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Race, Rap and the Community Standards Test of Obscenity: The Community of Culture

Steven Friedland*

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Abstract

Controversy and obscenity laws appear to go hand in hand.²

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KEYWORDS: standards, culture, rap

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-

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** Professor of Law, Nova University Center for the Study of Law; J.D., Harvard University, 1981; B.A., S.U.N.Y. Binghamton, 1978.

1. Bill Brancher, *Trial Hassle Is a Repeat Performance*, Miami Herald, Oct. 12, 1990, at 1 BR, 5BR, col. 4 (Broward County edition).

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.⁵ 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.⁶ 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.⁷ 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 *Skywalker Records, Inc. v. Navarro*⁸ found the group's recording, "As Nasty As They Wanna Be," to be obscene.⁹

The significance of these cases, particularly the ruling in *Skywalker Records, Inc.*, is both direct and periphrastic.¹⁰ At a mini-

Garbus).

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.

6. See N.Y. Times, June 21, 1990, § B, at 4, col. 1 (late ed.).

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.")

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

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.¹¹ 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 tremors¹² throughout the music industry,¹³ from performers to producers to other business personnel.¹⁴

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*.¹⁵ 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."¹⁶

Skyywalker 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 *Skyywalker Records, Inc.*, but many members of the Supreme Court as well.¹⁷ Members of the Supreme Court have expressed their dissatisfaction with the obscenity test since the Court first

ward bounds of something as distinguished from its internal regions or center." WEBSTER'S NEW COLLEGIATE DICTIONARY (1980).

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

12. See Philips, *Obscenity Ruling Rocks Industry*, L. A. Times, June 9, 1990, at 1F, col. 4; see also Higham, *Crackdown on Risque Artists Growing*, The Miami Herald, June 11, 1990, at 10A, col. 1.

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.*

14. The ruling received national attention, and participants in the case appeared on "Nightline" on ABC, the Phil Donahue show, and numerous other media events. See also Valbrun, *Navarro, Crew Take Show on the Road*, The Miami Herald, June 14, 1990, at 2B, col. 3; Valburun, *The Flip Side of a Raw-Talk Rapper*, The Miami Herald, June 17, 1990, at 2A, col.4; Higham and Van Natta, *Sheriff, Crew Share PR Coup*, The Miami Herald, June 12, 1990, at FP, col. 1.

15. 354 U.S. 476 (1957).

16. H. KALVEN, *supra* note 2, at 34.

17. "Obscenity . . . is a hodge-podge." 413 U.S. 15, 43 (1973) (Douglas, J., dissenting).

attempted a generalized standard in *Roth*.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.¹⁹ Instead, after years of trying, he was prepared to conclude that a tolerably vague rule could not be constructed.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."²¹ Justice Stewart agreed with this assessment in *Cohen v. California*,²² when he wrote "[i]t is often true that one man's vulgarity is another man's lyric."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*.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*.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:²⁶

18. *Roth*, 354 U.S. 476.

19. Justice Brennan stated:

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

....

Paris Adult Theater I v. Slaton, 413 U.S. 49, 83, 84 (1973).

20. *Id.*

21. *United States v. 12 200-ft Reels of Super 8 MM Film*, 413 U.S. 123, 137 (Douglas, J., dissenting).

22. 403 U.S. 15 (1971).

23. *Id.* at 25.

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.*

25. *Miller*, 413 U.S. 15.

26. *Id.*; see also Note, *First Amendment - The Objective Standard for Social Values in Obscenity Cases*, 78 J. CRIM. L. & CRIMINOLOGY 735 (1988).

(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 *Skywalker 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

27. *Miller*, 413 U.S. 15.

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.

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

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.³²

This article proposes that the reliance on a geographically based "community" to evaluate prongs one and two of the *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 *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 measure³³ of community standards under *Miller*.³⁴ In effect, the lack of content³⁵ in a

32. *Id.* at 590.

33. Even if it can be done, the speech form of obscenity would have sufficient value to survive prong three of the *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, *Defining Obscenity: The Criterion of Value*, 22 NEW ENG. L. REV. 315, 330 (1987-88) (quoting R. DWORKIN, A MATTER OF PRINCIPLE 342 (1985)).

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.

