolidated Freightways Corp. decision, the Ninth Circuit stated, “assuming that the Board’s actions in any way implicated the Commerce Clause, the plaintiffs cannot state a cause of action under [section] 1983 for violation of the Clause” because the Clause was an allocation of power provision which the section 1983 remedy was not intended to cover.121 Thus, the court relied on the allocation of power concept to deny the existence of a right under the Commerce Clause.

Another case which relied on the Consolidated Freightways Corp. allocation of power concept was Pesticide Public Policy Foundation v. Village of Wauconda,122 involving a Village ordinance which regulated the use of pesticides within its jurisdiction. Among other claims, the Foundation asserted that the ordinance violated the Commerce Clause, and sought attorney’s fees for its members pursuant to a section 1983 claim.123 In dictum, after the court decided that the Foundation did not have standing to sue on behalf of its members for fees, the court stated that the “Commerce Clause relates not to individual rights, but rather to the distribution of power between the state and federal govern-

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118. 872 F.2d 862 (9th Cir. 1989).
119. Dennis, 234 Neb. at 433, 451 N.W.2d at 680.
120. Kraft, 872 F.2d at 869.
121. Id. The court also relied on its own decision in White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1984), cert. denied, 479 U.S. 1060 (1987). That case involved an Arizona taxing scheme which the plaintiff Tribe alleged conflicted with federal regulations, and was, therefore, in violation of the Supremacy Clause. Id. at 846. The plaintiff succeeded in overcoming the state statute but failed in its attempt to secure attorney’s fees under section 1983 for a violation of Supremacy Clause rights. Id. at 850. The Ninth Circuit viewed the Supremacy Clause as a provision, like the Commerce Clause, which allocates power between the state and federal governments. Id. at 849. See also Note, Section 1983 Remedies, supra note 1.
122. 622 F. Supp. 423 (N.D. Ill. 1985), aff’d, 826 F.2d 1068 (7th Cir. 1987).
123. Id. at 426.
ments” and on this basis, concluded that section 1983 does not support violations of the Commerce Clause.124 With this, the court accepted the allocation of powers concept and held that attorney’s fees could not be awarded for a Commerce Clause violation.

The Tenth Circuit, in J & J Anderson v. Town of Erie,125 also denied section 1988 attorney’s fees for Commerce Clause violations based on the allocation of power concept. The Town of Erie passed an ordinance which prohibited certain airplanes from landing within its borders.126 The ordinance was later repealed, but the plaintiff sought attorney’s fees for the violation of, among other things, his rights under the Commerce Clause.127 The court concluded that “[t]he Commerce Clause . . ., although limiting the power of the states to interfere in areas of national concern, [does] not secure rights cognizable under [section] 1983,” and denied the plaintiff’s claim for attorney’s fees under section 1988.128 With this, the Tenth Circuit also fell in line with those cases stating that the Commerce Clause, as a constitutional provision which serves to allocate power between the levels of government, does not confer section 1983 rights.129

Several federal courts would expressly allow the Commerce Clause

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125. 767 F.2d 1469 (10th Cir. 1985).

126. Id. at 1471.

127. Id. at 1472.

128. Id. at 1476.

cause of action under section 1983 in opposition to the authorities above. One of these is *Confederated Salish and Kootenai Tribes v. Moe.* In an action seeking to enjoin enforcement of a Montana tax of cigarette sales by the plaintiff tribes, an issue was raised by the defendant that the court lacked subject matter jurisdiction pursuant to 28 U.S.C. § 1341 which prohibits, among other things, enjoining state taxation where an efficient remedy can be had in the state’s courts. In the court’s conclusion that 28 U.S.C. § 1362 granted subject matter jurisdiction over the tribes’ claims, the court also stated that it had jurisdiction over the individual plaintiffs’ claims under the jurisdictional counterpart to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), because these plaintiffs had alleged violations of the Commerce Clause which secured rights cognizable under 42 U.S.C. § 1983. The basis for the court’s conclusion was a prior statement made by the Supreme Court in *Lynch v. Household Finance Corp.* that the section 1983 phrase “‘rights, privileges, or immunities secured by the Constitution and laws includes not only [f]ourteenth [a]mendment .rights, but ‘[a]ll of] the Constitution [and] laws of the United States.’” The district court’s reliance on *Lynch* was improper, and did not serve to prove that section 1983 rights exist under the Commerce Clause.

The *Lynch* Court’s dictum was not stated pursuant to a determination under the Commerce Clause. Instead, the case dealt with whether there was a viable distinction between personal and property rights for purposes of a section 1983 claim of relief under the fourteenth amendment. Also, and perhaps more importantly, the Court’s statement only revealed the intent to apply section 1983 to rights which existed beyond the fourteenth amendment context and did so without defining these rights. Thus, the *Kootenai* conclusion, based on the Supreme Court’s decision in *Lynch* does not support a conclusion that individual rights exist under the Commerce Clause.

Furthermore, the Supreme Court, in affirming the decision in *Kootenai*, made statements which also discredit the district court’s decision.

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131. *Id.* at 1301-02.
132. *Id.* at 1304.
133. *Id.* at 1305 (emphasis in original) (quoting *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 n.16 (1972)).
135. *Id.* at 556.
that the Commerce Clause conferred section 1983 rights. First, the Court decided the case based only on the tribes' claims. The Court went on to say in a footnote that "if only the individual Indians have standing to sue for refunds, their claims must be properly grounded jurisdictionally." This statement called into question the district court's belief that the individual plaintiffs' Commerce Clause claims implicated rights which provided jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Although not dispositive, the Court's dictum suggests that the district court acted improperly in predicating jurisdiction on an alleged Commerce Clause rights violation.

The court in Kennecott Corp. v. Smith would also allow the section 1983 claim of relief under the Commerce Clause. The court considered whether to invalidate a New Jersey statute which the plaintiff alleged was in conflict with the Securities Exchange Act of 1934. In determining whether the federal anti-injunction statute, 28 U.S.C. § 2283, barred plaintiff's request for an injunction, the court stated that "actions brought under [section] 1983, such as this case, are explicit exceptions to the anti-injunction act." In a footnote, the court supported this statement by saying that "[t]he present action is properly brought under section 1983 because it seeks redress for deprivations of constitutional rights secured by the Commerce Clause and of federal statutory rights protected by the [Securities Exchange Act,]" and cited Maine v. Thiboutot as authority.

Two problems exist with relying on Thiboutot for the proposition that the Commerce Clause secures section 1983 rights. The first is that

137. Id. at 474-75, 475 n.14.
138. Id. at 468 n.7.
140. 637 F.2d 181 (3d Cir. 1980).
141. Id. at 183.
142. Id. at 186.
143. Id. at 186 n.5. See also Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (relying solely on Thiboutot, 448 U.S. 1, to allow a section 1983 action under the Commerce Clause); ANR Pipeline Co. v. Michigan Pub. Serv. Comm'n, 608 F. Supp. 43 (W.D. Mich. 1984) (similarly relying on Thiboutot, 448 U.S. 1, and, in turn, Kennecott Corp., 637 F.2d 181, to allow the section 1983 action under the Commerce Clause).
144. 448 U.S. 1 (1980)
the Kennecott Corp. court provided absolutely no reasoning for its conclusion, which is relegated to a footnote. Second, the Thiboutot case relied upon by the court does not stand for the proposition that the Commerce Clause confers individual rights. Rather, the Thiboutot Court held that section 1983 provided a remedy for all violations of federal statutes which create individual rights. The court in Kennecott relied on the Supreme Court's statement that "the section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Either way, the reliance on Thiboutot was misplaced, because that case did not address whether rights existed under the Commerce Clause.

145. Kennecott, 637 F.2d at 186 n.5.
146. 448 U.S. at 4.
147. Id. (emphasis added).
148. Consolidated Freightways Corp., 730 F.2d at 1143. Several Supreme Court cases also seem to contradict the conclusion that the Commerce Clause supports no individual rights due to language asserting that individuals have a right to engage in interstate commerce. See Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 260 (1911); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 21 (1910); Crutcher v. Kentucky, 141 U.S. 47, 57 (1891); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). All except one of these decisions, Garrity v. New Jersey, were handed down during the time that the freedom of contract concept was still in existence, and even Garrity expressly relied on Western Union for its decision. Garrity, 385 U.S. at 500. As stated in section two of this comment, the Lochner era relied on the natural law inherent rights of citizens to limit government action. The Court's statements that an individual right to engage in interstate commerce existed would seem to further the natural law's application to limit state infringement on commerce between the states. In any case, the Court's recognition of this right is strictly limited to the theories of that time period which have since been abrogated by the Court. See also L. Tribe, supra note 61, §§ 8-5 to 8-6 (generally describing the reasons for the downfall of Lochnerism). Abandonment of these theories "restricted the ability of the Justices to rely upon a natural law or openly subjective basis for defining liberty and individual constitutional rights." J. Nowak, R. Rotunda & J. Young, supra note 4, § 11.7, at 367. Since the Court's abrogation of the theories which supported the Lochner era cases, the Court was no longer in a position to declare that a right to engage in interstate commerce existed, because the foundation for such a statement had been wiped away. This is evident because the Court has never since mentioned a right to engage in interstate commerce. This lack of authority is what provided the impetus for the de novo determination of whether a right existed under the Commerce Clause in cases such as Consolidated Freightways Corp., 730 F.2d 1139, and Dennis v. State, 234 Neb. 427, 451 N.W.2d 676, and law review articles like Note, Dormant Commerce Clause Claims, supra note 1. It is also evident due to the Supreme Court's grant of certiorari to Dennis in order to finally resolve the issue of Commerce Clause rights under 42 U.S.C. § 1983. Dennis v. Higgins, 110 S. Ct 2559 (1990).
In light of the predominant body of case law, the Nebraska Supreme Court understandably denied the plaintiff's claim under section 1983 for violation of alleged Commerce Clause rights. The majority of courts which have considered this issue relied on the power allocating nature of the Commerce Clause to conclude that the Clause does not provide for individual rights, which would allow a claim for attorney's fees under section 1988 based on a section 1983 right. The only problem with the reasoning of these authorities is their failure to adequately consider why the Commerce Clause serves only to allocate power between the different levels of government, and to define the term "rights" before concluding that the power allocating nature of the Commerce Clause precludes the existence of rights under this Clause. However, by carefully defining 42 U.S.C. § 1983's use of rights, and closely examining the relationship of the Commerce Clause with the federal and state governments, and within history, the above discussion shows that the reasoning employed by the Nebraska Supreme Court in Dennis v. State, as well as those cases which serve to support Dennis, was well founded.

