COMMENTS

Law in the Electronic Brothel: How Postmodern Media Affect First Amendment Obscenity Doctrine

*Kenneth W. Masters**

I. INTRODUCTION

Since 1989, several interesting and innovative works have probed the relationships among electronic media[1] and various legal doctrines.[2] These works examine the past, the present, and the possible future effects of modern media on the law.[3] They attempt to explain the effects of modern media on the law and society. As such, they are both legal scholarship and media ecology.[4]

More specifically, these works probe the relationships among media, messages, society, and the law. In so doing, they use several models to illuminate the ways in which changes in communication technologies have changed society and its legal

* B.A., Metropolitan State College; J.D. Candidate 1992, University of Puget Sound School of Law.

1. For the purposes of this Comment, media are any technologies and models used to convey messages.

2. The works are as follows: 1) Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEXAS L. REV. 1087 (1990) [hereinafter Collins & Skover, *Paratroopers*]; 2) M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989); 3) Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. (forthcoming 1992) [hereinafter Collins & Skover, *Paratexts*]; 4) Ronald K.L. Collins & David M. Skover, Commerce and Communications (unpublished manuscript, on file with the *University of Puget Sound Law Review*).

3. For example, Professor Katsh notes that "social consciousness," or current societal norms, is as determinative of the meaning of obscenity as is the law. KATSH, *supra* note 2, at 181 & n.26 (citing 2 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 71 (1970)). To the extent that social consciousness is affected by modern media, the meaning of obscenity for society and the law will also be affected by these media.

4. Media ecology is the study of the effects of media on individuals, institutions, and society.

systems. This Comment applies three of these models to the legal doctrines addressing depictions of sex.[5]

The application of these models to obscenity doctrines in general, and to the case of *Skyywalker v. Navarro*[6] in particular, reveals the tentative status of current obscenity doctrine. The doctrine fails to account for the pervasive effects of media on society. This failure results in the inability of the doctrine to provide a coherent basis for careful First Amendment analysis. Consequently, the First Amendment is being debased: it is becoming both ineffective in controlling depictions of sex and also ineffective in controlling censorship. Thus, the models reveal that the First Amendment is in danger of collapse.

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5. In dealing with legal treatments of depictions of sex, virtually every pertinent work struggles from the outset with such questions as What is "sexuality"? What is "obscenity"? and What is "pornography"? Many works, particularly law review articles, begin with a footnote containing OED-type definitions of one or more of these terms. Others, notably book-length treatments such as Walter Kendrick's insightful historical analysis of the development of "pornography," spend their entire contents defining, or refusing to "merely" define, one or more of these terms. *See* WALTER KENDRICK, THE SECRET MUSEUM—PORNOGRAPHY IN MODERN CULTURE (1987).

As both Kendrick and the 1986 Report of the Attorney General's Commission on Pornography point out, to define a word like "pornography" at the beginning of an attempt to understand that term's meaning is a mere exercise in question-begging. *Id.* at 31; ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 228 (1986) [hereinafter 1986 FINAL REPORT]. It is question-begging because such terms "name an argument, not a thing." KENDRICK at 31. As Kendrick also points out, however, the 1986 FINAL REPORT, despite its apparent condemnation of such circular exercises, nevertheless jumps on the definitional merry-go-round by using the word "pornography" on "virtually every one of its 2,000 pages." KENDRICK at 234-35.

This Comment will use phrases such as "depictions of sex" or "sexually explicit depictions" to indicate representations, written or otherwise, of sexual acts. The phrase is intended to recognize the fact of the depiction of sexual acts, rather than to assert the relative value of such depictions. The term "obscenity" is used according to its legal definition at the time it was applied to a given sexually explicit depiction by a court.

The term "pornography" is eschewed because it appears to be the current battleground whereon a struggle is being waged for the power to define the "harmfulness" and relative worth or worthlessness of sexually explicit depictions. *But see* GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 20-29 (1988) (critiquing several pornography commissions' word usage, including the Meese Commission's. The authors nevertheless chose to use the word "pornography" because it includes, by one definition, the intention to arouse sexual impulses in the viewer.). *But see infra* notes 195-200 and accompanying text for a discussion of one court's mistakes regarding the ability to incite sexual behavior.

This Comment argues that the combatants in this struggle are ignoring the effects of the media that carry these depictions in determining the depiction's abilities to harm and their relative worth. As a result, the combatants are merely begging questions.

6. 739 F. Supp. 578 (S.D. Fla. 1990). *Skyywalker* involved the rap group 2 Live Crew's album, *Nasty As They Wanna Be*. The group sought injunctive relief and a declaration that the album was not obscene. *See infra* note 142, *et seq.*

One such model examines the historical relationships between changes in media and changes in society and its legal systems. Through such historical examinations, this model attempts to account for previously unrecognized and unexamined assumptions that may be sources of confusion in current legal thinking.

Another model used by these works to examine the effects of media on the law is the development of broad-based heuristics. A heuristic is both a system for organizing thought and a model for stimulating thought. The application of these models to current legal doctrine reveals discontinuities that may have developed between legal theory and the real world. Such discontinuities stem from a general failure to examine the effects of media on the law itself. By clarifying the pervasive ways that media affect legal doctrines, such heuristics may help courts and scholars to develop legal theories that will more accurately reflect the real world.

A third model for examining the relationships between law and media applies specific media theories to the facts of a case. This narrowly focused approach contrasts with and adds to the broader heuristic approach described above. By specifically analyzing the effects of media in the context of particular cases, this third model illuminates gaps in courts' reasoning caused by their failure to understand media effects. By elucidating these effects, this model may facilitate more careful analyses by the courts.

Thus, this Comment seeks to examine the implications of media ecology models for the past, present, and possible future of obscenity doctrine.[7] Section II of this Comment applies the first model in examining the historical origins of obscenity doctrine in light of media ecology.[8] This analysis of history reveals a critical presupposition about the effects of media on human behavior.

Since the Middle Ages, the ability of words to affect

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7. Professors Collins and Skover have applied the concepts of media ecology to the broader framework of the law. *See Paratroopers* and *Paratexts*, *supra* note 2. This Comment may be viewed in part as both an introduction to the concepts contained in their work and also as an application of their media theory framework to obscenity doctrine.

8. Professor Katsh gives a concise analysis of the development of obscenity doctrine in relation to developing media. KATSH, *supra* note 2, at 181-89. This Comment will expand on Professor Katsh's work.

human sexual conduct has been presupposed.[9] However, no one has convincingly demonstrated a causal connection between depictions of sex and sex crimes.[10] The assertion of such a connection may have developed as a result of the Catholic Church's struggle to control the written word.[11] In spite of this lack of empirical evidence supporting a causal connection between pictures of sex and sexual violence, courts have adopted this presupposition wholesale.[12] Thus, courts are perpetuating the presupposition as a legal presumption and, thereby, perpetuating confusion in legal thinking about sexually explicit materials.

To say that the courts have adopted the Church's presumption wholesale is not, of course, to say that such adoption is intrinsically "bad." However, the presumption fails to explain why obscenity is "harmful" and "worthless."[13] Seen in the light of media ecology, the historical development of obscenity doctrine[14] reveals that the absence of explanation

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9. *See infra* text accompanying notes 28-72, and KENDRICK, *supra* note 5.

10. *See* EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY 108-12 (1987) (while depictions of sex do not increase tendencies toward sexual aggressiveness, unless such depictions also include violence, depictions of violence alone may increase tendencies toward sexual aggressiveness). *Compare, e.g.*, 1986 FINAL REPORT, *supra* note 5, at 317-19:

> We recognize, therefore, that a positive correlation between pornography and sex offense does not itself establish a causal connection between the two. . . . The plausibility of hypothesized independent variables causing both use of pornography and sex offenses is one factor in determining the extent to which causation can be suggested by correlational evidence. . . . [B]ut *in no area has this inference* [causation from correlation] *been strong enough to justify reliance on correlational evidence standing alone*. . . . [Therefore,] drawing conclusions requires making assumptions. . . . Sometimes these assumptions are justified, and sometimes they are not.

(emphasis added), *with* 1986 FINAL REPORT at 203-07 (dissenting member doubting the efficacy of the social science materials cited in 1986 FINAL REPORT), *and with* PHILIP NOBILE & ERIC NADLER, UNITED STATES OF AMERICA V. SEX: HOW THE MEESE COMMISSION LIED ABOUT PORNOGRAPHY 351-53 (1986) (two researchers whose work was relied on by the Commission stating "new and more sophisticated research [our's and others'] reviewed by the Commission makes a causal connection between sexually explicit materials and rape even *less* plausible than it was when the 1970 Commission was examining this issue.").

11. *See infra* text accompanying notes 25-30. This struggle may have had its origins in the Judeo-Christian traditions surrounding the control of pictorialism (such as graven images) in the Middle Ages.

12. *See infra* text accompanying notes 38-72.

13. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY 181 (1986) (arguing that categorical exclusions of certain types of speech that do not require explanations by the court fail to provide the necessary guidance to society).

14. *See infra* text accompanying notes 38-72.

lies, at least partially, in the development of the media used to carry such messages.

In Section III, this Comment next applies the second model; the current test that courts use to determine whether an expression is obscene is examined through two broad media theory heuristics: the Paratroopers' Paradox[15] and the absorption theory.[16]

This Comment also applies the third model; Section IV examines media effects within the context of recent cases by applying specific media ecology theories to those facts. This application reveals the inability of current obscenity doctrine to facilitate careful and insightful analyses. By failing to account for the effects of media on the messages being analyzed, courts reach self-contradictory and untenable conclusions. This application also demonstrates the benefits of a careful examination of media effects within the context of obscenity analysis.[17]

II. THE HISTORY OF OBSCENITY LAW AND ITS RELATION TO CHANGING MEDIA[18]

Sexually explicit works have existed in the Occident at

15. Collins & Skover, *Paratroopers*, *supra* note 2.

16. The absorption theory is based on Jean Baudrillard's theories of "implosion." Those theories are developed in JEAN BAUDRILLARD, IN THE SHADOW OF THE SILENT MAJORITIES (1983) [hereinafter, BAUDRILLARD, SHADOW]. For an explanation of absorption theory, see *infra* text accompanying notes 93-114.

17. See *infra* text accompanying note 142, *et. seq.* For an analysis of the effects of postmodernist art on obscenity analysis, *see* Amy M. Adler, Note, *Postmodern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990). This Comment will reach a substantially similar conclusion to that of Ms. Adler: that rational legal principles are debased by postmodernist discourse involving new concepts of the limits of art and its relation to depictions of sex acts. However, this Comment seeks to analyze the broader effects of the media themselves, rather than specific uses of the media.

18. Many works have examined the history of the development of obscenity law. This Comment draws largely on the following works: EDWARD DE GRAZIA, CENSORSHIP LANDMARKS (1969); KATSH, *supra* note 2 at 181-89 (1989); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 904-27 (2d ed. 1988); Karl A. Groskaufmanis, Comment, *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1236, 1265-72 (1988); Robert E. Riggs, *Indecency on the Cable: Can it be Regulated?*, 26 ARIZ. L. REV. 269, 279-87 (1984); William B. Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 537-46 (1975); Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 3-22 (1974); William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 324-29 (1954); Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between Stanley v. Georgia and New York v. Ferber*, 29 WM. & MARY L. REV. 187, 189-98 (1987).

least since the Golden Age of Greece.[19] However, common law regulation of obscenity did not begin until the late eighteenth and early nineteenth centuries.[20] As Justice Douglas repeatedly noted in dissent,[21] obscenity in literature was considered a matter for the ecclesiastical courts until the second half of the nineteenth century.[22]

Prior to the development of the printing press in 1450, "scarcity and obscurity provided all the necessary safeguards" against widespread access to sexually explicit works.[23] The few transcriptions of texts were written slowly and exclusively by hand. Scribes were among the few who could read what was written. Because they learned their skills from the only school available, the Catholic Church, scribes rarely transcribed anything sexually oriented.[24] Thus, the Church effectively maintained control over access to sexually explicit materials.

As the print medium expanded, however, the leaders of the fifteenth-century Catholic Church recognized that the printed word presented a threat to the Church's control over hearts and minds.[25] Consequently, Church leaders perceived any messages conveyed through this new medium as dangerous to the extent that such messages threatened the Church's control.[26] Sexually explicit messages, therefore, were specifically regulated only to the extent that they were combined with

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19. KATSH, *supra* note 2, at 181-82.

20. *Id.* at 183-85.

21. Memoirs v. Massachusetts, 383 U.S. 413, 428-29 (1966); United States v. 12,200-Ft. Reels of Film, 413 U.S. 123, 135 (1966) (Douglas, J., dissenting). Justice Douglas' point was that common law courts had absorbed the ecclesiastical courts' presumptions regarding the harmfulness of depictions of sex acts, which were in turn largely based on the moral presuppositions of St. Augustine regarding original sin. *See generally* ELAINE PAGELS, ADAM, EVE, AND THE SERPENT (1988) (particularly ch. 5).

22. *Memoirs*, 383 U.S at 428-29. The origins of ecclesiastical censorship may perhaps be traced to St. Paul's followers. For example, the following passage is found in *Acts*: "Many of them also which used curious arts brought their books together, and burned them before all *men*. . . ." *Acts* 19:19 (King James).

23. KATSH, *supra* note 2, at 184 & n.39 (quoting KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE 58 (1987)).

24. WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 95 (1982). *See also* HAROLD INNIS, THE BIAS OF COMMUNICATION 19 (1951). Professor Innis' work was instrumental in the development of media ecology. Among others, it strongly influenced media ecologist Marshall McLuhan. McLuhan examined the transformation of human consciousness through alterations in communications technologies from orality to scribality, to print and beyond. *See, e.g.*, MARSHALL MCLUHAN, THE GUTENBERG GALAXY (1962) [hereinafter MCLUHAN, GALAXY].

