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Constitutional Law: Can Music Be Considered Obscene? *Skyywalker Records, Inc. v. Navarro* — The 2 Live Crew, Obscene or Oppressed?

I. Introduction

> *I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .*
>
> — Supreme Court Justice Potter Stewart addressing the dilemma of defining obscenity.[1]

On June 6, 1990, United States District Court Judge Jose Gonzalez, Jr. ruled that music contained within the rap group 2 Live Crew's album *As Nasty As They Wanna Be* was obscene.[2] The 2 Live Crew album became the first musical recording ruled obscene in federal court history and immediately bestowed upon the members of the band the dubious distinction of being first amendment martyrs.

The first amendment free speech guarantee is not absolute;[3] speech that is categorized as obscene has no protection under the first amendment.[4] However, in the last thirty years, the Supreme Court has examined and redefined obscenity in a variety of contexts in response to the changing attitudes and values of contemporary American society.[5]

This note will focus on the unique problems of applying the current obscenity standard to the 2 Live Crew album *As Nasty As They Wanna Be*. First, a brief explanation of the historical evolution of rap music and its role as a cultural catalyst will be provided. Second, an introduction to

1. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

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

3. "We hold that obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485, *reh'g denied*, 355 U.S. 852 (1957). In *Roth*, the defendant was convicted of violating the Federal Obscenity Statute by mailing obscene advertisements and an obscene book. In affirming Roth's conviction, the Court upheld the validity of the statute as "a proper exercise of the postal powers delegated to Congress. . . ." *Id.* at 493.

4. U.S. CONST. amend. I states:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5. *See, e.g.*, Roth v. United States, 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1951); "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 388 U.S. 413 (1966); Miller v. California, 413 U.S. 15 (1972), *reh'g denied*, 414 U.S. 881 (1973); Pope v. Illinois, 481 U.S. 497 (1987) (chronological progression).

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the facts of *Skyywalker Records, Inc. v. Navarro*[6] and an analysis of the Florida District Court's opinion will be examined. Third, the constitutional and creative repercussions of declaring music obscene will be explored. Finally, possible alternatives to the current obscenity test will be offered in an effort to present a workable test that reflects societal interests.

II. What Is Rap and Where Did It Come From?

Rap music is not a new phenomenon. Before rock 'n' roll's hazy inception, the roots of rap music were firmly established. Rap is a unique form of cultural expression nurtured by a long heritage of slavery and resistance to racial, economic, political, social and cultural oppression. Rap is not the first black cultural expression reflective of black history, but rather the most recent.[7]

The first rap music recording surfaced from a Bronx, New York subculture called hip hop, and beneath that first recording was a vast expanse of sources reaching back to pre-slavery West Africa.[8] The praise singing, spirituals, and social satires of rap music have been evolving in Afro-American music for over one-hundred years.[9]

All artistic expressions are at least partially explained in terms of available technology or technique.[10] Rap is no different. In the late 1970s, in the urban ghettos of the Bronx, young black males took the simplest and most widely available devices in the recording chain, turntables and microphones, and transformed them into a new channel for expression outside the standardized and inhibiting mores of established society.[11] Rap was the culmination of the black youth culture of the Bronx, and later Harlem, twisting technology into a new cultural shape.[12]

Rap is sonic graffiti, characterized by musical outbursts which combine black rhythms and verbal gymnastics of hip street talk with an oftentimes ingenious manipulation of the turntable.[13] On a pair of turntables, previous recordings, including classical music and political speeches, are phased in and out, speeded up, cross-cut, and sampled to create an idiosyncratic soundtrack of Afro-American rhyme and reason.[14]

The sexual frankness of rap, as previously demonstrated by rock 'n' roll, continuously progresses ahead of the professed values of the dominant culture.[15] Rap is all too often condemned because its subject matter deals

6. 739 F. Supp. 578 (S.D. Fla. 1990).

7. For an excellent discussion of black musical experiences, origins, and development, see A. SHAW, BLACK POPULAR MUSIC IN AMERICA (1986); I. CHAMBERS, URBAN RHYTHMS, POP MUSIC AND POPULAR CULTURE (1985).

8. *See* D. TROOP, THE RAP ATTACK, AFRICAN JIVE TO NEW YORK HIP HOP (1984).

9. J.B.T. MARSH, THE STORY OF THE JUBILEE SINGERS; WITH THEIR SONGS (1903).

10. I. CHAMBERS, *supra* note 7, at 189-90.

11. *Id.* at 190.

12. *Id.*

13. D. TROOP, *supra* note 8, at 29-34, 126-37.

14. *Id.* at 126-37; *see also* A. SHAW, *supra* note 7, at 292.

15. Palmer, *Early Blues Lyrics Were Often Blue*, N.Y. Times, Nov. 7, 1985, at C33 col. 4. As far back as the 1920s, parents and the clergy assaulted the "seductive, destructive

with graphic and unpleasant topics;[16] yet these topics are real and very important issues that cannot be ignored simply because they are disturbing. Rap music, while perhaps misunderstood, is entitled to the same constitutional safeguards afforded other forms of communication worthy of the first amendment's protection.[17]

One does not have to support rap music to understand the important role that unrestricted musical expression serves in a democratic society. Rap music is a social barometer that oftentimes effectively strips away much of the camouflage of our society, while providing an outlet for frustration and a medium for voicing new and different themes.[18]

We can reach useful conclusions about rap using plain common sense. We have ears to hear and minds to judge, and if we listen and think with all our sensibilities, not just our personal prejudice or habitual feelings, we can clearly understand how a specific piece of music works and hear what it has to say.

III. Statement of the Case

United States District Court Judge Jose Gonzalez, Jr. was handed the unenviable task of addressing the obscenity issue in a musical context for

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power" of jazz and blues music. Hentoff, *Pasting Pink Slips on Album Covers*, Newsday, Aug. 28, 1985, at 57, col. 2. ("But it was the arrival of rock 'n' roll 30 years ago, raw powerful music for black adults that was adopted by white teenagers, that really focused outrage [sic].").

Troop emphasizes that

> the culture and language patterns of our communities differ, and that black life and cultural forms in particular have had to develop in a racist, white-dominated society, it is important also to realize that hip hop culture has aspects that are *sexist and homophobic*, which reflect the presence of these attributes in black culture in general.

D. TROOP, *supra* note 8, at 5 (emphasis added).

16. An excellent example is the 1982 social commentary song "The Message" by Grandmaster Flash and the Furious Five. In rapped lyrics, "The Message" projected images of inner-city decay, punctuated by a sinister laugh. It dealt with "junkies, hustlers, derelicts, bag ladies, a numbers runner and a suicide." Miller, NEWSWEEK, Aug. 30, 1982, at 69. In its brutish realism, Jim Miller of NEWSWEEK found it "strident, historic and a record that made everything else on the radio seem cowardly by comparison." *Id.* Curiously, considering its impact, "The Message" did not make the pop charts. But it was voted the best single of 1982 by the nation's rock critics, and it quickly became recognized as the landmark song that helped legitimize rap music. *Id.*

17. Because the interests that are protected are so important, the government must carefully classify which speech is actually obscene. Freedom of speech enjoys a predominate status: "First Amendment rights are entitled to special constitutional solicitude. Our cases have required *the most exacting scrutiny* in cases in which a State undertakes to regulate speech." Swope v. Lubbers, 560 F. Supp. 1328, 1331 (W.D. Mich. 1983) (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)) (emphasis in original).

18. Blacking points out that "no musical style has 'its own terms': its terms are the terms of society and culture, and of the bodies of the human beings who listen to it, and create and perform it." J. BLACKING, HOW MUSICAL IS MAN? 19 (1973). Langer makes a similar claim. For her, "a work of art expresses a conception of life, emotion, inward reality. . . . [in particular] music can reveal the nature of feelings with a detail and truth that language cannot approach." S. LANGER, PHILOSOPHY IN A NEW KEY 191 (1948).