Conclusion

As evidenced by the grant of certiorari in the Nebraska case of Dennis v. State, the Supreme Court is concerned with the issue of whether the Commerce Clause protects individual rights cognizable under 42 U.S.C. § 1983 which can be used to base an award of attorney's fees under 42 U.S.C. § 1988. By examining the plain meaning and legislative history of section 1983, it is possible to develop a concrete definition of a right, a definition which reveals that its existence requires freedom from government action. When this definition is intertwined with a consideration of the purposes which give life to the Commerce Clause, the result is that the power allocating nature of this constitutional clause, necessary for the commercial security of a country

149. Dennis, 234 Neb. 427, 451 N.W.2d 676.
150. See supra note 8 and accompanying text, which references other articles that have recognized this flaw.
151. See supra section two of this article, stating that a right is anything which inures to the person upon which that person can claim to be free of government action.
152. See supra section three of this article, describing the nature of the Commerce Clause as a constitutional provision which serves to allocate power between the state and federal governments.
153. 234 Neb. 427, 451 N.W.2d 676.
comprised of fifty sovereign states, precludes the concurrent existence of an individual right. Thus, the majority of courts which have considered the Commerce Clause issue and which have concluded that the Commerce Clause does not secure rights within the meaning of 42 U.S.C. § 1983 to allow an award of attorney's fees under 42 U.S.C. § 1988 are correct in their decisions.

*Holiday Hunt Russell*
The Availability of Excess Damages in First-Party Bad Faith Cases: A Distinction Without a Difference*

I. Introduction

Selling uninsured motorist insurance coverage is big business in the State of Florida. In 1989, insurers earned $451,151,260 as a result of the sale of uninsured motorist policies. This represents nearly five percent of the over $10 billion in premiums earned from all types of coverage.

When an insured purchases uninsured motorist coverage or any other type of insurance, the insured reasonably expects to have any

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1. FLA. STAT. §§ 627.727(1),(3) (1989) state:
   (1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motorist coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom . . .
   (3) For the purposes of this coverage, the term “uninsured motor vehicle” shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
   (a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; or
   (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages.

2. 1989 Property & Casualty Statistical Report, 7 FLORIDA UNDERWRITER 36, 44-45 (July 1990). (Although references within the survey refer to “Priv. Pass. Auto.” the editor has informed this Author that the totals listed refer solely to uninsured motorist coverage.).

3. Id. at 37, 44-45.

legitimate claim promptly paid. Unfortunately, the insured may be disappointed to find that his friendly insurer who holds him in its "good hands" is applying the squeeze by refusing to pay a legitimate uninsured motorist claim. Until recently, the insurer, who claimed to be "like a good neighbor," could collect uninsured motorist premiums, delay or refuse to pay a valid claim for the limits of the policy, and if faced with a judgment in excess of the policy limits, pay only the policy limits without liability for the excess.

In 1989, the United States District Court for the Southern District of Florida decided *Jones v. Continental Insurance Co.*, which permitted insureds to recover damages in excess of the stated policy limits, as a matter of law, in a first party bad faith action. Another federal district court has refused to apply *Jones* insofar as it permits recovery of excess damages as a matter of law, holding instead that these damages are recoverable, if proven to have been causally related to the bad

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5. The author does not suggest that any connotation be placed on the use of the male pronoun in gender neutral situations. "The use of he as pronoun for nouns embracing both genders is a simple, practical convention rooted in the beginnings of the English language. He has lost all suggestion of maleness in these circumstances." W. STRUNK & E. WHITE, THE ELEMENTS OF STYLE (3d ed. 1979).


8. Bad faith is:
   The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

*BLACK'S LAW DICTIONARY* 176 (rev. 4th ed. 1968).
faith.\textsuperscript{9} Likewise, in the Florida state courts, decisions are in conflict. In \textit{Wahl v. Insurance Co. of North America}\textsuperscript{10} the court permitted the recovery of excess damages as a matter of law,\textsuperscript{11} and in \textit{McLeod v. Continental Insurance Co.},\textsuperscript{12} the court refused to direct a verdict that excess damages are, as a matter of law, recoverable, and further refused to instruct the jury similarly.\textsuperscript{13} The questions whether excess damages are recoverable and if so, whether they are recoverable as a matter of law are currently awaiting appellate resolution.\textsuperscript{14}

A cause of action for bad faith is not new in Florida. Indeed, it has existed in the third party context for over fifty years.\textsuperscript{15} Florida courts have defined a third party bad faith action as

one brought by an insured against his insurer because of its failure to settle a third party tort claim for a reasonable sum . . . where a reasonably prudent person would do so, and the wrongful refusal to settle exposes the insured to liability in an amount in excess of the policy limits. . . .\textsuperscript{16}

The injured third party, after becoming a judgment creditor, may then institute suit against the tortfeasor’s liability insurer for the portion of the judgment which exceeds the insured’s available coverage based upon a violation of Florida Statute section 624.155(1)(b)(1). This third party is, in effect, a third party beneficiary of the insurance contract

\textsuperscript{10} No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987).
\textsuperscript{11} No. 87-1187-CA(17), Excerpt of Proceedings at 20 (Fla. 19th Cir. Ct. 1987).
\textsuperscript{12} 15 Fla. L. Weekly 2785 (1990).
\textsuperscript{14} McLeod v. Continental Ins. Co., 15 Fla. L. Weekly 2785 (1990)(The Second District Court of Appeal certified the following question to the Supreme Court as one of great public importance: WHAT IS THE APPROPRIATE MEASURE OF DAMAGES IN A FIRST-PARTY ACTION FOR BAD FAITH FAILURE TO SETTLE AN UNINSURED MOTORIST INSURANCE CLAIM?). \textit{Id.} at 2787. On January 10, 1991, the Eleventh Circuit Court of Appeals certified the identical question to the Florida Supreme Court in Jones v. Continental Insurance Co., 920 F.2d 847 (11th Cir. 1991).
between the defendant and the defendant's insurer. Throughout the United States, courts have rendered a plethora of decisions in bad faith cases - particularly third party bad faith cases. The same is not true of first party bad faith, which has arguably existed for less than 20 years in the United States and only since 1982 or 1983 in Florida.

While the insurer/insured relationship in third party bad faith cases is relatively settled, the same cannot be said for the insurer/insured relationship in first party bad faith cases where an insured seeks payment of his own claim from his insurance company. Within the past decade, cases such as Jones v. Continental Ins. Co., 670 F. Supp. 937, 940 (S.D. Fla. 1987), have drawn the attention of the insurance industry and the trial bar. Of particular interest to both plaintiffs and defendants are those decisions addressing the damages recoverable in a first party bad faith case, especially damages in excess of the uninsured motorist coverage.

This Note will first provide a brief overview of bad faith law in the United States and particularly in Florida. The overview will begin with

24. The author addresses only those damages assessed in excess of the stated policy limits. Excess damages are those types of damages which exceed the policy limits but would be covered under the terms of the policy as opposed to punitive damages assessed as a penalty for prohibited conduct. See FLA. STAT. § 624.155(4) (1989).
third party bad faith through its evolution into first party bad faith, including a discussion of the availability of excess damages - essential to an understanding of the Jones v. Continental Insurance Co. cases. Next, this Note will examine the court's opinions in Jones along with reference to Cocuzzi, McLeod and Wahl. Finally, the impact of Jones as well as prior and subsequent cases and section 624.155 will be analyzed. The author will present an argument that the language of section 624.155 leaves no other reasonable conclusion except that excess damages are recoverable, as a matter of law, in first party bad faith cases and that Florida courts should permit insureds to recover excess damages in first party bad faith cases.

II. Background

Uninsured motorist coverage, also referred to as underinsured motorist coverage, is unlike any other type of insurance. In Florida, as in most states, uninsured motorist coverage is mandatory in all insurance policies, subject to the express rejection of such coverage by the insured. Uninsured motorist coverage has been described as a "hybrid" or a blending of first and third party insurance. It bears a resemblance to first party insurance, specifically medical insurance, but it also functions in the third party form because it becomes effective when the uninsured motorist is legally at fault. Uninsured motorist coverage then becomes, in effect, the liability insurance coverage for the uninsured motorist.

A clear understanding of the current status of Florida first party bad faith law must begin with a brief review of the principles of Flor-
ida third party bad faith law. The Florida Supreme Court, in *Auto Mutual Indemnity Co. v. Shaw*, first pronounced that an insurance contract contains an implied covenant of good faith and fair dealing between the parties in the context of a third party claim. The insurer, in conducting the defense of its insured, must exercise that degree of care which a person of ordinary care and prudence would exercise in the management of that person's own business.

A. Duty of Good Faith Extended to First Parties

In 1980 the Florida Supreme Court expanded the parameters of bad faith in *Boston Old Colony Insurance Co. v. Guttierrez*. Building on the fiduciary relationship announced in *Shaw*, the court in *Boston Old Colony* recognized that in a third party situation, where the insured's fate was in the hands of the insurer, the insurer must "exercise such control and make such decisions in good faith and with due regard for the interests of the insured." If the insurer breaches this common law duty of good faith in a third party situation, the insurer may be liable for amounts in excess of the policy limits and for punitive damages, if the insurer's conduct so warrants. In Florida, there-

35. Id. at 830, 184 So. at 859.
36. Id.
38. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. Id. at 785.
39. Id.; see also Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969); The *Boston Old Colony* court recognized that the good faith duty required an insurer to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery would do so." *Boston Old Colony*, 386 So. 2d at 785.
fore, an insured in a third party bad faith action may recover not only amounts in excess of the policy limits, but also extra-contractual damages.

In contrast to third party bad faith, there was no common law cause of action for first party bad faith prior to 1982. In Baxter v. Royal Indemnity Co., the First District Court of Appeal distinguished first party insurance from third party insurance, stating that the fiduciary relationship interest in the third party scenario was not present in the first party context. Rather, the relationship was actually that of debtor and creditor where the parties occupied an adversarial relationship toward one another, preventing any extra-contractual recovery by the insured. Justice Dekle, in his dissent, pointed out the fallacy of disparate treatment of first and third party bad faith:

[I]t would be anachronistic to hold that an insurer owes a duty of good faith in handling the liability claim of a third person totally unrelated to the parties to the contract of insurance while at the same time holding that the insurer owed no such obligation of good faith to its own insured, who has paid premiums . . . for the specific purpose of protecting himself . . . .

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43. Extra-contractual damages typically wind up in the pocket of the insured as opposed to a third party. Neyer, supra note 42.


45. Id. at 656.

46. Id. at 657.

47. Id.


49. Baxter, 317 So. 2d at 731 (Dekle, J., dissenting).
With one exception\textsuperscript{50}, it remained the rule in Florida until 1982 that a cause of action for first party bad faith did not exist.