25. KATSH, *supra* note 2, at 183-85.

26. *Id.*

messages that were politically dangerous.[27]

Within one hundred years after the advent of the printing press, the Church had determined that the printed word could corrupt the morals of its followers and had begun to control access to all types of printed works.[28] For example, in 1564, the Council of Trent published Pope Paul IV's ten rules for controlling literature in the Index of Forbidden Books; rule number seven forbade obscene books that might corrupt morals.[29] The Church failed to enforce these rules, however, perhaps because the Church was more interested in prohibiting dissemination of vernacular bibles.[30]

Similarly, the mid-sixteenth-century English government made no major attempts to control sexually explicit materials. However, because the government, like the Church, recognized the power of the word, it did manifest some desire to control the word through licensing statutes. These statutes prohibited plays that dealt with politics or religion in an unsatisfactory manner. In addition, a historical inversion of censorial concerns regarding political speech on the one hand, and obscene speech on the other, began to develop around this time.[31] As sexually explicit materials that had been reserved to the elite literate class became more accessible, the government gradually began to regulate them.[32]

Well into the late seventeenth century, the government asserted little control over sexually oriented materials and simply allowed the English licensing acts to expire. In addition, writings like those of Locke and Spinoza, calling for religious toleration and for the separation of politics and religion, began to influence political thought and institutions. Thus,

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27. *Id.*

28. JOSHUA MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 64 (1985) (citing S.H. STEINBERG, FIVE HUNDRED YEARS OF PRINTING (1974)). Meyrowitz, a media ecologist working from the perspective of sociology, argues that the Church's relative indifference to obscenity problems resulted from a perception in the Church that obscenity control was of relatively little import to maintenance of hegemony over individual morality. This fact will attain a certain irony as control of sexually explicit materials attains greater importance in the twentieth century. As will be shown, modern concerns over obscenity control are at least partially based on assumptions made by the Church regarding the supposedly powerful effect that depictions of sexuality have on morality. These assumptions were never questioned by courts at common law.

29. *Id.*

30. *Id.*

31. KATSH, *supra* note 2, at 185.

32. *Id.*

until the eighteenth century, control of sexually explicit materials remained with the religious institutions.

Although the term "obscene" was used in the context of common law libel cases beginning in 1726,[33] no definition of the term was provided. Prosecutions were limited to cases of libel, or "obscene libel," and to cases involving obscene conduct in public places.[34] Punishment for obscenity was thereby limited to attacks on others' reputations—reputations that could only develop and spread in the context of the printed word.

In the late eighteenth century, an explosion of mass publication occurred as commercialism and commodification[35] combined with mass printing technologies.[36] Since that time, a heated battle has raged in both religious and secular circles concerning the widespread dispersion of sexually explicit materials.[37]

Nineteenth-century England saw the development of the first secular and nongovernmental movements to suppress sexually-oriented materials when concerned citizens formed the "Society for the Suppression of Vice" in 1802, and Thomas Bowdler published his "bowdlerized" version of Shakespeare in 1818. This secularization of control over obscenity was a response to the collapse of religious hegemony over moral standards, partially brought about by the proliferation of printed works accessible to the public. In response to these political pressures, Parliament passed the Obscene Publications Bill in 1857, though the Bill left the term obscene undefined.

In the late nineteenth century, the court in *Regina v.*

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33. *Id.* at 183.

34. *Id.* The Obscene Publications Act of 1857 used the term "obscene libel." 1857, 20 & 21 Vict. ch. 83 (Eng.). The purpose of the act was to make "obscene publication" indictable. *Id.* However, as might be expected, the Act gave no definition of "obscene." *Id.*

35. "Commodification" is the process by which materials change from unique or limited production items into commodities that are reproduced on a mass scale.

36. INNIS, *supra* note 24, at 27, 29. While Professor Katsh does not directly discuss the interplay between commodification and commercialization, Collins and Skover place considerable emphasis on this causal nexus. Collins & Skover, *Paratroopers*, *supra* note 2, at 1097-1107. *See also* Collins & Skover, Commerce and Communications, *supra* note 2 (examination of dissonance between commercial speech theory and realities of electronic advertising culture). Commodification and commercialization are both seen as a result of the Industrial Revolution, which was in turn caused by the development of print, among other factors, according to Innis, McLuhan, and others. *See, e.g.*, MCLUHAN, GALAXY, *supra* note 24, at 269-72.

37. *See infra* note 41 (listing some of the works that detail the ongoing assault).

Hicklin[38] stated a common law test for obscenity. The *Hicklin* court examined obscenity in terms of representations of sexuality and their effects on the most susceptible persons that might be exposed to such representations.[39] Thus, any representation of sexually-related matter that might corrupt children or the "morally susceptible" could be suppressed under the *Hicklin* test. The *Hicklin* test also allowed the courts to find an entire work obscene based on any portion of the work, rather than requiring examination of the work as a whole.[40]

Although it purported to create a legal standard of obscenity, the *Hicklin* test merely absorbed the unexamined assumption that written depictions of sexually-oriented subjects were a corrupting influence. Thus, by 1868, the common law of England had absorbed the censorial concerns about sexually explicit speech. The shift from religious control of obscenity to legal control was all but complete. Thus, the statutory and common law of England had fully absorbed the assumptions made under religious tenets regarding obscenity.

Since the mid-eighteenth century, censorial zeal regarding sexually explicit material has greatly expanded, particularly in the late nineteenth and twentieth centuries with the advent of electronic media.[41] This increased fervor will be examined in

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38. [1868] 3 L.R.-Q.B. 360. *Hicklin* involved a "respectable metal broker's" possession and distribution of a work entitled "The Confessional Unmasked: Shewing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession." *Id.* at 362. Because it was destroyed, and the court is silent on the point, no one knows what the document actually said, though the court did say it contained "impure and filthy acts, words, and ideas." *Id.* at 363. These are the words of the Obscene Publications Act as well.

39. *Id.* at 368. The specific language of the court was "[w]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.*

40. TRIBE, *supra* note 18, at 906. However, Professor Tribe acknowledges an argument that *Hicklin* does not support an "isolated passages" test because one-half of the work at issue was found obscene. *Id.* at n.17 (citing Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1406 (1966)). The *Hicklin* court also noted that "[t]he mere use of obscene words, or the occurrence of obscene passages, does not make the work obscene"; otherwise, "the Venus in Dulwich Gallery," "Bayle's Dictionary," "Chaucer," "Byron," and "Milton's Paradise Lost and Regained" might all be considered "obscene." *Hicklin*, 3 L.R.-Q.B. at 365.

41. KATSH, *supra* note 2 at 181-86. *See generally*, EDWARD DE GRAZIA, BANNED FILMS: MOVIES, CENSORS, AND THE FIRST AMENDMENT (1982) (historical analysis of film censorship); EDWARD DE GRAZIA, CENSORSHIP LANDMARKS, *supra* note 18 (extensive survey of important court cases involving censorship); ROBERT P. DOYLE, BANNED BOOKS WEEK '90: CELEBRATING THE FREEDOM TO READ; A RESOURCE BOOK (1990) (citing hundreds of books recently banned or challenged); MICHAEL B.

relationship to developments in United States law and changes in modern media.

In the United States, the *Hicklin* test was widely adopted by the courts.[42] The groundwork for this widespread acceptance had been laid by secular movements, similar to those in England, organized to control the spread of sexually-oriented materials. Anthony Comstock and other self-styled guardians of public morality campaigned and lobbied for legislation to restrict the flow of all sexually-related materials.[43] These activist groups were largely successful, spurring the enactment of federal legislation criminalizing the mailing of obscene materials (the so-called Comstock Act of 1873[44]) and the adoption of anti-obscenity statutes in several states.[45]

Although Judge Learned Hand recommended abandoning the English *Hicklin* test as early as 1913,[46] it was not until 1933 that American courts decisively rejected the test.[47] Presiding

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GOODMAN, CONTEMPORARY LITERARY CENSORSHIP: THE CASE HISTORY OF BURROUGHS' NAKED LUNCH (1981) (interesting account of the various court challenges to gonzo journalism's seminal text); ROBERT W. HANEY, COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL (1974) (detailing the rise of the populist censorial campaign).

42. TRIBE, *supra* note 18, at 906.

43. *Id. See generally*, Lockhart & McLure, *supra* note 18, at 311-16.

44. Comstock Act of March 3, 1873, ch. 158, 17 Stat. 559 (codified at 18 U.S.C. § 1461 (1988)). The Comstock Act provided:

> That no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which indecent or scurrilous epithets may be written or printed, shall be carried in the mail.

Cited in KENDRICK, *supra* note 5, at 134 (citing ANTHONY COMSTOCK, TRAPS FOR THE YOUNG (Robert Bremmer ed., 1967)).

45. *See generally*, HANEY, *supra* note 41. In addition, local censorship boards, which managed to prevent the dissemination of many works through threats of boycotts and lawsuits, proliferated in the United States. *Id.*

46. *See* United States v. Dennerley, 209 F. 119, 121 (S.D.N.Y. 1913).

47. By that point, such works as THEODORE DREISER, AN AMERICAN TRAGEDY and D. H. LAWRENCE, LADY CHATTERLY'S LOVER had been found to be obscene. *See* TRIBE, *supra* note 18 at 906-07 (citing Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930) (AMERICAN TRAGEDY) and Commonwealth v. Delacey, 271 Mass. 327, 171 N.E. 455 (1930) (LADY CHATTERLY'S LOVER)). Interestingly, in England, Lawrence's THE RAINBOW had been banned in 1915, and no attempt to publish LADY CHATTERLY'S LOVER was made until 1959.

at a trial involving James Joyce's *Ulysses*,[48] Judge Woolsey created a new test and rejected *Hicklin*.[49] Finding *Ulysses* not to be obscene, Judge Woolsey suggested a new standard that measured the effect of the work on the "average person," rather than *Hicklin*'s "most susceptible person," and also examined the work as a whole, rather than only the most questionable portions, as *Hicklin* allowed.[50]

The rejection of the *Hicklin* test marked a substantial improvement in the efficacy of obscenity examination. By requiring consideration of the effects of the entire work, the *Ulysses* test avoided banning works based on isolated passages alone. This aspect of the *Ulysses* standard somewhat mitigated the unfortunate wholesale adoption of the *Hicklin* assumption that explicit depictions of sexuality are harmful to the average reader. This continued assumption that sexually explicit materials are harmful was unfortunate because, like any tacit assumption in the law, it may create a perception that the law in this area is unreasonable, arbitrary, and unprincipled. In other words, by failing to explain how the depiction of sexually explicit activity is harmful to the average reader, the court appears to lack a rational foundation for its assertions.

Applying the new standard, Judge Woolsey noted the tremendous creativity and essential integrity of Joyce's psychoanalytical or stream-of-consciousness approach in *Ulysses*. He likened Joyce's technique to a "multiple exposure on a cinema film," the parts of which could not be separated without making a mockery of his "sincere" and "honest" artistry.[51] Further, Judge Woolsey speculated that Joyce's use of this

48. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub. nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934). ULYSSES is considered by many critics to be one of the great works of literature produced in this century. It is an allegory about one day in the life of Leopold Bloom and his friends and family in Dublin, Ireland. It is written in a stream of consciousness format. No intimate thoughts that might conceivably come to mind in the course of a day are omitted, including those of sex and excretion. The intrusiveness of such depictions, combined with the obvious power of the narrative, led many to seek to ban ULYSSES.

49. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub. nom.* United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934). *See also* TRIBE, *supra* note 18, at 907.

50. *Ulysses*, 5 F. Supp. at 183-84. Indeed, with regard to examining the whole work, Judge Woolsey also noted that many critical studies of ULYSSES had been published. He even appeared to suggest that such in-depth analysis was the proper approach because of the work's literary reputation. *Id.* at 183.

51. *Id.*

graphic-like technique may have been one source of the famed obscurity of *Ulysses* because such rich and complex images are difficult, if not impossible, to capture in print.[52]

Thus, in refusing to ban *Ulysses* on the basis of the "strong draught"[53] of sexuality contained in some portions of the work, Judge Woolsey implemented a holistic analysis of the effect of the entire work. He analyzed the effect of the medium as a whole, rather than destroying the integrity of the message by separating it from its context. Judge Woolsey found the overall effect of the work to be "that of a somewhat tragic and very powerful commentary on the inner lives of men and women," rather than that of an "aphrodisiac."[54] Courts quickly adopted and applied the *Ulysses* formulation.

Then, in 1957, the Supreme Court addressed for the first time whether the First Amendment's protection of speech and the press should be extended to sexually explicit works. In *Roth v. United States*,[55] the Court applied a *Ulysses*-oriented test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[56] Unfortunately, the Court again carried forward the assumption that obscenity, whatever it may be, is "utterly without redeeming social importance."[57]

Once again, the Court failed to examine the presumptions underlying its assertion that depictions of sex are worthless.

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52. *Id.* This is not the last time that written works will be analogized to film, nor will such analogies always produce such happy consequences. *See infra* text accompanying notes 204-12 (discussing the analogy as applied in Skyywalker v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990)).

53. *Ulysses*, 5 F. Supp. at 185.

54. *Id.* The requirement of taking the work as a whole raises some interesting definitional issues involving photographs and music. *See infra* text accompanying note 185.

55. 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957).

56. *Id.* at 489. In a companion case to *Roth*, Butler v. Michigan, 352 U.S. 380 (1957), the Court implicitly rejected *Hicklin*'s susceptible persons test.

57. *Roth*, 354 U.S. at 484. While the Court did not explain what it was finding obscene or why, it did say that "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." *Id.* at 487 (footnote omitted). "Prurient interest" was defined in a footnote as "material having a tendency to excite lustful thoughts." *Id.* at 487 n.20 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949)). While the Court may have believed that this definition had some operative content, it is unclear how such a broad definition could distinguish many of the sights and sounds of a large American city from the material at hand. Once again, the circle was completed, the question begged, and the presumption absorbed.