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

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.³⁶ 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."³⁷ Freedom of speech has long been considered one of the most

techniques should not be used in place of an articulate definition." C. MacDougall, *The Community Standards Test of Obscenity*, 42 U. TORONTO FAC. L. REV. 79 (1984).

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.³⁸ 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.³⁹ The conceptualization of the first amendment is that it serves to promote "free trade in ideas."⁴⁰ 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.⁴¹ Speech such as fighting words, perjury, defamation and obscenity⁴² are considered to fall outside of the first amendment's protection,⁴³ and may be prohibited by the state.⁴⁴ 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.⁴⁵ Even in modern times, studies have been performed attempting

shire, 315 U.S. 568, 570-71 (1942); *Whitney v. California*, 274 U.S. 357, 373 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1924).

38. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 269-70 (1964).

39. See *id.*; see also *Whitney*, 274 U.S. at 375-76.

40. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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.⁴⁶ Important Supreme Court rulings supplemented the harm approach with the premise that obscenity has no social value.⁴⁷

To be obscene,⁴⁸ speech must at a minimum be erotic.⁴⁹ Yet, not all speech about sex is obscene,⁵⁰ and not all pornography is obscene. In 1957, the Court in *Roth v. United States*⁵¹ set forth a test describing the kind of material that is obscene. The *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."⁵²

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

46. See, e.g., United States Commission on Obscenity and Pornography, *Report on the Commission of Obscenity and Pornography*, (1970); Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Kamp, *supra* note 3, at 9 n.28 (citing Money and Anthanasion, *Pornography: Review and Bibliographic Annotations*, AM. J. OBS. AND GYN. 115 (1973)).

47. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966); *Roth*, 354 U.S. 476.

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 e.g., *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); C. Berry & D. Wolin, *supra* note 43, at 599-600; see also Schauer, *The Return of Variable Obscenity?* 28 HASTINGS L. J. 1275, 1279 (1977); Note, *supra* note 26, at 751; Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L. J. 617, 648 (1989); Note, *supra* note 42, at 1023. Wright, *supra* note 33, at 315. Furthermore, the test depends on local community standards, since the first two prongs of the *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).

49. *Cohen*, 403 U.S. at 20.

50. See, e.g., *Miller*, 413 U.S. at 24 (requiring that the "work taken as a whole appeals to the prurient interest"); see also *Kingsley 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).

51. 354 U.S. 476 (1957).

52. *Id.* at 489.

53. 383 U.S. 413 (1966). The full name of this case was *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.⁵⁴ Justice Brennan also added a third test requiring the material to be "utterly without redeeming social value."⁵⁵ This test emerged from language found in *Roth*, which stated that the first amendment did not protect material "utterly without redeeming social importance."⁵⁶

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.⁵⁷ In his now famous statement, Justice Stewart, in his concurring opinion in *Jacobellis v. Ohio*⁵⁸, stated that he might not be able to define obscenity, but would know it when he saw it.⁵⁹

The Court subsequently overhauled the *Roth - Memoirs* test in *Miller v. California* in 1973.⁶⁰ *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."⁶¹

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.⁶²

Although the Court conceded that the language of these standards may well be imprecise, it nevertheless pointed out that adequate warn-

54. *Id.* at 418.

55. *Id.*

56. *Roth*, 354 U.S. at 484-85.

57. In fact, for the seven years following *Memoirs v. Massachusetts*, the Supreme Court generally avoided obscenity cases by reversing obscenity convictions per curiam. See, e.g., *Redrup v. New York*, 386 U.S. 767, 770-71 (1967) (summarizing the different approaches to obscenity cases relied on by the Supreme Court).

58. 378 U.S. 184 (1964).

59. *Id.* at 197.

60. *Miller*, 413 U.S. at 24-25.

61. *Id.* at 24.

62. *Id.* at 27 (citations omitted).

ing existed.⁶³ The existence of marginal cases, noted the Court, is not a sufficient basis for adopting an "anything goes" approach to obscenity.⁶⁴ 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."⁶⁵

While the Court⁶⁶ 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.⁶⁷ The Court also attempted to provide further guidance on the intent⁶⁸ and scope⁶⁹ of its new delineation of the obscenity standard.