In 1983, the Florida Legislature enacted section 624.155, which has come to be known as the "bad faith" statute.\textsuperscript{51} This statute provides that "[a]ny person may bring a civil action against an insurer when such person is damaged\textsuperscript{52} by several specifically delineated acts. For purposes of first party bad faith in general and for this note in particular, section 624.155(1)(b)\textsuperscript{1} is the focus. This section permits any person to bring an action against an insurer when damaged by the insurer "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests."\textsuperscript{53}

However, the insurer is not left without protection. As a condition precedent to a bad faith action pursuant to section 624.155, the insured must give 60 days prior notice to the insurer and the Department of Insurance,\textsuperscript{54} on a form provided by the Department of Insurance.\textsuperscript{55} This notice must delineate the specific statutory provision allegedly violated,\textsuperscript{56} the facts and circumstances of the violation,\textsuperscript{57} the name of any individuals involved in the alleged violation,\textsuperscript{58} reference to any specific relevant policy language\textsuperscript{59} and a statement that the notice is given in order to pursue the remedy authorized by section 624.155.\textsuperscript{60} With the passage of section 624.155, Florida had codified the previously announced common law cause of action for third party bad faith.\textsuperscript{61}

But this codification had little practical effect on the common law prohibition against first party bad faith. It was a year until the federal courts in Florida began recognizing a statutory cause of action for first

\textsuperscript{51} FLA. STAT. § 624.155 (1982).
\textsuperscript{52} FLA. STAT. § 624.155(1).
\textsuperscript{53} FLA. STAT. § 624.155(1)(b)\textsuperscript{1}.
\textsuperscript{54} FLA. STAT. §§ 624.155(2)(a),(b).
\textsuperscript{55} FLA. STAT. § 624.155(2)(b).
\textsuperscript{56} FLA. STAT. § 624.155(2)(b)\textsuperscript{1}.
\textsuperscript{57} FLA. STAT. § 624.155(2)(b)\textsuperscript{2}.
\textsuperscript{58} FLA. STAT. § 624.155(2)(b)\textsuperscript{3}.
\textsuperscript{59} FLA. STAT. § 624.155(2)(b)\textsuperscript{4}.
\textsuperscript{60} FLA. STAT. § 624.155(2)(b)\textsuperscript{5}.
party bad faith under section 624.155(1)(b)1. The first such decision was *Rowland v. Safeco Insurance Co.* 62 The plaintiffs alleged that Safeco had violated section 624.155(1)(b)1 when it refused to pay a claim for uninsured motorist benefits. Safeco moved to dismiss, alleging plaintiffs failed to state a cause of action. In deciding whether a cause of action existed, the court acknowledged that prior to the enactment of section 624.155 there was no first party bad faith absent any independent tort. 63 However, section 624.155 created such a cause of action for first party bad faith because section 624.155(1)(b)1 enabled any person to sue an insurer. 64 In reaching its conclusion, the court relied on supporting dicta from *Industrial Fire & Casualty Insurance Co. v. Romer.* 65 The *Romer* court stated:

Although it need not be decided here, it is arguable that with the passage of this legislation, Florida has joined the ranks of those states which impose an implied covenant of good faith and fair dealing in insurance contracts. See, e.g., Gruenberg v. Aetna Ins. Co., 9 Cal.3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973). If this is so, then proof of a breach of the covenant would permit recovery in tort in first party, as well as third party, insurance claims. 66

The *Rowland* court also made reference to legislative history which arguably showed a legislative intent to create a cause of action for first party bad faith. The House Committee On Insurance stated in its 1982 Staff Report that section 624.155

[S]ubparagraph (f) (1.) requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies. 67

This language, it was urged, evinced the legislature's intent to create a

63. *Id.* at 614.
64. *Id.* at 615 (*emphasis added*).
65. 432 So. 2d 66 (Fla. 4th Dist. Ct. App. 1983).
66. *Id.* at 69 n.5 (Hurley, J., concurring).
67. STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION (HB 4F; As Amended by HB 10G) at 12 (June 3, 1982).
first party cause of action for bad faith. The court held that even in a first party case, the insured was entitled to the damages provided for in section 624.155(3). What the court failed to address is the equally compelling language which supports the applicability of section 624.155 to first party actions. Specifically, section 624.155(2)(b) provides that "[i]f the person bringing the civil action is a third party claimant, he shall not be required to reference the specific policy language if the insurer has not provided a copy of the policy to the third party claimant pursuant to written request." This language is conspicuously absent from first party decisions relying in whole or in part on the plain language of the statute. The logic is inescapable. Why would the Legislature draft legislation (urged by the insurer not to apply to first party cases) and specifically exclude compliance with section 624.155(2)(b)4 for third party claimants if section 624.155 did not apply to first party claimants as well? Accepting the insurer's argument leads to the illogical conclusion that because section 624.155 applies only to third party cases and section 624.155(2)(b)4 excuses third party claimants from compliance with that subsection, no one need comply with the provisions of section 624.155(2)(b)4. The Legislature intended that section 624.155 apply to first and third party causes of action and excuse only third party claimants from compliance with section 624.155(2)(b)4. In 1986, the United States District Court for the Middle District of Florida decided United Guaranty Residential Insurance Co. v. Alliance Mortgage Co. The case was before the court on United Guaranty's motion to dismiss Alliance's counterclaim alleging breach of contract and bad faith. Alliance argued that although there existed no common law first party bad faith, the enactment of section 624.155(1)(b)1 did provide such a cause of action. The court recognized the lack of controlling state court decisions, and looked to the Romer and Rowland opinions.

68. Rowland, 634 F. Supp. at 615.
69. Id.
73. Id.
74. Id. at 340.
75. Romer, 432 So. 2d 66.
United argued that section 624.155 did not specifically refer to first party claims, and therefore, only codified third party bad faith law. The court rejected that argument, based upon the language of section 624.155(1) and the holding in Baxter. Furthermore, application of section 624.155 to first and third party claims was consistent with the legislative scheme to impose liability on insurers who act "inequitably vis-a-vis their insureds." The Legislature chose not to exclude first party coverage from section 624.155(1)(b)(1) and therefore stated, as set forth in the 1982 Staff Report "[t]his section would apply to all insurance policies."

The first Florida state court decision permitting a first party bad faith cause of action was Opperman v. Nationwide Mutual Fire Insurance Co. In Opperman, the court held that section 624.155 created a first party cause of action, and further, that the duty of the insurer to act in good faith in the first party situation was akin to the duty to act in good faith when handling third party claims. Subsequent Florida decisions, both state and federal, followed Romer, Rowland and Opperman.

The courts had now solidified the common law concept of first party bad faith. The Legislature affirmed the existence of a first party cause of action when it passed section 624.155. Despite the settling of the issue of availability of a first party action under section 624.155 by the courts and Legislature, insurers continue to maintain that no such
B. Damage Assessment in First Party Bad Faith Actions

The issue of what types of damages are proper in a first party bad faith case is not as settled. Florida Statute section 624.155(3) provides, "[u]pon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff." 86

The legislative history of section 624.155(3) implies that the legislative intent was to permit the recovery of judgments in excess of the policy limits, and that this applies to all insurance policies. 86 Yet, Florida court decisions conflict as to whether damages in excess of the policy limits are available in first party bad faith cases, and if so, whether they are available as a matter of law 87 or whether they must be proven. 88

In the first party bad faith case, the insured typically demands that the insurer settle his claim for a specific dollar value. The insurer refuses to settle and either party demands arbitration or they litigate the claim. 89 If the insured receives an arbitration award or jury award

86. Staff Report - 1982 Insurance Code Sunset Revision (HB 4F, as amended by HB 10e)(emphasis added).
89. As a procedural caveat, it must be noted here that as of the date of the writing of this note, there exists a conflict as to whether a bad faith claim made pursuant to section 624.155 must be filed contemporaneously with the underlying claim for first party benefits. See, e.g., Schimmel v. Aetna Cas. & Sur. Co., 506 So. 2d 1162 (Fla. 3d Dist. Ct. App. 1987) (filing of bad faith claim subsequent to breach of property insurance contract claim barred by rule against splitting causes of action); Blanchard v. State Farm Mut. Auto Ins. Co., 903 F.2d 1398 (11th Cir. 1990) (in view of Schimmell and other Florida cases indicating a division of reasoning, the Eleventh Circuit certified the following questions to the Florida Supreme Court:

1. DOES AN INSURED'S CLAIM AGAINST AN UNINSURED MOTORIST CARRIER UNDER SECTION 624.155(1)(b)1., FLORIDA STATUTES, FOR ALLEGEDLY FAILING TO SETTLE THE UNINSURED MOTORIST CLAIM IN GOOD FAITH ACCRUE BEFORE THE CONCLUSION OF THE UNDERLYING LITIGATION FOR
in excess of the policy limits, the damages sought are referred to as the "shortfall", that is, the difference between the policy limits and the awarded amount.

The first Florida decision to implicitly address the issue of excess damages was *Opperman v. Nationwide Mutual Life Insurance Co.* In *Opperman*, the insureds received an arbitration award in excess of their uninsured motorist limits and sued the insurer for bad faith refusal to settle. In arriving at the holding that a first party action existed under the statute, the court examined the legislative history and other decisions in Federal courts, and found that the statute clearly provided a first party cause of action for bad faith. Implicit in the court's opinion is that the remedy for first party bad faith is the same as for third party bad faith, that is, the excess award.

A Florida circuit court case broke ground by holding that the shortfall was the proper amount of damages in first party bad faith cases. In *Wahl v. Insurance Co. of North America*, the insured was rendered comatose as the result of an automobile accident. Although the insurer recognized the value of the policy to be in excess of the policy limits, it made no offer to settle. The matter was arbitrated, resulting in an excess award. The judge heard arguments and held that the shortfall was recoverable as a matter of law upon proof of bad faith.

THE CONTRACTUAL UNINSURED MOTORIST INSURANCE BENEFITS?

2. IF SO, IS JOINDER OF THE CLAIM UNDER SECTION 624.155(1)(b)1. IN THE UNDERLYING LITIGATION FOR CONTRACTUAL UNINSURED MOTORIST BENEFITS PERMISSIBLE?

3. IF SO, IS JOINDER OF THE SECTION 624.155(1)(B)1. CLAIM WITH THE CONTRACTUAL CLAIM MANDATORY?

*B Blanchard,* 903 F.2d at 1400.


91. 515 So. 2d 263 (Fla. 5th Dist. Ct. App. 1987) rev. denied, 523 So. 2d 578 (Fla. 1988).

92. *Id.* at 264.

93. *Id.* at 265.

94. *Id.*

95. *Id.*


98. *Id.*

99. *Id.* at 30.

100. *Id.*
faith. At least one other Florida circuit court has held similarly, as has one federal district court.

Another federal district court has held that although the shortfall may be a proper element of damages, it is not available as a matter of law, but must be proven in accordance with traditional tort and contract law. A Florida circuit court has refused to instruct the jury that the shortfall is, as a matter of law, the appropriate measure of damages.

III. First Party Bad Faith Damages as Applied in Jones v. Continental

Jones v. Continental Insurance Co. was one of the first decisions, applying Florida law, which permitted insureds to recover amounts in excess of their uninsured motorist coverage limits for bad faith refusal to settle an uninsured motorist claim. Continental insured Thomas and Mary Ann Jones under an uninsured motorist policy. This policy was in effect on January 29, 1984, when the Jones' daughter Karen was killed when the car in which she was a passenger was struck by a drunk driver. The uninsured/underinsured limits of coverage were $300,000. Because the policy covered two of the Jones' automobiles, Florida law permitted stacking of limits based upon the number of vehicles. Therefore, there was a total of $600,000 in uninsured motorist benefits available.