This time, however, the Court's failure to examine this assumption is particularly unfortunate because, given the importance of the First Amendment to the *Roth* decision, the appearance of irrational decision-making creates a new level of danger for the First Amendment.[58] If the central meaning of the First Amendment is to protect speech from oppression, then the apparently arbitrary, unexamined exclusion of any particular expressive act (in this case, certain sexually explicit expressions) debases the meaning of the First Amendment itself.[59]

The development of an indeterminate constitutional test such as *Roth* provided was particularly striking in the context of the extensively researched, cogently argued concurrence by Judge Frank of the Second Circuit Court of Appeals in the lower court opinion.[60] Judge Frank pointedly noted that the "Victorian morality" underlying the post-*Hicklin* decisions had developed in the United States well after the First Amendment was adopted.[61] Thus, Judge Frank argued, the Court should interpret the First Amendment in light of the much more open views of the Framers, rather than the "prudish" views of the Victorians.[62] On the other hand, in light of subsequent developments, the *Roth* court's refusal to abandon categorical exclusion of some forms of sexual discourse may appear more prescient than prudish.

By the time of *Roth* a whole new wave of sexually explicit materials was hitting the marketplace of ideas. This new sexual discourse was carried out in pictures whose messages were very difficult to control. Pictorial messages may be difficult to control because such representations tend to blur the bright lines of print-based discourse.[63] For example, the multiplicity of their pictorial messages cannot be as easily controlled because enforceable distinctions between the various messages they seem to carry cannot be made. As Judge Woolsey noted in *Ulysses*, pictures never leave the realm of the concrete, so

58. For a detailed discussion of the ramifications of such unprincipled First Amendment decision-making, *see* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1982).

59. For further discussion of the debasement of the First Amendment, *see infra* Section III of this Comment.

60. United States v. Roth, 237 F.2d 796, 801-27 (1956), *aff'd*, 354 U.S. 476 (1957) (including Appendix to the case).

61. *Id.* at 808.

62. *Id.* at 808-09.

63. MEYROWITZ, *supra* note 28, at 93-100.

their meanings are difficult to understand and delimit within the context of abstract rational discourse. Because pictures seem to portray reality unmitigated by the relatively detached rationality created by print, pictures can be exploited for the lowest of purposes.[64]

In sum, pictorial images are relatively fixed and concrete because they present their images rather than explain them. Thus, their expressive content is nearly impossible to control short of preventing their distribution from the outset. As a result, the traditional remedy for undesirable speech—"more speech"[65]—may not be effective in fighting the messages conveyed by pictures. As noted, viewed in this light, Justice Brennan's *Roth* opinion may indeed appear more prescient than prudish.

By 1966, however, a plurality of the Court was prepared to abandon unexplained assumptions about the utter worthlessness of sexually explicit materials. In a case involving John Cleland's *Fanny Hill*, the Court turned its *Roth* assumption that obscenity is totally worthless into the *Memoirs* test for obscenity.[66] Under the *Memoirs* test, a work is not obscene *unless* it is "utterly without redeeming social significance."[67]

This new insight that a presumption of social worthlessness begs the essential question as to whether sexually explicit materials should be protected never commanded a majority of the Court. Instead, there ensued a series of per curium decisions, beginning with *Redrup v. New York*,[68] wherein each member of the Court applied his own unspecified test to determine whether a work was obscene.[69] In these cases, the Court offered much individual-case justice but little overall public guidance regarding the duties and limitations created by the *Memoirs* test. Thus, seemingly totally unstandardized analysis of First Amendment obscenity doctrine became the norm.

The inability of the *Redrup* era Courts to cope with the onslaught of the new sexual discourse elicited by the conjunc-

64. *See generally*, DANIEL BOORSTIN, THE IMAGE: OR WHAT HAPPENED TO THE AMERICAN DREAM (1962); *see also*, MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 177 (1964) [hereinafter MCLUHAN, UNDERSTANDING MEDIA].

65. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-55 (1974).

66. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

67. *Id.* at 418.

68. 386 U.S. 767, *reh'g denied sub. nom.* Austin v. Kentucky, 388 U.S. 924 (1967).

69. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 81-82 & n.8 (1972), *reh'g denied*, 414 U.S. 881 (1973) (Brennan, J. dissenting).

tion of modern media with sexually explicit messages represents a collapse of meaning in the face of a troubling paradox. The Court faced on one side the possibility of the wholesale commercialization of sexuality through the mass distribution of sexually explicit materials. Such commercialization threatened to trivialize sexuality by reducing it to entertainment—entertainment that was both exploitive and amoral. The Court faced on the other side the possibility of wholesale censorship of sexually explicit materials under the aegis of the First Amendment. But using First Amendment doctrine to censor a form of expression appeared contrary to the free speech ideals the amendment was supposed to protect.

Unable to resolve these difficult and conflicting problems, the Court retreated into silence. By issuing per curium decisions without explaining its findings, the Court allowed the meaning of obscenity doctrine to collapse.[70]

Perhaps in response to this collapse of meaning, the Court reexamined traditional First Amendment values in 1973.[71] To the other *Memoirs/Roth* requirements, the Court added a requirement that a work be of serious literary, artistic, political, or scientific value. This new approach, known as the *Miller* test, stated that:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[72]

This new test, which is still applied today, was the first test of obscenity since *Roth* to command a majority of the Court. It attempts to shore-up a collapsing First Amendment obscenity doctrine. As the next section will show, it cannot succeed. On the contrary, the *Miller* test may well have accelerated the implosive forces acting on the First Amendment.

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70. This "collapse of meaning" is the central focus of the third section of this Comment concerning the "absorption thesis" and the "Paratroopers' Paradox." *See infra* text accompanying notes 73-127.

71. Miller v. California, 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

72. *Id.* at 23-24 (citations omitted).

III. THE PARATROOPERS' PARADOX, THE ABSORPTION THESIS, AND THE *Miller* TEST

Before examining the relationships between the media and the *Miller* test, two heuristic devices, the Paratroopers' Paradox[73] and the absorption thesis,[74] must first be explained. The application of these heuristics will reveal that the First Amendment is in danger of collapse because of the paradoxical and implosive forces at work in the postmodern media.

A. The Paradox Explained

The Paratroopers' Paradox is underpinned by the precept that the First Amendment was intended to protect speech from unjust oppression. Yet no agreement has ever been reached on the meaning of the term speech, the reasons for protecting it, or the limits on the means and meaning of oppressing it. Each of these concepts has been, to differing degrees, the subject of First Amendment theory and doctrine. Despite the prodigious body of literature and law on the subject, however, these theories have failed to recognize either the full possibilities for the debasing of the First Amendment embodied in the modern media, or the potential impossibility of protecting speech from such debasement, whatever speech may be. The idea that a significant new threat to the First Amendment may now exist as a result of the advent of modern electronic media is one element of the analysis in Paratroopers' Paradox.

Traditional First Amendment theorists may be categorized into three groups: (1) the classicists, who hold that government may be empowered to regulate electronic mass communications that do not promote traditionally important First

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73. *See* Collins & Skover, *Paratroopers*, *supra* note 2. The summary of the "Paradox" given here is necessarily simplified, with apologies to Professors Collins and Skover. The importance of the Paradox for the study of media and the First Amendment requires the reader to have at least a limited familiarity with it. Along these lines, one additional caveat is necessary. The delineation of the Paratroopers' Paradox is intended as a heuristic, that is, a model designed to stimulate thought. It creates a "trichotomy" of First Amendment doctrine. Whether such a trichotomy is extant, and whether anyone falls neatly into any of the three models, is neither relevant nor important. The point is to identify the archetypal paradigms of current First Amendment jurisprudence, and then to examine the discontinuities between those archetypes and current realities. The question raised is whether current modes of thinking about the First Amendment lack efficacy in the face of the effects of the postmodern media.

74. *See supra* note 16.

Amendment values;[75] (2) the modernists, who hold that all forms of discourse that contribute to self-realization may be protected;[76] and (3) the reformists, who see the dangers implied in the trivialization of public discourse on the one hand, and the dangers of governmental censorship on the other. But the reformists believe that regulation can be limited so as not to infringe on fundamental rights.[77] While these three approaches to the First Amendment cover a wide territory, they are all threatened by "the new pleasure principle."[78]

The new pleasure principle describes the conjunction of the imagistic, nonsequential, and nonrational[79] electronic media[80] on the one hand, with the trivializing tendencies of commercialization on the other.[81] This conjunction of non-

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75. Collins & Skover, *Paratroopers*, *supra* note 2, at 1109-12 (citing Professors Meiklejohn and Anastaplo as classicists).

76. *Id.* at 1112-14 (citing Professor Ithiel de Sola Pool as "[p]erhaps the most highly regarded" modernist).

77. *Id.* at 1114-15 (citing consumer protection advocate Ralph Nader and public-interest lawyer Claire Riley as reformists).

78. *Id.* at 1090-97. The new pleasure principle is based on Freud's "old" pleasure principle—the conception of the human psyche as insatiably in search of pleasure.

79. *Id.* at 1095. "Imagistic" means simply that electronic media (particularly visual media, but also aural ones) present images rather than engaging in discursive description. "Nonsequential" points to the tendency for the presentation of images to be disconnected by comparison to the linearity of print media. The consequences of the presentational nature of electronic media are several, including: 1) their messages are concrete, rather than abstract; 2) their messages are ambiguous, rather than precise; and 3) their messages are expressive, rather than intercommunicative. *See* MEYROWITZ, *supra* note 28, at 93-99. In sum, these dichotomies tend to illustrate the distinction between written discourse, which is based on print conventions such as abstraction and more precise intercommunication, and the electronic media's presentation of concrete, ambiguous, and relatively indeterminate images. While meaning in written discourse is generally more controlled, precise, and verifiable, there is probably no way to control the expressive content of presentational messages, nor to verify their meaning to all observers. Thus, presentational media are considered "nonrational" relative to discursive media.

80. It must be noted here that Professors Collins and Skover focus exclusively on the effects of television in *Paratroopers*, while this Comment necessarily implicates other electronic media such as radio, film, video, and recorded music. However, the effects of these various electronic media are largely analogous; to the extent that they are not analogous, relevant distinctions will be noted. Collins & Skover, *Paratroopers*, *supra* note 2.

81. *See* Collins & Skover, *Paratroopers*, *supra* note 2, at 1097-1106; *see also* Collins & Skover, Commerce and Communications, *supra* note 2:

> In the new age of 'reason,' mass advertising asserts preferred constitutional status by associating itself with classified communications. Yet, it does so talismanically. Merely by invoking the norm of informed and rational decisionmaking, imagistic advertising professes to promote it. By assuming the weighty importance of reason, mass advertising does precisely what it does best: it appropriates the symbols of informational advertising, reconstructs

rational forces threatens to undermine the classical values of serious public discourse by trivializing all discourse.[82] In other words, modern media debase the serious public discourse that the First Amendment was designed to protect; therefore, according to the classicists, modern media must be removed from the protection of the First Amendment.[83] However, much of the traditional print-based discourse that classicists honor and respect is now carried on, albeit in greatly altered form, within the modern media.[84] Thus, by eliminating protection for these media, the classicist risks allowing the censorship of a great deal of serious public discourse. Such an oppressive approach appears contrary to the classicist's fundamental desire to protect speech through the First Amendment. The classicist is caught in a dilemma.[85]

The classicists' restrictive view of the scope of First Amendment protections is difficult for the modernist to stomach. The contradiction of the essence of First Amendment purpose—protecting speech from oppression—is clear in the modernist mind. Contrary to such a restrictive, classical view, the modernist advocates full protection for the modern media.[86] But such undifferentiated protections unleash the full trivializing potential of the modern commercial media and sound the starting gun for the race to the bottom. As soundbite discourse and cartoon politics and news gain in popularity, the social climate becomes less favorable for the kinds of meaningful political participation and rational discourse necessary to maintain democratic institutions.[87] Meaningful dissent

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them in its own image, and returns them to the legal community in the form of constitutional defenses.

Id. at 52.

82. Collins & Skover, *Paratroopers*, *supra* note 2, at 1095-1106. Collins and Skover proffer several media theories to explain the trivializing effect of electronic media: (1) because these media compress reality and disconnect it from a broader human context, they reduce all discourse to entertainment; *Id.* at 1095; (2) because these media are imagistic, they tend to encourage observers to respond emotionally, rather than rationally; *Id.* at 1096; (3) because these media are subjected to the competition of the marketplace, and because they tend to treat all their messages equally, all messages, including serious political discourse, are carried down in the proverbial "race to the bottom"; *Id.* at 1097-1106; and (4) because the competition of the market also places a premium on time, these media tend to produce decontextualized, nonrational, "soundbite discourse." *Id.* at 1101.

83. *Id.* at 1110-12.

84. *Id.* at 1119.

85. *Id.* at 1117-19.

86. *Id.* at 1112-14.

87. *Id.* at 1112.

may be squelched, and all discourse sunk to the level of "the lowest passions."[88] The modernist First Amendment becomes trivialized.[89]

Perhaps in a reaction against classicist oppression of speech on one side and against modernist trivialization of speech on the other side, the reformist stands the middle ground. By attempting to develop uses of media that may educate the populace on the dangers of trivialization, the reformists infuse the media with meaning and purpose and fight both opposing dangers.[90] Nonetheless, by using the media, the reformists subject their messages to the media's tendency to trivialize. That is, if the reforms are to gain an audience for their message they must either control the media or compete with them. On the one hand, to maintain a forum in the face of strong competition, reformists must place restrictions on others who would use the media to convey trivialities. On the other hand, if reformists refuse to stoop to such censorship, they must compete with other messages on the same entertainment-based terms they hope to undermine if they are to pull viewers away from the more entertaining, albeit trivial, fare.[91] Such tightrope walking is likely to be ineffectual, because the forces on either side of the reformists will be working unconstrained by any need of great care to pull them to one side or the other.[92]

Now that the paradoxical relationship between First Amendment theory and modern media has been examined, the Paradox itself becomes clear. The purpose of the First Amendment is to provide for the values of civic dissent, citizenship, and rational discourse by protecting some forms and models of expression. But the extension of First Amendment protection to the commercial mass media seems to undermine those traditional First Amendment values. Classicist protection of serious discourse results in a censorship of the media through application of the First Amendment; modernist openness to all forms of media results in trivialization of discourse under the protection of the First Amendment; and reformist attempts to balance between censorship and triviality result in ineffectual protection of speech under a debased First Amendment.