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the first time in federal court history in *Skyywalker Records, Inc. v. Navarro.*[19] The first amendment guarantees the right to self-expression and the right to receive information[20] in order to preserve what Justice Holmes categorized as the "free trade in ideas."[21] However, the right to freedom of expression is not absolute.[22] The state can regulate content[23] if the message falls into one of the limited categories established by the Supreme Court to distinguish unprivileged expression,[24] such as obscenity, from privileged expression under the first amendment.[25] *Skyywalker* illustrates the inherent difficulty of applying the obscenity test to a musical recording.[26]

The plaintiff record company, Skyywalker Records, Inc. (Skyywalker), is a Florida corporation headquartered in Miami, Florida. Skyywalker released the rap group 2 Live Crew's[27] double album *As Nasty As They Wanna Be* in 1989. Generally misogynous and sexually graphic, the album has sold approximately 1.7 million copies, despite virtually no radio airplay. The album has been the target of criticism from a wide cross-section of the

19. 739 F. Supp. 578 (S.D. Fla. 1990).

20. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1965).

21. Abrams v. United States, 250 U.S. 616, 630 (1919).

22. *See supra* note 3 and accompanying text.

23. However, the case of *Marcus v. Search Warrant* established the rule that a state may not adopt procedures for dealing with obscenity without considering the impact upon constitutionally protected speech. Marcus v. Search Warrant, 367 U.S. 717, 731 (1961).

24. While this note is limited to the issue of whether certain lyrics are unprotected speech because they are obscene, the theory that particular lyrics are constitutionally unprotected because they constitute legal incitement should be noted. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (defining incitement as speech which "is directed to inviting or producing imminent lawless action and is likely to incite or produce such action"); *see also* Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460 (1984) [hereinafter Note, *Anti-Pornography Laws*].

Most of the significant incitement cases have involved fringe political groups or the advocacy of unpopular political ideas. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (*per curiam*) (antiwar protesters); Brandenburg v. Ohio, 395 U.S. 444 (1969) (*per curiam*) (Ku Klux Klan); Dennis v. United States, 341 U.S. 494 (Communist Party members advocating overthrow of the United States government), *reh'g denied*, 342 U.S. 842 (1951), *reh'g denied*, 355 U.S. 936 (1958); Whitney v. California, 274 U.S. 357 (1927) ("revolutionary unionism"), *overruled*, Brandenburg v. Ohio, 395 U.S. 449 (1969); Schenck v. United States, 249 U.S. 47 (1919) (draft dodging during World War I).

For an in-depth analysis into the problems that arise when applying the incitement approach to regulation of rock lyrics, see Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPPERDINE L. REV. 421 (1987) [hereinafter Comment, *Censorship*]. Briefly stated, the incitement approach raises the following problems: (1) rarely is the speaker/singer expressly advocating that lyrics be interpreted as reality; (2) such lyrics do not pose "imminent" danger in the *Brandenberg* sense; and (3) causation is rarely, if ever evident." *Id.* at 442.

25. Note, *Anti-Pornography Laws*, *supra* note 24, at 465; *see also infra* note 130 and accompanying text.

26. *See* Comment, *Musical Expression and First Amendment Considerations*, 24 DE PAUL L. REV. 143, 159 (1974) [hereinafter Comment, *Musical Expression*].

27. The 2 Live Crew consists of Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon. Luther Campbell is also president, secretary, sole shareholder, and sole director of Skyywalker Records, Inc. *Skyywalker*, 739 F. Supp. at 582. It should be noted that Skyywalker Records, Inc. changed its corporate name to Luke Records after Judge Gonzalez's decision.

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media.[28] A sanitized version titled *As Clean As They Wanna Be* has sold approximately 250,000 copies without the sexually explicit lyrics.[29]

Skyywalker brought a civil suit under 42 U.S.C. § 1983,[30] seeking declaratory and injunctive relief after the Broward County Sheriff's office obtained an ex parte order warning various record store owners not to sell the album. The ex parte order was granted after a finding of probable cause to believe that the record was obscene under Florida statutes.[31] Issuance of the ex parte order threatened the store owners with arrest, and the store owners withdrew the album from their shelves.[32]

In mid-March 1990 Skyywalker filed suit in federal court. Predictably, Sheriff Nicholas Navarro filed an *in rem* proceeding in Broward County Circuit Court, seeking a judicial determination of the record's obscenity under Florida law.[33]

Skyywalker filed the action in federal court, requesting only equitable relief, without any right to a jury trial.[34] While no constitutional right to a jury trial in obscenity cases exists,[35] Skyywalker made the tactical decision to condition its consent to a jury trial upon the court's ruling on a motion before the court concerning the standard of proof.[36] Skyywalker argued for a standard of clear and convincing evidence, as opposed to the less demanding preponderance of the evidence standard.[37] Judge Gonzalez denied the motion because proof by clear and convincing evidence or proof beyond a reasonable doubt is warranted only in criminal cases.[38]

Judge Gonzalez based his opinion on the Supreme Court case of *Miller v. California*,[39] which established a three-pronged test for defining obscen-

28. The controversy received extensive coverage by the press. Will, *America's Slide into the Sewer*, NEWSWEEK, July 30, 1990, at 64; Gates & Katel, *The Importance of Being Nasty*, NEWSWEEK, July 2, 1990, at 52; Leo, *Polluting Our Popular Culture*, U.S. NEWS & WORLD REPORT, July 2, 1990, at 15; *Too Cruel, Live*, THE NEW REPUBLIC, July 9 & 16, 1990, at 8-9 (editorial); Curriden, *But Is It Art?*, BARRISTER MAGAZINE, Winter 1990-91, at 12.

29. *Skyywalker*, 739 F. Supp. at 582.

30. 42 U.S.C. 1983 (1982).

31. FLA. STAT. § 847.011 (1982).

32. On June 8, 1990, an undercover policeman purchased copies of *As Nasty As They Wanna Be* in the E. C. Records store owned by Charles Freeman. Freeman was subsequently arrested and convicted and now faces a maximum sentence of a year in jail and a thousand-dollar fine. Florida v. Freeman, No. 90-17446MM10A (S.D. Fla. 1990). However, on June 10, 1990, members of 2 Live Crew were arrested after performing *As Nasty As They Wanna Be* at a Hollywood, Florida nightclub before nearly 400 fans at an adults-only show. The 2 Live Crew was subsequently found innocent of the same charges faced by Truman. Florida v. Campbell, No. 90017616MM10A (S.D. Fla. 1990).

33. *Skyywalker*, 739 F. Supp. at 583.

34. *Id.* at 590.

35. *See* Alexander v. Virginia, 413 U.S. 836, *reh'g denied*, 414 U.S. 881 (1973). For a discussion of the sixth amendment right to counsel in obscenity cases see Note, *The Right to a Jury Trial in Obscenity Prosecutions: Sixth Amendment Analysis for a First Amendment Problem*, 50 FORDHAM L. REV. 1311 (1982).

36. *Skyywalker*, 739 F. Supp. at 590.

37. *Id.*

38. *Id.*

39. 413 U.S. 15 (1973). In *Miller*, the petitioner was convicted of mailing unsolicited

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ity.[40] The *Miller* test consists of three separate evaluations of a given work:

> (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.[41]

As noted by Judge Gonzalez, both the prurient and patent offensiveness elements of the *Miller* test require application of "contemporary community standards."[42] However, the third element of the *Miller* test is to be measured by a reasonable person standard,[43] as established by the Supreme Court in *Pope v. Illinois*.[44] The majority in *Pope* concluded that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[45]

Judge Gonzalez, in determining that the album *As Nasty As They Wanna Be* was legally obscene according to the test articulated in *Miller*, used a three-part analysis.[46] First, for purposes of determining community stan-

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sexually explicit material in violation of a California statute, 311.2(a) which made it a misdemeanor to knowingly distribute obscene material. *Id.* at 16. The unsolicited advertisements consisted of a film and four books. *Id.* at 18; *see* F. LEWIS, LITERATURE, OBSCENITY, AND LAW 230 (1976). For a discussion of the *Miller* decision and its impact on the definition of obscenity, see ATTORNEY GENS. COMM'N ON PORNOGRAPHY, FINAL REPORT 1276-77 (1986).