101. Id. at 30-31.
102. Order on Motion for Summary Judgment at 4, Fidelity & Cas. Co. of New York v. Taylor, No. 84-18844-CA (02) (Fla. 11th Cir. Ct. 1984).
103. 716 F. Supp. at 1460.
105. Brief of Appellant, supra note 90, at 20.
106. 716 F. Supp. 1456.
107. See supra note 24 and accompanying text.
111. Brief of Appellees at 1, Continental Ins. Co. v. Jones, No. 89-5911 (11th Cir. 1989).
113. Brief of Appellant, supra note 84, at 2.
The Plaintiffs made a written demand on Continental for the entire $600,000 limit.116 "Their attorney sent a five page letter to Continental detailing: (1) Karen's lack of fault because she was a passenger; (2) the limited insurance available from the tort feasors; and (3) the emotional loss sustained by Mr. and Mrs. Jones."117 Their counsel received a reply denying the demand for the $600,000 limits and advising them to get ready to arbitrate.118 Continental, on its own evaluation of the claim, established a $600,000 reserve.119

The Plaintiffs demanded arbitration and their depositions were taken.120 A scrapbook highlighting important points in Karen Jones' life was provided to Continental. "Thus, by the middle of May, Continental knew that Karen was a model daughter—she was a college level tennis player, a respected piano player, an excellent student, and she had just transferred colleges just to be close to her parents."121 Even Continental's counsel's evaluation of the case detailed the risks of litigating the claim:

In a letter dated May 7, 1984 Continental's own counsel evaluated the case as follows: '[B]oth parents made very good witnesses. The girl is a model daughter in all respects. The scrapbooks and photo albums present a detailed emotional picture of their daughter's life, and the accident is one of aggravated liability."122

Still, there was no offer of settlement. Continental failed to make an offer until the eve of arbitration, when Continental offered $250,000 per parent for a total of $500,000.123 The Plaintiffs rejected this offer and the matter proceeded to arbitration.124

During the arbitration, Continental defended the claim by alleging that Karen was negligent for not wearing a seat belt.125 The arbitrators rendered a $1,000,000 award, $500,000 per parent.126 Continental petitioned to limit the amount of the arbitration award to the $600,000

116. Id.
117. Brief of Appellees, supra note 111, at 1-2.
118. Id. at 2.
119. Id.
120. Brief of Appellees, supra note 111, at 2.
121. Id.
122. Id.
123. Id. at 3.
124. Id.
125. Id.
126. Id.
policy limit, and the Plaintiffs challenged the petition to modify claiming that the award was not defective. The trial court entered judgment against Continental for the policy limits.

The Plaintiffs filed a bad faith action in state court against Continental seeking damages for Continental's alleged bad faith refusal to settle their claim for the death of their daughter. While the action was pending on Continental's motion to dismiss, Continental removed the action to federal district court. Continental claimed that section 624.155 did not recognize an action for bad faith involving a claim for first-party benefits such as uninsured motorist coverage. The Plaintiffs argued to the contrary, that the bad faith statute applied equally to first and third party claims alike. The judge agreed with the Plaintiffs and in his Opinion and Order on Continental's Motion to Dismiss held that section 624.155(1)(b), which made it illegal for an insurer not to attempt in good faith to settle claims, applied to first party actions as well.

The case proceeded to trial on the bad faith claim and at the close of evidence, the Plaintiffs moved for a directed verdict asserting that as a matter of law, if Continental was found to have violated section 624.155(1)(b), they were entitled to the excess arbitration award of $366,750. The court ruled that this was a proper element of damages to be submitted to the jury. A verdict form comprised of special interrogatories was submitted to the jury.

128. Id.
129. Id.
130. Continental moved to dismiss the first party bad faith claim, maintaining that section 624.155 did not recognize a first party cause of action for bad faith, a position that Continental has steadfastly maintained, even in the instant appeal. Brief of Appellant, supra note 84, at 4.
132. See supra note 120 and accompanying text.
133. Brief of Appellant, supra note 84, at 4.
134. 716 F. Supp at 1457.
135. Brief of Appellant, supra note 84 at 4.
136. FED. R. CIV. PRO. 50(a).
138. Id. at 1458.
139. The special interrogatories submitted and the jury's responses (in italics) are set forth in their entirety as follows:
1. Do you find from a preponderance of the evidence that Continental
The jury returned a special verdict against Continental, finding that it did not attempt to settle the Jones' claim in good faith. However, the jury found "zero" damages. The Plaintiffs filed motions for judgment notwithstanding the verdict and for new trial. The judgment notwithstanding the verdict motion concerned the determination of damages and requested judgment be entered for $366,750.00. The motion for new trial alleged that the damages assessed, or rather, not assessed, were grossly inadequate and contrary to the manifest weight of the evidence.

After stating the proper standard for deciding a motion for judg-
ment notwithstanding the verdict, the court succinctly presented the issue of what the proper measure of damages should be in a first party bad faith insurance action under section 624.155. This was the same issue raised by Continental in its motion for partial summary judgment and the Plaintiffs in their post trial motions. The court noted that in third party bad faith actions, it was unassailable that damages may properly include amounts in excess of the stated policy limits.

The court went on to note that first party bad faith actions were, until 1982, distinguished from the third party action; there was no fiduciary relationship in first party claims and as a result, no cognizable common law action for bad faith. In 1982, the Florida Legislature enacted the “Bad Faith Statute,” and thereafter, both state and federal courts have extended a bad faith cause of action to first party claims.

The court looked first to the language of the statute and then to the legislative history and deduced that the full contours of the statute should be determined by Florida insurance law including third party doctrine. The court analyzed other Florida courts’ construc-

146. Id. at 1458-59.
147. Id. at 1459.
148. Id. at 1459 n.5. (citing Butchikas v. Travelers Indemnity Corp., 343 So. 2d 816, 817-818.
149. Jones, 716 F. Supp. at 1459.
150. Id.
152. Id. at 1459; (citing Fla. Stat. § 624.155 (1982)).
154. See, e.g., Opperman, 515 So. 2d 263; Fidelity, No. 84-18844 CA(02); Wahl, No. 87-1187-CA(17).
156. Jones, 716 F. Supp. at 1460.
157. Id.
158. "The Legislature's comments support the conclusion that it intended the full contours of the statute to be determined by reference to general principles of Florida insurance law including third-party doctrine." Id.
tions of section 624.155 as applicable to first party bad faith claims and those courts going further, holding that an excess award may be recoverable in a first party action. The court used this analysis to form the basis for granting Jones' motion for judgment not withstanding the verdict.

The court determined that the Plaintiffs were entitled, as a matter of law, to the $366,750 excess damages as well as prejudgment interest. Continental has appealed both of the court's rulings that: (1) there exists a first party bad faith cause of action; and (2) that the proper measure of damages in a first party bad faith case is the difference between the policy limits and arbitration award.

IV. In Defense of the Bad Faith Statute

Once an uninsured motorist carrier is determined to have acted in bad faith by failing to settle a claim "when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests," the issue then becomes one of a determination of damages. Specifically with regard to the first-party bad faith action, the question is whether the damages assessed against the insurer and in favor of the insured may exceed the policy limits. The legislative history of section

159. Id. The court analyzed: Wahl, No. 87-1187-CA(17); Fidelity, No. 84-18844-CA(02); Opperman, 515 So. 2d 263 (Fla. 5th Dist. Ct. App. 1987); United Guar., 644 F. Supp. 339 (M.D. Fla 1986).
160. The court ordered, inter alia: ORDERED AND ADJUDGED that Plaintiff's Motion for Judgment Notwithstanding the Verdict be, and the same is, hereby GRANTED; the damage verdict entered by the jury in this case on April 20, 1989 is hereby SET ASIDE and JUDGMENT is hereby entered in favor of the Plaintiff and against Defendant in the amount of $366,750.00 with prejudgment interest on this liquidated sum at a rate specified by law (12% per annum) commencing from the date of the state court judgment (October 31, 1984). Plaintiff is also awarded a judgment for COSTS OF THIS ACTION TO BE TAXED BY THE CLERK OF THIS COURT upon the filing of an appropriate bill of cost form.

Jones, 716 F. Supp. at 1460.
161. Id.
162. Id.
163. See Jones, 920 F.2d 847.
166. See supra note 18 and accompanying text.
624.155, current Florida decisions, sound social policy concerns, and reference to decisions in other states present a compelling rationale that damages in excess of the policy limits should be permitted in a first party bad faith action under section 624.155(1)(b)1.

Florida's bad faith statute is a remedial statute, intended to provide a remedy for first party bad faith where none existed before.167 The purpose of the statute is to provide redress for insureds and to impose damages upon insurers as a result of their bad faith. Remedial statutes, like section 624.155 are required to be liberally construed in favor of those parties for whose benefit the statute was enacted. Because section 624.155 provides a first party cause of action, the remedy, excess damages, is likewise applicable.168 Prior to the enactment of section 624.155, first party insurers could intentionally refuse to pay first party benefits with impunity.168

Florida Statute section 624.155(3) makes the insurer "liable for damages . . . ."170 Since the term "damages is undefined, and is susceptible to varied definitions,"171 each with its own unique implications," resort to the legislative history of section 624.155 is necessary to determine the intent of the Legislature with respect to the definition of "damages" as used within section 624.155(3).172

167. A remedial statute "is designed to correct existing law, redress existing grievance, or introduce regulations conducive to the public good; it may also be defined as a statute giving a party a mode of remedy for a wrong where he had none, or a different one, before." Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981). Prior to the enactment of section 624.155, there was no common law cause of action for first party bad faith. See supra note 36 and accompanying text.


171. Judge Friedman specifically held that, "[i]n reviewing F.S. section 624.155, the Court is of the opinion that the Statute is not clear or unambiguous." Fidelity & Cas. Co. of New York v. Taylor, No. 84-18844-CA(02) (Fla. 11th Cir. Ct. 1984), Order on Motion for Summary Judgment, at 3 (emphasis added).

172. According to the court in Foley:

If the language employed by the Legislature in the law itself is clear . . . the legislative intent is to be found therein . . . . Of course, if the phraseology of the act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, 'the evil to be corrected, the language of the act
Although the Legislative history of section 624.155 is brief, it specifically addresses the issue of excess damages:

"Subparagraph (f) (1.) requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies." \(^{173}\)

This history combined with the plain language of section 624.155, cannot possibly convey more clearly the intent of the drafters that Florida's Bad Faith Statute applies to first party actions. \(^{174}\) The language is as plain as it could possibly be. \(^{175}\)

Therefore, since the drafters of the statute intended, and court decisions held, \(^{176}\) that the Legislature intended to make section 624.155 applicable to the first party actions as well as third party actions, it is logical that the Legislature intended to apply the same remedy. \(^{177}\) As further evidence of the Legislature's intent that excess damages be recoverable in first party actions, section 624.155 was amended on June 1, 1990. \(^{178}\)

Amending section 624.155 F.S.: clarifying Legislative intent with respect to the issues of . . . the definition of damages; . . . (7) . . . [t]he damages recoverable pursuant to this section shall include those damages which are reasonably foreseeable as a result of a

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173. STAFF REPORT - 1982 INSURANCE CODE SUNSET REVISION, at 12 (HB 4F; as amended by HB 10e June 3, 1982).