The first two prongs of *Miller* are measured by the contemporary community's own standards.⁷⁰ 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.⁷¹ 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,⁷² taking the material as a whole.⁷³

While the government has the burden of proving the three prongs,⁷⁴ 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." *Id.*

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.⁷⁵ The trier of fact may derive community standards from the hypothetical average person in the community,⁷⁶ 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."⁷⁷ 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.⁷⁸

Significantly, the Court in *Miller* rejected a national community standard,⁷⁹ and stated that community standards "need not be precisely defined."⁸⁰ In leaving the definition of contemporary community standards open, the Court left to speculation its constitutional scope.⁸¹ 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

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

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'").

81. One issue is whether community standards refers to the majority of the community or a super majority of the population. See Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capitol Sentencing*, 64 IND. L.J. 617, 623 (1989); see also Beckett & Bell, *Community Standards: Admitting a Public Opinion Poll into Evidence in an Obscenity Case*, CASE AND COM. 20, 22-24 (Mar.-Apr. 1979). See generally Wright, *Defining Obscenity: The Criterion of Value*, 22 NEW ENG. L. REV. 315, 320 (1987).

person,⁸² rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one."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."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 *Miller* and its progeny.⁸⁵ This restriction is perhaps understandable, however, since constitutional line drawing has been committed to the judicial branch from the time of *Marbury v. Madison*, which was decided in 1803.⁸⁶ The jurors, of course, may consider the legislative determinations as evidence of community standards, but are not required to do so.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.'"⁸⁸

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

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, *Obscenity Law: Definitions and Contemporary Standards*, ANN. SURV. OF AM. L. 913, 919 (1985); see also Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S.CAL. L. REV. 693 (1982).

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

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

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 . . .").

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.

87. See *Smith*, 431 U.S. at 302-03 (1977).

88. Krauss, *supra* note 81, at 633 n. 73.

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 *Pacifica*, 438 U.S. 726.

popular movie, "Carnal Knowledge,"⁹⁰ to books without pictures,⁹¹ 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.⁹²

While some Justices abandoned the community standards test along with the rest of the definition advanced in *Miller*,⁹³ 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."⁹⁴ - 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.⁹⁵ 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-

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

91. *See Kaplan v. California*, 413 U.S. 115 (1973).

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.

94. Goldfuss, *What is "Community" In Judging Obscenity*, N.Y.L.J., Sept. 21, 1981, at 2, col. 3.

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.

nite 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 community standards analysis is improper.⁹⁶ Not only is the "geography-only" analysis inadequate, but such an evaluation ignores cultural and other considerations that determine the parameters of community tolerance. 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.⁹⁷ It has been defined as "any collectivity of people,"⁹⁸ and as "the maximal group of persons who normally reside together in face-to-face association."⁹⁹ One common formulation is that of a group of people who reside in the same geographic locale.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."¹⁰¹ In essence, in any moral community, "the operative aim is always the promotion of a good quality of life."¹⁰²

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." *Id.*

97. G. MURDOCK, *SOCIAL STRUCTURE* 79 (1949); see also Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L.L. REV. 457, 458 (1983).

98. Chesler, *supra* note 97, at 458.

99. G. MURDOCK, *supra* note 97, at 79 (quoting Murdock, Ford, Hudson, Kennedy, Simmons & Whiting, *Outline of Cultural Materials*, YALE ANTHROPOLOGICAL STUD., II 29 (1945)).

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, *supra* note 97, at 81.

101. R. Chesler, *supra* note 97, at 458 (1983).

102. ARISTOTLE, *THE POLITICS*, 117, 119 (E. Barker, trans. and ed. 1958).

The community is a universal social group.¹⁰³ That is, it occurs in some form in all human societies.¹⁰⁴ The reasons for humans to band together in communities are several:

[C]ommunity 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 aide 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.¹⁰⁵

The concept of community has survived from the time of the Ancient Greeks. Classical Athens provides perhaps the closest approximation of the ideal community.¹⁰⁶ 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."¹⁰⁷

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."¹⁰⁸

Changes in the modern configuration of the community also have created a shifting morality.¹⁰⁹ 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.¹¹⁰ The shifting of morality may be affected by many influences, including a dependency on religion within the group.¹¹¹

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."¹¹²

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.¹¹³

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."¹¹⁴

Modern communities in the 1990's are shaped and influenced by their "mode of life"¹¹⁵ 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.