40. *Miller*, 413 U.S. at 24. *Miller* is significant in that it rejected the earlier test established in the plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1986). *Miller*, 413 U.S. at 23. The *Memoirs* standard had been taken from the Court's first venture into the area of obscenity in *Roth*. *Id.* at 21-22.

41. *Miller*, 413 U.S. at 24 (citations omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting in turn Roth v. United States, 354 U.S. 476, 489 (1957))).

42. *Skyywalker*, 739 F. Supp. at 587; *see Miller*, 413 U.S. at 30-34; *see also* F. SCHAUER, THE LAW OF OBSCENITY 120-24 (1976). Prurience has been defined as the depiction of "erotic sexuality in a manner designated to create some form of immediate stimulation." *Id.* at 101-02.

43. *Skyywalker*, 739 F. Supp. at 593. In *Smith v. United States*, the Supreme Court, in passing, made the observation that perhaps the Miller Court did not intend the literary, artistic, political, or scientific value of a work to be determined by reference to contemporary community standards. Smith v. United States, 431 U.S. 291, 301 (1977).

44. 481 U.S. 497 (1987).

45. *Id.* at 500-01. For a discussion of the third part of the *Miller* test prior to *Pope*, see Main, *The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U.L.J. 1159 (1987). For analysis of the *Pope* decision, see Note, *Taking Serious Value Seriously: Obscenity, Pope v. Illinois, and an Objective Standard*, 41 U. MIAMI L. REV. 855 (1987); Note, *Pope v. Illinois: A Reasonable Person Approach to Finding Value*, 20 U. TOL. L. REV. 231 (1988); Note, *Obscenity: Is the Value of a Literary or Artistic Work to be Judged by Individual Community Standards?*, 15 S.U.L. REV. 129 (1988).

46. *Skyywalker*, 739 F. Supp. at 582. As noted by Judge Gonzalez, the obscenity issue was

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dards, the relevant communities were the adjoining counties of Palm Beach, Broward and Dade Counties in Florida.[47] Second, Judge Gonzalez held that he could determine community standards based on personal knowledge, without expert testimony, by noting that he had "attended public functions and events in all three counties."[48] Finally, by clear and convincing evidence, the album was legally obscene according to the three-pronged *Miller* test.[49]

IV. Skyywalker Analysis

The 2 Live Crew personifies everything that is wrong with music in society today. Some of the most insightful criticism of 2 Live Crew comes from Afro-Americans.[50] Stanley Crouch, a prominent critic and distinguished essayist, calls 2 Live Crew "spiritual cretins" and "slime."[51] Crouch goes on to say that "sadistic, misogynist, hateful music" adds to the increasing problems already burdening Afro-Americans.[52] However, sexually graphic content cannot be classified as obscene simply because it has an objectionable theme.[53] Furthermore, the presence of profanity may also be protected under the first amendment.[54] Any work having literary, political, or artistic merit has increasingly been given constitutional protection despite the patent offensiveness of the work.[55]

The *Miller* test is a mystifying test that exemplifies the Court's struggle to develop a workable standard that can both reflect reality and apply in a variety of contexts.[56] The *Miller* test is especially difficult to apply to rap, and music in general, for a variety of reasons.

First, and perhaps most importantly, lyrics are subject to varying interpretations and responses. Therefore, subjective evaluations reflecting the listener's personal preferences or bias may enter the decision-making process.[57] Second, *Miller* requires that the music in question be "taken as a

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only the first of two narrow and distinct issues. The second issue was "whether the actions of the defendant Nicholas Navarro, as Sheriff of Broward County, Florida, imposed an unconstitutional prior restraint upon the plaintiffs' right to free speech." *Id.* at 582. Judge Gonzalez held that the Broward County sheriff's actions subjected the recording to unconstitutional prior restraint of free speech in violation of the first and fourteenth amendments and permanently enjoined the sheriff from threatening record store employees with arrest. *Id.* at 603.

47. *Id.* at 588.

48. *Id.* at 589.

49. *Id.* at 596.

50. Leo, *Polluting Our Popular Culture*, U.S. NEWS & WORLD REPORT, July 2, 1990, at 15.

51. *Id.* at 15.

52. *Id.* at 15.

53. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 687-88 (1959) (a state cannot deny a license to show a film simply because adultery is presented in a favorable manner).

54. Cohen v. California, 403 U.S. 15, 22-26, *reh'g denied*, 404 U.S. 876 (1971).

55. *See supra* note 5 and accompanying text.

56. *Id.*

57. For an interesting, if one-sided, view of the roll of music in American society, see R.

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whole."[58] However, lyrics that are explicit when written but unintelligible when performed are difficult to evaluate. If the lyrics are transcribed, then analyzed, the music is not evaluated in accordance with the *Miller* test.[59]

While accompanying lyrics are generally considered secondary to music,[60] rap music's emphasis is exactly the opposite. The musical arrangements are structured to highlight the lyrical contents.[61] Finally, music with serious artistic or political value is excluded from the definition of obscenity.[62] Lyrics depicting violence or glorifying alcohol, drugs or the occult are not considered obscene under *Miller* because they do not appeal to prurient interests.[63]

A. Miller Test, Part I — Prurient Interest

Judge Gonzalez found that the album *As Nasty As They Wanna Be* appeals to the prurient interest[64] for several reasons. First, Judge Gonzalez

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PATTISON, THE TRIUMPH OF VULGARITY (1987). Pattison notes, "Rock is first, last, and always a musical return to the primitive. When white America turned to black rhythm and blues for its popular music, it embraced 'animalism and vulgarity' as virtues." *Id.* at 36.

58. *Miller*, 413 U.S. at 24; *see supra* note 26 and accompanying text; *see also* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934). According to the *Ulysses* court, the work must be considered as a whole, and objectionable passages can not be isolated and examined out of context. *Id.* at 707.

59. The *Skyywalker* court's reasoning on this point sends mixed signals. Judge Gonzales noted, "First, the *Nasty* lyrics contain what are commonly known as 'dirty words' and depictions of female abuse and violence. It is unlikely that the offensive description would not of themselves be sufficient to find the recording obscene." *Skyywalker*, 739 F. Supp. at 593 (citing American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (sexual subordination of women), *aff'd*, 475 U.S. 1001, *reh'g denied*, 475 U.S. 1132 (1986); New Jersey v. Rosenfeld, 62 N.J. 594, 303 A.2d 889 (1973)). However, Judge Gonzalez later cited the Supreme Court case of Kaplan v. California, 413 U.S. 115 (1973) (Court held expression by words alone, even if in a written form, can be legally obscene even if there are no accompanying pictures). Gonzalez maintained that *Kaplan* justified his analysis that "although music and lyrics must be considered jointly, it does not significantly alter the message of the *Nasty* recording to reduce it to a written transcript." *Skyywalker*, 739 F. Supp. at 595.

60. Note, *Song Lyric Advisories: The Sound of Censorship*, 5 CARDOZO ARTS & ENT. L.J. 225, 256 (1986).

61. D. TROOP, *supra* note 8, at 126-37.

62. *Miller*, 413 U.S. at 24. Curriden explains that the judicial system is having "major cultural problems" with the various 2 Live Crew cases. "Most judges I know don't think there is any serious value offered by rap or rock music, whether or not it is obscene." Curriden, *supra* note 28, at 14 (quoting F. Abrahms, a New York first amendment expert).