175. Id.


177. Brief of Appellees, supra note 111, at 16; Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990). Mr. Tilton expressed the opinion that the language could not have been made any clearer to apply the bad faith statute to first and third party claims alike.

specified violation of this section by the insurer and *may include an award or judgment in an amount that exceeds* the policy limits.\(^{179}\)

Thus, the Legislature again pronounced that excess damages are available in actions under section 624.155 and because section 624.155 applies to first and third party claims, so does the availability of excess damages.\(^{180}\)

The insurer is not without protection under the statute. The insurer is given sixty days, from the time the insured gives notice to the Department of Insurance and the insurer of the alleged violation, to conduct its investigation, evaluate the case and respond to offers of settlement.\(^{181}\) If the damages are paid or the alleged violation corrected within this sixty day period, no action for bad faith is permitted.\(^{182}\) This period is important to any action for bad faith. The conduct of the insurer throughout the entire period up to trial or arbitration is the gauge of bad faith.

In *Jones*,\(^{183}\) despite the overwhelming evidence of no fault on the part of Karen Jones,\(^{184}\) the limited insurance available from the tortfeasor,\(^{185}\) the potential for excess damages, and the insurer’s attorney’s evaluation of the case,\(^{186}\) Continental never responded to settlement demands, even with a one dollar offer, until the eve of arbitration.\(^{187}\) Similarly, in *Wahl v. Insurance Co. of North America (INA)*,\(^{188}\) the insured was comatose for two weeks with resultant brain damage.\(^{189}\) Despite INA’s evaluation of the value of the case as being in excess of the policy limits, it made no offer during pre-suit negotiations or during

\(^{179}\) *Id.* (emphasis added).

\(^{180}\) Because the drafters intended section 624.155 to apply to both first and third party causes of action, it is obvious that the new damages provision applies as well. The drafters could not have made it any clearer. Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990).

\(^{181}\) *FLA. STAT.* § 624.155(2)(a) (1989).

\(^{182}\) *FLA. STAT.* § 624.155(2)(d) (1989).


\(^{184}\) 650 F. Supp. at 939; Brief of Appellees, *supra* note 111, at 1.

\(^{185}\) Brief of Appellees, *supra* note 111 at 1-2.

\(^{186}\) *See supra*, note 122 and accompanying text.

\(^{187}\) *See supra* note 123 and accompanying text.

\(^{188}\) No. 87-1187 CA(17) (Fla. 19th Cir. Ct. 1987).

\(^{189}\) Brief of Appellant, *supra* note 90, at 29.
the 60 day period. The arbitrators awarded a total of $787,468.20. After trial, the judge held that the "shortfall" was recoverable as a matter of law.

Other jurisdictions permitting recovery for first party bad faith have defined the obligation on the part of the insurer as follows:

[A]t the very least, . . . the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim . . . . These performances are the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. When an insurer has breached this duty, it is liable for damages suffered in consequence of that breach.

In Bucholtz v. Safeco Insurance Co., the insured sued the insurer for an excess judgment allegedly due to Safeco's bad faith in failing to settle the case. The court affirmed the summary judgment in favor of the carrier because Safeco did handle the claim reasonably. Judge Tursi, in dissent, described the duty of good faith as including "the requirement that the insurer investigate the factual predicates of the claim of liability and not unreasonably persist in defenses that are without foundation in either fact or law." In Jones, the defendant presented no evidence to support its only defense which was that Karen Jones was negligent in failing to wear her seat belt.

Not every transgression by an insurer or complaint by an insured will suffice to sustain a cause of action for bad faith. Admittedly, an insurer is not in business to lose money. The insurer wants to minimize

190. Id. at 30.
191. Brief of Appellant, supra note 90, at 31.
194. Id. at 592.
195. Id. at 593; cf. Martin v. Horace Mann Ins. Co., No. 87-CV-19335 (Denver County, Colorado) ($255,000 verdict against insurer who acted in bad faith in refusing to pay $50,000 uninsured motorist claim).
196. Id. at 594. (Tursi, J., dissenting).
197. 716 F. Supp. 1456.
198. Brief of Appellees, supra note 111, at 3.
payment while the insured wants to maximize his recovery. However, when an insurer embarks on a course of conduct as in Jones, Wahl or McLeod where liability is clear and an award of damages in excess of the policy is foreseeable, it should not complain when an excess verdict is rendered.

Insurers maintain that any damages awarded were due to the acts of the uninsured driver and not the insurer. Therefore, the insurer should not be liable for the excess verdict. However, this reasoning ignores the fact that the insured purchases uninsured motorist coverage for this specific eventuality. Had the insurer dealt with its insured in good faith, there would be no bad faith suit and no excess verdict. But for the unreasonable acts of the insurer, there would be no excess judgment. Curiously the second district’s recent opinion in McLeod seems to dismiss this question of causation. According to the McLeod court, the best an insured can hope for, following lengthy litigation of a bad faith claim, is interest on unpaid benefits (up to the policy limits), attorney fees, and costs. This holding sends a clear message to any insurer who is faced with a legitimate serious damage claim and a large policy: feel free to withhold payment on the policy and litigate. Liability is limited, roll the dice. This was not the legislature’s intent when it drafted section 624.155.

199. Weese, 879 F.2d at 118.
200. 716 F.2d 1456.
201. No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987).
204. See, e.g., Brief of Appellant, supra note 84, at 22; Brief of Appellees, supra note 111, at 13; McLeod, 15 Fla. L. Weekly 2785.
205. "Reasonably foreseeable," as used in the 1990 amendment, means exactly what it says. It is reasonably foreseeable that if an insurer, first or third party, is found liable for a violation of Section 624.155, that insurer will be liable for damages, and these damages may exceed the policy limits. The drafters did not differentiate between first and third party bad faith because the statute applies equally to both. Telephone interview with Eric Tilton, Esquire, Editor-In-Chief of the 1982 version of section 624.155 and member of the drafting committee for the 1990 amendments effective October 1, 1990 (October 1, 1990).
206. McLeod, 15 Fla. L. Weekly 2785, 2786. Contra Opperman, 515 So. 2d at 267 (citing 15A COUCH ON INSURANCE 2d § 58.1 (1983)) ("The function of the bad faith claim is to provide the insured with an extra-contractual remedy.")
V. Conclusion

As a matter of policy, excess judgments in first party bad faith actions should be recoverable as a matter of law. The remedial purpose of section 624.155 cannot be satisfied without the imposition of damages, including excess judgments. To do otherwise would take the teeth out of the statute. If excess judgments are not permitted, there is little or no reason to require insurers to act in good faith when handling a first party claim.

It was the actions of insurers which prompted the Legislature to enact section 624.155. Insurers were reaping the benefits of premiums from uninsured motorist coverage, and refusing to pay valid claims. After all, what did they have to lose? An insurer could intentionally refuse to pay a valid claim and place the insured in a position where his medical bills would not be paid. This conduct may also take its toll on the insured’s emotional well being. The insurer could take a chance on arbitration or a jury. If the award was lower than the policy limits, the insurer wins. If the award was in excess of the policy limits, the insurer would pay no more than the policy. Prior to the enactment of section 624.155 it was a win-win situation for insurers.

Insurance companies do not prosper by paying claims - this is a fact. As a response to the abuses of insureds by insurers, the Florida Legislature enacted section 624.155 to provide a remedy for insureds.

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207. "To hold other than that the remedy is an award of the excess would emasculate the remedial purpose of the statute regarding first party claims." Brief of Amicus Curiae, Academy of Florida Trial Lawyers at 6, McLeod, No. 89-2586 (Fla. 2d Dist. Ct. App.).

208. In an excerpt from the trial in Wahl, counsel for INA aptly described the state of first party bad faith law prior to the enactment of section 624.155:

Before this statute [section 624.155] was passed, an insurance company could say to a plaintiff 'Hey, I'm not going to pay you, I am — I don't — I think your case is worth ten bucks less than you say it is and I'm still going to make you arbitrate.' They could go ahead, get hit for a $250,000 award, write him a check for two hundred and say 'That's all she wrote, I don't owe you another nickel.' There was no basis for anything. They couldn't get any costs back, except arbitration costs, couldn't get emotional distress, anything incurred for having to litigate something that should have been settled.

The Legislature came along and said 'Well, we're going to amend that. Now you're going to have a statutory claim for any damages that are caused by that bad faith.' Wahl, No. 87-1187-CA(17) (Fla. 19th Cir. Ct. 1987) (Excerpt of Proceedings, page 16, dated June 6, 1989).
The Legislature and the courts have applied section 624.155 to first party claims as well as third party claims. There is no differentiation in the statute concerning damages that can be awarded in first party claims as opposed to third party claims. The recent amendments to section 624.155 support the position that damages should be measured by the excess award over the policy limits in first party claims as well at third party claims. The federal and Florida trial courts have held that these damages are recoverable as a matter of law. The rationale for these holdings is compelling. The Florida Supreme Court will have an opportunity to squarely address and put to rest the question of what the measure of recovery in a first party bad faith action should be.209

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209. See supra note 14 and accompanying text for the exact language of the certified question.
Breakstone v. MacKenzie: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There are no Clear Winners

"[W]ould not a lawyer coming before a recently elected judge be concerned if opposing counsel had contributed to the judge's campaign . . . particularly if the concerned lawyer had not contributed to that campaign?"1 That question, posed by Florida Supreme Court Justice Ben F. Overton in an address delivered in April 1989,2 was prophetic. The following September, Florida's Third District Court of Appeal responded, holding in Breakstone v. MacKenzie3 that a lawful campaign contribution to a judge or even to the judicial campaign of a judge's spouse is legally sufficient grounds for disqualification of a judge upon a motion by the non-contributing party.4 In January 1990, however, Florida's Fourth District Court of Appeal aligned itself with the dissent in Breakstone, holding in Keane v. Andrews,5 that a legal campaign contribution by a lawyer to a judge is not legally sufficient grounds for disqualification when the contributing lawyer appears before the recipient judge.6

Justice Overton had the opportunity to answer his own question when the Florida Supreme Court recently decided the issue.7 In Breakstone,8 the court could either eviscerate the state's system of choosing its trial court judges through competitive nonpartisan elections9 or

2. Id.
4. Id. at 1166.
5. Keane v. Andrews, 555 So. 2d 940 (Fla. 4th Dist. Ct. App. 1990). Keane, and a subsequent case, also styled Keane v. Andrews, 561 So. 2d 30 (Fla. 4th Dist. Ct. App. 1990) and involving the same parties as well as the same issue is currently pending before the Florida Supreme Court. In both cases Dr. Moulton Keane moved for the disqualification of Broward County Circuit Court Judge Robert L. Andrews on grounds that opposing counsel had contributed to the judge's campaign.
6. Keane, 555 So. 2d 940.
8. Id.
9. FLA. CONST. art. V, § 10(b). Section 10(a) was amended to provide for merit
spare the system that no one really wants, a system that draws breath directly from the yawn of public apathy. With the exception of Justice Overton, the court chose the status quo, but not without reservations. "I concur in the majority's opinion because I believe it endorses the lesser of the evils from which we must choose," Justice Kogan said in his concurring opinion. "And in so concluding, I have many regrets," he added.