88. *Id.* at 1121 (citing ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 41 (1958)).
89. Collins & Skover, *Paratroopers*, *supra* note 2, at 1116.
90. *Id.* at 1114-15.
91. *Id.* at 1121-23.
92. *Id.*

B. The Absorption Thesis Explained

The second heuristic model of interest is the absorption thesis. It is essentially an extension of the theories of Jean Baudrillard regarding the *"implosion of meaning in the media."*[93] This is a highly abstract and difficult concept, but its implications for obscenity doctrine argue strongly for an examination of its possibilities. To oversimplify:

Baudrillard examines the deeper implications of Marshall McLuhan's aphorism—"the medium is the message."[94] McLuhan discussed the tendency of all media to affect messages, to absorb[95] them, to change them, and to reproduce them in an altered form.[96] Further, he recognized the power of media, as extensions of an individual's senses, to absorb individuals.[97] Baudrillard extends these concepts to the mass: the

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93. BAUDRILLARD, SHADOW, *supra* note 16, at 95-110.

94. MCLUHAN, UNDERSTANDING MEDIA, *supra* note 64.

95. BAUDRILLARD, SHADOW, *supra* note 16, at 1-12. The concept of "absorption" should be understood in the sense of consumption and digestion. After undergoing such a process, the original message is no longer recognizable. Once the message has been absorbed by the modern media, its meaning to any potential observer is forever changed. Indeed, although the sights and sounds of the original message are still present, the meaning of the message has been absorbed, much as nutrition is absorbed in the digestive process. The waste, the message that is now reproduced by the medium, consists largely of its "sensational" meaning. The observer senses the visual and auditory stimuli coming from the medium, but understands little of the original message.

96. *See generally* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 64. The absorption of meaning is largely restricted to electronic media, though all media, including books, affect their messages in fundamental ways.

McLuhan's work has often been severely criticized. *See, e.g.*, MCLUHAN HOT & COOL (Gerald E. Stern ed. 1967) (collection of critical essays and McLuhan's response). However, at least one highly respected scholar, Charles Van Doren, has recently given UNDERSTANDING MEDIA high praise: "In this work McLuhan offered for general consideration many exaggerations, all of them provocative and demanding thought. As a consequence, the book, although no longer widely read, is one of the most important of the twentieth century." CHARLES VAN DOREN, A HISTORY OF KNOWLEDGE 357 (1991). Van Doren was for twenty years the editorial director of the ENCYCLOPEDIA BRITANNICA. He is an acclaimed author and is currently Associate Director of the Institute for Philosophical Research in Chicago.

97. *See* MCLUHAN, UNDERSTANDING MEDIA, *supra* note 64. *See also* MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MASSAGE: AN INVENTORY OF EFFECTS (1967) (the spelling of "Massage" is correct; it is a play on the effect of loss of self discussed in this footnote). The idea of the absorption of the individual is obviously a highly literary device. Essentially, this concept many be roughly equated with a loss of a sense of "self-in-one-place" due to the individual's sensation that her senses are extended by the modern media. *See* MEYROWITZ, *supra* note 28 (this work is premised on the loss of the "sense of place" engendered by modern media; thus, the title, NO SENSE OF PLACE).

As an example of this sensation, consider a long distance telephone conversation.

undifferentiated crowd of modern observers that McLuhan asserts is created by the electronic media.[98]

For Baudrillard, the mass is itself a medium—one which, like all media, absorbs meaning and reproduces altered messages.[99] But the mass is the strongest medium; as a result, other media and their meanings are simply absorbed within the mass.[100] To use Baudrillard's analogy, the mass is to media/meanings as a ground, or earth, is to electromagnetic energy.[101] Just as a ground absorbs and dissipates that energy, the mass absorbs and dissipates media/meanings. It is not so much that the mass is *doing* anything, but rather, that its ability to absorb media/meanings without effect or response is unlimited.[102] Baudrillard calls this total absorption of media/meanings in the masses "implosion."[103]

At the point of the implosion of meaning in the masses, "simulation" begins.[104] That is, because the mass, or "silent majority," exists but refuses to be represented,[105] all attempts to represent the mass, such as surveys, polls, and referenda,

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An individual experiences the extension of her sense of hearing to a greatly removed distance. She is "hearing" someone speak who is one hundred miles away and, figuratively, her "self" has expanded to include that distance. Further, media that extend more than one sense, like television, may create a sense of self that is spread over many miles in many different directions. Because of these (perhaps largely unconscious) effects of electronic media, the sense of self may be said to be absorbed into the media: the individual self-concept is replaced by the extended self-concept.

98. *See* MCLUHAN & FIORE, *supra* note 97, at 68.

99. BAUDRILLARD, SHADOW, *supra* note 16, at 44.

100. *Id.*

101. *Id.* at 5.

102. *Id.* at 9. The larger implications of Baudrillard's assertion here are not clear from the text. He interprets the utter silence of the masses affirmatively. That is, while political theorists have sometimes attributed the silence of the masses to an apathy engendered by political control and manipulation through the media, Baudrillard finds such assertions condescending and naive. On the contrary, the masses "refuse" meaning. *Id.* at 10. They resist the "hegemony of meaning" through the inertia of their silence. *Id.* Thus, the masses cannot be manipulated through the media because they reject the "dialectic of meaning" in favor of the fascination of the spectacular. *Id.* at 10-11.

103. JEAN BAUDRILLARD, SIMULATIONS 57 (Paul Foss, Paul Patton & Philip Beitchman trans., 1983) [hereinafter BAUDRILLARD, SIMULATIONS]; BAUDRILLARD, SHADOW, *supra* note 16, at 9. Baudrillard analogizes the process of the implosion of meaning in the masses to a black hole. *Id.* He suggests that the political order, which has only ever been a "tiny fraction and superficial layer of our 'societies,'" is, like a spaceship of state attempting to maintain orbit around the event horizon of a black hole, frantically projecting meaning into the abyss, the mass. *Id.*

104. *Id. See also* BAUDRILLARD, SIMULATIONS, *supra* note 103, at 57.

105. BAUDRILLARD, SHADOW, *supra* note 16, at 20.

are mere simulations of discourse.[106] "[T]he answer[s are] called forth by the question[s]."[107] "Every message is a verdict."[108]

To the extent that answers are anticipated within questions, the yes/no's and on/off's of the pollsters' trade, the answers are mere simulacra of reality. They are reality imposed on reality. This condition, wherein all messages received from the silent majority are the mere simulations of public opinion, Baudrillard calls "hyperreality."[109]

Thanks to the modern media, we live in hyperreality. The dialectical poles of discourse are absorbed into each other by the circularity of media effects: the imposition of meaning on the masses through polling, the masses' subsequent absorption of that meaning, the reimposition of that meaning through polling, and so on.[110]

Thus, media become the models of a reality "more real than real"[111] and reproduction of reality effects becomes the *sine qua non* of postmodern sociopolitical discourse.[112] Hyperreality is *"the implosion of the medium and the real;"*[113] hyperreality is the absorption of the poles of reality and its representation into each other, the absorption of reality and art into the single model:[114] the medium is the mass-age is the medium is the mass-age. . . .

C. Paradox, Absorption, and Obscenity Doctrine

The historical development of obscenity doctrine described

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106. BAUDRILLARD, SIMULATIONS, *supra* note 103, at 116-17.

107. *Id.*

108. *Id.* That is, *"[t]he referendum is always an ultimatum*: the unilateral nature of the question, that is no longer exactly an interrogation, but the immediate imposition of a sense whereby the cycle is suddenly completed." *Id.*

109. BAUDRILLARD, SHADOW, *supra* note 16, at 99; BAUDRILLARD, SIMULATIONS, *supra* note 103, at 146.

110. BAUDRILLARD, SHADOW, *supra* note 16, at 101.

111. *Id.* at 99.

112. For instance, the political system must create the reality effects of "real" choice and the efficacy of the individual vote. In the context of postmodern democracy, "[t]he 'free choice' of individuals, which is the credo of democracy, leads in fact precisely to the opposite: the vote becomes functionally *obligatory*: if it is not legally, it is by statistical constraint, . . . reinforced by the polls. The vote becomes functionally *aleatory*: when democracy attains an advanced formal stage, it distributes itself around equal quotients (50/50). The vote comes to resemble a Brownian movement of particles or the calculation of probabilities. It is as if everyone voted by chance, or monkeys voted." BAUDRILLARD, SIMULATIONS, *supra* note 103, at 132.

113. *Id.* at 101.

114. *Id.* at 102.

earlier may now be seen as a microcosm of the larger Paradox of the First Amendment. First, the classicist fears that protection of sexually explicit materials will debase the First Amendment values furthered by "serious" public discourse. Such debasement occurs by virtue of the association of the high ideals of the First Amendment with the "low value speech"[115] of sexual discourse. This trivialization is avoided by developing legal standards such as *Hicklin* that place a very low premium on supposedly low value speech. Unfortunately, these same loose standards may well be applied to serious works. Therefore, in order to protect the First Amendment from censorship, the classicist must censor, and the Paradox is realized.

Second, reacting to a perceived threat to First Amendment principles embodied in classicist censorship, the modernist seeks to bring obscenity under the protective umbrella of those principles. In the process, the modernist may be forced to acknowledge that *all* forms of sexual speech must be allowed.[116] This modernist approach encourages the development of standards such as the *Memoirs* test, which protects all speech unless it is totally worthless. Modernist theory also contributes to the total collapse of meaning typified by the *Redrup* era. As a result, serious public discourse is equated with trivialized, objectified, and irrational sexual speech, and the First Amendment itself becomes trivial.

Finally, perhaps in an effort to avoid the Scylla and Charybdis of censorship and trivialization,[117] the reformist attempts to balance the standards by reasserting whatever values are perceived to be missing. This approach is typified by *Miller*'s reintroduction of a serious value concept in the face of the collapse of meaning following *Redrup*. Unfortunately, as the subsequent analysis will show, the attempt falls prey to one side of the Paradox or the other. Either the censorship standard is so generous that even serious materials are censored, or the censorship standard is so restrictive that all sexu-

115. *See, e.g.*, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-608.

116. Ronald K.L. Collins & David M. Skover, *The First Amendment in Bold Relief: A Reply, in Colloquy: The First Amendment and the Paratroopers Paradox*, 68 TEX. L. REV. 1185, 1186-87 (1990) [hereinafter, Collins & Skover, *Paratroopers' Reply*].

117. Collins & Skover, *Paratroopers*, *supra* note 2, at 1122 (arguing that the reformists may indeed recognize the Paradox, and formulate their reforms accordingly).

ally explicit materials would be protected. Consequently, the reformist attempt to balance triviality and censorship results in ineffectual regulation,[118] and the First Amendment is trivialized nonetheless.

In addition to the dangers presented by the Paradox, reformist methodology is also threatened by the peril of absorption. Reformists attempt to create meaning and purpose in the context of the electronic media by creating meaningful messages and attempting to project that meaning onto the masses. These messages, however, are subject to resistance both from absorption by the media and from the inertia of the masses.

As to absorption, the messages of the reformists, transmitted by the all-absorbing media, will be transmuted. The exact nature of the resultant reproduction by the media will be indeterminate because of the aleatory nature of the absorption process. These outcomes, however, move toward one of two poles of media-determined meaning. No matter the original input, the resultant message will reflect either 1) the compressed, disconnected, arational, and decontextualized contents of typical electronic media fare,[119] or 2) the pseudorational, pseudolinearity of "talking heads" television.[120]

Moreover, even those poles are likely to collapse and merge under the hypergravity of the inertial masses. After all, the talking heads model of information creation is the paradigmatic example of meaning imposed on the masses, which is then resisted through absorption and silence, thereby imploding meaning. As a result, the reformists' talking heads television is not only ineffectual because its messages are absorbed, but it is also counterproductive because it accelerates the absorption process, calling forth only resistance and silence from the masses.

Thus, the reformists' attempts to represent the masses,

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118. *Id.* at 1121-23.

119. *See supra* note 79.

120. While talking heads are becoming increasingly rare on television, a few still exist. *See, e.g.*, the individuals listed in *Paratroopers*, *supra* note 2, at 1106 & nn.96-98 (Bill Moyers, Ted Koppel, and William F. Buckley, Jr.). While Professors Collins and Skover cite these individuals as paragons of talking heads rationality, and rare exceptions to the current television rule, the listing has two distinct failings: 1) Some might consider one or more persons on this kind of list fine examples of the "celebrity anchors" decried in Paratroopers, *id.* at n.83, albeit in a somewhat outdated model; and 2) some might wonder at the exclusion of such notable talking heads as McNeil and Leherer and their co-anchors.

and to influence them, will meet with *willful* silence. Indeed, the reformists' attempts will be absorbed into the circularity of hyperreality: as reformists infuse the silent masses with meaning, constantly testing and polling and randomly imposing meaning on silence, the masses will silently absorb every bit without effect or response.

D. Paradox, Absorption, and the Miller *Test*

The absorption thesis and the Paradox are especially relevant to the three elements of the *Miller* test. The first two elements of the *Miller* test, prurient interest and patently offensive conduct, are measured by contemporary community standards.[121] These community standards are greatly influenced by the effects of modern media. Consequently, resting First Amendment protections on community standards may result in a kind of absorption of the *Miller* test. Ultimately, the community absorption will produce a debasement of the *Miller* standards similar to the debasement of the *Roth* standards during the *Redrup* era. In other words, the invasive nature of modern media and mass communications will cause the prurient interest and patently offensive conduct elements to be absorbed.

In the specific context of the prurient interest element, the Paradox and absorption theories have clear implications. This element, based on perceptions of what is or is not sexually arousing in the *community*, subjects the standard for determining obscenity to the very group most threatened by the degradation of community standards. The exception of obscenity from the First Amendment was designed to protect against this very degradation. In the face of the new pleasure principle, which may be driving the larger community unconsciously and uncontrollably to maximize both pleasure and profits, such a standard is in danger of being absorbed into the mass movement toward total permissiveness without offering the slightest resistance.