63. The Supreme Court has not decided whether violent material may be censored on other grounds. *See* Note, *The Censorship of Violent Motion Pictures, A Constitutional Analysis*, 53 IND. L.J. 381, 383 (1977). Curriden emphasizes, "You can show movies that show bodies being decapitated and violence beyond imagination, and those are not obscene. You show sex and you have gotten into the forbidden area — even though everybody thinks about it." Curriden, *supra* note 28, at 13 (quoting B. Rogow, professor of law at Nova University and the attorney representing 2 Live Crew).

64. The Supreme Court defines prurient as "material having a tendency to excite lustful thought." *Roth*, 354 U.S. at 487 n.20. Appeals only to "normal, healthy sexual desires" are

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noted that the lyrics and song titles were saturated with "references to female and male genitalia, human sexual excretion, oral-anal context, fellatio, group sex, specific sexual positions, sado-masochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning."[65]

Judge Gonzalez noted that Florida's obscenity statute provides statutory guidelines for determining what is sexual conduct,[66] and concluded that the depicted sexual activities were within the boundaries of the state statutes.[67] Judge Gonzalez also emphasized that the "frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into the activity."[68] Furthermore, the court placed some importance on 2 Live Crew's commercial motive in exploiting the prurient appeal to improve record sales.[69]

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not adequate to meet the test. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). The material must exhibit a "shameful or morbid interest in nudity, sex, or excretion." *Id.* (readopting definition in *Roth*, 354 U.S. at 487 n.20); *see also supra* note 40 and accompanying text.

65. *Skyywalker*, 739 F. Supp. at 591. Author notes this is a sanitized, yet accurate, interpretation of the *thematic* contents. However, to reproduce or transcribe the actual lyrics for the reader of the Note defeats the reasoning of *Miller* in taking a work "as a whole." *Miller*, 413 U.S. at 24; *see also Ulysses*, 72 F.2d at 707; *supra* note 26.

66. Section 847.001(11) of the Florida Statutes defines "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse, . . . masturbation. . . sadomasochistic abuse; [or] actual lewd exhibition of the genitals." FLA. STAT. ANN. § 847.001(11) (West Supp. 1990), *quoted in Skyywalker*, 739 F. Supp. at 591. Section 847.001 (2) defines "deviate sexual intercourse" as "sexual conduct between unmarried persons evolving contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva." FLA. STAT. ANN. § 847.001(2) (West Supp. 1990), *quoted in Skyywalker*, 739 F. Supp. at 591. Section 847.001(8) defines "sadomasochistic abuse" as "satisfaction from sadistic violence derived by inflicting harm upon another." FLA. STAT. ANN. § 847.001(8) (West Supp. 1990), *quoted in Skyywalker*, 739 F. Supp. at 591.

67. *Skyywalker*, 739 F. Supp. at 591. Censorship statutes are usually designed as a response to films. Case law addresses obscene magazines, books, films, photographs, and advertisements, but rarely focuses on recordings. One exception to this is the controversy over telephone pornography. *See generally* Cleary, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503 (1985).

68. *Skyywalker*, 739 F. Supp. at 591. Judge Gonzalez goes on to state: "The evident goal of this particular recording is to *reproduce the sexual act* through musical lyrics. It is an appeal directed to 'dirty' thoughts and the loins, not to the intellect and the mind." *Id.* at 591. (emphasis added). This language seems to reflect a reference to the incitement argument advanced by some critics of rap music. However, the problems noted in *supra* note 24 effectively dispel application of the argument to the case at bar.

69. *Skyywalker*, 739 F. Supp. at 591. Judge Gonzalez cites Ginzburg v. United States, 383 U.S. 463 (1966) as controlling on this point. In *Ginzburg*, the Court ruled that the state has the power to adjust the definitions of obscenity as it applies to minors to allow the state to restrict children's access to materials which would not otherwise be obscene. *Ginzburg*, 383 U.S. at 473-74. Central to the holding was the concept of pandering. *Id.* at 474. If the material is distributed in a manner to deliberately appeal to those whose only interest is in titillation, a court can rationally determine that the work is obscene. *Id.* at 475; *see also* Shauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1278 (1977).

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The court's conclusion that *As Nasty As They Wanna Be* appeals to the prurient interest[70] was justified. However, a seemingly valid question would be whether the lyrics appeal to the prurient interest or whether the court's analysis reflects a cultural bias. As previously noted, lyrics can be governed by differing interpretations and responses, with a listener's subjective evaluation entering the decision-making process.[71] Skyywalker and 2 Live Crew noted that when their music was played in open court, the audience's initial reaction was laughter followed by silence.[72] The probative value of the courtroom reaction is, again, subject to numerous interpretations. But the reaction illustrates the inherent difficulty in classifying a recording as appealing to a contemporary community's prurient interests.

B. Miller Test, Part II — Patently Offensive

The *Skyywalker* court, applying contemporary community standards,[73] found 2 Live Crew's album patently offensive.[74] Judge Gonzalez, noting that the frequency and lewdness of the lyrics are factors to be considered, distinguished this music from a song subtly depicting sexual situations or a case in which "one particular scurrilous epithet" is uttered.[75] Judge Gonzalez stressed that the conduct described on the album is within the scope of Florida's statutes[76] and observed that "dirty words"[77] can be more intrusive to an unwilling listener than other methods of communication.[78] Finally, Judge Gonzalez took into consideration the commercial exploitation of sex to promote sales.[79]

Although the "reception of communication should be voluntary,"[80] inevitably at some point in our daily lives we will be confronted with something offensive, indecent, and perhaps obscene. However, the line between free speech and obscenity is subtly drawn. The law imposes a presumption that all speech is protected by the Constitution until there is a judicial decision to the contrary.[81]

But would the lyrics of the album be patently offensive to the average person applying community standards?[82] Theoretically, in determining the

70. *Skyywalker*, 739 F. Supp. at 592 ("[T]his court has no difficulty in finding that *As Nasty As They Wanna Be* appeals to a shameful and morbid interest in sex.").

71. *See supra* note 57 and *infra* text accompanying note 114.

72. *Skyywalker*, 739 F. Supp. at 595.

73. *Miller*, 413 U.S. at 30.

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

75. *Id.* (quoting Cohen v. California, 403 U.S. 15 (1971)).

76. *Id.*

77. *Id.* at 593.

78. *Id.*

79. *Id.*

80. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153, 175 (1972).

81. *Skyywalker*, 739 F. Supp. at 597; *see, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63 (1989); Heller v. New York, 413 U.S. 483, 491 (1973).

82. For a discussion of contemporary community standards and the implication on obscenity trials *see generally* Note, *Community Standards and Federal Obscenity Prosecutions*, 55 S. Cal. L. Rev. 693 (1982).

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views of the "average person," a court should not focus only on the views of the most sensitive or most tolerant residents.[83] The "average person" is a legal theory that formulates a single perspective derived from the aggregation of everyone's opinion in the relevant community,[84] including persons with different degrees of tolerance.[85] Judge Gonzalez did not include minors in the average person formula because there was not sufficient evidence introduced at trial that the record was marketed toward or was actually heard by children.[86]

Curiously, in an area "remarkable for its diversity,"[87] reflective of a "*more* tolerant view of obscene speech"[88] than other Florida communities, the record was found to be patently offensive to the average person. Oddly enough, according to the court's findings, the average person of Palm Beach, Dade, and Broward counties could not tolerate an album which receives minimal commercial radio airplay, but could at the same time enthusiastically support a "famous topless doughnut shop."[89]

While the lyrics may be "dirty,"[90] the court's analysis of the written transcript of the lyrics fails to evaluate the album "as a whole."[91] The court refers to a captive audience analogy, purporting to defend unwilling listeners from offensive speech.[92] The court seems to ignore the fact that exposure to a record that receives limited radio airplay usually requires an affirmative act by the audience, such as purchasing the recording, to receive the expression. *Skyywalker* is clearly distinguishable from *Federal Communications Commission v. Pacifica Foundation*.[93] In *Pacifica*, the Supreme Court, while emphasizing the narrowness of its decision, upheld the Federal Communications Commission's right to regulate indecent expression on radio because the broadcast media is more intrusive in the home and, consequently, more accessible to children than other types of expression.[94]

Judge Gonzalez justly factored the commercial exploitation of sex into his patent offensiveness conclusion,[95] yet failed to recognize the influence

83. *Skyywalker*, 739 F. Supp. at 588; *see also* Smith v. United States, 431 U.S. 291, 304-05 (1977).