The majority held that a lawful contribution to the election campaign of a judge or the judge's spouse is not legally sufficient grounds for disqualification. However, the court upheld the third district's grant of writs of prohibition to disqualify Judge MacKenzie on other grounds. Justice Overton concurred in the result, but set forth in a separate opinion his view that a $500 contribution to a judicial election campaign may be legally sufficient grounds for disqualification of a judge.

retention of supreme court justices and district court judges. Section 10(b) provides for the election of circuit and county court judges as follows:

Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

FLA. CONST. art. V, § 10(b).


Voter apathy and unawareness in the area of judicial elections has been documented by several studies. Examples offered by the author include a 1976 Texas election exit poll in which just 15.4% of the voters were able to name a supreme court candidate, 4.9% could name a district court candidate, and only 2.4% were able to name a county court candidate. Not so surprisingly, 69 percent of those asked said they preferred the election of judges over appointment. Id. at 86-88.

Even those closest to the existing system of picking trial court judges, lawyers and the judges themselves, dislike the system. See Overton, supra note 1, at 21-22.

12. Id. at 400.
13. Id.
14. Id. at 397-98.
15. The supreme court upheld the third district's ruling in Breakstone that Judge MacKenzie impermissibly passed on the facts contained in the motion for disqualification and should be disqualified on that basis. Breakstone, 15 Fla. L. Weekly at 399-400. The supreme court also upheld the district court's ruling in Super Kids that Judge MacKenzie should have granted a motion for disqualification rather than granting an ore tenus motion for withdrawal of the counsel who had contributed to the judicial campaign of Judge MacKenzie's husband. Id.
This comment examines the rationales on both sides of the *Breakstone* controversy. Part I summarizes the facts of the case as well as the majority and dissenting opinions of the Third District Court of Appeal. Part II focuses on the Florida Supreme Court’s decision in *Breakstone*, analyzing what the court said as well as what the court did not say. Policy considerations involved in this controversy are discussed in Part III. Finally, Part IV concludes that the *Breakstone* decision failed to recognize the potential for infringement on litigants’ due process right to judicial impartiality in its conclusion that a lawful contribution to a judicial election campaign is not legally sufficient grounds for disqualification.

**Part I**

This section separately summarizes the facts of *Breakstone v. MacKenzie*\(^\text{17}\) and *Super Kids Bargain Store, Inc. v. MacKenzie*.\(^\text{18}\) Part I also summarizes the majority and dissenting opinions of the Third District Court of Appeal.

**A. Breakstone**

The Florida Supreme Court’s consideration of judicial disqualification in cases involving campaign contributors sprang from a chance encounter in the anteroom of Dade County Circuit Court Judge Mary Ann MacKenzie.\(^\text{19}\) Arthur Breakstone, the defendant in a postjudgment garnishment proceeding, was in the anteroom with his counsel and plaintiff’s counsel awaiting a hearing before Judge MacKenzie when the judge’s husband paid a visit to his wife in chambers.\(^\text{20}\) Two days after the anteroom encounter Breakstone’s attorney learned that opposing counsel had contributed $500 to the husband’s judicial campaign and promptly filed a motion to disqualify Judge MacKenzie.\(^\text{21}\) “The suggestion is that there was a specific opportunity for the

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\(^{17}\) *Breakstone*, 561 So. 2d at 1164.
\(^{18}\) *Id.*
\(^{19}\) *Id.* at 1164 n. 2. The third district stated that its analysis was based on the contribution itself, not the circumstances under which the contribution became a cause of concern to Arthur Breakstone and his counsel.
\(^{20}\) *Id.*
\(^{21}\) *Id.* at 1166.
\(^{22}\) *Id.* at 1164 n. 2.
husband to mention the $500 contribution by the plaintiff's counsel sitting in the anteroom, and that such information, however innocently imparted, would inevitably create a favorable bias toward the $500 contributor," the court stated.\textsuperscript{23}

Judge MacKenzie denied Breakstone's motion for disqualification.\textsuperscript{24} After finding the motion to be legally insufficient, the judge stated:

I cannot address your motion as far as the truth or misinformation that you may have or not have or anything like that. But I will state for the record that I kept absolutely clear of my husband's campaign, had nothing to do with it whatsoever. Couldn't go to a judicial luncheon—went to one and it was followed all over by The Miami Herald, and that's the last time I went to anything. And who donated to his campaign and who did not donate to his campaign, I don't know. I have not looked at his records. So in no way could I be prejudiced.\textsuperscript{25}

During the same hearing Judge MacKenzie expressed "frustration for not being in my husband's campaign . . . . In fact, if I had been in it, he would have won, and that's for real."\textsuperscript{26} On the basis of the judge's comments, Breakstone renewed his motion for disqualification on the grounds that the judge had impermissibly passed on the merits of the original motion for disqualification.\textsuperscript{27} Judge MacKenzie also denied the renewed motion.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 1166. Under Florida law, judicial disqualification in civil cases is governed by Rule 1.432 of the Florida Rules of Civil Procedure. Applicable standards for disqualification are contained in Florida Statutes section 38.10 and Canon 3(C) of the Code of Judicial Conduct. Florida statutes pertaining to judicial disqualification and judicial elections are considered in Part II.
\item The issue of whether a judge should decide a motion for his or her own disqualification is beyond the scope of this note. For a full discussion of the matter, see D'Agostino, \textit{Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law — Proposal for Reform}, 11 Nova L. Rev. 201 (1986).
\item \textsuperscript{25} Breakstone, 561 So. 2d 1164.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} \textit{Id.} \textit{See} Rule 1.432(d), FLA. R. CIV. P.; Bundy v. Rudd, 366 So. 2d 440, (Fla. 1978) ("[A] judge who is presented with a motion for disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.'") \textit{Id.} at 442 (quoting FLA. R. CRIM. P. 3.230(d)).
\item \textsuperscript{28} Breakstone, 561 So. 2d 1164.
\end{itemize}
\end{footnotesize}
B. Super Kids

Super Kids was a subsequent, separate case before Judge MacKenzie and the plaintiff's lawyer was the same contributing counsel who had represented the plaintiff in Breakstone. Based on the lawyer's same $500 campaign contribution and the third district's panel holding in Breakstone that Judge MacKenzie should have disqualified herself, defendant Super Kids Bargain Store, Inc., moved for disqualification. During a hearing on the motion, plaintiff's counsel offered to withdraw from the case and made a motion for substitution of counsel.

After stating that on the basis of the third district's panel holding in Breakstone the motion for disqualification was legally sufficient, Judge MacKenzie granted the ore tenus motion for substitution and then denied the motion for disqualification.

C. Opinions of the Third District Court of Appeal

The third district's en banc hearing and rehearing of the two consolidated cases produced a sharply divided 5-4 decision in which the majority held that a lawful campaign contribution of $500 to either a judge or the judge's spouse is legally sufficient grounds for disqualification. Judge Nesbitt's dissenting opinion argued that since the legislature set a $1,000 limit on contributions to trial court judicial campaigns, a $500 contribution could not be the basis of a reasonable fear of prejudice. In a separate dissenting opinion, Chief Judge Schwartz emphasized policy considerations, including concern that the majority opinion endorsed an unsubstantiated public cynicism about and distrust of the judiciary.

29. Id.
30. Id.
32. Breakstone, 561 So. 2d 1164, 1166.
33. Id.
34. Id. at 1172-73.
35. Id. at 1166.
36. Id. at 1174 (Nesbitt, J., dissenting) (citing FLA. STAT. § 106.08(1)(e) (1987)).
37. Id. at 1178.
1. The Majority

The third district majority opinion written by Judge Cope stated that both Florida's codified law,\(^{38}\) and case law\(^{39}\) require a judge's disqualification when a party reasonably fears bias.\(^{40}\) Judge Cope further stated that the litigant's fear must be taken as being reasonable so long as the allegations are neither frivolous nor fanciful.\(^{41}\)

The majority reasoned that because a $500 campaign contribution is both substantial and beyond the financial means of the ordinary litigant, a reasonable person would fear prejudice on the part of the recipient judge in favor of the contributing party.\(^{42}\)

The majority went on to argue that the statutory $1,000 limit on contributions to trial court judicial campaigns\(^{43}\) is not a legislative statement which implies no reasonable fear of prejudice could stem from contributions of $1,000 or less.\(^{44}\) Judge Cope pointed to state election law requiring disclosure of campaign contributions and expenditures\(^{45}\) as evidence that the legislature recognized the potential for bias in lawful contributions, requiring disclosure so the public can make its own assessments.\(^{46}\)

2. The Dissent

Judge Nesbitt's dissenting opinion argued that a lawful campaign contribution cannot form the basis for a reasonable fear of bias because the amount contributed is within the limits established by the legislature as being permissible.\(^{47}\) Nesbitt noted that if the legislature’s intent in enacting the contribution cap and the disclosure laws was to permit members of the public to "draw their own conclusions," then the purpose would be accomplished by the disclosure laws alone and there would be no need for a limit on campaign contributions.\(^{48}\)

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38. *Id.* at 1167 (citing * Fla. R. Civ. P. 1.432; * Fla. Stat. § 38.10 (1987)).
40. *Breakstone*, 561 So. 2d at 1166-73.
41. *Id.* at 1167.
42. *Id.* at 1168.
44. *Breakstone*, 561 So. 2d at 1171.
45. *Id.* (referring to *Fla. Stat.* §§ 105.08, 106.07 (1987)).
46. *Id.*
47. *Id.* at 1175.
48. *Id.* at 1174.
The opinion also stated that electing trial court judges through contested nonpartisan elections reflects the will of the people and that campaigns and campaign funding are "necessary evils."49 If the public is dissatisfied with the system, Nesbitt said, it is the legislature, not the courts, which must respond to those concerns.50

In his separate dissenting opinion, Chief Judge Schwartz opined that the majority replaced a presumption that lawful campaign contributions were proper with a "conclusive presumption of impropriety."51 Schwartz added that the appearance of impropriety to the uninformed does not amount to legally sufficient grounds for disqualification.52 "We cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful," Schwartz wrote.53

The third district certified the following question to the supreme court:

IS A TRIAL JUDGE REQUIRED TO DISQUALIFY HERSELF ON MOTION WHERE COUNSEL FOR A LITIGANT HAS GIVEN A $500 CAMPAIGN CONTRIBUTION TO THE POLITICAL CAMPAIGN OF THE TRIAL JUDGE'S SPOUSE?54

Part II

The Florida Supreme Court answered the certified question in the negative,55 but affirmed the lower court's writ of prohibition disqualifying Judge MacKenzie on other grounds.56 The court, speaking through Justice Ehrlich, held that a legal campaign contribution to a judge or to a judge's spouse is not legally sufficient grounds for disqualification of a judge.57 Justice Overton concurred in the result, but wrote separately, arguing that the majority had reached the wrong conclusion on that a lawful campaign contribution could spawn a reasonable fear of judicial bias.58 Justice Kogan concurred in the majority opinion but

49. Id. at 1176.
50. Id. at 1177.
51. Breakstone, 561 So. 2d at 1178.
52. Id.
53. Id.
54. Id at 1173.
56. Id. at 399-400.
57. Id. at 397-98.
58. Id. at 401.
wrote separately to express his concerns over the troubling policy considerations which he would anticipate stemming from the adoption of Overton's view.59

This part of the article is divided into two sections. The first deals with what the majority opinion said. The second deals with what the majority chose to ignore. Justice Kogan's concerns are addressed in Part III under the heading of public policy considerations.