The same can be said for the patently offensive conduct element. As sexual discourse is commercialized, infinite numbers of identical representations of sexuality proliferate in

121. Miller v. California, 413 U.S. 15, 24, *reh'g denied*, 414 U.S. 881 (1973). In other words, the trier of fact must determine, based on its own determination of the standards of the relevant community, whether the work in question appeals to the prurient interest in a patently offensive manner.

response to demands bolstered by such commercial appeals. Such commodification of sexuality threatens to undermine the patently offensive conduct element by absorbing it. Between the daily inundation of sexual innuendo and idealized conceptualizations of sexuality proliferating in the advertising media on the one hand, and the apparently enormous market for commercial home videos of explicit sex on the other, the average person would seem to be well acquainted with patently offensive conduct. And only in this average person's idea of what is normal, inoffensive sexual behavior can patently offensive sexual behavior be defined. Therefore, if the average person is commonly exposed to materials that will undermine serious public discourse, this element of the *Miller* test will not prevent the First Amendment from being trivialized.

When society can point to a very large number of participants in given "deviant" behaviors, such as watching sex videos, the strength of the argument that society as a whole must be protected from such behaviors is absorbed by the sheer multitude of that "other" portion of society. Because the combination of commodification and commercialization may create an ever-increasing demand for a given product (here, sexually explicit videos), a legal standard based on any societal consensus is inevitably debased by its own shrinking consensus.

To this point, the description of the absorption of the prurient interest and patently offensive conduct elements may appear to be a needlessly obscure way of saying that community standards will evolve in relation to the community's exposure to sexually explicit materials. Indeed, it might be argued that the *Miller* elements are purposefully designed to allow for just this sort of evolution by resting obscenity determinations on the relative levels of tolerance in the various communities. Moreover, the argument might continue, the community's standards are not absorbed at all, but simply developed. Finally, this argument may conclude that the community standards are not in danger because the community will know when to say when.

But such arguments fail to recognize the deeper implications of the absorption thesis. If the thesis is correct, then community standards are not merely being altered by exposure to media-transmitted sexual messages. Instead, the standards are being emptied of meaning through the process of absorp-

tion by the media and the masses. This process may occur as follows:

First, the meanings of the sexual messages themselves are absorbed by the media. A primary example would be sexually explicit home video movies or cable channel movies. As viewers observe the sexual activities portrayed, they interact directly with the images presented; they watch; they do not carefully analyze; they do not attempt to rationally dissect what they are seeing. Unlike reading descriptions of sexual encounters, watching television images of them does not as readily activate the viewers' visual imaginations. Instead, television largely replaces the viewers' imaginations with its own invasive images and thereby stifles the viewers' powers of contemplation. As a result, viewers receive an indeterminant meaning from what they are seeing.

Second, the demand for such video and cable movies, driven by the new pleasure principle, grows rapidly. Such consumption calls forth more production, which calls forth more consumption, and so on. To an outside observer of this process the community appears to be developing new standards, becoming more tolerant. However, this message is being generated by the outside observer, not by the community. The community itself is silent as to its views on these materials.

In actuality, the outside observer has attempted to rationalize the community's consumption of indeterminant images by imposing meaning on the statistic of consumption itself: greater demand for sexually explicit materials must mean greater tolerance of those materials. But it does not.

That demand is not equivalent to tolerance is the focus of the third and final point of the absorption process. The outside observer needs to impose meaning on the perceived demands of the community for sexually explicit home movies, and that need stems from the community's silence on its own views of such movies. The community is silent not because it has no opinion, but because it has no voice. The community cannot say when. Yet because television creates the illusion of discourse where only the one-way communication of meaning imposition has occurred, the political entities that control such meaning imposition are convinced they know what the people are thinking.

When face-to-face town meetings flourished, this politics of discourse gave voice and meaning to the demands and for-

bearances of the community. Now, however, the modern media have given the community an identity beyond politics. The desires of the community, the masses, the silent majority, can seemingly be learned by examining individuals' consumption of sexually explicit materials and then extrapolating these statistics into an evolving community opinion. Yet such extrapolations of the otherwise meaningless consumption of indeterminant images are merely futile attempts to manufacture meaning where none exists.

Meaning and the accompanying community standards are both being absorbed by the media and by the community. In this process, meaning and community standards are not merely being changed; they are being destroyed. No meaning is left to be changed. If the prurient interest and patently offensive conduct standards have been absorbed, however, the solidity of the remaining element must also be examined.

The third element of the *Miller* test, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value," was originally an outgrowth of the "utterly without redeeming social importance" test from *Roth*.[122] Until recently, the Court had not clarified whether this element was to be determined by a community standard or by an objective standard. Because this element contained no specific reference to community standards, however, courts had treated it as a mixed question of law and fact.[123] As a result, it was less likely to be subject to absorption than the prurient interest and patently offensive conduct standards.

So long as this was true, the serious value requirement could be seen as the constitutional safety valve that the Court had reserved to itself for emergencies, such as the need to protect First Amendment principles from absorption. The courts could perform their function of determining First Amendment standards by finding the existence or absence of serious value in sexually explicit materials. This finding of serious value by a court might have been as complex as Justice Woolsey's literary analysis in *Ulysses*,[124] or as brief as a *Redrup* era per curium decision without opinion.

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122. TRIBE, *supra* note 18, at 909.

123. *See, e.g.*, Smith v. United States, 431 U.S. 291, 301 (1977) (implying that *Miller* rejected community standards for the serious value element because it contains no such limitations, as do the first two elements).

124. *See supra* text accompanying notes 48-54.

In light of the Paradox, this element of the *Miller* standard reveals itself as a microcosm of the larger dilemma. Thus, the classicist's limitation of First Amendment protection to serious discourse tends to preclude any sexually explicit messages carried by modern media from First Amendment protection because those messages are trivializing.[125] In the face of such apparent threats of censorship, modernists will argue, and courts may accept, that all manner of sexually-related materials are of serious social value. Finally, reformists will argue that the reformed *Miller* standard of serious value is itself in need of reform. This argument also falls to the dilemma.

The Court's recent application of the reasonable person standard to the serious value element is an example of this reformist approach.[126] Perhaps in response to the perceived danger of erosion of serious discourse, or the perceived danger of judicial censorship, the Court decided that the serious value element should be measured by the reasonable person standard.[127] This attempt at reform may fail due to either of two conflicting reasons.

On the one hand, because the reasonable person standard may require juries to apply local community standards of what is reasonable, the serious value element may now be judged by some form of community standard similar to that used in the prurient interest and patently offensive elements. Thus, the reform may abandon the safety valve originally afforded by *Miller*. As a result, the serious value element may be subject to absorption like the other elements.

On the other hand, the Court's subjecting the serious value element to the reasonable person standard may signal a

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125. Indeed, at least two commentators have suggested that such limitations should be imposed; however, they approach the problem from opposite ends. Neil Postman, a leading media ecologist, has suggested the possibility of eliminating all forms of political discourse, including speeches, advertising, or debates, from television. *See generally*, NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985). In contrast, Professor Sunstein has advocated the possibility of restricting the effects of antipornography statutes (that is, statutes attempting to abolish depictions of violence against women involving sex) to television and movies. Sunstein, *supra* note 115, at 625. Thus, while each recognizes the relevance of the media to these questions, both fall on the side of censorship.

126. In Pope v. Illinois, 481 U.S. 497 (1987), obscenity charges were brought against two adult bookstore clerks. *Id.* at 499. The Court held that the reasonable person standard should be applied to determine whether a sexually explicit work has serious value. *Id.* at 500-01.

127. *Id.* at 501.

recognition of the risk of absorption. In other words, the Court may believe that the reasonable person standard immunizes the *Miller* test from total absorption of the community standard because, as an objective standard, it creates a barrier to such debasement of community morality. However, given the extent to which modern media currently pervade community consciousness, such hopeful reliance is unlikely to prove well-founded. Consequently, this reformist attempt to adjust the serious value element may prove ineffectual, as do all attempts that fail to recognize the power of the modern media. The serious value element may therefore be absorbed regardless.

To this point, when viewed in light of the broad media-ecology heuristics, the historical development leading up to and including the *Miller* standard reveals several weaknesses in current obscenity doctrine. The failure to account for the effects of media has resulted in a contradiction within the doctrine itself, a contradiction in the form of a Paradox of trivialization or censorship under the First Amendment. These heuristics have also shown that the standards themselves may be in danger of destruction through the absorption process.

IV. CURRENT OBSCENITY DOCTRINE

The current state of obscenity doctrine in relation to media theory must also be examined in the context of several recent obscenity indictments that illustrate the relationship of the absorption thesis and the Paradox to current obscenity law. After briefly examining the broader media theories, *Skywalker v. Navarro*[128] will then be reviewed in light of specific media theories to demonstrate the benefits of examining, and the costs of failing to examine, the effects of media on current obscenity doctrine.

A. Montgomery and Cincinnati

In Alabama, current obscenity standards were recently applied to messages carried on the modern media. A Montgomery grand jury returned indictments against several companies responsible for airing allegedly obscene movies through satellite-relayed home movie channels.[129] The companies in question quickly ceased broadcasting. In all, more than a mil-

128. 739 F. Supp. 578 (S.D. Fla 1990).

129. Mark Curriden, *But Is It Art?*, BARRISTER, Winter 1990-91 12, 12.

lion subscribers nationwide were affected by Montgomery's threat of prosecution.[130]

This case presents perhaps a paradigmatic example of the absorption effect. In this case, however, the absorption effect works to constrict First Amendment protection of sexually explicit materials. First, the national media absorb the local community standard. In short, the obscenity standards applied by the Alabama grand jury were based on local standards of obscenity; however, because of the pervasive nature of satellite broadcast television, those local standards were being applied to nationwide communications. As a result, the local standard was replicated on a national scale. Second, de facto national censorship resulted from the application of those local community standards to nationwide communications.

In addition to the Alabama case, which involved the electronic media of satellite communications, another recent obscenity-related case involved the photographic medium and the Postmodernist[131] conception of art.[132] The recent obscenity charges against Cincinnati's Contemporary Arts Center and its director for displaying Robert Mapplethorpe's five photographs[133] attracted much media attention. The Cincinnati jury returned a not guilty verdict, a verdict justified by some legal scholars on the grounds that the photographs were art.[134]

However, the lines between art, entertainment, and obscenity have become increasingly blurred in the postmodern period.[135] Many artists are deliberately challenging traditional

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130. *Id.*

131. The term "Postmodernism" refers to the movement in art that rejects the formalist distinctions between "good" and "bad" art as well as those between "serious" and "popular" art. *See* Adler, *supra* note 17, at 1362-64. In the view of this Author, Adler develops in fine detail one aspect of the general absorption thesis put forth in this Comment. Specifically, postmodern artists are attempting to destroy the above distinctions, through the use of various media, by absorbing the distinctions into their media, thereby eliminating them.

132. Following the lead of Adler, *supra* note 17, this Comment will not attempt a definition of art. As Adler explained, art cannot be defined "because contemporary [postmodern] art, by its very nature, will defy any definition that we assign to it." *Id.* at 1359 & n.3. That is, postmodern art makes a point of contesting whatever the definers of art say.

133. "One of the five photographs shows a man urinating into another man's mouth, another shows a finger inserted into a penis, and the other three each depict a man with an object inserted in the rectum: a whip, a cylinder, and a man's hand and forearm." N.Y. TIMES, Oct. 6, 1990, at 1, col 6.

134. *See* N.Y. TIMES, Oct. 6, 1990, at 56 (citing Professors Sunstein and Karst).

135. Adler, *supra* note 17, at 1364-74.

distinctions between popular culture and "legitimate" art.[136] As a result, previously clear distinctions between formal art and popular culture are being eroded by the artists themselves.

Similarly, other artists challenge the very social norms that established the concept of obscenity as an unworthy form of expression.[137] Such artists may see the postmodern role of the artist as consonant with somewhat more traditional views of art, which hold that art should challenge its viewers to new insights regarding their social norms. If so, what better societal norm to attack than the age-old fear of deviant sex?

Thus, artists are destroying the various distinctions between so-called serious art and popular or obscene art. In doing so, the artists may be creating difficulties for the courts in determining what is of serious value for society. After all, if depictions of sexually explicit acts are being created with artistic integrity and intent, the courts may be compelled, like Judge Woolsey in *Ulysses*, to find such depictions socially valuable.

While these difficulties may be attributed to the postmodernist perspective, that perspective itself may be a symptom of the absorption effects of modern media. Artists have long been challenging society's sexual norms. However, before the modern electronic media, observation of such challenging views was largely confined to a socially acceptable location, like a museum.

A museum is a medium for conveying certain socially defined messages. Society defines the appropriate range of psychic, emotional, and physical reactions to art in the museum context. Because these societal definitions affect the observers' perceptions and understanding of the art itself, the museum acts as a medium for the conveyance of artistic messages.[138] As a medium, the museum appears to have simi-

136. *Id.* at 1366 (describing artists Sherrie Levine, who photographs famous art photographs, and David Salle, "who layers and juxtaposes images that he appropriates from art history as well as from popular culture").

137. *Id.* at 1369 (describing performance artist Karen Finley, who "smears food into her genitals and has even defecated onstage" [and] graphically describes violent and bizarre sex acts). Artist Richard Kern also defies traditional concepts of art, creating "extremely violent pornographic *art* films." *Id.* at 1370.

138. For example, the context of Annie Sprinkle's performances seems to determine whether her work is "obscenity" or "art." Sprinkle, a performance artist, works in the pornography industry, appearing in magazines and X-rated films. She also performs in art settings. In 1988, Sprinkle appeared at the Kitchen Center for the Performing Arts; her performance included elements from another performance she

lar effects on the messages it conveys like those conveyed through other media.

As a result, the museum may actually absorb the meaning of the art and reproduce an entirely different message than intended by the artist. Such a message may be socially defined and controlled. Therefore, to confine the presentation of such materials to socially controlled settings is to define the art itself.