84. *Skyywalker*, 739 F. Supp. at 589.

85. *Id.* at 589 ; *see* Pinkus v. United States, 436 U.S. 293 (1978), *cert. denied*, 439 U.S. 999 (1978).

86. *Skyywalker*, 739 F. Supp. at 589.

87. *Id.* at 588.

88. *Id.* at 589 (emphasis in original).

89. Gates & Katel, *supra* note 28, at 52.

90. *Skyywalker*, 739 F. Supp. at 593.

91. *See supra* notes 26, 58.

92. *Skyywalker*, 739 F. Supp. at 593.

93. 438 U.S. 726 (1978).

94. *Id.* at 749. The Court did not indicate whether this protection from indecency would apply to other communication formats. *Id.* at 749..

95. *Skyywalker*, 739 F. Supp. at 593. For an interesting critique of patent offensiveness as a useful part of the obscenity test, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50-52 (1982). Schauer argues that only prurient interest (which identifies works that involve no communication) and serious value (which identifies work that do involve communication)

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of a basic human desire to taste the "forbidden fruit."[96] Humans possess an innate characteristic to want to experience something prohibited or scorned by the majority.[97] The disparity of approximately 1.45 million in record sales[98] between the explicit and sanitized versions of the record illustrates the widely accepted and often utilized notion of exploiting sex to promote commercial interests.[99]

C. Miller Test, Part III — Social Value

Judge Gonzalez, applying the final and most important element of the *Miller* test, held that a reasonable person would find that the album taken as a whole, lacked "serious literary, artistic, political, or scientific value."[100] The cumulative effect of this holding finalized the court's three-part *Miller* analysis and solidified the judicial determination that branded the recording as obscene.

The court emphatically stressed that neither 2 Live Crew nor the rap music genre was the target of the case; only the social value of the record *As Nasty As They Wanna Be* was at issue.[101] Judge Gonzalez emphasized that the judiciary's role does not include the role of art and music critic or censor. Nonetheless, Judge Gonzalez quickly pointed out that 2 Live Crew had "testified that neither their music nor their lyrics were created to convey a political message."[102]

The court proceeded to discredit the testimony of the only expert witness who testified on the political, cultural, and sociological aspects of the recording.[103] Judge Gonzalez acknowledged that 2 Live Crew's strongest argument was the possibility of the record having "serious artistic value," but predictably concluded that the explicit lyrics were "utterly without any redeeming social value."[104] The court then concluded its analysis by finding

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are relevant to the obscenity issue.

Schauer is a professor of law at the University of Michigan Law School, Ann Arbor, Michigan. He was a member of the Attorney General's Commission on Pornography. His work has been cited by the United States Supreme Court in *Smith v. United States* and the Louisiana Supreme Court in *State v. Walden Book Co. See* Smith v. United States, 431 U.S. 291, 301 (1977); State v. Walden Book Co., 386 So. 2d 342, 345 (La. 1980).

96. *Skyywalker*, 739 F. Supp. at 595.

97. Curriden states: "'Over two million people bought the album and they are not criminals. They have to wonder what type of legal system outlaws their purchases'." (quoting B. Rogow, professor of law, Nova University and the attorney representing 2 Live Crew). Curriden, *supra* note 28, at 14.

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

99. Troop notes that many rap groups become unknowing agents of cultural exploitation in pursuit of corporate profits and success. D. Troop, *supra* note 8, at 6. Troop also concludes that rap music has become a public relations and marketing strategy that promotes and sells products to youth. *Id.*

100. *Skyywalker*, 739 F. Supp. at 596.

101. *Id.* at 594.

102. *Id.*

103. *Id.* at 594-95.

104. *Id.* at 595, 596.

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that the recording, taken as a whole, was legally obscene in accordance with *Miller's* three-pronged analysis.[105]

While application of the reasonable person standard for social value was asserted by the court, was this nebulous term applied correctly or does the test itself highlight the Supreme Court's difficulty in establishing a uniform, workable guideline for use in defining obscenity? The correct answer to both questions is yes.

The "utterly without" redeeming social value language of Judge Gonzalez's[106] opinion seems to reflect the outdated test established in *Roth v. United States*,[107] which was later redefined in *Miller*[108] and further refined in *Pope*.[109] The judiciary plays the central role in balancing constitutional rights with community mores. When a court addresses a question of obscenity, the social value of the work judged by a reasonable person often plays the largest role in the analytical process.

The social value of the record is not just a factual question, it is also a legal question. Analysis of the *Miller* test suggests that the "serious value" element is essentially different than the first two elements. The *Miller* Court stipulated that prurient interest and patent offensiveness, not social value, are factual questions to be measured by the "average person applying contemporary community standards."[110] A logical inference would seem to indicate that prurient interests and patent offensiveness define obscenity, but social value identifies the protected speech.

Stated differently, the social value standard is the principal safeguard against infringement upon interests protected by the first amendment. However, a test for obscenity that fails to evolve in response to societal changes may become obsolete. Accordingly, the Supreme Court's adoption of the reasonable person standard in *Pope* may be interpreted as a response to this need for evolution.[111]

A fundamental understanding of the nuances of the social value standard is essential to understanding the *Skyywalker* holding because this factor was decisive in determining that the recording was obscene.[112] The reasonable person standard is more intangible than the outdated community standard, which theoretically could have been shown by extrinsic evidence.[113]

105. *Id.* Judge Gonzalez's opinion concluded with the resounding statement "OBSCENITY? YES!" *Id.* at 596 (emphasis in original).

106. *Id.* at 596.

107. Roth v. United States, 354 U.S. 476, 489, *reh'g denied*, 355 U.S. 852 (1951).

108. Miller v. California, 413 U.S. 15, 24 (1973).

109. Pope v. Illinois, 481 U.S. 497, 497 (1987).

110. *Miller*, 413 U.S. at 30. The issue is muddled by Justice Rehnquist's classification of patent offensiveness as a question of law: "We hold that the film [*Carnal Knowledge*] could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way. . . ." Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

111. Justice White based the *Pope* decision on the third prong of the *Miller* Test, and relied on the Courts' discussion in Smith v. United States, 431 U.S. 291 (1977) in reasoning that no precedent existed for determining the value of an allegedly obscene work by reference to community standards. *Pope*, 481 U.S. at 498-500.

112. *Skyywalker*, 739 F. Supp. at 593.

113. Extrinsic evidence could be shown from empirical data complied from surveys of a

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The reasonable person standard simply places more importance on the roles of the court, prosecution, and defense counsel. Both parties will attempt to inform the jury, and the judge, as to how a reasonable person will determine the serious value of the allegedly obscene music. This approach could focus the efforts of opposing counsels to cater to the subjective impressions of the jury or the judge, rather than focusing on the proper objective analysis required by the standard established in *Pope*.[114]

V. First Amendment Principles and Ramifications

Characterizing rap music as expression capable of first amendment protection is a task of deceptively great difficulty. Justice Harlan's insightful statement that "it is nevertheless often true that one man's vulgarity is another's lyric" reminds us of this dilemma.[115] The lyrics of rap music are clearly speech. However, some have argued that the mixture of rhyme and rhythm constitutes something entirely different from either component standing alone and, therefore, is unprotected by first amendment doctrines.[116] At least one commentator has convincingly argued that "since music serves a considerable social function and at the same time represents an important mode of artistic expression," music should be within the protective scope of the first amendment.[117]

The Supreme Court has never held that all forms of expression deserve first amendment protection against government restrictions. One of the basic reasons for not protecting obscenity is that obscene material appeals only to the prurient interest, and does not communicate any ideas or aid in rational decision making.[118] Although there has been much discussion of the purposes underlying the guarantee of free speech,[119] the *Skyywalker* opinion

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cross-section of the community. *But see* Note, *The Controversial Role of the Expert in Obscenity Litigation*, 7 CAP. U.L. REV. 519 (1978).