112. Kahn, *Community and Contemporary Constitutional Theory*, 99 YALE L.J. 1, 5 (1989); see also *Roots of Rap Run Deep in Black Musical Traditions*, Miami Herald, June 17, 1990, at 1, col. 1.

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.¹¹⁶ 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.¹¹⁷ 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,"¹¹⁸ 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 *Skywalker Records, Inc.*

A. *Skywalker 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.¹¹⁹

The first amendment furor surrounding the rap group 2 Live Crew¹²⁰ arose from the distribution and sale of the group's album, "As

116. See generally *id.*

117. Klinger, *Main Street U.S.A.*, Sun Sentinel, Aug. 28, 1990, at 1E, col. 1.

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,¹²¹ has sold more than 1.7 million copies.

The *Skywalker* 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,¹²² 1990.¹²³ In March, 1990, a Florida circuit court judge issued an order finding probable cause to believe that the recording was obscene.¹²⁴ Shortly thereafter,¹²⁵ *Skywalker Records, Inc.* filed suit in federal district court seeking a declaratory judgment of its legal rights.¹²⁶

pany, Luke's Records.

Campbell adopted the stage name of Luke Skywalker, and proceeded to produce several albums with 2 Live Crew. Luther Campbell was sued for using the name "Luke Skywalker" by movie impresario Steven Spielberg. The basis of the suit was that Luke Skywalker was a name used by and associated with Spielberg's "Star War" 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. *Skywalker 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.

123. See Stein, *Sheriff Nick: Thine is Kingdom, Power, Glory*, Sun-Sentinel, June 10, 1990, at 1B, col. 1; Kalajian, *Sheriff: I'm Just Doing My Job*, Miami Herald, June 17, 1990, at 12A, col. 1 (Broward County ed.); Parker, *Sheriff's Rap Lyric Drag-net Puts Florida County on Map*, *Washington Post*, June 17, 1990, at A10; Barry, *Navarro Gets Down and Dirty for the Cameras*, Miami Herald, June 14, 1990, at 16, col. 1 (Broward County ed.).

124. *Skywalker Records, Inc.*, 739 F. Supp. 578, 583.

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 *Skywalker 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,¹²⁷ 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.¹²⁸

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."¹²⁹ 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.¹³⁰ 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."¹³¹ The court concluded that the recording failed the third¹³² "serious value" test requirement as well, and was therefore

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.*

129. *Skywalker Records, Inc.*, 739 F. Supp. 578, 582.

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.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,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.¹³⁵ The court believed that this area was more liberal than on the average.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."¹³⁷ In a sense, no evidence at all would have been more convincing than the court's own idiosyncratic anecdotal experience.

or still." *Id.*

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).

134. *Skywalker Records Inc.*, 739 F. Supp. 578, 588.

135. *Id.*

136. *Id.* at 589.

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 hall which includes knowledge, belief, art, morals, lure, custom and any other characteristics and habits"¹⁴⁰ of those people within it.¹⁴¹

138. See generally H. SCHWENDINGER & J. SCHWENDINGER, *ADOLESCENT SUB-CULTURES AND DELINQUENCY* 79 (1985).

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 1 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. Kluckhohn 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.¹⁴² 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."¹⁴³ Yet, cultures do not always support their host communities.¹⁴⁴ In fact, a culture may be out of sync with a society. It consequently may be labeled deviant or anti-authoritarian.¹⁴⁵

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.¹⁴⁶ 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.¹⁴⁷ 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."¹⁴⁸ As a result, literally "hundreds of sub-cultures"¹⁴⁹ with their

142. BIERSTEDT, *supra* note 139, at 127.

143. B. OSTENDORF, BLACK LITERATURE IN WHITE AMERICA 16 (1982) (citing Mintz, *Forward to* WHITTEN & SZWED, AFRO-AMERICAN ANTHROPOLOGY at 10).

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.

145. OSTENDORF, *supra* note 143 at 16. *See generally* H.L. GATES, THE SIGNIFYING MONKEY (1988).

146. D. MAURER, EPILOGUE: SOCIAL DIALECTS AS A KEY TO CULTURAL DYNAMICS, LANGUAGE OF THE UNDERWORLD 381 (1964). *See generally* MERRILL, *supra* note 139.

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. MADSEN, 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 words¹⁵⁹ 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-

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. CLAERBAUT, BLACK JARGON IN WHITE AMERICA 48-55 (1972).