But with the advent of the all-pervasive modern media, the real possibility exists, perhaps for the first time, that all members of society may be exposed to such challenging materials. If the absorption thesis is correct, then the potential is great for the total abnegation of all societal limits on sexual expression. Further, the distinctions between serious discourse and trivial entertainment may also be eroded through the process of absorption of meaning by the undifferentiated mass.

These threats of absorption of societal standards in artistic expression have important implications for the Paradox from the perspectives of classicists, modernists, and reformists. First, if it is true, as the classicists believe, that categorical distinctions between serious discourse and trivial entertainment must be drawn in order to preserve the fundamental First Amendment value of serious public discourse, the classicists' task may be in vain. After all, if no lines can fairly be drawn between serious attempts to create and define art on the one hand, and postmodern attempts to redefine art by challenging such serious attempts on the other, then classicist attempts to distinguish between such definition and redefinition would seem futile.

More fundamentally, as such distinctions erode, the classicists will be increasingly driven to remove all forms of artistic expression, serious and postmodernist, from the First Amendment's definition of protected speech.[139] Thus, the Paradox is realized and the redefinition of the First Amendment leads to censorship of serious public discourse in the form of serious art.

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had given for a SCREW magazine party. When asked what made Sprinkle's performance at the Kitchen "art" and her performance for SCREW "pornography," a spokesman for the Kitchen said "[h]ere it was performed in an art context." *Id.* at 1369-70.

139. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28-29 (1971) (suggesting the removal of all but political speech, narrowly defined, from under First Amendment protection).

Second, from the modernists will come a redoubled effort to protect all forms of speech in response to the classicists' attempts to protect serious discourse through censorship. Classicist censorial tendencies send up a red flag for the modernists. Sensing a threat, the modernists will point to the impossibility of distinguishing between serious art and postmodern art in any principled way.[140] Thus, the modernist will argue for the protection of all speech, no matter how trivial such speech may be for the classicist.[141]

From the classicists' perspective, the modernists have trivialized the First Amendment's protections of serious discourse by simply ignoring any principled distinctions between trivial entertainment, obscenity, and serious public discourse. In effect, the classicists argue that resting First Amendment jurisprudence on vague distinctions like these may lead back to the *Redrup* era's seeming lack of principled decision-making.

Third, from the reformists' viewpoint, the absorption of the meaning of serious art presents the opportunity for mediation between the extremes of triviality and censorship. However, because the distinctions between the definitions of serious and trivial art may be destroyed through the efforts of postmodern artists, the very middle ground on which the reformists base their attempts at reconciliation seems to be disappearing. Principled distinctions may no longer be possible between control of triviality or censorship of sexually explicit messages on one side, and protection of serious discourse on the other. Consequently, the reformists may be forced to err on one side or the other, thereby realizing the Paradox in either case. Alternatively, the reformists could withdraw. Again, the reformists are left ineffectual in the face of absorption and the Paradox.

Up to this point, the general analysis of current obscenity cases has revealed several weaknesses in obscenity doctrine that may be ascribed to a failure to account for the effects of media. First, by allowing indictments of national media result-

140. Ironically, by this definition, Adler, *supra* note 17, represents the quintessential modernist view.

141. *See, e.g.*, Edward Rubin, *Television and the Experience of Citizenship*, 68 TEX. L. REV. 1155, 1165 (1990) (reply to Collins & Skover, *Paratroopers*, *supra* note 2, to the effect that watching national television "may be the average person's most important political act"); Collins & Skover, *Paratroopers' Reply*, *supra* note 116, at 1187-88 (replying to Rubin and suggesting that he has abandoned all but the most trivialized view of First Amendment protections).

ing from the application of local community standards, courts may allow de facto national censorship to occur through a chilling of national communications. Second, by resting determinations of serious value on definitions of art, the *Miller* test may be absorbed due to the effects of the modern media. Third, and concomitant to the second point, the absorption of the *Miller* standard may result in attempts by classicists to censor artistic speech. Such censorial action could lead to modernist trivialization through sweeping protections of all speech, or reformist ineffectuality in the face of these threats. Thus, in obscenity doctrine, the air is thick with paradox. This paradox becomes even more apparant in the recent case of *Skyywalker v. Navarro*.[142]

B. Skyywalker v. Navarro

Skyywalker was a civil action brought by the rap group 2 Live Crew (the Crew) in the United States District Court of Southern Florida against Broward County Sheriff Nicholas Navarro. The Crew sought a declaratory judgment of their rights regarding the Sheriff's attempts to prevent the sale of the Crew's album, *Nasty As They Wanna Be* (hereinafter *Nasty*). The Sheriff had obtained an order from the Broward County Circuit Court that found probable cause to believe that, under the Florida statutes and relevant case law, *Nasty* was obscene.[143] The Sheriff's deputies then visited fifteen to twenty Broward County record stores and warned the owners, "in a friendly conversational tone," that if they continued to sell the records, they would be arrested and charged with selling obscene materials.[144] Within a few days, no copies of *Nasty* were for sale in Broward County.[145]

In view of the success of the Sheriff's office in restraining the sale of *Nasty*, the Crew sought to restrain the Sheriff's activities[146] and, in addition, sought a declaration as to whether *Nasty* was obscene. Applying the preponderance of the evidence standard normally used in civil cases, Judge Gonzalez

142. 739 F. Supp. 578 (S.D. Fla. 1990).

143. *Id.* at 583.

144. *Id.* Under Florida law, selling obscene materials to minors is a felony; selling them to adults is a misdemeanor.

145. *Id.*

146. *Id.* The Crew alleged prior restraint against the Sheriff. Judge Gonzalez agreed with the Crew's position and granted the Crew a permanent injunction against the Sheriff. The prior restraint issue is not, however, of central concern here.

found *Nasty* obscene.[147]

Before turning to its application of the *Miller* test, the court first reiterated the policy values underlying the First Amendment. It noted both the classicist value of facilitating self-government through serious discourse and the modernist value of promoting "self-realization" in the "marketplace of ideas."[148] The court also reiterated the *Roth* assumption that, because sex is "a great and mysterious motive force in human life,"[149] state regulations on explicit depictions of sex are equivalent to state regulations on "prostitution, incest, rape, and other sexually related conduct."[150]

Turning to the *Miller* test, the court then asserted that distinctions between the "regulation of conduct and speech [do] not invalidate obscenity laws."[151] For the court, the rationale underlying obscenity doctrine "is simple: the message conveyed by obscene speech is of such slight social value that it is always outweighed by the compelling interests of society, as manifested in the laws enacted by its elected representatives."[152]

The court then turned to a brief analysis of what it called the "absolutist" view of the First Amendment. Under this "rugged individualist" view, any regulation of speech is labeled " 'censorship' and 'paternalism.' "[153] The absolutist seeks total freedom of speech without interference from the law.[154] Making an analogy to television, the court characterized the absolutist argument as follows: "[I]f the viewer does not like what he sees on Channel X, he may switch to Channel Y or turn off the set. In the case of obscene music, people who do not want to

147. *Id.* at 596. Judge Gonzalez noted that the Crew argued for the clear and convincing evidence standard because of the First Amendment issues presented in this case. While the judge did not agree that the higher standard should apply in this civil action, and so found *Nasty* obscene under the preponderance standard, he also later stated that he found *Nasty* obscene by the clear and convincing standard as well. *Id.*

148. *Id.* at 584.

149. *Skywalker*, 739 F. Supp. at 584 (quoting United States v. Roth, 354 U.S. 476, 487, *reh'g denied*, 355 U.S. 852 (1957)).

150. "These prohibitions are no different than a ban on obscenity." *Id.*

151. *Id.* (citing Miller v. California, 413 U.S. 15, 25-26, *reh'g denied*, 414 U.S. 881 (1973)). The *Miller* court stated that "sex and nudity may not be exploited without limit by films and pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Id.*

152. *Id.* at 584 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

153. *Id.* at 586.

154. *Id.*

listen to obscenity do not have to buy it."[155] As an example, the court noted that in the instant case the Crew had placed warning labels on *Nasty* to prevent unwary customers from exposure to their message.[156] Therefore, the court implied that the Crew is absolutist because it seeks to allow individuals to determine what they will see and hear without reference to societal norms.[157]

The court's discussion is a caricatured description of only one aspect of the much more complex modernist view of First Amendment protections. While it is true that modernists/absolutists eventually arrive at a position of advocating protection of certain materials that classicists would consider obscene, they arrive at that position through a complex process of balancing the concerns of the State and of society. The court's oversimplification allows the court to then dismiss the modernists/absolutists by referring them to the state legislature. According to the court, the absolutists are either insincere in their arguments to the court, or they are not saying what they mean.[158] What they really mean to say is: "Let's Legalize Obscenity!"[159] Of course, any desire to abrogate established statutes must be directed to the state legislature. The court is not a "Super-legislature."[160]

But this iteration of the limits of court powers begs the question. The point of the modernists' arguments that obscene speech may to some degree contribute to self-realization is not to argue against the State's criminalization of obscenity. Nor is the modernist's point to extend the scope of judicial powers. The modernist's point is to examine the underlying rationales of the classicists who say that only a limited range of speech should be protected under the First Amendment. The central issue is whether the First Amendment's protections prevent the State from suppressing certain forms of speech. Such examination must precede application of state law, not follow it.

Of course, the court might respond that the decision has already been made: obscenity is not protected by the First

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

Amendment.[161] Again, this begs the issue. If it is not true that discrete categories of speech can be defined as serious or trivial, then the court's assertion that it is merely applying the law is without foundation. Some determination of what obscenity is under First Amendment doctrine must precede any application of criminal statutes. Such determinations are made by courts. Therefore, the courts are the correct fora in which to bring modernist, classicist, and reformist arguments regarding the nature and meaning of obscenity doctrine, not the legislatures. Apparently recognizing its responsibilities to make such determinations under the First Amendment, the court next turned to an analysis of whether *Nasty* is obscene under the *Miller* standards.[162]

Before applying the *Miller* elements, the court first determined which community's standards should be applied to the prurient interest and patently offensive conduct elements of the test. This is a question for the trier of fact.[163] Because the parties assumed that the relevant community would likely be Broward County, where the Sheriff's activities occurred, they failed to present any evidence indicating the extent of the relevant community.[164] Citing this failure, the court determined that it had the power as the fact-finder to define the relevant community.[165] While the court proceeded to define the relevant community more broadly than did the parties, it gave no explanation as to why it did not accept the parties' views.[166] Some of the court's reasons may become evident in the following analysis.

In defining the relevant community to include Palm Beach and Dade Counties, in addition to Broward County, the court cited several factors. Categorized generally, these factors include the following: (1) common geography, including the Atlantic coastline; (2) common tourism and immigration exposure, including vacationers and retirees; (3) common transportation, including air, rail, and highways; (4) common markets, including those for goods and employment; (5) common cul-

161. For example, the *Skywalker* court stated, "obscenity is not a protected form of speech under the U.S. Constitution. . . . *It is a crime.*" *Id.* at 586.

162. For the *Miller* test, *see supra* text accompanying note 72.

163. *Skywalker*, 739 F. Supp. at 587 (citing Miller v. California, 413 U.S. 15, 30, *reh'g denied*, 414 U.S. 881 (1973)).

164. *Id.*

165. *Id.* (citing Smith v. United States, 431 U.S 291, 303 (1977)).

166. *Id.* at 588.

ture, including a distinct mix of ethnic peoples in each county; (6) common political ties, including both legislative and judicial boundaries; and (7) common media, including television, radio, and newspapers. In addition, the court noted that its own jurisdiction was broader than the three counties it chose, but that the other counties in its jurisdiction did not have as significant ties to all three counties as they did to each other.[167]

Whether examination of the first six factors—geography, tourism, transportation, markets, culture, and politics—is capable of creating any actual distinctions between relevant and nonrelevant communities is arguable. After all, depending on the size of one's geographic, cultural, and political frames of reference, such factors might be common to every county in Florida, every state in the Union, or every community in the Western Hemisphere. The problem with using such factors as boundaries is that they are indeterminate absent a limiting principle. The court did not specify a limiting principle.

What may be arguable in the court's first six factors is clear for the seventh—the media. What is common to the mass media of television, radio, and newspapers, among Palm Beach, Dade, and Broward Counties, is common to those media among every community in the United States. While these three communities do possess "targeted" media,[168] the court expressly excluded those media from its analysis. Limited to the national media, the messages carried by these media across the country are largely homogeneous. Thus, at least for the media factor, the court is defining the relevant community by a national standard rather than by a community standard. Or perhaps the court is attempting to account for the effects of the national media on the development of the local community's standards. If so, its choice of media is illuminating.

In limiting its choice of media, the court excluded books, movies, and videotapes from its analysis of the effects of media on the delineation of the relevant community. Each of these media has an impact on the definition and reach of community standards and, therefore, on the definition of the relevant community. One possible explanation for the court's omission of these shared media may be that sexual discourse is more tolerated in those than on television and radio or in newspapers.

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167. *Id.*

168. *See id.* Targeted media are those designed for a narrow and specific audience, like a local newspaper.

By considering the effects of these media within the community, a court could be forced to apply a more tolerant community standard. Another possible reason that the court did not consider these media in its analysis will become clear in the court's analysis of what constitutes the average person within the relevant community.

Concluding that "the relevant community standard reflects a more tolerant view of obscene speech than would other communities within the state,"[169] the court rejected the Crew's argument that the average person in the community was " 'tolerant' per se."[170] The Crew had pointed to the lack of written complaints in the *Nasty* investigation file of the Broward County Sheriff's Office as evidence that the average Broward County resident was undisturbed by the recording.[171] Even so, there were complaints in the file from other counties such as Palm Beach and Dade.

Thus, one possible explanation for the court's somewhat strained efforts to define the relevant community beyond the confines of the activities of the Sheriff's Office may be that no complaints from within Broward County existed. In order to find that the average person in the community had objected to *Nasty*, the court may simply have expanded the relevant community to include other "average persons." The court then downplayed the importance of the lack of complaints from Broward County by pointing to the complaints from the rest of the relevant community.[172]

The court also downplayed other arguably significant evidence. The Crew submitted copies of books, movies, and videotapes that were available for purchase or rental in the local community.[173] The effects of these media on community perceptions may be quite extensive. However, the court noted that such materials need not be considered, even if comparable works had been found nonobscene.[174] Further, the court stated that "[e]vidence of depictions of sexual conduct in pictures, moving or still, is not substantially equivalent to musical

169. *Id.* at 589.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* (citing Hamling v. United States, 418 U.S. 87, 126-27, *reh'g denied*, 414 U.S. 885 (1974)).

lyrics."[175] The court's choices of media and assertions as to their qualities must now be examined more closely.