114. For a more extensive evaluation of the *Pope* decisions role in defining obscenity, see *supra* sources cited note 45 and accompanying text.

Justice Stevens provided a detailed analysis in *Pope* describing how a juror superimposes his or her own view over that of a reasonable person since an individual juror sees his or her own view as reasonable. *Pope*, 481 U.S. at 514 (Stevens, J. dissenting).

115. Cohen v. California, 403 U.S. 15, 25 (1971).

116. *See* Comment, *Musical Expression*, *supra* note 26, at 159.

117. *Id.* "[M]aterial dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection." Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (footnote and citation omitted).

118. Miller v. California, 413 U.S. 15, 24 (1973).

119. The leading advocate of the view that the free speech guarantee is designed to facilitate intelligent self-government in a democratic system is Alexander Meiklejohn. *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) [hereinafter A. MEIKLEJOHN, FREE SPEECH]; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; *see also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); T. EMERSON, THE SYSTEM OF FREE

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advances a related and more fundamental question: Why, within the area of free expression restrictions, is the *Skyywalker* holding so important?

The potential danger of the *Skyywalker* decision should be heeded not only because of the harm that stems from the curtailment of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.[120] In the first amendment context, any effort by the government to suppress speech, and in this case a musical recording, because the government disagrees with the speaker's views directly contradicts three of the most important principles of free speech theory.[121]

The system of free expression advances the search for truth.[122] This theory is based upon the view that, in the search for truth, we are more likely to prevail if we depend upon "the power of the thought to get itself accepted in the competition of the market . . . ."[123] Any governmental effort to restrict 2 Live Crew's music simply because the music is a "wrong," "false," or "bad" idea defies this basic first amendment principle.

A second principle evolves from the idea that the free speech guarantee helps prepare citizens to make decisions essential to a self governing society.[124] Governmental attempts to extinguish "undesirable" information circumvents the right of the people to make their own decisions, thus conflicting with this essential principal. Evidence of this restriction is readily apparent in *Skyywalker*, and exemplified by the Broward County sheriff's overzealous

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EXPRESSION (1970); F. SCHAUER, *supra* note 95; Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Stone, *Reflections of the First Amendment: The Evolution of the American Jurisprudence of Free Expression*, 131 J. AM. PHIL. SOC. (1987); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

120. *See* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978), for an analysis of the "chilling effect" and free speech adjudication. Schauer states that "[a] chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." *Id.* at 693.

121. This theory has two principal correlations. The first is that the government cannot exempt expression from an otherwise general restriction because it agrees with the speaker's views. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1982 (1975). The second is that the government cannot restrict expression because it may be embarrassed by publication of the information revealed. *See* Blasi, *supra* note 119.

122. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 25 (1975).

123. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). The premise that a fundamental purpose of free speech is to aid in society's search for truth was first developed by Milton. *See* J. MILTON, AREOPAGITICA (1644), *reprinted in* J. MILTON, AEROPAGITICA AND OTHER PROSE WORKS 1, 23-38 (1972).

124. *See* A. MEIKELJOHN, POLITICAL FREEDOM 24-28 (1960) (absolute First Amendment protection should be awarded only to speech on public issues related to self-government); *see also* Bork, *supra* note 119, at 20-35 (for first amendment purposes, "public issues" should signify only political topics).

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efforts to prevent local distribution of nationally circulated musical recordings.[125]

Finally, first amendment protections are critical to the development of personal growth and self-realization by permitting an individual to make his own moral, social, and political decisions.[126] Open, unrestricted discourse is presumed a shared value in democratic societies.[127] Shared participation and expression of varying ideas are especially critical to segments of society traditionally isolated from the mainstream.[128]

The ramifications of *Skyywalker* leave society with an incomplete, and perhaps naive, perception of the world at large. As a result, two of the principal goals of free speech, the search for truth and effective self-government, are sacrificed.[129]

Theoretically, the *Skyywalker* court began with the presumption that *As Nasty As They Wanna Be* was protected by the first amendment. However, after making a legal determination of the music's obscenity, in accordance with *Miller*, the record was left unprotected because it did not sufficiently advance essential first amendment principles.[130]

Briefly stated, in conventional first amendment analysis, the Supreme Court used a "categorization" approach or definitional balancing technique to formulate categorical rules differentiating between speech protected by the first amendment and speech subject to governmental restriction and regulation.[131] *Skyywalker* demonstrates an attempt to strike an appropriate balance, judicially determining whether 2 Live Crew's album is of only "low" first amendment value, and thus deserving of only limited constitutional protection.[132]

125. *See supra* notes 32, 46.

126. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971); T. EMERSON, *supra* note 119, at 6; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 578 (1978).

127. A. MEIKLEJOHN, FREE SPEECH, *supra* note 119 and accompanying text.

128. *See generally* D. TROOP, *supra* note 8, at 4-5.

129. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) (this distortion of the marketplace of ideas is of concern because it may result in the "mutilation of the thinking process of the community," thus impairing effective self-governance and the search for truth).

130. Traditional first amendment doctrine requires that when a government regulation is targeted at the communicative impact of expressive activity, the regulation is invalid unless it falls within one of the several narrow exceptions (obscenity, express incitement, false statements of fact, fighting words, commercial speech, and child pornography) to the principle that the government may not prescribe the content or form of individual expression. *See* L. TRIBE, *supra* note 126, § 12-1, at 582.

131. For a brief yet informative discussion of the Court's categorization technique, *see generally* L. TRIBE, *supra* note 126, § 12-8, at 602-08; Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 979-81 (1987); Ely, *supra* note 121, at 1982.

First amendment absolutists might argue that speech should never be punished or prevented. However, when faced with a form of expression that did not seem worth protecting, even self-styled absolutionists like Justices Black and Douglass balanced the value of the expression against other interests to determine whether they would recognize the expression as protected "speech" at all. *See* J. ELY, DEMOCRACY AND DISTRUST 109 (1980).

132. The "low" value theory first appeared in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) in which the Court observed that

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The first amendment and the interests it promotes are permanent fixtures upon the constitutional landscape. The Supreme Court has held that the right to receive information is fundamental to a free society, and the fact that obscene materials in general are arguably lacking of any ideological content is irrelevant.[133] The line between the transmission of ideas and entertainment is much too elusive for any court to draw.[134]

VI. Skyywalker, Its Progeny and Alternatives

The Supreme Court made the brief comment in *Paris Adult Theater I v. Slanton*[135] that the banning of obscenity is not thought control because "obscene material . . . by definition lacks any serious literary, artistic, political, or scientific value as communication."[136] While the social value of sexually explicit musical recordings is questionable, a perpetual need for nonconformist outlets of expression in every democratic society undeniably exists. Because of these conflicting values, the *Skyywalker* decision was met with critical acclaim by anti-pornography supporters, especially various feminist groups,[137] while confirming the worst fears of first amendment absolutists.[138]

The legal definition of obscenity is based on the premise that obscenity has no first amendment value.[139] The definition emphasizes both the provocativeness and lewdness of the work and whether the work is likely to affect the listener in a way that offends community sensibilities.[140] In contrast, the feminist conception of pornography focuses on the women depicted and whether the illustration encourages men to believe that women experience sexual pleasure through degradation and brutalization.[141]

The specter of censorship and implications of increasingly-stifled first amendment principles are demonstrated in cases such as *Skyywalker*, and

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> certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72; *see also* Miller v. California, 413 U.S. 15 (1973).