A. What the Majority Said

The court arrived at its conclusion in Breakstone by applying first amendment freedom of association principles which were enunciated by the U.S. Supreme Court in Buckley v. Valeo,60 and adopted by the Florida Supreme Court in Richman v. Shevin.61 In determining the constitutionality of the Federal Election Campaign Act (FECA) of 1971,62 the Buckley Court stated that congressional limits on campaign contributions did implicate freedom of association,63 but upheld the $1,000 limitation on contributions as a means of checking the two evils which the Court saw as being associated with campaign contributions: 1) The creation of a *quid pro quo* between contributor and recipient, and, 2) the appearance of a *quid pro quo*.64

Justice Ehrlich concluded in Breakstone that the twin evils of campaign contributions (corruption and the appearance of corruption) are adequately managed by Florida election laws and Florida's Code of Judicial Conduct.65 The court cited the statutory provisions limiting contributions to candidates for circuit and county court judgeships to $1,000,66 and requiring public disclosure of campaign contributions in

59. *Id.* at 400-01.
60. 424 U.S. 1 (1976).
61. 354 So. 2d 1200 (Fla. 1977). The court held *inter alia* that the Dade County Judicial Trust Fund was a political committee within the definition of Florida Statutes section 106.011(2). *Id.* at 1205. The ruling effectively ended the attempt by the Dade County Bar Association to fund judicial election campaigns through a trust fund rather than through direct contribution from lawyers to judicial candidates.
64. *Id.* at 26-27.
66. FLA. STAT. § 106.08(1)(e) (1989) states in part:
(1) No person, political committee, or committee of continuous existence shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
excess of $100.\textsuperscript{67}

The court also pointed to Canon 7(B) of Florida's Code of Judicial Conduct as providing an additional safeguard against corruption or the appearance of corruption which might stem from judicial campaign contributions.\textsuperscript{68} Canon 7(B)(2) provides as follows:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate's committees may solicit funds for his campaign only within the time limitation provided by law. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.\textsuperscript{69}

Canon 7(B)(2) is designed to insulate judicial candidates from the financial aspects of their campaigns through the use of campaign committees to solicit and accept contributions. However, the Breakstone\textsuperscript{70} court failed to account for the contradiction of purpose between Canon 7(B)(2), which tries to isolate the judicial candidate from knowledge of

\textsuperscript{67} Id.

\textsuperscript{68} Florida Statutes section 106.07(1)(4)(a) states in part:

(1) Each campaign treasurer designated by a candidate . . . shall file regular reports of all contributions received . . . by or on behalf of such candidate . . .

(4)(a) Each report required by this section shall contain:

1. The full name, address, and occupation, if any, of each person who has made one or more contributions to or for such committee or candidate within the reporting period, together with the amount and date of such contributions. However, if the contribution is $100 or less or is from a relative, as defined in section 112.3135(1)(c), provided that the relationship is reported, the occupation of the contributor need not be listed, and only the name and address are necessary.

\textsuperscript{69} FLA. CODE JUD. CONDUCT Canon 7(B)(2) (1988).

\textsuperscript{70} Breakstone, 15 Fla. L. Weekly 397.
campaign contributions, and Florida Statutes section 106.07, which requires that contributions be made public for all, including the candidate, to inspect.\footnote{71}

Even without the public disclosure of campaign contributions mandated by statute, elected judges can not help but know who their supporters are because those supporters attend campaign functions such as fundraisers.\footnote{72} Consequently, despite the existence of Cannon 7(B)(2), judges are not insulated from knowledge of who backs their campaigns and, therefore, the \textit{Breakstone} court’s reliance on Cannon 7(B)(2) was misplaced. The majority stated that not all suspicions of judicial bias are legally sufficient grounds for disqualification.\footnote{73} “There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers,” the court explained.\footnote{74}

However, courts have held that circumstances which give the appearance of bias may rise to the level of legally sufficient grounds for disqualification. In \textit{Potashnick v. Port City Construction Co.},\footnote{75} for example, the court held that where the father of a judge is a partner in a law firm which represents a litigant before the judge, disqualification is required.\footnote{76}

In the context of judicial election campaigns, it was held in \textit{Caleffe v. Vitale}\footnote{77} that disqualification was warranted where the counsel for one of the litigants in a divorce action was running the judge’s ongoing campaign for re-election.\footnote{78}


\footnote{72. \textit{Id.}}

\footnote{73. \textit{Breakstone}, 15 \textit{Fla. L. Weekly} at 399.}

\footnote{74. \textit{Id.}}

\footnote{75. 609 F.2d 1101 (5th Cir. 1980).}

\footnote{76. \textit{Id.} at 1113.}

\footnote{77. 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986). The majority opinion in \textit{Breakstone} does mention \textit{Caleffe} in a footnote. “Although a motion for disqualification based \textit{solely} upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion.” 15 \textit{Fla. L. Weekly} at 400 n.5 (emphasis in original).}

\footnote{78. \textit{Caleffe}, 488 So. 2d at 629. \textit{But see} Raybon v. Burnette, 135 So. 2d 228, 230 (Fla. 2d Dist Ct. App. 1961) (Plaintiff and plaintiff’s attorneys campaigned for unsuc-}
The *Breakstone* majority found support in other jurisdictions for its position that a lawful campaign contribution by an attorney to a judge is not legally sufficient grounds for disqualification. 79 In *Ainsworth v. Combined Insurance Co. of America,* 80 the Nevada Supreme Court held that involvement of plaintiff's lawyer in the re-election campaign of the court's former chief justice some years earlier did not constitute legally sufficient grounds for disqualification. 81 The *Breakstone* court quoted *Ainsworth* for the proposition that:

[L]eadership members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases in which that attorney might be involved. 82

The *Breakstone* court also found support for its position in *Frade v. Costa,* 83 and quoted the Supreme Judicial Court of Massachusetts as saying a lawful, ordinary campaign contribution "does not tend to indicate any closer relation between the contributor and the recipient than would ordinarily exist between members of the same local bar." 84

However, the *Breakstone* majority did not consider several Texas cases on point, perhaps due to that jurisdiction's well known willingness to see no evil when it comes to judicial campaign contributions. 85 In *Rocha v. Ahmad,* 86 the Texas court held that disqualification was not

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81. *Id.* at 1020.
82. *Breakstone,* 15 Fla. L. Weekly at 399 (quoting *Ainsworth,* 774 P.2d at 1020).
84. *Breakstone,* 15 Fla. L. Weekly at 399 (quoting *Frade,* 171 N.E.2d at 865).
85. Texas precedent on the issue dates back to *Coker v. Harris,* 281 S.W.2d 100 (Tex. Civ. App. 1955) (plaintiff's attorney active in judge's reelection campaign was insufficient grounds for disqualification, especially in light of participation in same campaign by one of defendant's attorneys).
86. 662 S.W.2d 77 (Tex. Ct. App. 1983).
warranted where counsel for a litigant had contributed "many thousands of dollars" to two justices' election campaigns and held victory celebrations for those justices in his law offices.\footnote{87} The court dismissed the matter, saying:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.\footnote{88}

Similarly, in River Road Neighborhood Association v. South Texas Sports, Inc.,\footnote{89} the same court ruled, in a case involving the same contributing counsel and the same recipient justices, that disqualification was not required even though the attorney had contributed 21.7\% of one justice's total reported contributions, and 17.1\% of the other justice's total campaign war chest.\footnote{90}

The most widely known example of the Texan approach to this issue came in Texaco, Inc. v. Pennzoil, Co.,\footnote{91} in which the appellate court dismissed Texaco's contention that a $10,000 contribution from Pennzoil's lead attorney to the election campaign of the presiding judge two days after the suit was filed did not warrant disqualification.\footnote{92}

B. What the Majority Did Not Say

The court's opinion in Breakstone\footnote{93} is based on the right of free
association guaranteed by the first amendment, but the court did not
directly deal with the competing constitutional principle of due process
which requires judicial impartiality. The due process approach to the
issue is at the heart of the Third District Court of Appeal's majority
opinion in Breakstone, and is the argument advanced by Justice
Overton in his separate opinion.

State law regarding the disqualification of judges is rooted in the
principle of due process. The U.S. Supreme Court stated in Tumey v.
Ohio, that:

Every procedure which would offer a possible temptation to the av-
erage man as a judge to forget the burden of proof required to
convict the defendant, or which might lead him not to hold the
balance nice, clear and true between the state and the accused,
denies the latter due process of law.

In In re Murchison, the Court added that "a fair trial in a fair
tribunal is a basic requirement of due process. Fairness of course re-
quires an absence of actual bias in the trial of cases. But our system of
law has always endeavored to prevent even the probability of unfair-
ness." The Court went on to say that, "to perform its high function
in the best way 'justice must satisfy the appearance of justice.'"

The theme that due process requires not only impartiality, but the
appearance of impartiality, is present in Canon 3(C)(1) of Florida's
Code of Judicial Conduct, in state statutes on the disqualification of
judges in civil cases, and case law interpreting disqualification stat-

94. U.S. CONST. amend. XIV, § 1. ("nor shall any state deprive any person of
life, liberty, or property, without due process of law . . . ").
95. 561 So. 2d at 1166-73.
96. 15 Fla. L. Weekly at 401.
97. See Note, supra note 71, at 391.
98. 273 U.S. 510 (1927).
99. Id. at 532.
100. 349 U.S. 133 (1955).
101. Id. at 136.
102. Id. (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).
103. FLA. CODE JUD. CONDUCT, Canon 3(c)(1) (1988).
104. FLA. R. CIV. P. 1.432.

(a) Grounds. Any party may move to disqualify the judge assigned to the
action on the grounds provided by statute.
(b) Contents. A motion to disqualify shall allege the facts relied on to
show the grounds for disqualification and shall be verified by the party.
(c) Time. A motion to disqualify shall be made within a reasonable time

https://nsuworks.nova.edu/nlr/vol15/iss1/14
utes.\textsuperscript{105} As explained by Overton in his opinion in \textit{Breakstone}: "The Code of Judicial Conduct, in Canon 3(C)(1), states that, '[a] judge should disqualify himself in a proceeding \textit{in which his impartiality might be reasonably questioned}.'\textsuperscript{106} Overton went on to cite case law in which the court has construed Canon 3(C)(1) as being consistent with precedent holding that in a motion for disqualification, a judge need only consider whether the fear of bias exists in the mind of the moving party and whether that fear is well grounded.\textsuperscript{107} Overton also quoted \textit{Dickenson v. Parks},\textsuperscript{108} for the proposition that public confidence in the integrity of its judiciary is crucial:

after discovery of the facts constituting grounds for disqualification.