As already noted, three media that significantly affect community perceptions of sexual norms through their pervasive presence were submitted to the court: books, movies, and videotapes. With regard to books, American society may now have reached the point that Justice Brennan hoped it had reached in 1973. Justice Brennan, dissenting in a companion case to *Miller*,[176] suggested that "[s]urely we have passed the point where the mere written description of sexual conduct is deprived of first amendment protection."[177] While attempts to privately control dissemination of some books seem to continue apace,[178] courts do not appear to be banning many books. Indeed, works once banned by the courts, for example, those of James Joyce,[179] D. H. Lawrence,[180] John Cleland,[181] Henry Miller,[182] and the Marquis de Sade,[183] are now available in local book stores and libraries. Such availability seems to lend credence to Justice Brennan's views, if not vitality to his hopes.

Movies and videotapes also affect community perceptions of what is acceptable. Recent movies and videos have broken new ground in attempting to depict sexual acts without being

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175. *Id.*

176. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

177. *Id.* at 100.

178. See DOYLE, *supra* note 41.

179. *See supra* notes 48-54 and accompanying text.

180. *See supra* note 47.

181. *See supra* text accompanying note 66.

182. Henry Miller's TROPIC OF CANCER (1934) and TROPIC OF CAPRICORN (1939) were both banned in the United States until 1961 because of their "frank" use of language:

> In the four hundred years since the last devouring soul appeared, the last man to know the meaning of ecstasy, there has been a constant and steady decline of man in art, in thought, in action. The world is pooped out: there isn't a dry fart left. Who that has a desperate, hungry eye can have the slightest regard for these existent governments, laws, codes, principles, ideals, ideas, totems, and taboos? If anyone knew what it meant to read the riddle of that thing which today is called a "crack" or a "hole," if any one had the least feeling of mystery about the phenomena which are labeled "obscene," this world would crack asunder.

HENRY MILLER, TROPIC OF CANCER 249 (1934). Miller died in 1980.

183. The copious works of the Marquis de Sade (1740-1814) are some of the most vilified writings in history. Though a considerable body of writings is extant, the larger part of his work appears to have been lost or destroyed. He spent 27 years of his life in various prisons or asylums as a result of his many sexual offenses. Most of his writings make *Nasty* seem nice by comparison. *See, e.g.*, MARQUIS DE SADE, THE 120 DAYS OF SODOM AND OTHER WRITINGS (Austryn Wainhouse, Richard Seaver trans., Grove Weidenfeld 1966).

branded X-rated. Other films have received an X-rating in spite of their at least arguably serious artistic intent and execution. This has even led to the development of a new, intermediate rating standard: "NC-17." On the other hand, some films seek out X-ratings and have even devised multiple-X ratings in hopes of titillating potential customers. The value of an X-rating in some circles is very high.

The videotape's ability to bring such films into the home may eventually have the greatest effect on average persons in relevant communities. Since the Supreme Court's 1969 decision, *Stanley v. Georgia*,[184] the Court has recognized the right of individuals to possess sexually explicit materials within their own homes. The burgeoning videotape industry has given new meaning to this right. Triple-X rated videos are available in many video rental stores around the country and in corner convenience stores. Absorption is well under way.

As this limited review of the various impacts of books, movies, and videotapes indicates, these media may have a large impact on the beliefs of the local community. In choosing to downplay evidence regarding these media in the community, the *Skyywalker* court disregarded a matter of central importance to the determination of who average persons in the relevant community are and what they believe is obscene. Failure to consider the impact of these media may lead to distorted judgments about the current beliefs of average persons in the community.

Turning to the court's assertion that movies and pictures of sex are "not substantially equivalent to musical lyrics," it first appears that the court was self-contradictory on this point. Later in the opinion, during its analysis of the prurient interest element, the court also says that the "depictions of ultimate sexual acts [on *Nasty*] are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films."[185]

Pictures and films are either sufficiently equivalent to lyrics to be helpful in determining the lyrics' obscenity, or they are unequivalent and thus of no help. They cannot be both.

The court's non sequitur regarding the equivalence of pic-

184. 394 U.S. 557 (1969). Of course, *Stanley* has subsequently been limited largely to its facts by, *inter alia*, Bowers v. Hardwick, 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

185. *Skyywalker*, 739 F. Supp. at 591.

tures and lyrics is important because it may result from a failure to carefully consider the effects of the media. In contrast to Judge Woolsey's careful and cohesive analysis in *Ulysses*, wherein he draws illuminating parallels between various media to clarify his analysis, Judge Gonzalez appears to be avoiding such intermedia analyses. Some of the possible pragmatic reasons for this avoidance have already been discussed. The important point is that avoiding a careful examination of the relationships among media, messages, and the observers of those messages, may lead to self-contradictory conclusions by the courts.

Having determined that average persons in relevant communities are more tolerant than persons in other communities in the state, the court turned to an application of the *Miller* standards to the facts of the case. The court began its *Miller* analysis with the prurient interest element.[186] Finding that *Nasty* does appeal to the prurient interests of average persons in the relevant communities, the court found "a clear intention to lure hearers into" a variety of vividly described sexual acts.[187] For the court, this clear intention was manifest in the repetitive nature of the descriptions and in the vividness of those descriptions. Further, because the Crew testified that "the *Nasty* recording was made to be listened and danced to,"[188] and because "the 'rap' genre focuses upon verbal messages accentuated by a strong beat,"[189] the court found that the words in the songs were the central focus of *Nasty*.[190] As a result, "the graphic deluge of sexual lyrics about nudity and sexual conduct"[191] led the court to decide with "no difficulty . . . that Nasty As They Wanna Be appeals to a shameful and morbid interest in sex."[192]

No purpose would be served by arguing with the court's findings of fact on this or the other elements of the *Miller*

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186. *Id.*

187. *Id.* According to the court, the acts depicted on *Nasty* include: "references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sadomasochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse." The court also strongly implied that *Nasty* also depicted "deviate sexual intercourse, . . . masturbation and sadomasochistic abuse. . . ." *Id.* *See infra* note 240, for a sample of lyrics from *Nasty*.

188. *Id.* at 591.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 592.

standard. As the court noted in reference to the interpretation of the musical aspects of *Nasty*, "reasonable persons could disagree."[193] However, it is of central importance to this Comment to examine two of the court's premises regarding the prurient appeal of *Nasty* as they relate to the medium of recorded music.

The court's first premise, that "it does not significantly alter the message of the *Nasty* recording to reduce it to a written transcription,"[194] is related to the serious value element of the *Miller* test.[195] The court's second premise is that depictions of sexual conduct in any media are intended to lure observers into such conduct.

Depictions of sexual conduct are not sexual conduct.[196] Though the *Skyywalker* court explicitly found that "the evident goal of [*Nasty*] is to reproduce the sexual act through musical lyrics,"[197] such an interpretation of a musical performance is untenable. No rational person could hope to reproduce a sexual act, or any other type of act, within a piece of music. Indeed, the Crew itself testified that it created *Nasty* to be "listened and *danced* to."[198]

The origin of the court's untenable assertion regarding the Crew's musical reproduction may be found in another of its assertions: "it would be difficult, albeit not impossible, to find that *mere sound* without lyrics is obscene."[199] While on its face this assertion may wrinkle a few brows, the inclusion of the concept of *mere sound* merits attention. The court did not say "it would be difficult, albeit not impossible, to find that *mere music* without lyrics is obscene." Such a statement would be absurd because, considering the nonrational and nonexplicit nature of *music*,[200] no rational person could find a particular piece of music obscene under the *Miller* standards. Music

193. *Id.* at 591.

194. *Id.* at 595.

195. *See infra* notes 224-44 and accompanying text.

196. In American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001, *reh'g denied*, 475 U.S. 1132 (1986), the Seventh Circuit Court of Appeals extensively noted the basic semantic distinction between depictions of the thing and the thing itself. The court drew this distinction between pornographic depictions of violence and sex on the one hand, and actual sadism on the other. The distinction holds as well for distinctions between depictions of sexual acts and sex itself.

197. *Skyywalker*, 739 F. Supp at 591.

198. *Id.* (emphasis added).

199. *Id.* (emphasis added).

200. Music is nonrational because it requires no linear analytical processes to

alone cannot depict sexual matters so as to appeal to the prurient interest absent an undue imaginative exercise on the part of the listener. Therefore, any assertion that a piece of purely instrumental music could arouse "dirty" thoughts cannot be logically supported.

Perhaps the court was aware of this logical impossibility when it chose the term *mere sound* instead of *mere music*. Sounds, such as utterances simulating those stimulated by sexual arousal, could probably be found obscene. This is true because such sounds are a product of the human voice and because they are explicitly intended to simulate the actual act of sexual moaning. A court could find that such sexually explicit sounds were intended to appeal to the prurient interest.[201]

Again, this may be the reason that the court chose the term *mere sound*. If this is true, however, then the court used its awareness of the distinctions between the media of *sound* and *music*, and their different possible effects on listeners, to obscure the issue of whether *Nasty* appeals to the prurient interest. After all, the issue in *Skyywalker* is not *sound* but *music*. Such obfuscation is counterproductive at best. Courts should be aware of the effects of different media on the materials they are examining, but they should not use this awareness to confuse the issues.

Turning next to the patently offensive conduct element, the court also found that average persons in the relevant communities would be patently offended by *Nasty*. Of interest are two of the court's assertions regarding the effects of the messages and their medium. First, the court likened *Nasty*'s descriptive lyrics "to a camera with a zoom lens, focusing on the sights and sounds of various ultimate sex acts."[202] Second,

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perceive its nonexplicit messages. Such processes are used in understanding written materials. People listen to music; they do not read it.

This is not to say that rational analysis cannot be applied to music; such an analysis lies at the core of music theory. But such a rational analysis is not *listening* at all. Though it increases listeners' appreciation for the craftsmanship of the composer, it does not increase their understanding of the emotive or nonrational aspects of the music's message. In effect, one cannot "hear" music's "other" messages at all unless and until one stops analyzing it.

201. *But cf.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985) (material appealing to "normal, healthy, sexual desires" is not obscene). Thus, if such "moaning" sounds were not depicted so as to arouse a lascivious reaction, but merely to arouse the same healthy reaction such sounds would normally arouse, then they arguably would not be obscene.

202. *Skyywalker*, 739 F. Supp. at 592.

the court noted the "intrusive" nature of recorded music upon unwilling listeners.[203]

The court's analogy of *Nasty*'s lyrics to a zoom camera recalls Judge Woolsey's analogy of Joyce's literary technique to the filmmaker's art.[204] However, whereas Judge Woolsey found that such comparisons illuminated the nature of Joyce's artistic techniques and their relation to his depictions of a "strong draught" of sexuality and excretory function, the *Skyywalker* court finds only evidence of offensiveness in its comparisons. On closer examination, such comparisons are nevertheless appropriate. However, they are more complex than the court's analysis would suggest.

Both music and pictures are nonrational media:[205] They each are capable of conveying their messages without reference to rational forms of analysis or discourse. People look at pictures. People listen to music. People do not normally analyze either, unless they are expressly trying to rationalize them. Because they can and do convey messages in a nonrational format, the messages of both music and pictures are difficult to control, short of banning their distribution. However, there is at least one relevant difference between them: while pictures can convey explicit depictions of sex without any accompanying text, music cannot.

This distinction between music and pictures brings us to the court's second assertion, regarding the intrusiveness of music. The court here notes that the presence of "dirty words" on *Nasty* is not, by itself, sufficient to find the recording patently offensive.[206] While acknowledging that "the law does require citizens to avert their ears when speech is merely offensive,"[207] the court next argues that citizens "do not have an obligation to buy and use ear plugs in public."[208] Arguing further for the protection of the "unwilling listener,"[209] the court then makes the following statement: "Unlike a video tape, a book, or a periodical, music must be played to be

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203. *Id.* at 593.

204. *See supra* notes 51, 52 and accompanying text.

205. *See supra* notes 52, 63-64 and accompanying text (pictures are a nonrational medium) and *supra* note 200 (music is a nonrational medium).

206. *Skyywalker*, 739 F. Supp. at 593 (citing American Bookseller's Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd*, 475 U.S. 1001, *reh'g denied*, 475 U.S. 1132 (1986)); for a discussion of *American Bookseller's*, *see supra* note 196.

207. *Skyywalker*, 793 F. Supp. at 593.

208. *Id.*

209. *Id.*

experienced."[210]

That books need not be "played" to be enjoyed is clear. However, it is not true that they cannot be played. Many books are now available on recorded cassettes for use by commuters, the blind, or other people who would just rather listen to a book on the beach than read one. The court's assertion, therefore, raises an interesting question. Could a book that was otherwise not patently offensive, like *Ulysses* or *An American Tragedy*,[211] become patently offensive simply by virtue of its being recorded? Probably not.

But the issue thus posed does illuminate a weakness in the court's analysis. It is incorrectly attributing patent offensiveness to a quality of the medium carrying the message, rather than to the message itself. Specifically, the court attributes the patent offensiveness of a given piece of music to the fact that it may be played in public, which is a characteristic of the medium of recorded music, rather than a characteristic of the message.

The court's faulty attribution becomes all the more clear in its related assertion that videotapes need not be played to be enjoyed. The temptation to be facetious in the face of such an assertion is overwhelming. Suffice it to say that little pleasure is likely to be derived from "reading" a videotape, in public or otherwise, whatever its contents. Perhaps this was an oversight on the part of the court.