133. Stanley v. Georgia, 394 U.S. 557, 566 (1969). However, such an uninhibited right of access is granted only to adults, not children.

134. *Id.*

135. 413 U.S. 49, *reh'g denied*, 414 U.S. 881 (1973).

136. *Id.* at 67.

137. *See* C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987); A. Dworkin, Pornography: Men Possessing Women (1981). However not all feminists support attempts to censor pornography. *See, e.g.*, Kaminer, *Pornography and the First Amendment: Prior Restraints and Private Action*, in Take Back the Night 241, 247 (L. Lederer ed. 1980).

138. For varying interpretations of what the implications were prior to *Skyywalker*, see Comment, *Musical Expression*, *supra* note 26; Comment, *Censorship*, *supra* note 24; Comment, *Regulating Rock Lyrics: A New Wave of Censorship?*, 23 Harv. J. Legis. 595 (1986).

139. *See* Note, *Anti-Pornography Laws*, *supra* note 24, at 465.

140. *Id.* at 466.

141. *Id.* at 460.

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alluded to in *Pope*. In *Pope*, Justice Scalia's concurring opinion emphasized that the Court's holding modified only the serious value prong of the *Miller* test. While underscoring the need for a reexamination of *Miller*, Justice Scalia noted the difficulty of making objective evaluations of literary or artistic value after emphasizing that there are "many accomplished people who have found literature in Dada, and art in the replication of a soup can. . . ."[142] Justice Scalia remarked that "[j]ust as there is no use arguing about taste, there is no use litigating about it. For the law courts to decide 'What is Beauty' is a novelty even by today's standards."[143] Essentially, Justice Scalia reasons that regardless of the standard used, the Court is unable to develop a completely objective test because personal preferences will naturally play a role in any decision. The *Skyywalker* court's analysis reflects Justice Scalia's concerns.

Justice Stevens' dissent in *Pope* identified the majority's failure to establish a precedent on obscenity that defines the offense with sufficient clarity so that ordinary people can understand what actions are prohibited.[144] Justice Stevens also cited in his dissent the first amendment ramifications of *Pope*.[145] Justice Stevens found the majority opinion inaccurate because it assumed all reasonable persons would address the "value" inquiry in an identical fashion.[146] Specifically, he noted that use of the "reasonable person" standard could result in inconsistent decisions.[147] Justice Stevens advised that first amendment protection "must not be contingent on this type of subjective determination."[148]

Justice Brennan's dissent in *Pope* noted that "obscenity cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials."[149] Justice Scalia's concurring opinion in *Pope* suggests the need for a reevaluation of the *Miller* test.[150] The message sent by these two learned, yet ideologically opposite, Supreme Court justices seems to state that, while a realistic obscenity test is desirable, the Court's decisions exemplify the inherent impossibility of formulating a workable obscenity test. Numerous theories and alternatives have been offered, but none seem to fill the void demonstrated by the *Skyywalker* court's application of the current test for obscenity to the rap music context.

A. *Time, Place, and Manner Restrictions Alternative*

Justice Brennan's alternative approach, that there is no test for obscenity, fell one vote short of acceptance by a Supreme Court majority in 1973.[151]

142. Pope v. Illinois, 481 U.S. 497, 504 (1987).
143. *Id.* at 505.
144. *Id.* at 515 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).
145. *Id.*
146. *Id.* at 1926; *see also supra* note 114.
147. *Pope*, 481 U.S. at 511; *see also supra* note 32.
148. *Pope*, 481 U.S. at 1927.
149. *Id.* at 1924 (Brennan, J., dissenting) (quoting Paris Adult Theater I v. Slanton, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting)).
150. *Id.* at 505.
151. Paris Adult Theater I v. Slanton, 413 U.S. 49 (1973).

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Due to the Court's realignment, Brennan's test is not likely to be established anytime soon. However, many first amendment absolutists maintain that this alternative would allow communities to focus on the actual problem of keeping sexually explicit music away from minors and unwilling adults.

In connection with this idea, there is a viable option that would eliminate the need for federal legislation regarding explicit lyrics. Individual states or municipalities could elect to promulgate statutes in response to offensive music by utilization of time, place, and manner restrictions.

Under the authority of its police powers, a state may control music either performed or broadcast in a public forum by regulation of the time, place, and manner of the music.[152] For these restrictions to be valid, they must be reasonable and implemented without considering the content of the music.[153] The Supreme Court has developed a three-part analysis under which time, place, or manner restrictions will be upheld if they are content neutral, narrowly defined to address a significant governmental interest, and leave sufficient alternative means of communication open.[154]

Application of this test to state regulation of musical recordings must pass two analytical hurdles. Initially, the court must determine if the regulation is actually an attempt to control or suppress the content of the message. Such a regulation will not be upheld unless the reviewing court determines that the music is obscene, or falls within another category of speech unprotected by the first amendment.[155]

Assuming that the regulation is not restrictive of content, the court must then determine if the regulation is the least restrictive means of promoting a significant governmental interest. This determination is essentially a balancing test that weighs the stringency of the time, place, or manner regulation against the significance of the state interest involved.[156]

152. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In *Pacifica* the Supreme Court, while emphasizing the narrowness of its decision, upheld the FCC's right to regulate indecent expression on radio because the broadcast media was more intrusive in the home and, consequently, more accessible to children. *Id.* at 749. Note that the Court did not indicate if this protection from indecency would apply to other communication formats. *Id.*

153. These limits on the power of the state exist to prevent restrictions of content being disguised as time, place, and manner restriction. *See* Madison School Dist. v. Wisconsin Employment Relations Comm'n., 429 U.S. 167, 176 (1976); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92-94 (1977).

154. Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983); *see also* United States v. O'Brien, 391 U.S. 367, 377, *reh'g denied*, 393 U.S. 900 (1968). In *O'Brien* the Supreme Court held:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Id.

155. *See* Regan v. Time, Inc., 468 U.S. 641, 648 (1984). "We hold that obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485, *reh'g. denied*, 335 U.S. 852 (1957); *see also* note 130 and accompanying text.

156. *Regan*, 468 U.S. at 648. It should be noted that the existence of alternative means for musical expression weighs substantially in deciding the permissibility of the regulation.

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Three methods can be suggested by which musical recordings could be regulated through time, place, or manner restriction. First, the place where recorded music is delivered can be controlled if the delivery takes place in a public forum.[157] Second, the state can regulate certain music in order to protect individuals who claim a right to avoid hearing a message they consider offensive.[158] Finally, graphically explicit album covers[159] can be kept within opaque covers placed over any potentially offensive material.

Application of these time, place, and manner restrictions to music are functional in theory, but problematic in reality. Most rap music is played in places other than traditional public forums, although occasionally a concert will take place in a public park. While time, place, and manner restrictions are well suited for live performances and radio and television broadcasts, 2 Live Crew's album received minimal commercial radio airplay. Record albums are not played in a public forum, but rather are bought and sold privately. Unless the stream of commerce is considered a public forum, these commercial transactions do not fit within any of the established categories of regulation.

Use of time, place, and manner regulations in protecting unwilling recipients also generates problems. Normally, the purchase of recorded music is done voluntarily, thereby imposing a diminutive threat to those claiming a right not to hear the message. However, expansive misuse of this option could provide justification for the regulation of radio and television broadcasts, and perhaps street musicians.