161. MAURER, *supra* note 146, at 386. See generally R. BELLAH, R. MADSEN, W., SULLIVAN, A., SWINDLER, & S. TIPTON, HABITS OF THE HEART (1985).

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.¹⁶⁶ 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.¹⁶⁷ 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"¹⁶⁸

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.¹⁶⁹ 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."¹⁷⁰ 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."¹⁷¹ 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.

169. See generally Note, *Modern-Days Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777 (1990).

170. Feedenthal, *Taking a Rap*, Miami Herald, June 11, 1990, at 10A, col. 4; see also Higham, *Crackdown on Risque Artists Growing*, Miami Herald, June 11, 1990, at 4A, col. 2.

171. *Taking a Rap*, *supra* note 170.

gether. It inflames teenagers and is obscenely objective."¹⁷²

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."¹⁷³

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" ¹⁷⁴ 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."¹⁷⁵ 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.¹⁷⁶

The line separating Black culture from the "dominant" American culture is sometimes blurred.¹⁷⁷ The dominant culture and other subcultures, such as late adolescents, have borrowed jazz, blues, and other aspects of the Black culture.¹⁷⁸ 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.

173. Feedenthal, *Taking a Rap*, Miami Herald, June 11, 1990, at 10A, col. 4; Higham, *Crackdown on Risque Artists Growing*, Miami Herald, June 11, 1990 at 10A, col. 1-6.

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 cheived 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.'¹⁷⁹

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.¹⁸⁰ 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."¹⁸⁴ Hip hop music is a combination of musical influences that has been likened to "pop music cubism."¹⁸⁵ As musical expression it is identified foremost with the

179. *Id.* at 148.

180. *See id.* at 165 n.2.

181. *Id.* at 1.

182. H. GATES, JR., *THE SIGNIFYING MONKEY* at 19 (1988) (quoting W. LABOV, NATIONAL SCIENCE FOUNDATION STUDY (1985)).

183. *See id.* *See generally* D. TOOP, *The Rap Attack* (1984).

184. Vandermere, *Introduction* to D. TOOP, *THE RAP ATTACK* (1984).

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 console 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.¹⁸⁶ 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."¹⁸⁷

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.¹⁸⁸ In essence, the language of hip hop was forged from "historical experiences and realities."¹⁸⁹ 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."¹⁹⁰

Originally, hip hop music existed almost exclusively within the Black culture,¹⁹¹ but, as its popularity increased, it became part of the mainstream culture.¹⁹² The increased attention paid to hip hop by the media and numerous musicians caused it to "cross over" into the mainstream culture.¹⁹³

Yet, hip hop was not the only music form influencing the development of rap. A different antecedent was African jive.¹⁹⁴ 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."¹⁹⁵ Within African jive, there were various strains of music. Even boxer Mohammed Ali's rhymes, narrative poems called

LOOKING FOR THE PERFECT BEAT, by Afrika Bambaataa and "Soul Sonic Force," written and produced by Arthur Baker and John Robie, 1982).

186. Vandermere, *supra* note 184.

187. *Id.*

188. *See generally* S. HAGER, HIP-HOP: THE ILLUSTRATED HISTORY OF BREAK DANCING, RAP MUSIC AND GRAFFITI 45-55.

189. Vandermere, *supra* note 184.

190. *Id.*

191. "For over two years rap had developed in almost complete isolation from the rest of the world . . . Tapes were circulated around New York, in prisons, in nearby states, and could even be found on army bases overseas." S. HAGER, *supra* note 188, at 49.

192. *See id.* at 89.

193. *See id.* at 87.

194. *See generally* D. TOOP, THE RAP ATTACK (1984).

195. D. TOOP, THE RAP ATTACK 29 (1984).

"toasts,"¹⁹⁶ were a form of African jive. Some toasts had hundreds of different forms.¹⁹⁷ Most of these toasts glorified the criminal way of life.¹⁹⁸

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."¹⁹⁹

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."²⁰⁰ 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."²⁰¹ 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 percussive effect of short words, and unexpected internal rhymes . . ."²⁰²

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 sub-cultures within the community, including both the ethnic and non-ethnic forms. *Skywalker 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.²⁰³ Instead, the court completely failed to consider culture to inculcate its tri-county "community" - which, as the court conceded,²⁰⁴ contained a wide diversity of people - with values or standards.²⁰⁵

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.²⁰⁶ 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,²⁰⁷ 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.²⁰⁸

203. See, e.g., Mills, *The Rap on 2 Live Crew*, Wash. Post, June 17, 1990, at G6, col. 4-5; Le Moyne, *Recording Ruled Obscene Brings Arrest*, N.Y. Times, June 9, 1990, at A8, col. 4 (nat'l ed.); see also, Phillips, *Obscenity Ruling Rocks Industry*, L.A. Times, June 9, 1990, at F8, col. 1.