Alternatively, it could be a symptom of a kind of media blind-spot. In other words, because the court failed to distinguish between an attribute of the medium and the contents of the message, it was blindsided by the two absurdities noted here.[212]

To this point, the analysis of *Skyywalker* has revealed several weaknesses in the court's reasoning that may be ascribed

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210. *Id.*

211. *See supra* notes 47-48.

212. Marshall McLuhan has termed such media blindness "Narcissus-narcosis." The essence of McLuhan's theory is that, because media are extensions of our senses, and because such extensions cause an extreme sense of dislocation in our minds, we have a tendency to block out the effects of the media. *See supra* note 97. In the instant case, the implication is that the court could not see the contradiction of finding that an attribute of the medium that affects all the messages carried on it, whether sexual or not, could contribute to the patent offensiveness of a particular sexual message that might be played on it. In fact, if McLuhan is correct, the court might not recognize the contradictory nature of its finding even after it was explained. *See generally*, MCLUHAN & FIORE, *supra* note 97, at 51-63.

to a lack of understanding of the effects of media. First, by including national media in its determination of the relevant community and excluding local ones, the court may hasten the absorption of the *Miller* test. Second, by excluding books, movies, and videotapes from its analysis of media effects on local community standards, the court may develop a skewed perception of those standards. Third, by avoiding careful consideration of the effects of the media on messages, the court may develop contradictory reasoning processes and fail to correctly determine whether a given message is obscene. Fourth, by failing to explicitly state its assumptions regarding the effects of the media in question, the court may subvert the legal process' attempts to control obscenity, or it may be blindsided by the media's effects on messages, thereby arriving at untenable positions regarding those effects.

Finally, the court addressed the serious value element of the *Miller* test: "whether the Nasty recording, taken as a whole, lacks serious literary, artistic, political, or scientific value" as judged by a reasonable person.[213] To begin, the court explained that this case is not about (1) the rap or hip-hop genres of music; (2) the Crew itself, as a band; (3) the Crew members themselves, as individuals; (4) the Crew's other music; nor (5) whether the *Nasty* recording is "stylish," "tasteful," and "popular."[214] The court is only interested in whether *Nasty* is obscene. Striking a somewhat defensive tone, however, the court wrote "[t]he Phillistines [sic] are not always wrong, nor are the guardians of the First Amendment always right."[215]

The court next examined whether *Nasty* might have any political or scientific value. Professor Carlton Long, a qualified expert in African-American culture, testified that *Nasty* does have political and scientific value. Two of Professor Long's explanations may be generally characterized as follows: (1) *Nasty* is an expression of the experiences and perceptions of young African-American men in the late twentieth century and, as such, it is an inherently political statement about the conditions of life for these men; and (2) *Nasty* contains examples of expressive modalities of African-American oral

213. *Skywalker*, 739 F. Supp at 593.

214. *Id.* at 594.

215. *Id.*

culture.[216]

The court dismissed Professor Long's first point, that expressions of the life experiences of African-American men are inherently political, by saying that "[w]hile it is doubtless true that *Nasty* is a product of the group's background . . . [and] heritage as black Americans, this fact does not convert whatever they say, or sing, into political speech."[217] But the Crew did not seek to "convert" their speech. In fact, the Crew's members testified that *Nasty* is not intended to convey a political message. Conversion is not the issue. The issue is whether the angry and misogynistic expressions on *Nasty* are political expressions worthy of First Amendment protection. However, further analysis of this issue is outside the scope of the present inquiry.

Turning to Professor Long's second point, that *Nasty* uses elements of African-American oral tradition that are significant from both political and scientific standpoints, the court found "none of these arguments persuasive."[218] These arguments consisted of testimony by Professor Long on the oral traditions of "call and response," "doing the dozens," and "boasting."[219] Professor Long testified that such examples of the street culture of African-American youths have significant sociological value.[220] In addition, Long testified that examples of literary techniques such as rhyme, allusion, and personification were present on *Nasty*.[221]

In dismissing these points, the court first noted that the examples of call and response on *Nasty* consisted of "males and females yell[ing], in repetitive verse, 'Tastes Great—Less Filling' and, in another song, assail campus Greek-letter group [*sic*]."[222] The court then noted that the other examples of African-American oral traditions, while perhaps present in greater quantities than call and response, "are also found in other cultures."[223] Finally, in response to Professor Long's testimony regarding *Nasty*'s use of literary devices, the court

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*

stated that "[t]his, of course, is nonsense."[224] In sum, the court found by a preponderance of the evidence, and even by clear and convincing evidence, that a reasonable person could not find *Nasty* to have serious political or scientific value.

It is illuminating, from a media ecology perspective, that the court strikes a somewhat strident tone throughout its examination of the political and scientific value of the evidence concerning the oral traditions of African-American culture. The court's apologetic listing of groups and individuals that it does not wish to offend, its defensive Philistine remark, and its characterization of Professor Long's testimony as "argument" and "nonsense" appear to manifest a latent hostility toward *Nasty*.

Such hostility, if it is present, may have its unconscious origins in the larger clash between the oral and literate cultures,[225] of which *Skyywalker* is a modern microcosm. This clash between the oral and literate cultures has been studied by many media ecologists.[226] According to Father Walter J. Ong, perhaps the foremost expert on the distinctions and conflicts between orality and literacy, the clash between an oral culture and a literate one is inherent in the nature of the literate mind.[227]

Simply put, this clash originates with the process of learning to write in a literate culture, which restructures human consciousness so as to exclude and devalue previous, oral modes of thought.[228] Through the development of writing, and later, printing, the law developed its bias in favor of rational discourse and against nonrational, nonliterate discourse.[229]

While a detailed account of the differences between an oral culture and a literate one is outside the scope of this Com-

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224. *Id.* at 595. The court went on to quote the famous dictum from Kois v. Wisconsin, 408 U.S. 229, 231 (1972): "A quotation from Voltaire in the fly leaf of a book will not constitutionally redeem an otherwise obscene publication."

225. It is beyond the scope of this Comment to give a detailed account of the effects on the law of the clash, or process of change, from a primarily oral culture, to a primarily literate one and beyond. Fortunately, such an examination has already been made and is the subject of Professors Collins and Skover's *Paratexts*, *supra* note 2.

226. *See e.g.*, INNIS, *supra* note 24; MCLUHAN, GALAXY, *supra* note 24, and MCLUHAN, UNDERSTANDING MEDIA, *supra* note 64; ONG, *supra* note 24 (1982); ERIC HAVELOCK, THE MUSE LEARNS TO WRITE (1986); Collins and Skover, *Paratexts*, *supra* note 2.

227. *See generally* ONG, *supra* note 24.

228. *Id.* at 78-123.

229. Collins & Skover, *Paratexts*, *supra* note 2, at 26-54.

ment, some examination of the attributes of the oral mind[230] or more appropriately, the secondary oral mind,[231] in relation to the serious value evidence in *Skyywalker* may clarify the nature of the conflict between the orality of *Nasty* and the literacy of the law.

As noted above, the Crew introduced testimony that *Nasty* contains examples of African-American oral traditions in the form of doing the dozens, boasting, and call and response.[232] Father Ong has carefully examined these forms of oral discourse and the literate mind's reactions to them.[233] The application of a few of his insights in relation to the expert testimony of Professor Long will disclose weaknesses in the court's analysis.

The court's first objection to Professor Long's testimony was that the alleged call and response aspects of *Nasty* were apparently "lifted from a beer commercial."[234] But the use of aspects of the culture's common experience is a hallmark of expression in oral traditions. That the Crew recognizes the call and response patterns present on the television and replicates them in its music shows its awareness of the "real life" experiences of its intended audience. In asserting that "[t]he

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230. The "oral mind" is simply one that has not been restructured by learning to write. ONG, *supra* note 24, at 10-15.

231. *Id.* Father Ong has stated that truly oral minds no longer exist because all cultures have been exposed, to some extent, to the effects of writing. But Ong and others have identified a newly emergent consciousness which he calls "secondary orality." This secondary orality is a hybrid of the oral mind and the literate mind, brought about by the extension of the senses through electronic media discussed above. *See supra* note 97. In essence, because these media allow us to communicate and interact orally and from a distance, thereby extending the reach of our senses, a secondary phase of predominantly oral discourse, secondary orality, has begun to develop. While this new orality will not likely displace literacy, it has distinctly limited the once dominant value of literacy in modern society.

232. *See supra* text accompanying notes 219-24.

233. ONG, *supra* note 24, at 31-57. Of particular interest among Father Ong's analyses of the traits of individuals in oral societies are the following: (1) Because oral societies must rely on memory rather than written records, mnemonic devices such as rhyme, rhythm, and alliteration are used extensively; (2) because oral societies must rely on repetition rather than "backlooping" in a text (i.e., quickly glancing back to the beginning of a line or page for recall), redundancy is essential for both remembering and explaining; and (3) because oral societies must rely on knowledge gained and stored in terms of their daily struggles for existence, rather than abstractly conceptualizing possible outcomes, agonistic expressions (i.e., combative expressions) and "real life" expressions are prevalent in their discourse. Each of these concepts will become clearer through an examination of their relationship to the court's analyses of the serious value element in the text.

234. Skyywalker v. Navarro, 739 F. Supp. 578, 594 (S.D. Fla. 1990).

phrases alone have no significant artistic merit nor are they examples of black American culture,"[235] the court addresses neither the meaning of artistic merit in the context of a secondary oral culture, nor the realities of African-American culture.

The court's second objection to Professor Long's testimony was that his examples of African-American oral traditions "are found in other cultures."[236] This is certainly true. But if the court is sincere in attempting to discover whether *Nasty* has any scientific value, then its recognition of the cross-cultural significance of such expressive modes should argue in favor of finding serious value in *Nasty*, not against it.

More specifically, "running the dozens" is "[s]tandard in oral societies across the world [and its] reciprocal name-calling has been fitted with a specific name in linguistics: flyting."[237] Thus, the universality among oral cultures of this flyting activity, which the court takes to invalidate its sociological significance, actually is itself sociologically significant. The court fails to recognize this significance because it is not examining the medium of discourse, but only its surface message.

The court's third objection to Professor Long's testimony was that it is nonsense to assert that the presence of certain literary devices on *Nasty* could give it serious political or scientific value.[238] But evidence of the use of literary devices signifying traditional oral discourse in the form of rhyme, rhythm, and alliteration, is probative on the nature of such expressions.

For instance, the expression of pent-up emotions created by constant exposure to difficult living conditions is fundamental to such traditional oral discourse and may be socially cathartic. Therefore, the court should at least have examined more closely the evidence regarding the oral mode of discourse and its possibly serious political and scientific value.

Turning from political and scientific value, the court then addressed the question of serious artistic value. The Crew first argued that *Nasty* was comedic and satirical art.[239] The court was not amused: "[i]t cannot be reasonably argued that the

235. *Id.*
236. *Id.*
237. ONG, *supra* note 24, at 44.
238. *Skywalker*, 739 F. Supp. at 595.
239. *Id.*

violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and miscroscopic [sic] descriptions of human genitalia [sic] contained on this recording are comedic art."[240] According to Father Ong's theories, had the court examined the nature of oral expression more closely, it might have found more to laugh about on *Nasty*.

As Father Ong has noted, "the Dozens is not a real fight, *but an art form*, as are the other stylized verbal tongue lashings in other cultures."[241] Such stylized verbal abuse inevitably is aimed at a "sister, but ultimately, [a] mother."[242] Furthermore, "[e]nthusiastic description of physical violence often marks oral narrative."[243] This is because "violence in oral art forms is . . . connected with the structure of orality itself."[244] Thus, the real world tensions of day-to-day life will find expression and release in a nonviolent verbal purging of anger within the oral art form. This purging acts on both the speaker and the listener.

In light of these analyses, the agonistic and violent expressions on *Nasty* would seem to have social value as artistic expression, as well as political value as a kind of pressure release valve. Furthermore, the misogynistic expressions noted by the court would appear to be part of the "stylized verbal tongue lashings" common in oral modes of expression. These expressions also reflect the real world tensions of every day life for *Nasty*'s audience. The court, however, does not recognize the possibility of the artistic and political value of *Nasty* because it only analyzes the apparent message in its words. The deeper message is in the form of the communication.

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240. *Id.* A representative sample of the expressions the court was objecting to includes the following: (Rap over drums and music):

> Dick Almighty (repeat several times)/ Dickta Almighty's of no surprise/ It'll fuck all the bitches/ All shapes and sizes/ She'll climb a mountain/ Even run the block/ Just to kiss the head/ Of this big black cock/ It'll tear the pussy open/ Cause it's satisfaction/ The bitch won't leave/ It's fatal attraction/ Dick's so powerful/ She'll kneel and pray/ Awaiting her time/ Hoping soon to slay . . ./ That Dick/ Will make a bitch act cute/ Suck my dick bitch/ And make it puke/ Jump up on it/ Grab it like you want it/ If you could wear a dick bitch/ You would flaunt it/ That Dick Almighty,/ A-A-All-mighty . . . .

241. ONG, *supra* note 24, at 44 (emphasis added).

242. Carlton Long, *The Oral Tradition*, N.Y.L.J., July 20, 1990, at 29.

243. ONG, *supra* note 24, at 44.

244. *Id.* at 45.

V. CONCLUSION

Courts must begin to examine the relationships between the media and messages they carry if they are to recognize the kind of paradoxical and destructive powers that the media contain. Careful judicial analysis of these relationships might, for a time, result in more enlightened and effective regulation of sexually explicit materials if courts no longer incorrectly attribute qualities of media to messages they carry.

As a result, courts may attempt to regulate the media themselves, within the framework of traditionally accepted "time, place, and manner" regulations. They may also abandon tacit presumptions of harmfulness that contribute only confusion and contradiction to current theory. Such band-aids might forestall highly dangerous attempts to restrict First Amendment freedoms in the name of preventing the debasement of the First Amendment by modern media.

However, if the absorption thesis and the *Paratrooper's Paradox* ultimately prove true in their most extreme manifestations, little can be done to prevent the debasement of discourse through the process of derationalization inherent in the modern media. No rationalistic course of preventive medicine can rid the postmodern society of this continually intensifying derationalization. "Don't attempt to adjust your TV, you are no longer in control . . . ."