(d) Determination. The judge against whom the motion is directed shall determine only the legal sufficiency of the motion. The judge shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the action.

(e) Judge's Initiative. Nothing in this rule limits a judge's authority to enter an order of disqualification on the judge's own initiative.

\textit{Id.}

Florida Statutes section 38.10 provides in part:

Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

\textit{Fla. Stat.} \S\ 38.10 (1989).

105. \textit{See}, e.g., \textit{Livingston v. State}, 441 So. 2d 1083, 1086 (Fla. 1983); \textit{Dickenson v. Parks}, 104 Fla. 577, 582-584, 140 So. 459, 462 (1932).

106. \textit{Breakstone}, 15 Fla. L. Weekly at 401 (emphasis in original). For a critical look at Canon 3C(1), see Rehnquist, \textit{Sense and Nonsense About Judicial Ethics}, 28 Rec. A.B. City N.Y. 694 (1973). Then-Justice Rehnquist stated that, "though the Canons of Ethics are extraordinarily detailed and specific about what constitutes a 'financial interest,' they have virtually nothing to say about what constitutes 'bias.'" Rehnquist suggested that the use of the word "favoritism" would be clearer than "bias." \textit{Id.} at 708-711.


108. 104 Fla. 577, 140 So. 459 (1932).
Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. 109

In weighing the effects on impartiality and the appearance of impartiality created by lawyer contributions to judicial election campaigns, courts should consider the amount of the contribution, the timing of the contribution, and whether there is a pattern of support between the contributor and recipient. Consideration of these factors is useful in determining whether the recipient has an interest in the outcome of a particular case involving the contributor, and therefore is useful in determining the potential due process infringement. 110 In Florida, the maximum dollar amount of a contribution to a trial court judicial campaign is limited to no more than $1,000. 111 However, the amount of a contribution may have particular significance to the recipient because of its size in comparison to other contributions received. As Overton noted in Breakstone, the $500 contribution in question was the second largest received by the candidate. 112 Considering the timing factor, Overton noted that the judicial election campaign of Judge MacKenzie's husband was ongoing at the time the disqualification motion was made. 113 Although Florida limits contributions to trial court judicial campaigns to $1,000, and requires public disclosure of contributions, the potential exists for an infringement on due process. Depending on the proportionate size of the campaign contribution, the timing of the contribution and the existence of a pattern of support, the lawful contribution could affect the judge's impartiality as well as the public perception of impartiality. The court's holding in Breakstone that an attorney's lawful campaign contribution to a judicial candidate is not legally sufficient grounds for disqualification ignores the potential

109. Breakstone, 15 Fla. L. Weekly at 401 (quoting Dickenson, 104 Fla. at 582-584, 104 So. at 462).
110. See Note, supra note 71 at 403.
111. FLA. STAT. § 106.08(1)(e) (1987).
113. Id.
114. FLA. STAT. § 106.08(1)(e) (1987).
116. 15 Fla. L. Weekly 397.
for due process infringement.

Part III

Justice Kogan, in his concurring opinion in Breakstone, calls the majority's position on judicial disqualification "the lesser of evils from which we must choose." Kogan goes on to describe what evil lurks on the side of the issue chosen by Overton. According to Kogan's view, the dangers include the possibility that contributions to judicial campaigns would be made by lawyers or litigants solely for the purpose of avoiding particular judges who would be required to grant a motion for disqualification. This, Kogan notes, would have the double negative impact of securing contributions for those inferior candidates that contributing lawyers and litigants would seek to avoid through disqualification, and would promote "judge-shopping." The combined effect would be "an administrative nightmare" in the judicial system. Finally, Kogan suggests that well-motivated lawyer contributions to the best qualified judicial candidates would dry up, and as a result, only the wealthy or those supported by special interests could afford the cost of a judicial election campaign. An answer to the dilemma presented by Breakstone rests in the hands of Florida voters and their legislators, Kogan said, suggesting a merit retention system for trial court judges along with public financing of judicial election campaigns. "So long as judicial seats can be filled by elections financed by private campaign contributions, we in Florida must live with a system that opens the door to some type of abuse," Justice Kogan wrote.

Florida is not alone in its struggle to solve the problems inherent in electing judges. As one author noted, "[i]t may well be that no subject in American law has provoked more articles, more speeches and meetings, more hearings and struggles in legislatures and for constitu-

117. Id. at 400 (Kogan, J., concurring).
118. Id.
119. Id.
120. Id. at 400-01.
121. Breakstone, 15 Fla. L. Weekly at 401.
122. Id.
123. Id.
124. Id.
The practice of electing judges by popular vote was not instituted by the founding fathers of our nation, but rather emerged after 1832 as part of the Jacksonian era’s wave of democratization of the American political scene.

Today, forty-two states elect some portion of their judiciary. Twenty states, including Florida hold nonpartisan judicial elections. Florida, thirty-three other states, and the District of Columbia use the “Missouri Plan” process of merit selection and retention for at least some of their judiciary. Florida employs merit selection and retention for its supreme court justices and district court judges. While twenty-four states now use some form of merit selection and retention for trial court judges, Florida continues to elect its circuit and county court judges in competitive elections.

A. The Nature of the Judicial Election Problem

Voter apathy and unawareness in the area of judicial elections have been well documented in a number of studies. As a result of public apathy, judicial elections are decided not on the issues or the candidates’ records, but on name recognition. The 1982 primary race of incumbent Alabama Supreme Court Justice Oscar Adams provides an example of how the name game operates in judicial politics. Although Adams’ challenger was a three-year practitioner from an unaccredited law school, the challenger had the same name as a popular bakery and Adams only won the primary by a narrow margin. “Our survey showed a substantial number voted for him because they

126. Schotland, supra note 10 at 72.
127. Overton, supra note 1, at 11.
129. Note, supra note 125 at 452.
130. Id.
131. Overton, supra note 1 at 12, 14.
132. Id. at 12-13.
133. Id. at 14.
134. FLA. CONST. art. V, § 10(b).
136. Overton, supra note 1, at 18-19.
137. Schotland, supra note 10 at 89.
138. Id.
thought he was the bakery man,” Justice Adams said.  

Buying name recognition in a contested election is an expensive proposition. The price tag for an average campaign for a Dade County circuit court judgeship is $150,000, but, in one race a judicial candidate spent $600,000, while his opponent spent $350,000. In jurisdictions in which competitive judicial elections are held, the national trend is toward more contested elections at a steadily escalating cost. 

These increasingly expensive judicial elections will require more campaign contributions to pay the bills and a high percentage of the contributions to judicial campaigns come from lawyers. A 1982 study showed that in Florida, 50% of the contributors to judicial campaigns were lawyers and that lawyers gave 50% of the money raised by judicial candidates from outside sources.

Lawyer contributions to judicial campaigns raise concerns about the integrity and independence of the judiciary. Concerning the ethical dilemma, one judge said, “I very much appreciated the contributions I received from others. However, it makes me feel uncomfortable dealing with them in court.”

B. The Merit Selection and Retention Solution

Extending merit selection and retention to trial court judges is the most frequently mentioned solution to the problems posed by Breakstone. The move has been endorsed by The Florida Bar, the League of Women Voters, and the Circuit Judges Conference. The 1978 report of the Constitutional Revision Commission recommended the

139. Id.
141. Schotland, supra note 10, at 77.
142. Id. at 136.
143. Id.
144. Id. at 120. (Schotland writes, “I reject the proposition that practices . . . inherent in judicial elections can be called corrupt. Present campaign financing practices put undue strain on actual judicial integrity and independence, on the judiciary’s and the bar’s appearance of integrity and independence . . . .”)
147. Overton, supra note 1, at 21-22.
change, as did the 1984 report of the Article V Review Commission.\textsuperscript{148} The Florida Bar Commission on Merit Selection and Retention recommended extending the process to trial court judges as a means of upgrading the quality of judges and eliminating the public perception of impropriety spawned by judicial election campaigns.\textsuperscript{149}

The predominant contributors to judicial elections are attorneys. The collection of large sums of money from those who will be representing clients before the judges creates the appearance [of] impropriety in the eyes of the general public. Although the commission did not find that this, in fact, does create widespread problems of favoritism; the perception of favoritism by the public is a very real and serious problem which poisons the public's attitude toward our justice system generally.\textsuperscript{150}

However, even supporters of the move to extend merit selection and retention to Florida's trial judges admit that problems would remain,\textsuperscript{151} because those judges would still face election to retain their positions. But the major problem with the view that merit retention will ease the present dilemma is that extending merit retention to trial court judges requires a constitutional amendment, which requires legislative action. The most recent attempt to pass legislation placing such a constitutional amendment on the ballot was House Joint Resolution 9, which was referred to the House Judiciary Committee,\textsuperscript{152} where it died in June 1990. Therefore, for the present and foreseeable future, the courts should not look to the legislature for solutions to the problems \textit{Breakstone}\textsuperscript{153} represents.

\textbf{Part IV}

Justice Kogan's lesser evil approach to this issue is only necessitated by the court's all-or-nothing answer to the \textit{Breakstone} dilemma. A more sensible alternative is a case-by-case approach which balances

\begin{itemize}
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Report, supra note 140, at 18-19.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Breakstone, 15 Fla. L. Weekly at 400. Justice Barkett, in a brief concurring opinion, stated that, "merit retention elections requiring judges to solicit campaign funds are subject to the same concerns as those presented here. Therefore, although merit retention improves the situation, it is not the answer to the problem." Id.
\item \textsuperscript{152} Journal of the House of Representatives, No. 1, at 9 (April 3, 1990).
\item \textsuperscript{153} 15 Fla. L. Weekly 397.
\end{itemize}
the freedom of association of campaign contributors against the due process requirement of judicial impartiality.

Such a case-by-case analysis would require consideration of at least three relevant factors relating to the judicial campaign contribution. Those factors are the proportionate size of the contribution in relationship to other contributions received, the timing of the contribution, and whether any pattern of support exists between the contributor and the judge.

While the Court chose not to consider such circumstances in Breakstone, the facts of Keane v. Andrews\(^{154}\) offered the court another opportunity to look beyond the mere fact that the contribution was within the legal limit. In Keane, Dr. Moulton Keane moved for the disqualification of Broward County Circuit Court Judge Robert L. Andrews on grounds that opposing counsel had contributed to the judge's campaign.\(^{155}\) But while opposing counsel contributed $500 to the judge's campaign, contributions by his firm and members of the firm brought the total contribution to $3,850.\(^{156}\) These contributions, made during a two-month period of 1988, represented 17.25\% of the judge's campaign contributions through the first eight months of that year.\(^{157}\)

Only by assessing the circumstances surrounding the lawful contribution is it possible to determine the importance of the contribution to the recipient judge. The greater the importance, the greater the potential for due process infringement. By not considering the relevant circumstances surrounding judicial campaign contributions the Court is opening the door to due process violations created by the appearance of judicial bias.

Peter Cooke

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155. Id.
157. Id. at 2-3.