While self-restraint by the record distribution companies in marketing albums with opaque covers is advocated as a less restrictive alternative to state regulation, this practice raises unique policy concerns. Regulation by private industry can be an arbitrary, ungovernable form of restraint and a greater threat to first amendment values than state-sponsored regulations. Furthermore, by being cautious, consumers who are particularly sensitive to potentially offensive album covers, and the lyrics contained within, do not have to actively subject themselves to such material.[160]

157. *See generally* Comment, *Censorship, supra* note 24, at 421 (noting that the Supreme Court has recognized at least three types of public forums: (1) Places such as parks and streets, which have traditionally been used for purposes of assembly and communication of public issues; (2) Areas such as public university facilities, that the state has opened to the public as a place of expressive activity; and (3) public property which is neither a traditional place for public communication nor was it opened by the state for expressive purposes).

158. This is analogous to the Courts "captive audience" analogy in FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978). *See also* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

159. In the case at bar, the album cover for *As Nasty As They Wanna Be* features all four members of 2 Live Crew facing shapely females who are clothed in "G-strings" or "thong" bikini bottoms exposing bare buttocks. Not surprisingly, as a precursor for the thematic content of the album, the statement "WARNING EXPLICIT LANGUAGE CONTAINED" is also on the album cover. *Skyywalker*, 739 F. Supp. at 583.

160. This is analogous to Justice Harlan's majority opinion in Cohen v. California, 403 U.S. 15 (1971). By wearing a jacket bearing the slogan "Fuck the Draft" in a courthouse hallway, Cohen violated a provision of the California Penal Code which prohibited "mali-

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B. Serious Value and Creator's Intent Alternative

Another option that could be employed by courts is one that focuses on the serious value of the work and the intent of the artist involved.[161] Judge Gonzalez's *Skyywalker* opinion seemed to revolve around the serious value element of the *Miller* test.[162] While the Supreme Court adopted the reasonable person standard for serious value in *Pope*, for many observers the change in terminology was of no substantial help in deciphering serious value.[163]

Prior to the test established in *Miller*, the Supreme Court addressed the meaning of serious literary, artistic, political, or scientific value in the case of *Kois v. Wisconsin*.[164] In *Kois*, the Court, in a *per curiam* decision, reversed a defendant's conviction for publishing an allegedly obscene poem based on the observation that the poem "bears some of the earmarks of an attempt at serious art."[165]

Applied to 2 Live Crew's case, the status of their album as serious art would depend not upon actual merit, but upon the intent of the artist to produce a serious work.[166] Given the first amendment purpose of protecting the communication of ideas, the protection of speech should not be limited to the cultural elite, the articulate, and the eloquent. To extend the first amendment solely to mainstream musical performers would hinder the development of new artists who must polish their skills by performing. If the intent behind the work is to produce an album of literary, artistic, political, or scientific value, the work is not obscene. However, for a court to attempt to discover underlying aspirations of performers simply replaces one unworkable standard with another unmanageable one.

C. Variable Obscenity Alternative

Another possible alternative, the variable obscenity theory, has been used by the Supreme Court in numerous decisions.[167] This approach would ex-

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ciously and willfully disturb[ing] the peace or quiet of any . . . person . . .'" *Id.* at 16. According to the Court, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Id.* at 21.

161. Main, *supra* note 45, at 1164.

162. *Skyywalker*, 739 F. Supp. at 593.

163. Curriden states that "[t]he fear is that if they do revisit *Miller*, they won't be able to improve on it . . . [O]bscenity laws are like souffles, they seldom come out right." Curriden, *supra* note 28, at 36 (quoting D. Brenner, professor of law, UCLA).

164. 408 U.S. 229 (1972). *Kois* was cited frequently with approval in *Miller*, indicating an intent to reaffirm the decision and analysis. Miller v. California, 413 U.S. 15, 23, 24, 25, 26, 35, 37 (1973).

165. *Kois*, 408 U.S. at 231. This hints that the word "serious" might refer to artist's sincerity rather than to the degree of value in work. *See* Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 929 (1979).

166. *Skyywalker*, 739 F. Supp. at 594.

167. Ginsberg v. New York, 390 U.S. 629, 637 (1968); Erznoznik v. Jacksonville, 422 U.S. 205, 213, n.10 (1975); Ginzburg v. United States, 383 U.S. 463, 465-66 (1966); FCC v. Pacifica

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amine 2 Live Crew's music in relation to how the particular audience to which the music was addressed perceived it. Under the variable obscenity approach, the reasonable person standard of *Miller* is abandoned in favor of the actual audience, which in the context of the 2 Live Crew controversy is the younger generation.

This theory has been primarily used by individual states. These states have recognized interests in child welfare which give the states broader authority over children's activities than over similar adult activities.[168] Ideally, states' protective interests in their youth would be balanced against values underlying the first amendment.[169]

However, as with other proposed obscenity tests, the variable obscenity approach has its limitations when applied to rap music. First, as Judge Gonzalez noted, because of insufficient evidence at trial, minors are not factored into the average person formula used in determining prurient interest and patent offensiveness.[170] The problem of applying a theory traditionally used in promoting child welfare to a scenario in which minors are, according to Judge Gonzalez, not even part of the equation, leaves the variable obscenity test at a loss. Additionally, music that, at its inception, has a particular target audience can achieve popularity and become a crossover hit to a wide variety of listeners, thereby reducing the effectiveness of variable obscenity alternatives.

Finally, the concept of "pandering" to the appeal of those whose only interest is in titillation is essential to the variable obscenity concept.[171] Variables such as the method of distribution and the motivation of the individual who is doing the distributing,[172] as well as that of the audience to whom it is directed, are evaluated. However, in 2 Live Crew's case, warning labels affixed to the record reinforced the fact that consumers under eighteen years of age were prohibited from purchasing the album.[173]

Conclusion

The potential ramifications of the *Skyywalker* analysis and holding sends a disturbing message to those who maintain that unrestricted musical expression, expounding diversified viewpoints, serves important first amendment values and goals. With each repetition of the *Skyywalker* holding, the principles it supports become more deeply embedded in our thinking, and the threat of expansive application in new contexts looms ever larger.

Foundation, 438 U.S. 726, 747 (1978). For an in-depth analysis of the concept of variable obscenity, see Schauer, *supra* note 69, at 1279.

168. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

169. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (Court embraced a balancing test to determine whether the state interest infringes upon a child's first amendment rights).

170. *Skyywalker*, 739 F. Supp. at 589.

171. Shauer, *supra* note 69, at 1278.

172. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1965).

173. *Skyywalker*, 739 F. Supp. at 583.

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Judge Gonzalez's finding, that *As Nasty As They Wanna Be* was legally obscene, initially seems in accordance with the test articulated by the Supreme Court in *Miller* and refined in *Pope*. The 2 Live Crew's music is sexually graphic, abusive, and justifiably offensive to a large percentage of the population. If the music taken as a whole can be classified as obscene, the music is unprotected by the first amendment and subject to government regulation.

Nevertheless, the first amendment guarantees the right to self-expression and the right to receive information.[174] If the music contained within *As Nasty As They Wanna Be* affects the attitudes of its listeners, it communicates an idea. If the album is obscene because of the attitude it instills, the music is suppressed based on the content of the ideas communicated. From the beginning, the Supreme Court has assumed that the first amendment protects the communication of ideas.[175]

Since *Roth*, the Supreme Court's first venture into the area of obscenity, the Court has grappled with the obscenity issue in a variety of contexts.[176] Yet as reflected by the varying precedents and differing opinions of the Court, perhaps the word obscenity is a term that escapes definition. *Skyywalker* suggests that unless an obscenity test is developed that protects societal interests while insuring constitutional rights, 2 Live Crew's music is within the scope of constitutionally protected speech until a constitutional justification for stopping it is presented.

Kirk A. Olson

174. Roth v. United States, 354 U.S. 476, 486, *reh'g denied*, 335 U.S. 852 (1957).
175. *Id.* at 484.
176. *See supra* note 5.

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