204. See also Strossen, Book Review, 62 N.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).

208. D. Hackett & D. Adrianson, *Roots of Rap Run Deep in Black Musical Traditions*, Miami Herald, June 17, 1990, at A12, col. 2; see also Mills, *The Rap on 2 Live Crew*, Washington Post, June 17, 1990, at G9, col. 3. But see Wynter, *NAACP Raps 2 Live Crew, Reflecting Division among Blacks Over the Music*, Wall St. J., June 21, 1990, at A16, col. 1-2.

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 M.M. 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.²¹⁶

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-

216. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA, 6 (1988); see also Holt, *Protecting America's Youth: Can Rock Music Be Constitutionally Regulated?* 16 J. CONTEMP. L. 53, 55 (1990).

217. H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA, 149 (1988); see also Bollinger, *Harry Kalven, The Proust of the First Amendment*, 87 MICH. L. REV. 1576 (1989) (reviewing Kalven's A WORTHY TRADITION).

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 Murphy²¹⁹ 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*,²²⁰ 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.²²¹ 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.²²² Furthermore, the determination becomes not so much about any specific material, but how much material a community had tolerated previously within its geographical boundaries.²²³ 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).

222. H. KALVEN, A WORTHY TRADITION 6 (1988).

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.²²⁴ 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.²²⁵

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."²²⁶

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.²²⁷ 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.

226. Mills, *The Rap on 2 Live Crew*, Washington Post, June 17, 1990, at G9, col. 3.

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.²²⁸ 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.²²⁹ 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."²³⁰

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.

Id.

See also Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 399-400 (1987); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063 (1981).

228. See generally Kahn, *supra* note 227, at 7.

229. P. BUHLE, *POPULAR CULTURE IN AMERICA* (1987).

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.²³¹ 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.²³² One commentator noted that, "[c]ulture 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."²³³ The cultural community test thus may itself become vague to the point that it becomes completely malleable, and lacking in consistency.²³⁴

In Justice Douglas' dissent in *Roth v. United States*, he spoke of

231. While a jury may provide its own representative consensus, even jury deliberations need not reach a consensus in all cases, since a less than unanimous verdict is acceptable in some jurisdictions. Moreover, a jury is not simply an adequate substitute for a clear and precise constitutional standard. As one commentator has noted, "the use of juries . . . however, . . . should not be used in place of an articulate definition." MacDougall, *The Community Standards Test of Obscenity*, 42 U. TORONTO FAC. L. REV. 79 (1984).

232. The theoretical use of community also fails because the notion of community illustrates a concept of consent or approval. This is contradictory to, or at least inconsistent with, the concept of reason, which also informs the law of boundaries. Using community standards to define obscenity law may provide a definition of what material the community consents to seeing, but does not pertain at all to the reasoning for any such determination. As one commentator has noted, "more importantly, only through discourse are common values revealed and maintained. This discursive element of community replicates much of the function of reasoning classical, political theories." Kahn, *supra* note 227, at 3.

233. T. VANDERMERE & D. TOOP, *The Rap Attack* (1984).

234. While flexibility is essential to legal rules and principles, too much of it may undermine those same rules and principles. As one commentator has noted, "while traditional legal theorists acknowledge the inevitability and desirability of some indeterminacy, traditional legal theory requires a relatively large amount of determinacy as a fundamental premise of the rule of law. Our legal system, however, has never satisfied this goal." Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 13 (1984).

the "battle between the literati and the Philistines."²³⁵ In Judge Gonzalez's decision in *Skyywalker Records*, he wrote that "the Philistines are not always wrong."²³⁶ 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 *Skyywalker 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.

235. *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting).

236. *Skyywalker Records, Inc.*, 739 F. Supp. 578.

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.

